CHAPTER 7

SUPRANATIONAL ORGANIZATIONS

PETER L. LINDSETH

The key distinction between a supranational organization (SNO) and an international organization (IO) is the scope of autonomous regulatory power that the body may enjoy. Taking the European Union (EU) as the leading exemplar of the type, an SNO can exercise a whole range of rulemaking, adjudication, and enforcement powers with a comparatively high degree of independence from intergovernmental or national control, at least within the scope of authority delegated to the supranational level. Indeed, in the case of the EU, the very purpose of delegating authority has been to create precisely this sort of autonomy. The aim has been to overcome cooperation and coordination problems among multiple principals (the member states) and thus make European integration a functioning reality rather than a legal fiction.

More traditional IOs, of course, also exist to overcome coordination or cooperation problems.[1] However, the degree of an IO's delegated regulatory power, particularly in the economic or trade context, is generally less comprehensive, intrusive, and/or binding in national legal orders than in the case of an SNO.[2] On the other hand, an IO in the security context (such as the United Nations Security

[1] See generally Darren G. Hawkins et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006).

[2] Cf. William Phelan, "What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime," *International Studies Review* 14 (2012): 367–85.

Council) may also exercise autonomous regulatory power to varying degrees.[3] But the instances are still generally more constrained or targeted as compared to an SNO like the EU, with its extensive competences across a broad range of regulatory domains. Hence the old adage to describe the EU—that it "remains something well short of a federal state" but "has become something far more than an international organization of independent sovereigns."[4]

In the literature on European legal integration over the last several decades, this degree of autonomous regulatory power has given rise to the notion that the EU has become something of an autonomous "constitutional" order in its own right.[5] To my mind, however, the idea of the EU as autonomously "constitutional" is based on a partly valid but nevertheless incomplete legal-historical perspective, one that focuses excessively on supranational adjudicative power in disciplining member states as well as the enforcement of rights on behalf of private parties.[6] This perspective operates along a spectrum from the relative weakness of public international law (IOs) to the stronger disciplinary power of supranational "constitutionalism" (the EU). When applied to SNOs more generally, this becomes what we might call the "constitutional, not international" framework.

However, both SNOs and IOs can equally be seen—in fact, arguably should better be seen—along a different dimension, what we might call the "administrative, not constitutional" framework.[7] From this perspective, delegation expresses "pre-commitment" of constitutional principals on the national level to a stream of policy choices to be implemented by denationalized agents enjoying some measure of autonomy, either *de jure* or *de facto*. The key difference between an SNO and IO is not in their purported "constitutionalization" but in the degree of autonomous regulatory discretion delegated to the denationalized agent. In legal terms, this analytical framework operates along a spectrum stretching from strongly legitimated "constitutional government" on the national level to diffuse and fragmented forms of "administrative governance" on either the sub-national, national, supranational,

[3] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton, NJ: Princeton University Press, 2007).

[4] Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political-Theory of Legal Integration," *International Organization* 47/1 (1993): 41–76, 41.

[5] See, e.g., Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

[6] Cf. J. H. H. Weiler, "The Geology of International Law: Governance, Democracy and Legitimacy," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004): 547–62, 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").

[7] Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford; New York: Oxford University Press, 2010); and "Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration," *German Law Journal* 15/4 (2014): 529–67.

or international levels. In this regard, both SNOs and IOs, as well as national and sub-national agencies, can be seen as a further stage in the development of the diverse expressions of administrative governance beyond the political summit of the state (i.e., the "legislature" or the "executive" in their highest institutional forms).

This approach has admitted affinity to the groundbreaking work of Giandomenico Majone on the EU as a regulatory "fourth branch."[8] 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.[9] However, my work has tried to make clear that this insight in fact entails a good deal of historical and legal complexity as to what those standards demand.[10] As I try to summarize in this contribution, a more legal-historical approach challenges the idea, now fairly widespread in the literature on legal integration in the EU, that the member states "self-consciously took the decision to create institutions constitutionally separated from national legitimation processes."[11] The advantage of a historical approach to European legal integration is that it captures important elements of the complex process of reconciling "government" and "governance," terms that are more familiar in this context. If we recast this challenge as one of reconciling strongly legitimated democratic and constitutional "government" and diffuse and fragmented administrative "governance," then SNOs become, in important respects, a "new dimension to an old problem."[12] As we shall see later, national constitutional bodies play a crucial role in addressing the disconnect between "government" and "governance" in its now supranational form.

To capture the full import of this process, however, one must undertake an examination that is sensitive to institutional change within three interrelated historical dimensions. The first is *functional*, in which existing institutional structures and legal categories are brought under pressure and even transformed as a consequence of objective social and economic demands (e.g., international competition, the extension of markets beyond national borders, transnational environmental or financial challenges, etc.). The second is *political*, in which divergent interests struggle over the allocation of scarce institutional and legal advantages in responding to these structural-functional pressures. The third is *cultural* (in the sense that a historian uses the term), encompassing the ways in which competing notions of

[8] Giandomenico Majone, "The European Community: An 'Independent Fourth Branch of Government?'" in *Verfassungen für ein ziviles Europa*, ed. Gert Brüggemeier (Baden-Baden: Nomos, 1994), 23–44.

[9] Giandomenico Majone, "Europe's 'Democratic Deficit': The Question of Standards," *European Law Journal* 4/1 (1998): 5–28.

[10] Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community," *Columbia Law Review* 99/3 (1999): 628–738, 657–9, 684–91; and *Power and Legitimacy*, 36–7.

[11] Anand Menon and Stephen Weatherill, "Democratic Politics in a Globalizing World: Supranationalism and Legitimacy in the European Union," LSE Law, Society and Economy Working Papers 13/2007 (2007).

[12] Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism," 630.

legitimate governance (conceptions of "right"), often legally expressed, are then mobilized to justify or resist these changes in institutional and legal categories or structures. The interaction of these dimensions results in a complex interplay of reciprocal influences that can only be explored historically, through an analytical narrative of institutional and legal evolution that tries its best not to privilege change along any single dimension at the expense of the others. This process of change is punctuated, finally, by the quest for "settlement," in which actors seek to reconcile developments in the various dimensions in some roughly stable way.[13] The reconciliation aims at satisfying structural-functional and political demands while still allowing the outcome to be experienced in terms of persistent, though evolving, cultural conceptions of legitimacy.

* * *

The aptness of an administrative framework for analyzing supranational delegation does not flow from the nature of the power exercised (political vs. technical). Supranational regulatory power can obviously be deeply political, in the sense of dealing with the allocation of scarce resources or contests over values, as is the case with most regulatory power in the modern administrative state.[14] What in fact defines an administrative regime, regardless of its location (within or beyond the state), is the *separation* of norm-production from strongly legitimated "democratic" and "constitutional" bodies, whether legislative, executive, or judicial. Although SNOs and IOs may enjoy other kinds of legitimacy (legal, technocratic, functional), they are not experienced, within the cultural dimension at least, as democratic or constitutional in their own right. The reason is that they do not represent a historically grounded political community conscious of itself as "entitled to effective organs of political self-government."[15] They are—despite efforts to democratize and constitutionalize the EU's supranational institutions over many decades—experienced as disconnected from more strongly legitimated national political communities; hence they are experienced as essentially legal, technocratic, and functional—that is, *administrative*—agents, exercising specified regulatory powers, albeit beyond the state.

This disconnect at the heart of supranationalism—between regulatory *power* and democratic and constitutional *legitimacy*—gives rise to a central feature of the public

[13] Lindseth, *Power and Legitimacy*, 13–14. For further elaboration, see Peter L. Lindseth, "Between the 'Real' and the 'Right': Explorations Along the Institutional-Constitutional Frontier," in *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, ed. Maurice Adams, Ernst Hirsch Ballin, and Anne Meuwese (Cambridge University Press, forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716185.

[14] Lindseth, *Power and Legitimacy*, 35.

[15] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 173. This democratic and constitutional self-consciousness need not be grounded in exclusionary ethnic, religious, or linguistic affinities; indeed, as Neil MacCormick has also shown, this demos-consciousness can also be "civic," although it still must be grounded in a "historical" and indeed "cultural" experience for that particular community (ibid., 169–74).

law of European integration that this contribution seeks to highlight. I am referring here to the seemingly paradoxical combination of autonomy from, and yet dependence upon, national oversight mechanisms—executive, legislative, and judicial—in the legitimation of the integration process. These mechanisms include, most importantly: collective oversight of the supranational policy process by national executives; judicial review by national high courts with respect to certain core democratic and constitutional commitments; and increasing recourse to national parliamentary scrutiny of supranational action, whether of particular national executives individually or of supranational bodies more broadly. These mechanisms operate in conjunction with participation and transparency rights within supranational policy processes themselves; together, they do not necessarily "control" the EU *qua* SNO, but they do attempt to ensure that the EU is experienced as "under control."[16] They serve, in other words, the crucial function of legitimation—that is, bridging the disconnect between diffuse and fragmented regulatory power and its ultimate sources of legitimacy in the historically constituted bodies on the national level—a function similar to what analogous oversight mechanisms serve within the administrative state.

To understand national oversight mechanisms as instruments of legitimation, if not actual control, we must appreciate certain features of modern administrative governance more generally. Delegation is obviously pervasive in modern governance, initially within and now beyond the confines of the state. However, the capacity for hierarchical control over administrative and technocratic actors who exercise delegated power is generally overstated even within states, often on the basis of stylized principal–agent models.[17] To understand modern governance, we must dispense with an idealized understanding of a "Westphalian" principal with unbridled power to direct regulatory outcomes within a particular territory, an ahistorical reading of state sovereignty if there ever was one.[18] As a consequence of institutional complexity, the power of control over administrative actors, whether *de facto* and *de jure*, is often greatly diminished, if sometimes nearly relinquished entirely, except in all but the most extreme circumstances. Over the course of the twentieth century in particular, constitutional principals came to settle for something less than actual control—perhaps merely supervision, coordination, or what an American administrative lawyer would call "oversight."[19]

[16] Peter L. Lindseth, Alfred C. Aman, and Alan Charles Raul, *Administrative Law of the European Union: Oversight*, ed. George A. Bermann, Charles H. Koch, and James T. O'Reilly (Chicago, IL: ABA Publishing, 2008), 140.

[17] See, e.g., Deirdre Curtin, "Holding (Quasi-)Autonomous EU Administrative Actors to Public Account," *European Law Journal* 13/4 (2007): 523–41, 524–5

[18] James J. Sheehan, "Presidential Address: The Problem of Sovereignty in European History," *American Historical Review* 111/1 (2006): 1–15.

[19] Lindseth, Aman, and Raul, *Administrative Law of the European Union*; Peter L. Strauss, "Forward: Overseer, or 'the Decider'? The President in Administrative Law," *George Washington Law Review* 75 (2007): 696–760.

This shift away from actual control toward oversight of administrative governance, whether within or beyond the state, necessarily has given rise to the need to reconcile, in normative cultural terms, the socio-institutional reality of diffuse and fragmented regulatory power with conceptions of strongly legitimated representative government inherited from the past. In this process of reconciliation, both the reallocations of regulatory power (understood legally as "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. This is an intensely political-cultural process of contestation over values but also in deference to functional realities. In the case of the EU, the result has been an uneasy balance, not merely in European integration but in administrative governance more generally. On the one hand, the diffuse and fragmented administrative sphere came to exercise significant and often seemingly autonomous regulatory power of varying types (rulemaking, enforcement, adjudication); on the other hand the supranational sphere has never been understood *culturally* to enjoy an autonomous democratic and constitutional legitimacy of its own, at least in a historically recognizable sense.[20]

As a consequence, the possessors of supranational regulatory power have remained answerable, in terms of the rationality and limits of their actions, to the oversight of what I define below as "historically constituted bodies" in the nation-state, all in order to satisfy these cultural demands for legitimacy. Rarely do these mechanisms prevent the exercise of delegated authority outright. Rather, they simply serve as a means of raising the costs to the administrative agent in the exercise of delegated regulatory power, while having the added benefit of simultaneously reducing the information costs to the constitutional principal that in turn enables more effective oversight.[21] The emergence of these national legitimating mechanisms in European public law over the last half-century, my theory suggests, reflects a convergence of European integration around the legitimating structures and normative principles of what I call the "postwar constitutional settlement of administrative governance."

* * *

This theoretical perspective is thus born of a particular historical understanding of the evolution of public law and institutions in the North Atlantic world over the course of the nineteenth and twentieth centuries, culminating in that postwar settlement. At the core of this evolution is the diffusion and fragmentation of regulatory power away from what I call the "historically constituted bodies" of the state. By this I mean those institutions—notably national legislatures, but also chief executives

[20] Peter L. Lindseth, "Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance," in *Reframing Self-Regulation in European Private Law*, ed. Fabrizio Cafaggi (Alphen aan den Rijn: Kluwer Law International, 2006).

[21] Lindseth, *Power and Legitimacy*, 261–2.

and cabinets, as well as courts or court-like jurisdictions like the French *Conseil d'Etat*—which evolved over the course of the nineteenth and twentieth centuries into the preeminent expressions of ruling legitimacy within democratizing national political communities. Tocqueville anticipated this development in *Democracy in America* (1835) when he spoke of the process of "centralization of government," particularly in elected assemblies, with the English Parliament being his paradigmatic example.[22] Latter-day political sociologists referred to this process as national "consolidation" in nineteenth-century Europe, a development with territorial, political-cultural, and institutional dimensions.[23]

And yet, almost from the moment of the seeming triumph of national assemblies and other Tocquevillean expressions of the "centralization of government" (the second half of the nineteenth century), these bodies were confronted by extraordinary, countervailing functional pressures for diffusion and fragmentation of regulatory power. The need to address a range of new regulatory challenges posed by urbanization, industrialization, and the globalization of markets in goods, capital, and labor forced the historically constituted bodies of the nation-state to begin transferring regulatory authority outward and downward, into an increasingly complex, multilayered administrative sphere. Despite our images of national "consolidation" in the nineteenth century, one could just as easily conclude, based on these countervailing pressures, that the nation-state throughout the North Atlantic world was very much a "leaky and porous … vessel."[24] This administrative "leakiness," if you will, would be one of the identifying attributes of modern governance over the course of the twentieth century, as advanced nation-states confronted even more intense functional and political pressures to regulate a whole range of social and economic phenomena, both in war and peace.

My historiographical theory thus stresses two overarching and somewhat contradictory trends over the second half of the nineteenth and first half of the twentieth centuries, a period of "significant acceleration" in administrative governance.[25] The first was the ascendance of centralized elected assemblies (parliaments and the like), which, by the later nineteenth century, became the core institutions of

[22] Cf. Alexis de Tocqueville, *Democracy in America*, ed. Bruce Frohnen (London: Longmans; Washington: Regnery Publishing, 2002 [1835]), 64–7 (associating "centralization of government" with the elected legislature, distinguishing it from decentralized "local administration" in the United States).

[23] Robert J. Holton, *Globalization and the Nation-State* (New York: Macmillan, 1998), 45–6; Stein Rokkan, *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan*, ed. Peter Flora with Stein Kuhnle and Derek Urwin (Oxford; New York: Oxford University Press, 1999), 163; Charles Tilly, *Stories, Identities, and Political Change* (Lanham, MD: Rowman & Littlefield, 2002), 178.

[24] Charles Bright and Michael Geyer, "Where in the World Is America? The History of the United States in the Global Age," in *Rethinking American History in a Global Age*, ed. Thomas Bender (Berkeley and Los Angeles: University of California Press, 2002), 65.

[25] Sabino Cassese, "The Rise of the Administrative State in Europe," *Rivista Trimestrale di Diritto Pubblico* 4 (2010): 981–1008, 981.

representative government in democratizing nation-states of the North Atlantic.[26] (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.)[27] The second trend 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."[28] Deeply functional in character, this second development was by no means confined to the United States, with its notorious dispersal of regulatory power.[29] 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.[30]

My theory therefore understands European integration, and the phenomenon of supranational regulatory power more generally, as a new stage in this historical process of diffusion and fragmentation of administrative governance, operating in tension with the "centralization of government" in a Tocquevillean sense on the national level. Such disaggregated governance did not emerge only recently, as a consequence of late-twentieth century globalization, as Anne-Marie Slaughter has suggested.[31]

[26] Cf. Geoff Eley, "The Social Construction of Democracy in Germany, 1871–1933," in *The Social Construction of Democracy, 1870–1990*, ed. George Reid Andrews and Herrick Chapman (New York: New York University Press, 1995), 106–15.

[27] For a useful summary for Europe, see Charles Tilly, *Contention and Democracy in Europe, 1650–2000* (New York: Cambridge University Press, 2003), 213–17 ("A Rough Map of European Democratization").

[28] James Landis, *The Administrative Process* (New Haven, CT: Yale University Press; London: Oxford University Press, 1938), 1.

[29] William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (2008): 752–72.

[30] For a suggestive overview of trans-Atlantic developments in this "social politics," see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Belknap Press of Harvard University Press, 1998). We should recall, moreover, the extent to which the functionalist strain within international relations theory was influenced by a particular understanding of the development of the modern administrative state. See, e.g., David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (London: National Peace Council, 1946), 30 ("the situation at the end of this war will resemble that in America in 1933, though on a wider and deeper scale. And for the same reasons the path pursued by Mr. Roosevelt in 1933 offers the best, perhaps the only chance for getting a new international life going"). 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: Sabino Cassese, "What Is Global Administrative Law and Why Study It?," (2012) http://cadmus.eui.eu/bitstream/handle/1814/22374/RSCAS_PP_2012_04.pdf?sequence=1; Joshua Cohen and Charles F. Sabel, "Directly-Deliberative Polyarchy," *European Law Journal* 3/4 (1997): 313–42; Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 15–61.

[31] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

It is in linking European governance to this deeper history of the rise of administrative governance that one can begin to see the basic truth in Alan Milward's famous, though controversial, assertion with regard to European integration—that it is "one more stage in the long evolution of the European state."[32] To gain a more complete picture of how this is true, however, one must go beyond a focus on the functional and political dimensions to a perspective more sensitive to institutional change along the more normative cultural dimension as well. As an extension of the functional diffusion and fragmentation of regulatory power, supranational governance in postwar Western Europe necessarily relied on elements of the same legal-cultural settlement that provided the foundation for the twentieth-century welfare state (*Sozialstaat, l'Etat providence*). When observers emphasize certain features of governance in Europe—for example, "deparliamentarization" or "executive dominance"—they are in fact referring to elements of this same settlement. Moreover, when they suggest that integration somehow caused the development of these features,[33] they are in fact ignoring this deeper history on the national level and below.[34]

Over the first half of the twentieth century, the dispersion of authority inherent in the emergence of modern administrative governance was a deeply destabilizing process, particularly with the demands of total war between 1914 and 1945—punctuated, of course, by the Great Depression and genocidal horrors on a scale heretofore unimaginable.[35] For postwar Western Europeans struggling, as Alan Milward put it, for a "new form of governance" to meet the needs of the modern welfare state,[36] the legal and constitutional lesson of this tumultuous period was twofold: first, that executive and technocratic power were essential to the welfare state's success; and second, that such power must be counterbalanced by parliamentary and judicial checks. In the postwar constitutional settlement of administrative governance, the three traditional constitutional branches remained as separate *mechanisms of legitimation*—legislative, executive, and judicial—despite the diffusion and fragmentation of regulatory power. This 'mediated legitimacy' allowed the postwar state to surmount what Carl Schmitt had asserted in the interwar period was "insurmountable,"[37] a situation that he thought demanded not balanced administrative governance but executive dictatorship.

[32] Alan S. Milward, *The European Rescue of the Nation-State*, 2nd ed. (London: Routledge, 2000), x.

[33] See, e.g., Tanja A. Börzel, and Carina Sprungk, "Undermining Democratic Governance in the Member States? The Europeanization of National Decision-making," in *Democratic Governance and European Integration: Linking Societal and State Processes of Democracy*, ed. Ronald Holzhacker and Eric Albæk (Cheltenham: Edward Elgar, 2007), 113–36.

[34] Tapio Raunio and Simon Hix, "Backbenchers Learn to Fight Back: European Integration and Parliamentary Government," *West European Politics* 23/4 (2000): 142–68.

[35] Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s," *Yale Law Journal* 113/7 (2004): 1341–415.

[36] Milward, *The European Rescue of the Nation-State*, 4.

[37] Carl Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (legislative Delegationen)," *Zeitschrift fuŕ ausländisches öffentliches Recht und Völkerrecht* 6 (1936): 252–68, 257.

This constitutional settlement after 1945 allowed the diffusion and fragmentation of normative power in the postwar administrative state to claim a democratic and constitutional pedigree in a historically and culturally recognizable sense, even as governance was obviously deeply evolving. From its inception in the 1950s, European integration also relied heavily on mechanisms of mediated legitimacy—most importantly, at least in the initial decades, on various forms of oversight by increasingly plebiscitarian national executives, in order to establish a connection between supranational regulation and historically constituted representative government on the national level.[38] Eventually, as supranational regulatory power expanded, these mechanisms would come to include judicial review by national high courts as well as national parliamentary scrutiny, all in the interest of furthering the integration project while seeking to preserve some semblance of national democracy in an intelligible sense.[39]

* * *

Other scholars have certainly acknowledged the legitimating functions of national institutions in European governance, at least in a limited sense.[40] Indeed, this is something that the Treaty on European Union post-Lisbon explicitly recognizes (e.g., in Art. 12, on the role of national parliaments in European integration). And thus, from that perspective at least, my argument regarding the role of national legitimation and oversight in European integration may not appear to be particularly original. My aim, however, is to offer a more ambitious analytical and historical framework for understanding the role of national legitimation in European public law as an extension of "administrative" governance. In so doing, I also hope to offer a deeper challenge to the persistent impulse in the scholarship to characterize EU governance in autonomously "constitutional" terms. By virtue of delegations from the historically constituted bodies of the nation-state, I claim that European governance *as a whole* (including the European Parliament as well as the European Court of Justice (ECJ)) is best understood as an extension of administrative governance on the national level over the course of the twentieth century.

Taking such a position is in obvious tension with the "constitutional, not international" perspective that has dominated scholarship on European legal integration over many decades. My alternative perspective, however, is born of a basic insight: that the legitimation of supranational regulatory power (its "mandate," so to speak) has never been successfully located supranationally, whether in the elections to the European Parliament, in the deliberations of the European Commission, or even, dare I say it, in the judgments of the ECJ (the ultimate bastion of a seeming

[38] Lindseth, *Power and Legitimacy*, ch. 3. [39] Ibid., chs. 4 and 5.

[40] See, e.g., Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (Oxford: Oxford University Press, 2005), 175 ("[I]t is difficult to identify any other sources of legitimacy [for the EU] than the direct borrowing of national legitimacy through the governments' representatives").

supranational "constitutionalism"). Regardless of any legal, technocratic, input, output, or even "messianic"[41] 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—namely, "Europe" as a collectivity.[42] 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.

As a consequence, the mandate of the EU, *qua* SNO, has been located, however tenuously, in the "enabling" treaties themselves, akin to enabling legislation for administrative bodies on the national level. Undoubtedly these treaties were 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.[43] The purpose of such "enabling legislation," if you will—whether national or supranational—is not to make rules but rather to create other institutions and confer power upon them to make rules.[44] This delegation is then subject to substantive parameters and procedural mechanisms of oversight to ensure pre-commitment to a stream of regulatory choices generally in line with the original enactment. Moreover, both the substantive parameters and procedural mechanisms find their ultimate legal basis in national constitutional orders, authorizing the enforcement of European norms in national law, the *sine qua non* of European integration.

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.[45] Rational-choice institutionalism undoubtedly offers a compelling theory—often inspired by the analysis of the American administrative state—of why the member states of the EU might have opted for supranational delegation as a tool of governance.[46]

[41] J. H. H. Weiler, "The Political and Legal Culture of European Integration: An Exploratory Essay," *International Journal of Constitutional Law* 9/3–4 (2011): 678–94.

[42] Peter L. Lindseth, "Of the People: Democracy, the Eurozone, and Lincoln's Threshold Criterion," *Berlin Journal* 22 (2012): 4–7.

[43] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (New York: Oxford University Press, 2005), 7.

[44] Edward L. Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89 (1989): 369–426, 380–5.

[45] Lindseth, *Power and Legitimacy*, 54–5; cf. also Hurd, *After Anarchy*.

[46] Mark A. Pollack, "Learning from the Americanists (Again): Theory and Method in the Study of Delegation," in *The Politics of Delegation*, ed. Alec Stone Sweet and Mark Thatcher (Portland, OR: Frank Cass, 2003); and "Delegation and Discretion in the European Union," in *Delegation and Agency in International Organizations*, ed. Darren G. Hawkins et al. (Cambridge: Cambridge University Press, 2006), 165–96.

Most importantly, rational-choice approaches theorize that the member states have sought, as multiple principals, to reduce the transaction costs of their cooperation and to enhance the credibility of their treaty commitments by delegating significant normative authority to relatively autonomous supranational bodies as their agents. The problem with this rationalist interpretation, however, is that it often treats the choice for delegation in general, and for supranational delegation in particular, as a choice made outside of time, born of a logic without a normative legal and political history of its own.[47]

Constructivist approaches, by contrast, take that normative history more seriously, paying much closer attention to the specifically legal-cultural dimension in the process of institutional change. This implies, in the context of integration, an effort to understand why delegation came to be seen as an appropriate foundation for supranational governance in the 1950s, after a period of significant constitutional struggle and contestation.[48] By tracing the emergence of this "logic of appropriateness,"[49] one should seek to understand how and why notions of hierarchical control necessarily gave way, over time, to looser forms of oversight as an acceptable means of legitimating diffuse and fragmented forms of administrative decision-making. The purpose of history as a scholarly discipline, and more particularly of legal history, should be to help trace the "micro-foundations" of new institutional structures—that is, "how and why they emerge, develop, or die out within any group"—something that, in its complexity and variability among contexts, often appears to political scientists as "problematic" and "somewhat mysterious."[50]

In searching for these legal-cultural micro-foundations in the case of "delegated" administrative governance in the EU, what one finds, both nationally and supranationally, is that the very essence of public law itself deeply evolved over the course of the second half of the twentieth century. Public law has become less a system of rules marking 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.[51] Instead, public law has evolved toward something

[47] Cf. Ann-Christina L. Knudsen and Morten Rasmussen, "A European Political System in the Making 1958–1970: The Relevance of Emerging Committee Structures," *Journal of European Integration History* 14/1 (2008): 51–67, 57.

[48] Lindseth, "The Paradox of Parliamentary Supremacy"; and *Power and Legitimacy*.

[49] James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989); "The Institutional Dynamics of International Political Orders," *International Organization* 52/4 (1998): 943–69; "The Logic of Appropriateness," Centre for European Studies, University of Oslo, ARENA Working Papers, WP 04/09 (2009), http://www.arena.uio.no/publications/wp04_9.pdf.

[50] Stone Sweet, *Governing with Judges*, 8.

[51] Ernest A. Young, "Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review," *Texas Law Review* 78 (2000): 1549–614, 1594 (describing "a regime of invalidation norms" as opposed to one of "resistance norms"—the former being a system in which "governmental action is perfectly unproblematic even though it pushes right up to the constitutional limit; that limit, however, amounts to an inflexible line beyond which any government action is barred").

more focused on "the allocation of burdens of reason-giving,"[52] or, as scholars of European legal integration are increasingly calling it, *accountability*. Accountability mechanisms are, in turn, best 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 the American public law scholar Ernest Young.[53]

The evolution of public law toward a system of "resistance norms" in European integration is intimately linked to the distinction between legitimation and control that is essential to the administrative character of supranational governance. This distinction is admittedly spectral rather than dichotomous, but the key difference is this: control entails power over the formulation of specific policies whereas legitimation does not (or at least not necessarily)—hence the crucial distinction between more intergovernmental IOs and the more supranationally autonomous EU. There are clearly elements of control within some forms of legitimation (e.g., treaty ratification), but otherwise legitimation generally permits a larger measure of functional autonomy in the agent exercising delegated authority. Legitimation, rather, serves the purpose (to borrow from another American administrative law scholar, Peter Strauss) of "maintaining the connection between each of the [constitutional] institutions and the paradigmatic function which it alone is empowered to serve, while also retaining a grasp on [administrative governance] as a whole that respects our commitments to the control of law."[54]

As in the administrative state, so too in the process of European integration: the persistence and growth of national oversight mechanisms in European public law have worked to "maintain the connection" between supranational regulatory power and the historically constituted bodies of the nation-state, providing an essential means of legitimating administrative governance in its now supranational form. In the integration context just as in the administrative state, the separation of regulatory power from democratic and constitutional legitimacy has been accomplished through transfers of authority that are best understood legally (if not always functionally) as "delegations" in an administrative sense—that is, as transfers from constitutional "principal" to administrative "agent"—*not* as the establishment of a constitutionally original or autonomous level of governance at the supranational level.

From this theoretical perspective, it is no coincidence that European integration emerged as a viable supranational project at precisely the moment in Western history (the 1950s) when the foundations of the "postwar constitutional settlement

[52] Alexander Somek, "Dogmatischer Pragmatismus. Die Normativitätskrise der Europäischen Union," in *Demokratie und sozialer Rechtsstaat in Europa. Festschrift für Theo Öhlinger*, ed. Stefan Hammer et al. (Vienna: WUV-Universitätsverlag, 2004), 58.

[53] Young, "Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review," 1594.

[54] Peter L. Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?," *Cornell Law Review* 72 (1987): 488–526, 488.

of administrative governance" were also secured on the national level.[55] The mechanisms of national oversight over the integration process have developed, even if imperfectly, to do the work of reconciliation not unlike similar mechanisms within the administrative state. This reconciliation has tolerated a good deal of autonomous regulatory power in what has become an increasingly dense and complex sphere of "Europeanized" administrative governance, one that now encompasses both national and supranational technocratic actors. Nevertheless, these mechanisms strive to balance the evident functional and political demands for supranational regulatory solutions, on the one hand, with the continued cultural attachment to the nation-state as the primary locus of democratic and constitutional legitimacy in Europe, on the other.

Put another way, these mechanisms establish a legitimating framework within which the otherwise undoubted complexity of Europe's policymaking processes—characterized by significant amounts of functionally autonomous regulatory power, distributed across multiple levels of governance—can operate *without evident democratic and constitutional legitimacy of their own*, at least as classically understood. To borrow an apt phrase from Robert Dahl,[56] nationally grounded legitimating mechanisms can be seen as efforts to reduce the "costs to democracy" that inevitably flow from the transfer of regulatory power outside the historically constituted bodies of representative government on the national level.

* * *

To arrive at this seemingly sanguine conclusion is not to ignore the real difficulties of legitimation that arise when the locus of administrative governance shifts beyond the confines of the state (particularly in the context of the Eurozone crisis, as we shall see later). We should not simply assume that the largely technocratic and delegated character of "Europeanized" administrative governance is somehow unproblematically equivalent to its national counterparts in terms of democratic and constitutional legitimacy.[57] Even as Europeans have attempted to translate the postwar settlement into workable supranational form (notably through national oversight mechanisms, conjoined with other kinds of transparency and participation rights), integration remains a unique form of administrative governance in one critical respect: the fact of the member states and their electorates serving as principals *severally* in the system.[58]

[55] Lindseth, "The Paradox of Parliamentary Supremacy"; and *Power and Legitimacy*.

[56] Robert Dahl, "Can International Organizations Be Democratic? A Skeptic's View," in *Democracy's Edges*, ed. Ian Shapiro and Casiano Hacker-Cordón (New York: Cambridge University Press, 1999), 34.

[57] See, e.g., Andrew Moravcsik, "The European Constitutional Compromise and the Neofunctionalist Legacy," *Journal of European Public Policy* 12/2 (2005): 349–86 (describing the EU as democratically legitimate).

[58] Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism," 637.

While multiple principals are hardly unknown in modern administrative states (legislatures, for example, are notoriously plural and diverse), the challenge of multiple principals is of a completely different order of magnitude in European governance. In the integration context, there is a vastly larger number of possible "veto players,"[59] which in turn leads to a "joint-decision trap" of significantly greater difficulty than anything experienced on the national level.[60] There are several potential consequences of these factors worth noting.

First, *ex ante*, the fact of multiple principals can, in certain domains, create incentives for exceedingly broad delegations of autonomous regulatory power to supranational agents, precisely so the latter can address and perhaps overcome the coordination and cooperation problems that the larger number of veto players creates. The purpose of such broad, initial delegations is to reduce the risk of potential defection among the multiple principals—what has been called "principal drift."[61] These delegations occur not just to the Commission and to the Council acting by qualified majority, but also, perhaps most importantly, to the ECJ in its interpretation of the Treaty and EU legislation, as well as to the European Central Bank in the exercising of monetary policy.

Second, once these bodies exercise their relatively autonomous normative power at the supranational level, then, *ex post*, the erstwhile principals in some sense become agents themselves, responsible for implementation. In theory, this should only occur within the bounds of the broad policy limits to which member states themselves originally committed—such as free movement or fiscal discipline. But this transformation of principals into agents can nevertheless have consequences that member states may still find deeply disruptive in domestic legal and political orders (something that the Eurozone crisis has proven at repeated junctures).

Third, again *ex post*, a desire may subsequently emerge in one member state to reverse any of these supranationally devised norms—for example, ones announced by the ECJ, interpreting the general provisions of the treaties. If this occurs, then the fact of multiple principals (and therefore of even more multiple "veto players")

[59] George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton, NJ: Princeton University Press, 2002).

[60] Fritz W. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration," *Public Administration* 66/2 (1988): 239–78.

[61] Anand Menon and Stephen Weatherill, "Legitimacy, Accountability, and Delegation in the European Union," in *Accountability and Legitimacy in the European Union*, ed. Anthony Arnull and Daniel Wincott (Oxford: Oxford University Press, 2002), 119. Cf. also Mark Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation in Non-Majoritarian Institutions," *West European Politics* 25/1 (2002): 1–22, 6, discussing "[c]omposite principals" as "a principal comprised of multiple actors whose collective makeup changes periodically through, for example, elections," and which thus "may not possess stable, coherent preferences over time. Instead, they may be competitive with one another over some or many issues, as when member state governments in the EU disagree on matters of policy that fall within the agents' mandate."

means that the sort of political mobilization needed to undertake such a reversal is vastly more challenging than within a purely national administrative polity—not impossible, but challenging.[62]

In these various regards, supranational administrative governance *is* different from its purely national counterparts.[63] From the perspective of a theory of democracy focusing on the circulation of elites,[64] perhaps the biggest problem with integration is the perceived entrenchment of its technocratic class in Brussels or Frankfurt, or its juristocratic class in Luxembourg (or, for that matter, in Strasbourg, if one were to add the European Court of Human Rights to the discussion). In other words, as a practical matter, given the reality of multiple principals in the European system, the institutional beneficiaries of supranational delegation are entrenched to a degree not found in instances of administrative delegation on the national level, even with regard to independent agencies. Giandomenico Majone's effort to capture the sometimes extreme independence of certain supranational agents by introducing the subcategory of "trustee" is analytically helpful.[65] The result is that supranational agents appear (at least from a populist, plebiscitarian perspective) to enjoy an unusual degree of freedom from the ultimate political sanction in the administrative state—specific legislative de-authorization.

Perhaps the talk in the midst of the Eurozone crisis about "repatriation of competences"—that is, the return of powers in certain domains to the national level—is a sign of change in course.[66] But it should be recognized as well that, even in national administrative states, that sort of outright de-authorization is relatively rare, in part because the instrument is blunt and costly, indeed even "illusory."[67] Rather, as discussed above, the focus of legitimation in administrative governance today has much more to do with "the allocation of burdens of reason-giving" and "resistance norms" than outright sanction. Moreover, as one scholar has suggested from a game-theoretic perspective, just because oversight does not tend to "bite" does not mean that the "bark" is ineffective.[68] Even within national administrative states

[62] Hussein Kassim and Anand Menon, "The Principal–Agent Approach and the Study of the European Union: Promise Unfulfilled?," *Journal of European Public Policy* 10/1 (2003): 121–39, 131.

[63] Cf. David A. Lake and Mathew D. McCubbins, "The Logic of Delegation to International Organizations," in *Delegation and Agency in International Organizations*, ed. Darren G. Hawkins et al. (Cambridge: Cambridge University Press, 2006), 341–68.

[64] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1976 [1942]), 269–73.

[65] Giandomenico Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," *European Union Politics* 2 (2001): 103–22.

[66] See, e.g, Michael Emerson, "The Dutch Wish-List for a Lighter Regulatory Touch from the EU," CEPS Commentary (2013), http://ceps.be/book/dutch-wish-list-lighter-regulatory-touch-eu.

[67] Carol Harlow and Richard Rawlings, "Promoting Accountability in Multilevel Governance: A Network Approach," *European Law Journal* 13/4 (2007): 542–62, 545.

[68] Arthur Dyevre, "Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?" (2012) http://papers.ssrn.com/abstract=2084639.

the focus today is much more on raising the "enactment costs" for delegated rule-making, primarily through procedural and substantive requirements that can be monitored in less direct ways.[69] In this sense, the difference between administrative governance nationally and supranationally is, I would suggest, one of degree and not of character.

By contrast, at the level of legitimacy (understood in terms of conceptions of democracy and constitutionalism in the cultural dimension), the difference between European institutions and the strongly legitimated bodies on the national level amounts to a vast gulf, one not merely of degree but truly one of character. At this point in history, Europeans have found it extremely difficult, if not impossible, to experience supranational governance as "democratic" or "constitutional" in itself, despite the existence of a quite stimulating theoretical literature explaining how they might do so.[70] Instead, Europeans see supranational governance as a largely "bureaucratic affair run by a faceless, soulless Eurocracy in Brussels."[71] In this sense, the actual evolution of European public law—as an "administrative, not constitutional" phenomenon in which legitimation by historically constituted bodies on the national level plays such a crucial role—is more in line with this popular understanding than is normally supposed.

* * *

There is one additional consequence of this legal-cultural/political-cultural state of affairs I would like to stress in conclusion, relating to the scope of authority delegable to the supranational level in Europe. This aspect of the "administrative, not constitutional" character of integration has been of particular importance to understanding the evolution of European public law in the Eurozone crisis.

The problem with a "constitutional" framework for understanding European integration is that it ignores any limitation on the scope of authority delegable to the supranational level. It assumes European supranationalism can legitimize an ever increasing range of regulatory powers in autonomously democratic and constitutional terms, as if supranational institutions are or could be a site of such authority in their own right, apart from the member states that created them. 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

[69] Cf. Matthew C. Stephenson, "The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs," *Yale Law Journal* 118/1 (2008): 2–62.

[70] See, e.g., Jürgen Habermas, "The Crisis of the European Union in the Light of a Constitutionalization of International Law," *European Journal of International Law* 23/2 (2012): 335–48; and *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2012).

[71] Joschka Fischer, "From Confederacy to Federation: Thoughts on the Finality of European Integration," Speech by Joschka Fischer at the Humboldt University in Berlin, May 12, 2000, http://ec.europa.eu/dorie/fileDownload.do?docId=192161&cardId=192161; also http://www.cvce.eu/en/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html.

of interdependence as they perceive them.[72] Given the demands of the Eurozone crisis, this ultimately functionalist understanding suggests that the Eurozone crisis should have automatically led to both to greater fiscal capacities as well as an intensification of democratization and constitutionalization at the supranational level.[73] This purely functionalist approach, however, ignores the complex interplay between the various dimensions of institutional change, not just functional (need), but also political (interests) and cultural (conceptions of right), as well as the ensuing process of contestation, reconciliation, and settlement.[74] This failure to account for the full complexity of institutional change leads to a temptation to view European legitimacy as primarily a matter of institutional engineering, most often revolving around more powers for the European Parliament.[75]

By contrast, a historical-constructivist understanding of the EU as a denationalized form of administrative governance is deeply cautious about such engineering and, in view of the complex process of institutional change, stresses the ultimate constraints on the scope of authority delegable to the supranational level. Such supranational delegation constraints are analogous, I would maintain, to similar constraints that exist in national administrative states, expressed in such doctrines as the Italian *riserva di legge*, the German *Vorbehalt des Gesetzes*, or the American "nondelegation doctrine."[76] Given the fundamentally administrative character of the European integration, the EU (*qua* SNO) can sustain a great deal of autonomous regulatory *power*; nevertheless, there are limits to what it can reasonably sustain given the lack of autonomous democratic and constitutional *legitimacy*.

This disconnect is something that the Eurozone crisis (indeed, also the more recent refugee crisis) has arguably demonstrated in a highly acute and perhaps even tragic way. As Stefano Bartolini presciently warned in 2005 (i.e., well before the onset of these crises), "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."[77] When it comes to the sort of transnational taxing, borrowing, and spending authority that many thought the Eurozone crisis demanded for the EU, there proved to be

[72] Miguel Poiares Maduro, "A New Governance for the European Union and the Euro: Democracy and Justice," (2012) http://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1&isAllowed=y.

[73] Cf. Jürgen Habermas, "Democracy, Solidarity and the European Crisis," Presented at the KU Leuven, Belgium (2013).

[74] Cf. Lindseth, *Power and Legitimacy*, 13–14; and "Between the 'Real' and the 'Right.'"

[75] See, e.g., European Commission, "A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate" (May 28, 2013), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF.

[76] Lindseth, "Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration," 553, 556.

[77] Bartolini, *Restructuring Europe*, 175.

"a line in the sand beyond which only governments can set priorities and act."[78] The lack of robust democratic and constitutional legitimacy at the supranational level in the EU is a barrier to formulating policies with real macroeconomic significance (not the 1 percent of European GDP that is the current EU budget). 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.

This outcome, alas, is entirely predictable from an administrative perspective on European legal integration and its ongoing struggle for reconciliation between supranational regulatory power and national democratic and constitutional legitimacy.[79] European governance, as an example of an SNO of an essentially administrative character, is legitimate for certain purposes but not others—unless Europeans are prepared to change fundamentally their understanding of what democratic self-government means, or where it is located. Both the allocation of competences in the first place, as well as the interpretation of competences already allocated, must be sensitive to this reality.

In short, whenever we talk about the legitimacy of a supranational organization, we must always ask "legitimate for what?"—just as we would for an administrative body on the national level.[80] It is one thing to delegate authority to harmonize regulatory standards in various domains (important a task though that may be). It is quite another to delegate taxing, spending, and borrowing authority in some indeterminate way, subject to the control of a European Parliament whose democratic and constitutional legitimacy is tenuous. For that latter kind of power, as the Eurozone crisis seems to have demonstrated, Europe still depends on the strongly legitimated institutions of outright "government" at the national level. Institutions of supranational "governance," exercising delegated power in a delegated, administrative sense, are simply not yet equal to that task.

[78] Jean Pisani-Ferry, "Whose Economic Reform?," Project Syndicate (2013), http://www.project-syndicate.org/commentary/the-purpose-and-strategy-of-structural-reofrm-by-jean-pisani-ferry.

[79] See generally Lindseth, *Power and Legitimacy*.

[80] Peter L. Lindseth, "Author's Reply: 'Outstripping', or the Question of 'Legitimate for What?' in EU Governance," *European Constitutional Law Review* 8/1 (2012): 153–64.