FROM ADMINISTRATIVE LAW TO ADMINISTRATIVE LEGITIMATION? TRANSNATIONAL ADMINISTRATIVE LAW AND THE PROCESS OF EUROPEAN INTEGRATION

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Abstract Globalization redefines the relationship between law and space, resulting in the emergence of transnational administrative law in a globalizing legal space. I aim to shed light on transnational administrative law by examining how administrative law relates to the process of European integration. I argue that the idea of administrative legitimation is at the core of this relationship. In the European Union, transnational administration grounds its legitimacy on the fulfilment of administrative law requirements. However, given that in the European Union, administrative legitimation is rooted in Europe's constitutional transformation, I caution against the projection of Europe's experience onto global governance.

Key words: administrative legitimation, European integration, formal and material constitutionalization, global governance, transnational administrative law.

I. INTRODUCTION: GLOBAL GOVERNANCE IN SEARCH OF LEGITIMACY

Globalization reinvigorates interest in the long-standing movement for an international rule of law.[1] Global governance becomes the central concept around which various projects for legal reform are organized.[2] Although there

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[1] See D Kennedy, 'The Mystery of Global Governance' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009). See also M Koskenniemi, 'The Fate of Public International Law: Between Techniques and Politics' (2007) 70 MLR 1–3.

[2] A-M Slaughter, *A New World Order* (Princeton University Press 2004). See also DC Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115

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are distinct understandings of global governance, at its core this concept evokes some sort of political ordering that transcends nation states.[3] For this reason, efforts to consolidate global governance with a legal framework face a fundamental challenge relating to the legitimacy of proposed transnational legal orders.[4]

Proponents of global governance are aware of the elusiveness of the idea of a global political community.[5] As a result, some proponents of global governance turn to administrative law as the main tool to lay legal grounds for global governance.[6] Instead of pinning their hopes upon a comprehensive constitution-like charter to govern the operation of global administration,[7] proponents of global governance sometimes cast their eyes on two aspects of the contribution that administrative law has made to modern governance. First, they place emphasis upon the role of administrative law in increasing transparency and accountability. Second, they focus attention upon its role in strengthening the reasonableness and procedural fairness of the decisions made. Administrative law aims to bolster the legitimacy of global administration by enhancing the quality of policy outcomes and by bridging the gap between transnational decision-making mechanisms and interested parties.[8] Correspondingly, traditional tools of administrative law such as reason-giving and due process requirements, including the rights to be heard and to have access to effective judicial review, are employed to contribute to the legitimacy of global regulatory regimes.[9] Global administrative law is thus regarded as essential to the growth of global governance, albeit that the global

YaleLJ 1490; G-P Calliess and M Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Juris 260.

[3] See C Offe, 'Governance: An "Empty Signifier"?' (2009) 16 Constellations 550–4.

[4] See JHH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 Heidelberg Journal of International Law (ZaöRV) 560–2; N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); G Anthony et al, 'Values in Global Administrative Law: Introduction to the Collection' in G Anthony et al (eds), *Values in Global Administrative Law* (Hart 2011) 1–3.

[5] See Krisch (n 4) 54–61. See also A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 HarvIntlLJ 233–6. Cf UK Preuss, 'Equality of States—Its Meaning in a Constitutionalized Global Order' (2008) 9 ChiJIntlL 41–5.

[6] See, eg, Esty (n 2); Anthony et al (n 4); S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 NYUJIntlL&Pol 663.

[7] See Cassese (n 6) 687–9; N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 245. See also Krisch (n 4) 57–104.

[8] See Esty (n 2) 1561; Cassese (n 6) 687–9. See also S Correia, 'Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and a Global Right' in G Anthony et al (n 4) 343.

[9] See Esty (n 2); B Kingsbury et al, 'The Emergence of Global Administrative Law' (2005) 68 LCP 37–41; B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 34–50. See also A von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 GermanLJ 1928–38.

administrative law project is only one among several proposals to provide a legal foundation to global governance.[10]

The attempt to provide the nascent political ordering of global governance with legitimacy by means of administrative law without getting involved in the debate about global constitutionalism implies the idea of administrative legitimation,[11] as I term it. Departing from the revolutionary tradition of constitution-making, the idea of administrative legitimation is understood as a new paradigm in conceiving political legitimacy.[12] By proposing a central role for administrative law in grounding the relationship between citizens and administration, it suggests that the legitimacy of transnational administration will rest on the fulfilment of administrative law requirements, even when there is no legitimacy-bestowing constitutional moment in sight.[13] On this view, the legitimacy of global governance rests on a process of administrative legitimation at a global level.

This idea of administrative legitimation as implied in the effort to (re) construct global governance by means of global administrative law is contested.[14] On the one hand, it is not clear whether this is an accurate account of the direction in which global governance is moving. On the other hand, it remains to be seen if the legitimacy of a political ordering can rest entirely on the idea of administrative legitimation with constitutional issues left unanswered. I do not intend to enter the debate about whether the idea of administrative legitimation accurately reflects the development of global governance or whether it is worthy of support at all. Rather, my concern is whether administrative legitimation can really lay the grounds of legitimacy for global governance but at the same time stop short of implicating any model of constitutional ordering for global administration.

The European Union (EU)[15] is a sophisticated experiment in transnational governance and, in significant part this experiment rests upon the existence and operation of European administrative law. As a result, the EU is sometimes put forward as a model to conceive how global administrative law may be related to global administration.[16] Transnational regulation in the EU is viewed as a

[10] See JL Dunoff and JP Trachtman, 'A Functional Approach to International Constitutionalization' in Dunoff and Trachtman (n 1).

[11] See Esty (n 2); G Anthony et al (n 4).

[12] The comparison of the revolutionary tradition of legitimacy and administrative legitimation will be further addressed in parts B and C of section III.

[13] See Esty (n 2); J Morison and G Anthony, 'The Place of Public Interest' in Anthony et al (n 4) 217. See also Krisch (n 4) 12–13; Krisch (n 7) 256–8.

[14] See, eg, BS Chimni, 'Co-Option and Resistance: Two Faces of Global Administrative Law' (2005) 37 NYUJIntlL&Pol 799; S Marks, 'Naming Global Administrative Law' (2005) 37 NYUJIntlL&Pol 995; M Shapiro, '"Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?' (2005) 68 LCP 357.

[15] For the purpose of the present discussion, the EU law is conveniently used to refer to the pre-Lisbon Community law as well.

[16] See, eg, contributions by F Goudappel and T van den Brink, and T Koopmans in Anthony et al (n 4). See also E Chiti and RA Wessel, 'The Emergence of International Agencies in the

model for the future of global governance and the European legal order is seen as exemplifying the direction in which global administration is moving.[17] Nevertheless, it remains unclear whether transnational regulation in the EU's system of multilevel governance provides a credible model of administrative legitimation for global governance.[18]

In this article, I examine the relationship between the development of the EU legal order and European administrative law to see what lessons we may learn for the idea of administrative legitimation and for the future of global governance. As the paradigm case of administrative legitimation,[19] the relationship between the development of the EU legal order and European administrative law is helpful in illuminating the global administrative law path that global governance may take. It can also help us to understand better the legitimacy challenges facing global governance, shedding light on the question of whether administrative legitimation can lay the grounds of legitimacy for global governance without implicating the rise of a constitutional order on a global scale.

This article places the development of transnational administrative law in Europe in a comparative perspective. In so doing, it aims to make a twofold contribution to comparative and European Union law scholarship. First, I argue that a shift of emphasis has taken place in comparative law as globalization comes to redefine the relationship between law and space (section II). While traditional comparative law scholarship focused attention on legal transplants between distinct legal jurisdictions, it is the phenomenon of institutional convergence that underlies revitalized interest in comparative administrative law as jurisdictional boundaries become blurred. In the light of this institutional convergence, the values shared by different administrations may be considered as cosmopolitan. Yet, the manner in which these values find expression in concrete institutional arrangements is rooted in the legal culture and tradition of an individual jurisdiction, suggesting that the relationship between law and space in our globalizing world rests upon what I call the rooted cosmopolitanism of administrative law.

In line with this general observation, my second and major goal is to take up the idea of administrative legitimation in the constitutional order of the

Global Administrative Space: Autonomous Actors or State Servants' in R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 149–50.

[17] In this article, I use European legal order to refer to the multilevel governance ordering centred on the EU structure. While it is underpinned by the process of integration leading to the establishment of the EU and the subsequent development, European legal order is a broader concept than the EU legal order. Cf N Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart 2000).

[18] See, eg, Shapiro (n 14); C Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in Anthony et al (n 4) 173–92.

[19] This point will be further discussed in part C of section III.

European Union (section III). I observe that the standard account of the development of the EU constitutional order has concentrated on the *formal* aspect of constitutionalization. From this perspective, the EU's transformation from an international organization to a supranational body through the jurisprudence of the European Court of Justice (ECJ) is the central theme of EU constitutionalization. Here, I draw attention to the *material* (or substantive) aspect of the constitutionalization of the EU legal order and to the underlying concept of administrative legitimation. I argue that the debate on the legitimacy of the EU constitutional order can only be understood by reference to the substance of the ECJ's constitutional jurisprudence. An analysis of the EU's material constitutionalization demonstrates that administrative legitimation has played a pivotal role in the EU's transformation into a constitutional space. Because this administrative legitimation, which is characteristic of European administrative law, is rooted in the formation of European constitutional space, we should be cautious about projecting the European model onto global administrative law (section IV).

II. LAW AND SPACE: ROOTED COSMOPOLITANISM OF ADMINISTRATIVE LAW IN A GLOBALIZING WORLD

The relationship between law and space has long attracted the interest of comparative jurists.[20] As jurisdictional boundaries become blurred in today's globalizing world, the relationship between law and space comes to the fore in comparative law.[21] Riding the wave of globalization, some scholars express scepticism about the claim that law is oriented by and towards the space where it originates and operates, suggesting a cosmopolitan turn in the discussion about the global spread of the rule of law.[22] Others emphasize the spatiality of law and reaffirm the embeddedness of legal systems in the legal culture and political history of individual jurisdictions.[23]

Standing outside of this debate, I examine the manner in which the relationship between law and space is conceived in administrative law, with a view to demonstrating the rooted cosmopolitanism of administrative law, and shedding light on the state of comparative law. In the first part of this section, I highlight a shift of emphasis in comparative law studies. In contrast to traditional comparative law scholarship, comparative law regenerated by globalization brings issues of institutional convergence to the fore. In the next

[20] See R Pound, 'Comparative Law in Space and Time' (1955) 4 AmJCompL 70; G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 HarvIntlLJ 411.

[21] See A Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (2000) 6 Law and Critique 39; W Twining, *Globalisation and Legal Theory* (CUP 2000).

[22] See, eg, M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Dunoff and Trachtman (n 1).

[23] See generally F von Benda-Beckmann et al (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate 2009).

part, I discuss how this emphasis on institutional convergence makes a quest for cosmopolitan values a central part of comparative law. I then introduce and examine the idea of publicness in administrative law, exemplifying differences in the way in which it is embodied in the institutions of democratic administration in the United States (US) and Germany. This case study serves to illustrate my key argument concerning the rooted cosmopolitanism of administrative law.

A. Comparative Law in a Globalizing Legal Space: Transplant, Convergence, and Shift of Emphasis in Comparative Law Studies

Comparative studies of different jurisdictions have been an enduring object of interest in legal scholarship. Yet, the blurring of jurisdictional boundaries resulting from globalization has added new dimensions to comparative legal studies. In contrast to traditional comparative jurists, comparative law scholars in the global era have switched their focus from legal transplant to institutional convergence.[24]

With legal reform in mind, traditional comparatists turned to foreign law for inspiration. Foreign legal systems were analysed, and provided ideas for domestic legal and institutional reform.[25] Comparative law was instrumental in the improvement of national legal systems. On this view, traditional comparatists were not as cosmopolitan as some contemporary US legal scholars suggest.[26] Instead, as early US Supreme Court decisions illustrate,[27] comparative law had great bearing on early US nation/state-building.[28] In contrast, comparative law in the context of globalization focuses more on convergence between different national jurisdictions. The main driver for this new turn is not legal reform through legal transplant. Instead, as a legal space transcending national boundaries is seen to be taking shape,[29] the comparative law aspiration is for a common legal consciousness in order to nurture the idea of a global rule of law.[30] With the aid of comparative law, institutional

[24] See MC Rahdert, 'Comparative Constitutional Advocacy' (2007) 56 AmULRev 553. See also A Riles, 'Introduction: The Projects of Comparison' in A Riles (ed), *Rethinking the Masters of Comparative Law* (Hart 2001).

[25] Cf A Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79.

[26] One of the reasons that conservative jurists are opposed to references to comparative law, or rather, foreign law, in US courts is the cosmopolitan orientation in comparative law argument, which is feared to lead to the compromise of US constitutional values. See CR Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton University Press 2009) 187–209.

[27] See SH Cleveland, 'Our International Constitution' (2006) 31 YaleJIntlL 1.

[28] See, eg, M-S Kuo, 'The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited' (2003) 67 AlbLRev 27.

[29] See, eg, Kingsbury et al (n 9) 18–20; DM Trubek and MP Cottrell, 'Robert Hudec and the Theory of International Economic Law: The Law of Global Space' in C Thomas and JP Trachtman (eds), *Developing Countries in the WTO Legal System* (OUP 2009).

[30] See PW Kahn, 'Comparative Constitutional Law in a New Key' (2003) 101 MichLRev 2679; Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional

dialogues between national legal systems are expected to take place on a global scale, leading to convergence among legal institutions rooted in a common legal culture.[31]

The prime example of this new comparative law turn is found in the context of the so-called Europeanization of private law. Defying the orthodox distinction between the common law and civil law systems, scholars seek common ground among the legal regimes of different European countries.[32] The ultimate goal is to develop a Europe-wide private law regime (codified or not) based on the convergence of national private laws.[33] Through the comparatist's looking glass, what matters is not specific provisions or doctrines in national private law regimes, but rather the development of a European private law culture to smooth out the textual or doctrinal differences among the jurisdictions of the EU member states.[34]

Although public law has traditionally been regarded as more resistant to comparative analysis than private law,[35] globalization and particularly regional integration has brought public law into the fold of comparative law. On the one hand, talk about global constitutionalism, centred on the commonality of values among constitutional democracies, has spawned writing which refers to the migration of constitutional ideas or to a rising world constitutionalism.[36] The globalization of constitutionalism suggests global or regional convergence on constitutional values such as the rule of law, the separation of powers, and the protection of human rights.[37] On the other hand, national courts around the globe are looking to one another for theoretical and doctrinal inspiration, resulting in the cross-fertilization of constitutional jurisprudence.[38] Excepting

Law' in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006). See also LA Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations' (2000) 34 IntlLaw 1055.

[31] See A-M Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 URichLRev 99; A-M Slaughter, 'Judicial Globalization' (2000) 40 VaJIntlL 1103; A-M Slaughter, 'A Global Community of Courts' (2003) 44 HarvIntlLJ 191. Cf Krisch (n 4) 119–43.

[32] See H Beale, 'The "Europeanisation" of Contract Law' in R Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth 1996); C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 ELJ 378.

[33] Joerges (n 32) 384.

[34] See Horst Eidenmüller et al, 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems' (2008) 28 OJLS 660.

[35] See J Schwarze, *European Administrative Law* (rev edn, Sweet & Maxwell 2006) 85–6; M Ruffert, 'The Transformation of Administrative Law as a Transnational Methodological Project' in M Ruffert (ed), *The Transformation of Administrative Law in Europe* (European Law Publishers 2007).

[36] See Choudhry (n 30); B Ackerman, 'The Rise of World Constitutionalism' (1997) 83 VaLRev 771.

[37] See, eg, Symposium, 'Global Constitutionalism' (2007) 59 StanLRev 1153. See also Kahn (n 30).

[38] See JHH Weiler et al, 'Prologue – The European Courts of Justice' in A-M Slaughter et al (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart 1998); E Smith, 'Give and Take: Cross-Fertilisation of Concepts in Constitutional Law' in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Hart 1998). See also Kahn (n 30) 2679.

the conservative stalwarts in the US Supreme Court, comparative law analysis is now prevalent in judicial opinions in different jurisdictions of constitutional democracies.[39]

Administrative law is no exception.[40] For example, corresponding to the Europeanization of private law, talk about 'a European *ius commune* in the area of administrative law', the 'communautarisation' of national administrative law in the EU, and 'the Europeanisation of administrative law' is widespread in scholarly literature.[41] In addition to the convergence in national administrative law driven by regional integration projects such as the EU, comparative administrative law suggests that a closer inspection of the relationship between administrative law and its object of regulation, namely administration, will itself serve to bring about a convergence of administrative legal regimes.[42]

In sum, a shift of emphasis has taken place in comparative law studies as globalization redraws jurisdictional boundaries and thus reconfigures the relationship between law and space. In the place of legal transplant, institutional convergence occupies centre stage in this new comparative turn.

B. Revitalizing Comparative Public Law: The Idea of Publicness and the Quest for Cosmopolitan Values in Administrative Law

While the focus of contemporary comparative law has shifted to issues of institutional convergence, what underlies the revitalized interest in comparative public law is a quest for common values.[43] Departing from the nationalist legacy of tracing public law to the political history and legal culture of individual states,[44] comparatists in the global era recast the development of the modern legal system as paralleling the evolution of constitutional democracies. In terms of the development of modern constitutional states, the abuse of discretion by bureaucracy is identified as the central concern shared among constitutional democracies in respect of the exercise of public power.[45] It is true that discretion is essential to modern administration in that it enables

[39] See FI Michelman, 'Integrity-Anxiety?' in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005).

[40] See generally S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010). See also Ruffert (n 35) 5–9.

[41] See Schwarze (n 35) 93; T Heukels and J Tib, 'Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence' in P Beaumont et al (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 114; K-H Ladeur (ed), *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (Ashgate 2002).

[42] See Rose-Ackerman and Lindseth (n 40).

[43] See also Kumm (n 22).

[44] Administrative law is even more impenetrable to comparative analysis than constitutional law. See J Schwarze, 'Enlargement, the European Constitution, and Administrative Law' (2004) 53 ICLQ 971–2.

[45] Notably, the question of administrative discretion is at the core of how to define the limits of bureaucratic power. See RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 HarvLRev 1671–88. CF Edley Jr., *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale University Press 1990) 1–12. See also G Nolte, 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective' (1994) 57 MLR

administrative agencies to address diverse issues that require quick and flexible responses. Nevertheless, discretion also offers officials the chance to abuse their administrative power to the benefit of private individuals or organizations but at the expense of the public interest. A central concern for administrative law is how to curb the discretion of administrative agencies without straightjacketing modern administration.[46]

To guard against the abuse of discretion, administrative law is imbued with three dimensions. In its first dimension, administrative law checks the exercise of administrative power by shaping the institutional design and legal constitution of entities that exercise administrative power. This is constitutive administrative law. Substantive and procedural administrative law are the second and third dimensions and they similarly serve to mitigate the abuse of administrative discretion.[47]

It is also important to observe that one goal of administrative law is to ensure that the law is enforced in a way that is fair, without benefiting certain social groups at the expense of the public interest.[48] In this respect, administrative law mechanisms for guarding against the abuse of discretion can be understood as an institutional embodiment of the normative idea of publicness: the law should be 'wrought by the whole society, by the public', while the law should 'address[ ] matters of concern to the society as such'.[49]

Obviously, the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such, jointly constitute the idea of publicness and are not relevant only in respect of administrative abuse of discretion. Rather, they are integral to modern law in constitutional democracies.[50] The object of public law is to bring about and enhance public interest by governing the organization, operation, and exercise of public authority. Thus, the idea of publicness is identified as a shared value in comparative public law.[51]

As an underlying feature of public law, Benedict Kingsbury has observed, the substantive value of publicness entails the principle of legality, the principle of rationality, the principle of proportionality, the rule of law, and human rights protection.[52] Furthermore, as these concepts are generalized as characteristics of administrative law transcending national boundaries, the

196–7; B Sordi, '*Révolution, Rechtsstaat*, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe' in Rose-Ackerman and Lindseth (n 40).

[46] See Stewart (n 45) 1688. See also C Harlow and R Rawlings, *Law and Administration* (2nd edn, CUP 2006) 29–127.

[47] See Kingsbury (n 9) 34–50.

[48] R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart 2000) 13–14.

[49] See Kingsbury (n 9) 31.

[50] See Morison and Anthony (n 13) 216–17, 229–31; B Kingsbury, 'International Law as Inter-Public Law' in HS Richardson and MS Williams (eds), *Moral Universalism and Pluralism* (NOMOS XLIX, NYU Press 2009). See also J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W Rehg trans, MIT Press 1996) 168–93.

[51] See Morison and Anthony (n 13) 217–23.

[52] See Kingsbury (n 9) 32–3; Kingsbury (n 50) 178–9.

doctrines and positive provisions of national administrative law are reflexively interpreted and constructed in the light of these legal principles emanating from the idea of publicness.[53] Seen in this light, on the one hand, the idea of publicness is at play in various public institutional designs.[54] On the other hand, the tools and concepts that have long been associated with administrative law, including (quasi)judicial review, transparency, reason-giving, participation requirements, and legal accountability and liability,[55] are regarded as reflective of the idea of publicness.

Taken as a whole, the idea of publicness arises as a cosmopolitan value with comparative administrative law identifying common features of administrative law among different jurisdictions. National administrative law is thus recast as an expression of general administrative law principles, with the idea of publicness in particular, suggesting a cosmopolitan understanding of administrative law.[56]

C. Towards Rooted Cosmopolitanism of Administrative Law: The Case of Democratic Administration in the US and Germany

While the idea of publicness seems to stand out as a cosmopolitan value inherent in public law, it is given expression in different ways in different national systems of administrative law. These differences or particularities of positive administrative law cannot be explained away or trivialized as legal niceties. Rather, they are indicative of the manner in which administrative law relates to and shapes administration in individual jurisdictions. In other words, the pursuit of cosmopolitan values is rooted in individual jurisdictions. To get a clear sense of the rootedness of cosmopolitan values in administrative law, I undertake a close study of how the idea of democratic administration, which is at the core of publicness,[57] is understood in US and German administrative law, respectively.

The question of how to bring administrative decision-making closer to democratic control flows directly from the idea of publicness and has been a long-standing concern in the development of national administrative law.[58] Nevertheless, different understandings of democracy among constitutional democracies have ramifications for administrative law when it comes to thinking about how to involve citizens in the adoption of administrative decisions. As a pioneer in regulating administrative decision-making, the US Administrative Procedure Act of 1946 (APA) creates a significant role for citizen participation in rule-making procedures and

[53] See also S Cassese, 'Global Standards for National Administrative Procedure' (2005) 68 LCP 109. Cf Esty (n 2) 1524.
[54] See Morison and Anthony (n 13) 223–37.
[55] See Kingsbury (n 9) 41–50.
[56] Cf Krisch (n 4) 97–8.
[57] Cf Habermas (n 50) 168–93.
[58] See J Frug, 'Administrative Democracy' (1990) 40 UTLJ 559; E Fisher, *Risk: Regulation and Administrative Constitutionalism* (Hart 2007) 32–5.

adjudication.[59] Because adjudication is concerned with the rights and concrete interests of individuals, the procedural route provided by the APA in this regard is conceived in terms of trial-type adversarial proceedings.[60] Outside of the sphere of adjudication, the APA goes to great lengths to facilitate citizen participation in the formulation of general administrative policies. In addition to the notice and comment requirement in the so-called informal rule-making procedure,[61] the APA also provides for a formal rule-making procedure in which interested parties are entitled to participate in the enactment of administrative regulations through trial-type proceedings.[62]

Two points deserve special mention concerning the rule-making procedures in the APA. First, any interested person can participate in policy making by submitting his or her written opinion to administrative agencies in accordance with the informal rule-making requirement.[63] Operating on the basis of a pluralist model of democracy in the US, various citizen groups have taken advantage of the APA's rule-making provisions as a point of entry into the decision-making processes of administrative agencies.[64] Second, thanks to the heightened scrutiny of administrative processes by the courts, the notice and comment requirement has been bolstered to make public participation in administrative decision-making more meaningful, albeit that it is given expression in a variety of different forms.[65] As the judicial interpretation of the APA has evolved, administrative decision-making has become more inclusive, thus democratizing administration.[66]

In stark contrast, in Germany a highly sceptical view of the role of citizen participation in administrative decision-making prevails, as is

[59] For the influence of APA on the debate as to the enactment of a European administrative procedure act, see A Meuwese et al, 'Towards a European Procedure Act' (2009) 2 (2) Review of European Administrative Law 3.

[60] 5 USC sections 554, 556–57 (2006). According to 5 USC section 554(a), the formal adjudication procedure applies only when adjudications are 'required by statute to be determined on the record after opportunity for an agency hearing'. See also M Asimow, 'The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute' (2004) 56 AdminLRev 1005–6; SG Breyer et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (6th edn, Aspen 2006) 489–92.

[61] 5 USC section 553 (2006). See Breyer et al (n 60) 493–4.

[62] 5 USC sections 553(c), 556–57 (2006). The formal rule-making procedure applies only '[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing'. 5 USC section 553(c). After *United States v Florida East Coast Railway* (410 US 224 (1973)), administrative regulations are almost exclusively made through the channel of informal rulemaking. See also Breyer et al (n 60) 492–4, 514–20.

[63] 5 USC section 553(c) (2006). See also JV DeLong, 'Informal Rulemaking and the Integration of Law and Policy' (1979) 65 VaLRev 258.

[64] See Stewart (n 45) 1760–70. Cf PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (OUP 1990) 116–36.

[65] See Breyer et al (n 60) 527–44.

[66] See LB Bingham, 'The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance' [2010] WisLRev 297, 316–22. See also S Rose-Ackerman, *Controlling Environment: The Limits of Public Law in Germany and the United States* (Yale University Press 1994) 14–15, 126–7.

indicated in the Federal Administrative Procedures Act of 1976 (*Verwaltungsverfahrensgesetz*).[67] According to the standard German interpretation of the constitutional principle of democratic statehood, the institutional embodiment of democracy is parliament.[68] The parliament gains direct legitimacy from the people through election and further transmits its democratic mandate through legislation to administration. Under this transmission-belt model of democratic legitimacy, the administration is required to implement parliamentary legislation.[69] According to the first paragraph of Article 80 of the Basic Law (*Grundgesetz*), the parliament is obliged to define the content (*Inhalt*), purpose (*Zweck*), and scope (*Ausmaß*) of its policies in primary legislation. The parliament is prohibited from devolving its constitutional responsibility as the main decision-maker to the administration through general enabling legislation.[70]

The constitutional principle of democratic statehood in Germany is safeguarded by a twofold requirement: the administration executes the law faithfully, either in the form of adjudication or rule-making,[71] while it is for parliament to decide the content, scope and purpose of the law.[72] Correspondingly, judicial review of administrative decisions in Germany is focused more on substance than on procedure, in order to ensure the compatibility of administrative decisions with underlying parliamentary law. On this view, citizen participation in administrative processes is unnecessary to ensure the democratic quality of administration. On the contrary, there is a danger that citizen participation disrupts the chain of legitimacy that connects the administration directly with the parliament. Put bluntly, citizen participation in administrative decision-making is considered anathema to the German constitutional principle of democratic statehood.[73] The Federal Administrative Procedures Act thus does not apply to the policy-making activities of the Federal ministries but only to the implementation of a general policy in individual cases by administrative agencies.[74]

The question of why the US and Germany have developed such contrasting attitudes to citizen participation in administrative decision-making is too

[67] Bruce Ackerman notes, 'The German Administrative Procedures Act . . . ignor[es] almost entirely the distinctive problems involved in legitimating bureaucratic rule-making'. B Ackerman, 'The New Separation of Powers' (2000) 113 HarvLRev 633, 697. Cf TT Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Ashgate 2001) 7–8, 143–6.

[68] See E Schmidt-Aßmann and C Möllers, 'The Scope and Accountability of Executive Power in Germany' in P Craig and A Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP 2006) 281; V Mehde, 'Political Accountability in Germany' in L Verhey et al (eds), *Political Accountability in Europe: Which Way Forward?* (European Law Publishing 2008) 104.

[69] See Mehde (n 68). For an American account of the transmission-belt theory of legitimacy, see Stewart (n 45) 1675–6.

[70] See Ziamou (n 67) 56–9.

[71] The German conceptual equivalent of adjudication is *Verwaltungsakt*, while the closest German counterpart of the object of the rule-making procedures in APA is *Rechtsverordnung*. See Schmidt-Aßmann and Möllers (n 68) 275.

[72] ibid 280–3.

[73] ibid 281.

[74] See Rose-Ackerman (n 66) 59–60.

complex to address fully here. In brief, these differences in attitude can be traced to distinct constitutional understandings of the relationship between the legislature and the administration, to different experiences of and reactions to historical alternatives to parliamentary democracy, to the bureaucratic culture of each country, and to the divergent formations of intermediary groups in US and German societies.[75] Moreover, these different attitudes towards citizen participation in administrative processes lead also to different views on standing and to different levels of emphasis being placed upon substantive norms and procedural requirements in judicial review.[76]

Despite this, both countries are exemplars of constitutional democracy and accept the importance of the democratic control of administration.[77] The US and Germany converge on the idea of democratic participation in policy-making as the shared idea of publicness requires. On the other hand, they diverge on the role of citizen participation in administrative law.

What should we make of these two cases? For some, the focus should be on the fact of value convergence rather than doctrinal divergence, with convergence of this kind hailing a cosmopolitan turn in administrative law. For others, the focus should be on doctrinal divergence to remind us that administrative law remains rooted in individual states. We may, however, find a middle way between these two extremes. As Bruce Ackerman has observed when commenting upon the relationship between Enlightenment cosmopolitanism and American constitutionalism, the US constitutional order is imbued with a cosmopolitan character in its commitment to fundamental rights and to liberty and equality and the value of the rule of law.[78] Yet, the manner in which these cosmopolitan ideas and principles figure in the American constitutional system is rooted in the particularities of its political history and constitutional politics. This is a characteristic of what Ackerman calls rooted cosmopolitanism.[79] Echoing the rooted cosmopolitanism which is characteristic of the US constitutional order, the preceding discussion about the idea of the democratic control of administrative power and the role of citizen participation in administrative processes in the US and Germany indicates that administrative law also exemplifies the rootedness of cosmopolitan principles and values.

While both German and US administrative law subscribe to the principle of democratic administration and to the idea of publicness, this commonality finds

[75] See Schwarze (n 35) 18–20, 85–6. See also Nolte (n 45) 212; Rose-Ackerman (n 66); PL Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s' (2004) 113 YaleLJ 1341.

[76] See Rose-Ackerman (n 66) 12–13, 15–16. See also Nolte (n 45) 197–8.

[77] See Rose-Ackerman (n 66) 1–3.

[78] See B Ackerman, 'Rooted Cosmopolitanism' (1994) 104 Ethics 516.

[79] ibid.

expression through different administrative law doctrines and different preferences in terms of institutional design. As was suggested above, these doctrinal and institutional differences are rooted in the distinct constitutional history and legal culture of these two countries. Thus, the way in which the particularities of German and US administrative law nonetheless converge on cosmopolitan values such as the idea of publicness and the democratic control of administrative power serves to illustrate the concept of rooted cosmopolitanism.[80]

To sum up, an investigation of how the cosmopolitan idea of publicness, and the associated idea of the democratic control of administration, are shared but result in divergent attitudes towards citizen participation in administrative processes between Germany and the US exemplifies what I call the rooted cosmopolitanism of administrative law. The convergence and divergence in the administrative law of these two legal systems also illuminates the rootedness of cosmopolitan law in a historico-juridical space in a global era. It is to the European (EU) version of the rooted cosmopolitanism of administrative law that I now turn.

III. CONSTITUTIONAL SPACE CONCEIVED IN ADMINISTRATIVE LAW: THE CASE OF EUROPE REVISITED

The emergence of European administrative law is intertwined with the process of EU integration,[81] while the history of EU integration is one of Europe's transformation into a constitutional space.[82] Seen in this light, in this section, I aim to draw attention to the material (substantive) as opposed to the formal aspect of the constitutionalization of the EU legal order and to the underlying concept of administrative legitimation. I first examine the debate surrounding the constitutionalization of the EU legal order and show why this should move beyond an exclusive focus on the legitimacy of the ECJ. Next, the duality of constitutionalization, formal and material, is explained. In the final part of this section, I continue to discuss the relationship between the material (substantive) aspect of constitutionalization and the idea of administrative legitimation in the EU.

[80] See also P Lindseth, '"Always Embedded" Administration: the Historical Evolution of Administrative Justice as an Aspect of Modern Governance' in C Joerges et al (eds), *The Economy as a Polity: The Political Constitution of Contemporary Capitalism* (UCL Press 2005).

[81] See Schwarze (n 35) 4–10.

[82] See generally JHH Weiler, 'The Transformation of Europe' (1991) 100 YaleLJ 2403. For recent literature on the constitutionalization of the EU, see, eg, A Stone Sweet, *The Judicial Construction of Europe* (OUP 2004); B Rittberger and F Schimmelfennig (eds), *The Constitutionalization of the European Union* (Routledge 2007); T Christiansen and C Reh, *Constitutionalizing the European Union* (Palgrave Macmillan 2009).

A. Constitutionalization in Perspective: Taking the Constitutional Debate beyond the Legitimacy of Judicial Review

The characterization of the EU legal order as constitutional is a theme that needs no repetition here.[83] Asserted by the ECJ and advocated by academics, it has now become widely accepted that the EU legal order rests upon a constitutional pedestal, although the nature of this constitutional pedestal remains the subject of heated debate.[84] While the future and sustainability of the current EU constitutional order are clouded by uncertainties,[85] there is no denying that the ECJ's judicial bootstrapping from the 1960s onward has set the tone for the debate surrounding the constitutional character of the EU.[86] Moreover, the ECJ's jurisprudence is not simply a springboard for constitution-building collaboration between judges and academic lawyers.[87] It exerts actual influence over actors at the EU level and in the member states, including politicians, judges, and individuals. It is fair to say that the ECJ's recasting of the EU legal system as a constitutional order has framed the current EU legal order.[88]

In the light of the ECJ's jurisprudence, the constitutional character of the EU needs to be understood by reference to the so-called constitutionalization.[89] Despite its various applications,[90] constitutionalization connotes several characteristics of the EU constitutional order. First, unlike the 'momentary' constitution-making acts following political revolutions in national constitutional orders,[91] one key feature of constitutionalization is

[83] See, eg, JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (CUP 1999); A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd and rev edn, Hart and CH Beck 2010).

[84] See A von Bogdandy and J Bast, 'The Constitutional Approach to EU Law – From Taming Intergovernmental Relationships to Framing Political Processes' in von Bogdandy and Bast (n 83); FC Mayer, 'Multilevel Constitutional Jurisdiction' in von Bogdandy and Bast (n 83). See also M Everson and J Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge-Cavendish 2007) 3. But see PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) 1 (urging an administrative rather than a constitutional account of the EU legal order).

[85] See U Haltern, 'On Finality' in von Bogdandy and Bast (n 83). Needless to say, the sovereign debt crisis in Europe not only poses existential challenges to the eurozone but also calls the constitutional order of the EU into question.

[86] See Weiler (n 82) 2413.

[87] See JHH Weiler, 'Thinking about Rethinking' (2005) EuConst 415–16; N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 OJLS 581; M-S Kuo, 'From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails' (2009) 29 OJLS 589–600.

[88] But see Lindseth (n 84) 4–14 (the legitimacy of the EU legal order is underpinned by a chain of legitimacy traced to the member states).

[89] See Weiler (n 82). See also Krisch (n 4) 29–31.

[90] For an extensive account of constitutionalization that includes both the legal and sociological aspects of constitution-making, see DZ Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) 28–48. See also F Snyder, 'The Unfinished Constitution of the European Union: Principles, Processes and Culture' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 55.

[91] See B Ackerman, *We the People: Foundations, vol 1* (Belknap 1990).

process.[92] Even in a national context, the full meaning of a state constitution can only be gradually discovered and grasped as the constitutional order evolves in political practices and judicial interpretations. Even so, its normative and functional elements are regarded as being established in the one-off constitution-making act.[93] Thus, conceptually and normatively, a distinction needs to be maintained between creation and articulation in relation to constitutional values.[94] Yet, this distinction does not hold up in the case of the EU. Although the ECJ's 1963 *Van Gend en Loos* decision[95] is considered as marking the beginning of the EU's evolution into a constitutional order,[96] it takes decades for the EU to take on the constitutional character as it is. Instead of originating in a constituent act of constitutional creation as national constitutional orders are widely believed to do, the EU constitutional order flows from a process of constitutionalization.

Relatedly, constitutionalization hints at the imperfect state of a constitutional order as it progresses down the spectrum of constitutionalization.[97] A traditional constitutional order is regarded as having comprehensive competence.[98] In contrast, a constitutional order resulting from constitutionalization is considered as only 'partial' until it reaches ultimate constitutional perfection at the end of constitutionalization.[99] Finally, constitutionalization takes place in the 'spontaneous forms of juridification' in which the constitutional character of the EU legal order materializes.[100] On this view, the core of ECJ-driven constitutionalization is a self-creating process by which the Court puts forward a set of core values through judicial decisions in routine cases and sets these apart from other judicial doctrines, leading to the gradual formation of a new legal order.[101] Through the 'gradual and self-referential process of juridification' from which a distinction between constitutional and non-constitutional decisions emerges, the ECJ remakes the EU legal order into a constitutional order.[102]

[92] See C Walter, 'International Law in a Process of Constitutionalization' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007) 192. See also JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 ICON 173–6.

[93] See WF Harris II, *The Interpretable Constitution* (Johns Hopkins University Press 1993). As a matter of historical fact, the making of a constitution takes a period of time. However, the whole period in which a constitution is drafted, deliberated, and approved is conceptually regarded as a constitutional moment. See M-S Kuo, 'Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering' (2010) 23 Ratio Juris 399–400.

[94] See M-S Kuo, 'The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering' (2010) 1 Transnational Legal Theory 361.

[95] Case 26/62 [1963] ECR 1.

[96] See Weiler (n 82) 2434.

[97] See Walter (n 92) 192–4.

[98] See Kuo (n 93).

[99] ibid; Krisch (n 4) 33.

[100] See C Möllers, 'Pouvoir Constituant—Constitution—Constitutionalisation' in von Bogdandy and Bast (n 83) 195. See also Kuo (n 94) 358–64.

[101] Kuo (n 87) 585; Möllers (n 100) 195–6.

[102] See Möllers (n 100) 196. On this view, whether the EU treaties constitute the EU constitution is beside the point. The EU treaties are constitutional to the extent that their provisions take on

Unfortunately, the standard account of the constitutionalization of the EU legal order is gripped by how the EU legal order has been transformed from an international legal system into a supranational order.[103] Seen in this light, the significance of constitutionalization is obscured, while the process of constitutionalization also leaves an embarrassing birthmark on the EU constitutional order, contributing to its legitimacy deficit.[104] Moreover, with the ECJ as the propeller of EU constitutionalization, the EU's legitimacy deficit feeds a debate on the legitimacy of judicial review.[105]

On the one hand, for those who subscribe to the constitutional characterization of the EU legal order, constitutionalization provides a conceptual alternative to the traditional model of constitution-making. Assuming the legitimacy of judicial review, defenders of the constitutional character of the EU legal order present a new paradigm of legitimacy based on ECJ-driven constitutionalization. On this view, criticisms rooted in the counter-majoritarian difficulty of judicial review are dismissed as simply failing to recognize the uniqueness of the EU constitutional order. Discussion about the role of the ECJ should be detached from the debate about the legitimacy of judicial review.[106] As a result, the new paradigm of legitimacy based on a process of constitutionalization and the traditional legitimacy model organized around the idea of constitutional moment are presented as mutually exclusive.[107] For this reason, the relationship between these different models of legitimacy is never addressed.

On the other hand, those who question the constitutional character of the EU blame the counter-majoritarian genesis of the EU constitutional order for its problems. By laying the EU's legitimacy deficit at the counter-majoritarian door of the ECJ, these critics acquiesce in a conception of constitutional legitimacy that rests upon a one-off constitution-making act. On this view, the root cause of the legitimacy deficit of the EU legal order is the very absence of the constituent 'We the People' of the EU.[108] In this way, sceptics of the EU constitutional order do not give the idea of constitutionalization its due and are thus unable to fully capture its implications for the legitimacy of the EU legal order.

Taken together, both sides in the debate about the legitimacy deficit of the EU stumble over the legitimacy of judicial review. Both fail to do justice to the

constitutional significance as construed by the ECJ. See also Case 294/83 *Parti écologiste 'Les Verts' v Parliament*, [1986] ECR 1339, 1365, para 23. Cf Möllers (n 100) 189–95.

[103] See Weiler (n 82) 292–8. See also Snyder (n 90) 62–7.

[104] See Lindseth (n 84) 58–9.

[105] See D Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 10. See also M de S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004) 356–60.

[106] See Everson and Eisner (n 84) 27–32, 119–21; MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty* (Hart 1998) 7–34.

[107] See Everson and Eisner (n 84).

[108] See Möllers (n 100) 175–6, 185–8, 198–9, 201–3.

idea of constitutionalization and to the way that it contributes to the legitimacy of the EU. To compensate for this, it is important to recognize the duality of the EU's constitutionalization, a theme to which the next section will turn.

B. Towards the Duality of Constitutionalization: Relating Material Constitutionalization to the Formal Transformation of the EU

The focus of academic commentary on the EU's constitutionalization has been on the ECJ's landmark decisions that established the doctrines of direct effect and supremacy regarding EU law in relation to the domestic law of member states. The ECJ has been credited with setting the EU apart from traditional international organizations.[109] Accordingly, literature on the constitutionalization of the EU legal order abounds with discussion on the formal transformation of the EU legal order from one based on international law to a supranational order.[110] Formal constitutionalization, as I term it, occupies centre stage in the standard account of the constitutional development in the EU.

Nonetheless, the formal aspect of constitutionalization alone would not rest the EU's constitutionalized legal order on a solid normative basis. When the material (or substantive) aspect of EU constitutionalism is left out of the discussion, the debate about the legitimacy of the EU legal order proceeds on the basis of a traditional model of legitimacy.[111]

As a matter of historical fact, constitutional traditions can be characterized according to whether they are oriented towards founding a new order or shaping political power.[112] Some national constitutions such as the German Basic Law appear to be more power-shaping than order-founding; other national constitutions, for example, the US Constitution, are more order-founding.[113] Nevertheless, in the traditional model of legitimacy, even the legitimacy of the power-shaping constitutional order is attributed to an order-founding act.[114] Take the post-World War II German constitutional order again. Referring to the German Basic Law, Peter Badura notes, '[t]he constitution is an order-creating and programmatic act of foundation and shaping that seeks to give the community a legal foundation in a concrete historical situation'.[115] Taken as a whole, what is characteristic of the traditional constitutional model is the existence of a foundational act, which is

[109] G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595. But see B de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012).

[110] See Weiler (n 82); Snyder (n 90) 62–7.

[111] Cf A von Bogdandy, 'Founding Principles' in von Bogdandy and Bast (n 83) 46; Snyder (n 90) 62–7.

[112] See Möllers (n 100) 170–8.

[113] ibid.

[114] See Kuo (n 101).

[115] See R Wahl, 'In Defence of "Constitution"' in Dobner and Loughlin (n 7) 221–2 (quoting and translating P Badura, *Staatsrecht: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland* (3rd edn, CH Beck 2003) 7 (emphasis omitted)).

both order-creating and legitimacy-bestowing.[116] On this view, the EU constitutional order is perceived as defective because no legitimacy-conferring foundational act can be identified.[117]

To counter this traditional model of legitimacy, any adequate account of the legitimacy of the European constitutional order must rest upon the *process* of constitutionalization. Yet, the standard account of the constitutional development of the EU has obscured the legitimacy-bestowing character of constitutionalization. By leaving out the legitimacy-bestowing effect of constitutionalization, discussion about the EU's formal constitutionalization threatens to exacerbate the legitimacy deficit of the EU. Thus, to ensure that constitutionalization emerges as a working conceptual tool to account for the legitimacy of the EU order, it will not be sufficient to point to changes in the formal character of the EU order and its transformation from an intergovernmental to a supranational organization. The process of constitutionalization also needs to make up for the legitimacy deficit resulting from the absence of 'We the EU People'.[118] The legitimacy-bestowing character of constitutionalization must be tackled head-on.

To this end, and looking beyond its transformative effect on the nature of the EU, the substance of the foundational ECJ jurisprudence requires close inspection. As indicated above, this jurisprudence set in train a process of EU constitutionalization. Foundational jurisprudence of this kind is by no means equivalent to the constitutional authorship of the citizenry expressed in the name of 'We the People', which underlies the traditional model of legitimacy.[119] Nevertheless, this foundational jurisprudence does speak to citizens in a way. As the cases that constitute the doctrinal pillars of EU constitutionalization show, the ECJ's foundational jurisprudence deals mostly with disputes between private individuals and public authorities.[120] In this way, the relationship between private citizens and government that underlies legitimacy figures in the substance of the ECJ jurisprudence, pointing to the material (substantive) aspect of the EU's constitutionalization. The process whereby constitutionalization bestows legitimacy through its material dimension is what I call material constitutionalization.

In sum, it is only by taking account of both the formal and material aspects of the EU's constitutionalization that we can get a full picture of the constitutional character of the European legal order. What underlies the substance of the ECJ jurisprudence, and the question of how this relates to the

[116] Even in British constitutional thought: see Kuo (n 93) 400; Kuo (n 94) 345. Cf V Bogdanor, *The New British Constitution* (Hart 2009) 11.

[117] See Möllers (n 100) 185–88. See also Everson and Eisner (n 84) 10.

[118] Cf JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in Weiler and Wind (n 90).

[119] See M-S Kuo, 'Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship' (2009) 7 ICON 683–7. See also RS Kay, 'Constituent Authority' (2011) 59 AmJCompL 715. But cf Everson and Eisner (n 84); Maduro (n 106).

[120] See Schwarze (n 35) 4.

emergence of a transnational, European administrative law, are the themes I address next.

C. Beyond Formalism: Discovering Administrative Legitimation in the Material Constitutionalization of the European Legal Order

As noted above, the ECJ's foundational jurisprudence deals mostly with disputes arising from the exercise of power regarding EU law by public authorities both at the EU level and in the member states. Specifically, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*,[121] which established the direct effect doctrine, concerned a dispute on a tariff imposed by the Dutch government on an import from Germany; at the centre of *Costa v ENEL*,[122] which set out the supremacy doctrine, was a legal challenge concerning Italy's policy to nationalize energy companies, which allegedly constituted the distortion of the market; *Stauder v City of Ulm*,[123] which laid grounds for fundamental rights, was concerned with a Community regulatory measure concerning the distribution of butter at reduced prices, which was deemed as necessary to maintain a balanced production of butter. To paraphrase, almost all of the ECJ cases that constitute the doctrinal pillars of the EU constitutionalization are concerned with specialized administrative law, for example, competition law and tax law, in Europe.[124] The formal constitutionalization of the EU through the ECJ-driven transformation of the EU from an intergovernmental into a supranational body also provides the vantage point for observing how the ECJ has taken up constitutional jurisdiction as it functions as an international administrative court.[125] That the ECJ functions as the supreme administrative court in respect of the exercise of power by EU institutions is key to the legitimacy of the EU constitutional order.

Material constitutionalization provides a close-up on the relationship between administrative law and constitutional ordering in the EU, and the nature of this relationship is captured by the idea of administrative legitimation. On close inspection, it is in cases spelling out fundamental rights in relation to the principles and doctrines of administrative law in which the EU's

[121] Case 26/62 [1963] ECR 1.
[122] Case 6/64 [1964] ECR 585.
[123] Case 29/69 [1969] ECR 419.
[124] See also M Everson, 'The Constitutionalisation of European Administrative Law: Legal Oversight of a Stateless Internal Market' in C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart 1999) 281 (characterizing European administrative law as one 'for or of the internal market').
[125] See R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan 1998) 16–28. See also M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 399–423; A Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2010) 1–14. But cf Schwarze (n 35) 60–1.

constitutional order is laid down.[126] These fundamental administrative rights include the right to be heard, the right to effective judicial review, and the right to be given reasons for official decisions.[127] Corresponding to the constitutional implications of administrative law in nation states,[128] the principles and doctrines of administrative law articulated by the ECJ bear out the material constitutionalization of the EU legal order.[129] Moreover, to the extent that the ECJ incorporates European Convention on Human Rights (ECHR) as part of the fundamental rights system governing the EU, the European Court of Human Rights (ECtHR) jurisprudence concerning fundamental rights also plays a role in the relationship between private citizens and the EU underpinning material constitutionalization.[130] To be sure, the fact that the ECJ's administrative jurisdiction takes on a constitutional character does not *per se* guarantee the legitimacy of the EU constitutional order.[131] This will depend also on how the operation of administrative law and justice is perceived by the citizens of the member states.

European administrative law has taken shape against the backdrop of the growth of an EU administrative space.[132] Yet, it has played more than an instrumental role in promoting respect for the rule of law. It has been noted that for the most part, the subject matter of administrative law and justice, which lies at the core of the material constitutionalization of the EU legal order, concerns the relationship between the government and citizens and that it thus feeds the legitimacy of the politico-legal system itself.[133] Seen in this light, administrative law is constitutive of the legitimacy of European multilevel governance even without a foundational moment of constitutional authorship.[134]

ECJ decisions in the area of administrative law influence the relationship between the governing authorities and citizens in the EU in a fundamental sense. The fundamental rights relating to European administrative law impact on national administrations as they penetrate into national administrative procedures in the course of the implementation of EU law. In this way, ECJ jurisprudence plays a significant role in the general relationship between citizens and public authorities in EU administrative space.[135] In other words,

[126] See T Koopmans, 'Globalisation of Administrative Law—the European Experience' in Anthony et al (n 4) 399. See also Morison and Anthony (n 13) 220–1.

[127] See Schwarze (n 35) 1460–5.

[128] See generally T Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Rose-Ackerman and Lindseth (n 40)

[129] von Bogdandy (n 111) 23. See also Koopmans (n 126) 400–1.

[130] See, eg, S Kadelbach, 'Union Citizenship' in von Bogdandy and Bast (n 83) 466.

[131] For the types of and the nature of the ECJ's jurisdiction, see Dehousse (n 125) 7–28.

[132] See Schwarze (n 35) 1455–65.

[133] See M Shapiro, *Courts: A Comparative and Political Analysis* (p/b edn, University of Chicago Press 1986) 27. The allocation of power and competence between public agencies is also a part of administrative law. Accordingly, Case 22/70 *Commission v Council (AETR)* [1971] ECR 263 can be regarded as an administrative law case as well.

[134] See also Everson (n 124) 283.

[135] See J Küling, 'Fundamental Rights' in von Bogdandy and Bast (n 83) 499.

administrative legitimation in the EU constitutional order involves not only the ECJ but also the administration itself.[136] Through the implementation of general principles of European administrative law and the corresponding fundamental rights as developed by the ECJ, the relationship between the governing administration and the governed citizens is recast as one of fundamental rights, although the scope of fundamental rights developed by the ECJ has already extended beyond those intertwined with administrative law issues. In this way, public authorities obtain legitimacy in the exercise of administrative power when this power falls within the scope of EU law.

More important, the relationship between the government and citizens is changed in a deep sense. EU protection of fundamental rights also shapes national administrative procedures in regard to the implementation of EU law.[137] What is important in respect of the procedural dimension of European administrative law is its capacity to transform the general bureaucratic culture of member states as well as of EU agencies.[138] Accordingly, the material aspect of ECJ-driven constitutionalization penetrates into general administrative culture in European administrative space. Administrative legitimation is not simply a juridical phenomenon of constitutionalization. Rather, administrative legitimation involves a social process in which ingrained social perceptions of public authorities are opened up for reconstruction in the light of the fundamental rights associated with the general principles of administrative law.[139] In this way, ECJ jurisprudence not only reshapes the political image and legal nature of the EU, but it also lends legitimacy to the EU constitutionalized legal order.

The judicial dialogue prompted by the so-called *Solange* decisions of the German Federal Constitutional Court sheds light on the manner in which the EU is legitimated and (re)conceived as a constitutional space by means of administrative law.[140] In the *Solange II* case, the German Federal Constitutional Court changed the position it had put forward in *Solange I* and in so doing it laid the grounds for a grand reconciliation between national constitutional courts and the ECJ. Taking account of the ECJ's response to its *Solange I* decision,[141] the German Federal Constitutional Court exercised judicial prudence in *Solange II*. It thus suspended its constitutional jurisdiction regarding secondary EU legislation 'so long as' (*solange*) the EU legal order under the ECJ's guardianship continued to provide the same level of the fundamental rights protection as the Basic Law did.[142]

[136] Möllers (n 100) 197; Everson (n 124) 283. See also Snyder (n 90) 63.
[137] See generally Ladeur (n 41).
[138] See Everson (n 124); Küling (n 135) 497, 499. Cf Fisher (n 58) (embedding the values of constitutionalism in administrative practice and regulatory culture).
[139] See Möllers (n 100) 197–8. See also Snyder (n 90) 62–3.
[140] *Solange I*, BVerGE 37, 271 2 BvL 52/71 (1974), [1974] 2 CMLR 540; *Solange II*, BVerfGE 73, 339 2 BvR 197/83 (1986), [1987] CMLR 225.
[141] See, eg, Case 4/73 *Nold v Commission* [1974] ECR 491.
[142] See Claes (n 125) 690–1.

It is notable that the catalogue of fundamental rights presented by the German Federal Constitutional Court as a condition for the suspension of its jurisdiction to reach a truce in 'La Guerre des Juges'[143] consists mainly of those associated with general principles of administrative law. They include the general principle of equal treatment, the prohibition on arbitrary acts, the principles of the prohibition of excessive action and of proportionality, the prohibition of retrospection, the right to receive reasons, effective judicial protection, and the right to legal hearing.[144] In other words, the ECJ's substantiation of fundamental rights concerning administrative law was regarded as paving the way for the EU's transformation into a constitutional space where the material aspect of constitutionalism would thrive alongside the EU's formal constitutionalization.

Overall, the legitimacy of the EU constitutional order is built up step by step in ECJ decisions that play a defining role in the relationship between the governing authorities and citizens. Nonetheless, a note of caution is in order regarding the legitimacy-bestowing character of the constitutionalization of the European legal order. To argue that the process of the EU's constitutionalization contains legitimacy-bestowing effect does not mean that the legitimacy of the EU constitutional order can be completely cut off from its member states and displace constitutional authorship, which is perceived as the privileged legitimacy-giver in the politico-cultural sense.[145] Nor is the constitutionalized legal order of the EU necessarily superior to its national counterparts in the member states.[146] Unnerved by the impact of formal constitutionaliation on the legal nature of the EU, member states have re-emphasized the importance of national parliamentary democracy. As a result, the notion of a 'chain of legitimacy' still figures dominantly in our understanding of the legitimacy of EU public authorities.[147]

Nevertheless, the chain of legitimacy, with its emphasis upon the consent of member states, falls short of giving a full account of the EU constitutional order.[148] Under the model of the chain of legitimacy, individual policies made at the EU level may be unwelcome and thus disparaged as lacking in legitimacy; the direction in which the EU constitutional order moves may not resonate with the citizens of the member states. Even so, the very constitutional nature of the EU legal order as it stands is not completely without legitimacy; otherwise the current EU constitutional order would simply fall apart.[149] For this reason, an integrated version of legitimacy that takes account of the

[143] ibid. 452–64.

[144] See Schwarze (n 35) 1461–2.

[145] See Lindseth (n 84) 6–14; Möllers (n 100) 170–2, 185–8, 198, 202–3. Cf Kuo (n 119).

[146] See Mayer (n 84) 429–31.

[147] See Lindseth (n 84) 53–57. Cf de Witte (n 109).

[148] See JHH Weiler, 'Dialogical Epilogue' in de Búrca and Weiler (n 109) 262–70. See also Everson (n 124) 289–90.

[149] For the uniqueness of the legitimacy challenge facing the EU, see U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 ELJ 14.

legitimacy-bestowing character of the process of constitutionalization is needed to explain the overarching constitutional ordering embracing both the EU and its member states.[150]

To sum up, a close inspection of the role of administrative law in the trajectory of European integration lays bare the relationship between administrative law and the EU legal order and the idea of administrative legitimation. European administrative law plays an essential role in the constitutionalization of the European legal order. That the constitutional space of Europe is conceived in administrative law provides the key to understanding the character of European administrative law and to making sense of the legitimacy of the EU legal order.

IV. CONCLUSION

Globalization blurs different types of boundaries, redefining the relationship between law and space. As transboundary issues increase, transnational administrative arrangements are on the rise, resulting in the formation of transnational administrative space and leading to calls for the emergence of transnational administrative law. The EU stands out as the most sophisticated example of transnational administration. It not only functions to resolve regulatory issues that transcend the boundaries of the member states but it has also evolved into a supranational order and is suggestive of a new paradigm of international relations. EU experience inspires various institutional experiments in transnational administration, while the development of European administrative law appears to set an example for other cases of transnational administrative law, including global administrative law. Yet, it is far from clear whether the European experience can only be understood in the unique context of European integration or whether it may be suggestive of a more general tendency in the development of transnational administrative law.

The question of whether the European experience provides a credible model for global administrative law becomes more acute considering the attempt of global administrative law to alleviate the legitimacy challenges facing global governance. On the one hand, European administrative law and the development of the multilevel governance regime in the EU are closely connected. On the other hand, the EU governance structure has developed alongside the EU's constitutional transformation. If proponents of global administrative law wish to find support for the idea of administrative legitimation from EU experience, the role of European administrative law in European integration requires closer inspection.

[150] See, eg, I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CML Rev 703; I Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 ColumJEurL 349. See also Mayer (n 84) 426–31.

In this article, I have attempted to shed light on the potential role of transnational administrative law in the formation of a transnational legal space by examining the relationship between European administrative law and European integration. To see whether this European experience can be applied to global governance and to global administrative law, I first took account of revitalized contemporary interest in comparative administrative law in the pursuit of cosmopolitan values. I argue that as the emphasis shifts to institutional convergence in contemporary comparative law studies, the pursuit of cosmopolitan values emerges as an underlying theme in comparative administrative law. My observation of the manner in which the cosmopolitan ideal of democratic administration finds expression in US and German administrative law indicates that the pursuit of cosmopolitan value is conditioned by the rooted cosmopolitanism of administrative law. In this way, I look into the duality of the constitutionalization of the European legal order. My examination of the EU's constitutionalization shows that the formal constitutionalization of the EU legal order with its ECJ-driven transformation from an international organization to a supranational body is substantiated by the protection of the fundamental rights which are central to administrative decision-making. Thus, administrative law has come to underpin the material legitimacy of the constitutionalized European legal order. The legitimacy-bestowing effect of European administrative law on the EU legal order is rooted in the EU's material constitutionalization.

To conclude, in the light of EU experience, administrative legitimation, albeit proposed as a new model of legitimacy, is unable to stand aside from constitutional issues when it is invoked to provide legitimacy for the nascent political ordering of global governance. The idea of administrative legitimation turns out to be deeply rooted in the formation of European constitutional space. Thus, by generalizing the EU example of administrative legitimation, proponents of global administrative law may be forced, unexpectedly, to confront the uncomfortable reality of the constitutionalization of global governance.[151] As the uniqueness of the EU example shows, we should be cautious about projecting the European model onto global administrative law.

[151] See Krisch (n 4) ch 2; M-S Kuo, 'Between Law and Language: When Constitutionalism Goes Plural in a Globalising World' (2010) 73 MLR 858.