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Doctrinal Methodology in EU Administrative Law: Confronting the “Touch of Stateness”

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Abstract

From its inception, the academic study of EU administrative law has relied heavily on doctrinal categories, concepts and principles, borrowed from the administrative law of the Member States. It has largely preferred research agendas such as the Europeanisation of national administrative law or the development of common European principles derived from national administrative laws. Legal doctrine has also engaged in the critique of EU administrative law when it fails to account for the normative standards that national administrative law must usually observe. Whereas all these constitute important research agendas, they reproduce in particularly acute terms a familiar paradox. While the existence of a European administration and administrative law beyond the state cannot be seriously disputed today, legal doctrine tends to consider them, implicitly or explicitly, from the perspective of the administrative law of the nation-state. The so-called “touch of stateness” has had a firm grip on EU administrative law, even though it includes unique aspects that lack any precedent in national laws. The article considers, and proposes a methodological approach to address, the ways in which preconceptions and normative expectations originating in national law have conditioned, and indeed prevented, the deeper doctrinal development of EU administrative law.

Keywords: EU administrative law; legal doctrine; methodology; European polity paradox; touch of stateness; interdisciplinarity

A. Confronting Our Past Lives

European integration may have brought us an extensive phenomenon of public administration beyond the nation-state. It has not, however, led to the development of a scholarly discipline of European Union (EU) administrative law that is fully dissociated from the conceptual and methodological habits of national administrative law. The national experience of administrative law followed it beyond the state, colonizing EU administrative law and remaining central to it.

This Article considers how the continued influence of preconceptions and normative expectations originating in national administrative law has conditioned, and indeed prevented,

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the deeper doctrinal development of EU administrative law. It also proposes one possible methodological approach to avoid the excessive weight of that influence.

Section B situates the issue in the broader context of EU legal scholarship at large. EU administrative law doctrine shares the same problem of the “touch of stateness” that Jo Shaw and Antje Wiener have diagnosed in other disciplines devoted to the study of European law and governance. While scholars accept that the existence of public power and of law beyond the state is beyond any dispute, their analysis is often led—or, indeed, misled—by analogies and preconceptions that take the workings of state power as their implicit frame of reference, even where EU law and governance raises issues that have historically been unknown to states. Paradoxically, although EU administrative law has become widely recognized as a form of public law beyond the state, its study has tended to remain—to a very significant extent—thematically focused on its influences into, and from, the administrative law of states.

Section C explores an endemic cause for the particularly strong grip of the “touch of stateness” in EU administrative law doctrine. The cause lies in the fact that the seminal studies of EU administrative law ultimately proved so influential that the discipline largely tended to build on the research agendas pioneered by its founding scholars—Jürgen Schwarze in particular. Those research agendas emphasized two main themes: The transplant of general principles of administrative law common to the Member States into EU law, and the Europeanization of national administrative law. Both themes explored how EU administrative law resembled, or affected, the administrative law of the Member States, and therefore made the national administrative law experience the yardstick for the relevance of EU administrative law issues. As Section C will further illustrate, this is—in a sense—a repetition of history because the relation developed by EU administrative law doctrine to national administrative law bears remarkable resemblances to how early administrative law doctrine positioned itself with respect to private law dogmatics a century ago.

Section D argues that the reliance of EU administrative law doctrine on its national counterpart often leads it to overlook legal issues that are specific to the EU’s administrative order. Such reliance leads, on the one hand, to a familiarity bias. The implicit benchmark for *what* counts as an issue of administrative law has, to a large extent, remained whether that issue can be described by employing the familiar vocabulary from domestic administrative laws. As a result, the doctrinal development of EU administrative law has tended to dwell on the same concepts and principles that one would find in national laws, whereas those which are specific to EU administrative law and unprecedented in domestic laws have remained underdefined at best and ignored at worst. On the other hand, when approaching EU administrative law matters, it is difficult for EU administrative law scholars to wholly abandon the expectations of justice they internalized from their native national legal culture. This generates what will be termed a normative bias: A habit of implicitly, though sometimes also explicitly, judging the appropriateness of EU administrative law against the standard of the value choices commonly made by national administrative laws.

Section E suggests two methodological strategies that can be pursued to mitigate the influence of the “touch of stateness.” In order to overcome the legal preconceptions that we have inherited from state and national legal cultures, one must pay the utmost attention to the distinctive legal and institutional aspects of the EU’s administrative system. On the one hand, this requires close interdisciplinary engagement with disciplines that have empirically studied the practices and political dynamics of that system. On the other hand, however, EU administrative law doctrine must seek a deeper *intradisciplinary* dialogue based on the analysis of recurring administrative law issues across policy sectors and on an appropriate contextualization of EU administrative law problems exclusively within the constitutional law of the EU.

It is almost inevitable that we transport expectations derived from national doctrinal traditions into our study of EU administrative law. Jurists across Europe are heirs and stewards of the great strides that administrative law has made in pursuing collective interests while preserving

individual rights. The past national lives of EU administrative law doctrine are also *our* past lives. Yet, as administrative law reincarnates in transnational and supranational forms, we too must adjust to what this should mean for legal doctrine itself.

B. Legal Culture and the “Touch of Stateness” in EU Administrative Law

The term “legal doctrine” is generally used to refer to one of three things. It may refer to an interpretive proposal put forward by legal scholars to reformulate, clarify, and systematize sources of positive law into clusters of coherently networked concepts and principles.¹ Legal doctrine may also be used to refer to the strand of legal scholarship that occupies itself with developing such proposals. Indeed, this approach to the law has historically been so dominant in European legal scholarship that—especially in continental traditions—legal doctrine (*die Lehre, la dottrina, la doctrine*) is often used in a third, more abstract sense—as synonymous with legal scholarship, as a whole. Given that much of contemporary European legal scholarship is engaged with theoretical, empirical, or reform-oriented projects—and can no longer be said to exclusively adopt a doctrinal approach—the argument in this Article will use the term “legal doctrine” only in the first two senses. If used as a countable noun—such as “a legal doctrine” or “legal doctrines”—it will refer to the first sense. If used as an uncountable noun—for example, “European administrative law doctrine”—it will refer to the body of scholarly writings that primarily aims to reconstitute the content of EU law sources and the relations between them.

The argument made in this Article does not concern any doctrine of EU administrative law in particular. It is rather an argument about EU administrative legal doctrine—that is, about the doctrinally oriented scholarship of EU administrative law—and its longstanding dependency on national legal doctrine. As will be shown below, some reasons for this dependency are endogenous to EU administrative law. Others, however, are of a more systemic nature and affect European legal doctrine in general.

Indeed, in spite of over half a century of legal development in European integration, it has been noted that European legal doctrine still remains at a comparatively early stage of maturity. It has been lamented that, as “the common language of European law,” European legal doctrine “seems to be still a kind of pidgin—its terms derive from many national legal systems; its grammar is not sufficiently complex; and many of its concepts are vague.”² Moreover, one can even doubt whether, in practice, European legal doctrine constitutes such a “common language” at all. A common doctrinal scholarship of European law, with a shared vocabulary and a minimum of methodical consensus for the critique of interpretive propositions, is—as of yet—nonexistent.³

To understand why this may be, it is worth recalling an often-overlooked aspect of the general nature of legal doctrines. The doctrinal reformulation of legal sources does not occur in an insulated, pristine, and purely legal world, but rather in the context of a concrete interpretive community.⁴ The boundaries of doctrinal legal discourse are defined by a web of tacit social conventions among interpreters about how meaning may be plausibly ascribed to legal sources, and about the nature of the extralegal realities that those sources intend to govern. Legal doctrines are as much a product of the legal sources they intend to reformulate as they are of their makers’ implicit conceptions of social and political institutions, shared normative beliefs, and established

¹See generally JAN SMITS, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, in RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 207, 210 (Rob van Gestel, Hans Micklitz & Edward Rubin eds., 2017); Aleksander Peczenik, *A Theory of Legal Doctrine*, 14 *RATIO JURIS* 75 (2001).

²Nils Jansen, *Making Doctrine for European Law*, in RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 224, 224 (Rob van Gestel, Hans Micklitz & Edward Rubin eds., 2017). Jansen’s remarks concern European private law scholarship, but the same could be said—word for word—of both the EU legal doctrine in general and EU administrative law doctrine in particular.

³See generally Armin von Bogdandy, *National Legal Scholarship in the European Legal Area: A Manifesto*, 10 *INT’L J. CONST. L.* 614 (2012).

⁴For the notion of interpretive community, see generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

argumentative practices.⁵ Put differently, legal doctrines—as the scholars who author them—are always nested in a particular legal culture.⁶

Herein lies the perennial challenge for the doctrinal development of EU law. National legal doctrine is embedded in a shared and relatively stable cultural infrastructure, upon which any participant in legal argument can rely. European legal doctrine is not. Indeed, some—like Haltern—argue this to be the defining qualitative difference between national law and EU law; whereas the former enjoys a “richly textured cushion of cultural resources,” EU legal sources constitute “just texts, empty shells with no roots.”⁷

This may be different for a small subgroup of “Eurolawyers,” the activist technocratic legal elites who, linked by shared common federalist beliefs about the nature and political destiny of European integration, historically inhabited the legal services of the institutions and helped them advance the integration process further.⁸ The overwhelming majority of jurists on the continent are not, however, socialized in this subculture. The implication is that, in the absence of an established common legal culture, it is inevitable that jurists transport doctrinal preconceptions into EU law that in fact originate in their own national legal cultures. Some, like Armin Hatje and Peter Mankowski, go as far as to speak of “national Union laws” (*nationale Unionsrechte*) to describe what they see as an inherent feature of EU law, which—though intended to be the same for all Member States—is construed differently due to the fundamental differences in national legal culture.⁹

Far from concerning only the scholarship of EU law, the weight of national preconceptions is an issue that has long been felt in EU legal practice. The writings of Andreas Donner, the influential Dutch president of the European Court of Justice (ECJ) in its early years, illustrate the issue well:

Every one of [the ECJ’s Judges] has to go through a process of disenchantment. He will start by consulting the texts and will find them reasonably clear. Perhaps during the argument he will be checked by some plea that, to him, at first view seems palpably wrong. But the argumentation is afterwards, in conference, taken up by one or two of his colleagues, and at a certain moment he discovers that they read the law in a different way. Then it will depend upon his personal and national character how long it is before he admits that his reading may be conditioned by some national preconception that should not apply in community law.

The problem . . . is not that we all chauvinistically defend our national solutions . . . as one more proof of the intellectual superiority of our own national law. It is simply that we have all been educated in a certain system which our professors presented to us as a well-balanced and logical precipitation of natural reason and natural justice.¹⁰

Indeed, far more than simply learning the substance of the law, the very point of legal education is that aspiring lawyers are immersed in their national doctrinal tradition and internalize its particular ways of approaching legal sources. Put differently, it is through legal education that jurists learn what it means to “think like a lawyer” in their specific jurisdiction. What “thinking like a

⁵KARLO TUORI, CRITICAL LEGAL POSITIVISM 300–03 (2002); Aulis Aarnio, ESSAYS ON THE DOCTRINAL STUDY OF LAW 178 (2011).

⁶The role of legal culture considered here has been the object of much deeper theoretical development elsewhere in the literature. The rather heterogeneous “law and culture movement” has drawn, for instance, on insights from semiotics, anthropology, and sociology—for example, by reference to Bourdieu’s notion of *habitus* in socializing individuals to common practices. For an overview, see Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

⁷Ulrich Haltern, *The Dawn of the Political: Rethinking the Meaning of Law in European Integration*, 5 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 585, 608–09 (2004).

⁸See generally ANTOINE VAUCHEZ, BROKERING EUROPE: EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY (2015).

⁹See generally Armin Hatje & Peter Mankowski, *Nationale Unionsrechte: Sprachgrenzen, Traditionsgrenzen, Systemgrenzen, Denkgrenzen*, 49 EUROPARECHT 155 (2014).

¹⁰ANDREAS DONNER, THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES 43–44 (1968).

lawyer” means will differ from country to country. This is one of the key factors contributing to the status of EU legal scholarship as a discipline which, rather than being unified, remains fragmented along national fault lines.¹¹ Indeed, unlike the judges of the Court of Justice described by Donner, scholars of EU law are geographically scattered and—except, perhaps, for a minority at genuinely transnational institutions like the European University Institute—are not confronted with their own internalized parochial preconceptions on a daily basis.

When considering issues of EU law, jurists inescapably rely on intuitions they acquire from their native legal knowledge, as legal culture shapes their interpretive pre-understanding of any legal source.¹² This is true for any domain of EU law, including EU administrative law. Much as it is impossible to entirely forget one’s own mother tongue when learning a new language, it is impossible to approach EU administrative law in a *tabula rasa* state after having shed any previous understanding of administrative law learned in a domestic legal education.

The study of EU administrative law is particularly prone to a phenomenon that Shaw and Wiener have rightly identified in the study of European law and governance, which they theorize as the “paradox of the European polity.” The paradox lies in the fact that, while it is uncontested that something like governance beyond the state *does* exist in the EU, the theories analyzing its legal and political dimensions consistently succumb to making the state their main point of reference. This is a trend that Shaw and Wiener appropriately named the “touch of stateness.” “The risk of European governance,” they write, “lies in studying a non-state polity within the frame of stateness, with all its theoretical and methodological implications.”¹³ To illustrate the point, the two authors note that classic debates on the democratic deficit of the EU have implicitly relied on state standards of democracy as a comparative yardstick.

Yet, the “touch of stateness” has a reach that is just as deep—if not deeper—in a discipline such as administrative law, which was born and grew under the shadow of the state. If there is one unifying element of the most influential national traditions of administrative law scholarship across Europe, it is that they historically revolved around the idea of the state. While some would perhaps argue that the United Kingdom would be an exception,¹⁴ even there, authors such as Carol Harlow and Richard Rawlings concede that “behind every theory of administrative law there lies a theory of the state.”¹⁵ It is no wonder that, even if they universally acknowledge that an administrative order beyond the state has emerged in Europe, scholars analyzing EU administrative law unavoidably carry with them preconceptions internalized from their national legal culture, and with it, the century-old intellectual legacies of the state and its administrative law.

The sway of the “touch of stateness” in European legal scholarship, in general, could already explain why state-related topics and expectations of justice have continued to dominate EU administrative law doctrine. However, as the following section will attempt to illustrate, there are reasons for the “touch of stateness” being especially strong in EU administrative law that relate to how scholarly discussion was framed by the writings that first laid the discipline’s groundwork.

C. Commonality and Derogation: Two Narratives of Disciplinary Geography in (EU) Administrative Law

Newcomer disciplines within legal scholarship cyclically face the same challenge. They need to justify their added value and earn recognition from potentially skeptical peers. Doing so

¹¹See generally BRUNO DE WITTE, *European Union Law: A Unified Academic Discipline?*, in *LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD* 101 (Antoine Vauchez & Bruno de Witte eds., 2013).

¹²Cf. JOXERRAMÓN BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* 132 (1993).

¹³Jo Shaw & Antje Wiener, *The Paradox of the ‘European Polity’*, in *RISKS, REFORM, RESISTANCE, AND REVIVAL* 64, 65 (Maria Green Cowles & Michael Smith eds., 2000).

¹⁴Andrew Le Sueur, *‘Tradition’ in English Administrative Law*, in *ADMINISTRATIVE LAW IN EUROPE: BETWEEN COMMON PRINCIPLES AND NATIONAL TRADITIONS* 19, 30 (Matthias Ruffert ed., 2013).

¹⁵CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 1 (3d ed. 2009).

necessarily involves adopting some sort of narrative about how the new discipline positions itself in the overall geography of legal studies—how it defines its place amidst more established legal fields.

In this regard, the narratives developed by the first scholars of *European* administrative law display striking similarities to those of the first scholars of *national* administrative law. These narratives emphasized either analogy or disruption to preexisting laws. Whereas national administrative lawyers developed these two narratives with respect to private law, the influential founding studies on European administrative law—which came to set the discipline’s course for decades to come—did so with respect to national administrative law.

I. A Familiar Struggle for Disciplinary Affirmation

A comparative study of European administrative legal cultures shows that, historically, there have been two influential doctrinal narratives about how administrative law situated itself with respect to the dominant discipline in legal scholarship at the time of its foundation—private law. In very rough terms, these can be described as the narratives of commonality and derogation.

Some of the early scholars of administrative law adopted a narrative of commonality. They highlighted the fact that their discipline shared and gave continuity to many of the principles and doctrines found in private law. A radical version of this view, popular among late nineteenth-century Italian public lawyers, considered administrative law as a mere part of private law.¹⁶ A milder, more commonly supported version recognized administrative law as an autonomous legal discipline but—nevertheless—sought its doctrinal development by crafting concepts and principles analogous to those found in private law,¹⁷ where legal dogmatics were found to be “more precise and complete.”¹⁸ Administrative law was thus “founded on timeless tenets or dogmas derived from private law”; the writings of private law giants such as Friedrich Carl von Savigny were “taken for granted and imported” into administrative law doctrine.¹⁹ Given the historical dominance of private law doctrine in legal academia, the early administrative lawyers needed to build upon it to secure the credibility of their own discipline. For a significant period, administrative law doctrine sought to emphasize the symmetry of its conceptual framework with that of private law.²⁰ Carl Friedrich von Gerber theorized public law rights by reference to his previous background in private law.²¹ Otto Mayer—one of the founders of German administrative law—in addition to conceptualizing the “administrative act” by reference to judicial decisions in civil law disputes,²² highlighted that rather than replacing private law, administrative law assimilated the old private law-based institutions of the *Ancien Régime* administration by qualifying them as “public”—for example, “public property,” “public servitudes,” or “public contracts.”²³ Well into the mid-twentieth century, some of the leading treatises of Dutch administrative law mirrored the subdivisions of private law and spoke of an administrative property law or an administrative law of obligations.²⁴ Kranenburg’s treatise was even modeled on the old

¹⁶SABINO CASSESE, DIRITTO AMMINISTRATIVO: STORIA E PROSPETTIVE 265 (2010).

¹⁷SEBASTIÁN MARTÍN-RETORTILLO BAQUER, EL DERECHO CIVIL EN LA GÉNESIS DEL DERECHO ADMINISTRATIVO Y DE SUS INSTITUCIONES 39 (1960).

¹⁸SANTI ROMANO, PRINCIPII DI DIRITTO AMMINISTRATIVO ITALIANO 15–16 (1906).

¹⁹Sabino Cassese, *New Paths for Administrative Law*, 10 INT’L J. CONST. L. 603, 604 (2012).

²⁰See HEINRICH DE WALL, DIE ANWENDBARKEIT PRIVATRECHTLICHER VORSCHRIFTEN IM VERWALTUNGSRECHT 14 (1999).

²¹EBERHARD SCHMIDT-AßMANN, VERWALTUNGSRECHTLICHE DOGMATIK 11 (1838); MICHAEL STOLLEIS, ÖFFENTLICHES RECHT IN DEUTSCHLAND: EINE EINFÜHRUNG IN SEINE GESCHICHTE 69 (2014).

²²OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT VOL. 1, 94 (1895).

²³*Id.* at 134, 136.

²⁴Herman van den Brink, *Niederlande*, in GESCHICHTE DER VERWALTUNGSRECHTSWISSENSCHAFT IN EUROPA 117, 126 (Erk Volkmar Heyen ed., 1982).

Roman tripartition into *personae*, *res*, and *actiones*,²⁵ distinguishing between an administrative law of persons (services and officials), things (public property), and remedies.²⁶

Rather than highlighting administrative law's resemblance to private law, other scholars sought instead to demonstrate how starkly administrative law departed from it. It may well be the case that many Dutch administrative law scholars sought the conceptual symmetry of their field to private law because they conceived it as an "artificial exception" to private law.²⁷ Such views were relatively common across European countries. A second narrative about administrative law's positioning in legal studies considered it to constitute a deviation—indeed, a *derogation*—from private law. The emergence of administrative law in the nineteenth century, with its emphasis on the exercise of authority over individuals, was perceived as disruptive to the existing law, where private law and its equalitarian institutions occupied a central position. Many scholars,²⁸ among them the influential Hauriou, saw administrative law as a *lex specialis* in respect of private law.²⁹ This view, quite dominant in France, was what prompted Dicey's famous contention that nothing similar to administrative law could exist in England, because the notion that "the relation of individuals to the State is governed by principles essentially different from those rules of private law which govern the rights of private persons towards their neighbors" was "absolutely foreign to English law."³⁰

Across national legal cultures and in more recent decades, the relationship between administrative and private law has become the object of an increasingly sophisticated and nuanced discussion. The description of the two narratives adopted by national administrative law scholars is heuristic and merely intends to show a simplified snapshot of the discipline's self-perception at its historical beginnings. On the surface, the two historical narratives of commonality and derogation could not be more different. One emphasized stability and likeness; the other, disruptiveness and exceptionalism. Nevertheless, and not without some irony, the two were unified on a deeper level by the fact that they both defined the location of administrative law in the legal order by reference to private law, either positively—by how similar the two were—or negatively—by how far the former deviated from the latter.

The same narratives of commonality and derogation—in respect of private law—that pervaded the earlier generations of administrative law doctrine resurfaced from the early 1990s, almost a full century later, in how EU administrative law doctrine defined itself vis-à-vis national administrative law. However, far more than simply forming the subject of a discussion about the positioning of their newborn legal field, as had occurred with the early (national) administrative lawyers, the similarities between EU and national administrative law and the disruptive impact of EU law in national administrative law came to define the very thematic focus of EU administrative law doctrine for decades. The "touch of stateness" that pervades EU legal studies in general became particularly strong in EU administrative law, as the national experience of administrative law became central to it in one way or another. To understand why this occurred, it is worth revisiting the doctrinal genesis of EU administrative law.

II. Schwarze's Groundwork

Of the seminal early writings, it was Jürgen Schwarze's treatise *Europäisches Verwaltungsrecht*, published thirty years ago, that ultimately proved the most influential.³¹ Along with the writings

²⁵Emperor Justinian I, Justinian's Institutes 1.2.12 (Grant McLeod & Peter Birks trans., Cornell Univ. Press 1987): "omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones".

²⁶ROELOF KRANENBURG, INLEIDING IN HET NEDERLANDSCH ADMINISTRATIEF RECHT: ALGEMEEN DEEL 11–12 (1941).

²⁷In this sense, and in fact arguing that this perception still pervades Dutch administrative legal thought. See Lukas van den Berge, *The Relational Turn in Dutch Administrative Law*, 13 UTRECHT L. REV. 99, 103 (2017).

²⁸See, e.g., Fernando Garrido-Falla, *Sobre el Derecho Administrativo y sus Ideas Cardinales*, 7 REVISTA DE ADMINISTRACIÓN PÚBLICA 11, 25 (1952).

²⁹MAURICE HAURIOU, PRINCIPES DE DROIT PUBLIC 387 (2d ed. 1916).

³⁰ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION 336–37, 388 (reprint 1979) (1885).

³¹JÜRGEN SCHWARZE, EUROPÄISCHES VERWALTUNGSRECHT: ENTSTEHUNG UND ENTWICKLUNG IM RAHMEN DER EUROPÄISCHEN GEMEINSCHAFT (1988).

of Sabino Cassese,³² Schwarze’s landmark treatise began what some have described as a “golden age” of EU administrative law.³³

Schwarze’s analysis focuses on demonstrating the convergence of administrative laws in Europe through the influence of EU law. He argues that the gradual development of a European *ius commune* can be observed. The main avenue for that development lies in how the ECJ resorted to comparative public law to craft general principles commonly recognized in the administrative laws of the Member States. Classic examples of this approach include *Algera*,³⁴ where the Court established a general principle according to which the EU administration enjoys the power to review and revoke its own illegal decisions, and *Transocean Marine Paint*,³⁵ recognizing a general principle of the right to be heard.

Schwarze meticulously analyzes a succession of general principles of administrative law, such as legality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of the defense. When examining each of these principles, he begins by comparing how they are enshrined in the legal orders of the Member States. Then, he tests how they were adopted by the ECJ against the backdrop of substantive areas of EU law, such as competition law, the customs union, the common agricultural policy, or social security coordination.

In his own words, Schwarze’s main interest lay in bringing “to light the multiple forms taken by the interconnections between the administrative law of the European Community and the administrative laws of the Member States.”³⁶ The study of those interconnections in essence translated into two subtopics.³⁷ First, the relevance of national administrative law in the development of common principles by the ECJ, through a process of comparative law analysis. Second, the influence of EU law in the general administrative law of the Member States. Some have referred to this as “ascending” and “descending” aspects of the development of EU administrative law,³⁸ to evoke how legal materials from domestic systems are synthesized at the EU level into European legal principles and, subsequently, influence the legal orders of other Member States.

Schwarze’s treatise is both masterly and monumental in size. In over 1,500 pages, his reasoning displays an arguably still unsurpassed fluency—both in the comparative administrative law of the Member States and in core domains of EU law. Especially after its translation into French and English, the emphasis of Schwarze’s *European Administrative Law* on the mutual influences between national and EU administrative law set the tone for the research agendas that dominated the literature in the decade that followed.³⁹

And yet, a familiar paradox remained at the heart of Schwarze’s invaluable contribution. Though vested in unveiling the emergence of an administrative law beyond the state, Schwarze’s treatise—like the later writings that built on it—followed a research agenda that begins and ends in national administrative law. That research agenda was guided by the same overarching interest in legal convergence between national and EU administrative law, and, more specifically, by the same two sub-themes of “ascending” and “descending” influences that pervaded Schwarze’s treatise. Its principal

³²See generally Sabino Cassese, *La Signoria Comunitaria del Diritto Amministrativo*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 291 (2002).

³³Aldo Sandulli, *Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo*, in L’AMMINISTRAZIONE EUROPEA E LE SUE REGOLE 273, 289 (Luca de Lucia & Barbara Marchetti eds., 2015).

³⁴ECJ, Joined Cases 7/56 & 3–7/57, *Algera*, ECLI:EU:C:1957:7, Judgement of 12 Jul. 1957.

³⁵ECJ, Case 17-74, *Transocean Marine Paint Ass’n v. Comm’n Eur. Communities*, ECLI:EU:C:1974:91 (Oct. 23, 1974).

³⁶Schwarze, *supra* note 31, at 1434.

³⁷*Id.* at 1434–39.

³⁸Sandulli, *supra* note 33, at 281.

³⁹See generally Edoardo Chiti, *The Relationship Between National Administrative Law and European Administrative Law in Administrative Procedures*, in WHAT’S NEW IN EUROPEAN ADMINISTRATIVE LAW/QUOI DE NEUF EN DROIT ADMINISTRATIF EUROPÉEN 7–10 (Jacques Ziller ed., 2005); Rob Widdershoven, *Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?*, 7 REV. EUR. ADMIN. L. 5 (2014).

focus was on the ways that EU administrative law borrows from, and resembles, national administrative law, and how national administrative law has been impacted by EU administrative law. The narratives of commonality and derogation had been resurrected.

Schwarze highlighted how the predominant role of case law in the development of unwritten principles of EU administrative law mirrored the jurisprudential origins of national administrative laws.⁴⁰ He moreover indicated that the key overarching conclusion of his treatise was that the “[c]ommunity now has access to a structure of rules of administrative law which is *entirely comparable* with those of the Member States.”⁴¹ In other words, the point was about commonality: That EU administrative law gave continuity to national administrative law principles on the EU level, and that those principles were shared by the EU and the Member States among themselves. The general unwritten principles of EU administrative law—and, in particular, their inspiration from shared national legal traditions—came to be widely studied as potential factors of convergence towards a European administrative *ius commune*. Just to name a few, one could mention authors such as Walter van Gerven,⁴² Roberto Caranta,⁴³ Claudio Franchini,⁴⁴ Giacinto della Cananea,⁴⁵ Stephan Neidhardt,⁴⁶ or Hans Peter Nehl’s influential book about principles of EU administrative procedure.⁴⁷

The second subtheme in Schwarze’s work—that is, the impact of EU law on the laws governing the Member States’ administrations—came to form a major research agenda on the Europeanization of national administrative laws.⁴⁸ The interest of EU administrative law doctrine here was in how EU law—and especially the ECJ’s case law—has “affected,”⁴⁹ “transformed,”⁵⁰ “modified,”⁵¹ and had a “deep and indisputable impact”⁵² on national administrative law. Put differently, the Europeanization research agenda is driven by an interest in the disruptive implications of EU administrative law for institutions and principles of domestic administrative law. It analyzes how Member States’ laws are required to adjust to the particular demands that EU law places for its own administrative implementation. Domestic implementation of EU laws and policies sometimes requires derogation from the solutions conventionally enshrined in “ordinary” national administrative law. There have been numerous and sophisticated writings in European administrative law doctrine on this sort of process.⁵³ Those writings include Kadelbach’s 1999 monograph in

⁴⁰SCHWARZE, *supra* note 31, at clxiv.

⁴¹*Id.* at 1433 (emphasis added).

⁴²See generally Walter van Gerven, *Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?*, 32 COMMON MKT. L. REV. 679 (1995).

⁴³See generally Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, 32 COMMON MKT. L. REV. 703 (1995).

⁴⁴See generally Claudio Franchini, *I Principi Applicabili ai Procedimenti Amministrativi Europei*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1037 (2003).

⁴⁵See generally Giacinto della Cananea, *Ius Publicum Europeaeum: Divergent National Traditions or Common Legal Patrimony*, in ADMINISTRATIVE LAW IN EUROPE: BETWEEN COMMON PRINCIPLES AND NATIONAL TRADITIONS 125 (Matthias Ruffert ed., 2013).

⁴⁶See generally STEPHAN NEIDHARDT, *NATIONALE RECHTSINSTITUTE ALS BAUSTEINE EUROPÄISCHEN VERWALTUNGSRECHTS* (2008).

⁴⁷HANNS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* 78 (1999).

⁴⁸See, e.g., MARIOLINA ELIANTONIO, *EUROPEANISATION OF ADMINISTRATIVE JUSTICE?: THE INFLUENCE OF THE ECJ’S CASE LAW IN ITALY, GERMANY AND ENGLAND* (2009).

⁴⁹See generally Jean-Bernard Auby, *About Europeanization of Domestic Judicial Review*, 7 REV. EUR. ADMIN. L. 19 (2014).

⁵⁰See generally Friedrich Schoch, *Zur Europäisierung des Verwaltungsrechts*, 21 JURIDICA INT’L 102 (2014).

⁵¹See generally Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET 167 (Christian Joerges & Renaud Dehousse eds., 2002).

⁵²See generally Rob Widdershoven & Milan Remac, *General Principles of Law in Administrative Law under European Influence*, 2 EUR. REV. PRIV. L. 381 (2012).

⁵³See generally SUSANA DE LA SIERRA, *TUTELA CAUTELAR CONTENCIOSO-ADMINISTRATIVA Y DERECHO EUROPEO. UN ESTUDIO NORMATIVO Y JURISPRUDENCIAL* (2004); *EUROPEANISATION OF PUBLIC LAW* (Jan Jans, Sacha Prechal & Rob Widdershoven eds., 2d ed. 2015); ATTILA VINCZE, *UNIONSRECHT UND VERWALTUNGSRECHT: EINE RECHTSVERGLEICHENDE UNTERSUCHUNG ZUR REZEPTION DES UNIONSRECHTS* (2016); ELIANTONIO, *supra* note 48.

German, titled “General administrative law under European influence,”⁵⁴ and the influential contributions of Michael Dougan and Diana-Urania Galetta on the transformative effects of EU law on national legal remedies and administrative law from the lens of national procedural autonomy.⁵⁵ Certain national debates on Europeanization became particularly prominent, such as those in Italy, which discussed whether EU law required any derogation of the normal national rules on the review of administrative acts when those acts violate EU law.⁵⁶

III. Mapping the Extent of the “Touch of Stateness” in EU Administrative Law

To illustrate just how dominant the two narratives of commonality and derogation became in European administrative law, this Article surveys a sample of scholarly articles written in the thirty years since the 1988 publication of Schwarze’s treatise, and published in academic journals of particular influence in the discipline. Six representative journals were selected: *The Common Market Law Review*, the *Maastricht Journal of European and Comparative Law*, *European Public Law*, the *European Law Journal*, the *Review of European Administrative Law*, and *Rivista Italiana di Diritto Pubblico Comunitario* (RIDPC). Despite being primarily an Italian-language journal, RIDPC was included both because it was founded by influential scholars of EU administrative law—Mario Chiti and Guido Greco—and also because it regularly publishes papers by non-Italian and internationally acknowledged experts in the field. Alongside the *Cahiers de Droit Européen* and *Europarecht*, RIDPC is probably one of the most renowned EU law journals published in a language other than English—and certainly in Southern Europe.

Articles were considered to refer to EU administrative law, if they were related to the analysis of the body of rules and principles of EU law governing the implementation of EU law by the administrative authorities of the Member States and of the Union itself, and the control of those authorities’ action in that implementation.⁵⁷ Based on this very broad definition, and excluding contributions limited to the analysis of administrative issues in specific policy sectors, there were 464 articles published in the six aforementioned journals during the period from 1988 to 2018.

From the contents of their abstracts, titles, and introductory and concluding paragraphs, the papers could subsequently be divided into fifteen subtopics commonly associated with EU administrative law: 1) The Europeanization of national administrative law, in which the impact of EU law on national procedural autonomy and remedial regimes is included; 2) the study of general principles of EU administrative law that are common to, and derive from, the Member States’ laws—such as principles on procedural rights or the protection of legitimate expectations; 3) EU public procurement law; 4) forms of composite administration, understood as multilevel administrative cooperation, either through information-sharing, the creation of “mixed bodies,” or joint decision-making procedures⁵⁸; 5) structural or institutional issues of transparency, accountability, good administration, and participation; 6) direct judicial actions against EU authorities and the role of the EU’s two primarily administrative courts, the Civil Service Tribunal and the General

⁵⁴See generally STEFAN KADELBACH, *ALLGEMEINES VERWALTUNGSRECHT UNTER EUROPÄISCHEM EINFLUSS* (1999).

⁵⁵See generally MICHAEL DOUGAN, *NATIONAL REMEDIES BEFORE THE COURT OF JUSTICE: ISSUES OF HARMONISATION AND DIFFERENTIATION* (2004); DIANA-URANIA GALETTA, *PROCEDURAL AUTONOMY OF EU MEMBER STATES: PARADISE LOST?* (2010).

⁵⁶See generally Giovanni Cocco, *Incompatibilità comunitaria degli atti amministrativi: Coordinate teoriche ed applicazioni pratiche*, in *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 447 (2001); Guido Greco, *Inoppugnabilità e disapplicazione dell’atto amministrativo nel quadro comunitario e nazionale*, in *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 513 (2006); Mario Chiti, *La peculiarità dell’invalidità amministrativa per anticomunitarietà*, in *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 477 (2008).

⁵⁷For a similar definition, see generally Rob Widdershoven, *European Administrative Law*, in *ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES* 245 (René Seerden ed., 2012).

⁵⁸For the distinction between informational, procedural, and organizational cooperation as forms of European composite administration, see generally Eberhard Schmidt-Aßmann, *Introduction: European Composite Administration and the Role of European Administrative Law*, in *THE EUROPEAN COMPOSITE ADMINISTRATION 1* (Oswald Jansen & Bettina Schöndorf-Haubold eds., 2011).

Court; 7) EU agencies; 8) codification of EU administrative law; 9) decision-making and executive rulemaking by EU administration, in the form of delegated and implementing acts; 10) the Open Method of Coordination and other non-authoritative techniques of administrative governance, such as the use of soft law; 11) the European Ombudsman; 12) the Services Directive;⁵⁹ 13) standardization; 14) non-judicial remedies against EU administration, such as self-review or boards of appeal; and 15) other topics that did not fall into any of the preceding categories, such as historical or methodological inquiries into EU administrative law.

Many articles relate to more than one of the subtopics listed above and were thus counted accordingly. Even so, the results are quite striking. Of the 464 articles in the sample collected from 1988 to 2018, over thirty-three percent—171 articles—consider issues of Europeanization of national administrative law, and over twenty percent—98 articles—analyzed principles of EU administrative law that are, in their respective origins, principles of national administrative law. About fifteen percent, or 67 articles, analyzed public procurement law. This is a topic which, to the extent that it constitutes a subject matter of EU administrative law—and not all scholars would agree it does—must largely be seen as an example of Europeanization of national laws on public contracting. However, all remaining categories pale in comparison to the first two: The impact of EU law on national administrative law, and general principles of EU administrative law that replicate principles previously known in national laws (see figure 1). It would not be unreasonable to suppose that the relative proportion of these two subjects would be even higher if one began factoring in publications from additional law journals that are primarily intended for a domestic readership.

IV. Why Did the Focus on National Administrative Law Become So Dominant?

There may be a few possible explanations for the pervasiveness of topics linked to general principles that EU administrative law adopted from national law and to the Europeanization of national administrative law. As mentioned above, one is the influence of Schwarze's pioneering work—the breadth and depth of which made it an indispensable source for all those interested in being initiated into the field. Schwarze's treatise was the first major comprehensive work of its kind in EU administrative law. It outlined what the discipline of EU administrative law was about and defined the terms of the discussion for years to come. These early building blocks have since influenced, directly or indirectly, every scholar or EU administrative law.

Why did those first building blocks need to pay so much attention to the influence of national administrative law in EU administrative law and vice-versa? One reason is that both issues were undeniably relevant legal developments. It is unquestionable that European integration relies heavily on and affects the administrative machineries and courts of the Member States, and that the ECJ draws inspiration from national administrative law. In fact, Judge Andreas Donner—a professor of administrative law—wrote an article, the first ever published in the *Common Market Law Review*, illustrating how extensively the Court of Justice drew on such inspiration since its early days. It also noted how pleadings made reference to national administrative law far more often than to international law precedents, and that the Court could therefore best be described as “an administrative, and sometimes constitutional court.”⁶⁰ Schwarze's work was especially compelling for its implicit methodological intuition of proposing a form of legal scholarship that gave continuity, on the level of legal doctrine, to the attention evidenced by the ECJ to the role of national administrative doctrines in EU law.

However, the relevance of the interdependencies between national and EU administrative law in the case law of the ECJ, alone, does not explain why they became the dominant themes of the discipline. This is an insufficient explanation, especially given that, in the 1980s and 1990s, there

⁵⁹Council Directive 2006/123, 2006 O.J. (L326) 36 (EU).

⁶⁰Andreas Donner, *National Law and the Case Law of the Court of Justice of the European Communities*, 1 COMMON MKT. L. REV. 8, 11 (1963).

Frequency of selected topics of EU administrative law in 464 Articles published 1988-2018

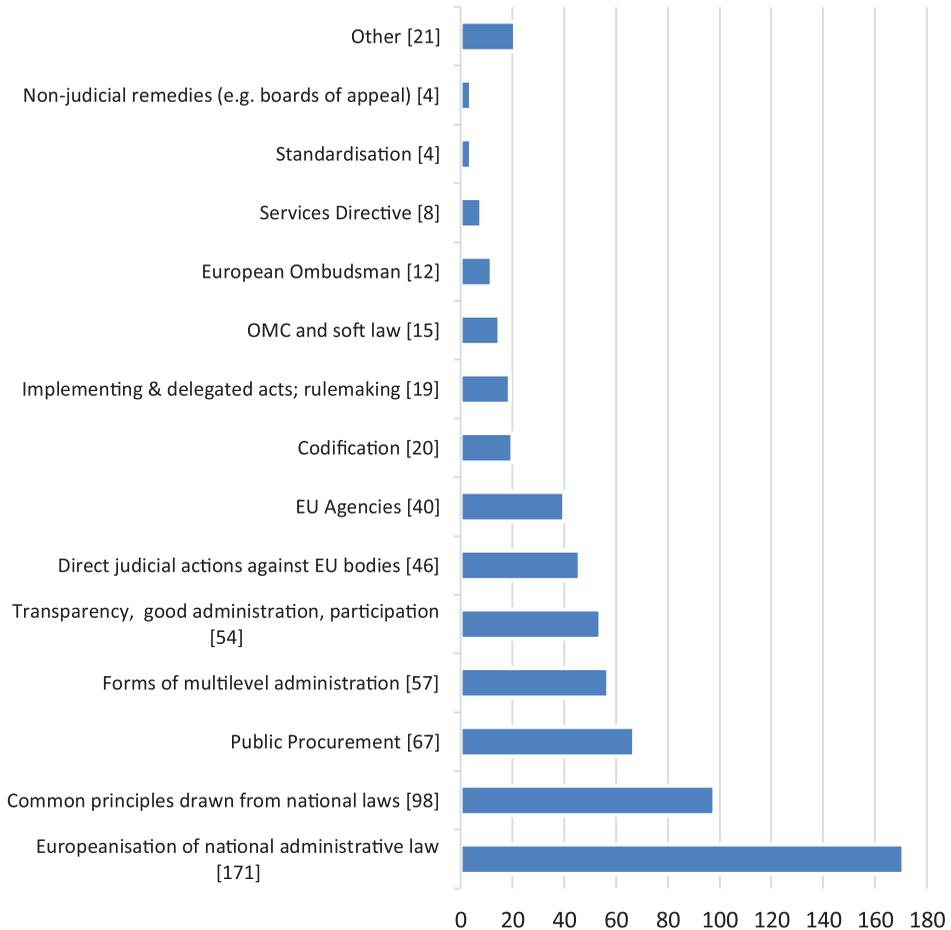


Figure 1. Infographic depicting the frequency of selected topics of EU administrative law in 464 academic journal articles published from 1988–2018.

was already plenty of case law and legislation on idiosyncratically European administrative law issues—such as comitology procedures and multilevel administrative networks—that remained comparatively neglected in the literature.

One reason for the relative overrepresentation of topics that resonated with national administrative law might be the generally pro-integration stance of many of the leading scholars on EU administrative law. One needs to look no further, for instance, than the passionate, excoriating criticism that Schwarze—but also Cassese—later leveled against the German Federal Constitutional Court’s *Lisbon* judgment, not just on legal grounds, but for its political implications in limiting future deepening of European integration.⁶¹ For someone of deep pro-European

⁶¹Schwarze, for instance, suggested that the BVerfG’s interpretation that the *Grundgesetz* could stand in the way of European unification would have been unthinkable to its drafters. Jürgen Schwarze, *Die verordnete Demokratie*, *EUROPARECHT* 108, 111–12 (2010). *C.f.* Cassese, *L’Unione europea e il guinzaglio tedesco*, in *GIORNALE DI DIRITTO*

persuasion, employing the normal language of national administrative law to describe EU law seems only natural. It underlines how EU law is supposed to be closer to the public law of a state than to “mere” international law.⁶² At the same time, making the case that the EU is endowed with a budding administrative *ius commune* evokes that, however slow the pace of political integration, public law is already attaining an advanced state of unification.

However, the main reasons why the first wave of studies on EU administrative law focused on its similarities and disruptiveness to national administrative law, ironically, may resemble some of the challenges faced by the first scholars of national administrative law itself. First, much as the early administrative lawyers were inescapably imbued with preconceptions drawn from then-dominant private law doctrine, so was it also near impossible for EU administrative law doctrine to start from a completely clean slate, without relying on previous knowledge of national administrative law. Second, much as early administrative lawyers needed to strive for the respect of their peers in private law, EU administrative law needed to earn its recognition from conventional administrative lawyers. Many traditional public law scholars were skeptical about the very idea of a European administrative law emerging beyond the state⁶³—indeed, some denied that it was even conceptually possible.⁶⁴ Schwarze and other leading academics knew that national administrative law colleagues were an audience to be persuaded, which may have encouraged them to demonstrate that their discipline both resembled and affected what those colleagues studied and taught.

These early challenges defined the course that EU administrative law came to take. The study of common principles originating in the Member States, on the one hand, and Europeanization, on the other hand, both took national administrative law—directly or indirectly—as the threshold of “administrativeness” in EU law. Both mirrored the two old narratives of commonality and derogation developed by the first national administrative law scholars in respect of private law, and both have become the dominant strands of literature ever since.

D. A Double Bias

Following Jürgen Schwarze’s seminal contribution, the focus of EU administrative law doctrine remained the study of how preexisting principles and concepts of national administrative law are, or should be, replicated or affected by EU administrative law. The dominance of the two topics is, however, only part of a much broader trend that may not be as easily quantified. There are more ways in which the national biases of scholars influence their reasoning than can be counted. Those biases often influence their writing in subtle ways—discernible, for instance, in an unspoken assumption that concepts and principles of administrative law may be discussed interchangeably in the national and EU law context, or in implicit expectations that EU administrative law should make the same value choices in, say, protecting the rights of individuals in respect of public authorities, as national administrative law.

The experience of administrative law of the nation-state became the more or less explicit general test of “administrativeness” in EU law. Even occasional self-reflective analysis on the role of legal

AMMINISTRATIVO 1003, 1005 (2009) (decrying the BVerfG’s ruling as a “political manifesto” for the “glorification of the nation-state.”); Cassese, *L’Unione europea e il guinzaglio tedesco*, in *GIORNALE DI DIRITTO AMMINISTRATIVO* 1003, 1005 (2009).

⁶²One could counter-argue that the national language of administrative law is also vastly used to describe international law phenomena in the Global Administrative Law literature. For an early important piece, see generally Benedict Kingsbury, Nico Krisch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005). That argument, however, would underestimate how deeply EU law scholarship has historically been imbued, if not indeed dominated, by pro-integration political commitments. For many, see FRANCIS SNYDER, *NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW* 1, 10 (1990). Global Administrative Law as an intellectual project may itself be affected by similar influences of national administrative law preconceptions, but that is a question that cannot be explored in depth here.

⁶³Sandulli, *supra* 33, at 289.

⁶⁴Massimo Severo Giannini, *Profili di un diritto amministrativo delle Comunità europee*, in *RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO* 979, 985 (2003).

scholarship has considered how distinct national doctrinal traditions have contributed to shape EU administrative law, rather than whether EU administrative law doctrine itself has contributed to shape the case law of the ECJ or EU legislation relevant from an administrative law perspective.⁶⁵

It is remarkable how different this trajectory was from that of the neighboring field of EU constitutional law. During the same period, in the 1990s and 2000s, the project of uncovering the unique constitutional features of the EU stood front and center. Maduro's contribution to the theory of constitutional pluralism and Joseph Weiler's principle of constitutional tolerance are but two examples of this strand of literature.⁶⁶

The present section explores two ways in which the intensity of the "touch of stateness" has manifested in EU administrative law. The doctrinal inventiveness of scholarship is inevitably constrained by its past life in the nation-state, which has led it to project its domestically acquired expectations of what administrative law is—or should be—onto EU administrative law. It is submitted that this has caused an unintended double bias in the literature. The first bias is one of *thematic familiarity*, by which it is intended that academic inquiry has often privileged those issues of EU administrative law which resonate with one's own previous knowledge of administrative law from the national context.⁶⁷ This is particularly visible in how legal doctrine has barely sought to identify legal principles unique to EU administrative law and, at points, has attempted to expand its own conceptual framework by adopting national legal concepts without any bearing on EU law while overlooking the development of a conceptual vocabulary for EU-specific issues of administrative law. Yet, a second *normative* bias can also be detected, in that the value choices embodied in EU administrative law sources are—more than occasionally—implicitly judged against the standards of justice adopted in national administrative laws.⁶⁸

I. Thematic Familiarity Bias

When the early administrative lawyers began laying the foundations of their discipline, they drew heavily on insights from private law doctrine—excessively so, for some. Hauriou, for one, cautioned his contemporaries that too much focus on principles and concepts drawn from private law had made scholars overlook the "true foundations" of public law.⁶⁹ This was also a problem that afflicted much of Italian public law doctrine well into the 1950s, which, "due to the heavy reliance on categories borrowed from the private law tradition . . . lacked a conceptual apparatus capable of grasping the peculiar complexities of the state and its organization."⁷⁰ Just to give one example, legal scholarship used to neglect the reasons-giving requirement in administrative decision-making because of how alien it was to canonical contract theory in private law.⁷¹

A similar problem reappeared in EU administrative law doctrine many decades later. While the thematic focus of the literature is still largely biased in favor of topics that resonate with what counts as "legal administrativeness" in national laws, EU administrative law doctrine has yet to offer a clear conceptual framework to refer to the distinctive legal issues of the field.

There have been noteworthy exceptions to this bias. A growing number of authors have offered a doctrinal analysis of the unique aspects of EU administrative law as problems of administrative law in their own right. Luca de Lucia examined the legal regime of transnational administrative

⁶⁵Sandulli, *supra* note 33.

⁶⁶See generally MIGUEL POIRES MADURO, *WE THE COURT* (1999); Joseph Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7* (Joseph Weiler & Marlene Wind eds., 2003).

⁶⁷See *supra* Part D.I.

⁶⁸See *supra* Part D.II.

⁶⁹HAURIOU, *supra* note 29, at 405–406.

⁷⁰Lorenzo Casini, Sabino Cassese & Giulio Napolitano, *The New Italian Public Law Scholarship*, 9 *INT'L J. CONST. L.* 301, 302 (2011).

⁷¹See Antonio Cassatella, *Il dovere di motivazione nello jus commune europeo*, in *I PROCEDIMENTI AMMINISTRATIVI DI ADJUDICATION DELL'UNIONE EUROPEA: PRINCIPI GENERALI E DISCIPLINE SETTORIALI* 17, 28 (Giacinto della Cananea & Martina Conticelli eds., 2017).

acts in the EU.⁷² Joana Mendes investigated the constitutional particularities of participation in EU administrative decision-making.⁷³ Edoardo Chiti offered a valuable analysis of the specific constitutional and political foundations of the creation of EU agencies.⁷⁴ Mario Chiti, Herwig Hofmann, and Giacinto della Cananea pioneered the analysis of the problems raised by composite—or “joint”—administrative procedures.⁷⁵ Paul Craig’s influential treatise has illustrated in great depth how the development of EU administrative law situates itself in the broader context of EU law as a whole.⁷⁶

Nevertheless, despite such important contributions, a shared and stabilized doctrinal framework is overwhelmingly still lacking in EU administrative law. As a result of bias in favor of familiarity from national administrative law experiences, a blind spot has persisted that prevents the literature from identifying, analyzing, and debating endemic issues of EU administrative law, for which an appropriate vocabulary cannot be simply imported from national law. This occurred both on the level of principles and of the legal concepts of EU administrative law.

1. *Unique Administrative System, But No Unique Principles?*

The principles of EU administrative law that have been most studied in the literature since Schwarze’s treatise—such as legitimate expectations and the right to be heard—all have an equivalent in national administrative law. The only two EU-specific principles that Schwarze seems to consider are not even described explicitly as such, and make but a brief appearance in the book’s second edition—the principles of separation between national and EU administration, and the principle of cooperation between them.⁷⁷ Still today, besides the principles of equivalence, effectiveness, and national procedural autonomy—though even the status of the third as an actual legal principle is disputed⁷⁸—and besides the so-called *Meroni* principle,⁷⁹ one would be hard-pressed to find in the literature any explicit analysis of principles of EU administrative law that have no equivalents in national laws.⁸⁰

To be sure, one would certainly expect EU administrative law to draw on the legal heritage of its Member States and adopt many of the legal principles found in their laws. However, the EU is in many ways fundamentally different from a nation-state. Besides being based on a constitutional and political architecture that blends federal and intergovernmental features, the EU’s administrative law governs the multilevel administrative order of a Union of sovereign states; a Union where the relations between national and Union law still remain contested, where the Union’s protection of the fundamental rights of citizens from state authorities is circumscribed by the limited scope of its competences, and where the central Union legislator does not even have a general competence to make administrative law. All of these aspects mean that the organization of public power in the EU, and its relations to citizens and

⁷²See generally LUCA DE LUCIA, *AMMINISTRAZIONE TRANSNAZIONALE E ORDINAMENTO EUROPEO: SAGGIO SUL PLURALISMO AMMINISTRATIVO* (2009).

⁷³See generally JOANA MENDES, *PARTICIPATION IN EU RULE-MAKING: A RIGHTS-BASED APPROACH* (2011).

⁷⁴See generally EDOARDO CHITI, *LE AGENZIE EUROPEE: UNITÀ E DECENTRAMENTO NELLE AMMINISTRAZIONI COMUNITARIE* (2002).

⁷⁵See generally Mario Chiti, *I procedimenti composti nel diritto comunitario e nel diritto interno*, in QUATERNI DEL CONSIGLIO DI STATO: ATTIVITÀ AMMINISTRATIVA E TUTELA DEGLI INTERESSATI. L’INFLUENZA DEL DIRITTO COMUNITARIO 55 (1997); Giacinto della Cananea, *The European Union’s Mixed Administrative Proceedings*, 68 *LAW & CONTEMP. PROBS.* 197 (2005); Herwig Hofmann, *Composite Decision Making Procedures in EU Administrative Law*, in *LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW: TOWARDS AN INTEGRATED ADMINISTRATION* 136 (Herwig Hofmann & Alexander Türk eds., 2009).

⁷⁶See generally PAUL CRAIG, *EU ADMINISTRATIVE LAW* (3d ed. 2018).

⁷⁷See generally JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW*, clxx–clxxix (2006).

⁷⁸Michal Bobek, *Why There is No Principle of “Procedural Autonomy” of the Member States*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 305 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2011).

⁷⁹PAUL CRAIG, *EU ADMINISTRATIVE LAW* 155 (2012).

⁸⁰For an excellent comprehensive study of principles of EU administrative law, see GIACINTO DELLA CANANEA AND CLAUDIO FRANCHINI, *I PRINCIPI DELL’AMMINISTRAZIONE EUROPEA* 57–117 (2017). With perhaps the exception of the principle of independence of EU institutions, all of the remaining principles considered by the two authors can be found in national laws.

other branches of government, has some characteristics that are unlike those of a state. Accordingly, one would expect that the legal problems emerging from those characteristics would lead to the emergence of at least *some* legal principles unknown to the administrative law of a state.

Lastly, it is not only that surprisingly few principles specific to EU administrative law have been identified and studied in the literature. Some so-called “common principles” may prove deceptive, as EU administrative law may not only have *adopted* those principles, but indeed *adapted* them, and given them a different meaning from the one they would have in national law. As will be elaborated below, some such principles—for example, the principle of proportionality—actually conceal different versions in national and EU law,⁸¹ while others—even ones as revered as the principle of legality—make little sense in EU law if understood in the typical ways of national administrative law.⁸²

2. A Missing Language of Its Own?

The very same phenomenon of thematic familiarity bias can be traced even more clearly in the development of the legal concepts of EU administrative law. Legal concepts are linguistic shortcuts that represent a plurality of legally relevant occurrences in abstract terms and constitute a shared vocabulary that interpreters may use to argue about the interpretation and application of legal sources. They tend to encapsulate evaluative criteria—for example, “reasonable delay”—normative notions—such as “duty” or “competence”—or generic descriptions of factual realities—for example, “foodstuff”—some of which may themselves be constituted by the law—such as “court” or “procedure.”⁸³

Given that their content is inherently contingent upon the legal order to which they belong, and upon the social and factual realities that its sources aim to govern, one would expect legal doctrine to have fleshed out legal concepts that were endemic to EU administrative law. Yet, many concepts of national administrative law are often assumed to be equally relevant and importable into EU administrative law, even where there are significant differences between the two. There are numerous examples of this, as illustrated by the doctrinal attempts to theorize the concept of “European administrative act.” Meanwhile, few EU-specific concepts of administrative law have been identified, and those that have been have largely remained underdeveloped. Such conceptual austerity and underdeterminacy have unfortunately clouded some of the most vibrant debates in EU administrative law. This will be shown below by taking, as an example, the debates on whether administrative cooperation has rendered the distinction between direct and indirect administration obsolete.

2.1 National Concepts Imported

Xavier Arzoz is one of many authors who make a strong case for a theory of EU administrative acts.⁸⁴ Though he admits that there is a risk for every scholar to approach the notion of an administrative act from the point of view of their own legal system, Arzoz relies on an assumption—derived from national law—that the concept of administrative law can fulfill in EU law the same “structuring and rationalizing” function it performs in Member States’ laws. Arzoz suggests that the absence of a theory of the administrative act in EU law is reflective of its novelty and relative underdevelopment, and that EU administrative law could “undoubtedly benefit from the conceptual wealth reached in internal law.”⁸⁵ He defines the EU administrative act rather broadly, as any

⁸¹See *supra* Part D.II.

⁸²See *supra* Part E.I.2.

⁸³Cf. Dietmar von der Pfordten, *About Concepts in Law*, in *CONCEPTS IN LAW* 17, 18–19 (Jaap Hage & Dietmar von der Pfordten eds., 2009).

⁸⁴See generally Xavier Arzoz Santisteban, *El Acto Administrativo en el Derecho de la Unión Europea*, 19 *REVISTA DE DERECHO DE LA UNIÓN EUROPEA* 71 (2019). See also Luís Filipe Mota Almeida, *Nótulas Sobre o Conceito de Acto Administrativo da União Europeia*, 4 *E-PÚBLICA* 96.

⁸⁵Santisteban, *supra* note 84, at 75.

measure taken by an EU authority—binding or non-binding—which aims at regulating a specific subject matter in respect of a private party of a Member State.

Arzoz's argument raises one fundamental reservation. Unlike the administrative laws of many EU Member States, such as Germany or Portugal, EU administrative law simply does not follow a model based on the distinction between discrete legal forms of administrative action (*Handlungsformenlehre*), where the qualification of a given administrative action—as, for example, an administrative act, contract, or regulation—is essential to establish which legal framework it is subject to. Only after it is established that a concrete administrative measure fulfills the formal criteria to qualify as an “administrative act” may one identify the relevant procedural, substantive, and remedial aspects of its legal regime. As Hans-Christian Röhl points out, no such form-dependency exists in EU administrative law. The procedural, substantive, and remedial legal regime of any measure adopted by EU administration is determined not by its formal characteristics, but by its substantive criteria—such as whether it produces binding legal effects, and whether an individual is individually or directly concerned by it. A “decision,” as a legal form in the context of Article 288 of the Treaty on the Functioning of the European Union (TFEU), is not the same as a decision for purposes of judicial review under Article 263 TFEU. Because the “structuring and rationalizing” role that legal forms—such as the administrative act—indeed play in national laws is simply absent from it, there is no basis in positive EU law for the development of a theory of forms of administrative action—or, indeed, of a concept of an EU administrative act.⁸⁶

The point made here is not that it is a methodological mistake per se to propose the adoption of national concepts, but rather—to put it bluntly—that it is a non-sequitur to suggest that a legal concept must be adopted in EU administrative law simply because it enjoys a strong tradition in national administrative laws. Doctrinal analysis of EU administrative law may, of course, build on national conceptual tools, but it has the burden of justifying their relevance in the distinct context of EU law. Marta Simoncini's recent book on the delegation of discretion to EU agencies provides an excellent example of how this may be done. Simoncini develops a notion of administrative discretion derived from a comparative analysis of Member States' laws. Yet, it is not because a distinctly administrative kind of discretion is recognized across national laws that she ultimately argues that the *Meroni* case law allows such discretion—as opposed to *political* discretion—to be delegated to EU agencies. It is because the distinction between the two kinds of discretion can also be implicitly recognized in the ECJ's jurisprudence. As Simoncini rightly concludes, “national taxonomies of administrative powers can help to frame the distinctive limits to EU agencies' action”—but only if “adequately transposed in the supranational context.”⁸⁷

2.2 EU-Specific Concepts Neglected

The reverse side of the thematic familiarity bias is that EU administrative law has struggled to develop a sophisticated doctrinal language and conceptual framework of its own, beyond the vocabulary of national administrative laws. Without such language, it becomes difficult for legal scholarship to refer to recurring features that are unique to EU's administrative law and administrative system, which in turn renders it difficult to even begin addressing the legal issues they raise.

A case in point is offered by the recent rise of a form of administrative cooperation which, for want of better—of *any*—terminology, could be described as multilevel panels. Across many policy areas, there has been a surge of regularly convening groups of officials who represent administrative authorities from distinct jurisdictions—that is, EU authorities such as European Agencies or the Commission, or national authorities from a varying number of Member States

⁸⁶See generally Hans-Christian Röhl, *Die Anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV*, in DER EUROPÄISCHE VERWALTUNGSVERBUND 319 (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold eds., 2005).

⁸⁷MARTA SIMONCINI, ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE: A STUDY ON EU AGENCIES 94, 99, 106 (2018).

with a particular stake in a given matter. These groups are intended to coordinate the various authorities involved, and typically have a mandate circumscribed to addressing specific needs posed by a market actor or of a limited geographical scope. Multilevel panels appear to be neither national nor EU bodies. They are unlike comitology committees, where all Member States involved in a policy area are represented. In fact, not all multilevel panels would be conventionally described as administrative bodies or authorities at all. Many are informal and ad-hoc in nature, which perhaps explains the recurring choice of the term “team” in EU legislation. For instance, the European Central Bank (ECB) is assisted in the supervision of each significant bank by a Joint Supervisory Team, composed of staff members of both the ECB and national supervision authorities from the Member States where the bank, its subsidiaries, or its cross-border branches are established.⁸⁸ There are numerous other examples—such as Migration Management Support Teams⁸⁹ or Asylum Support Teams⁹⁰—of similar composition and ad hoc mandate. Such “teams” mainly provide technical and operational assistance to one or more authorities, or contribute to their decision-making procedures by taking preparatory measures. Other panels are somewhat more formalized. In the Single Resolution Mechanism, regulators from national resolution authorities convene in so-called resolution colleges to adopt a single resolution plan for a credit institution with cross-border activities. In the framework of European Territorial Cooperation (Interreg), Member States create joint interstate committees to manage applications for structural funds financing in border regions.⁹¹

Multilevel panels, as tentatively named above, defy any preexisting conceptual framework that EU administrative law—or, indeed, national administrative law—has at its disposal. They may share some similarities with gatherings of distinct administrative services, such as the Italian *conferenza di servizi*, but it is their cross-level and cross-border makeup—involving multiple distinct legal orders—that raises fundamental questions. Which legal order’s rules apply to them? Which courts are competent to review their action? How can we ensure that, because such panels are shared by several jurisdictions, they do not fall outside the control of any jurisdiction? Do various types and subtypes of multilevel panels exist, raising different kinds of legal problems? If EU administrative law developed a doctrinal language to begin articulating an answer to these questions, it would greatly facilitate their resolution.

Nevertheless, even where EU administrative law *does* have a doctrinal language of its own, it often consists of ill-defined concepts. As Hohfeld famously put it, “in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.”⁹² That peril is very present in EU administrative law, where—under the magnifying glass—it becomes apparent that the way in which the key concepts of the field are deployed in legal argument betrays deep, unspoken disagreements about their meaning. There is perhaps no clearer example of this than the main unfinished debate in the literature for about a decade and a half.

This debate concerns whether the growing cooperation between EU direct administration—that is, EU-level administration—and indirect administration—that is, national administration—has blurred the distinction between the two to the point that it has been rendered obsolete. The overwhelming view in the literature is that it has. Most scholars agree that the traditional dualistic divide has been “abandoned” and “hardly does justice” to how intertwined national and EU administration

⁸⁸Council Regulation 468/2014 of Apr. 16 2014, Establishing the Framework for Cooperation within the Single Supervisory Mechanism between the European Central Bank and National Competent Authorities and with National Designated Authorities by the European Central Bank 2014 O.J. (L 141) 3.

⁸⁹Joint Regulation 2016/1624 of Sept. 14, 2016, On the European Border and Coast Guard, art. 18 (EU).

⁹⁰Joint Regulation 439/2010 of May 19, 2010, Establishing a European Asylum Support Office, art. 13 (EC).

⁹¹For a case illustrating the doubts posed by these committees, see Case C-562/12 *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229 (Sept. 17, 2014), <https://curia.europa.eu/juris/liste.jsf?num=C-562/12>.

⁹²Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 29 (1913).

have become.⁹³ Yet, if one scratches the surface of that agreement, what emerges are distinct authors who ascribe a fundamentally different meaning to key operative terms of the debate—such as what is intended by “direct administration” or, indeed, “administration.”

Hofmann, Türk, and Rowe—on the one hand—and Chiti, on the other hand, agree that the boundaries of direct and indirect administration have been blurred.⁹⁴ Yet, they employ two distinct versions of what “direct administration” means. Whereas the first three authors broadly understand “direct administration” as the bodies involved at the EU level with the administrative implementation of EU law,⁹⁵ Chiti adopts a much more restrictive view, which limits the concept of “direct administration” to the administrative powers that the treaties confer onto the Commission.⁹⁶ While the first view—which is also supported by Craig⁹⁷—includes the very common delegation of administrative powers to the EU administration through secondary legislation, the second view does not. The first view primarily conceives of “direct administration” in an organizational sense, as a set of EU-level authorities that are institutionally separate from national authorities, but acknowledges that such institutional separation coexists with a profound intertwining of the two levels’ administration in a functional sense—that is, the tasks and powers used in administrative activity.⁹⁸ The second view considers “direct administration” in a functional sense, limited to the Commission and to the tasks and powers entrusted to it in primary law, and characterizes other administrative bodies created at the EU level—such as EU agencies and comitology committees—as bodies not of “direct” but of “composite” or “mixed” administration.⁹⁹ Hofmann, Türk, Rowe, and Chiti all agree that the division of direct and indirect administration has been blurred, but they do not appear to agree on what exactly direct administration means to begin with.

The differences between the two conceptions of what direct administration—or execution or implementation—means are far from trivial. If the distinction between direct and indirect administration concerns administration in a functional sense—that of administrative activity—then it is nearly impossible to argue that direct and indirect administration are strictly separate. If, however, the distinction concerns administration in an organizational sense—that of administrative authorities—then it remains *generally* valid because the administrative entities active in the EU are created by and subject to the legal and judicial jurisdiction of either the EU or the Member States.

Under the appearance of a shared conceptual framework and of consensus on the meaning of direct administration, scholars have talked past each other. Jacques Ziller, for instance, clearly uses the terms direct and indirect administration in a strictly organizational sense, and it is in that sense that he concludes that the distinction between the two remains relevant for as long as there has been no radical reform of the ECJ’s jurisdiction to place national administration under its control.¹⁰⁰ Chiti

⁹³See generally Herwig Hofmann, *Composite Decision Making Procedures in EU Administrative Law*, in LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW: TOWARDS AN INTEGRATED ADMINISTRATION, 136, 137 (Herwig Hofmann & Alexander Türk eds., 2009); Edoardo Chiti, *The Governance of Compliance*, in COMPLIANCE AND THE ENFORCEMENT OF EU LAW 31, 36 (Marise Cremona ed., 2012); Mariolina Eliantonio, *Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’*, 7 REV. EUR. ADMIN. L. 65, 66 (2014).

⁹⁴HERWIG HOFMANN, GERARD ROWE & ALEXANDER TÜRK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION (2011), 262; Edoardo Chiti, *The Administrative Implementation of European Union Law: A Taxonomy and Its Implications*, in LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW, 9, 11 (Herwig Hofmann & Alexander Türk eds., 2009).

⁹⁵HOFMANN et al., *supra* note 94, at 11.

⁹⁶Chiti, *supra* note 94, at 26.

⁹⁷PAUL CRAIG, UK, EU AND GLOBAL ADMINISTRATIVE LAW: FOUNDATIONS AND CHALLENGES 391, 396 (2015).

⁹⁸HOFMANN et al., *supra* note 94, at 18. Tellingly, some of Hofmann’s work occasionally refers to a blurring—not of direct and indirect administration, but implementation. See generally Herwig Hofmann & Morgane Tidghi, *Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks*, 20 EUR. PUB. L. 147 (2014).

⁹⁹Chiti, *supra* note 94, at 36–37.

¹⁰⁰Jacques Ziller, *Introduction: Les Concepts D’administration Directe, D’administration Indirecte et de Co-Administration et les Fondements du droit Administrative Européen*, in DROIT ADMINISTRATIF EUROPÉEN 235, 241–43 (Jean-Bernard Auby & Jacqueline Dutheil de la Rochère eds., 2007).

argues that it “is easy to object” to Ziller’s “reaffirmation of the direct-indirect dichotomy” because it “oversimplifies or simply ignores the developments of legal reality,” namely the growing cooperation between national and EU authorities.¹⁰¹ Yet, in countering Ziller’s views, Chiti gives examples of such cooperation that either relate to the *activities* of national and EU authorities in supporting each other or to the creation of “mixed” *administrative entities*, such as EU agencies or comitology committees. This reflects two fundamental miscommunications between the two authors’ views.

The first is that the two authors mean something entirely different when they use the conceptual distinction between direct and indirect administration. Chiti uses the distinction in a functional sense, meaning *administrative activity* of national and EU-level bodies as expressed through their powers and tasks. It is in that sense that he objects to Ziller’s position for supposedly failing to capture the interconnectedness and interdependence of that activity. Yet, it is the distinction between direct and indirect administration in an organizational sense—that of distinct levels of *administrative authorities*—that Ziller has in mind. Put differently, Ziller does not deny that the administrative activity of EU and national authorities is deeply intertwined, given their extensive cooperative practices—to which, in fact, he alludes multiple times. He simply makes the elementary point that such cooperative practices do not deprive either of their legal status as authorities of the EU or the Member States.

The second miscommunication is that the two authors implicitly disagree on their distinct criteria as to what even counts as an administrative body that is part of the EU’s direct administration. Chiti’s criterion is that the body and its competences enjoy a legal basis in the treaties, whereas Ziller’s is that the body is created by the EU and exclusively subject to EU law and the jurisdiction of EU courts. In Chiti’s conception, a body such as an agency or comitology committee—not created or empowered by the treaties—cannot belong to direct or indirect administration and must constitute a “tertium genus” of “mixed” administration beyond the dual direct-indirect divide. Yet, it is entirely consistent with Ziller’s own conception to conclude that those bodies, which are created by the EU legislature and subject to EU courts, are therefore *undeniably* part of the EU’s direct administration. Indeed, the acts of bodies such as these “will be fully assimilated to European law,”¹⁰² in that they will be treated much like any measure adopted at the EU level. The fact that the members of EU agency boards and comitology committees stem from and represent the Member States’ authorities makes them no more “mixed” than the Council, whose legal status as a legislative institution of the EU cannot be seriously disputed.

This is not to say that there are no instances of administrative cooperation that are incompatible with the dualistic divide between direct and indirect administration, even in an organizational sense. The “multilevel panels,” sketched out above, or composite administrative procedures—where decisions must be adopted jointly by the national and EU administrations as if they were one¹⁰³—may be two instances. Nonetheless, even the exercise of identifying which forms of administrative cooperation contradict the divide between direct and indirect administration is rendered far more complicated because of how little agreement there is on the meaning of that divide.

The absence of doctrinal consensus about the meaning of legal concepts is not a problem in itself—much of legal scholarship is a contest between the merits of competing versions of concepts.¹⁰⁴ It is only problematic if disagreements about the meaning of concepts are not explicitly articulated or openly debated, and if scholars do not engage with each other’s versions of concepts in a self-conscious manner. Edoardo Chiti’s otherwise excellent chapter falls short of explaining why, “contrary to the usual representations,” direct administration should not be understood as “a

¹⁰¹Chiti, *supra* note 94, at 11.

¹⁰²Robert Schütze, *From Rome to Lisbon: “Executive Federalism” in the (New) European Union*, 47 COMMON MKT. L. REV. 1385, 1424 (2010).

¹⁰³Indeed, several scholars have noted that the CJEU tends to treat and conceive of the national and EU authorities involved in composite decision-making as a unitary administration. See Sabino Cassese, *European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 2, 31–32 (2005); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 388 (2d ed. 2006).

¹⁰⁴KAARLO TUORI, *RATIO AND VOLUNTAS* 106 (2011).

situation in which the Commission has the exclusive responsibility for . . . administrative implementation.”¹⁰⁵ A reader remains without a sense of what and whose those “usual representations” are, and of what the implications are for competing conceptual versions of “direct administration.” The need for transparent debates of this kind is all the more pressing in EU administrative law, given how many of its basic concepts—lacking an equivalent in national traditions of administrative law—have remained too underdeveloped and unstable to offer a language for scholars and practitioners to argue clearly about the discipline’s legal problems.

II. Normative Bias

Jurists assimilate and internalize the expectations of justice adopted by their own legal system. Even if certain “common principles,” of the kind studied in the literature since Schwarze, are shared across many legal systems, the finer meaning of the same common principle may vary significantly between national and EU law, and between EU Member States.

The principle of proportionality in EU law, for instance, is commonly understood to have been introduced by the ECJ under the influence of German law.¹⁰⁶ The classical understanding of that principle in German constitutional and administrative law involves four distinct tests or requirements: 1) That the purpose served by a measure is legitimate; 2) that the measure is suitable to attain that intended purpose; 3) that the measure is necessary in the sense of constituting the least restrictive solution to pursue a purpose effectively; and 4) proportionality *stricto sensu*—that is, the requirement that the eventual harm inflicted by the measure does not outweigh its benefits. By contrast, however, the ECJ’s stated version of the principle of proportionality—and, more importantly, its use in practice—does not, but for rare cases, include the “canonical” fourth test of balancing, or proportionality *stricto sensu*, found in its original German counterpart.¹⁰⁷ This is a striking difference in conceptions of proportionality that even some of the most celebrated articles discussing the German influence in EU administrative law have overlooked or played down.¹⁰⁸ That difference was one of the key reasons behind the German Federal Constitutional Court’s (BVerfG) recent ruling in *Weiss*, in which it declared the European Central Bank’s Public Sector Purchase Program (PSPP) decision an unconstitutional *ultra vires* act—despite the ECJ’s previous preliminary ruling confirming that decision’s validity.¹⁰⁹ Indeed, after highlighting the fact that the ECJ’s longstanding understanding of proportionality focuses primarily on only the suitability and necessity tests, the BVerfG went as far as to say that because of the absence of the balancing test, the ECJ’s review of the proportionality of the challenged ECB decision was “meaningless” and could not “fulfil its purpose.”¹¹⁰ One commentator noted that the BVerfG’s rather harsh criticism of the ECJ betrays a false—for that matter, a parochial—assumption that the conception of proportionality of German law is universally accepted in other Member States.¹¹¹ Put differently, the BVerfG saw a version of proportionality different from that known

¹⁰⁵Chiti, *supra* note 94, at 26.

¹⁰⁶ROBERT THOMAS, LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW 78 (2000).

¹⁰⁷See generally Toni Marzal, *From Hercules to Pareto: Of Bathos, Proportionality, and EU Law*, 15 INT’L J. CONST. L. 621, 632–39 (2017). Marzal aptly points to the common formula that the CJEU uses in its own case law on market freedoms, holding that:

[N]ational measures capable of hindering the exercise of the fundamental freedoms guaranteed by the Treaty or of making it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued.

ECJ, Case C-202/11, *Las* ECLI:EU:C:2013:239, (July 12, 2012) para. 23 (emphasis added). Note that the first three tests of proportionality—as understood in German law—are present, but not the fourth.

¹⁰⁸Georg Nolte, *General Principles of German and European Administrative Law: A Historical Perspective*, 57 MODERN L. REV. 191, 192–93 (1994). The author, in fact, even suggests that the suitability and necessity requirements—in German and EU law alike—merely derive from the requirement of balancing.

¹⁰⁹ECJ, Case C-493/17, *Weiss*, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

¹¹⁰BVerfG, 2 BvR 859/15 (May, 5 2020) paras 124–125, 138 (Ger.).

in its own national law, and concluded that it had to be a wrong use of proportionality. The *Weiss* saga may well have illustrated how the “touch of stateness” can lead to mutual misunderstanding and exacerbate constitutional conflict between national constitutional courts and the ECJ.

Differences between Member States as to how a given principle should be understood are also very common. The requirement for individuals to seek review of a decision by the administration itself before turning to courts for its annulment may be seen in one country as irreconcilable with the right to an effective judicial protection¹¹² and, in another, as a core feature of the ways in which the national system of administrative justice seeks to give effect to that right.¹¹³

Inevitably, the expectations and sensibilities of justice that a scholar learns from national legal cultures seeps into her doctrinal analysis of the sources of EU administrative law. The risk, however, is that the scholar judges the appropriateness of the administrative law of the European Union against the exact same value choices that would be made within the context of the nation-state. This risk will be described here as that of normative bias: The tendency of legal scholarship to criticize solutions of EU administrative law based on whether they would conform to the standards of national administrative law; indeed, as if it *were* (a failed version of) national administrative law.

Many instances in the literature illustrate this point, but the almost universally critical response to the *Borelli* ruling does so especially well. *Borelli* concerned the judicial review of administrative procedures where the EU administration is legally obliged to make a final decision that conforms to preparatory measures drafted by national authorities. The key question was whether the ECJ had jurisdiction to review the final decision taken by the EU administration on the grounds that it was allegedly based on illegal national preparatory acts. In essence, the ECJ’s answer was to refuse to review the final EU-level decision if that meant reviewing the binding national preparatory acts on which it relied, and to require national courts to review those acts instead. The main reason invoked by the ECJ was that it lacked jurisdiction to review national measures. It went on, however, to state that no EU decision could be automatically illegal simply on the grounds that it was based on an illegal national preparatory act.¹¹⁴

The *Borelli* case law was certainly not self-evident in its line of reasoning, and it prompted a number of critical reactions from legal scholarship. In different publications, Caranta accused the ECJ of having adopted an “embarrassing” ruling in *Borelli*,¹¹⁵ highlighting that in *all* national legal orders he had examined, the invalidity of preparatory measures led to derivative invalidity of final administrative decisions.¹¹⁶ Similarly, Giorgio Gaja considered that the ECJ’s solution in *Borelli* was “less persuasive,” and seemed to suggest that it should have considered itself competent “to examine all the questions that are relevant for ascertaining the validity of the Community act – whether these questions relate to facts, EC law or national law.”¹¹⁷ Lastly, Herwig Hofmann makes explicit that the

¹¹¹Toni Marzal, *Is the BVerfG PSPP Decision “Simply not Comprehensible”?*, VERFASSUNGSBLOG, May 9, 2020, <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>.

¹¹²In the context of Portuguese administrative law, see generally João Miranda, *Em Defesa da Inconstitucionalidade do Recurso Hierárquico Necessário*, 9 CADERNOS DE JUSTIÇA ADMINISTRATIVA 39 (1998); VASCO PEREIRA DA SILVA, EM BUSCA DO ACTO ADMINISTRATIVO PERDIDO 667–74 (2003).

¹¹³Andrzej Skoczylas & Mariusz Swora, *Administrative Remedies in Polish Administrative Law*, in ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW 337, 361 (Dacian Dragos & Bogdana Neamtu eds., 2014).

¹¹⁴See generally Filipe Brito Bastos, *The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, 8 REV. EUR. ADMIN. L. 269 (2015).

¹¹⁵Roberto Caranta, *Coordinamento e Divisione dei Compiti tra Corte di Giustizia Delle Comunità Ruropee e Giudizi Nazionali Nelle Ipotesi di Coamministrazione: il Caso Dei Prodotti Modificati Geneticamente*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1133, 1141 (2000).

¹¹⁶Roberto Caranta, *Sull’impugnabilità Degli atti Endoprocedimentali Adottati Dalle Autorità Nazionali Nelle Ipotesi di Coamministrazione*, in FORO AMMINISTRATIVO 752, 760 (1994).

¹¹⁷Giorgio Gaja, *Case C-6/99, Association Greenpeace France and Others v. Ministère de l’Agriculture et de la Pêche and Others*. 37 COMMON MKT. L. REV. 1427, 1431 (2000).

“incidental review of the legality of national measures instrumental to the EU decisions is necessary so that affected parties can challenge the entirety of the decision-making process.”¹¹⁸

The doctrinal views presented above are all based on a noble purpose. They champion the preservation of the historical strides that administrative justice has made in providing the most effective judicial protection possible against the state. They are uncompromising in demanding that protection be offered to its fullest extent, even in the face of the complex fragmentation of power in the EU’s administrative system. These views reflect an understanding that anything short of full jurisdiction to review an administrative decision-making procedure *in its entirety* cannot constitute *effective* judicial protection.

However, this understanding measures the effectiveness of judicial protection against the high standards that have been afforded in national administrative law for many decades now. According to such standards, it would be simply unthinkable for a court to be prohibited from reviewing most, if not all, points of law raised in an administrative procedure.¹¹⁹ The views discussed above criticize the ECJ for not setting aside the limits of its jurisdiction in *Borelli* in order to comply with these standards of judicial protection. And yet, in doing so, those views betray a shared normative expectation that EU administrative law should give effect—or, indeed, *can* give effect—to the fundamental right to effective judicial protection in the very same way as national administrative law does. However, the fact is that—as Advocate General Bot has put it—the old adage *jura novit curia* “does not extend to national law, of which the EU judicature is not deemed to be aware.”¹²⁰

The point made here is not that the *Borelli* case law does not raise plausible concerns of effective judicial protection. The point is, quite simply, that the doctrinal critique of EU administrative law should be carried out exclusively within the EU’s own constitutional context and take due account of constitutional constraints that are specific to the EU and unknown to national administrative laws. The strict division between the competences of national and EU courts is but one such constraint.

E. Cutting the Cord

The argument up until now aimed to show that we all inevitably project preconceptions acquired from our own national traditions of administrative law onto EU administrative law. Such preconceptions may, however, skew EU administrative law scholarship to prioritize the study of legal issues that affect or evoke known elements of national administrative law and detract it from developing a doctrinal framework for issues alien to national laws. National preconceptions may also mislead scholars to expect EU administrative law to conform to the very same normative standards as national administrative law, rather than to evaluate it against EU law’s own normative standards.

While many of its foundations were originally borrowed from Member States’ laws, EU administrative law is autonomous from its national relatives. It has an identity and life of its own. Accordingly, the present section puts forward a methodological proposal to cut the umbilical cord tying EU administrative law doctrine to national administrative law. That proposal is only partly novel, in that it echoes the methodological case that Shaw and Wiener make for awareness of the contextual embeddedness of EU norms as a strategy to counter the influence of the “touch of stateness” in EU legal studies generally.¹²¹ In a nutshell, I submit that in order to do justice to

¹¹⁸Herwig Hofmann, *The Right to an ‘Effective Judicial Remedy’ and the Changing Conditions of Implementing EU Law*, UNIV. LUXEMBOURG – LAW WORKING PAPER 2013-2, 17 (2013).

¹¹⁹This view is also endorsed by the European Court of Human Rights (ECtHR). According to the ECtHR, the right to an effective remedy—as enshrined in Articles 6(1) and 13 of the European Convention on Human Rights—requires a court to “have jurisdiction to examine all questions of fact and law relevant to the dispute before it.” See *Terra Woningen v. The Netherlands*, App. No. 200641/92, para 52. (1996).

¹²⁰See Opinion of Advocate General Bot Case C-530/12 P OHIM v. National Lottery Commission ECLI:EU:C:2013:782 (Mar. 27, 2014), para. 71.

¹²¹Shaw & Wiener, *supra* note 13.

the specific context and characteristics of EU administrative law, doctrinal analysis must begin from a standpoint based on two simple assumptions—one empirical and one normative.

The empirical assumption is that EU administrative law governs the administrative system not of a nation-state but of the EU. That administrative system is a historical byproduct of the EU's unique political order. Its design and everyday practices are shaped by the specific political challenges and tensions, and by the delicate balances of power inherent to European integration. Thus, an adequate understanding of EU administrative law and its limitations must be informed by the factual characteristics of the administrative system it aims to regulate.

The normative assumption is that EU administrative law is a subfield of EU law. The primary interlocutor disciplines in its doctrinal development should therefore be other fields of EU law rather than national administrative law. In particular, it is *exclusively* within the framework of the EU's unique constitutional order that the substance of EU administrative law should be assessed.

In short, in order to overcome—or at least mitigate—national preconceptions of administrative law, EU administrative law scholarship must both draw on non-legal disciplines and situate its doctrinal analysis in the context of EU law. It must be deeply committed to both interdisciplinary and intradisciplinary dialogue.

I. Interdisciplinary Dialogue

Aiming to secure the credibility of their discipline, the early administrative law scholars sought to mimic the methodological practices of private law jurists. This included the rejection of interdisciplinary analysis. This was the case in France¹²² as well as in Italy and Germany. In the latter two, Vittorio Emanuele Orlando and Fritz Fleiner first adopted the same “strictly legal” juristic method of civil law jurists, with the aim of overcoming administrative law's status as a “hybrid discipline” that “amalgamated” philosophy, economics, sociology, and politics.¹²³ The influential German public lawyer Paul Laband even warned his followers that extralegal considerations of that kind were not just irrelevant in legal doctrine but indeed *obscured* the work of legal scholars.¹²⁴

Yet, a “pure” administrative law never came into being.¹²⁵ Many of the issues raised by administrative law cannot be grasped in a reading of rulings or provisions that is entirely detached from their social and political context. In contemporary German legal scholarship, the “New Science of Administrative Law” movement has championed the integration—alongside more classical doctrinal analysis—of insights from non-legal disciplines, such as administrative, political, or social science, in order to enhance the role of administrative law in improving the effectiveness of public administration in addressing real-world issues.¹²⁶

Nevertheless, advocacy for interdisciplinarity is still relatively recent in administrative law. Crucially, it only truly gained momentum *after* the founding period of EU administrative law scholarship in the late 1980s. This may explain why Schwarze's treatise, though analyzing European *administrative law* in depth, barely scratches the surface of the practices or real-world structure of European *administration* itself.

¹²²Georges Langrod, *France*, in *GESCHICHTE DER VERWALTUNGSRECHTSWISSENSCHAFT IN EUROPA* 67, 71–72 (Erk Volkmar Heyen ed., 1982).

¹²³See GIULIO CIANFEROTTI, *IL PENSIERO DI V. E. ORLANDO E LA GIUSPUBBLICISTICA ITALIANA FRA OTTOCENTO E NOVECENTO* 99 (1980); SABINO CASSESE, *CULTURA E POLITICA DEL DIRITTO AMMINISTRATIVO* 21–25 (1972); Michael Stolleis, *Die Entstehung des Allgemeinen Teils des Verwaltungsrechts (1850–1900)*, 21 *JURIDICA INT'L* 21 (2014).

¹²⁴WALTER WILHELM, *ZUR JURISTISCHEN METHODENLEHRE IM 19. JAHRHUNDERT: DIE HERKUNFT DER METHODE PAUL LABANDS AUS DER PRIVATRECHTSWISSENSCHAFT* 9 (1958).

¹²⁵Schmidt-Aßmann, *supra* note 18, at 13.

¹²⁶Andreas Voßkuhle, *Neue Verwaltungswissenschaft*, in *GRUNDLAGEN DES VERWALTUNGSRECHT VOL. 1*, 24, 58 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2d ed. 2012). See generally Wolfgang Kahl, *What Is 'New' about the 'New Administrative Law Science' in Germany?*, 16 *EUR. PUBL. L.* 105 (2010).

In the past decade or so, EU administrative law scholarship has begun to revert to the traditional skepticism of administrative interdisciplinarity. Deirdre Curtin's 2009 monograph, *Executive Power of the European Union*, illustrates well how interdisciplinary approaches can shed further light on many of the legal issues arising in the EU's administrative order.¹²⁷ Drawing on numerous empirical studies in political science allowed Curtin to clearly demonstrate what the EU's issues of executive transparency and accountability actually look like before analyzing them from a more conventionally legal point of view. In his recent book, Marijn Chamon analyzes both the legal and political limits of "agencification" in a complementary manner, which allows him to ultimately conclude that, if they are to remain legitimate and accountable, the relatively weak legal discipline of agencies must be compensated by practices of political control.¹²⁸ Lastly, Hofmann, Türk, and Rowe have notably highlighted the "interdisciplinary foundations" of EU administrative law, precisely with the understanding that non-legal perspectives may be of assistance in understanding many aspects of EU administration that are not captured by the traditional conceptual apparatus of national administrative law.¹²⁹

Whenever the realities that the law intends to govern are not accessible by mere intuition, or when scholars are unlikely to regularly experience their practice in person, legal research may benefit from drawing on existing literature in non-legal domains. Unlike the juristic method that the older "purists" may have believed, the autonomy of legal scholarship is not necessarily compromised by complementing robust legal analysis with the insights of neighboring disciplines. Interdisciplinary legal research comes in many different forms of how doctrinal and non-legal perspectives can be combined. Some forms examine the law as simply the backdrop for broader economic, social, or philosophical questions. Others, however, constitute what Matthias Siems describes as "basic interdisciplinarity" and accord non-legal disciplines a purely instrumental and subordinate role in the doctrinal study of law.¹³⁰

It is beyond question that analyzing the law through the external perspective of another discipline may constitute an intellectual enterprise that is valuable in itself. Nevertheless, from the point of view of a doctrinal approach—focused as it is, and must be, on the reformulation of legal sources—the role of extralegal perspectives can only be instrumental and subordinate. In this light, incorporating basic interdisciplinarity into the doctrinal study of law may help overcome the tendency of legal doctrines towards what Kaarlo Tuori has called "in-built inertia." Legal doctrines often fossilize around certain factual assumptions about the nature of the extralegal realities they govern. Non-legal disciplines may assist scholars in excavating those assumptions and exposing when they are factually wrong or become outdated.¹³¹

In administrative law, and especially in EU administrative law, familiarity with public administration studies and political science may become instrumental to understanding the design and function of public administration. Precisely because national administrative law lacks similar experiments of the multilevel exercise of administrative power and tasks, empirical studies carried out by political scientists may be invaluable to gain a sense of what EU administrative governance actually looks like. One could allude, in this regard, to the pervasiveness of indirect administrative governance, whereby EU authorities may resort to informal strategies of orchestrating national authorities rather than deciding in respect of citizens and firms,¹³² or to the fact that—even

¹²⁷See generally DEIRDRE CURTIN, EXECUTIVE POWER IN THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION (2009).

¹²⁸MARIJN CHAMON, EU AGENCIES: LEGAL AND POLITICAL LIMITS TO THE TRANSFORMATION OF THE EU ADMINISTRATION 369 (2016).

¹²⁹HOFMANN et al., *supra* note 94, at 25.

¹³⁰Matthias Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert*, 7 J. COMMONWEALTH L. & LEG. EDUC. 5, 6–8 (2009).

¹³¹TUORI, *supra* note 104, at 23–24.

¹³²See generally Kenneth Abbott, David Levi-Faur, & Duncan Snidal, *Theorizing Regulatory Intermediaries: The RIT Model*, 670 ANNALS AMERICAN ASS'N POL. & SOC. SCI. 14 (2017).

though decentralized multilevel administrative networks are intended to respond to the desire of the Member States to preserve their “administrative sovereignty”—many, in practice, lead to a concentration of power at the EU level.¹³³

Empirical realities such as these, unique to the EU, raise numerous legal issues that have nevertheless not yet been identified or studied from a legal angle. Empirical social and political science may prove invaluable in documenting and explaining how competing interests shape the mechanisms and institutional practices that are typical of the EU’s administrative system. It is, however, for legal doctrine to examine whether those interests are worthy of legal protection, and whether the EU’s administrative mechanisms and practices adequately respect and pursue the EU’s legal and constitutional requirements.

1. Intradisciplinary Dialogue

In arguing for intradisciplinary dialogue, one could begin by making a trivial point: Scholars of EU administrative law will certainly not be able to confront their own national biases unless they engage with the work of scholars native to other legal cultures. However, more is needed to overcome the “touch of stateness” that pervades the discipline.

EU administrative law doctrine must reflect on which other legal disciplines should serve as its interlocutors. It has often tended to see its primary interlocutor in national administrative law. I propose that EU administrative law reconsiders its own relation to other domains of EU law.

First, to uncover the distinctive ways in which EU law regulates administrative activity, legal doctrine must look to how specialized policy fields address the EU’s contemporary political, economic, and social challenges. Second, to assess whether the legislative or judicial development of EU administrative law is constitutionally adequate, legal doctrine must pay due regard to the specificities of the EU’s constitutional order.

1.1 Inductive Doctrinal Analysis

In the way it relates issues of general and specialized administrative law, EU administrative law doctrine may have picked up some of the old habits of national administrative law scholarship. To illustrate this point, it may be worth recalling what is typically meant by the concepts of “general” and “specialized” administrative law. General administrative law is the term usually employed to refer to means—principles, organizational rules, powers, obligations, procedures, and others—that apply across all substantive policy sectors. By contrast, special—or “specialized,” or yet “sectoral”—administrative law refers to how those means are enshrined in legislation at the service of particular substantive policy objectives—such as food safety, environmental protection, or a productive agriculture. This is a distinction that can be used without any difficulty in EU administrative law.¹³⁴

The main purpose of administrative law scholarship has been to develop the overarching doctrines of general administrative law. Its traditional approach to the relationship between general and specialized administrative law was of a deductive kind. Analyzing specialized administrative law primarily served two methodological purposes.

First, it served as a testing ground for doctrinal theories. It was common practice for scholars to first develop potential general doctrines, then confirm their validity by applying them to a field of specialized administrative law. The major flaw of this approach was that it historically led to

¹³³See generally Miroslava Scholten, *Mind the Trend! Enforcement of EU Law has been Moving to ‘Brussels’*, 29 J. EUR. PUBLIC POL’Y 1348 (2017); Tobias Bach & Eva Ruffing, *The Transformative Effects of Transnational Administrative Coordination in the European Multi-level System*, in THE PALGRAVE HANDBOOK OF PUBLIC ADMINISTRATION AND MANAGEMENT IN EUROPE 747, 758 (Edoardo Ongaro & Sandra van Thiel eds., 2018).

¹³⁴See generally Herwig Hofmann, Gerard Rowe, & Alexander Türk, *A Conceptual Understanding of EU Sectoral Administrative Law*, in SPECIALIZED ADMINISTRATIVE LAW OF THE EUROPEAN UNION 4-9 (Herwig Hofmann, Gerard Rowe, & Alexander Türk eds., 2018).

administrative law doctrines becoming fossilized. Rather than being regarded as opportunities to reassess sometimes dated doctrinal categories of general administrative law, legislative developments in specialized administrative law were artificially fit into those doctrines.¹³⁵ Even influential scholars like Zanobini appeared to present their own principles and concepts as if they were immutable and above changes in sectoral legislation.¹³⁶

The second purpose of specialized administrative law was merely to serve as a backdrop to illustrate how codified provisions of general administrative law are detailed or derogated in specific policy areas. Codified general administrative law—provisions on administrative decision-making procedures, administrative justice, or general principles such as legitimate expectations or legality—was seen as the capital of administrative law and specialized administrative law, as its provincial periphery of technicalities. The emphasis of legal doctrine on codified administrative law has, however, been criticized as excessive. It is feared to have led to the ossification of administrative law scholarship, to a decreased interest on the part of legal scholarship to venture beyond the general provisions of codes, and into the constantly evolving sectoral legislation.¹³⁷

To a considerable degree, EU administrative law doctrine still follows the old deductive approach. It assigns the same two subordinate purposes to specialized administrative law as national scholarship traditionally did. In the absence of a general codification,¹³⁸ however, the emphasis of EU administrative law doctrine has been on how general principles and concepts, typically imported from national legal traditions, are or should be applied in fields of specialized EU administrative law. Writing on Schwarze's *European Administrative Law*, an early commentator rightly noted:

[T]he book is deductive rather than inductive The author tends to start his discussion on each separate theme at the conceptual level When dealing with legal principles, the author will first describe their nature and their general characteristics; it is only after having finished this conceptual exercise that he will dig up more specific rules which are covered by the legal principle or derive from it; finally, he will progressively descend to the applicable case law.¹³⁹

This same deductive approach has since been widely used in numerous influential contributions. For instance, in Nehl's comprehensive study on principles of administrative procedure, general principles—such as the right to be heard—are the starting point, while policy sectors—such as the Customs Union or cohesion policy—are treated as a backdrop to illustrate how those principles are applied in practice.¹⁴⁰ However, as explained earlier, the risk of adopting deductive approaches of this kind is that they lead to the inertia of general administrative law doctrine. If its purpose in examining the fields of specialized administrative law is simply to illustrate the validity or application of general principles and concepts, legal doctrine risks overlooking patterns of structural shift in administrative law that only emerge once developments in those fields are analyzed and compared.

¹³⁵Christoph Möllers, *Methoden*, in GRUNDLAGEN DES VERWALTUNGSRECHTS I 123, 171–72 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, & Andreas Voßkuhle eds., 2012); Andreas Voßkuhle, *Die Reform des Verwaltungsrechts als Projekt der Wissenschaft*, 32 DIE VERWALTUNG 545, 551 (1999).

¹³⁶See CASSESE, *supra* note 16, at 268.

¹³⁷See, e.g., Hans-Christian Röhl, *Procedures in the European Composite Administration*, in TRANSFORMING ADMINISTRATIVE PROCEDURE 77, 80 (Javier Barnes ed., 2008).

¹³⁸The closest EU administrative law has had to a codification is the ReNEUAL draft model rules, which have yet to be endorsed by the Commission.

¹³⁹Thymen Koopmans & Jürgen Schwarze, *European Administrative Law. London and Luxemburg: Sweet & Maxwell and Office for Publications of the EC*, 1992. CV and 1547 pages (Book Review), 31 COMMON MKT. L. REV. 193, 195 (1994).

¹⁴⁰See generally HANNS PETER NEHL, EUROPÄISCHES VERWALTUNGSVERFAHREN UND GEMEINSCHAFTSVERFASSUNG. EINE STUDIE GEMEINSCHAFTSRECHTLICHER VERFAHRENSGRUNDSÄTZE UNTER BESONDERER BERÜCKSICHTIGUNG "MEHRSTUFIGER" VERWALTUNGSVERFAHREN (2002).

A recent movement in administrative law dogmatics has proposed an alternative methodological approach to address this risk. That approach, known as a method of “subjects of reference,”¹⁴¹ inverts the relationship between general and special administrative law that traditionally informed administrative law scholarship.

The main proposition of the subjects of reference method is the following: It suggests that legal scholarship should not attempt to explain or justify special administrative law by reference to general administrative law theories or as manifestations of general codified principles. Rather, legal scholarship should resort to representative sectors of special administrative law—the subjects of reference—as a source of legal “raw material” that may serve to reform existing doctrines and principles of general administrative law, or from which new principles or legal doctrines can be fleshed out.¹⁴²

The methodical process is thus not deductive but inductive. It starts with the legal issues, concepts, and principles that—at first sight—appear to be specific to the chosen sectors of administrative law, and tests their generalizability to other sectors. The analysis of the subjects of reference approach focuses on identifying structurally comparable legal problems across different domains of special administrative law, in order to expand the theoretical and doctrinal frameworks of general administrative law.¹⁴³ In doing so, this method aims to find the real overarching up-to-date issues of administrative law by examining the developments of administrative law in different policy sectors.¹⁴⁴ It seeks to “decipher the key features of a sector” and to “inquire if the pieces that integrate it may be generalized.”¹⁴⁵

As Eberhard Schmidt-Aßmann and Luis Arroyo Jiménez point out, the method of subjects of reference can be usefully employed in the doctrinal analysis of EU administrative law.¹⁴⁶ Indeed, some authors already seem to advocate for an approach that bears significant semblance to it.¹⁴⁷ Luca de Lucia—by comparing legal regimes in GMO governance, novel foods, and pharmaceutical regulation—has identified common structural features and developed a legal-doctrinal reconstruction of administrative procedures, whereby EU authorities exercise arbitral powers meant to end disagreements between national regulatory agencies.¹⁴⁸ Interestingly, if one looks closely enough, the ECJ itself appears to sometimes engage in a similar reasoning of subjects of reference.

Indeed, besides employing the “vertical” method identified by Schwarze decades ago—that is, incorporating common national standards of administrative law into EU administrative law—the ECJ also follows a “horizontal” method of using previous rulings to address structurally similar issues of administrative law in unrelated policy areas. The recent *Berlusconi & Fininvest* ruling provides a good example of this. Even though the case concerned the review of a specific

¹⁴¹“Subject of reference” is the translation proposed for *Referenzgebieten*. See Matthias Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in *THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE = LA MUTATION DU DROIT ADMINISTRATIF EN EUROPE*, 3, 12 (Mathias Ruffert ed., 2007). Other possible translations could eventually be “ambit” or “domain” of reference.

¹⁴²Eberhard Schmidt-Aßmann, *Cuestiones Fundamentales Sobre la Reforma de la Teoría General del Derecho Administrativo. Necesidad de la Innovación y Presupuestos Metodológicos*, in *INNOVACIÓN Y REFORMA EN EL DERECHO ADMINISTRATIVO* 15, 75–76 (Javier Barnes ed., 2006).

¹⁴³Martin Eifert, *Das Verwaltungsrecht zwischen klassischem dogmatischen Verständnis und Steuerungswissenschaftlichem Anspruch*, 67 *VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRE* 288, 298–99 (2008).

¹⁴⁴Andreas Voßkuhle, *Neue Verwaltungsrechtswissenschaft*, in *GRUNDLAGEN DES VERWALTUNGSRECHTS VOL I* 1, 39 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, & Andreas Voßkuhle eds, 2d ed. 2012).

¹⁴⁵Schmidt-Aßmann, *supra* note 142, at 76.

¹⁴⁶See Schmidt-Aßmann, *supra* note 21, at 9; Luis Arroyo Jiménez, *Système et Systématisation du Droit Administratif Européen*, 3 *PREPRINTS SERIES OF THE CENTER FOR EUROPEAN STUDIES LUIS ORTEGA ÁLVAREZ AND THE JEAN MONNET CHAIR OF EUROPEAN ADMINISTRATIVE LAW IN GLOBAL PERSPECTIVE* 9–10 (2019). Implicitly, this view is also supported by Hofmann et al., *supra* note 94, at 6.

¹⁴⁷See Carlo Maria Colombo & Mariolina Eliantonio, *The Changing Nature of the Public Administration: Innovations and Challenges for Public Lawyers*, 24 *EUROPEAN PUBLIC LAW* 403, 405 (2018) (pleading for more cross-level and cross-sectoral analysis in EU administrative law).

¹⁴⁸See generally Luca de Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, 5 *REV. EUR. ADMIN. L.* 49 (2012).

composite administrative procedure in the Single Supervisory Mechanism, the Court followed a line of reasoning based on previous judgments that concerned similar procedures in other, substantively different policy areas—such as access to documents or GMO governance.¹⁴⁹

2. Constitutionally Contextualized Doctrinal Analysis

Constitutions must inform the ways in which public power, including administrative power, is exercised within the relevant polity. It is not only in the national context, but also in the EU context, that administrative law must be concretized constitutional law.¹⁵⁰ Doctrinal analysis of EU administrative law must therefore examine whether legislative regimes and their interpretation by EU courts adequately respond to the requirements of the EU's constitutional framework.

Few would dispute that EU administrative law must be informed by the normative standards of EU constitutional law. Yet, it is often overlooked that those standards may not regularly coincide with those found in national laws. EU administrative law must be concretized constitutional law of the EU, not of its Member States. It must therefore do justice to the EU's unique constitutional characteristics, however counterintuitive they may be from the state-based standpoint of national administrative law.

One simple illustration of this issue concerns the principle of legality in public administration. This is widely recognized as one of the most basic principles of administrative law. In its most traditional conception, the principle of legality represented the demand that public administration be bound to the sovereign will of the people, as expressed in the legislation passed by its representatives in parliament.¹⁵¹ However, as Nicola Lupo and Giovanni Piccirilli have rightly noted, this classic conceptual link between administrative legality and democracy is difficult to sustain under EU constitutional law. Unlike parliamentary legislation passed in the context of a Member State, legislation passed by the European Parliament does not express the will of a self-constituted demos within a political community and, accordingly, cannot realistically be said to enjoy an identically robust democratic legitimacy.¹⁵² Moreover, it is notoriously hard to describe the EU's institutional framework in terms of a conventional tripartite theory of separation of powers between the legislative, executive, and judicial branches—especially in the boundaries between the legislative branch and the administrative-executive branch.¹⁵³ The principle of legality in EU administrative law, therefore, cannot be conceived in terms of an administrative branch of government being subject to the commands of a clearly distinct legislative branch, as would be the case in the national context where parliaments command the administrations. Administrative legality in the EU would require doctrinal reconceptualization to account for these critical constitutional differences with respect to a nation-state.

Another important point concerns the constitutional framing of relations between citizens and authorities in the EU. Traditionally, administrative law was the body of laws governing and mediating the bilateral relationship between the liberty of the individual and the authority of public administration.¹⁵⁴ The relevant constitutional parameters for that relationship were, in essence,

¹⁴⁹ECJ, Case C-219/17 Berlusconi v. Bank of Italy, ECLI:EU:C:2018:1023 (Dec. 19, 2018).

¹⁵⁰See generally Fritz Werner, *Verwaltungsrecht als konkretisiertes Verfassungsrecht*, in RECHT UND RICHTUNG UNSERER ZEIT 212–226 (Fritz Werner ed, 1971). See also THOMAS VON DANWITZ, EUROPÄISCHES VERWALTUNGSRECHT 141 (2008) (supporting the same notion in the context of administrative law).

¹⁵¹Hans Klecatsky, *Reflections on the Rule of Law and in Particular the Principle of Legality of Administrative Action*, 4 INT'L COMMISSION JURISTS 205, 209 (1963).

¹⁵²Nicola Lupo & Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts' Case Law: An Italian Perspective*, 11 EUR. CONST. L. REV. 55, 67 (2015).

¹⁵³See generally Eoin Carolan & Deirdre Curtin, *In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers*, in ALLOCATING AUTHORITY: WHO SHOULD DO WHAT IN EUROPEAN AND INTERNATIONAL LAW 53 (Joana Mendes & Ingo Venzke eds., 2018).

¹⁵⁴See CASSESE, *supra* note 123, at 38.

the fundamental rights of citizens against the state and the constitutional provisions drawing boundaries between the administrative and the remaining branches of government. In EU constitutional law, similar parameters exist but, crucially, must compete with other requirements that are alien to national constitutional laws.

First, constitutions generally fulfill—among others—a restrictive function: They determine the limits that cannot be exceeded by the polity's institutions. A key feature of EU constitutionalism is that this restrictive function not only manifests itself in fundamental rights norms, but also in principles intended to preserve the powers of the Member States—and of the institutions of their various branches of government—from undue interference by the EU.¹⁵⁵ The EU's rule of law not only protects individuals from the power of the Member States and the Union's institutions, it also shields the Member States from intrusions into their power by EU institutions.¹⁵⁶ This is why the ECJ demands that the EU administration respect procedural guarantees required by the rule of law, such as the right to be heard, regardless of whether the addressee of its decisions is an individual or a national authority.¹⁵⁷ Yet, the constitutional protection afforded to the Member States may also clash with the rights of individuals. The same EU constitutional order that requires respect for the fundamental right to effective judicial protection also requires respect for the principle of conferral, according to which EU institutions—including the ECJ—may only act within the limits of the competences attributed to them.¹⁵⁸ If the ECJ accepted judicial review of binding national preparatory acts—such as those in *Borelli*—it would be violating the boundaries of its judicial jurisdiction, which is essentially another way of saying that it would be subtracting—indeed, usurping—the control of national decision-making from the jurisdiction of national courts. The jurisdictional limits of the ECJ are neither a formality without purpose nor a technicality imposed out of whim.¹⁵⁹ They are the reverse side of the Member States' sovereign choice to preserve the relations between the national judicial and administrative branches, as defined in national constitutional laws and detailed in national ordinary legislation.

Second, it must be noted that—unlike what typically occurs in national laws—the legal regime of judicial remedies against the EU administration are not regulated in ordinary legislation, but constitutionally in the treaties. The fact that EU remedial law can only be reformed by treaty change, not by the legislative process, means that its shortcomings cannot be corrected easily or simply interpreted away. The debates on *Borelli*—described above—are a case in point, as objections to the ruling often imply that the ECJ's lack of jurisdiction to review national measures could be disregarded in the name of effective judicial protection.

Third, for good or for bad, the Court of Justice considers that the protection of the fundamental rights of individuals must coexist—and often give way—to many structural principles of EU constitutional law. This was already illustrated by the principle of conferral. The protection of individuals may, however, also suffer in concrete cases from the application of the principle of mutual trust. That principle requires national authorities to presume that other Member States' authorities are complying with fundamental rights in all but exceptional circumstances.¹⁶⁰ Even if national constitutional laws afford a higher degree of protection to the fundamental rights of an individual than the Charter of Fundamental Rights, that protection may not be offered if it

¹⁵⁵Cf. KAARLO TUORI, EUROPEAN CONSTITUTIONALISM 29–30 (2015).

¹⁵⁶*Id.* at 214.

¹⁵⁷See ECJ, Case T-157/15 Republic of Estonia v. Commission, ECLI:EU:T:2017:483 (July 12, 2017), para. 151; ECJ, Case C-521/15 Kingdom of Spain v. Council, ECLI:EU:C:2017:982 (Dec. 12, 2017), para 90.

¹⁵⁸Treaty of European Union, Art. 5(2) (1992). See generally Koen Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 COMMON MKT. L. REV. 1625 (2007).

¹⁵⁹Cf. Opinion of Advocate General Bobek in Case C-557/16 *Astellas*, ECLI:EU:C:2017:957 (Mar. 14, 2018), para. 87.

¹⁶⁰See, e.g., ECJ, Case C-578/16 PPU C. K., ECLI:EU:C:2017:127 (Feb. 16, 2017), para. 92; ECJ, Case C-163/17 *Jawo*, ECLI:EU:C:2019:218 (Mar. 19, 2019), para. 81.

compromises the principles of primacy and effectiveness of EU law.¹⁶¹ Fundamental rights as such cannot override the principle of the autonomy of the legal order either, and their interpretation must in fact be *adjusted* to the specific institutional requirements of EU constitutional law. In Opinion 2/13, the Court of Justice held that the “autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law” requires that the interpretation of fundamental rights be ensured “in accordance with the constitutional framework”—“the framework of the structure and objectives” of the EU.¹⁶²

Fourth, the principle of the autonomy of EU law has one particularly important implication for legal doctrine. The principle holds that only EU law can stipulate the rules governing its own application, relations with other legal orders, and—crucially—its own *interpretation*.¹⁶³ Doctrinal analysis is, by definition, an interpretive reconstruction of legal sources. Consistency with the EU legal order’s specific characteristics requires the interpretive process to be independent from national law. The legal concepts of EU administrative law may draw some inspiration from national law, but must nevertheless be considered as independent in meaning. Transplanting legal concepts into EU administrative law simply because those concepts exist in national administrative law would not only be a non-sequitur, as highlighted before, but irreconcilable with the interpretive implications of the principle of autonomy. It would lead, on the level of legal doctrine, to defeat the very essence of the autonomy of the EU legal order—the requirements that EU law must be considered as a separate category from other legal systems in its own right, indivisible and the same in all Member States, and in all circumstances.¹⁶⁴ Ignoring these requirements would lead to an unsustainable fragmentation of EU administrative law into a multitude of different national versions, harmful both to the consistency of EU law across the Union and to the communication of jurists from different nationalities.¹⁶⁵

F. Conclusion: Embracing Administrative Singularity

The argument made in this Article can be summarized as follows: Three decades after its foundation, and despite the near-universal consensus that the EU has generated an administrative system and an administrative law beyond the nation-state, EU administrative law doctrine still relies heavily on preconceptions derived from national law as to what administrative law is or should be. It continues to adopt criteria of “administrativeness,” borrowed—explicitly or implicitly—from the experiences of national administrative law. It was argued that this tendency can—to an extent—be attributed to the so-called “touch of stateness” that pervades EU legal scholarship at large, but which is particularly strong in EU administrative law, due to the historical thematic focus of the literature on how that law reproduces or affects national administrative laws.

The argument was made that legal scholarship should beware of national preconceptions of administrative law, as such preconceptions often lead to a double bias in EU administrative law doctrine. First, there is a bias of thematic familiarity. EU administrative law tends to be analyzed from the point of view of principles and concepts known in national law, while far less attention is devoted to developing such principles and concepts for the aspects in which EU administrative law bears little resemblance to national laws. A second bias is of a normative kind. This translates into an implicit

¹⁶¹ECJ, Case C-399/11 Melloni, ECLI:EU:C:2013:107 (Feb. 26, 2013), paras. 56–58; ECJ, Case C-469/17 Funke Medien, ECLI:EU:C:2019:623 (July 29, 2019), paras. 30–32.

¹⁶²Opinion 2/13, ECLI:EU:C:2014:2454 Dec. 18 2014), paras 170 and 177. Bruno de Witte, *The Relative Autonomy of the European Union’s Fundamental Rights Regime*, NORDIC J. INT’L L. 65, 73 (2019) (pointing out critically in the CJEU’s reasoning that “the primary concern of the CJEU . . . is to protect the autonomy of the EU legal order against ‘foreign’ influence, whereas the concern to ensure optimal protection of human rights for European citizens is nowhere voiced”).

¹⁶³Loïc Azoulay, *The Europeanisation of Legal Concepts*, in EUROPEAN LEGAL METHOD: IN A MULTI-LAYERED EU LEGAL ORDER 165, 170 (Ulla Neergard & Ruth Nielsen eds., 2012).

¹⁶⁴RENÉ BARENTS, THE AUTONOMY OF COMMUNITY LAW 7–8 (2004).

¹⁶⁵For an early version of this point, see Otto Bachof, *Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung*, 30 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, 194, 236 (1972).

expectation that EU administrative law should adhere to the same values, and to the same ways to observe those values, as national administrative law. EU administrative law has, on occasion, been judged as if it were defective national administrative law—unfairly so, I argued.

Legal doctrine should endeavor to examine, self-critically and self-consciously, whether it is not intuitively resorting to national doctrinal categories or normative expectations that do not apply in EU administrative law. This is not to suggest that scholars could ever *completely* strip themselves of preconceptions internalized in their study of national administrative law. Nevertheless, this Article concluded by putting forward a methodological proposal to at least mitigate the influence of those preconceptions in order to avoid the double bias mentioned before. This proposal involves two elements.

First, legal doctrine must operate with full awareness that there are many ways in which the administrative system of the EU is distinctive from that of its individual Member States. To that end, it should engage more deeply with the findings of non-legal disciplines—especially those of an empirical kind—and cultivate a better grasp on the design and the everyday practices specific to the EU’s administrative system.

Second, the doctrinal analysis of EU administrative law should be primarily conducted within the legal order to which it belongs—the EU legal order. On the one hand, the proposal suggests revisiting the traditional way in which legal doctrine has conceived of the relationship between general and specialized EU administrative law. It is proposed that, rather than treating sectoral fields of EU law as a mere backdrop to the operation of general principles and concepts, legal scholarship should try a more inductive, bottom-up approach to extract new principles and concepts from contemporary developments across sectoral fields.

On the other hand, the normative critique of EU administrative law should be carried out only in light of the EU’s constitutional order—however counterintuitive its requirements may be from the conventional standpoint of national administrative law. In EU constitutional law, principles that serve the protection of the individual must coexist—and sometimes even compete—with principles designed to preserve the integrity of EU institutions’ powers, to protect the Member States, and to govern the relations between them. For as long as the treaties and, indeed, the nature of the EU as a polity are not radically transformed, legal doctrine must make peace with the fact that EU constitutional law sometimes requires value choices that would seem abject in a purely national administrative context. Many of us share a commitment to the notion of administrative law as concretized constitutional law. That commitment must surely mean that EU administrative law can only be judged for its ability to serve as a concretized version of the EU’s *own* constitutional order.

This Article by no means intended to deny the importance of the profound interdependence between national and EU administrative law. Topics such as Europeanization and common principles of administrative law continue to prove invaluable fertile fields of inquiry and innovative research.¹⁶⁶

Instead, this Article intended to make a simple plea for the singularity of EU administrative law to be taken seriously, and indeed even embraced. It has shaped and been shaped by national administrative law. But it is also a body of administrative law in its own right. It is a new world of administrative law, where much more remains to explore than—sometimes deceptive—semblances of the old.

¹⁶⁶See generally Giacinto della Cananea & Mauro Bussani, *The ‘Common Core’ of Administrative Laws in Europe: A Framework for Analysis*, 26 MAASTRICHT J. EUR. & COMP. L. 217 (2019).