A Framework for Historically Comparing Control of National, Supranational and Transnational Public Power

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Note to the reader: this is a long article. The first section summarises the argument and conclusion of my recent book, Controlling Administrative Power. I include it because even if you read it eventually, I doubt that you will have had a chance to do so by the end of April. The last section is not integral to the argument, but attempts to locate my methodology in relation to more common discourses of legal and constitutional analysis. The most important sections to read are 2, 4 and 5 in that order. I apologise for the length of the paper – I realised only half-way through that I had bitten off rather too much. Of course, feedback on any and all sections of the paper will be most gratefully received.

1. Introduction

This paper offers an analytical framework for historically comparing control of public power at national, supranational and transnational levels of governance. It builds on the analysis in a recently published book¹ which explores the relationship between control regimes and systems of government. A system of government I define as a set of institutions,² norms and practices concerned with the nature and allocation (or ‘distribution’ or ‘constitution’) of public power. A control regime I understand as a set of institutions, norms and practices concerned with controlling public power. I conceptualise a control regime as a sub-system of a system of government. Controlling Administrative Power, as its title states, focuses on control of administrative power. As will become clear in due course, this paper is not so limited.

*Australian National University College of Law. I owe a great debt of gratitude to Carol Harlow for truly penetrating comments that saved me from some very basic errors.

¹ P Cane, Controlling Administrative Power: An Historical Comparison (Cambridge: Cambridge University Press, 2016).

² I use the term ‘institution’ as a rough synonym of ‘organisation’. In the mainstream ‘institutional studies’ literature it tends to be used more broadly to refer to any norm-based social practice. Note that I define a ‘system’ (and ‘regime’) in terms of a ‘set’. ‘Set’ is often used to indicate a lack of system. In my usage, a ‘system’ need not be integrated or stable while, conversely, a set may be.
A distinction is often drawn between ‘government’ and ‘governance’, the former referring primarily to institutions and the latter to functions. My definitions of systems of government and control regimes encompass both institutions and functions. In discussing international law and relations, ‘governance’ is sometimes preferred to ‘government’ because of significant differences between the way power is allocated and exercised in the international sphere as contrasted with the national arena, the latter being understood as the realm of ‘government’.

In this paper the usage of the two terms will not be rigorous, which is to say that ‘government’ will not refer exclusively to statal arrangements and public institutions, and nor will ‘governance’ refer exclusively to extra-statal arrangements and public functions. I do not wish to be bound by the more specific senses these terms bear in much of the relevant literature, in which the question of whether particular arrangements are better analysed in terms of ‘government’ or ‘governance’ is often highly contested: where some see government others see only governance, and vice-versa. I am interested in both and think that a watertight distinction between the two is unhelpful. In my usage, both government and governance may have institutional and functional aspects.

In *Controlling Administrative Power* I set out to test the hypothesis that similarities and differences between regimes for controlling administrative power in various national legal systems may be fruitfully explained in part by reference to the relationship between control regimes and their respective systems of government. I tested the hypothesis in relation to three legal systems: the English, the US federal and the Australian federal. The analysis of systems of government was framed by a distinction between two models of distribution of public power: diffusion and concentration. Since at least the eighteenth century, the preferred framework for analysing the allocation of public power (and, in many systems, for

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interpreting constitutions) has been Montesquieu’s theory of separation of powers. For various reasons, I decided not to adopt this framework. One reason was that the theory predates fundamental changes in the structure of government associated with the building of the ‘administrative state’ since the late nineteenth century. Another was that all three of the systems I chose to analyse display Montesquieu’s tripartite institutional and functional separation. My concern was to identify differences (and more specific similarities) in the way power is separated in the various systems. In other words, for my purposes, classic separation-of-powers theory was too abstract. A third reason was that separation of powers theory is often deployed normatively, whereas my concerns are analytical and interpretive, not prescriptive. As will become clear in due course, this paper provides a fourth, compelling reason to abandon separation of powers as the preferred analytical tool.

As I have implied, the difference between the two models of distribution – concentration and diffusion – relates to how power is allocated. Diffusion involves division and sharing of one and the same sort of power (eg, legislative, executive, bureaucratic or judicial) between various institutions that are ‘coordinate’ with one another and which, by virtue of the fact that the power is shared amongst them, must cooperate with each other to achieve exercise of the power as consistently as possible with their respective goals and objectives. In terms made famous by George Tsebelis, diffusion of power creates ‘veto players’. In Tsebelis’s sense, both the President and each House of Congress are veto players in the US legislative system, as are coalition political parties in a parliamentary system. The standard rationale for this mode of separation is to limit government and, thereby, protect individual rights. By contrast, concentration involves the allocation of different types of

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5 It is not possible, of course, to abandon the term in discussion of systems in which separation of powers is considered to have formal, constitutional status.

power to separate institutions, each of which can use the particular type of power more-or-less autonomously to promote its own policy objectives and preferences. For instance, Australian law draws a very sharp distinction between judicial and executive power, and provides, as a general rule, that non-judicial bodies cannot exercise judicial power and also that judicial bodies cannot exercise non-judicial power. The main rationale for this mode of separation is to strengthen judicial power as a tool for controlling the exercise of legislative, executive and bureaucratic power. Concentration is designed not to promote coordination and cooperation between institutions but to maintain a clear distance between them. Ironically, concentration ‘separates’ power more cleanly than diffusion.

I associate these two models of distribution respectively with two modes of controlling power: concentration with accountability, and diffusion with checks-and-balances. Sharing power between institutions enables each to ‘check’ the other. ‘Checking’ has two connotations: one is stopping or delaying, as in ‘checking someone’s progress’. The other is supervising – as in ‘checking up on’ someone or ‘keeping an eye’ on them. Thus, for instance, Congress can both check the legislative ambitions of the President (in the first sense), and oversee the President’s ‘execution of the laws’ (in the second sense). By contrast, autonomy in the exercise of power enables one institution to use that power to hold others ‘to account’. A paradigm example of accountability – formally and theoretically, at least – is ‘ministerial responsibility’ to Parliament in the English system of government. Responsibility is the price that governments pay in parliamentary systems for the large amounts of autonomous (i.e. concentrated) power they enjoy by virtue of the degree of control they can exercise over the legislature and the bureaucracy.

In *Controlling Administrative Power* I applied this framework of analysis historically and comparatively in order to test the hypothesis about similarities and differences between control regimes. My conclusion was that understanding the relationship between a control
regime and the system of government in which it is embedded can help to explain certain – but certainly not all – significant differences between the control regimes of England, the US and Australia. I contrast this sort of ‘structural’ explanation of similarities and difference with explanations that refer primarily to ‘values’ and ‘value-judgments’. Value-judgments are typically a product partly of conscious practical reasoning about how things ought to be, and partly of the (more-or-less subconscious) influence of temperament, education and socialisation. The structural explanation may be understood either as a non-competitive complement to value-based explanations, or as addressing the (more-or-less) subconscious element of practical reasoning. In other words, the structural explanation may help to explain why people make the value-judgments they do about how power should be controlled – for instance, about whether and to what extent courts should ‘defer’ to decisions of administrators. At the same time, the relationship between structures and values is symbiotic: values may explain structures, as well as vice-versa. Explanations based on perceived political, social and economic needs, must also be given a place in accounting for similarities and differences between control regimes. Nevertheless, the primary focus of this analysis is on structures.

It is important to stress that the two models of distribution of public power are not used to describe systems of government as a whole. Rather, it will be found that all systems of government display, in different combinations and proportions, elements of both diffusion and concentration. In other words, the distribution of power in various systems of government is more-or-less concentrated and diffused. It follows (in my analytical scheme) that we might expect particular control regimes to display a mixture of checks-and-balances

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8 For instance, the fact that the founders of the Australian system of government wanted to create a federation resulted in significant similarities between the Australian and US systems of government and control regimes, and significant differences between the Australian and English systems and control regimes.
and accountability. My study of the English, US and Australian systems shows that whereas power in the US system is (relatively) highly diffused, in both the English and Australian systems it is (relatively) much more concentrated – although in significantly different ways in the two latter systems respectively. Correspondingly, it shows that in the US system, checks-and-balances dominate the control regime whereas in the English and Australian systems, accountability mechanisms are more prominent. Finally, it shows that these differences (and similarities in the case of the Australian and English systems) can partly explain striking differences (and similarities) between the control regimes in the various systems.

My analysis of systems of government and control regimes in *Controlling Administrative Power* has a significant historical component. This is because complex social practices, such as governance and law, are ‘sticky’ or ‘path-dependent’ phenomena, products of both continuity and change. Einstein showed us that time is a dimension of physical space essential to understanding the natural world in which we live. Similarly, time is a dimension of ‘social space’. If law is conceptualised as ‘a system of rules’ – to adopt HLA Hart’s famous characterisation – it may be analysed at a particular point in time (or ‘synchronically’). However, if our interest is in law as a social practice, a diachronic (or ‘dynamic’) perspective is needed for its accurate portrayal and understanding. In an important sense, law’s present simultaneously contains its past and its future. Its purpose is to shape the future, but in fulfilling this purpose it is constrained by its past. Of course, law may be understood (*inter alia*) both a system of rules and a social practice, and so it invites both synchronic and diachronic analyses.

2. The Argument

The basic aim of this paper is to explore how the historical-comparative, framework and methodology, developed in *Controlling Administrative Power* for analysing state-based, national systems of government and control regimes, might apply to power and its control...
beyond the state: in supranational environments (notably the EU) and transnational environments (such as the WTO). The paper is inevitably tentative and exploratory if only because I know much less about governance beyond the state than about the three national systems analysed in *Controlling Administrative Power*. Moreover, the task undertaken here is complicated, in the supranational case, by the fact that the EU system of government is chronically unstable; and in the transnational case, by the fact that both system(s) of government and control regime(s) at this level are at a much earlier stage of their development than those in England, the US and Australia, and even those of the EU.

What the tentative and preliminary analysis in this paper will show (or so I will argue) is that in comparing systems of government – and more particularly, national systems on the one hand, and supranational and transnational systems on the other – it is helpful and illuminating to distinguish between two principles of design of governmental institutions that I will refer to respectively as ‘functional’ and ‘socio-political’. Separation of powers is a functional design principle in the sense that it allocates power described in terms of particular governmental functions (legislative, executive, judicial) to institutions that characteristically perform one of those functions (legislature, executive, judiciary). A classic example of what I mean by a socio-political design principle is the division of power in mediaeval England between royalty, the nobility (and the Church) and the ‘commons’. Socio-political designs distribute governmental power amongst various social ‘estates’ (or, in more modern terms, ‘constituencies’ or ‘groups’) defined in terms of different sectional, socio-political interests. In such distribution, types of power may be mixed and allocated together to one and the same group. If it is also the case that particular institutions characteristically exercise different

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9 This term encompasses the ‘international’ sphere of bilateral and multi-lateral relations between nations-states, but extends further.

10 As in functional distributions, so in socio-political distributions, power may be more-or-less concentrated or diffused. Power was less concentrated in the monarchy in mediaeval England than in the ‘absolute’ monarchies of the Continent. Understood in such terms, the English constitutional struggles of the seventeenth century were over how concentrated power would be.
types of power, those institutions can be expected to have components representing each of the various interests that have a share of that power. A major conclusion of this paper will be a suggestion that supranational and transnational systems of government can be more plausibly analysed as socio-political rather than functional in design.

This distinction between functional and socio-political design is, of course, not new. In fact, in political theory, the idea of the ‘balanced constitution’ can be traced back at least to Classical Greece.\(^{11}\) As I have already implied, it was the dominant principle of distribution in mediaeval Europe. For instance, in England before the Glorious Revolution, legislative, executive and judicial powers were not clearly distinguished from one another. Public power was divided between the Monarch, the House of Lords, the House of Commons and the (Common Law) Courts. Each of these institutions exercised various types of power, and each was identified with a particular socio-political interest. In these terms, one of the most significant results of the Glorious Revolution was that the Courts were re-aligned – out of the royal orbit and into the Parliamentary camp. Montesquieu half a century later who reinterpreted it functionally.

In summary, the underlying argument of this paper is that however useful the concept of separation of powers may be in analysing national systems of government and control regimes (and I have cast doubt on its usefulness in this context), it is much less useful than some concept of socio-political balance\(^{12}\) in understanding supranational and transnational systems of government and control regimes. This explains why, in this paper, I have shifted focus from control of administrative power (functionally defined) to control of public power

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\(^{11}\) MJC Vile, *Constitutionalism and the Separation of Powers*, 2nde edn (Indianapolis: Liberty Fund, 1998), 36-8. Vile explains (especially in chapter 3) that when combined with separation of powers, the idea of mixed government gave birth to what I have called ‘diffusion’ of power characteristic of the US system of government.

\(^{12}\) The term ‘institutional balance’ is used in relation to the EU. I have avoided that term because there is no on-on-one identification of interests and institutions in the EU.
(socio-politically understood in terms of the balance of power between various groups and interests).

3. Historical Background to the Argument

Despite the focus of this paper on the supranational and transnational levels, it is best to begin with national systems because these constitute the environment out of which supranational and transnational systems have emerged. In Western histories, the origin of the modern nation-state, and of international law as the law of nation-states, is traditionally traced to the Peace of Westphalia in 1648. The basic characteristic of the nation-state in its dealings with other states is ‘sovereignty’, the normative force of which is to construct states as ‘free and equal’ amongst themselves, and to establish consent and *pacta sunt servanda* as the normative bases of international obligations. By contrast, within states, ‘sovereignty’ signifies and locates the ultimate source of public power over citizens. In this latter sense, the location of sovereignty in England shifted from the monarch to Parliament as a result of the Revolution settlement in 1689. In France, the Revolution moved sovereignty from the monarch to ‘the state’, understood as an embodiment of ‘the people’. After the Revolution in the US, sovereignty was located in ‘the people’, understood in much the same way as we now think of the non-governmental elements of the state – civil society, the private sector, the market, and so on.

From the middle of the eighteenth century, the internal structure of (the governmental element of) the well-functioning state came to be understood in terms of Montesquieu’s tripartite institutional and functional ‘separation of powers’. Indeed, Nick Barber thinks that as a matter of constitutional theory, maintenance of functional separation of powers ‘to an extent’ and ‘at least in a thin sense’, is a defining feature of a state\(^\text{13}\). Despite the descriptive shortcomings of Montesquieu’s account of the English system of government, it captured in

\[^{13}\text{NW Barber, The Constitutional State (Oxford: Oxford University Press, 2010), 37.}\]
broad outline the (perhaps unanticipated) effects of the Glorious Revolution of the previous century. Since it was enunciated, it has provided basic language and concepts for analysing the internal structure of states and changes in those structures, which have been many and significant. In some systems, such as the US and Australia, it is understood to be an entrenched feature of constitutional arrangements.

The birth of modern national, state-based control regimes is normally dated to the late nineteenth and early twentieth centuries. In response to various major social, economic and political crises and upheavals, the governance resources and capacities of nation-states were dramatically increased. Such increases have been understood primarily as affecting the executive element of Montesquieu’s trio of governmental powers – hence the image of ‘the administrative state’ and its more particular modalities, the welfare, entrepreneurial and regulatory states. Perhaps the most tangible manifestations of the new order were the emergence and rapid growth of national career bureaucracies, and changes in the relationship between elected and appointed members of the executive branch (as a result, for instance, of the creation of ‘independent agencies’ in the US, beginning with the Interstate Commerce Commission in 1887).

Social, political and economic change affected not only the internal governmental structure of nation-states, but also their relations with each other. From the middle of the nineteenth century, ‘permanent’, treaty-based international organisations for the cooperative and coordinated performance of governmental functions, such as provision of cross-border postal services, regulation of cross-border railways, and international standard-setting, became an increasingly common feature of the world scene. Cooperation to promote international peace and security became a preoccupation after the First World War, pursued first through the League of Nations and, following World War II, the United Nations. The Second World War also provoked the creation of two major, regional, treaty-based
governance regimes in Europe: the Council of Europe’s European Convention on Human
Rights; and the six-nation European ‘Communities’ (the most prominent of which was the
European Coal and Steel Community), which have morphed, in 60 years, into the European
Union of 28 nation-states.

At the global level, the advent of the Cold War and the polarisation of states into two
competing blocs slowed the pace of inter-governmental cooperation and coordination.
However, since its end in the 1990s, so-called ‘international’ governance organisations have
proliferated\(^\text{14}\) as global flows of goods, services and intangibles have increased massively,
much assisted by the information and communications revolutions. Just as the industrial
revolution was a significant factor in the development of national systems of government and
national control regimes from the late nineteenth century onwards, so the information and
communications revolutions have been significant factors, from the late twentieth century
onwards, in the development of supranational and transnational systems of government and
their associated control regimes.

Many of these recently-created governance organisations are treaty-based, but an
increasing proportion are themselves creatures of other (treaty-based) international
governance organisations. The latter are sometimes referred to as international ‘agencies’ to
distinguish them from their treaty-based creators.\(^\text{15}\) Non-governmental (‘private’) entities
have also been created to meet specific needs for governance capacity at the global level in
the absence of a ‘world government’. There is a great deal of, and a large literature on,
‘private transnational regulation’, for instance.\(^\text{16}\) Use of the word ‘transnational’ recognises

\(^{14}\) According to Sabino Cassese, writing in 2011, there are approximately 8,000 such organisations: 'A Global
Due Process of Law? In G Anthony, J-B Auby, J Morison and T Zwart (eds), Values in Global Administrative

\(^{15}\) E Chiti and RA Wessel, 'The Emergence of International Agencies in the Global Administrative Space' in R
Collins and NG White, International Organizations and the Idea of Autonomy: Institutional Independence in the

\(^{16}\) See, eg, C Scott, F Cafaggi and L Senden, 'The Conceptual and Constitutional Challenge of Transnational
Private Regulation' (2011) 38 Journal of Law and Society 1; F Cafaggi, 'New Foundations of Private
Transnational Regulation' (2011) 38 Journal of Law and Society 20; ‘Enforcing Transnational Private
two related phenomena: on the one side, the appearance of non-treaty-based and private governance entities at the global level; and on the other, the increasing impact, within states, of the activities of such entities, and the recognition of individuals, corporations and other non-state entities as subjects of particular international legal regimes, such as international human rights and criminal law, and their increasing involvement in transnational governance. A characteristic feature of international organisations, agencies and private regulatory entities is that they enjoy a degree of autonomy from the community of nation-states, and it is primarily in that sense that they are ‘transnational’. Various organisations and agencies occupy different locations along the autonomy axis.

The term ‘supranational’ is used to describe a mode of governance of which the EU is the paradigm and most developed example. ‘Supranational’ tends to be applied to regional, as opposed to global, governance arrangements. Supranational and transnational arrangements (like federal arrangements at the national level) share the characteristic that they superimpose on an existing layer of government an additional layer which, like the existing layer, has some sort of direct, unmediated relationship with the governed (as opposed to the lower layer of government).

4. Development of the Argument

(a) Theorising Governance Beyond the State
The traditional picture of the relationship between national and international law is dualist. The subjects of international law are states, and states are conceptualised, by analogy with human beings living in the pre-Westphalian world, as juridical equals who can construct legal


18 Perhaps the ultimate expression of autonomy for non-state bodies is the capacity to make treaties with nation-states.
relations amongst themselves by exercising freedom of contract (ie by treaty-making). The normative underpinning of international law is *pacta sunt servanda*. States may also (be taken to have given) consent to norms that are not expressly stated in treaties (‘custom’, ‘general principles of law’, ‘*ius cogens*’). Because states are juridical equals, no one of them has authority (normative power) over any other except by the other’s consent. The voting rule amongst states is unanimity. Treaties have legal effect within states only by the free, positive action of the state. Disputes between states may be resolved by negotiation or voluntary submission to binding arbitration, but failing agreement, the only enforcement mechanism is individual self-help.

In theory, at least, the creation of treaty-based international governance organisations represents a significant modification of these arrangements. If an international organisation has institutional elements additional to a group of contracting member-states, and if the contracting states give those elements power to make norms, and agree to accept those norms and give them effect within their states, they have taken the first step away from self-government towards constructing an ‘external’ of government.\(^\text{19}\) In a world of self-government (as in HLA Hart’s ‘pre-legal’ world)\(^\text{20}\) there is no distinction between officials and non-officials, between those who make the norms that govern the society and those who are subject to them. The proliferation of treaty-based and non-treaty-based, public and private international organisations and agencies since the end of the Cold War can be understood as significantly accelerating the shift, which seems to have begun in the nineteenth century, from self-government to government. And just as states were constructed (as juridical equals) using categories from the pre-Westphalian world, so modern theorists and norm-entrepreneurs have sought to construct emerging, ‘post-Westphalian’ modes of governance


beyond the state using legal concepts and categories from systems of national governance that developed during the Westphalian period.

Two categories have dominated the literature: constitutional law and administrative law. In terms of my analytical framework, constitutionalists seek to interpret governance beyond the state as a system of government analogous to a national system in a state such as the UK or France or Canada. Those I shall (inelegantly) call ‘administrativists’, by contrast, interpret governance beyond the state by analogy with the executive-cum-bureaucratic element of such a national system. Concerning control of public power, constitutionalists typically start with ‘constitutional’ ideas such as democracy, separation of powers and, perhaps, rule of law. Administrativists, on the other hand, begin with the concept of a regime for controlling administrative power and, more particularly, the normative component of such a regime (‘administrative law’ in their terminology) as it has developed since the late nineteenth century, most notably in the US. The term ‘global administrative law’ has been coined to refer to this phenomenon at the transnational level.

Typically, the concern of both constitutionalists and administrativists is the legitimacy of governance and government. Constitutionalists look for legitimation in a constitution that

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23 For theoretical discussion of the rule of law at the international level see J Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 European Journal of International Law 315, the comments thereon and Waldron’s reply.


26 There is more on legitimacy in the last section of this paper.
embodies certain desirable structural features (including separation of powers) and promotes certain ‘values’ (such as ‘democracy’). Administrativists look to administrative law to discipline the exercise of one type of governmental power – administrative power – in the name of ‘values’ such as participation, transparency and reason-giving. In these terms, my aim, in Controlling Administrative Power was to understand the relationship between the ‘constitution’ and the ‘administrative law’ of a governance system, not the legitimacy of either. In this paper the focus is more widely on the relationship between the ‘constitution’ and the associated regime for controlling public power more generally, not just administrative power. On the other hand, my focus is less abstract than that of these literatures. Because of their concern with values and legitimation, both constitutionalists and administrativists tend to think abstractly in terms, for instance, of ‘democracy’ rather than versions of democracy, ‘separation of powers’ rather than local variants, ‘rule of law’ rather than various understandings of the rule of law. The basis of my methodology is analysis of the relationship between particular systems of government and particular control regimes. In terms of values, I try to explain why particular control regimes interpret similar abstract values in different ways by reference (in part) to the relationship between the particular regime and the system of government of which it is an element.

(b) Supranational Governance

The distinction between supranational governance and transnational governance is somewhat misleading. Both terms refer to the exercise of power over states that is more or less independent of the consent of those states. One way of thinking about the distinction, which is adequate for present purposes, is to identify supranational governance as regional and

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27 Democracy is typically understood in electoral terms. However, some theorists argue for a non-electoral understanding of democracy that brings constitutionalism closer to administrativism: eg T Macdonald and K Macdonald, ‘Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry’ (2006) 17 European Journal of International Law 89.

transnational governance as global. In this picture, supranational governance may be understood as sitting between a select group of states and organs of transnational governance. By far the most highly developed system of supra-national governance is the European Union (EU) or, more precisely, the European Community (EC) under the First Pillar of EU law (concerned predominantly with economic integration), not the Second and Third Pillars (concerned with matters such as defence and social policy) which, along with the governance arrangements of the Eurozone, are not considered in this paper.

(i) The EU system of government

The EU system of government is extremely complex and highly unstable. The root cause of both characteristics is the same: the EU is a treaty-based organisation dependent for its existence and continuance on the present and future consent of its members – the (now) 28 nation-states of the Union. These states are extremely diverse constitutionally, legally, governmentally, economically, socially, culturally and linguistically. This multi-faceted diversity add significantly to the difficulty of analysing and understanding the EU.

Amongst themselves and vis-a-vis the Union, the Member States retain their Westphalian sovereignty. All claim the right, for instance, to withdraw from membership of the EU without needing to ‘secede’. On the other hand, each has agreed to share its internal, domestic sovereignty with the Union. Debates about where Westphalian sovereignty ends and domestic sovereignty begins are ongoing and often acrimonious. Moreover, at least since the UK joined in 1973, the Member-States have chronically and significantly disagreed about

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29 Ironically, at the same time, external diffusion of (domestic) sovereignty has increased the power of (further concentrated power in) national executives by weakening the capacity of national legislatures to control policy-making, and empowering national governments in this respect through their strong participation rights in the European Council and the Council of Ministers. In the EU system, even more than in a mature national system of parliamentary government, national parliaments have been marginalised in the process of determining national policy. So, eg, under the Protocol on the Application of the Principles of Subsidiarity and Proportionality, Member-States Parliaments have the right to be consulted about the compliance of proposed EU acts with the principle of subsidiarity but not the principle of proportionality: P Craig, ‘Institutions, Power, and Institutional Balance’ in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford: Oxford University Press, 2011), 76-77.
the nature and purposes of the Union, producing what is called a ‘multi-speed’ Europe. So, for instance, only a proportion of the Member States belong to the currency union that establishes the euro as a transnational medium of exchange (the ‘Eurozone’). In order to cope with such disagreement, the original voting requirement amongst the Members of unanimity, which is a corollary of Westphalian sovereignty, has been abandoned in many areas of the Union’s operations in favour of ‘qualified majority voting’ (QMV). Under this system, certain ‘core members’ of the Union have more say than any of the rest. In other words, in the affairs of the Union the \textit{de facto} inequality of its members \textit{inter se} has been given \textit{de iure} force and effect.

The EU governmental system has been in a state of constant flux almost from the time of the formation of the first three Communities in the early 1950s. Since then, the constitutive treaties have been regularly amended and supplemented, and the membership has grown from 6 to 28, thus re-institutionalising some of the national tensions that, in the wake of the horrors of World War II, the organisation was originally conceived to manage. In the language of domestic constitutional law, the manifestation of this chronic instability and flux is an extremely ‘flexible constitution’,\footnote{By using this term I am not engaging in the debates between constitutionalists and administrativists about the nature of the EU. I use the word merely to refer to the normative framework of government and its associated control regime.} subject to ongoing renegotiation and change. In the EU, any and every constitutional settlement is provisional. In this respect, the EU resembles the UK, with the fundamentally important difference that the EU is significantly more politically unstable than the UK.

For present purposes, the most important thing to observe about the EU system of government is that its basic design (or so I would argue) is socio-political, not functional: power is divided not by type but amongst various socio-political constituencies.\footnote{Paul Craig proposes a related ‘republican’ analysis. In contrast to my essentially descriptive, interpretive agenda, however, his is normative: PP Craig, ‘Democracy and Rule-making Within the EC: An Empirical and Normative Assessment’ in P Craig and C Harlow, \textit{Lawmaking in the European Union} (London: Kluwer, 1998).}
the shift from a ‘balanced constitution’, framed around groups and interests to one framed around governance functions (‘separation of powers’), was arguably the great European constitutional achievement of the seventeenth and eighteenth centuries.\(^{32}\) The transition is neatly illustrated by Montesquieu’s reflections on the English system of government. Although he admired the system of separated powers instituted by the Glorious Revolution, he was equally enamoured of the balance this separation had struck between the three estates of the realm – royalty, the nobility and the ‘commons’.\(^{33}\) This, not separation of powers, was the focus of his ideological agenda, namely to strengthen the French nobility against France’s ‘absolutist’ monarchy.\(^{34}\) It just so happened that in England, the ‘balance’ he admired (and wanted for France) had been achieved by superimposing a new functional system of power-allocation on top of a pre-existing, socio-political institutional structure.

The three constituencies of the EU are (1) the Member States, (2) the Union and (3) the people (the body of EU citizens made up of all the citizens of the various Member States, who are entitled to vote in elections for the European Parliament). The three interests represented by these three institutionalised constituencies are, respectively (1) the ‘intergovernmental’, (2) the ‘supranational’ and (3) the ‘popular’ or ‘democratic’.\(^{35}\) The various

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\(^{32}\) Montesquieu's 'theory represented a fundamental advance over traditional Aristotelian understandings of mixed government': B Ackerman, ‘Good-bye Montesquieu’ in Rose-Ackerman and Lindseth (eds), Comparative Administrative Law, 128.

\(^{33}\) Another irony is that although Montesquieu is credited with the tripartite division of powers, he treated judicial power effectively as an aspect of executive power. In so doing, he failed to realise the significance of the Revolutionary realignment of the (common law) courts with Parliament and their progressive removal from monarchical control. This re-alignment was, in fact, far from clean. Its longer-term effect was to relegate the courts to an awkward space between government and civil society, torn in both directions at once. In other words, it marginalised the courts as governmental actors and, in an increasingly important sense, placed them outside government. This partly explains why separation of judicial power became the hallmark of the English system even as the separation between legislative and executive power gradually weakened with the development of responsible government and democratisation of the franchise. Adam Tomkins makes much of the pre-Revolutionary alignment of the courts with the monarchy in Public Law (Oxford: Oxford University Press, 2003), arguing that a bipartite, socio-political division of power between Crown and Parliament is key to understanding the modern English constitution.


EU institutions (the Council, the Commission, the Parliament and so on) are the vehicles through which the power of the socio—political interests is expressed and exercised. EU ‘Constitutional’ and ‘administrative’ law determine and regulate the functions of and interrelationships between the various institutions. A byzantine plethora of decisional procedures (including procedures for choosing the President and Members of the Commission and for legislating/rule-making) allocates power between these three constituencies and interests in myriad different ways in various different areas of Union activity and competence. Moreover, the balances struck have changed over time. For instance, the strength of the supranational interest in the legislative and policy-making processes waxes and wanes relative to that of the intergovernmental interest. Again, over the years, the role of the popular interest in law-making has been progressively strengthened and deepened as the involvement of the European Parliament has moved in a direction from ‘consultation’, through ‘cooperation’, to ‘co-decision’.

The competences of the EU under the First Pillar are primarily regulatory rather than redistributive or entrepreneurial. The predominant activity of the EU institutions is rule-making. They are relatively little involved in either ‘adjudication’ or exercising ‘discretion’ (non-adjudicatory ‘implementation’) in the US sense of these terms: both are mainly the province of the Member States (involving what is called ‘shared administration’).

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36 For a general account of the institutional development of the EU, see Craig, ‘Institutions, Power, and Institutional Balance’.
37 Both the inter-governmental and the popular interests are significantly weakened by internal division. As already noted, there are many disagreements amongst the Member States about the supranational interest. The popular interest is divided between the European ‘demos’ and the various ‘demoi’ of the Member States. At the European level, political ‘parties’ are not as cohesive as their national counterparts.
38 The main welfare schemes are the Common Agricultural Policy (CAP), the Regional Development Fund, the Cohesion Fund, the Social Fund and the Solidarity Fund. The EU has no taxing powers, being funded by Member-State contributions. Given that the combined population of the Member States is about 500 million, the EU budget is very small. This is partly because many supranational, governmental functions are ‘delegated’ to Member States.
39 This word is used here to refer to participation in the market as a producer.
distinctions between legislative, executive and bureaucratic power are of no formal significance in the EU context, nor is the distinction between primary, and secondary (and tertiary), legislation (at least in the sense that EU secondary (and tertiary) legislation is not ‘subordinate’ to primary legislation so much as supplementary of it). It is true that EU law distinguishes between ‘legislative’ and ‘non-legislative’ acts of the Union (and, within the latter category, between ‘direct’, ‘delegated’ and ‘implementing’ acts); but this distinction does not coincide with that drawn between legislative power and the other types of governmental power in the national context. Moreover, as with the distinctions between rule-making, adjudication and implementation under the US Administrative Procedure Act 1946 (APA), the technical significance of the distinction between legislative and non-legislative acts in EU law is procedural rather than substantive or formal. As a result, like the distinctions between rule-making, adjudication and implementation in the US system, the distinction in EU law between legislative and non-legislative acts (and that between delegated and implementing non-legislative acts) is difficult to draw formally or substantively.

What is the role of the European Court of Justice (ECJ) in this set-up? The Court’s ‘mission’, its website tells us, is ‘to ensure that the law is observed in the interpretation and application of the Treaties’. In carrying out this mission, the Court has played and continues to play various different parts in the EU system. First, particularly in the early years, the Court contributed pivotally to building the capacity of European institutions and the European system of government – in other words, in moulding the EU ‘constitution’. Most importantly, perhaps, it was the Court that forged a direct link between the European institutions and governmental system on the one side, and the citizens of Member States (as

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42 Craig, UK, EU and Global Administrative Law, 522-531.
43 For general discussion see A Stone Sweet, ‘The European Court of Justice’ in Craig and de Búrca, The Evolution of EU Law.
opposed to the Member States themselves) on the other by developing the doctrine of direct effect. It was also the Court that established the ‘supremacy’ of EU law over the laws of the Member States such that inconsistencies between EU law and the law of a Member State are to be resolved in favour of EU law. Moreover, the Court has exercised significant control over implementation of EU law by Member States, regulating the availability, nature and scope of domestic processes and mechanisms for challenging local implementation and remedying adverse outcomes. On the other hand, it has been much more reluctant to allow individuals to challenge acts of EU institutions directly, mainly because it considers the courts of Members States to be the proper forum for such litigation.

Secondly, the Court has assumed responsibility for maintaining and policing the allocations of power to the various socio-political interests within the EU under the constitutive treaties. In this respect, the Court performs a function in the system, analogous to that performed by the US Supreme Court, of providing governmental institutions with juridical weapons of self-defence against other power-holders who attempt to upset the socio-political balance by self-aggrandisement. Mainly at stake in such contests are rights of participation in decision-making ranging from the right to be consulted, through ‘cooperation’ to ‘co-decision’, the last bringing with it the right of veto. Whereas in the US system the contest is over participation in the exercise of particular types of governmental power, in the EU system it concerns the roles of particular constituencies and interests in EU decision-making processes. This difference affects the respective roles of the US Supreme Court and the ECJ in their systems. The US Court is itself the repository of one of the types of power in contest, thus putting it in the position of being self-policing. This helps to explain

45 ‘It was almost certainly never the intention of the Member States that national governments would be held responsible for breaches of EC law at the suit of individuals before national courts’: Harlow, Accountability in the European Union, 147. See generally M Dougan, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts’ in Craig and de Búrca, The Evolution of EU Law.

why the so-called ‘passive judicial virtues’ are so widely prized in US constitutional theory. By contrast, in the EU dispensation the Court has always understood itself as aligned with the supranational interest, as opposed to the inter-governmental interest or the popular interest. This explains why the ECJ has taken upon itself the responsibility to build the governmental capacity of the Union and why it has, over the years, attracted much criticism, especially from less integrationist Member States.

These two roles of the ECJ align it with the supranational interest. A third role, by contrast, aligns it with the popular interest. It has often been observed that the Court has constructed the relationship between EU institutions and EU citizens in terms of individual ‘rights’. This move may, perhaps, be understood in US terms: individual rights define and defend the boundary between, in the US case, government and non-government, state government and federal government; and, in the EU case, between the supranational interest and the popular interest. In a system in which the representative of the popular interest, the European Parliament, was originally very weak and in which the popular interest is torn between (dual) citizenship of a Member State and the Union, rights may be understood as giving a role and status in the system to individual citizens – ‘real people’ – unmediated through competing EU institutions representing the various aggregate interests: intergovernmental, supranational and popular.

In this picture, rights attach to individuals not by virtue of their humanity but of their citizenship of a Member State (or, perhaps, of the Union). Such rights are designed not so much to protect fundamental human interests against government as to regulate the relationship between the government and non-governmental sectors of society.

47 See, eg, Craig, UK, EU and Global Administrative Law, 375-7; Harlow and Rawlings, Process and Procedure in EU Administration, 87-91.
In terms of the analytical framework developed in *Controlling Administrative Power*, governmental power in the EU system of government is significantly diffused – ie divided and shared.\(^49\) However, the dimension of diffusion is not functional, as in many national systems of government (including the three that were compared in *Controlling Administrative Power*), but socio-political – as between various constituencies and their respective interests: the inter-governmental, the supranational and the popular. In this sense, diffusion of rights of consultation, cooperation and veto amongst EU institutions is more like vertical diffusion of power between the federal and sub-federal elements in a federation than akin to horizontal diffusion of power between various governmental institutions at either federal or sub-federal level.\(^50\) At the national level, it is precisely in the vertical dimension that the contest takes place between (geographically-defined) constituencies and interests rather than between repositories of different types of governmental power.

(ii) The EU control regime

As just noted, public power within the EU is relatively highly diffused amongst inter-governmental, supranational and popular constituencies.\(^51\) Within the analytical framework of *Controlling Administrative Power*, diffusion of power is associated with checks-and-balances as the characteristic mode of controlling power. This association can be seen clearly in the history and operation of the EU. As we have already noted, for many years, relations between

\(^{49}\) This is one of the major forces to which Daniel Kelemen attributes the judicialisation and legalisation of the EU political system that he describes in terms of ‘Eurolegalism’ (by analogy with the ‘adversarial legalism’ that RA Kagan attributes partly to diffusion of power in the US system in *Adversarial Legalism: The American Way of Law* (Cambridge, Mass: Harvard University Press, 2001): RD Kelemen, *Eurolegalism* (Cambridge, Mass: Harvard University Press, 2011).


\(^{51}\) And also within the inter-governmental and popular interests: see n 37 above. The supranational Commission is vertically fragmented along sectoral lines. Because the Commission’s decision-making style is ‘more consensual than majoritarian…it is vital for proposers of reform to gain common assent (sometimes through complicated trade-offs between unrelated issues), or at least to secure reluctant acquiescence’ amongst the various Directorates-General (DGs) of the Commission (of which there are 33): C Pollitt and G Bouckaert, *Public Management Reform: A Comparative Analysis: New Public Management, Governance, and the Neo-Weberian State*, 3rd edn (Oxford: Oxford University Press, 2011), 68-69.
the popular interest on the one hand, and the intergovernmental and supranational interests on
the other, have been dominated by the Parliament’s attempts to secure for itself more power
(ultimately veto power) in EU policy-making processes. A second manifestation of the
association between diffusion and checks-and-balances is the history (alluded to earlier) of
the unanimity and qualified-majority voting rules in the Council. The pathology of a system
in which power is highly diffused is inertia.52 As the membership of the EU has become
larger and more economically, politically and culturally diverse, unanimity has increasingly
become a dysfunctional voting rule, and has been replaced in more-and-more areas of
decision-making by QMV.53

Thirdly, the association between diffusion and checks-and-balances is obvious in the
role played by the ECJ as ringmaster in contests between different constituencies and
interests. In this respect, there is a notable tension between the Court’s intermediating
function and its self-identification as a supranational institution. In the former role, it must at
least give the appearance of impartiality as between the competing interests.54 By contrast, in
the latter role its function is to promote the supranational interest over the interests of the
Member States. In this respect, it is perhaps noteworthy that the Court has been reluctant to
become involved in disputes between the Union and Member States over the principle of
subsidiarity, which (prima facie) favours the national over the supranational interest.55

In its dispute-settlement role, the Court operates in two different modes: direct and
indirect. In the direct mode it entertains claims for alleged breaches of EU law between EU
institutions and Member States, and vice-versa; between EU institutions amongst themselves;

52 See, eg, Craig, UK, EU and Global Administrative Law, 358-60.
53 QMV is what Jason Koppell, writing about the transnational sphere, calls a ‘safety valve’: JGS Koppell,
World Rule: Accountability, Legitimacy, and the Design of Global Governance (Chicago: University of Chicago
Press, 2010).
54 For instance, by always speaking univocally as ‘the Court’.
55 Dashwood et al, Wyatt and Dashwood’s European Union Law, 117-119.
and, with considerable reluctance (in relation to EU regulatory activities at least) by individuals and corporations against EU institutions. In the indirect mode, the court entertains ‘references’ from courts of Member States, which bear prime responsibility for settling disputes between ‘citizens’ and EU institutions. Under this procedure, the Court answers questions of EU law, remitting the dispute to the national court, which has responsibility for applying the law as declared by the ECJ to the case before it.

It is the law regulating the establishment and operation of EU institutions, and their relations between themselves and with Member States, and claims against EU institutions and Member States, that is referred to as ‘EU administrative law’. The name is misleading because, as we have seen, the distinctions between different types of public power are of no formal significance in EU law. Regarding claims, the EU Treaties recognise four grounds of judicial review of exercises of power by EU institutions: (1) lack of competence, (2) infringement of an essential procedural requirement, (3) infringement of a treaty provision or of any rule of law relating to its application, and (4) misuse of powers, but say nothing more about them. In the words of Paul Craig, the first, third and fourth of these were relatively discrete grounds of judicial review, which limited the need for judicial creativity, but limited also their potential for the development of more wide-ranging principles of judicial review of the kind that existed in national legal systems… Infringement of the “Treaty or any rule of law relating to its application” was, however, more promising in this respect. It could provide a foundation for what became the general principles of law that fashioned EU judicial review, which were read into the Treaty by the ECJ, in particular during the 1970s.  

56 Craig, UK, EU and Global Administrative Law, 379-85, 469-77.
57 Craig, UK, EU and Global Administrative Law, 317.
The ECJ developed the treaty provisions by using them ‘as a vehicle for the application of more specific principles of good governance, such as equality’\(^{58}\) and anti-discrimination; and also by drawing eclectically on the administrative law of various Member States. For instance, French law provided inspiration if only because the treaty provisions were modelled on the jurisprudence of the *Conseil d’Etat*. The principle of proportionality was borrowed from German law, and English law has provided a source for principles of procedural fairness. Openness and transparency are often seen as the legacy of Scandinavian administrative law.

In *Controlling Administrative Power* I found considerable support for the hypothesis that similarities and differences between the norms (as well as the institutions) of control regimes in different legal systems can be explained in part by similarities and differences between systems of government analysed in terms of the distinction between concentration and diffusion of power and their associated modes of control – accountability and checks-and-balances respectively. This raises the question of whether the hypothesis holds good for similarities and differences between the control regimes of the EU on the one hand, and its Member States on the other. This is too large a question to answer fully here. The critical point to bear in mind in comparing the EU system of government with national systems (or so I would argue) is that the design principle of the former is socio-political rather than functional. For this reason, direct comparison between the EU and national systems will require caution.\(^{59}\) This is particularly true of comparison between the EU system and the

\(^{58}\) Craig, *UK, EU and Global Administrative Law*, 326.

\(^{59}\) For an arguable example of inadequate sensitivity to this point see Daniel Halberstam’s rich comparison of the US and EU systems in ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Dunoff and Trachtman (eds), *Ruling the World?*. Richard Stewart contrasts the US ‘contestatory’ model of regulatory governance with the EU ‘consensus-oriented’ model, arguably thereby failing to understand that the purpose of contestation in the US model is to cooperation and compromise, and to notice the contest of interests and constituencies in the EU regulatory process: RB Stewart, ‘Accountability and the Discontents of Globalisation: US and EU Models for Regulatory Governance’: [http://www.iilj.org/courses/documents/Stewart_Accountability9-20-06.pdf?origin=publication_detail](http://www.iilj.org/courses/documents/Stewart_Accountability9-20-06.pdf?origin=publication_detail). In contrast to Stewart, I would argue that contest and consensus are actually related in that the aim of creating competition
systems of Members States of the Union. The governmental systems of Union and its Member States are deeply and elaborately integrated, and study of their interaction (I would suggest) requires sensitivity to the distinction between a system of socio-political division of power and one in which, by contrast, power is divided functionally.

All I can do here is to make a few more-or-less connected suggestions for further analysis. First, in *Controlling Administrative Power* I argued that the existence of the office of ombudsman in both the English system and the Australian system and its absence from the US system can be explained partly in terms of the diffusion of power, both legislative and executive, between Congress and the President. The institution of ombudsman, I suggested, is more likely to be found in systems of government in which legislative and executive power are relatively highly concentrated than in systems where they are relatively highly diffused. Given that the EU system is one of relatively highly (albeit socio-politically) diffused power, the existence of the European Ombudsman presents a puzzle and an invitation to closer analysis of the EU system relative to the English system (and other national systems that contain the institution of ombudsman).

Secondly, in *Controlling Administrative Power* I argued that the much more intense focus of US administrative law, compared with English and Australian administrative law, on records and reasons, and its procedural interpretation of rationality, could be explained partly at least by different understandings of the nature of bureaucratic power and the relationship between executive and bureaucratic governmental institutions. Like US law, EU law by dividing and sharing power is to provide incentives for bargaining and compromise. In a system where power is concentrated, consensus between power-holders is unnecessary and undesirable.

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63 Cane, *Controlling Administrative Power*, ch 7.
embodies a general obligation to give reasons for all actions of EU institutions, and the concept of proportionality, which is central to judicial review in EU law, bears important similarities to the proceduralised concept of rationality (‘hard-look review’) found in US law. Since the 1990s, the General Court of the EU (formerly the Court of First Instance), in particular, has shown more willingness to engage in ‘high-intensity review’ of decisions of fact and exercises of discretion. We might speculate that similarities between US and EU law may be related to the relatively high degree of diffusion of power in both systems, even though the axis of division differs as between the two systems.

Thirdly, like administrative rule-making procedure in the US system, decision-making (including rule-making) procedure in the EU system is highly structured and elaborately regulated (although the EU system offers much less scope than the US system for participation by individuals and corporations in rule-making processes). By contrast, administrative rule-making in the English and Australian systems is subject to much less formal, external regulation. In Controlling Administrative Power I argue that this difference between US law on the one hand, and English and Australian law on the other, is partly explicable by reference to the relatively diffused nature of the US system of government, the dynamics of the relationship between Congress, the President and the bureaucracy in the US system and, more generally, the relationship between government and society in the US as compared with England and Australia. US scholars, in particular, have shown great comparative interest in EU rule-making procedures, and the relationship between EU and US procedures clearly provides rich opportunities for comparative study using the sort of

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65 Cane, Controlling Administrative Power, ch 8.
66 This interest is, no doubt, also sparked by the relative importance of regulation in both the US and the EU. See, eg, M Shapiro, ‘Codification of Administrative Law: The US and to the Union’ (1996) 2 European Law Journal 26; S Rose-Ackerman, S Egidy and J Fowkes, Due Process of Lawmaking: The United States, South Africa, Germany and the European Union (Cambridge: Cambridge University Press, 2015).
structural approach that I have outlined in this paper.\textsuperscript{67} British scholars, Carol Harlow and Richard Rawlings are of the view that ‘administrative procedures stand at the heart of the European project, grounding a substantial part of its legitimacy’.\textsuperscript{68}

One of the important aspects of public law and institutional design that traditional separation-of-powers analysis tends to suppress is the role of the bureaucracy and the nature of its interactions with the executive on the one hand, and the legislature on the other. For instance, whereas the US Congress plays the prime role in designing the bureaucracy and determining its relationship with the executive, in England and Australia this primary role is allocated to the executive. One of the ongoing concerns of the European Parliament has been the level of its involvement in selection of the Commission and the design of agencies. This would seem a topic ripe for comparative legal analysis.\textsuperscript{69}

Fourthly, in \textit{Controlling Administrative Power} I explore at some length the impact of changes in the structure and operation of government, in the name of ‘New Public Management’ (in England and Australia) and ‘Reinventing Government’ (in the US), on modes of controlling the exercise of administrative power.\textsuperscript{70} My general conclusion is that such changes have had no fundamental effect on control regimes. Analogous structural changes have occurred in the EU system in the shape of the creation of ‘agencies’\textsuperscript{71} and ‘networks’ designed to increase governmental capacity at the EU level. Once again,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} Harlow and Rawlings, \textit{Process and Procedure in EU Administration}, 8; and concerning rule-making in particular see 106-118.
\item \textsuperscript{70} Cane, \textit{Controlling Administrative Power}, ch 12.
\item \textsuperscript{71} Craig, \textit{UK, EU and Global Administrative Law}, 401-4, 532-545.
\end{itemize}
\end{footnotesize}
comparative study of the nature and impact of such changes at the EU level as compared with
the national level would, I suggest, help to broaden and deepen our understanding of the
nature, allocation and control of public power. Such understanding provides a firm
foundation for normative reflection on systems of government and control regimes, and is an
essential precondition for sound normative arguments about norm-diffusion, transfer and
transplantation. Efficacious prescription presupposes accurate diagnosis!

(c) Transnational Governance

Compared with the typical national systems and the supranational system of the EU, the
transnational sphere is characterised by a severe shortage of governmental and institutional
capacity. Participation by non-governmental actors in governance processes and activities
has, of course, a long history at the national level and has increased very considerably over
the past 40 years. One way of analysing such developments is in terms of the ‘hollowing out
of the state’. An alternative analysis, which puts particular emphasis on increasing
government regulation of non-government entities, sees the growth of ‘third-party
government’ as a technique for maintaining or even increasing governmental capacity while
giving the appearance that government is shrinking or, at least not growing.

It is probably true to say that non-governmental, private actors at the transnational
level are significantly more involved in norm-making than their counterparts at the national
or even the supranational level. One may speculate that this is because, nationally and
supranationally, such actors are recruited largely to supplement government’s policy-making
and enforcement capacity, whereas transnationally such actors are more likely to operate as

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72 See, eg, Pollitt and Bouckaert, Public Management Reform, 256-262. Carol Harlow, ‘Three Phases’ 463-4
locates EU ‘soft governance’ (NPM-like) reforms in a context of subsidiarity and pluralism, suggesting that they
operate within a model of socio-political diffusion. She promotes a concept of ‘networked accountability’
which sounds to me like a soft version of checks-and-balances. Both create what John Braithwaite calls
regulatory ‘circles’: J Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of
73 Re the EU see Börzel, ‘European Governance’.
alternatives or competitors to national and international governmental actors.\textsuperscript{74} The increasing involvement of non-governmental actors in transnational norm-making has led to a proliferation of ‘soft law’ addressed to national and supranational governments, but typically in the capacity of agents for enforcement of norms against their citizens rather than actors in their own right. Such proliferation of soft law with intended and actual ‘third-party effects’ challenges Kelsenian and Hartian understandings of the nature of law and legal systems developed in national contexts. In the national sphere, soft law tends to be conceptualised as norms addressed to ‘second-party’ governmental actors with no direct effect on third parties. This analysis needs to be reconsidered in contexts where there is a shortage of governmental capacity compared with that found in developed states.\textsuperscript{75}

(i) The transnational system of government

The transnational system of governance is at an early stage of its development. The appearance of a web of international organisations and agencies with a significant degree of autonomy from nation states is a recent development. Regulation provides the main focus of transnational governance. We might draw a parallel between its development and that of federal regulation in the US. For much of the nineteenth-century in America, although the federal government was involved in regulation,\textsuperscript{76} much more regulatory activity took place at state and local level.\textsuperscript{77} Many explanations have been given for the centralisation and federalisation of regulation from the late nineteenth century onwards.\textsuperscript{78} Whatever the causes, a similar centralising process occurred in England, starting somewhat earlier in the century, associated with technological, social and economic change. The development of transnational

\textsuperscript{74} ‘Governing without the state’: Börzel, ‘European Governance’.
\textsuperscript{75} See further n 110 below.
regulatory regimes may be understood, similarly, as a form of centralisation and a reaction to rapid and radical economic and technological change.

As already observed, the transnational system of governance is characterised by a severe shortage of governmental regulatory capacity. According to a common understanding of regulation, it has three elements: standard-setting, monitoring of non-compliance and enforcement of compliance. Multi-lateral treaty-making is a relatively difficult and complex mode of standard-setting, and mechanisms for monitoring and enforcement of compliance with treaty standards tend to be weak in many areas. The need for increased transnational regulatory capacity has been met partly by creation of treaty-based international organisations, and international agencies established under their auspices. So-called ‘network governance’– the establishment of informal regulatory ‘communities’ of governmental and non-governmental (civil society) organisations – is another important development. Private corporations provide a third, increasingly significant source of transnational regulatory capacity. Such organisations may be understood as involved in ‘governance’ to the extent that they enjoy and exercise more-or-less autonomy from the States (and their populations) whose activities they aim to regulate. Their existence and activities are generally ‘spontaneous’ and self-generated rather than the result of deliberate action by another party, such as a State.

Some of the standards set by such regulators have the force of international ‘law’; but (as already noted) a large proportion lack the ‘full force of law’, and are often referred to as ‘soft law’. As at the supranational level, transnational regulators rely heavily on States for monitoring and enforcement. However, given the general shortage of coercive capacity at the international level, non-coercive alternatives – such as market forces – play a crucial role in securing compliance with transnational hard and soft law.

79 The Kyoto Protocol provides a good example. Nuclear non-proliferation and human rights perhaps provide counter-examples.
For present purposes, perhaps the most pertinent lack of transnational governance capacity is in the area of external control – ‘judicial review’ – of the activity of regulatory organisations, agencies and entities. There is, in fact, a large number of international adjudicatory bodies, but they are almost exclusively involved in dispute settlement between States and, to a lesser extent, individuals and States. There are international bodies called ‘administrative tribunals’, but these deal only with employment disputes between international organisations and the international civil servants. The transnational regulatory regime that has the most well-established mechanisms for reviewing regulatory activity is the WTO; but even here, the ‘administrative law’ of the WTO is generated as a by-product of settling disputes between Members about interpretation of the WTO treaties as they affect Member States’ decision-making processes, and not as a result of direct review of WTO regulatory standards or conduct. National and supranational courts exercise a certain amount of control over transnational regulators, but such control is very rare.

The transnational regulatory system is characterised not only by high institutional and normative informality. It is also extremely diverse and fragmented. This is not to say that transnational regulatory power is highly diffused in the sense used in this paper. Diffusion involves the sharing of power over one and the same regulated activity to provide incentives for cooperation and compromise. Although there is a certain amount of spontaneous,

81 CF Amerasinghe, ‘International Administrative Tribunals’ in Romano, Alter and Shany, Oxford Handbook of International Adjudication.
83 For a constitutionalistic analysis of dispute-settlement by the Appellate Body (AB) of the WTO see D Cass, ‘The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 European Journal of International Law 39. For an administrativistic analysis see Stewart, Ratton and Badin, ‘The World Trade Organization’ (pointing out, inter alia, that the decision-making processes of the WTO’s own institutions are barely touched by the ‘administrative law’ principles that the AB imposes on Member-State decision-making processes). See also JE Alvarez, ‘What Are International Judges For? The Main Functions of International Adjudication’ in Romano, Alter and Shany, Oxford Handbook of International Adjudication, 170-176. T Zwart, ‘Would International Courts be Able to Fill the Accountability Gap at the Global Level?’ in Anthony et al (eds), Values on Global Administrative Law directly addresses the distinction between dispute-settlement and judicial review.
unplanned ‘regulatory competition’ and associated coordination at the transnational level (as at the supranational and national levels), fragmentation indicates division of regulatory power over various different activities between more-or-less independent entities. In cases where the various regulated activities interact, networks of regulatory entities involved in the various areas may develop or be created to promote coordination and cooperation. In the analytical framework of this paper, networked governance is better analysed as aggregating rather than concentrating power; or, as it is often put, as creating horizontal rather than vertical relationships between agents.

As already noted, the main activity of transnational regulators is standard-setting or, put another way, rule-making. This fact, alone, suggests that analysis of their internal structure in terms of a functional principle of institutional design is unlikely to be useful or even possible. Rather, we are likely to be able to understand such entities better in terms of a socio-political design principle. Even so, some transnational regulators – notably private corporations – are unlikely to be amenable to this form of analysis either. Like private and privatised regulation, and self-regulation, at the national level they raise meta-regulatory issues (who regulates the regulators?) that will not be considered in this paper.

At the transnational level, the interests typically at stake in regulation may be referred to as ‘the membership’, ‘the institutional’, ‘the regulated’ and ‘the popular’ interests respectively. The constituencies associated with these interests are, respectively, the members of the organisation, whether States, governmental agencies or NGOs; the organisation itself; the ultimate addressees of the standards set by the organisation; and the beneficiaries of regulation. In cases where transnational regulators rely on States for monitoring and enforcement of standards against their citizens, the direct addressees of transnational standards will be those States, and the monitoring and enforcement challenges for the regulator will relate to implementation of the standards by States against the ‘indirect’
addresses of those standards. In cases where ‘market’ mechanisms are relied on for enforcement, individuals and corporations may be the direct addressees of the standards.

In what, to my knowledge, is the most comprehensive and systematic study of the internal structure and dynamics of transnational regulatory organisations (covering 25 entities), Jonathan Koppell identifies two models of what he calls ‘global governmental organisations’ (GGOs): traditional and hybrid.84

*Traditional* GGOs feature...a representative body with all members participating in annual or biannual meetings. A subset of this group convenes more regularly in “intermediate bodies” that are more engaged in the day-to-day operations of the organisation, oftentimes including rule-making...The *traditional* GGO has [a]...familiar bureaucratic component...[and] tends to be centralized and functional...The *hybrid* GGO model is associated with specialized representation (i.e., entities join the GGO through intermediate bodies defined by their interests) or nonrepresentative arrangements (i.e., the organisation is governed by individuals who do not represent member nations, firms, or groups)...*Hybrid* GGOs often keep rule-making in the members’ hands through working groups or technical committees, giving the bureaucracy a facilitative role...members...retain a great deal of influence over the organisation, thus the functional bureaucracy of the *traditional* GGO is generally more influential [than that of the *hybrid* organization].85

Koppell also identifies two approaches to rulemaking, which he refers to as the ‘forum’ and ‘club’ approaches respectively. The former


85 Koppell, *World Rule*, 295-6 (original italics); see also ch 2.
is highly structured with binding formal requirements creating clear opportunities for members to influence the process...[it] is more permeable for non-members...as norms of transparency and accessibility seem to have been integrated in line with normative expectations applied to governmental organizations...[GGOs that adopt the club approach] are more likely to have closed membership...This makes a more informal rule-making process less threatening...[Traditional] GGOs are associated with forum rule-making but the hybrid GGO structure is not a strong predictor of rulemaking type.  

Koppell finds that ‘many of the most venerable and well-known international organizations, including the WHO, IAEA, ILO, UPU, and most governmental GGOs’ are traditional in structure and take a forum approach to rulemaking. Three of the ‘most influential and controversial’ of the 25 organizations studied, including the WTO, are hybrid, and adopt a club approach to rulemaking amongst a consensus-driven closed membership’. Amongst the total population of GGOs studied by Koppell, a majority adopt a forum approach to rulemaking and are roughly equally divided between traditional and hybrid structure.

For present purposes, at least three important points emerge from Koppell’s study. First, the executive/bureaucratic components of various international organisations play a more-or-less active, autonomous, ‘policy-making’ role depending on the degree of cohesion and identity of interest amongst the organisation’s members. In this latter regard, Koppell found that the organizations with diverse governmental membership were typically

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86 Koppell, World Rule, 297 (original italics); see also ch 5.
87 World Health Organization; International Atomic Energy Agency; International Labour Organization; Universal Postal Union.
88 Koppell, World Rule, 300-1.
89 Koppell, World Rule, 301.
characterised by what he calls structural ‘safety valves’ – such as ‘skewed representation on intermediate bodies’⁹¹ and voting rules requiring ‘consensus’ (as opposed to specific numbers or proportions of votes) that enable some members to exercise more effective power than others. In this way, *de facto* differences (in size, wealth and so on) between members can be given *de iure* effect. As we have seen, such mechanisms also feature in the EU system of government. They reflect a fundamental difference between the (formal) normative foundations of most national systems and those of organizations of nation-states, namely that the ‘rule-of-law’ is more demanding of equality before the law at the national level than at either the supranational or the transnational level. This, we may speculate, is because nation-states have at their disposal coercive resources, of a type lacking at the transnational level, that they can use to neutralize *de facto* power.

Secondly, a possible analytical proxy for the regulated and popular interests is the accessibility of a GGO’s processes to participation by non-member interest groups. Here, Koppell distinguishes between three degrees of accessibility that he calls (from least to most open) ‘corporatism’, ‘concertation’ and ‘pluralism’.

*[Concertation]…sees interested parties drawn into the organization, particularly through the rulemaking process. Commercial interests have an advantage in as much as they have superior resources and access at their disposal. And, most important, the GGO has a deep need to promulgate rules that are acceptable to concerned interests. Without their adherence, the organizations collapse. Conflict regarding this dynamic is increasingly common as socially oriented groups come to understand the importance of GGOs and seek greater influence.⁹²*
Koppell argues that concertation is a means by which GGOs, which operate as aggregators of the interests of their members, can weaken interest groups by internalising and thus controlling debates and disputes between them and the GGO’s members. Koppell also finds that pluralism is extremely rare in transnational regulatory processes. Given that corporatism and concertation dominate interactions between GGOs and interest groups, we may conclude that the regulated and popular interests at transnational level, like the popular interest in the EU system, are the least well-represented of the four interests in regulatory decision-making processes.

Thirdly, what can we say about the degree of concentration/diffusion of power at the transnational level? Based on Koppell’s research, we may conclude that transnational regulatory organisations are ranged at various points along the concentration/diffusion axis. This conclusion leads to the question of whether they are (correspondingly) arrayed along the accountability/checks-and-balances axis.

(ii) The transnational control regime

At the national level, typical organs of ‘accountability’ (in the particular sense I have given the term in this paper and elsewhere) are legislatures (in parliamentary systems), courts, tribunals, ombudsman, and other more-or-less institutionalised and formalised review and complaint mechanisms. As we have seen, at the transnational level there is a dearth of such organs, especially independent external bodies.93 For this reason alone, we might expect checks-and-balances to be the prime mode of control at this level, their relative strength in any particular system depending on the degree of diffusion of power in the system.

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Koppell argues that the various design features of GGOs ‘represent different ways to reconcile the competing imperatives of legitimacy and authority’. He finds that GGOs that have a ‘traditional’ decision-making structure and adopt the ‘forum’ approach to rule-making (including most governmental GGOs) ‘hew[] very closely to normative expectations imported from the domestic context’:

Representation on the basis of geography, with each member assigned an equal vote, is familiar and accepted as legitimate. There are safety valves built into the architecture to assuage concerns of more powerful nations that the organization might produce undesirable outcomes, and additional protection comes through the rulemaking process. Key actors, confident in their ability to waylay an undesirable rule, are willing to cede authority to the GGO.

GGOs that have a ‘hybrid’ decision-making structure and adopt the ‘club’ approach to rule-making ‘build authority at the expense of legitimacy….Membership is limited to nations (all three [GGOs in this category] are governmental) that are approved by existing members.’ They rely successfully on market forces to secure the compliance of the regulated with the rules they make. In other words, the regulated comply because they have no practical choice to do otherwise. By contrast, GGOs that adopt the ‘forum’ approach to rule-making and are accessible to non-members balance ‘responsiveness’ to the regulated with ‘responsibility’ to the members. Koppell argues that they do this because, unlike organisations in the hybrid/club group, they are dependent on national governments for enforcement and on the cooperation of the regulated to maximise voluntary compliance.

94 Koppell, World Rule, 302; also chs 2 and 8. See also Stewart, Ratton and Badin, ‘The World Trade Organization’, 580-583.
95 Koppell, World Rule, 302.
96 Koppell, World Rule, 303.
97 S Cassese, ‘A Global Due Process of Law?’ provides a systematic account of participation rights in transnational governance.
98 Koppell, World Rule, ch 6. For legally-focused discussion of enforcement of private regulation see references in n 16 above; and regarding enforcement of public regulation see R Stewart, ‘Enforcement of Transnational Public Regulation’ in Cafaggi (ed), Enforcement of Transnational Regulation.
We may conclude that as might have been expected, transnational regulatory bodies sit at various points along the checks-and-balances segment of the control spectrum. In this context (as at the supranational level), the checks and balances (to the extent they exist) arise not from exercise of various types of power by various participants in decision-making processes, but rather from involvement of various constituencies and interests in decision-making processes. The position on the spectrum occupied by any particular transnational organisation will be associated with the organisation’s internal structure, its approach to rule-making, its accessibility to interest groups and its dependence on its members for enforcement of the rules it makes.

Just as there is a dearth of accountability organs at the transnational level, there is also a lack of reviewing bodies that (like the ECJ) can mediate between the various constituencies and interests that compete for power over transnational regulation. There are no independent, external bodies that can impose on transnational organisations the sort of (diffused) balance between interests required for a strong system of checks-and-balances. The result may be a concentration of decision-making power in one or other of the competing interests – at this level, typically the membership interest or, even more narrowly, the interests of one or a small group of States. Braithwaite and Drahos conclude, on the basis of theoretical reflection and extensive empirical research, that the ‘US state has been by far the most influential actor in accomplishing the globalization of regulation’99 They also argue that,

[t]here are paradoxes…in the growth of global regulation. When national sovereignty and the sovereignty of elected parliaments are eroded, the sovereignty of ordinary citizens is sometimes enhanced…[However,] [a]ttempts by developing countries and NGOs to exercise influence by organising independently of the business-dominated epistemic communities have failed… NGO influence has been greatest when it has

captured the imagination of mass publics in powerful states. The most important instances have been the...labour, women’s and environment movements.100

5. Recapitulation of the Argument
In this paper, I have drawn a distinction between systems of government and control regimes and have conceptualised control regimes as components of systems of government. I have offered a framework for analysing systems of government and control regimes in terms of distinctions between concentration and diffusion as patterns of distribution of public power, and accountability and checks-and-balances as modes of control of public power. I have also drawn a distinction between functional and socio-political distributions of public power. Functional distributions allocate power by types: legislative, executive, bureaucratic and judicial. Socio-political distributions allocate public power amongst constituencies and interests. I have argued that the supranational system of government of the EU and transnational regulatory regimes are better understood as characterised by socio-political rather than functional distributions of power.

There is no necessary relationship between socio-political and functional distribution. In fact, systems of socio-political distribution typically manifest weak functional distribution. The EU system of government provides perhaps the best example of this phenomenon. Power is widely (but unstably) diffused in that system amongst three constituencies, each representing a distinct interest – the inter-governmental, the supranational and the popular. At the same time, none of these constituencies exercises a characteristic type of power. On the contrary, each shares in the exercise of various types of power. Similarly, at the transnational level power is distributed amongst four constituencies, each representing a particular interest – the membership, the organisational, regulated and popular, as I have called them.

100 Braithwaite and P Drahos, Global Business Regulation, 31.
In contrast to both supranational and the transnational systems of government, many national systems of government distribute power functionally, allocating characteristic types of governmental power to particular institutions. The degree of socio-political distribution of power tends to depend on whether the system is unitary or multi-level. In other words, while the socio-political principle of distribution may be important vertically, it tends to play a much lesser role horizontally. This is well illustrated by the US system in which power is highly diffused vertically and socio-politically amongst federal, state and local constituencies and interests, while at the same time being highly diffused horizontally and functionally amongst legislatures, executives, bureaucracies and judiciaries.

The analysis in this paper has revealed certain significant features of functional and socio-political distributions of power. First, in either case, the distribution in any particular system may sit at various points along the concentrated/diffused spectrum. So, for instance, power is relatively more diffused functionally in the US system than in the English and Australian systems. Power is relatively diffused socio-politically in the EU system and has become more diffused over the history of the Union. At the transnational level, the picture is mixed. In some sectors and organisations power is relatively concentrated; and in general, concentration favours the membership interest over the organizational, regulated and popular interests.

Secondly, by comparison with the national and even the supranational (EU) levels, the transnational level, which is characterised by a lack of ‘independent’ institutions that can control the exercise of public power. More generally, the transnational control regime is at best inchoate both institutionally and normatively. Strong, independent control mechanisms can contribute to avoidance of the pathologies of the various distributions of power, whether functional or socio-political – inertia in the case of diffusion, and hegemony in the case of concentration. By common agreement, the best contemporary instance of pathological
diffusion is the US system; and many of the causes of ‘American gridlock’\(^{101}\) are beyond the control of independent institutions, notably the US Supreme Court. Conversely, the dominance of the US in transnational regulatory affairs can, perhaps, be partly explained as an effect of the virtual absence of transnational institutions capable of securing and maintaining a balanced, socio-political distribution of power amongst the membership, organisational, regulated and popular interests.

The exploration undertaken in this paper (I would argue) has confirmed the analytical value of the distinctions between concentration and diffusion, and accountability and checks-and-balances. However, it has added a major supplement to earlier work by recognising that diffusion may be either functional or socio-political; but also that the more diffused a system is either functionally or socio-politically, the more its control regime will consist of checks-and-balances as opposed to accountability mechanisms.

6. Coda: Legitimacy and Control

In this paper I have begun a process of seeking explanations for similarities and differences between national, supranational and transnational control regimes in terms of characteristics of the systems of government in which they are respectively embedded. I offer such ‘structural’ explanations either as a complement to accounts that refer to values and value judgmnts about how public power ought to be controlled, or as themselves uncovering possible roots of such value judgments. It is true, of course, that systems of government, like control regimes, might also be explained, at least in part, by reference to values and value judgements, particularly about the relationships between the governors and the governed. In the legal literature, such explanations are more-or-less explicit in normative discussions of the ‘legitimacy’ of systems of government. In such accounts, legitimacy is typically

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understood in terms of some concept of ‘democracy’. In this paper, I have consciously bracketed normative issues of legitimacy. However, I will end by offering some speculative comments about the salience, to debates about legitimacy, of the sort of analysis I have undertaken in this paper. Acceptance, based at least implicitly on judgments of legitimacy, provides the essential social foundation of every stable and successful legal system and system of government. For that reason, no legal system or system of government can be adequately understood without identifying the sources of the acceptance on which it depends.

It is widely accepted that one of the explanations for the relatively high diffusion of power in the US system of government is a strong cultural preference for individualism and individual rights, producing a mistrust of government in general and of federal government in particular. Such mistrust is manifested, so the argument goes, in institutional designs that ‘weaken’ government in the sense that they make it harder for government to intervene in civil society and the lives of individual citizens and, correspondingly, harder to reverse such interventions. By contrast, it is often said that relatively high concentration of power in systems of government may be explained, in part at least, by a cultural preference for community solidarity and ‘strong’ government, in the sense that it is relatively easy for government to intervene in civil society and the lives of individual citizens; and, correspondingly, relatively easy to modify or reverse such interventions. Within this explanatory framework, checks-and-balances, which impose prospective constraints on government action, are the characteristic mode of controlling power in systems where power is relatively highly diffused. Correspondingly, accountability is the characteristic mode of controlling power in systems where it is relatively highly concentrated, because such control leaves government relatively free to exercise power, subject to retrospective checks when such power is exceeded, abused or misused.
In these terms, the EU is a particularly complex phenomenon. Amongst the Member States (reflecting, we may assume for the sake of argument, the cultural preferences of their populations) some are more committed than others to the European project and to strong European government. The less committed a Member State, the more one would expect it to favour weak government, diffusion of power, and checks-and-balances, at the European level. Conversely, the more committed a Member State, the more likely it would be to encourage or at least tolerate strong government, concentration of power, and control by accountability mechanisms, at the European level. However, such speculation is greatly complicated by the fact that the EU is an organisation of nation-states in a region with a very long history of more-or-less extreme nationalism. Moreover, in general it is probably true to say that the dominant cultural preference within European states is for strong government. Most European systems of government are, in significant respects, parliamentary, and parliamentarism tends to be associated with more rather than less concentration of power.

If we assume, for the sake of argument, that the systems of government of all the Member States of the EU lie more-or-less towards the concentrated end of the concentrated/diffused spectrum, and that the more concentrated a system of government the stronger that government will be, the issues of legitimacy arising out of the European project will be different for Member States that are more committed to the European project than for Member States that are less committed. We might also speculate that the more concentrated the system of government in any particular Member State, the less tolerant that Member State (and its population) will be of concentration of power and strong government at the European level. A ‘strong’ Member State (and its population), committed to the European project, may be expected to favour government at the European level that is as strong as possible consistently with maintenance of its own domestic strength. By contrast, a ‘strong’ Member State (and its population), ambivalent about the European project, may be expected to prefer
government at European level no stronger than necessary to promote those aspects of the project it favours.

In this light, it is easy to understand why the EU system of government is so complex and unstable. Complexity may be understood, in part, as an outworking of the various levels of commitment to the European project amongst Member States and the various degrees of commitment to strong European government. Instability, in turn, may be understood partly in terms of the shifting balance of power between more committed and less committed Member States. As a general proposition, we may speculate that in multi-level systems of government, the more diversity there is, in terms of attitudes to government generally and to government at the higher (‘more remote’) level(s) in particular, amongst the components of the system the less stable the upper level(s) of the system will be. If this is right, we may further speculate that national multi-level systems of government, such as the US and the Australian, are highly stable because their component polities (and their populations) are politically, socially, culturally and, to a lesser extent, economically, quite homogeneous, and have similar attitudes to government in general and federal government in particular. If this is correct, it may help to explain why the US and Australian constitutions have survived with only relatively few amendments for such long periods.

In the Anglo-US legal literature on the EU there is a high level of consensus that the EU suffers from a serious lack of legitimacy, and that part of the solution is to increase the control exercisable by governmental institutions at the Member State level (especially Parliaments as representative of their populations) over governance at the EU level. I would suggest that in the case of US commentators, this may be explained partly in terms of American cultural attitudes to government in general and federal government in particular. Given that the UK system of government sits quite close to the concentrated end of the concentrated/diffused spectrum, in the case of ‘Anglo’ commentators the best explanation of
this consensus is probably the relative lack of commitment of the UK (and its population) to the European project.

At the transnational level, it is widely agreed that significant progress towards a system based on the model of the modern ‘democratic’ state or even a supranational system of government such as the EU, is highly unlikely in the foreseeable future. As noted earlier, this has led some scholars to look, for improvements in legitimacy, to the development of independent, transnational control mechanisms. Unfortunately, agreement on the first point suggests that the prospects for the development of transnational institutions of control (courts, tribunals, ombudsmen, and so on) are slim, indeed. The chances that national institutions will fill the breach are unknown, but probably not good. This helps to explain why global administrative law entrepreneurs tend focus on control norms rather than institutions, and predominantly on procedural norms associated particularly with control of diffused power such as informational openness, accessibility and transparency of, and participation in, decision-making processes, and reason-giving. As an empirical matter, we may hypothesize that the degree to which such norms are elaborated and prized in any particular control regime tends to be directly proportional (or so I would argue) to the degree of diffusion of power in the system of government of which the control regime is a component.

In the absence of institutions of control, how might we expect such norms to become part of transnational control regimes? One possibility is incorporation in treaties. Apart from treaties, the other source of international hard law is custom (and, relatedly, general principles). However, development of customary hard international law is a slow and chancy


103 Many of these entrepreneurs are American. The classic discussion of transplantation of US administrative law to the global level is Stewart, ‘U.S. Administrative Law: A Model for Global Administrative Law?’. Other scholars see the project as one of post-colonial imperialism, likely to reinforce the power of the West: eg BS Chimni, ‘Co-option and Resistance: Two Faces of Global Administrative Law’ (2005) 37 New York University Journal of International Law and Politics 799.
process, and it seems unrealistic to expect customary ‘global administrative law’ to develop in the short term, let alone to assume mandatory status. This explains why proponents of global administrative law seek for it some source of legitimacy other than State consent.104

Another possibility may be that international dispute-settling bodies would develop principles of ‘global administrative law’ collaterally as a by-product of resolving disputes between states amongst themselves, and between states and other individuals and entities that can engage the jurisdiction of such bodies. Judicial decisions (along with scholarly writings) are recognised as a subsidiary source of international hard law. The problem here, I suspect, is to understand how such principles would acquire force against the regulator as opposed to the disputing regulated entities. As we have seen, direct judicial review of transnational rule-making is effectively non-existent.

Thirdly, some national courts and the supranational ECJ have been prepared, on the basis of ‘administrative law’ principles, to deny effect to regulatory decisions of international organisations and national agencies involved in monitoring and enforcing transnational regulatory standards. The problem here, I suspect, is how such principles can become part of international or transnational law, as opposed to the national law of the court’s State.

Perhaps the most likely route is voluntary adoption by transnational regulators.105 Koppell’s work suggests that regulators that depend on the cooperation of States, NGOs and the regulated for monitoring and enforcement have incentives to impose on themselves disciplines – of informational openness, transparency in decision-making processes, accessibility to non-member interests, and reason giving – that regulators who can rely on the invisible hand of the market for enforcement have less incentive to adopt. The hope might be

105 An exogenous shock or a scandal may provide a catalyst, as happened in the EU in 1999, when the Santer Commission resigned en masse: Harlow, ‘Three Phases’, 450-5.
that if enough transnational regulators voluntarily subject themselves to the disciplines of ‘global administrative law’, these rules and principles may attain the status of customary transnational law even though the relevant actors are not States.

Such voluntary standards are often dubbed ‘soft law’ – soft because they lack ‘the full force of (international) law’ in some sense. Soft law is a common feature of national, supranational and transnational control regimes, but especially at the transnational level. This is because of the dearth, at this level, of autonomous law-making, and coercive law-enforcing, bodies and mechanisms. The widespread phenomenon of transnational soft ‘law’ challenges Kelsenian and Hartian concepts of law that focus on national systems, and invites theorists to distinguish soft law from mere ‘international morality’ or ‘state practice’. One reaction to this invitation is to argue that the transnational legal system is more like national systems than such theories allow. Another is to offer an alternative account of law that can encompass soft, as well as hard, transnational and international norms. A third reaction is to argue that in the transnational sphere, power is less amenable to control by hard law than nationally, and that a greater role is and can be left to politics and ‘pragmatic accommodation’ between competing constituencies and interests. A fourth possible approach is to take a less ‘philosophical’ and more ‘sociological’ approach to legal theory that acknowledges that the term ‘law’ can mean, and that the social practices that constitute

106 In the EU context, see Harlow, ‘Three Phases’, 455-7.
law can be, different things at different times and in different places. Implicitly, this is the approach taken in this paper.

In this regard I observe, finally, that in the typical discussion of legitimacy, it is treated 'philosophically' as a normative standard of which there is one correct, or at least preferable, version. By contrast, in this section I have treated legitimacy ‘sociologically’ as a value judgment, the precise content of which may vary from one system of government and control regime to another. From a methodological perspective, I would argue that this approach usefully adds to normative accounts of and debates about legitimacy. The more we know about what legitimacy is and how it is generated, the better placed we will be to understand how it might be improved.

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110 Consider soft law, for instance. Soft law is theoretically more puzzling in some systems than in others. One feature of soft law is flexibility in the sense that it is provisional and revisable at the point of application. In the US (federal) system all the formal sources of law are inflexible – the Constitution, treaties and statutes. Courts can, of course, 'make common law' but, with very few exceptions, such common law is 'dependent', in the sense that it is made as a by-product of interpreting and applying one or other of the inflexible sources of law. Such dependent, judge-made law has no independent authority. In the English system, by contrast (and to a different extent in the Australian system), decisions of courts provide an independent source of law in the sense that courts can make law independently of interpreting and applying an inflexible source of law, such as a statute. Independent common law, like soft law, is flexible. Moreover, flexible norms are a fundamental part of the English constitution, lacking as it does a single 'higher law' document. The pervasiveness of flexible norms in the English system may help to explain why modern English courts have found it relatively easy to give legal force, different from that of hard law, to soft norms, and to understand conventions as an integral component of the Constitution despite their political rather than legal status. In this light, it is somewhat surprising that the status of soft law is seen as theoretically problematic by many international lawyers (for general discussion see SL Karlsson-Vinkhuysen, ‘Global Regulation through a Diversity of Norms: Comparing Hard and Soft Law’ in Levi-Faur (ed), Handbook on the Politics of Regulation). It is true that decisions of international courts are only a 'subsidiary' source of international law (along with scholarly writings). At the same time, although the prime sources of international law – treaties – are 'inflexible', the other main sources – custom and general principles – are flexible and, in the case of custom, based on the practices of subjects of the legal system, as are constitutional conventions. The technical position in EU law appears to be closer to that in US law than that in English law.