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### **European Solidarity and National Identity: An American Perspective**

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Der Beitrag geht auf einen Vortrag des Verfassers am 10. Mai 2012 bei der Europarechtkonferenz „In Vielfalt geeint – Wieviel europäische Solidarität? Wieviel nationale Identität?“ zurück, die am 10. und 11. Mai 2012 in Berlin stattgefunden hat. Der Tagungsband zur Konferenz wird demnächst unter gleichlautendem Titel im Mohr Siebeck Verlag erscheinen und den vorliegenden Beitrag enthalten.

## **European Solidarity and National Identity: An American Perspective**

Let me begin with a caveat. This contribution draws from my most recent book, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010). The views on integration expressed there (and here) undoubtedly reflect a certain American sensibility; nevertheless, they are neither peculiarly American nor are they ones that all American specialists on the EU would necessarily share (many do not).

That said, I believe the analytical framework set out in *Power and Legitimacy* may be particularly helpful in answering the questions posed by the subtitle of this conference: ‘How much European solidarity? How much national identity?’ In a nutshell, *Power and Legitimacy* argues that European integration is best understood, legally and historically, as a denationalized expression of ‘administrative governance’ as it evolved over the course of the twentieth century. By ‘administrative’, I do not mean that the EU is ‘technical’ or ‘non-political’—it is obviously deeply political, with a jurisdiction that stretches well beyond any merely technical regulatory domain. Rather, I mean that European governance is a manifestation of the diffusion and fragmentation of regulatory power *away* from the strongly-legitimated democratic and constitutional bodies of the nation-state.

The EU clearly has a great deal of functionally and legally autonomous regulatory power—what in Germany you might call *Hoheitsrechte*—whether legislative, executive, or judicial. These *Hoheitsrechte* stretch across a vast range of regulatory domains that often penetrate deeply into national legal orders. But what the EU lacks, in my view, is an autonomous legitimacy commensurate with this autonomous power. The major focus of *Power and Legitimacy* is precisely this incongruence between the EU’s extensive *Hoheitsrechte* and any plausible claim to autonomous democratic and constitutional legitimacy of its own, i.e., unmediated through the member states. The EU may well enjoy several different kinds of legitimacy, as I’ll point out in a moment. But crucially, it does not enjoy autonomous *democratic and constitutional legitimacy*—that is, the sense that it embodies or expresses the capacity of a new political community (‘Europe’) to rule itself in autonomously democratic and constitutional sense. This lack of this crucial form of autonomous legitimacy, as I hope to show in this talk, bears directly on what I consider to be the fundamentally ‘administrative’ character of European governance, as well as the questions of national identity and European solidarity that are at the heart of this conference.

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What kind of legitimacy does the EU possess? The first, clearly, is a *legal legitimacy* deriving from the treaties themselves as well as the culture of respect for the rule of law and fundamental rights they reflect. Under the treaties, the member states have legally pre-committed themselves to a whole range of policy goals. And in service of that legal pre-commitment, they have submitted themselves to the oversight of a set of supranational agents—most importantly the European Commission and the Court of Justice—to ensure that they live up to their supranational legal commitments.

This sort of ‘pre-commitment’ legitimacy has been the cornerstone of European integration since its inception. It has been supplemented by a second and third form of legitimacy: on the one hand, *technocratic legitimacy*, deriving from the expertise that supranational bodies in the EU should, in theory, bring to bear in exercising their *Hoheitsrechte*; and, on the other hand (and perhaps most importantly), a *legitimacy* deriving from the fact that the EU, like the European Communities before it, exists as *an agent of peaceful coexistence and cooperation* in a continent that has known far too much war and death in its history, notably in the first half of the twentieth century.

This is a good deal of autonomous legitimacy. But, as almost everyone agrees in Europe, it is not the sort of legitimacy that the historically ‘constituted’ bodies of the nation-state enjoy, with all their many flaws. These bodies generally enjoy a legitimacy as the privileged expression of the capacity of national political communities to rule themselves in a democratic and constitutional sense, subject of course to the demands of human rights. This is what we can call *democratic and constitutional legitimacy*, which, at this point in Europe’s history, remains the privileged (but not necessarily the exclusive) possession of constitutional bodies on the national level, whether legislative, executive, or judicial. There are exceptions of course, like Belgium, but these exceptions does not undermine the general claim that, for most of Europe, democratic and constitutional legitimacy still remains wedded to national institutions in important respects.

How best should we ‘come to terms’ with this disconnect between power and legitimacy in the process of European integration? What conceptual framework best captures this reality? In my view, it is a conceptual vocabulary drawn from the historical evolution of modern administrative governance, as I describe in detail in *Power and Legitimacy*. The EU’s legitimacy is best understood as that of a large scale, denationalized regulatory structure that has been constructed on the foundations of what I call the ‘postwar constitutional settlement of administrative governance’ that took hold in Europe in the decades after 1945.

The classic framework for understanding European integration in legal terms has operated along a dimension stretching from international organization (IO) at one end to some kind of (quasi-federal? multilevel? plural?) ‘constitutional’ polity at the other end. In my view this framework fails to capture the core tension in European integration, between autonomous supranational regulatory ‘power’, on the one hand, and the persistence of national democratic and constitutional ‘legitimacy’, on the other. In *Power and Legitimacy*, I argue that integration should be analyzed, both legally and historically, along a different dimension. This one stretches from the strongly-legitimated democratic and constitutional bodies on the national level (legislative, executive, and judicial) to the more weakly-legitimated, but functionally necessary, loci of regulatory power existing both within and beyond the state. These

loci of diffuse and fragmented regulatory power, I argue, include both IOs and the EU, along with domestic administrative bodies.

Understanding integration along this alternative dimension, I believe, will help us better understand why (at least as of this writing in May 2012) the expressions of ‘solidarity’ in European public law have not achieved the open-ended character that one finds expressed, either politically or legally, within a historically grounded national polity. Rather, despite the great advances in the integration process, inter-European expressions of solidarity have remained either limited (e.g., Articles 122 or 222 TFEU) or surprisingly grudging in the face of crisis (e.g., the EFSF/ESM). European solidarity has remained constrained in this way, I would argue, precisely because of the pervasive and, in some sense, incommensurable demand on the part of Europeans to preserve certain core democratic and constitutional prerogatives on the national level. This quest to preserve national democratic and constitutional legitimacy, I would maintain, derives in no small measure from the persistence of national identity as a core political-cultural reality in the EU, even as regulatory power migrates to supranational bodies.

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To demonstrate the point, allow me to do something not particularly innovative: Allow me to invoke Lincoln’s classic formulation from *The Gettysburg Address*—democracy is ‘government of the people, by the people, [and] for the people.’ (This portion of the contribution draws from my Spring 2012 Daimler Lecture at the American Academy in Berlin; see Lindseth 2012).

The effort to ‘democratize’ the EU has made significant achievements along the final two of Lincoln’s dimensions. ‘Government by the people’ refers to what academics call ‘input legitimacy’; that is, popular participation, most importantly via elections (the European Parliament clearly meets this criterion, as do other features of the EU, like the new citizens’ initiative in the Treaty of Lisbon). And, despite the many woes of the current crisis, my sense is the EU deserves significant credit in terms of ‘government for the people’, or what the German political scientist Fritz Scharpf has famously called ‘output legitimacy’ (Scharpf 1999). This can be measured not merely in additional points added to net GDP as a consequence of market integration (if not of the common currency), but also by such things as the removal of border controls; the broadly shared respect for human rights and the rule of law; as well as, perhaps most importantly, the overall sense of peaceful co-existence that integration has brought to this historically troubled continent. (Peace, after all, was the stated aim the Schuman Declaration in 1950.) Thus, despite its current economic travails, the EU has much to be proud of in terms of output legitimacy as well.

So what, then, is the problem with the EU’s democratic legitimacy? I would say the problem lies precisely in Lincoln’s threshold criterion: ‘government of the people’. This refers to the historical identity between a population and a set of governing institutions; that is, to the political-cultural perception that the institutions of government are genuinely the people’s own, which they have historically constituted for the purpose of self-government over time. Europeans may favor integration for all sorts of instrumental reasons, indeed even deeply emotional ones, but they do not yet experience it as their ‘own’ in the sense of democratic self-government.

This process of self-constitution is tied to the historical sense of the existence of a ‘people’ itself, to the sense that there exists a historically cohesive political community, shaped by broadly shared historical memories, in which it is legitimate for the majority to rule over the minority in a democratic sense (subject, of course, to the protection of human rights). When a political community gains this historically grounded sense of democratic self-consciousness, it has become a ‘demos’—in the sense of *demos-kratia*, or democracy.

In other words, democratic legitimacy in the deepest sense depends not merely on democracy’s inputs or outputs. Rather, it ultimately depends on whether there exists this crucial sense of historical identity between governing institutions and a ‘people’ self-conscious of itself as such. I would argue that this sense of demos-legitimacy is not merely essential to democracy but also to constitutionalism itself: it is on the basis of this demos-legitimacy that merely functional institutions of rule (those that might otherwise possess input and output legitimacy) are transformed into genuinely ‘constitutional’ ones, because they have come to be understood as the institutional expressions of the right of the demos to rule itself.

As is well known today, the EU is riddled with multiple ‘demoi’ across its various member states. This creates a great deal of democratic and constitutional legitimacy, unfortunately not for the EU, but for national constitutional bodies. (There are exceptions, of course, such as in Belgium, where the coherence of the national demos is deeply contested, thus undermining the legitimacy of national institutions.) But as is broadly recognized throughout Europe, the EU, as yet, lacks any single, overarching European demos. Without such demos-legitimacy—that is, without the sense that European institutions are genuinely the people’s own, rather than some distant bureaucratic construct—Europe will always have a great deal of difficulty overcoming its democratic deficit, no matter how much input and output legitimacy otherwise exists.

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Indeed, the very idea of a democratic deficit in the EU may itself reflect an elite misapprehension of the nature of the problem. As my book *Power and Legitimacy* describes in some detail, the problem in the EU is not a democratic deficit, in the sense of needing increased input legitimacy, but rather a democratic disconnect. European institutions are generally perceived as beyond the control of democratic and constitutional bodies in a historically recognizable sense, and this has a bearing on the scope of authority that Europeans believe supranational bodies can legitimately exercise.

Sympathetic European commentators, not to mention judges in Luxembourg, have struggled for decades to reconceive the nature of democracy and constitutionalism in the EU. They have come up with a whole range of ‘network-based’ theories of transnational or cosmopolitan democratic and constitutional legitimacy in order to dissociate these concepts from the nation-state and thus bring supranational governance within their conceptual ambit. And yet the idea of the EU as democratic and constitutional in its own right has remained deeply suspect, at least when

measured against the perceived legitimacy of institutions on the national level, with all their many flaws.

I should say that there are many benefits to this sense of supranational constitutionalism, notably in the protection of the individual against the excesses of public power, wherever located. But there are also significant risks, as the Eurozone crisis may be sadly demonstrating. Constitutional interpretations of integration wrongly bracket out the no-demos problem and thus effectively assume a degree of autonomous legitimacy in supranational governance that is fundamentally lacking (or at least is still fundamentally in dispute).

This leads us, then, to the key point: overestimating the legitimacy of European institutions is not merely an error of academic analysis; rather, it can lead to even more profound and dangerous errors of institutional or policy design, as the Eurozone crisis is demonstrating. As the Italian political theorist Stefano Bartolini presciently warned in his 2005 book *Restructuring Europe*, ‘the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions . . . may lead to the overestimating of the capacity of the EU to overcome major economic and security crises’ (Bartolini 2005, 175).

In terms of the topic of this conference, simply substitute word ‘solidarity’ for ‘capacity’ in this last quotation and you should begin to see the point: ‘the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions . . . may lead to the overestimating of the [requisite solidarity] of the [Eurozone] to overcome [a] major economic and security crisis’.

The events of the last two years suggest that the EMU was built on just such an overestimation of EU capacity tied to the limitations of European solidarity. The common currency was not just flawed economically (although economists never tire of pointing out that the countries of the Eurozone—and certainly Germany and Greece—do not constitute what they call an ‘optimal currency area’). Rather, it was also flawed constitutionally, in terms of its lack of a foundation in demos-legitimacy and therefore ultimately in the necessary degree of solidarity. Given the downside risks that the Eurozone crisis is now revealing, the adoption of the euro presupposed a degree of centralized political power and legitimacy—most importantly relating to shared taxing and borrowing authority (Eurobonds)—that the EU, or rather the Eurozone countries collectively, simply lack.

So why not just ‘more Europe?’ Why not just solve the problem by creating the long-sought political union to match the currency union? The answer is simply stated, even if its manifestations are complex: ‘no demos’, or rather, ‘no sense of European solidarity commensurate with the functional demands of the Eurozone crisis’. European elites cannot simply wave the political-cultural magic wand and create the necessary sense of democratic and constitutional self-consciousness across national borders that constructing such solidarity (and hence political union) would demand. To do so without the requisite demos-legitimacy—the sense of ‘government of the people’—would be the institutional equivalent of pouring good money after bad. At this point in Europe’s history, it cannot get from here to there without a major political mobilization in Europe.

The Eurozone crisis may yet force Europeans into a fundamental constitutional choice, which in Germany would come in the form of a referendum to shift real democratic and constitutional legitimacy to the EU, along with the requisite powers to address the crisis. No prior step in the integration process has really presented this choice—not the Treaty of Maastricht, not the failed Constitutional Treaty, not the Treaty of Lisbon, indeed not even the impending Fiscal Pact. Each of those treaties were built on a ‘pre-commitment’ theory of European integration, in which only the power to enforce prior member-state policy commitments migrated to the supranational level, but actual democratic and constitutional legitimacy for those commitments necessarily remained national. That traditional formula, reflective of the ultimately ‘administrative’ character of European integration, simply cannot work for debt-mutualization (Eurobonds), particularly if they entail joint-and-several liability (which is in fact the only reason to adopt them).

A general recourse to debt-mutualization in the EU, perhaps legitimized through increases in the power and authority of the European Parliament and the European Commission as a genuinely accountably European government, would require a genuine shift in core constitutional authority—taxing, spending, and borrowing power—beyond the confines of the nation-state. If this power does not go to the EU or Eurozone per se, then it will need to go to other member states, which will be authorized in some way to sell bonds for which the other member states will be jointly and severally liable (thus potentially adding to their overall debt exposures). Such a shift in power would go the essence of democratic self-government that all prior shifts of ‘pre-commitment’ authority did not. Europeans would no longer be talking about using supranational institutions to help the member states discipline themselves in order to meet legal obligations to which they have already agreed. Rather, Europeans would be talking about denationalizing taxing and spending power in a potentially open-ended way.

The functional demands of this crisis may yet force Europeans to attempt to mutualize some of its member states’ debts, at least if it wants the common currency to survive. But it is quite unclear how stable the resulting institutional settlement would be. One might call the resulting regime a ‘political union’ but its underlying socio-cultural and socio-political foundations would be tenuous. Does this mean there is no legitimacy for further integration? Of course not. But in contemplating further steps for integration, Europeans must always be honest with themselves about this key question: *legitimate for what?*

In a system where democratic and constitutional legitimacy remains fundamentally national, but significant normative power is increasingly supranationalized (heretofore on a ‘pre-commitment’ basis), it must be recognized that there are limits to European solidarity and hence integration. And in responding to the question of ‘legitimate for what?’, any move beyond ‘pre-commitment’ to an actual denationalization of core democratic and constitutional prerogatives like control over the national debt may yet prove an unacceptable answer to the question, truly a step too far. Whatever legitimacy the integration process currently has (legal, technocratic, even idealistic as an instrument of peace to a great extent), it almost certainly does not have enough to sustain such a fundamental transformation. Not merely in Germany, but also in other member states, these core prerogatives of self-government go to the democratic and constitutional identity of the nation-state in a historically recognizable sense. The

desire to maintain these prerogatives of self-government would necessarily prevent this sort of open-ended shift in fiscal sovereignty; hence the limits of European solidarity, tied to national democratic and constitutional identity.

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Despite the many efforts to create a version of constitutionalism beyond the state in the EU, the current crisis is a further manifestation of a still basic fact in Europe: ‘government of the people’ is still wedded to the nation-state in crucial respects. This means that identity, but also solidarity, remains significantly national. The process of European integration has undoubtedly chipped away at this socio-political and socio-cultural reality, something reflected in the solidarity provisions of the European treaties, in the EFSF and the future ESM, even in some of the citizenship decisions of the European Court of Justice. But this process of chipping away has heretofore remained marginal, certainly more so than many fervent advocates of integration might acknowledge. As a historian, I have a hard time predicting the future, although the Eurozone crisis may (via, for example, a referendum in Germany) force a fundamental choice in favor of moving beyond mere marginal to real and genuine intra-European solidarity. But looking at the immediate past, the Eurozone crisis seems to be reminding us, in its constant running up against the limitations of national identity and the solidarity constraints they impose, of an insight stressed by the French philosopher Ernest Renan in 1882, in his famous lecture ‘What is a Nation?’ (Renan 1996 [1882]). Despite all that has changed in the intervening century and a quarter, the current crisis is reminding us that, in extremis, national institutions are still looked upon, in terms of political culture, as a ‘guarantee of liberty’ in a collective, constitutional sense, something that ‘would be lost if [Europe] had only one law and only one master’.

### Sources Cited

- Bartolini, Stefano. 2005. *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*. Oxford: Oxford University Press.
- Lindseth, Peter L. 2012. “Of the People: Democracy, the Eurozone, and Lincoln’s Threshold Criterion.” *Berlin Journal* (22): 4–7.
- . 2010. *Power and Legitimacy: Reconciling Europe and the Nation-State*. Oxford; New York, N.Y.: Oxford University Press.
- Renan, Ernest. 1996. “What is a Nation?” In *Becoming National: A Reader*, eds. Geoff Eley and Ronald Grigor Suny. Oxford; New York: Oxford University Press.
- Scharpf, Fritz Wilhelm. 1999. *Governing in Europe: effective and democratic?* Oxford; New York: Oxford University Press.