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New Governance Fatigue? Administration and Democracy in the European Union

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NEW GOVERNANCE FATIGUE? ADMINISTRATION AND DEMOCRACY IN THE EUROPEAN UNION

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ABSTRACT

I first examine new governance as the compound of multilevel and network governance. I structure its main claims around the principles of partnership and flexibility, which serve to demote the notions of stateness, publicity, legalism, and hierarchy. I use the Open Method of Coordination as case study. I end this part with a critique on several counts: over-comprehensiveness, concealment of the administrative state, dubious democratic credentials, and suppression of political contestation. A second narrative of new governance focuses on democracy and administrative law. I explain the dynamics of administrative interweaving in the EU, exposing the interplay of difference and commonality and the resilience of stateness, publicity, legalism and hierarchy. I use experimentalist governance as the basis for a further research agenda that would incorporate a notion of the public in administrative terms based on the premise of politics as managing differentiation.

* SJD'04 (Harvard) (rosacomella@yahoo.com) This essay draws in part from my doctoral dissertation (*Multilevel governance and Democracy in the European Union: Citizenship, Political Community and the Regulatory Administrative State*) (Harvard Law School, 2004) I am deeply indebted to Gerald Frug, patient and gracious teacher. I have greatly benefited from my stay as Emile Noël Fellow at the Jean Monnet Centre for International and Regional Economic Law and Justice (NYU School of Law); I wish to thank the participants of the Hauser Global and Jean Monnet Joint Forum for helpful suggestions and in particular to Joseph Weiler for his careful reading of this paper.

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I. INTRODUCTION

This paper examines new governance in the European Union (EU), with a particular emphasis on its democratic implications. The term ‘new governance’ is meant to include descriptors of the legal and political system of the EU such as ‘multi-level governance’ and ‘network governance’, as well as proposals that, while sharing the new governance sensibility, are much more decisively democracy-centered –‘experimentalist governance’-. While none of these terms nor their combination under the label ‘new governance’ exhaust the prolific literature on all things novel in the EU, new governance gradually engulfs formerly autonomous discourses under an ever-more comprehensive paradigm. It permeates EU policy analysis with allegations of strong descriptive command as well as the normative thrust provided by its claims of applicability to changing circumstances and unforeseen regulatory problems. It provides a particular analytical lens through which to look the Union that would expose a non-traditional landscape of political and legal dynamics, actors, and decisionmaking processes.¹

The untangling of the new governance paradigm is structured as follows. In a first narrative of new governance (**Part II**), I describe this paradigm as it surfaced in the field of international relations and merged with comparative policy analysis. In this account, new governance discourse gathered tremendous impetus in the 1990’s by virtue of the convergence of: 1) a governance turn in EU integration studies, 2) a strong scholarly interest in the specific of regulatory/policymaking processes, and 3) the full assumption of the understanding of the Union as a polity. I show how multilevel governance and network governance have collapsed on each other and thus fostered a phenomenal expansion of the new governance paradigm, which now aims at offering a holistic panorama of policy dynamics in the Union. Still, the purpose of this

¹ Borrowing from Iris Young, I take the notion of paradigm to mean the “configuration of elements and practices which define an inquiry: metaphysical presuppositions, unquestioned terminology, characteristic questions, lines of reasoning, specific theories and their traditional scope and mode of application” (Iris Young, *Justice and the Politics of Difference* 16 (1990)) Paradigms both conform and are molded by individual input, epistemic communities, disciplinary demarcations, and the course of specific debates. They allow scholars to comprehend and build upon each other, while simultaneously acting as disciplinarians of investigation and critique. A specific vocabulary often lies at the core of paradigms; exposing, rejecting, or re-appropriating such vocabularies is the task of their internal critique.

part is not so much to trace a particular intellectual history, as it is to underline how the main tenets of new governance can be arranged under the principles of partnership and flexibility. These principles serve to demote the ideas of stateness, publicity, legalism, and hierarchy that are associated to old forms of governing. The principle of partnership structures the participation of and relationships amongst all actors involved, placing a strong emphasis on exposing the multiple links existent between government agencies and private actors, all of whom seemingly share a leveled playing field. The public nature of government power recedes, as rigid legalism and the coerciveness of the law are replaced by the language of managerialism and voluntary implementation. The principle of flexibility, in turn, refers to the preference of those regulatory tools that provide better adaptability to new or unforeseen circumstances, or foster regulatory innovation. A strong component of this notion is the understanding of politics as expert problem-solving through negotiation. I use the Open Method of Coordination to unpack and visualize these ideas in practice and create a platform for critique by setting some question marks on its purported embodiment of the notions of partnership and flexibility, as well as on its empirical strength. This part ends with a preliminary assessment of new governance that suggests a certain ‘fatigue’ of this paradigm on several counts: its over-comprehensiveness, its concealment of the administrative state, its dubious democratic credentials, and the possibility that it may lead to an over-reaching administrative state that suppresses legitimate political contestation. The more ground new governance claims, the more its discourse has to stretch to accommodate within it the multifaceted institutional arrangements and decisionmaking processes that populate the Union. In fact, new governance reveals a familiar picture, that of an administrative ‘state’ of sorts, yet one whose democratic implications are hastily disposed by alluding to the automatic legitimating value of enhanced transparency and formally participatory processes with a ‘deliberative’ component. Moreover, by its seeming perpetual embracement of actors across policy arenas, what surfaces is an overreaching administrative sphere that absorbs, normalizes and neutralizes political conflict. I then move on to introduce several additional analytical components. In a second narrative of new governance (**Part III**), I take on an administrative law perspective, as well as a stronger focus on the democratic dilemmas of new governance. First, I offer a panoramic view of the dynamics of administrative interweaving in the EU based on the premise that politics in the Union is about the management of differentiation. The analysis of several forms of administrative interweaving (policy networks,

comitology, and adjudicatory administrative law) serves to expose the continuous interplay of difference and commonality in the EU arena(s), suggest the possibility of reformulating the basal democratic inquiry as that of which actors should enter policymaking processes, and show the practical impossibility –and normative irrelevance- of establishing a clear-cut division between new and old governance (including the features of stateness, publicity, legalism and hierarchy). I then **(Part IV)** examine the main democratic tenets of ‘experimentalist’ governance/administration. Here, experimentalist governance reveals a remarkable potential: it is precisely the novel array of actors that convene in experimental regulatory mechanisms what can lead not only to upgrade the legitimacy of policymaking, but also to achieve more efficient regulatory solutions. In the final section of this essay, I propose further research in this direction by arguing that the key question of the notion of political community needs to be incorporated into the analysis. I end by tossing in a notion of the public in ‘administrative terms’ with a strong emphasis on the interplay of commonality and difference, a notion that may provide a yardstick for the re-examination of specific regulatory arrangements.

II. NEW GOVERNANCE (NARRATIVE 1)

1. INTRODUCING THE LANGUAGE OF GOVERNANCE

The EU eludes direct associations with the vocabulary of the state and its system of public law. With 27 Members and an unprecedented breadth of substantive powers, its political and legal system reveals a complex image, a “continuing paradoxical relationship between a non-state polity and a touch of stateness.”² On the one hand, the EU powers come ever closer to those of a traditional state and its institutional framework moves towards a system of separation of powers and procedural guarantees that echo those that are familiar in domestic scenes, feeding a conceptual path dependency that holds analysts back from stepping outside familiar categories. On the other hand, the centrality of states in the political game is seemingly downplayed by the dense interaction –economic, legal, political, strategic, and otherwise- that zigzags the Union. As the legal systems of the Union and its Member States intermesh ever more deeply, the boundaries between the domestic and the international seem to become more and more meaningless. In this setting, the notion of *governance* suits scenarios that do not fit neatly with standard notions of government, but where an appeal is made to the preservation of a certain order through the formulation and enforcement of rules, as is the case of private or international settings. One of several plausible (new) governance narratives centers on international relations. EU integration scholars –and international relations scholars generally- a central question has been that of the “fate of the nation-state”³, that is, whether European states would be able to adjust successfully to the forces of integration “without losing their autonomy and legitimacy.”⁴ The resort to governance, argue its proponents, has “opened up a new conceptual space for

² Jo Shaw and Antje Weiner, ‘The Paradox of the European Polity’ (in: Maria Green Cowles and Michael Smith (Eds.), *The State of the European Union (Vol. 5) Risks, Reform, Resistance, and Revival* 87 (2000))

³ Stanley Hoffmann, ‘Decline or Renewal? France Since the 1930’s’ (1960), reprinted at: Stanley Hoffmann, *The European Sisyphus. Essays on Europe 1964-1994*, 71 (1995) For selected key works in the field, see: James Der Derian (Ed.), *International Theory. Critical Investigations* (1995); Andrew Linklater (Ed.), *International Relations. Critical Concepts in Political Science* (5 Vols.) (2000)

⁴ William Wallace, *The Transformation of Western Europe* 1 (1990)

thinking about political order, which goes beyond anarchy and hierarchy”⁵, thus proving a convenient term to depart from the loaded language of the Nation-State by shifting the debate away from “zero-sum notions associated with discourses of sovereignty.”⁶ Governance –or *new* governance- discourse gathered tremendous impetus through the 1990’s with the convergence of several factors: 1) a ‘governance turn’ in EU integration studies, 2) a strong interest in the specifics of regulatory/policymaking processes, and 3) the full assumption –despite qualifying descriptors⁷- of the Union as a polity. As a result, if scholarly debates of the previous decades had been presented in terms of a mutually exclusive split between state-centrism (intergovernmentalism) and supranationalism, the decade of the 1990’s saw the acceptance by many of their juxtaposition; seemingly contradictory rationales coexist and encroach on each other.⁸ The question of integration per se has receded in favor of a wholesale assault on the traditional dilemmas of political theory and policy analysis. The convergence of multilevel and network governance has resulted a new governance paradigm that seeks to explain the nature of politics, the actors involved in policymaking, and the relationships amongst them.

⁵ Jürgen Neyer, ‘Discourse and Order in the EU: a Deliberative Approach to Multilevel Governance’ 41(4) JCMS 687, at 288 (2003)

⁶ Ben Rosamond, *Theories of European Integration* 17 (2000)

⁷ The term polity is often seasoned by qualifications that highlight the Union’s embryonic, unique, or weird nature: “dispersed polity” (Philippe Schmitter, *Imagining the Future of the Euro-polity with the Help of New Concepts*, in: Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streeck. *Governance in the European Union* 127 (1996)); “strange sort of polity” (Heidrun Abromeit, *Democracy in Europe. Legitimising Politics in a Non-State Polity* 3 (1998)); “contested polity” (Thomas Banchoff and Mitchell Smith, *Legitimacy and the European Union. The Contested Polity* (1999)); “part-formed polity” (Brigid Laffan, ‘Democracy and the European Union’ in: Laura Cram, Desmon Dinan, and Neill Nugent (Eds.), *Developments in the European Union* 330 (1999)); “sui generis political system” (Rainer Eising and Beate Kohler-Koch, ‘Network Governance in the European Union’, in: Beate Kohler-Koch and Reiner Eising (Eds.), *The Transformation of Governance in the European Union* 3 (1999)); “huge new political entity” (Max Haller, ‘Servants of Power or Providers of Indispensable Ideas? The Role of Scientists and the Use of Social Science in the Making of the European Union’ in: Max Haller (Ed.), *The Making of the European Union. Contributions of the Social Sciences* 3 (2001)); “mixed polity” (Richard Bellamy and Dario Castiglione, ‘The Uses of Democracy. Reflections on the European Democratic Deficit’, in: Erik Oddvar Eriksen and John Erik Fossum (Eds.), *Democracy in the European Union. Integration through deliberation?* 69(2000)); “composite polity” (Sidney Tarrow, ‘Contentious Politics in a Composite Polity’, in: Doug Imig and Sidney Tarrow (Eds.), *Contentious Europeans. protest and politics in an emerging polity* 233 (2001)); “single, though diverse, polity” (Liesbet Hooghe and Gary Marks, *Multilevel Governance and European Integration* 119 (2001)).

⁸ In sum, observes Pollack, international relations and comparative politics have come together to generate a ‘governance approach’ which “considers the EU as neither a traditional international organization *nor* as a domestic ‘political system’, but rather as a new and emerging system of ‘governance without government’.”(Mark A. Pollack, ‘Theorizing EU Policy-Making’ in: Helen Wallace, *William Wallace and Mark A. Pollack: Policy-making in the European Union* 36 (5th Ed.) (2005) (emphasis in the original))

2. NEW GOVERNANCE

2.1. Multilevel governance and network governance

While “[G]overnance means different things in different contexts..., the concept generally relates to group decisionmaking to address shared problems”⁹, or to the “ability to make collectively binding decisions.”¹⁰ In this expansive sense, governance includes governing: it covers the spectrum of instruments that ranges from self-regulation by private actors, to informal networking between public and private entities, to formal and publicized non-binding instruments, to standard form of ‘hard law’. Nevertheless, most often the resort to *new* governance discourse aims at disposing of those features characteristically associated with a traditional system of government: stateness, publicity, legalism, and hierarchy. Rigid legalism and the coerciveness of the law are replaced by the user-friendly language of managerialism and voluntary implementation, while distinction between the public and the private is yet again deconstructed through a strong emphasis in exposing and promoting the multiple links between government agencies and private actors who share a leveled playing field: “if government denotes the formal exercise of power by established institutions, governance denotes cooperative problem-solving by a changing and often uncertain cast.”¹¹ Incremental change takes place as much through landmark legal reforms as it does through everyday practices of policy formulation and implementation.¹² Hajer and Wagenaar describe this mood:

“One of the most striking developments in the analysis of politics and policy-making is the shift in vocabulary that has occurred over the last ten years. Terms such as ‘governance’, ‘institutional capacity’, ‘networks’, ‘complexity’, ‘trust’, ‘deliberation’ and ‘interdependence’ dominate the debate, while terms such as ‘the state’, ‘government’, ‘power’ and ‘authority’, ‘loyalty’, ‘sovereignty’, ‘participation’ and ‘interest groups’ have lost their grip on the analytical imagination”¹³

⁹ Daniel C. Esty, ‘Good Governance at the Supranational Scale: globalizing administrative law’, 115 (7) Yale L. J. 1490, at 1497 (2006)

¹⁰ Markus Jachtenfuchs, ‘The Governance Approach to European Integration’, 39(2) JCMS 245, at 246 (2001)

¹¹ Anne-Marie Slaughter, ‘The Real New World Order’, 76 Foreign Affairs (5) 184 (1997)

¹² For a distinction between formal and informal integration, see: William Wallace, *The Transformation of Western Europe* 54 (1990)

¹³ Maarten Hajer and Hendrik Wagenaar, *Deliberative Policy Analysis. Understanding Governance in the Network Society* 1 (2003)

This shift is the result of the combination of multilevel governance and network governance. The term ‘multilevel governance’ has become a popular token to describe the political system of the EU. Initially, multilevel governance was an explicit response to state-centered approaches. It set off to describe the dispersion of decisionmaking power across all territorial levels, rejecting the idea of unitary states hierarchically organized in a pyramidal fashion and claiming the existence of overlapping political arenas.¹⁴ These works had a precise goal within the European integration studies debates: that of promoting the view of a leveled playing field amongst the supranational institutions of the Union, the central governments of the Member States, and sub-national entities. The image of the EU space offered by these scholars was that of a European polity that “stretches beneath and above the central state.”¹⁵ Subsequently, the term has experienced a phenomenal expansion. Today, new governance, multilevel governance, network governance and combinations thereof are used as far-reaching descriptors of policymaking in the Union: from the cohesion policy to environmental policy, from the role of regions in the design of European policies to the implementation of Union law through the administrative apparatuses of the Member States, from the Open Method of Coordination to the interlocking of the constitutional systems of the Member States and the Union. While some studies are explicit in the use of the multilevel governance framework and others employ the term as little more than a metaphor, the fact is that this notion can be connected to a thriving range of works that focus on themes intrinsic to the consideration of the EU as a regulatory ‘state’ –theories of regulation, policy networks, interest intermediation, issue-specific regulatory schemes, the application of constitutional themes to the legal structure of the Union, and the assault of integration theory on classic themes in the study of democracy.

¹⁴ See: Liesbet Hooghe (ed.), *Cohesion Policy and European Integration: building multilevel governance* (1996); Gary Marks and Doug McAdam, ‘Social Movements and the Changing Structure of Political Opportunity in the European Union’, in: Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streeck, *Governance in the European Union* 102 (1996); Gary Marks, François Nielsen, Leonard Ray and Jane Salk, ‘Competencies, Cracks and Conflicts: Regional Mobilization in the European Union’, in: Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streeck, *Governance in the European Union* 41 (1996); Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streeck, *Governance in the European Union* 41 (1996); Stephen Ward and Richard Williams, ‘From Hierarchy to Networks? Sub-central Government and EU Urban Environment Policy’, 35(3) *JCMS* 439 (1997); Liesbet Hooghe and Gary Marks, *Multilevel Governance and European Integration* (2001).

¹⁵ Liesbet Hooghe and Gary Marks, *Multilevel Governance and European Integration* 78 (2001)

Multilevel governance aims now at offering a holistic panorama of policy dynamics in the Union, its “signature form of governance.”¹⁶

The reliance on policy networks as basal organizational nodes is the conceptual bite that has opened up this expansion and that many scholars use to differentiate *new* from *old* governance.¹⁷ The fusion of multilevel and network governance has set the foundations of a new governance paradigm that is meant to speak about the geography of political power, the nature of politics, the actors involved in policymaking, and the makeup of the relationships amongst them. The literature on policy networks has a long tradition in several fields, with particularly deep roots in international relations.¹⁸ The term itself has expanded to the point of referring broadly to the existence of “repeated relations of exchange contributing to outcomes in public policy”.¹⁹ Network governance is variously defined:

¹⁶ Anne-Marie Slaughter, *A New World Order* 11 (2004) Against this holistic approach, see: Philippe Schmitter, ‘Imagining the Future of the Euro-Polity with the Help of New Concepts’ (Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streeck, *Governance in the European Union* 145 (1996); Helen Wallace, ‘An institutional anatomy and five policy modes’ in: Helen Wallace, William Wallace and Mark Pollack, *Policy-Making in the European Union* 49-90 (5th ed.) (2005)

¹⁷ The “network concept appeared particularly well suited to grasp the essence of multilevel governance in the European Union... [T]he network metaphor became a fruitful heuristic device” that allowed for a much better understanding of the actual practices of policy-making.(Markus Jachtenfuchs, ‘The Governance Approach to European Integration’, 39(2) *JCMS* 245, at 254 (2001)) See also: Markus Jachtenfuchs, ‘Theoretical Perspectives on European Governance’, 1(2) *ELJ* 115 (1995)

¹⁸ Policy networks in this field trace back to the appearance of ‘interdependence’ and ‘trans-nationality’ in the 1970’s. Very roughly stated, these notions sought to reveal a world where relationships of economic and political cooperation took place amongst multiple actors, including states, supra and sub-national government entities, transnational interest groups, and the booming NGOs. In this scheme, loosely structured network-type organizations challenge long-standing ideas of the state as a monolithic and hierarchical institution. State bureaucracies are continuously penetrated by a multitude of stakeholders; the boundaries between state and civil society are constantly redrawn. Power persistently moves upward to the supranational, downward to the local, and outward to the transnational and the private. See: Robert Keohane and Joseph Nye (Eds.): *Transnational relations and world politics* (1972); Robert Keohane and Joseph Nye, *Transgovernmental Relations and International Organizations* XXVII *World Politics* (1) 39 (1974); Robert Keohane and Joseph Nye, *Power and interdependence: world politics in transition* (1997); Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (3rd ed., 2001) At the same time, the “State strikes back”, as scholars strive to account for these changes while putting forward re-conceived notions of the state that would hold for it, if not a comprehensive role, that of *primus inter pares* amongst political actors. (Anne-Marie Slaughter, ‘The Real New World Order’, 76 *Foreign Affairs* (No. 5) 183 (1997)) As a result, explains Wæver, the international system appeared as a “pluralist system” crowded by sub- and trans- state actors. Moreover, “states did not exist as such” but were “split up into networks of bureaucracies, interest groups and individuals.” In fact, the system as a whole was no a system proper, because its fragmentation made it necessary to “study specific issue areas, their distinctive distributions of power, maybe their specific forms of power, and then to work out separate theories about how issue linkages were made, how issues were politicized and de-politicized, and agendas set.” (Ole Wæver, ‘Figures of international thought: introducing persons instead of paradigms’, in: Iver Neumann and Ole Wæver (Eds.), *The future of International Relations. Masters in the making?* 13 (1997))(references omitted)

¹⁹ Alison Woodward, ‘Challenges for Democratic organization and Citizen Voice in the European Process’, in: Max Haller (Ed.), *The Making of the European Union. Contributions of the Social Sciences* 203 (2001)

“The core idea of ‘network governance’ is that political actors consider problem-solving the essence of politics and that the setting of policy-making is defined by the existence of highly organised social sub-systems. In such a setting, efficient and effective governing has to pay tribute to the specific rationalities of these sub-systems. The ‘state’ is vertically and horizontally segmented and its role has changed from authoritative allocation ‘from above’ to the role of an ‘activator’. Governing the EC involves bringing together the relevant state and societal actors and building issue-specific constituencies. Thus, in these patterns of interaction, state actors and a multitude of interest organisations are involved in multilateral negotiations about the allocation of functionally specific ‘values’. As a consequence, within the networks the level of political action ranges from the central EC-level to decentral sub-national levels in the member states. The dominant orientation of the involved actors is towards the upgrading of common interests in the pursuit of individual interests. Incorporated in this concept is the idea that interests are not given as it is assumed in ideal-type assumptions about pluralism and corporatism, but that they may evolve and get redefined in the process of negotiation between the participants of the network.”²⁰ (Eising and Kohler-Koch 1999, pp. 5-6)

For Börzel a network is

“a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests acknowledging that co-operation is the best way to achieve common goals.”²¹

Next, I unpack the new governance paradigm by arranging its tents around two principles: partnership and flexibility. As I explain, these principles are deployed at the service of the overarching goals of overcoming the notions of stateness, publicity, legalism and hierarchy that are associated with ‘old’ forms of governing.

2.2. The principles of partnership and flexibility as antidotes to stateness, publicity, legalism and hierarchy

Under the new governance lens, complexity seems to be the Union’s ubiquitous feature. The EU is seasoned with abundance of allusions to ambiguity, contingency, informality, diversity, asymmetry, syncretism, fragmentation, variable geometry or multiple speeds. I propose to arrange the tenets of this first narrative of new governance around two principles: partnership and flexibility. Their combination serves to dispose of –or, at least, decisively

²⁰ Rainer Eising and Beate Kohler-Koch, ‘Network Governance in the European Union’, in: Beate Kohler-Koch and Rainer Eising (Eds.), *The Transformation of governance in the European Union* 5-6 (1999)

²¹ Tanja Börzel, ‘Organizing Babylon. On the different conceptions of policy networks’, 76 *Public Administration* 253, 254 (1998)

reformulate- the *stateness, publicity, legalism, and hierarchy* that are attributed to old governance. Under the premises of the possibility of cooperation and the understanding of politics as problem-solving, the principle of *partnership* operates to structure the participation of and relationships amongst all actors involved, placing a strong emphasis in fostering collaborative links between the public and the private. This is in part due to the “diversity and sheer number of powerful actors who have to be mobilized, negotiated with, cajoled, or defeated in the process of power redistribution and institutional creation.”²² Multitude of actors are brought together in policy networks to “collaborate closely and continuously”²³, which implies a “sympathetic treatment of target groups.”²⁴ In connection with this, the public nature of government power recedes. The ‘state’ is vertically and horizontally segmented into a multiplicity of relatively autonomous networks.²⁵ Its “role has changed from authoritative allocation ‘from above’ to the role of an ‘activator’”²⁶ Authority unfolds revealing an intricate, decentralized, de-centered, uneven, and deeply contextualized map across territorial and functional levels. The principle of partnership “interlock[s] layers of government and organized social interests across multiple arenas in order to prepare and implement supranational policies.”²⁷ There are networks (domestic, supranational) and second generation networks of networks, hence giving an important push to the trans-national dimension. Actors, driven by most account by strategic impulses of self-interest, have incentives to form policy networks: expansion of their regulatory reach, consolidation of a good reputation, pooling of information, development of best practices, etc.²⁸ The repeated player rationale provides stability and aids in avoiding collective action problems.²⁹ The system sees itself as openly participatory, with

²² Liesbet Hooghe and Gary Marks, *Multilevel Governance and European Integration* 35 (2001)

²³ Liesbet Hooghe, ‘Reconciling EU-wide Policy and National Diversity’, in: Liesbet Hooghe (Ed.): *Cohesion policy and European Integration: Building multilevel governance 2* (1996)

²⁴ Beate Kohler-Koch, ‘The Evolution and Transformation of European Governance’, in: Beate Kohler-Koch and Rainer Eising (Eds.), *The Transformation of Governance in the European Union* 25 (1999)

²⁵ Anne-Marie Slaughter, *A New World Order* (2004)

²⁶ Rainer Eising and Beate Kohler-Koch, *Network Governance in the European Union*, in: Beate Kohler-Koch and Rainer Eising (Eds.), *The Transformation of Governance in the European Union* 5-6 (1999)

²⁷ Michael W. Bauer, ‘The EU ‘Partnership Principle’: Still a Sustainable Governance Device across Multiple Administrative Arenas?’ 80(4) *Public Administration* 769, at 770 (2002))

²⁸ Anne-Marie Slaughter, *A New World Order* 3 (2004)

²⁹ Alexander Ballmann, ‘Infranationalism and the Community Governing Process’ (Annex to: European Parliament (Directorate General for Research), *Certain Rectangular Problems of European Integration*, Project IV/95/02 (prepared under the direction of J.H.H. Weiler))

remarkable degrees of trust, equality, non-hierarchy, relative informality and a “real exchange of resources on the basis of equivalence and mutuality.”³⁰

The principle of partnership is interconnected with that of *flexibility*. Flexibility refers to the preference of those regulatory tools that provide better adaptability to new or unforeseen circumstances, or foster regulatory innovation. Traditional command-and-control regulatory tools are demoted in favor of self-regulation, negotiated regulation, and ‘soft law’ techniques such as non-binding coordination, or even purely informal exchanges of information. A strong steering factor of flexible regulatory approaches is the understanding of politics and policymaking as *expert problem-solving through negotiation*. Problem-solving places a strong emphasis on expertise, which acts as a major conditioning factor in the formation, entry conditions and internal dynamics of networks, as well as in the mode of evaluation and solution of regulatory problems. Scholars argue that the ability to provide specialized knowledge relevant to the policy issue becomes so crucial that it determines the array of actors –public and private– that enter decisionmaking process in a manner that breaks the bureaucratic malaise and infuses the system with an egalitarian component.³¹ Internal confrontation is often glossed over.³² Expertise facilitates the pooling knowledge and the promotion innovation and flexibility via techniques such as benchmarking or experimental pilot programs. The degree of internal cohesion will be a function of the common ground and vocabulary that is particular to the

³⁰ Alexander Ballmann, ‘Infranationalism and the Community Governing Process’ (Annex to: European Parliament (Directorate General for Research), *Certain rectangular problems of European integration*, Project IV/95/02 (prepared under the direction of J.H.H. Weiler)); Liesbet Hooghe, ‘Reconciling EU-wide Policy and National Diversity’, in: Hooghe, Liesbet (Ed), *Cohesion Policy and European Integration: Building Multilevel Governance* (1996); Thomas Risse-Kappen, ‘Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union’, 34 *JCMS* 53 (1996); Tanja Börzel, ‘Organizing Babylon. On the Different Conceptions of Policy Networks’, 76 *Public Administration* 253 (1998)

³¹ “The emphasis on information collection and provision, research and education help the creation of equal partnerships in policy-making, joint learning but also mutual control. The plurality of actors associated with the different instruments will result in a new complexity in territorial and public-private terms, counteracting old hierarchical chains of command” (Andrea Lenschow, ‘Transformation in European Environmental Governance’, in: Beate Kohler-Koch and Rainer Eising (Eds.), *The Transformation of Governance in the European Union* 48 (1999)) Some scholars point out that trust also commands the conditions for entry, which would hence depend more on the recommendation of existing members “than it does on position in a formal or constitutional system.” (Paul Burton, ‘Policy Networks and the Implementation of the European Union’s Structural Funds’, in: Stratos Konstadinidis (ed.), *A people’s Europe. Turning a concept into content* 234 (1999) Others emphasize the role of communicative action and trust as constitutive elements of interactions among such members. See: Thomas Risse-Kappen, ‘Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union’, 34 *JCMS* 53, 68-72 (1996))

³² ‘The EU ‘Partnership Principle’: Still a Sustainable Governance Device across Multiple Administrative Arenas?’ 80(4) *Public Administration* 769, at 770 (2002)

relevant area of expertise, as happens with epistemic communities generally.³³ Scholars differ as to the end product: cooperative expertise can be a vehicle that facilitates either regulatory convergence³⁴, a productive use of divergence³⁵, or the promotion of a mode of deliberation that can lead to efficient, effective and qualitatively better outcomes.³⁶ Hierarchy recedes, whether it refers to the nature of the relationships amongst all actors involved in policymaking, more generally to institutional organization, or to decisionmaking processes.³⁷ The EU is seen by many today as paradigmatic of a broad trend whereby ‘traditional’ regulatory states are shifting to “less authoritative, less interventionist, more participatory regulatory forms.”³⁸ Thus, while the notions of partnership and flexibility are conceptually independent, they often come together in the innovation package: an open attitude towards of actors and modes of interaction is linked to an equally open disposition to collaborative decisionmaking and the promotion of experimentation and flexibility in the adoption of regulatory tools. These components interact and are hoped to reinforce each other.

³³ An epistemic community is defined by Peter Haas as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (4) a common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.” (Peter Haas, ‘Epistemic communities and international policy coordination’, 46(1) *International Organization* 1, at 3 (1992) In the EU, Majone advocates the formation of transnational policy networks amongst those institutions that pursue similar objectives and face comparable problems, networks that should be found on the basis of comparable operational capabilities, mutual trust and a leveled degree of professional specialization. (Giandomenico Majone, *Regulating Europe* 265-283 (1996))

³⁴ Renaud Dehousse, *Regulation by Networks in the European Community: the Role of European Agencies*, 4 (2) *Journal of Public Policy* 246, at 254 (1997)

³⁵ Christian Joerges, ‘The Law’s Problems with the Governance of the European Market’, in: Christian Joerges and Renaud Dehousse (eds.), *Good Governance in Europe’s Integrated Market* 3 (2002)

³⁶ Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Policy Analysis: the Constitutionalisation of Comitology’, 3(3) *ELJ* 273 (1997); Jürgen Neyer, ‘Discourse and Order in the EU: a Deliberative Approach to Multilevel Governance’ 41(4) *JCMS* 687 (2003)

³⁷ Alexander Ballmann, ‘Infrationalism and the Community Governing Process’ (Annex to: European Parliament (Directorate General for Research), *Certain rectangular problems of European integration*, Project IV/95/02 (prepared under the direction of J.H.H. Weiler)); Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Policy Analysis: the Constitutionalisation of Comitology’, 3(3) *ELJ* 273 (1997), 3(3) *ELJ* 273 (1997)

³⁸ Christoph Knill and Andrea Lenschow, ‘Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation’, *EIoP* Vol. 7(1) (2003) p. 1

3. TEST CASE: THE OPEN METHOD OF COORDINATION

Branded as the development in European integration that has aroused greatest interest and controversy in recent years, the Open Method of Coordination (OMC) has become a preferred target of study for analysts of new governance approaches in the EU.³⁹ It is seen as a perfect combination of partnership and flexibility in the deployment of novel ways to solve common problems. The OMC serves the purposes of this paper by virtue of its suitability for forging a landscape of de facto regulatory power in the EU –an illustration of the need to adopt an expansive definition of administrative law-, its empirical significance, and the attention it receives by new governance scholars. If a look at this method turns out at odds with new governance, it becomes possible to speak of empirical ‘fatigue’ of this paradigm.

The OMC can be broadly defined as a technique for the coordination at the EU level of Member States policies over which primary competence resides and remains in the hands of the national legal systems, and where the reach of the EU institutions can, in principle, go no further than mere ‘coordination’ of what is done primarily at the national (and internal parts thereof) level. The OMC is specifically designed for the management of difference –in interests, actors, political goals and regulatory cultures- across the EU space. It serves, argue De Búrca and Zeitlin, as a “template” for the policy formulation in “complex, sensitive areas where diversity among the Member States precludes harmonization, but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as at the European level.”⁴⁰ Notably, the OMC is a mode of ‘uploading’ to the EU arena the formulation of collective goals in previously autonomous areas of intervention.⁴¹

The OMC was named as such at the Lisbon European Council of March 2000, although practices of coordination predate Lisbon. From its initial coverage of the fields of employment and macro-economic indicators, it has expanded to pensions and social exclusion, research and

³⁹ Jonathan Zeitlin, ‘The Open Method of Coordination in Question’, in: Jonathan Zeitlin and Philippe Pochet (Eds.) with Lars Magnusson, *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies* 19 (2005)

⁴⁰ Grainne de Búrca and Jonathan Zeitlin, ‘Constitutionalising the Open Method of Coordination: What should the Convention Propose?’ CEPS Policy Brief No. 31 (March 2003), p.2

⁴¹ Susana Borrás and Kerstin Jacobsson, ‘The Open Method of Coordination and New Governance Patterns in the EU’, 11(2) *Journal of European Public Policy* 185, 190, 197 (2004)

development, information society, education, or some aspects of environmental protection.⁴² The European Council launched the so-called ‘Lisbon strategy’ that set a 2010 strategic goal for the Union to become “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁴³ The Lisbon strategy original basic deal has been described as that of making “labor markets more flexible, stimulate innovation, encourage more people to become entrepreneurs, spend more on research and development and complete the single market.”⁴⁴ With the aim of setting up a “comprehensive, interdependent and self-reinforcing series of reforms”⁴⁵, existing mechanisms policy mechanisms were to be complemented with a ‘new’ method:

“Implementation of the strategic goal will be facilitated by applying a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:

- . fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- . establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- . translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- . periodic monitoring, evaluation and peer review organized as mutual learning processes.”⁴⁶

The OMC, in short, is an essentially procedural vessel that implies the fixing of goals in the form of guidelines, indicators, benchmarks and timetables at the EU level, which then the Member States translate into specific policies. Member States “agree to voluntarily cooperate ... and make use of best practice from other Member States, which could be customized to suit their

⁴² Yet, the Treaty Constitution has avoided a direct reference and definition of this method: “Art 15. 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies. [] Specific provisions shall apply to those Member States whose currency is the euro. 2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. 3. The Union may take initiatives to ensure coordination of Member States' social policies.” (Treaty Establishing a Constitution for Europe (2004/C 310/01) (OJ C310 Vol. 47, 16 December 2004) For an argument in favor of the inclusion of a generic provision defining the OMC in the Constitution, see De Búrca and Zeitin’s brief submitted to the European Convention (Grainne de Búrca and Jonathan Zeitlin, ‘Constitutionalising the Open Method of Coordination: What should the Convention Propose?’ (CEPS Policy Brief No. 31 (March 2003))

⁴³ Lisbon European Council, 23 and 24 March 2000. *Presidency Conclusions*, Conclusion 5.

⁴⁴ Alasdair Murray and Aurore Wanlin, *The Lisbon Scorecard V. Can Europe Compete?* (Centre for European Reform, 2005)

⁴⁵ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 8 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁴⁶ Lisbon European Council, 23 and 24 March 2000. *Presidency Conclusions*, Conclusion 37

particular national circumstances”, assigning to the Commission tasks of coordination, facilitation and monitoring by making information available and publicized across the board, thus pushing for benchmarking and peer pressure.⁴⁷ The system operates on the basis of periodic monitoring and peer review.⁴⁸ The Commission understands it as a form of ‘voluntary cooperation’ amongst the Member States that enhances transparency and efficiency.⁴⁹

The OMC is seen by its supporters as a fitting combination of partnership and flexibility as antidotes to stateness, publicity, legalism, and hierarchy. A definitive abandonment of old forms of hierarchical intervention, it promotes joint problem-solving, cross-jurisdictional community-building, participation of ‘outsiders’, multilevel integration, power-sharing, a leveled playing field, diversity, decentralization, deliberation, reversibility, and experimentation.⁵⁰ If notions such as joint problem-solving, participation, power-sharing or cross-jurisdictional community building would be incarnations of the principle of partnership, features such as experimentation, reversibility or deliberation (which allows the shaping of preferences during the decisionmaking process) would respond to the thrust of flexibility. But it is the debated ‘soft law’ nature of the method what would constitute a trademark of flexibility, as it seemingly allows the Member States wider discretion margins than any other decisionmaking process yet to be seen in the EU.⁵¹

The OMC has been praised for its democratic credentials. The argument has been put in various forms. Often, the soft law nature of the method does the trick, as it ‘increases(s) the social basis of legitimacy of the EU by allowing stakeholders to participate in the policy process

⁴⁷ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p.9 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁴⁸ Lisbon European Council, 23 and 24 March 2000. *Presidency Conclusions*, Conclusion 37

⁴⁹ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p.9 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁵⁰ Christoph Knill and Andrea Lenschow, ‘Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation’, *EIoP* Vol. 7 (2003) No.1; Sabrina Regent, ‘The Open Method of Coordination: a New Form of Governance?’ 9(2) *ELJ* 190 (2003); Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, and Hugo Zsolt the Sousa, ‘The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an Effective Multilevel Strategy’ 2-3 (Notre Europe, policy paper No. 12, March 2005); David M Trubek, Patrick Cotrell, and Mark Nance, “‘Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity”, Jean Monnet Working Paper 02/05, pp. 6-7 (2005)

⁵¹ Pertti Ahonen, ‘Soft Governance, Agile Union?’ European Institute of Public Administration working paper 01PAH (2001); Susana Borrás and Kerstin Jacobsson, ‘The open method of coordination and new governance patterns in the EU’, 11(2) *Journal of European Public Policy* 185, 190, 197 (2004); David M Trubek, Patrick Cotrell, and Mark Nance, “‘Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity”, Jean Monnet Working Paper 02/05, pp. 6-7 (2005)

and thereby facilitating knowledge diffusion and engendering a feeling of enfranchisement and investment in the system.”⁵² In other instances, the emphasis is in the mechanism of peer review, a source of accountability in the face of the failure of the traditional principal-agent model.⁵³ Overall, scholars take the OMC as a promising venue for a more democratic and efficient Union, because: 1) it is more participatory by “open(ing) up new mechanisms of ‘voice’ and political involvement” if compared to the traditional Community Method or to representative democracy generally, 2) the compound of transparency, access to documentation, open-endedness with regard to participants and regularization of the peer review system provide better accountability and 3) it fosters deliberation through its heavy reliance in collective learning at all stages of design and implementation.⁵⁴ This would lead to some form of “cognitive convergence”⁵⁵ in the shape of epistemic communities, which would, in turn, foster true transnational policy learning by “promot[ing] transformative processes of norm diffusion, persuasion and learning” and, in the end, better regulatory solutions.⁵⁶

But, does the OMC work? Some scholars point out the existence of a “widespread recognition” of the “usefulness, efficiency, and flexibility” of the OMC.⁵⁷ Yet, the well-known 2004 ‘Kok Report’, while insisting in the sanitary nature of naming, shaming and faming, came to admit that it has “fallen short of expectations”: its implementation often leads to the creation of cumbersome procedures and scarce outside participation.⁵⁸ Part of the problem may be the very difficulty of measuring whether, given the discretion left to the Member States, one particular initiative taken through the OMC has been implemented at all and, if such is the case, how to measure such implementation. Member States might be tempted to address the easiest targets first in order to show progress, might feel queasy about shaming their peers, or may have

⁵² David M Trubek, Patrick Cotrell, and Mark Nance, ““Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity’, Jean Monnet Working Paper 02/05, p. 5 (2005)

⁵³ Charles F Sabel and William H Simon ‘Accountability without Sovereignty’ in: Gráinne de Búrca and Joanne Scott (Eds.), *Law and New Governance in the EU and the US* (2006)

⁵⁴ Susana Borrás and Kerstin Jacobsson, ‘The Open Method of Coordination and New Governance patterns in the EU’, 11(2) *Journal of European Public Policy* 185, 195-200 (2004)

⁵⁵ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, and Hugo Zsolt the Sousa, ‘The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multilevel strategy’ 11 (Notre Europe, policy paper No. 12, March 2005)

⁵⁶ David M Trubek, Patrick Cotrell and Mark Nance, ““Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity’, Jean Monnet Working Paper 02/05, p. 17 (2005)

⁵⁷ Grainne de Búrca & Jonathan Zetlin, ‘Constitutionalising the Open Method of Coordination: What should the Convention Propose?’ (CEPS Policy Brief No. 31 (March 2003), p. 2

⁵⁸ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 42 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

incentives for window-dressing in their reports.⁵⁹ Moreover, success itself has to be defined when speaking of a process that starts with non-binding agreements. Indicators frequently used, such as domestic legal transposition rates or administrative reform, mean nothing per se, since they are entirely contingent on the empirical scenario at which each Member State was prior to transposition. In other words, legal transposition might be almost immaterial if the Member State was already in good shape with regard to that specific target, or it may be entirely irrelevant if not followed by effective implementation. While empirical studies are still in much need, it has been pointed out that the structural features of the method place Member States under pressure to converge.⁶⁰ The European Council has admitted to slow translation into specific domestic measures, poor channels for the exchange of information and best practices, and weak monitoring mechanisms.⁶¹ Chalmers and Lodge list several problems: peer-group pressure and benchmarking in some areas are unable to actually induce substantive policy changes, constant issuance of new benchmarks and targets overload the reporting duties of the Member States and diminish their ability to concentrate on individual initiatives, doubts with regard to whether the selection of European standards and national targets have in fact been made after a careful exploration of all available alternatives, the fallacy of the belief that “cross-national benchmarking opens up national self-referential policy-making” in view of the fact that many national action plans simply reformulate well established policies, the poorness of cross-national evaluation of policy alternatives, or the disappointing participatory component given that, so far, only well established social actors seem to have had access and input.⁶²

A couple more considerations are of order. The image of the OMC as a ‘soft-law’ mechanism corresponds to a fragmentary view of the regulatory landscape of the EU and conceals its true nature. Should a Member State actually abide by the standards agreed upon, domestic implementation will normally run the usual, binding, formal legal mechanisms that

⁵⁹ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt de Sousa, ‘The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an Effective Multilevel Strategy’ (Notre Europe, policy paper No. 12, March 2005)

⁶⁰ See: Caroline de la Porte, ‘Is the Open Method of Coordination Appropriate for Organizing Activities at European Level in Sensitive Policy Areas?’ 8(1) ELJ 38 (2002)

⁶¹ Brussels European Council 25 and 26 March 2004, *Presidency Conclusions*, Conclusion 10 (POLGEN 20 CONCL 1(9048/04)

⁶² Damian Chalmers & Martin Lodge, ‘The Open Method of Co-ordination and the European Welfare State’, CARR Discussion Paper; pp. 14-19, 16 (2003)

(<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 30 August 2006)

govern administrative regulation. Only a holistic view of policymaking in the EU offers an accurate understanding of how the line of command progresses and descends to furnish what at the bottom are perfectly binding legal mandates. Another reflection concerns the supposedly direct connection between enhanced participation, deliberation and democracy that weighs in favor of the OMC. It is clear that, absent substantive standards for the evaluation of participation itself, the presence of more actors or the compilation of more information does not necessarily lead to any form of participatory or deliberative democracy, let alone substantively better policy outcomes. Participants may deploy dominance strategies, unduly delay the process, or overload the docket with redundant, unverified or irrelevant information. These are common problems in the fabric of any regulatory state. “Is it not the case that deliberation describes a form of interaction which is largely restricted to expert communities with low political salience, which is immediately trumped by bargaining whenever ‘real’ concerns with significant cost implications are involved?”⁶³

4. NEW GOVERNANCE FATIGUE? A PRELIMINARY ASSESSMENT

New – or multilevel network governance- appears before us with the glamour of its technical language and the seductiveness of its optimism. It portrays itself as comprehensive in virtue of its broad applicability, inherent adaptability to changing circumstances or emergent regulatory problems, and the normative thrust supported by its claims of procedural and outcome superiority. It tempts both the modernist and the postmodernist through its embracement of

⁶³ Jürgen Neyer, ‘Discourse and Order in the EU: a Deliberative Approach to Multilevel Governance’ 41(4) *JCMS* 687, at 690 (2003) For Neyer, the answer resides in an ‘institution-based’ deliberation constrained by the elements of participation, publicity and legalization, where actors are required to state their positions and “different points of view can be made subject to institutional treatment before they are implemented in national political actions.” The basic idea is the following: “[I]nstitution-based deliberation depends neither on the existence of historically established and collectively shared ethical concerns (community), nor merely on the condition that actors genuinely believe that their claims are in accordance with a collective norm (honesty), but is very much compatible with the strategic disposition of actors, i.e. the motivation of political actions by self-minded interests. Participation, publicity, and legalization are the institutional cornerstones of deliberative governance. Participation connects the plurality of society with an otherwise sterile mode of policy-making. Publicity forces actors to abstain from bargaining and to modify their proposals so that they can be publicly justified as promoting collective well-being. Legalization is a necessary instrument to structure the discourse and provide normative criteria against which preferences can be assessed. It formalizes interaction, reduces problems of free-riding, settles disputes about the inadequacy of individual action and provides (dis)incentives for (non)compliance.” (Jürgen Neyer: ‘Discourse and Order in the EU: a Deliberative Approach to Multilevel Governance’ 41(4) *JCMS* 687, at 690, 696 (2003))

rationality within fragmentation, completeness within multiplicity, stability within fluidity, and autonomy within interdependence. It is sufficiently sophisticated to know that boundaries (between the public and the private, the domestic and the international, amongst actors, etc.) are blurry and dynamic, that power is dispersed, that political arenas are multiple and interconnected. It promotes a shift in the level of analysis from high politics amongst formal institutional actors to day-to-day policymaking. It speaks simultaneously of the relentless pursuit of self-interest and the frequent possibility of collaboration and trust. It draws complicated power games with the happy prospect that it all works out to the efficient achievement of regulatory goals and the enhancement of social learning. The emphasis on governance and the corresponding rejection of government reinforces the notions of private initiative, voluntary cooperation, non-coercive implementation. It offers an unassumingly egalitarian face through the conscientious inclusiveness and leveling of all actors. States ease their grip on the fate of policies as they disaggregate into policy networks. Other actors, public and private find their way upwards and side-ways, become politically visible.

This is a familiar picture to administrative lawyers. We are presented with a map of actors, political arenas, and policy-making processes with an emphasis on their numerical entity and diversity. The panoramic of power stresses the existence of disaggregation, a certain overlapping of competences, shared decisionmaking authority, strong links with private interest groups, variable patterns of political control in different policy areas, and an overall diffusiveness of authority. The relationships amongst actors are defined by interdependence, relative informality, frequent interactions, commitment to cooperation, a formally leveled playing field, and a strong valuation of arguments that invoke expertise. The system is presented as dynamic, yet stable, because institutions, highly organized sub-systems (networks), greatly specialized decisionmaking processes, and the complex and unique constellation of actors that needs to converge for decisions to be made, all act simultaneously as influential constrainers and activators of behavior. Because the essence of politics is simply problem-solving, the state retreats from its heavy-handedness and appears permeable to all interests, accessible by all instances. This is no more than the administrative state, yet one whose organization and decisionmaking dynamics fit several models of regulation, and whose democratic credentials are too slim for comfort. This first narrative of new governance seems to brush off the democratic question through some reference to the automatic legitimating value of enhanced participation

and the assurance of accountability through process transparency. (Is agency capture avoided? Can new governance overcome the fallacy of the equation of enhanced participation and democracy?)

Some of the difficulties encountered by the new governance paradigm might in fact be related to two factors that pull in opposite directions. On the one hand, new governance reveals an ambition of comprehensiveness beyond particular regulatory areas or decisionmaking arrangements. The more ground it claims, the more it has to stretch to accommodate within it the multifaceted institutional arrangements and decisionmaking procedures that populate the Union. Inevitably, the language is vague and the guidance to interpret specific situations and set them against other possible conceptual frameworks scarce. The model cannot be proven wrong by virtue of the amplitude and malleability of its terms, but it cannot be proved right either. The very multifarious nature of the Union that new governance rightly exposes shows its resilience by fighting new governance itself. On the other hand, new governance might unjustifiably restrain itself due to its aversion towards the notions of government and administration. It finds itself not only facing the challenges of proposing a new way of thinking about a problem, but also constrained by that newness mode in the strategic choice of regulatory solutions. Thus, new governance suffers from a double blind: the insufficiencies of a model yet to be perfected, and the unwillingness to resort to conceptions that can be identified with old paradigms of the regulatory state. In connection with this, new governance presents itself immersed in the private, from where it takes examples on which to model regulatory techniques and articulate the nature of the relationships amongst actors in decisionmaking processes. Yet, I would argue that the end product of this reliance in the private is, somewhat counter-intuitively, an overreaching administration. By this seemingly perpetual embracement of actors, trans-jurisdictionally and across pre-existing (if dynamic) boundaries between the public and the private, what surfaces is an administrative sphere that absorbs, normalizes, institutionalizes and, ultimately, disciplines conflict. Political conflict, the processes of opinion and will-formation that take place in more or less autonomous enclaves are critical to a healthy democracy. One should ask if it is possible or, more importantly, desirable, to eliminate the adversarial nature of the relationships between governments (administrative agencies in this case) and their counterparts.

With these considerations in mind, I next introduce several additional analytical components. First, I down shift the level of analysis to that of administrative law. I argue that

administrative law discourse needs to become more decisively democratic. From this perspective, I trace a panoramic view of the geography of interwoven bureaucracies in the EU with the twin goals of examining the multilevel component of governance from a perspective more firmly rooted in the specifics of daily institutional dynamics amongst administrative agencies across the EU space, and formulating the basal democracy inquiry as one of which actors should enter policymaking processes. I will turn to experimentalist governance, a strand of legal analysis that is firmly seated on the regulatory arena and that places a strong emphasis on the democratic implications of novel modes of regulating. In the final part of this paper, I will argue that new/experimentalist governance needs to be further pushed in a democratizing track. For this purpose, I will toss out a notion of the ‘public in administrative terms’, a normative yardstick for a research agenda centered in the democratic implications of new governance.

III. NEW GOVERNANCE (NARRATIVE 2): DEMOCRACY AND THE ADMINISTRATIVE ‘STATE’. A LANDSCAPE OF ADMINISTRATIVE POWER IN THE EU

1. ADMINISTRATION AND DEMOCRACY IN THE EU: MANAGING DIFFERENCE

We all live immersed in administrative ‘states’. The administrative/regulatory environments of today are fuzzy and dynamic compounds of numerous actors and processes, somehow stabilized by the (imperfect) certainty attached to the law. The mundane and grave occurrences of our lives are both constrained and facilitated by such legal and institutional frameworks. Administrative law reaches beyond the formal body of rules that demarcate agency powers, their decisionmaking processes and the mechanisms of control and review of final decisions. It encompasses also informal action, both that which is preparatory of formal decisions and that which is developed for the purpose of building the agency’s expertise or fact-gathering activities, informative to the public, experimental of novel regulatory approaches, promotional of certain conducts, etc. To a considerable extent, political struggles, the very practice of democracy, emerge, consolidate, and dissolve through the channels of will-formation and decisionmaking provided by the regulatory state, either promoted by or in response to formal and informal administrative action, but always in reference to a particular regulatory setting. Yet, most administrative law discourse either holds that democratic theory proper has no place within its confines, or assumes that there is a shared understanding of democracy within the province of liberalism-cum-pluralism that provides a baseline for regulatory intervention.⁶⁴ I nevertheless argue that a meeting –if partial- of democracy and administration is normatively desirable and empirically feasible. Given the exceptional reach of the administrative state in our lives, there is a strong case for its democratization. Democracy should not be exogenous to the

⁶⁴ Even those administrative law scholars with longstanding preoccupation on the democratic implications of administrative policymaking hold a restrained view of the reach of democracy in the realm of administrative law. Richard Stewart, for example, reflecting on recent developments in the US and the EU argues that “[t]he domestic experience of democracies with advanced economies, the EU’s arrangements for regulatory governance and emerging international practice suggest a variety of techniques by which the *basic goals of administrative law – fair, responsive, and accountable decisional procedures—can begin to be achieved, even if we have to wait for democracy.*” (Richard B. Stewart, ‘Administrative Law in the Twenty-First Century’, 78 N.Y.U. L. Rev. 437, at 459 (2003)) (emphasis added)

regulatory process, but deeply embedded in it. This does not imply a lessening of the evident democratic relevance of electoral politics and the constitutional law that frames it, nor do I intend to propose an ‘administrative democracy’ capable of supplying the same kind of emotional and political integrative force. Whether democracy in this mode should resemble that of electoral politics, or what portion of the democratic life at large it should take, are entirely different questions. Moreover, it is not my argument that the primary mission of administrative law should be that of fulfilling a given idea of democratic practice but, quite differently that, in the conduction of the business of governing, it should do so democratically. By adopting a democratic lens for the regulatory state, all its components become plausible suspects for democratization.

If we turn our attention to the EU, this proposition becomes apparent. EU citizens experience it everyday, intertwined with the multiple other occurrences of life that might be local, regional, national, transnational, virtual, place-less. It is a fact of life that offers its residents a common -however fragmented or partial- legal, political, and social space. But precisely how regulatory development takes place in the EU is inherently related to the nature of politics within. In the EU, politics is “not about the reproduction of identity, but the managing of differentiation.”⁶⁵ We are thus faced with a collective structure where the preservation of difference coexists with the premise of the possibility of cooperation, that is, the belief in a basal compatibility of legal systems and core political values, as well as a shared interest in working together. The examination of the regulatory landscape of the Union that I offer next rests in this basic premise: *politics as the management of differentiation*. This means, in other words, radically diverse actors who come to the EU regulatory arena with very partial knowledge of each other, diverse preferences and expectations, and contextually embedded regulatory cultures. But it also entails the very act of coming together to deal with shared problems, permeability to outside legal and political influences, and a gradual history of repeated interaction and exchange of resources. The combination of these elements produces a dynamics of hybridization and interweaving. I turn next to develop these ideas.

⁶⁵ Beate Kohler-Koch, ‘The Evolution and Transformation of European Governance, in: Beate Kohler-Koch and Rainer Eising (Eds.), *The Transformation of Governance in the European Union* 24 (1999)

2. THE COMMISSION'S REFORM AGENDA: DEMOCRATIC GOVERNANCE OR ADMINISTRATIVE RESHUFFLING?

The language of governance reform has cropped up in multitude of institutional documents, particularly in the work of the Commission. Here, the governance reform agenda draws on the rhetoric of democratization. The democratic preoccupation has reached beyond the apex of the EU institutional and decisional framework and descended to the more prosaic handling of Union affairs, the adoption and administration of regulatory programs. The establishment administrative processes that allow for palatable degree of citizen input in the adoption of policies and in the monitoring of their implementation has become a baseline requisite for propping up the Union's legitimacy and promoting general support for the integration process. The Commission has been a long-time target of criticism, either on the grounds that it is a formalistic, highly bureaucratic, isolated body, or, on the other end, on those that it is a highly politicized, sneaky body that serves special interests with little regard for the notion of due administrative process. In an attempt to address these concerns, the Prodi Commission launched a governance reform agenda under the institutional coverage of the 2001 White Paper on Governance.⁶⁶ The same themes that once filled the democratic deficit discourse have now been relocated in the realm of administration under the slogan of 'good governance':

“Five principles underpin good governance and the changes proposed in this White Paper: openness, participation, accountability, effectiveness and coherence. Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States, but they apply to all levels of government –global, European, national, regional and local.”⁶⁷

⁶⁶ Commission of the European Communities, *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final)

⁶⁷ Commission of the European Communities, *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final), p 10. Governance is defined as the “rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.” Commission of the European Communities, *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final), p. 8. The Commission's official website speaks of *governance* as being a 'very versatile' term that “originates from the need of economics (as regards corporate governance) and political science (as regards State governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term 'government' and that corresponds to the “so-called post-modern form of economic and political organizations.” (http://ec.europa.eu/governance/docs/archives_en.htm) (accessed 26 August 2006)

It is possible to re-arrange and simplify the five principles of good governance around partnership and flexibility. The combination of these two principles feed a mode of network governance:

“legitimacy [of the Union] today depends on involvement and participation. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, *based on feedback, networks and involvement from policy creation to implementation at all levels.*” (White Paper on Governance, p. 11)⁶⁸ (emphasis added)

Trustworthy partnership with private stakeholders requires baseline transparency throughout the policy cycle and the advocacy of structured expert networks at the European level⁶⁹, whereas flexibility in the choice and configuration of regulatory techniques and the use of expertise materializes in the extended use of instruments such as co-regulation, the Open Method of Coordination and other non-binding tools such as recommendation or guidelines. There is a fundamental gap between an overly-ambitious rhetoric and the very limited nature of the actual reform measures proposed and gradually implemented. The White Paper has made the Commission the focus of widespread criticism on several grounds: self-aggrandizing ambition, inappropriately visionary rhetoric, unrealistic assessment of the politico-legal situation of the Union, thinness of effective reform measures, lack of legal finesse, etc.⁷⁰ The transition to the

⁶⁸ Commission of the European Communities, *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final), p 11 A 2003 Commission report on governance define ‘networks’ as “interaction between individuals and/or organizations (communities, regional and local authorities, undertakings, administrations, research centres and so on) in a non-hierarchical way and where every participant is responsible for a part of the resources needed to achieve the common objective, electronic communication being their most preferred tool.” (Commission of the European Communities, *Report from the Commission on European Governance* (2003) p. 17) Network governance unfolds in the system of multilevel governance: a “tangible Europe that is in full development; a Union based on multilevel governance in which each contributes in line with his or her capabilities or knowledge to the success of the overall exercise. In a multilevel system the real challenge is establishing clear rules on how competence is shared- not separated; only that non-exclusive vision can secure the best interests of all the Member States and all the Union’s citizens.” (Commission of the European Communities, *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final), p. 35)

⁶⁹ See: the new communication policy (Commission of the European Communities, *White Paper on a European Communication Policy* (COM(2006) 35 final)(2006)); Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on An Information and Communication Strategy for the European Union* (COM (2002) 250 final/2)(2002). Public access to European Parliament, Council and Commission documents is guaranteed by Regulation (EC) 1049/2001 of the European Parliament and of the Council *regarding public access to European Parliament, Council and Commission documents*, 2001 O.J. (L 145/43). Consultation of outside experts and interested parties has been streamlined by the Communication from the Commission of the European Communities, *Towards a reinforced culture of consultation and dialogue- General principles and minimum standards for consultation of interested parties by the Commission.* (COM(2002) 704 final) (2002), and the Communication from the Commission of the European Communities, *On the collection and use of expertise by the Commission: principles and guidelines* (COM(2002) 713 final) (2002)

⁷⁰ See, for all, the collection of articles published by the Robert Schuman Centre for Advanced Studies (European University Institute) and the Jean Monnet Program(Harvard Law School and NYU School of Law): Christian

Barroso Commission and the French and Dutch rejections of the Treaty Constitution have prompted an agenda readjustment.⁷¹ Following the June 2005 European Council's call for a 'period of reflection'⁷², the Commission issued a "Plan-D for Democracy, Dialogue and Debate."⁷³ This communication calls for the structuring and promotion of widespread discussions within each Member State as well as directly by the institutions of the Union. It intends to establish a two-way communication channel between the Union and its citizens with regard to what the Union's specific tasks should be, both substantially and in terms of the institutional allocation of responsibilities between the Union and the Member States, with the overall aim of bringing forward a sense of ownership of the integration process on the part of the Union's citizens.⁷⁴

In the end, while some might argue that "Europe finds itself in a deep crisis"⁷⁵, we might instead acknowledge that, despite changes in the terms of engagement, the Union runs its daily routine at full steam and thus democratization is also a matter of micro-management of daily policymaking. The basal question of democracy in the administrative realm can be reformulated as that of who should enter policymaking processes. Everyday policymaking in the EU implies the involvement of usual and unusual suspects. As I argue in the remainder of this paper, one trademark of the EU is the particular, varying and novel arrays of actors that converge in

Joerges, Ives Mény, J.H.H Weiler (Eds.), *Mountain or Molehill? A critical appraisal of the Commission White Paper on Governance* (2001) (<http://www.jeanmonnetprogram.org/papers/01/010601.html>)

⁷¹ Treaty Establishing a Constitution for Europe (2004/C 310/01) (OJ C310 Vol. 47, 16 December 2004). On 29th of May 2005 the citizens of France flocked to the ballot boxes in unprecedented numbers (70%) to deliver a resounding *non* (54.8%). Three days later, on June 1st, 63% of the Dutch electorate outbid their co- EU citizens by rejecting the treaty by 61.7% of the votes. (For updates the ratification process, go to: http://www.europa.eu.int/constitution/ratification_en.htm (accessed 30 August 2006)) Neither of these legal systems required a referendum, which had been called precisely in efforts to enhance the democratic credentials of a treaty that, albeit its intended purpose of enhancing the democratic standing of the Union, had ostensibly been handled by the political elites.

⁷² European Council, *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe*, Brussels, 18 June 2005 (SN 117/05)(2005)

⁷³ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, dialogue and debate* (COM(2005) 494 final) (2005)

⁷⁴ Plan-D has been followed by the 2006 Green Paper "European Transparency Initiative". Commission of the European Communities, *Green Paper "European Transparency Initiative"*, COM(2006) 194 final(2006) The Green Paper on Transparency builds on the measures taken under the coverage of the White Paper on Governance that attempt to structure lobbying activities, widen citizen participation in policymaking processes, and improve access to documentation.

⁷⁵ European Union (Luxemburg Presidency) Press Release 18-06-05, *with regard to the European Council of 16-17 June 2005* (<http://www.eu2005.lu/en/actualites/communiqués/2005/06/17jcl-pf/index.html>) (accessed 30 August 2006)

administrative processes. This, in turn, is both the result and the cause of the progressive interweaving of administrative legal systems in the EU space through the constant interplay of the impulses of commonality and difference. I unpack these ideas next.

3. ADMINISTRATIVE INTERWEAVING

The array of actors that converge in specific regulatory decisionmaking processes or other administrative initiatives constitutes the trademark of policymaking in the EU. The interplay of the contrasting impulses of commonality and difference, separation and integration, is built into the legal framework of the EU. H. Wallace has proposed the image of a ‘policy pendulum’ that

“swings between the national political arenas ... and the transnational arena... Each of these arenas is a kind of magnetic field that attracts –or repels- the policy-makers, the claimants of policy, and would-be policy-influencers. The relative strength of these magnetic fields varies across policy domains, over time, and between countries...”⁷⁶

While the steering power of the EU in regulatory innovation is undeniable,⁷⁷ the overall dynamics is complex and multidirectional. There is constant interaction between the EU, domestic and transnational administrative apparatuses, resulting in a continuous phenomenon of interpenetration and asymmetrical influence. The ‘dense multilateralism’ has been proposed to describe this particularly intense dynamics of “cross-border regime-building.”⁷⁸ The EU regulatory arena(s) are sub-, supra-, inter-, trans- and a-national. They reveal a populated, diversified and multilayered range of actors, institutional and legal arrangements. The routines and norms of the various administrative legal systems in play constrain and facilitate dynamism, creating path dependencies that are at the same time courses for incremental reform. The interweaving of administrative systems is continuous and dialectical. At the risk of

⁷⁶ Helen Wallace, ‘The policy process. A moving pendulum’, in: Helen Wallace and William Wallace, *Policy-Making in the European Union* 41 (4th ed., 2000)

⁷⁷ Majone, for example, sees the EU as the “most important stimulus” to regulatory development in the Europe: it not only forces the Member States to adopt specific legislative and administrative rules, but also influences the particular ways of national policy-making by distressing “historically rooted institutional equilibria” and changing the “rules of the domestic policy game”, thus promoting policy learning and change (Giandomenico Majone, *Regulating Europe* 266 (1996))

⁷⁸ Helen Wallace, William Wallace and Mark A. Pollack, *Policy-Making in the European Union* 5 (5th Ed. 2005)

oversimplification, to aid in visualizing this interweaving it becomes necessary to untangle its multi-directional nature. Taking on the Commission's end, three combined elements provide an image of how it relates to other actors in the EU administrative space:

- it promotes the formation of 'expert policy networks' and places a strong emphasis on consensus in their mode of operation
- in its role as regulator, it relies on committees drawn from the Member States (comitology)
- the EU is a system of decentralized administration; the execution of EU policies resides in the hands of the administrative apparatuses of the member states

The promotion of policy networks is a necessity for an entity like the Commission that has no physical presence in the Member States. Throughout all regulatory processes, the Commission works in close cooperation with the administrations of the MSs, as well as interest groups of multiple kinds, whose formation has often been supported by the Commission itself. The Commission welcomes government units, expert committees, ad hoc working groups, outside consultants (research centers, academic institutions, thin-tanks), interest groups – domestic, transnational, European-, trade unions, professional and consumer organizations.⁷⁹ These networks are valuable for gathering information on the policy issue at hand, pooling expertise, identifying best practices, developing policy alternatives, designing pilot programs that set the foundations for potentially transferable policy schemes, and promoting cooperative environment that ensures the reach of agreements and a smooth implementation of legal mandates (which lies in the hands of the administrations of the Member States). In a discursive leap, the Commission's 2001 White Paper on Governance justifies its direct promotion of networks in view of their democratizing effect in a multilevel system of governance:

“European integration, new technologies, cultural changes and global interdependence have led to the creation of a tremendous variety of European and international networks focused on specific objectives. Some have been supported by Community funding. These networks link business, communities, research centres, and regional and local authorities. They provide new foundations for integration within the Union and for building bridges to the applicant countries in

⁷⁹ See: Commission of the European Communities, Communication from the Commission. *Towards a reinforced culture of consultation and dialogue. General principles and minimum standards for consultation of interested parties by the Commission* (COM(2002) 704 final (2002)); Commission of the European Communities, *Communication from the Commission on the election and use of expertise by the Commission: principles and guidelines. “Improving the knowledge base for better policies* (COM(2002) 713 final (2002))

the world. They also act as multipliers spreading awareness of the EU and showing policies in action.”⁸⁰

Distinctive and standardized forms of networks are the comitology committees, composed of national officials that aid the Commission in the issuance of ‘implementing rules’ (regulations).⁸¹ The comitology system has been the subject of great scholarly attention.⁸² The basic typology of comitology committees –advisory, management, and regulatory- attends to the degree of control retained by the Council over the final decision, being advisory committees those where the Commission is given the widest discretion. The end result of comitology is the production of thousands of *implementing rules* each year that make it possible for European law to be enforced, from the specifics of eco-labels to, say, the market regime for milk. In Vos’ analysis, comitology committees fulfill three goals: 1) the satisfaction of the Commission’s “voracious demand” for expertise with regard to the complex risk assessment and risk management processes involved in policy areas such as health, safety, etc., 2) the provision of a forum where ‘normative’ (i.e., political) issues are aired and, 3) the furnishing of a technique

⁸⁰ Commission of the European Communities: *European Governance. A White Paper*. Brussels, 25 July 2001 (COM(2001) 428 final), p. 18 ‘Networks’ are understood as “interaction between individuals and/or organization (communities, regional and local authorities, undertakings, administrations, research centres and so on) in a non-hierarchical way and where every participant is responsible for a part of the resources needed to achieve the common objective, electronic communication being their most preferred tool.” (Commission of the European Communities, *Report from the Commission on European Governance* (2003) p. 17)

⁸¹ Treaty Establishing the European Community: arts. 202 3rd indent & 211 4th indent (consolidated version, Dec. 24, 2002, O.J. (C325)). The so-called ‘implementing rules’ are typically what in national legal systems is known as regulations, that is, legal norms of a general nature issued by the administrative branch. See: 1987 Comitology Decision (Council Decision 87/373 *laying down the procedures for the exercise of implementing powers conferred on the Commission*, 13 July 1987 (OJ L 197/33)). The system has been partially amended by the 1999 Comitology Decision (Council Decision of 28 June 1999 *laying down the procedures for the exercise of implementing powers conferred on the Commission* (OJ L 184, 17 July 1999)). The Commission has proposed a reform of the 1999 Council Decision: Commission of the European Communities, *Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission* (COM(2002) 719 final)(2002/0298 (CNS))

⁸² Robin Pedler and Gunther Schaefer (Eds.), *Shaping European Law and Policy: the Role of Committees and Comitology in the political Process* (1996); Ellen Vos, ‘The Rise of Committees’, 3(3) ELJ 210 (1997); Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process: the Constitutionalisation of Comitology’, 3(3)ELJ 273 (1997); M.P.C.M. Van Schendelen (Ed.), *EU Committees as Influential Policymakers* (1998); Wolfgang Wessels, ‘Comitology: Fusion in action. Politico-Administrative Trends in the EU System’, 5:2 Journal of European Public Policy 209 (1998); Christian Joerges and Ellen Vos (Eds.), *EU Committees: Social Regulation, Law and Politics* (1999); Francesca E. Bignami, ‘The Democratic Deficit in European Community Rulemaking: a Call for Notice and Comment in Comitology’, 40 Harv. Int’l L.J. 451 (1999); Georg Haibach, ‘The history of Comitology’, in: Mads Andenas and Alexander Türk (Eds.), *Delegated Legislation and the role of committees in the EC* 185 (2000); Mads Andenas and Alexander Türk (Eds.), *Delegated Legislation and the role of committees in the EC* (2000); Günter F. Schäfer, Georg Haibach and Alexander Türk, ‘Policy Implementation and Comitology Committees’, in: EIPA, *Governance by Committee. The role of Committees in European Policy-making and policy implementation* (Research Paper 00/GHA)(2000), pp 39 y ss.

whereby the Member States—via the Council—continue to exercise a measure of control over decisionmaking.⁸³ Despite the role boundaries demarcated by the formal Council Decisions on comitology, scholars point that in practice the leadership role of the Commission is undeniable, and that the “boundaries of the Committee system cannot be equated with its formal structures”, as actors “exploit many sources of information and are open to receive advice from ‘outside’.”⁸⁴ Comitology has been identified by Joerges and Neyer as a “forum for the development of novel an mediating forms of interest representation and decisionmaking, a mode of governance that pointed to a ‘deliberative turn’ in EU policy analysis –more precisely, towards deliberative supranationalism, to use their label.”⁸⁵ Comitology committees embody and promote the interpenetration of the administrative legal apparatuses of the EU and the Member States. Domestic bureaucrats are forced to cooperate, share tasks, and justify themselves in front of their peers. Comitology creates an arena for policy learning among national bureaucrats and enhanced exposure to other administrative cultures. Wessels argues that these interactions promote a continuing ‘fusion’ of administrative legal systems in the direction of progressive ‘Europeanization’ of national administrations.⁸⁶ This merging can be interpreted as a by-product of competition for influence in policymaking processes: “the push to and pull from Brussels are part of a battle for power in the multilevel system which does not lead to an ultimate victory of any one level or group of actors; the dynamics of this competition lead to greater participation by many national actors.”⁸⁷ Regardless of the direction of policy influence, what seems gradually more certain is that for these policymakers the “European dimension is an extended policy arena, not a separate activity.”⁸⁸

This interweaving extends to adjudicatory administrative law. European adjudicatory administrative law proper would consist of those rules that apply to direct administration by the institutions of the Union. Restricted almost solely to the area of competition law, it consists of a collage of rules (administrative impartiality, duty to notify initiation of proceedings, right to be

⁸³ Ellen Vos, ‘The Rise of Committees’, 3(3) *European Law Journal* 210, at 212 (1997).

⁸⁴ Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process: the Constitutionalisation of Comitology’, 3(3) *ELJ* 273, at 279-280 (1997)

⁸⁵ Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process: the Constitutionalisation of Comitology’, 3(3) *ELJ* 273, at 279-280 (1997)

⁸⁶ Wolfgang Wessels, ‘Comitology: fusion in action. Politico-administrative trends in the EU system’, 5:2 *Journal of European Public Policy* 209 (1998)

⁸⁷ Wolfgang Wessels, ‘Comitology: fusion in action. Politico-administrative trends in the EU system’, 5:2 *Journal of European Public Policy* 209, at 217 (1998)

⁸⁸ Helen Wallace, William Wallace and Mark A. Pollack, *Policy-Making in the European Union* 7 (5th Ed. 2005)

heard, proportionality, diligence, good administration, access to files, etc.) formulated by the European Court of Justice and the Court of First Instance through a method of “evaluative comparison of the national legal principles.”⁸⁹ But most implementation of EU law rests in the Member States (the so-called ‘indirect administration’). In theory, each MS applies its own administrative law system and is not allowed, in application of the principle of equality, to apply rules or standards different than those applicable to comparable domestic situations.⁹⁰ Yet, scholars have identified growing instances of Europeanization and trans-nationalism of what in principle is strictly domestic administrative law that applies to the domestic execution of Union policies, to purely national aspects of policies where competence is shared between the Member States and the Union, or even to the implementation of strictly domestic policies. This would be the result of increased interaction amongst bureaucracies as a result of their general involvement in EU policymaking. The depth, speed and direction of these Europeanization and/or trans-nationalization would depend on factors such as the traditional conceptual dominance of a given system, the relative power of the Member States, their interest in actively promoting the expansion of their own systems, etc.⁹¹ Knill refers to a ‘logic of appropriateness’ as determinant of this dynamics, that is, whether the transplant can be considered “change *within* rather than change *of* the core of national administrative institutions.”⁹² Some scholars take issue with a clear-cut distinction between direct and indirect administration. For Edoardo Chiti, the implementation of Union law today is typically a question of “joint action” of the various levels of administration, notwithstanding varying intensity of such cooperative mode across policy

⁸⁹ Jürgen Schwarze (Ed.), *Administrative Law under European influence. On the convergence of the administrative laws of the EU Member States* 17 (1996) Also, see: Jürgen Schwarze, *European Administrative law* (1992); Hanns Peter Nehl: *Principles of Administrative Procedure in EC law* (1999); Alberto J. Gil Ibáñez: *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (1999); Susana Galera Rodrigo, *La aplicación administrativa del Derecho Comunitario. Administración Mixta: Tercera vía de Aplicación* (1998); Stefan Kadelbach, ‘European Administrative Law and the Law of a Europeanized Administration’, in: Christian Joerges and Renaud Dehousse (Eds.), *Good Governance in Europe’s Integrated Market* 181-192 (2002); Francesca Bignami, ‘Three generations of Rights before the European Commission’, 68-WTR Law & Contemp. Probs. 61 (2004); Sabino Cassese, ‘European Administrative Proceedings’, 68 (1) Law & Contemp. Probs. 21 (2004); Jürgen Schwarze, ‘Judicial Review of European Administrative Procedure’, 68-WTR Law & Contemp. Probs. 85 (2004)

⁹⁰ Joined cases 205-215/82, *Deutsche Milchkontor GmbH et al. v. Germany*, (1983), ECR 2633

⁹¹ It has to be kept in mind that in continental Europe there is a longstanding tradition of rich doctrinal exchange. Domestic administrative law has often been the result of extensive exchange and transplantation within an overall dominance of the French and German systems. Often, there is not even an acknowledgment of comparative legal analysis being performed but instead the drawing from a shared heritage of legal concepts that is understood as part of one’s own theoretical armory.

⁹² Christoph Knill, ‘European Policies; the Impact of National Administrative Traditions’, 18(1) J. Publ. Pol. 1, at 3-4 (1998)

sectors.⁹³ In a similar vein, Cassese refers to the notion of ‘common systems’ that reflect the collective character of EU government and whose aim is to reconcile “conflicting but interconnected interests”, as well as to exercise mutual control.⁹⁴ Such systems vary across policy areas (depending on whether the original competence is supranational, concurrent or domestic). The multiple actors that intervene in them develop dynamics characterized by the casting of each individual actor in different roles along a decisionmaking process, the development of ad hoc vertical and horizontal links as each process unfolds, and the varied nature of the roles taken on by the Commission (coordinator, stirrer, and final decisionmaker).⁹⁵ Mario Chiti, in sum, detects the

“rise of a *multilevel* public administration in which the original Community scheme of the indirect, autonomous execution of Community policies by national administrations is being replaced by an administrative model of integration based on the criteria of flexibility and differentiation. By now, the model of polycentric public administration is standard in national systems, and is gradually coming so in Europe’s supranational system of governance. Europe’s legal order contains a variety of principles capable of disciplining the new multilevel public administration that may be said to substitute and ‘administrative law of integration.’”⁹⁶ (M Chiti pp. 37-38)

The phenomena just described –the flourishing of policy networks under the Commission’s patronage, the growing intermeshing of the rulemaking and adjudicatory administrative law systems of the Member States and the EU- unveil a cosmos of interlinked bureaucracies and administrative legal practices, a dialectical process of influence amongst all levels where law and authority exercise fundamental roles. Administrative interaction is continuously molded by the discursive layers furnished by the highly legalistic and deeply institutionalized environment in which it unfolds. EU policy processes set in motion a multidirectional dynamic of power in all its facets (recognition, persuasion, pressure) that results in asymmetrical influences; inertia and permeability mix in varying concoctions. These finite and mundane practices unveil public administrative spheres that create, at the very least, an expanded experiential universe where each actor is immersed in a system of enhanced visibility that allows for comparison, transplantation or resistance to norms and ideas. In the course of this

⁹³ Edoardo Chiti, ‘The Relationship between National Administrative Law and European Administrative Law in Administrative Procedures’, in Jacques Ziller (ed), *What’s New in European Administrative Law? Quoi de Neuf en Droit Administratif européen?* (EUI working paper Law 2005/20) (2005).

⁹⁴ Sabino Cassese, *European Administrative Proceedings*, 68 (1) *Law & Contemp. Probs.* 21, at 22 (2004)

⁹⁵ Sabino Cassese, *European Administrative Proceedings*, 68 (1) *Law & Contemp. Probs.* 21 (2004)

⁹⁶ Mario P. Chiti, ‘Forms of European Administrative Action’ 68 (1) *Law & Contemp. Probs.* 37, at 37-38 (2004).

dynamics, political and legal self-perceptions as well as decisional autonomy are necessarily altered. The political struggles that lie underneath administrative processes are thus formulated, contested and transformed in a context of interwoven bureaucracies deeply marked by the recurrent insertion of the particular into the universal, the domestic into the regional, and vice-versa. The end result is not –should not be- a convergence that implies sameness in the letter of the law and unvaryingly similar implementation, but a much more nuanced game of (mis)interpretation and (mis)appropriation.⁹⁷ New governance appears under this lens akin to a multi-layered and multi-actor system of administration, complex and innovative indeed, but administrative at core and as such, impregnated by stateness, publicity, legalism and hierarchy.⁹⁸ Government agencies are key players in a system where there is unquestionable awareness of being in the business of conducting public affairs and where actors exert power to the best of their judgment. Conflict is omnipresent, as is the law. What is remarkable in the EU policy arena is the cast of players that concur in a specific decisionmaking procedure, how they relate to each other as a result of finding themselves in this experiential universe and, as a corollary, the stirring power that these relationships have in fostering new ways of seeing or addressing the problems at hand.

⁹⁷ In connection with this, it should be noted that, while governance has undoubtedly impregnated administrative law scholarship to the point that the term “administration’ is decisively old-fashioned” (Francesca Bignami, ‘Foreword’, 68 (1) *Law & Contemp. Probs.* 1, at 1 (2004)) a trend that runs in the reverse direction –that of claiming for administrative law the territory of international regulation- argues that most institutions that engage in what comes under the aegis of ‘governance’ ‘governance’ “perform functions that most national public lawyers would recognize as having a genuinely administrative character” (Benedict Kingsbury, Nico Krisch, Richard Stewart, ‘The emergence of Global Administrative Law’, 68-AUT *Law & Contemp. Probs.* 1 (2005))

⁹⁸ Joerges offers a word of caution: “The concepts of ‘governance’ and ‘administration’ point to continuous management activities, which turned out to be indispensable even after the adoption of the internal market’s new legal framework... ‘Administration’ is a term with a long and varied history; but even if reflecting the ‘post-classical’ developments of administrative function, it seems to carry with it connotations of a hierarchical order or a unitary state polity. ‘Governance’ is a term employed primarily by political scientists to designate the phenomenon of ‘governance without government’ in general, and in the EU context in particular.” (Christian Joerges, ‘The Law’s Problem with the Governance of the European Market’, in Christian Joerges and Renaud Dehousse (2002) (Eds.) *Good Governance in Europe’s integrated Market* 5

IV. FINDING THE PUBLIC

1. THE NEW ADMINISTRATIVE LAW: EXPERIMENTALIST GOVERNANCE

The language of administrative law is that of *interests* –stakes-. Actors are assimilated to issues; individuals are relevant only as *stakeholders* and groups are generally equated to interest groups. The term stakeholder is revealing, a word so malleable that becomes virtually meaningless, except for the fact that it serves to offer a clear image of the absence of the human factor. Reference to the entity of the subject is reduced to ‘she who holds a stake’, a notion with substantial implications: nothing beyond the stake is relevant for the purpose of administrative law; the individual enters the realm of administrative operations only insofar as she holds a stake; once ‘inside’ the administrative state, the individual is just an instrument of her stake; the stake does not contribute to conform the identity (political, psychological, cultural) of the individual, it is simply ‘held’ by her as some kind of external attachment.

Yet, administrative law has experienced a clear democratic turn in recent years. In this part, I resort to legal scholarship that, while sharing the new governance sensibility, is firmly seated on the regulatory ‘state’ and places a strong emphasis on the democratic implications of the paradigm. The US has been particularly fertile in this area, as scholars have strived to find a cure for the “pathologies of regulation.”⁹⁹ While the differences in the administrative legal systems and regulatory cultures in the US and the EU are evident, I refer in this section to some literature conceived from within and for the US legal system, as well as to contributions that, while tracing its roots in the US, have taken off and embarked on a fertile exploration of the EU regulatory environment, thereby providing a traceable transatlantic bridge. These approaches take an ostensibly democratic turn and profit from a variety of theoretical stances, such as civic republicanism, deliberative democracy, philosophical pragmatism, or theories of organization. They attempt to define anew the relationships that tie agencies to individuals and groups, as well as the nature and purposes of policy formulation. One distinctive feature of the approaches

⁹⁹ Karkkainen, Bradely C., “New governance” in legal thought and in the world: some splitting as antidote to overzealous lumping’, 89 Minn. L. Rev. 471, at, 472 (2004)

described in this section is their confidence in the enhancement of legitimacy of the system through the very mechanisms that increase the efficiency of the procedures and the regulatory solutions articulated thereby. Traditionally, the two objectives of regulatory efficiency and democratic legitimacy have been perceived as indispensable, yet mutually conflicting, and thus the question has been one of articulating a suitable balance between them. The ability of moving away from this tension is supplied by the blend of actors that converge in decisionmaking processes, whose capabilities and the interactions developed amongst them seemingly set in motion decisionmaking processes that enhance social learning, promote the shaping of better-informed preferences, encourage experimentation and innovation, and improve accountability through mechanisms such as peer review. Efficiency and legitimacy are thus tied together by the very relationships and dynamics amongst the actors that converge in a given policy process. I take this notion as central to the task of reconsideration of new governance. By forcing actors to face, explain, monitor, expose, engage, and depend on each other, the system brings forward a different experiential universe, whereby all participants are transformed in the process.

In all instances, the common target is the mode of command-and-control regulation and the interest representation that is seen as supporting this mode of administrative operation.¹⁰⁰ Growing dissatisfaction with the descriptive power and normative content of this traditional model has led a number of scholars to spell out new approaches that would account for emerging practices in various regulatory settings and further promote legal reform. American American legal scholarship has long developed a sound critique of the “ossification” of command-and-control.¹⁰¹ Indeed, command-and-control regulation, argues Stewart with regard to the U.S. legal system, suffers from the “inherent problems involved in attempting to dictate the conduct

¹⁰⁰ Under the model of interest representation, seminally articulated in the US by Stewart, administrative law acts as a complement to electoral politics by providing a political and legal process whereby agency discretion is deployed at the service of “adjusting the competing claims of various private interests affected by agency policy.” (Richard B. Stewart, ‘The Reformation of American Administrative Law’, 88 Harv. L. Rev. 1667, at 1683 (1975)) Its main preoccupation, is that of the legitimacy of the use of agency discretion. Its focus, then, is on providing mechanisms that promote participation, transparency, reasoned decisionmaking, and accountability. Through the decades of the 1960’s and 1970’s, US courts “transformed the basic purpose of administrative law –from one of limiting governmental power to protect private interests (as defined by the common law) to one of representing relevant interests, by providing a system in which all of the various interests with a stake in agency policy have the right to participate and secure judicial review of the balance struck by the agency” (Stephen Breyer, Richard Stewart, Cass Sunstein and Matthew Spitzer, *Administrative Law and Regulatory Policy* 27 (4th ed., 1998)). For a critique, see: Gerald Frug, ‘The ideology of Bureaucracy in American Law’, 97 Harv. L. Rev. 1276 (1984)

¹⁰¹ For a systematic formulation of the ‘ossification’ of the US administrative law system, see: Thomas O. McGarity, ‘Some Thoughts on ‘Deossifying’ the Rulemaking Process’, 41 Duke L.J. 1385 (1992).

of millions of actors in a quickly changing and very complex economy and society throughout a large and diverse nation.”¹⁰² A plethora of negatives is associated with it, including “fixity, state-centrism, hierarchy, excessive reliance of bureaucratic expertise, and intrusive prescription”.¹⁰³ In contrast, new regulatory approaches, argues Karkkainen, would aim at being “open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic”, often with an emphasis on “the capacity and the necessity to continuously generate new learning and to adjust in response to new information and changing conditions, systematically employing information feedback loops, benchmarking, rolling standards of best practice, and principles of continuous improvement.”¹⁰⁴ Mashaw has coined the term “accountability as responsiveness” to refer to those visions that see “*accountability as responsiveness*, encompassing within that notion both process responsiveness (processes that are discursive, interactive, open and participatory) and outcome responsiveness (decision outcomes that are contextual, spontaneous, experimental and revisable)”¹⁰⁵ Some of the labels coined by the authors are ‘collaborative governance’, ‘democratic experimentalism’, ‘directly deliberative polyarchy’, or ‘experimentalist governance’.¹⁰⁶ An early systematic formulation of this turn in administrative law thinking was put forward by Freeman under the label of “collaborative governance”.¹⁰⁷ This model is based on the understanding of agency decisionmaking as

¹⁰² Richard B. Stewart, ‘Administrative Law in the Twenty-First Century’, 78 N.Y.U. L. Rev. 437, at 447 (2003)

¹⁰³ Karkkainen, Bradely C., “‘New governance’ in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping’, 89 Minn. L. Rev. 471, at, 472 (2004)

¹⁰⁴ Karkkainen, Bradely C., ‘“New governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping’, 89 Minn. L. Rev. 471, at 474 (2004) In a survey of developments in the US, Orly Lobel defines ‘new governance’ as organized by the principles of: participation and partnership; collaboration; decentralization (which promotes, amongst other values, participation, experimentation, localness, partiality of human knowledge, and the building of deliberative and collaborative capacities); a holistic approach to problem solving across policy domains; and “softness-in-law” (See: Orly Lobel, ‘The Renew Deal: the Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’, 89 Minn. L. Rev. 342, 373-388 (2004))

¹⁰⁵ Jerry L. Mashaw, ‘Structuring ‘Dense Complexity’: Accountability and the Project of Administrative Law’, Issues in Legal Scholarship, The Reformation of American Administrative Law (2005): Article 4, p. 7 (<http://www.bepress.com/ils/iss6/art4>)

¹⁰⁶ See: Jody Freeman, ‘Collaborative Governance in the Administrative State’, 45 UCLA L. Rev. 1 (1997); Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’, 3 ELJ No. 4, 313 (1997); Michael C. Dorf and Charles F. Sabel, ‘A Constitution of Democratic Experimentalism’, 98 Colum. L. Rev. 267 (1998); Jody Freeman, ‘The Private Role in Public Governance’, 75 N.Y.U. L. Rev. 543 (2000); Oliver Gerstenberg and Charles F. Sabel, ‘Directly-Deliberative Polyarchy, an Institutional Ideal for Europe?’, in: Christian Joerges and Renaud Dehousse (Eds.), ‘Good governance in Europe’s integrated market’ 289-341 (2002); Joshua Cohen and Charles F. Sabel, ‘Sovereignty and Solidarity: EU and US’, in: Jonathan Zeitlin and David M. Trubek (Eds.), *Governing Work and Welfare in a New Economy. European and American Experiences* 345- 375 (2003); Charles F. Sabel and Jonathan Zeitlin, ‘Learning from Difference: the /new architecture of Experimentalist Governance in the European Union’ (2006)(manuscript on file with the author)

¹⁰⁷ Jody Freeman, ‘Collaborative Governance in the Administrative State’, 45 UCLA L. Rev. 1 (1997)

‘problem-solving’, a notion that would seemingly eliminate the adversarial nature of regulatory procedures. Collaborative governance is envisioned as a multi-stakeholder process where: deliberative participation holds an independent democratic value, the system facilitates the sharing of information and the continuous redefinition of problems and regulatory solutions, and where the role of administrative agencies is that of mere facilitator of a very open-ended and inherently provisional rulemaking process. This results in faster, less costly, and more effective procedures.¹⁰⁸ For this model, it is crucial to overcome the public-private divide, in particular in what regards accountability:

“The purpose of collaboration is not to displace or ‘privatize’ agency functions on the theory that privatization would be more efficient or because agencies are viewed as unaccountable. In fact, the word ‘privatization’ is misleading in this context. A collaborative regime challenges existing assumptions of what constitutes public or private roles in governance, because most collaborative arrangements will often involve sharing responsibilities and mutual accountability that crosses the public-private divide.”¹⁰⁹

A seminal piece in this trend is Dorf and Sabel’s ‘democratic experimentalism’.¹¹⁰ The driving force of the study was Dorf and Sabel’s conviction in the inadequacy of traditional administrative and constitutional law to deal with the volatility that characterizes economic conditions today and the extreme complexity of large societies. What was needed was a “new model of institutionalized deliberation that responds to the conditions of modern life.”¹¹¹ Their proposal of democratic experimentalism rejects the configuration of administrative agencies as centralized, hierarchically, and vertically integrated, and advocates instead a notion of ‘working groups’ with blurred boundaries and open-ended membership, a decisive transcendence of the public/private divide, a regulatory philosophy of ‘networking’ and information sharing. Their envisioned administrative world is a colossal system of information pooling, where all parties involved have incentives to share information, and where citizens have access to information

¹⁰⁸ See: Jody Freeman, ‘Collaborative Governance in the Administrative State’, 45 UCLA L. Rev. 1, 8-33 (1997)

¹⁰⁹ Jody Freeman, ‘Collaborative Governance in the Administrative State’, 45 UCLA L. Rev. 1, at 30 (1997). In later works, Freeman has taken this notion further and proposed a complete disposal of the distinction between the public and the private, an altogether elimination of the notions of governance and governing See: Jody Freeman, ‘The private Role in Public Governance’, 75 N.Y.U. L. Rev. 543, at 547-548 (2000); Jody Freeman, ‘Private Parties, Public Functions, and the New Administrative Law’, 52 Admin. L. Rev. 813 (2000).

¹¹⁰ Michael C. Dorf and Charles F. Sabel, ‘A Constitution of Democratic Experimentalism’, 98 Colum. L. Rev. 267 (1998)

¹¹¹ Michael C. Dorf and Charles F. Sabel, ‘A Constitution of Democratic Experimentalism’, 98 Colum. L. Rev. 267, at 283 (1998) The authors rely on philosophical pragmatism for their conception of thought and action.

about how better or worse a similar problem is solved in a different jurisdiction.¹¹² This openness and fluidity of ideas is envisioned as an incentive for agencies to compete for the best solution and would seemingly render a much less hierarchical, more collaborative and democratic administrative universe.

In the end, democratic experimentalism ‘privatizes’ political institutions by “exposing them to the novel ‘market’ of compelling, competitive benchmarking comparisons with the performance of like entities”, yet, argue Dorf and Sabel, it also

“re-politicizes political institutions by introducing a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience. This form of deliberation ... neither depends on consensus nor results in uniformity of view. Rather, it produces workable cooperation by continuously exploring different understandings of means and ends.”¹¹³

Sabel and Cohen have written a series of pieces that spell the variously labeled model of ‘directly-deliberative polyarchy’ (1997), ‘deliberative-polyarchy’ (2003) and ‘global administrative law’ (2005).¹¹⁴ While it is possible to trace the roots of this strand of work to democratic experimentalism, the focus shifts to the particularities of the EU, making it particularly fitting for the purposes of this paper. In their 1997 essay, Cohen and Sabel proposed the notion of ‘directly-deliberative polyarchy’ as a tentative, embryonic, approach to tackle the democracy deficit in the EU. In this model:

“collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions. But in deciding, those citizens must examine their own choices in the light of relevant deliberations and experiences of others facing similar problems in comparable jurisdictions or subdivisions of government. Ideally, then, directly-deliberative polyarchy combines the advantages of local learning and self-knowledge with the advantages and discipline of wider social learning and heightened political accountability that result when the outcomes of many current experiments are pooled to permit public scrutiny of the effectiveness of strategies and leaders.”¹¹⁵

¹¹² This article studied a plethora of administrative programs and initiatives, and set them against a conceptual framework of philosophical pragmatism, as well as a variety of popular innovations in the private sector, such as benchmarking, concurrent engineering, and ‘learning by monitoring’.

¹¹³ Michael C. Dorf and Charles F. Sabel, ‘A Constitution of Democratic Experimentalism’, 98 Colum. L. Rev. 267, at 313-314 (1998)

¹¹⁴ See also: Michael C. Dorf and Charles F. Sabel, ‘A Constitution of Democratic Experimentalism’ 98 Colum. L. Rev. 267 (1998), a seminal article that I do not analyze in this essay because it refers primarily to the US context. For a deeper understanding of the flourishing of new administrative law approaches at the turn of the century, see the work of Jody Freeman on collaborative governance and the deconstruction of the public/private divide (cited in the bibliography).

¹¹⁵ Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’, 3 ELJ No. 4, 313, at 313-314 (1997)

In 2003, Cohen and Sabel further develop their framework in the light of what they see as becoming a predominant mode of operating in the EU. In deliberative polyarchy, lower level actors have the autonomy to experiment with regulatory solutions, insofar as they furnish higher-level actors with such information, in a “periodic pooling of results” that serves to unveil the flaws of local solutions, elaborate standards on how to compare such local solutions, expose “poor performers to criticism from within and without, and making of good (temporary) models for emulation.”¹¹⁶ Deliberative polyarchy, then, focuses on the array of actors in policymaking and the nature of their relationships. The notions of political community –the public- and the civic bond that sustains it are reformulated:

“Consider now a world in which sovereignty – legitimate political authorship- is neither unitary nor personified, and politics is about addressing practical problems and not simply about principles, much less performance or identity. In this world, *a public is simply an open group of actors, nominally private or public, which constitutes itself as such in coming to address a common problem, and reconstitutes itself as efforts at problem solving redefine the task at hand. The polity is the public formed of these publics:* this encompassing public is not limited to a list of functional tasks (police powers) enumerated in advance, but understands its role as empowering members to address such issues as need their combined attention.”¹¹⁷ (emphasis added)

The defining feature of deliberative polyarchy, then, would be its ability to “transform diversity and difference from an obstacle to cooperative investigation of possibilities into a means for accelerating and widening such inquiry.”¹¹⁸ In a deliberative polyarchy, the civic bond is understood as a “mutual capacitating by equals” that begins with the acknowledgment of the need to collaborate “with the others whose experiences, orientations, and even most general goals differ from his or her own- a recognition that both express and reinforce a sense of human commonality that extends beyond existing solidarities”¹¹⁹

¹¹⁶ Joshua Cohen and Charles F. Sabel, ‘Sovereignty and Solidarity: EU and US’, in: Jonathan Zeitlin and David M. Trubek (Eds.), *Governing Work and Welfare in a New Economy. European and American Experiences* 345, at 366 (2003)

¹¹⁷ Joshua Cohen and Charles F. Sabel, ‘Sovereignty and Solidarity: EU and US’, in: Jonathan Zeitlin and David M. Trubek (Eds.), *Governing Work and Welfare in a New Economy. European and American Experiences* 345, at 362 (2003)

¹¹⁸ Joshua Cohen and Charles F. Sabel, ‘Sovereignty and Solidarity: EU and US’, in: Jonathan Zeitlin and David M. Trubek (Eds.), *Governing Work and Welfare in a New Economy. European and American Experiences* 345, at 368 (2003)

¹¹⁹ Joshua Cohen and Charles F. Sabel, ‘Sovereignty and Solidarity: EU and US’, in: Jonathan Zeitlin and David M. Trubek (Eds.), *Governing Work and Welfare in a New Economy. European and American Experiences* 345, at 363 (2003)

A 2006 piece by Sabel and Zeitlin builds on the model, now under the label of ‘experimentalist governance.’¹²⁰ Experimentalist governance is deliberative, informal and has a multilevel nature. It does not deny conflict or repress difference; on the contrary, it is “primarily concerned with overcoming political blockages” via centralized coordination and decentralized experimentalism.¹²¹ Sabel and Zeitlin argue that the mechanism of peer review peculiar to new governance, while not inherently democratic, has the potential of acting as a democratizing force –fostering a “democratizing destabilization”- and break entrenched forms of authority.¹²²

Next, I end this essay by pushing this notion further through its projection into several normative notions of political community that center on the interplay of commonality and difference, the insertion of Them in Us, the acknowledgement of the multiplicity, malleability and even disposability of political identities in the realm of policymaking struggles.

2. A RESEARCH AGENDA: FINDING THE PUBLIC(S)

A key idea that emanates from the analyses reflected in the previous section is its reliance in a range of participants that unsettle traditional understandings of stakeholders in regulatory activities. This begs the question of the notion of political communities. To push the democratic thrust further, we need a formulation of political community that replaces that of stakeholders that today soaks administrative law. I want to put forward some proposals that, although spelled out for other contexts, fit nicely with the goal of preserving difference while of ‘forcing’ novel actors into regulatory decisionmaking and unsettling traditional notions of who belongs and who should be left out. Young, for example, proposes an ideal of *differentiated solidarity* that assumes respect and mutual obligation, yet allows for the permanence of separation. What is the nature of solidarity in this framework? It is a being together of strangers. Differentiated solidarity requires a fundamental openness to “*unassimilated otherness*”¹²³ Frug, on his part, has

¹²⁰ Charles F Sabel and Jonathan Zeitlin, ‘Learning from Difference: the New Architecture of Experimentalist Governance in the European Union’ (manuscript on file with the authors) (2006)

¹²¹ Charles F Sabel and Jonathan Zeitlin, ‘Learning from Difference: the New Architecture of Experimentalist Governance in the European Union’ (manuscript on file with the authors), p. 6

¹²² Charles F Sabel and Jonathan Zeitlin, ‘Learning from Difference: the New Architecture of Experimentalist Governance in the European Union’ (manuscript on file with the authors) p. 59

¹²³ Iris Marion Young, *Inclusion and democracy* (2000)

developed a notion of ‘relational autonomy’ that springs from the core conviction that it is difference, not sameness, what resides at the core of processes of polity-formation: “the hard work in community building... is to deal with the differences within the group. For me, this task requires not cultivating a feeling of oneness with others but increasing the capacity ... to live in a world filled with those they find unfamiliar, strange, even offensive”¹²⁴ Frug’s proposed sense of community would be characterized “not by a feeling of mutual connection, but by an acceptance of difference, complexity, and strangeness”¹²⁵ Thus, a crucial insight is the normative view that commonality be built on the basis of difference; difference resides and remains at the heart of political communities. More importantly, difference is a resource with a strong democratic value; groups should be essentially heterogeneous. Dealing with internal conflict, then, becomes a central task, one that has direct implications for institutional design.

The heart of the ideas just described -notwithstanding the diverse intellectual history of each of them- resides in the goal of articulating a relationship between separateness and togetherness that promotes the preservation of difference and the understanding of the political subject in terms that are fragmented, ambivalent, and manifold. This fundamental goal can be projected onto the administrative realm with the purpose examining the relationships between levels of government and between agencies and private actors. Such view would provide a yardstick for the determination of who should be the actors in policymaking procedures and how they stand in relation to each other. This, in turn, can be connected with the literature on new governance, now re-evaluated through the notions of the civic bond just reflected. I have in this essay described the variety of developments, including the system of comitology and the phenomenon of interpenetration of administrative legal systems in the EU space. Here, a strategic move has been the repeated exposure of the interplay between commonality and difference that impregnates the EU regulatory space(s). This interplay is reflected in many other institutional and decisionmaking arrangements, where each represents a micro-cosmos of politics in a Europe of multiple *demoi*. New governance can be reformulated under this lens. In so doing, a renewed coating of democratic legitimacy becomes a prerequisite for all other considerations.

¹²⁴ Gerald Frug, *City-Making. Building Communities Without Building Walls* 11 (1999)

¹²⁵ GERALD FRUG: *CITY-MAKING. BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 118 (1999)

It is not difficult to imagine how this would translate in specific settings. Let us return to the OMC, for example. Its virtue resides in bounding actors, previously strangers to each other, into a system that forces them to deal with each other, examine their differences and discover their shared interests, find solutions to common problems. The experiential universe of each is enhanced and, possibly, qualitatively changed in the process. Then, upon attempting to return to the niche of the local/domestic –the untouched self-, the realization comes that such place of solace has disappeared. It has been inexorably altered by the muted perceptions of its actors. Consequently, a new voice is injected into a previously autonomous administrative sphere, and thus a dialectical process of identity-in-difference is set in motion. This opens the doors to a reform agenda that would in principle accept the notion that actors are ‘forced’ into a system that compels them to deal with each other in the quest for legal solutions to political problems. In settings such as the OMC, legal reform would, for example, consider agreements on targets and indicators reached at the EU level merely provisional until they have been subjected to full-blown notice and comment in the domestic sphere. But, at the same time, it would require that such domestic administrative process opened up to the other Member States and the ‘European interest’ embodied by the Commission. Such suggestion might immediately arouse skepticism because: 1) as a matter of fact, politicians and lobbyists do not have the resources (and probably, the willingness) to go out and seek to influence administrative procedures in each and every one of the 27 Member States and 2) because even if such thing were possible, it would open the doors to a virtual impossibility of actually making decisions. Frankly, there is a reason for the OMC to exist, which is that of taking common decisions at the EU level at the least political cost possible, that is, by short-circuiting the cumbersome process of hard lawmaking and the political costs attached to it, and come back home with a plan for action that is no longer contestable by hostile political constituencies. Hundreds of pages could be (and have been) written on the intricacies of this two-level game. But simpler, more feasible variations of this theme could instead be adopted. For example, it could be required that Member States paired (by a system of rotation, by lottery, by virtue of their comparability in population, by virtue of their distance in population, etc.) and take the domestic stages of legal reform jointly, opening up and giving decisionmaking power to each other in identical conditions. This is just one suggestion. The possibilities for institutional reform are plenty. What should remain unaltered is the normative goal of democratizing administrative processes and fostering administrative law universes where

individuals and government agencies are bound to include those who might seem alien, but who should cease to remain outside upon the realization that the decisions that we make affect all Us and Them.