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Experimentalist governance: An introduction

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Abstract
This symposium critically engages with the volume *Experimentalist Governance in the European Union: Towards a New Architecture* (2010), edited by Charles F. Sabel and Jonathan Zeitlin. "Experimentalist Governance" (EG) opens up an original theoretical perspective on the emergent governance architecture of the EU and sheds new light on developments in key policy sectors. This symposium brings together a transatlantic group of distinguished political scientists and legal scholars to discuss the added value of EG as a concept for analysis, its theoretical underpinnings, empirical relevance, and normative implications, in terms of legitimacy. Contributors discuss EG from different disciplinary and theoretical perspectives, referring to a variety of empirical examples in the EU context and beyond. The symposium closes with a response from the authors to their critics. This collection of essays sheds new light on debates around the nature of the EU and democratic governance beyond the nation state.

Keywords: deliberation, European Union, experimentalism, governance, legitimacy.

1. Introduction

For more than a decade, governance in the European Union (EU) has been a topical issue amongst practitioners and academics alike. The Commission's White Paper on Governance (COM 2001 [428] final) has been appraised as an important trigger of academic research across Europe. At the same time, the governance literature which grew rapidly throughout the 1980s and 1990s fuelled consideration at the highest political level. In any case, governance had become a prominent theme of research in EU studies by the beginning of the new millennium, as a stocktaking exercise of governance research conducted across countries for the period between 1995 and 2005 illustrates (Kohler-Koch & Larat 2009). The list of authors having researched governance in the EU is impressive, as is the multiplicity of concepts and notions which have been discussed, such as network governance (e.g. Kohler-Koch & Eising 1999), multi-level governance (e.g. Hooghe & Marks 2001), informal governance (Christiansen & Piattoni 2003), new

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modes of governance (Héritier 2003; Héritier & Rhodes 2010), or innovative governance (Tömmel & Verdun 2008).

The volume *Experimentalist Governance in the European Union: Towards a New Architecture*, edited by Sabel and Zeitlin (2010b), comes as a timely contribution to this ongoing debate. It opens up an original theoretical perspective on the emergent governance architecture of the EU and sheds new light on developments in key policy sectors. In the introduction to the volume (Sabel & Zeitlin 2010a) the authors establish their notion of "experimentalist governance" (EG) and contrast it with widely held claims about the functioning of the EU's multi-level architecture. The subsequent chapters examine the relevance of EG across a wide range of policy areas, including data privacy, financial market regulation, energy, competition, food safety, genetically modified organisms (GMOs), environmental protection, anti-discrimination, fundamental rights, justice and home affairs, and external relations.

Sabel and Zeitlin (2010a) advance an innovative interpretation of EU governance, claiming that regulatory expansion rests on a recursive process of framework rulemaking and revision across levels and sectors. While framework goals are being set at the supranational level, actors involved in governance at lower levels enjoy a considerable degree of autonomy in achieving these goals. This dynamic architecture relies on reporting duties, peer review, and deliberative processes. It bears democratic merits as a Directly Deliberative Polyarchy (DDP). According to the authors, a DDP is characterized by a context where settled practices are being dis-entrenched by arguments (deliberation) on the basis of immediate experience (directly deliberative) and in the absence of central steering (Sabel & Zeitlin 2010a, pp. 5–6; 2012b, p. 170).

This symposium critically engages with Sabel's and Zeitlin's understanding of governance. It brings together a transatlantic group of distinguished political scientists and legal scholars. In what follows we will briefly outline the major themes addressed by the contributors to this symposium when it comes to the added value of EG as a concept for analysis, its theoretical underpinnings, empirical relevance, and normative implications in terms of legitimacy.

2. Conceptual contribution and theoretical underpinning

Ever since studies about the EU have turned to the governance approach (Jachtenfuchs 2001; Kohler-Koch & Rittberger 2006), there have been numerous efforts by the scholarly community to define governance and delineate specificities in the European context. Sabel and Zeitlin add to this debate with their notion of EG which, according to the authors, can be applied to different constituencies, such as the EU or the United States. EG "in its most developed form involves a multi-level architecture, whose four elements are linked in an iterative cycle" (Sabel & Zeitlin 2012b, p. 169). These four elements refer, first, to setting broad framework goals; second, to discretion being granted to lower levels when implementing the goals; third, to practices of regular reporting and assessment; and fourth, to periodical revision of framework goals. The authors argue that EG appears in various multi-level systems, but that it is particularly present in the EU's polyarchic system. Key points of discussion in the symposium evolve around the structural and procedural specificities of this form of governance and the underlying notion of learning.

Unlike many established concepts, such as network governance or new modes of governance, EG is not structured along the public–private divide, a fact highlighted by

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most contributors to the symposium. EG encompasses public and private actors, as Fossum notices (Fossum 2012), and, in the edited volume, is mainly applied to administrative decisionmaking, as Kumm observes (Kumm 2012). Börzel goes even further in arguing that EG at the conceptual level privileges governance by administrative actors (Börzel 2012), implying a relative neglect of political and private actors. The conceptualization does also not differentiate between actors with and those without an electoral mandate. For Fossum, this neglect of the role of representative bodies is a key point of criticism and links to important normative questions in terms of democratic legitimacy (Fossum 2012). Setting apart such a normative underpinning, EG also does not allow capture of important processes of politicization and depoliticization. Verdun identifies phases within the scope of EG which would typically involve processes of politicization (Verdun 2012), yet Sabel and Zeitlin themselves do not integrate this perspective into their conceptualization of EG.

In structural terms, EG not only privileges non-hierarchical steering; Sabel and Zeitlin go further in delineating their notion of governance from hierarchy. Hierarchy, according to the authors, "is legitimated by principal-agent forms of accountability, while experimentalist or networked decision making is legitimated [. . .] by forms of dynamic accountability that reject the principal-agent distinction" (Sabel & Zeitlin 2010b, p. 17). They consider the prevalence of EG to dismantle the assumptions underlying a principal–agent approach, as principals will no longer be in a position to give detailed instructions to their agents, having to rely on experience and knowledge of the latter. This leads them to claim a "breakdown of the distinction between conception and execution" (Sabel & Zeitlin 2012a, p. 411), which makes the distinction between phases of policymaking superfluous and impossible. They further stress that EG dissolves a strict distinction between a top-down and bottom-up perspective, and emphasize that EG should not be understood as "simply a capacity-increasing extension of the EU's formal hierarchical decision-making apparatus rather than a networked, deliberative alternative to it" (Sabel & Zeitlin 2010a, p. 15). However, EG does not exclude interaction between hierarchical and nonhierarchical modes. It takes the form of a specific destabilization mechanism which the authors call "penalty default" (Sabel & Zeitlin 2010a, p. 14). The penalty default mechanism is at work where a central authority is in a position to dis-incentivize relevant actors to refuse deliberation, for example, by threatening to engage in traditional rule-setting.

According to Fossum, Sabel and Zeitlin provide a stylized account of modern public administration that draws too heavily on a rational choice-inspired principal–agent approach. In doing so, they may not pay sufficient heed to the characteristics of today's public administration regimes, notably how these are imbued by a contextual rationality that highlights socialization effects and the logic of appropriateness. Contrasting hierarchical, principal–agent style rulemaking on the one hand and experimentalism on the other hand, Sabel and Zeitlin overrate the transformative power of EG (Fossum 2012). In a similar vein, Börzel highlights the interdependence between different modes of governance and points to the interaction between EG and hierarchy (Börzel 2012). She argues that it remains an open question whether the shadow of hierarchy functions as a penalty default mechanism and to what extent both provide another scope condition, next to strategic uncertainty and polyarchy, for experimentalist governance to emerge and to be effective. If actors' interests are too diverse and they are not willing to upgrade the common interest, respectively, additional incentives might be required to make them engage in collective problem-solving. These do not necessarily have to stem from a

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"freestanding punitive power" (Sabel & Zeitlin 2012a, p. 413). In their rejoinder, Sabel and Zeitlin rightly point to functional equivalents to the shadow of hierarchy cast by the state. Next to penalty default mechanisms provided by external actors, those include collectively shared norms, which resonate with Kumm's argument about the cultural prerequisites to experimentalism (Kumm 2012). In the end, the transformative power of EG depends on whether it requires other forms of governance, hierarchical or otherwise, to emerge and be effective.

Another central issue for critical engagement is the learning processes involved in EG. Indeed, EG is understood as a "recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts" (Sabel & Zeitlin 2012b, p. 169). Although learning forms a constitutive element of EG, several commentators find the underlying notion to be underspecified. Fossum points to the absence of clear benchmarks which would allow us to establish that convergence is the result of learning, and not mere copying or emulation. As such, he also calls for the need to make a clearer distinction between learning on the one hand, and copying and isomorphism on the other (Fossum 2012). Börzel finds no substantial specification of the type of learning involved by examining whether it goes beyond Bayesian updating by altering actors' beliefs. Rather, the authors would have overemphasized the role of certain institutional settings in facilitating learning processes (Börzel 2012). Kumm (2012) argues that EG, and the learning process involved, are rich in prerequisites. Strategic uncertainty and polyarchic distribution of power as such would not be sufficient conditions for learning behavior. Rather, EG would require widely spread acceptance and institutionalization of liberal democratic constitutionalism. In their rejoinder, Sabel and Zeitlin point to the possibility that rather than being an initial endowment, such agreement could be produced by the explorative process involved in EG, particularly after a disappointing experience (Sabel & Zeitlin 2012a).

3. Empirical relevance in policy-making and constitutionalism

Setting aside the conceptual contribution of EG to the existing governance literature, its empirical relevance, or "scope conditions" as Sabel and Zeitlin call it in their response, will be questioned in our symposium. How important is EG for EU policymaking? Does it transform the EU's multi-level architecture, as claimed by the authors? These questions will be approached from a political science perspective, while the legal perspective transposes EG into the realm of constitutionalism.

According to Sabel and Zeitlin, EG destabilizes and transforms the EU's pre-existing governance architecture (Sabel & Zeitlin 2010a). The extent to which EG has been institutionalized, so that destabilizing and transformative dynamics are at play, has been critically questioned by most commentators. Verdun's reading of the concept is that it mainly applies to areas where the EU does not dispose of competencies and where a shift toward supranational policymaking faces national resistance (Verdun 2012). She highlights that the Open Method of Coordination (OMC), widely discussed in the literature, most closely matches the procedural requirements formulated for EG. Börzel acknowledges that EG is present in many areas and is not confined to those where the OMC has been institutionalized (Börzel 2012). Referring to evidence provided by the empirical chapters in the edited volume she, however, argues that policymaking in different sectors and over time relies on a governance mix that includes, but does not privilege, EG. The

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transformative capacity of EG, which can be questioned from a conceptual and theoretical perspective (cf. Fossum 2012), thus also raises important empirical questions. Sabel and Zeitlin perceive EG as a distinct phase of governance, framed as an alternative to the new modes of governance in the shadow of hierarchy, which succeeds previous phases of state expansion and neo-corporatism. They expect to find EG "when actors in a polyarchy anticipate the joint gains from collaborative problem-solving under uncertainty," yet they also point to situations where these scope conditions are unlikely to be met (Sabel & Zeitlin 2012a, p. 412).

While the empirical scope of EG in the EU's policy process may be more limited than argued by the authors, EG can be usefully transposed into the realm of constitutionalism, as demonstrated by Kumm (Kumm 2012), and earlier contributions by Sabel *et al.* (Sabel & Cohen 1997; Dorf & Sabel 1998; Sabel & Gerstenberg 2010). Kumm convincingly frames the evolving constitutionalism in Europe as a story following the four functions of EG (Kumm 2012). Although European Court of Justice (ECJ) judgements have not only set a broad framework but claimed primacy for supranational law, national courts have used their discretion in interpreting the framework and in integrating EU law into the domestic system. The judicial levels involved would interact in an iterative process to open up national legal orders, while at the same time guaranteeing constitutional principle, eventually leading to a revision of goals initially set. Kumm exemplifies this analogy between governance and constitutionalism by looking into the judicial practice of the Federal Constitutional Court in Germany. He shows how the court has accommodated supranational law and points to instances where it has drawn red lines and has not fully complied with EU requirements. In response to such challenges by national courts, the EU legal order would, at least in part, have accommodated concerns by modifying the framework. This would have been conducive to the emergence of a polyarchical and pluralist constitutional structure in the EU, he argues. In their rejoinder, Sabel and Zeitlin emphasize that representative democracy needs to be reconceived, a position which resonates with Kumm's stance on constitutionalism beyond the state (Sabel & Zeitlin 2012a). In their reading, Kumm's account of constitutionalism in the EU's multi-level system presupposes a degree of convergence on constitutional values for experimentalism to be at work, which would be inconsistent with the processes he actually describes. According to Sabel and Zeitlin, this points once more to the transformative capacity inherent in EG which would, in itself, produce and strengthen consensus (Sabel & Zeitlin 2012a). With respect to national constitutionalist models, they argue that transposing them in a rather direct way beyond the nation state may have the perverse effect to expand rather than check the discretion of the Court of Justice of the EU. This is, however, not in opposition to Fossum's line of argumentation that modern constitutionalism has played a central role at EU level as a regulatory ideal. According to him, the emergence of a novel institutional structure resides in complex processes of copying, emulation, and experimentation (Fossum 2012).

4. Normative implications and legitimacy challenges

Sabel and Zeitlin have framed the democratic merits of EG in terms of being a DDP. They argue that EG addresses both effectiveness and legitimacy challenges posed by governance in contemporary societies. It has developed in "response to a secular rise in environmental volatility and complexity" which has increased "strategic uncertainty" and, at the same

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time, limited the capacity of centralized, hierarchical steering (Sabel & Zeitlin 2010b, p. 8). For them, EG is a workable solution in a context characterized by decentralization and diversity, which also generates new venues for democratization by destabilizing entrenched forms of authority and by providing dynamic accountability mechanisms (Sabel & Zeitlin 2010b, pp. 12, 18). Contributors to this symposium have critically engaged with these claims and have notably raised concerns with respect to the output as well as the input legitimacy of DDP.

Verdun (Verdun 2012) finds that DDP is mainly geared toward aspects of output legitimacy. While she acknowledges the merits of deliberative processes as a way of improving the epistemic quality of policies, she doubts whether DDP is a remedy for the democratic deficit of EU governance. In this context, Verdun notes that the authors have not sufficiently engaged with the literature on democracy in the EU that has intensively discussed related issues. Fossum (2012) offers his criticism at a more fundamental level as he puts into question the type of output legitimacy the authors claim for a DDP in Europe. He points to the very peculiar environment in which European governance operates and concludes that patterns of learning will necessarily be skewed toward certain policy objectives and outcomes rather than others. Here, he refers to the predominance of a structural imbalance that favors market-making policies, important budgetary constraints, and a confined arsenal of available policy instruments. As a result of these inbuilt biases, certain policy paths and choices would be precluded from the outset, limiting the self-correcting and transformative potential of learning involved in EG. Sabel and Zeitlin discuss what they call the question of a "structural deficit" in the EU prominently in their rejoinder (Sabel & Zeitlin 2012a). They agree that related concerns, which they attribute politically to social democracy, are understandable and important, yet discard the structural deficit argument on the basis that an inbuilt bias toward deregulation and neoliberalism cannot be convincingly supported by empirical evidence. They illustrate this point by discussing important judgements by the Court of Justice of the EU. Here, they reject Fritz Scharpf's line of argument by emphasizing the autonomy of courts at lower levels, a point also highlighted by Kumm in his contribution (Kumm 2012).

EG is a thought-provoking and challenging concept when it comes to issues of input legitimacy. Once representative democracy has been discarded as a workable model in highly dispersed and polyarchic polities, the question emerges to what extent EG constitutes a democratically viable option. The normative issues involved are at the core of Fossum's contribution to this symposium (Fossum 2012). He argues that the question of democratization in the EU cannot be addressed adequately without paying tribute to representation, and criticizes the authors' (implicit) assumption that DDP was superior to representative democracy (a point shared by Verdun 2012). Fossum doubts that democratizing principles, such as transparency and participation, can be directly attributed to the destabilizing character of DDP, objecting that these would not form part of the EU system if it were not for the demands raised by representative bodies. But Fossum also notes that EU democratization has taken a distinct shape which also causes specific challenges for the theory of representation. Similarly, Börzel raises the concern that EG might increase problems of democratic representation and might be mainly perceived as technocratic governance (Börzel 2012). In an analogy to post-national constitutionalism, Sabel and Zeitlin (2012a) reject the idea of directly transposing established conceptions of representative democracy beyond the nation state. They argue that rather than creating increased input legitimacy, parliamentarization at EU level would simply serve institutional

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self-interest. As an alternative avenue, they take up on Fossum's challenge and suggest reconsidering representation and democracy in the light of experimentalist governance.

The following contributions discuss EG from different disciplinary and theoretical perspectives, referring to a variety of empirical examples in the EU context and beyond. The symposium closes with a response by the authors to their critics. This collection of essays sheds new light on debates around the nature of the EU and democratic governance beyond the nation state.

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Experimentalist governance in the EU: The emperor's new clothes?

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Abstract
Most students of the EU agree by now that it is best described as a governance system. There is far less consensus on what kind of governance the EU actually features: modern, postmodern, network, cooperative, innovative or simply new? Sabel and Zeitlin have advanced yet another concept. This paper discusses the added value of their "experimentalist governance" (EG), as presented in an edited volume published in 2010, for understanding and explaining the nature of EU policymaking, addressing four questions: First, to what extent is EG distinct from existing concepts of governance? Second, how pervasive is EG in the EU when compared to alternative forms of governance? Third, what is the effect of EG on EU policy outcomes, on the one hand, and the overall architecture of the EU, on the other? Finally, does EG solve or exacerbate the EU's democratic deficit?

Keywords: experimentalist governance, European Union, governance.

1. Introduction

The European Union (EU) is often considered a unique supranational organization that could not be compared to any other form of political order we are familiar with at the national or international level. There is broad agreement that the EU is and has always been more than an international organization of states; but it is not, and probably never will be, a state (Wallace 1983). Political scientists have shown a remarkable creativity in developing new concepts to describe the allegedly *sui generis* nature of the EU. This changed in the 1990s with the "governance turn" in EU studies (Kohler-Koch & Rittberger 2006). The governance perspective seemed to finally capture the nature of the EU as "a unique set of multi-level, non-hierarchical and regulatory institutions, and a hybrid mix of state and non-state actors" (Hix 1998, p. 39), without having to invent new labels and making the EU a polity of its own kind.

Governance concepts are indeed more appropriate to study the political institutions and policymaking processes of the EU than traditional approaches of both international relations and comparative politics. Yet the debate on what type of governance the EU presents is still not settled. Charles Sabel and Jonathan Zeitlin do not claim that governance in the EU is unique. Rather, the two scholars argue that the EU has been developing into a new form of governance whose experimentalist nature is not captured by previous research on the deliberative supranationalism (Joerges & Neyer 1997), network governance (Kohler-Koch & Eising 1999), informal governance (Christiansen & Piattoni 2003),

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new (Héritier & Rhodes 2010) and soft modes of governance (Borrás & Conzelmann 2007), or innovative governance (Tömmel & Verdun 2008).

In the following, I will discuss the added value of "experimentalist governance" (EG) for understanding and explaining the nature of EU policymaking, addressing four questions: First, to what extent is EG distinct from existing concepts of governance? Second, how pervasive is EG in the EU when compared to alternative forms of governance? Third, what is the effect of EG on EU policy outcomes, on the one hand, and the overall architecture of the EU, on the other? Finally, does EG solve or exacerbate the EU's democratic deficit?

2. What's new about experimentalist governance?

By conceptualizing the EU as a "new architecture of experimentalist governance," Sabel and Zeitlin do not declare the EU unique. They find similar properties of its governance architecture, which they refer to as a "directly deliberative polyarchy" (DDP), in the United States, the World Trade Organization, and other political systems with a polyarchic distribution of power (Sabel & Zeitlin 2008). Rather, DDP and EG are more pervasive in the EU, since its polyarchic character is more pronounced (Sabel & Zeitlin 2010, p. 10).[1]

Describing the EU as a "novel polity without a state" (Sabel & Zeitlin 2010, p. 2), Sabel and Zeitlin emphasize distinctive features of EU rulemaking identified by others before them, but "connecting them into a novel whole" (Sabel & Zeitlin 2010, pp. 2–3). These distinctive features refer, first, to multi-level decisionmaking structures in which private and public actors of the supranational, national, and subnational levels interact within highly complex networks to produce policy outcomes (Kohler-Koch & Eising 1999). This "polyarchic distribution of power" (Sabel & Zeitlin 2010, p. 9), second, fosters deliberation particularly when actors are unwilling or unable to resolve conflict by majority decisions (Joerges & Neyer 1997; Joerges 2001).

Sabel and Zeitlin, hence, agree with parts of the literature that "networked deliberative decision making" characterizes EU governance as distinctive (Sabel & Zeitlin 2010, p. 2). Yet their definitions of directly deliberative polyarchy (DDP) and experimentalist governance (EG) are less demanding with regard to both governance structures and processes. Unlike deliberative supranationalism, network governance, or new modes of governance, DDP and EG do not explicitly require the involvement of private or non-state actors. In fact, they appear to be biased towards administrative agents linked up in transgovernmental networks (Newman 2008), emphasizing the role of lower-level units, such as national ministries and regulatory authorities in decisionmaking and implementation (Sabel & Zeitlin 2010, p. 3). As regards process, deliberation refers to learning from experience. Facing similar problems, local units are to "learn from their separate efforts to solve them" (Sabel & Zeitlin 2010, p. 6). Whether they merely engage in Bayesian updating or change their causal and principled beliefs in light of the better argument (Risse 2000) is not specified. Rather, Sabel and Zeitlin emphasize the institutional design of DDP, which manifests itself in four key elements (Sabel & Zeitlin 2010, p. 3): (i) the establishment of framework goals and of measures for their achievement; (ii) autonomy of lower-level units in the implementation of the framework goals; (iii) regularly reporting on performance and participation in peer review; and (iv) periodical revision of framework goals, measures and, procedures. These "necessary functions" strongly resemble the Open Method of Coordination (OMC) but can be performed in any policy area,

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irrespective of the formal competences of EU institutions and the legal bindingness of the framework goals. Moreover, EG is about decisionmaking by trans-governmental actors and, hence, narrower in its focus than OMC, which emphasizes the involvement of societal and economic interests. EG might be, therefore, not entirely new. And if the polyarchic distribution of power is a scope condition for the emergence of trans-governmental forms of OMC or experimentalist patterns of decisionmaking throughout the EU, EG might reinforce rather than change certain characteristics of the EU's overall governance architecture.

3. How pervasive is experimentalist governance?

Sabel and Zeitlin do not claim that EG is ubiquitous in the EU but they find that it is pervasively institutionalized in a whole range of policy areas (Sabel & Zeitlin 2010, p. 3; 2008). While the contributions to their edited volume present a more mixed picture, they clearly demonstrate that DDP is not confined to the realm of OMC, but has travelled to different policy sectors, including data privacy, financial market regulation, energy, competition, food safety, genetically modified organisms (GMOs), environmental sustainability, anti-discrimination, fundamental rights, justice and home affairs, and external relations. While EG spans the entire range of EU policies, the question remains how central it is. Virtually all contributions to the edited volume find that the scope of EG is still limited and that EG coexists with, rather than replaces existing forms of governance. These findings confirm arguments in the literature that the EU, as such, does not present a particular prototype of governance, but combines different forms or modes of governance (Wallace *et al.* 2005; Tömmel & Verdun 2008; Börzel 2010; Héritier & Rhodes 2010). The EU's governance architecture is too multifaceted to be captured by one particular mode. EG may be a new addition to the governance mix that has been largely overlooked in the literature and is not captured by any of the existing typologies. Yet EG is certainly not the only, and arguably not the most prominent, mode of governance in the EU. Rather, it is embedded in and interacts with supranational decisionmaking, intergovernmental cooperation, and market-based coordination. The interaction with alternative governance modes is particularly relevant for how EG affects both policy outcomes and the overall governance architecture of the EU.

4. What is the effect of experimentalist governance?

The various contributions to the edited volume trace the emergence of EG as a response to the limits of centralized decisionmaking in the form of the traditional community method. Either member states are not willing to cede further sovereignty rights to the EU (e.g. energy; Eberlein 2010) or issues are so politicized that even qualified majority voting fails to produce collective decisions (e.g. GMOs; Dabrowska 2010). The polyarchic nature of the EU may foster a functional demand for EG explaining its emergence and diffusion. However, it might be the very conflictual nature of certain issues and the absence of centralized decisionmaking that could mitigate the effectiveness of EG (see also Kumm 2012). While deliberation is certainly capable of overcoming political conflict, governance research has demonstrated that the willingness of actors to compromise significantly increases if they take decisions in the shadow of hierarchy (Scharpf 1997; Héritier & Lehmkuhl 2008). The threat to hierarchically impose collectively binding decisions helps

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to unblock deadlock and prevents voluntaristic defection. It is not confined to the imposition of Pareto-optimal solutions but can also involve what Sabel and Zeitlin refer to as "penalty default" and define as the threat to engage in traditional rule making that is disruptive and produces dysfunctional results (Sabel & Zeitlin 2010, p. 14). Actors are willing to compromise in order to avert a policy outcome imposed by central authorities that would leave them worse off than a possible agreement among themselves. Hence, in its broader conceptualization, the shadow of hierarchy is one of the three destabilization mechanisms Sabel and Zeitlin have identified to induce participation in EG and ensure compliance with its outcomes (Sabel & Zeitlin 2010, p. 14).

Whether the shadow of hierarchy is a scope condition for the effectiveness of EG is an empirical question. Several contributions to the edited volume point to serious problems of effectiveness related to decision impasses (Dabrowska 2010; Eberlein 2010), implementation deficits (Homeyer 2010; Monar 2010), or the lack of adequate mechanisms (De Schutter 2010), which may or may not require some centralized decisionmaking to be overcome. Sabel and Zeitlin recognize the findings of the contributions to their edited volume that EG coexists with more traditional centralized modes of governance, rather than replacing them. While they deem such complementarities of old and new as unlikely to endure, it is probably too early to speak of a "broad and deep transformation of European governance" as long as supranational decisionmaking and intergovernmental cooperation still dominate EU policymaking (Sabel & Zeitlin 2010, p. 25). Nor do we know for sure whether it is EG or rather the progressive extension of the shadow of hierarchy on which the effectiveness of EU policymaking relies.

5. Does experimentalist governance solve or exacerbate the EU's democratic deficit?

The "governance turn" (Kohler-Koch & Rittberger 2006) in EU studies promised to address problems of both effective and legitimate decisionmaking in an enlarged Union, yet the democratizing potential of new or network governance has been questioned, as Sabel and Zeitlin acknowledge themselves (Sabel & Zeitlin 2010, p. 6). They do not deny that EG might subvert representative democracy. Rather, they question the workability of the principal–agent model on which accountability in representative democracy is based in the first place, since it is increasingly impossible to identify who is the principal and who the agent in polyarchic systems (Sabel & Zeitlin 2010, p. 11). While EG itself is not intrinsically democratic, it opens up "new possibilities for democratization of decision making" (Sabel & Zeitlin 2010, p. 8) by promoting new forms of dynamic accountability based on peer review deliberations which make technical expertise subject to public scrutiny. Trans-governmental networks lack democratic credentials, but they are required to justify their decisions in light of new knowledge. EG thereby "destabilizes entrenched forms of authority" (Sabel & Zeitlin 2010, p. 18). Such "democratic destabilization" heavily relies on certain procedural requirements, including transparency and active participation by a broad range of stakeholders (Sabel & Zeitlin 2010, pp. 18–21).

Whether representative democracy is an unworkable model for legitimizing collectively binding decisions in polyarchic polities, or whether EG provides a viable alternative, is foremost a normative question (see Fossum 2012; Kumm 2012). It may well be that EG does both, destabilizing entrenched forms of authority in some areas while increasing problems of democratic representation in others. Yet the various contributions to the

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edited volume cast some doubts on the extent to which the procedural requirements for the EG's destabilizing effect are met empirically. While EU policies increasingly contain obligations for public access to information and stakeholder participation, local compliance with these procedural requirements is often wanting (Börzel 2009). Moreover, citizens still orient their expectations for democratic legitimacy toward domestic institutions of representative democracy (Kohler-Koch 2000). As a result, EG may be perceived as technocratic governance that contributes to, rather than helps solve, the EU's democratic deficit (cf. Smismans 2006, pp. 59–64).

6. The promises and pitfalls of experimentalist governance

EG may not represent the new architecture of EU governance, which promises to cure the problems effective and legitimate rulemaking has been facing in an ever more diverse Union. Yet EG and DDP do provide a new perspective unveiling a mode of coordination or decisionmaking style that has been largely neglected by the literature on EU governance, particularly outside the realm of social policy (but see Tömmel & Verdun 2008). Not capturing the EU as a whole, EG adds an important mode of governance in the EU that differs from the community method of supranational decisionmaking, network governance, intergovernmental cooperation, mutual recognition, or private interest government. It comes closest to an inter- or trans-governmental form of OMC, which, however, is not confined to particular sectors where the EU has only limited formal competencies, but coexists with other forms covering the entire range of EU policies. Whether EG will provide the institutional and policy innovations necessary to overcome the current financial crisis and help maintain the internal and external integration capacity of an EU 27 + remains to be seen. While EG holds many normative promises, empirical findings so far are mixed and point to some potential pitfalls with regard to both the effectiveness and the legitimacy of EG. Future research should explore the scope conditions for EG to deploy its innovative and democratizing potentials, focusing on the ways in which it interacts with other modes of governance. The latter are not confined to centralized decisionmaking, but also include decentralized, market-based modes, such as mutual recognition and regulatory competition. The EU cannot be reduced to a particular mode of governance or institutional architecture. The virtue of Sabel's and Zeitlin's work, rather, lies in pointing to particular patterns of decisionmaking that may play an increasingly prominent role in the EU's governance mix.

Note

1 Sabel and Zeitlin identify two scope conditions for the emergence of experimentalist governance: strategic uncertainty and polyarchy (Sabel and Zeitlin 2010, pp. 9–10). While increasing strategic uncertainty appears to be a constant among multi-level polities, the polyarchic distribution of power may vary significantly. However, the contributions to their volume indicate that there is no direct correlation between the level of centralization and the emergence of experimentalist governance in the EU. Future research needs to clarify how the two scope conditions exactly relate to each other.

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Experimentalist governance in the European Union: A commentary

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Abstract
Sabel and Zeitlin's *Experimentalist Governance* offers an insight into European governance in those cases where the EU institutions do not have clear competence and where member states are not prepared to accept a unified policy on a problem at hand. *Experimentalist Governance* identifies four steps of action: agree on common goals, have lower levels propose ways to meet goals, then report on their meeting of goals, and, finally, periodically reevaluate the review procedures. By looking at the developments in EU policymaking through the lens of experimentalist governance (EG), one obtains an appreciation of how goals might be achieved that would otherwise not likely have been achieved through the community method. Sabel and Zeitlin highlight how EG can be effective in obtaining results, integrating peers, and incorporating deliberation, and offer a different way to deal with accountability and legitimacy. This article closes by taking the next step, namely, asking what challenges EG poses to democratic processes.

Keywords: European Union, governance, institutions, legitimacy, modes of governance, open method of coordination.

1. Introduction

Experimentalist Governance in the European Union: Towards a New Architecture, by Charles F. Sabel and Jonathan Zeitlin (2010), seeks to understand recent developments in governance in the European Union (EU). For decades the EU has been involved, behind the scenes, in innovations in EU governance, which have assisted the EU in developing and meeting policy goals (Tömmel & Verdun 2009). The EU has become involved in a new form of governance, which Sabel and Zeitlin (2010, p. 5) refer to as "directly deliberative polyarchy" or "DDP" – a term which they use interchangeably with "Experimentalist Governance" (Sabel and Zeitlin 2010, p. 6).[1] This article seeks to review this concept as set out in Sabel and Zeitlin's recent edited book (2010) and their earlier work, with a view to examining its constituent parts and placing it within the broader literature.

The structure of this article is as follows. Section 2 provides an overview of Sabel and Zeitlin's thinking and offers a review of the wider governance literature. Section 3 examines a few key aspects of their theoretical framework, namely the roles of deliberation, democracy, accountability, and transparency, again placing it in the literature. Section 4 concludes.

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2. Experimentalist governance in perspective

In their earlier contribution, Sabel and Zeitlin (2008) argue that the EU has been characterized as a polity in which various levels of governance (mostly EU and member state levels) contribute together to the development and meeting of joint goals, through public rulemaking. In so doing, they join a growing body of literature on EU governance (cf. Kohler-Koch & Eising 1999; Hooghe & Marks 2001; Héritier 2002; Eberlein & Kerwer 2004; Kohler-Koch & Rittberger 2006; Tömmel & Verdun 2009, to name but a few). Sabel and Zeitlin find that the existing literature has failed to appreciate fully the benefits of this interactive, multileveled process whereby goals are met and rules are made through deliberation and the rule of law. They argue that conventional interpretations of EU governance need to incorporate some of the advantages of the modes of governance used in the EU:

> This profusion of common deliberative techniques not only prompts revisions of partial descriptions of EU governance, but also challenges application to the EU of more settled, theoretically rooted views about the form and possibility of good governance (. . .) [T]hese developments challenge the related assumption that deliberative processes produce at most a monitoring, "soft" complement to "hard" state-made law (. . .). A third revision of conventional interpretations concerns the rule of law. (. . .) But we will see that recursive framework making and revision is prompting the emergence of new forms of dynamic accountability and peer review, which discipline the state and protect the rights of citizens without freezing the institutions of decision making. (Sabel & Zeitlin 2010, pp. 4–5)

How does experimentalist governance (EG) work? *Experimentalist Governance* identifies four steps of action (Sabel & Zeitlin 2010, p. 3): member states agree on common goals, lower levels of government propose ways to meet these goals, then they report on their meeting of goals, and, finally, periodically they reevaluate the review procedures. By looking at the developments in EU policymaking through the lens of EG, one obtains an appreciation of how goals might be achieved that would otherwise not likely have been achieved through the community method.

Sabel and Zeitlin's concept of EG shares characteristics with the open method of coordination and the earlier literature on new modes of governance (cf. Kohler-Koch & Eising 1999; Hodson & Maher 2001; Borrás & Jacobsson 2004; Eberlein & Kerwer 2004; Citi & Rhodes 2007; Büchs 2008; Heidenreich & Bischoff 2008; Héritier & Rhodes 2010). That literature focused on the increased role of non-state actors in public policymaking, coupled with a decline in the need felt for the state to be involved in centralized rulemaking, as well as an increasing role for non-hierarchical modes of governance (for a discussion see also Tömmel & Verdun 2009). Throughout the 1990s, and indeed the 2000s, a vast body of literature emerged that sought to characterize the EU as now involved in "governance" rather than in "integration," meaning that it was no longer about transferring powers over policymaking from the national to the EU level, and, thus, giving the EU competence. Rather, it was all about how the various levels of governance jointly engage in the setting of goals and making of policies in the absence of formal transfer of powers (Kohler-Koch & Rittberger 2006). At what levels do we see this "governance?" The so-called Open Method of Coordination (OMC), thus named in the context of cooperation in employment policy and social policy (Zeitlin 2008; Cram 2009;

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Leibfried 2010; Fink-Hafner 2011; Wood 2011), is one mode of governance that dominates in this regard. In OMC, the EU plays a role at the intergovernmental level, the Council of Ministers (or Council of the EU), where it sets common goals (cf. Radaelli 2003). The member state level is crucial too: actors at this level determine how to achieve those goals. Then the experiences across member states are compared: benchmarking, best practices, twinning, peer review, and many other modes of governance are used to insert some competition among member states as to how goals are best achieved.

The work of Sabel and Zeitlin resembles, to some extent, our work on *Innovative Governance* (Tömmel & Verdun 2009). We spell out the interaction between hierarchical and non-hierarchical modes of steering, identifying four ideal types of modes of governance: hierarchy, negotiation, competition, and cooperation.[2] Our study examines developments in policymaking over time, using four ideal types as theoretical lenses through which to analyze policy change in the EU. These modes, sometimes in hybrid forms, facilitate our understanding of how policymaking in the EU has moved forward, sometimes without the EU having competence in the area; yet joint or coordinated policies have emerged. We also observed, in some cases, that non-hierarchical modes of governance were used in policy areas in which the EU did have competence. The difference between innovative governance and EG is as follows: while the former is interested in understanding developments in various policymaking areas and how the conceptual framework facilitates a better understanding of governance process and policy developments, EG is interested in explaining how the actual policymaking process takes place. It even asks the more normative question as to whether or not we should worry about the possible claim that EG could be lacking democratic credentials or how a better understanding of it may provide the seeds for developments toward more accountable and democratic governance (Sabel & Zeitlin 2010, pp. 1, 18).

EG focuses mostly on the output – the manner by which high quality standards can be obtained. It states that the EU is

> a functioning novel polity without a state . . . its regulatory successes are possible because decision making is at least in part deliberative . . . Deliberation in turn is said to depend on the socialization of the deliberators (civil servants, scientific experts and representatives of interest groups) into epistemic communities, via their participation in 'comitological' committees of experts and member state representatives that advise the Commission on new regulation and review its eventual regulatory proposals. (Sabel & Zeitlin 2010, p. 2)

By identifying the importance of output (high quality standards), the role of experts therein, and socialization of technocrats and committee members, EG connects with a few other bodies of literature. First, it links to the literature that looks at the role of technocracy (Radaelli 1999) and epistemic communities (Haas 1992; Verdun 1999; Zito 2001). The technocrats or experts that come together in the EU context can often be identified as an epistemic community (individuals who share expertise and knowledge). They play an important role in moving forward consensus about EU policymaking (be it coordinated separate national policies, or gradually developing EU policies). More recently we have labeled an analysis that focuses on the prominence of experts in EU policymaking as an "expertocratic approach" (Heipertz & Verdun 2010). As Sabel and Zeitlin point to comitology in the above quotation, it is worth pointing out that

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comitology is a more formal process that facilitates the coming together of representatives of member states on a committee. But committees are used in the EU in more ways than only in comitology: the use of committees is at the heart of many policies (Christiansen & Kirchner 2000). One example of a committee that has been influential is the Economic and Financial Committee (formerly known as the Monetary Committee; see Verdun 2000a, b; Puetter 2006). The process enables small groups of experts, with access to knowledge and expertise, to come together in forums in which representatives of member states deliberate and propose joint goals and review each others' best practices. These settings, though pro forma intergovernmental (member states are indirectly represented, but the meetings are at a level below that of the Council of Ministers), often do not reflect the dynamics of intergovernmental bargaining. The effect of socialization and mutual respect of each others' expertise is such that common ideas and understanding develop about what might be the best standard or policy for the EU. In this way, effective peer review becomes possible (on socialization in the EU context see Hooghe 2001, 2012; Beyers 2005; Checkel 2005). The role of experts in this process often ensures that there is not a race to the bottom, but that, in fact, at times, a higher standard can be achieved. Sabel and Zeitlin contribute to this literature by pointing to the efficacy of this process in generating the desired standard or policy outcome. They worry less about democratic concerns.

Sabel and Zeitlin also see a considerable role for informal politics: "In the eyes of some it may [be] 'informal,' in the sense that it was neither directly anticipated by, nor much less can it be deduced from, the directives and other legal instruments" (Sabel & Zeitlin 2010, p. 2). Informal governance includes the role of networks, lobbyists, and the like (Christiansen & Piattoni 2003). Yet Sabel and Zeitlin further comment on informalism:

> The mutability of institutions and the lack in some cases of formal sanctions create the general impression of informal governance. But we will see that whatever the informal attributes of the governance system as a whole, those institutions whose explicit purpose is to expose and clarify difference so as to destabilize and disentrench settled approaches and solutions are typically highly formalized. (Sabel & Zeitlin 2010, p. 4)

As much as Sabel and Zeitlin also highlight the more formal aspects of governance in the EU, their analysis points to the understanding of the role of actors who participate in the policymaking process to create better standards, whether those processes are formal or informal.

Thus, EG fits in a number of ways into the existing governance literature that has been growing rapidly over the past two decades. Sabel and Zeitlin, as authors before them, seek to contribute to the analysis of governance in the EU that is different from the classic state steering (hierarchical) mode of governance. In fact, Sabel and Zeitlin see a limited scope for centralized steering and mostly focus on the process by which member states seek to achieve common goals, devolve implementation to lower levels, and highlight what they see as the important mechanism of peer review, and of reviewing assessment procedures (Sabel & Zeitlin 2010, pp. 1–6). Given this, they are concerned that their analysis could be read as a celebration of technocratic governance, with a limited role for the wider electorate (in a principal–agent type context). Indeed, it is in this area that one may have concerns on how this approach can be read, and based on what is written in the

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introductory chapter of the book, the reader is not entirely convinced Sabel and Zeitlin have dealt with the problems of technocratic governance as identified in the literature to date. They recognize it to some extent and, thus, they place considerable emphasis on the importance of deliberation by peers (see also Fossum 2012). Since their approach makes us pause and beg the question about the roles of deliberation, accountability, and legitimacy, we shall now turn to those themes.

3. The roles of deliberation, democracy, accountability, and transparency in experimentalist governance

How does the democratic process work in EG? Clearly, it is not about governance in the traditional parliamentary procedures.[3] In EG, politicization is more limited – the scope for contestation being in different realms than is typically the case in the parliamentary process of liberal democracies. In EG, politicization takes place in various parts of the policymaking process. It takes place when EU institutions and member states set their goals. Those setting the goals are elected representatives, responsible to a broader electorate. Experts and stakeholders, who have technical know-how about the issues at stake, aid them. Likewise, in EG, when lower levels (member states and other stakeholders) operationalize their aim to obtain goals, they need to be prepared to explain their policies to a wider audience, another venue for politicization or feedback. Sabel and Zeitlin also focus on peer review of how member states meet common goals and argue that this process offers a venue for checks and balances. Finally, by rethinking review procedures, one should be able to remain up to date on how best to assess the performance of member states to meet goals. Here, too, there is a feedback loop that should ensure checks and balances in peer assessment and review. In other words, Sabel and Zeitlin argue that EG, in fact, may very well assist with making the EU more democratically accountable: ". . . our claim is not the new system of governance is intrinsically democratic, but rather that it destabilizes entrenched forms of authority . . . in ways that may clear the way for an eventual reconstruction of democracy" (Sabel & Zeitlin 2010, p. 18).

This perspective on the democratic credentials rests on assumptions that output legitimacy would be the way to go and that the process of deliberation among experts contributes to higher standards. The literature on democracy in the EU has for many years sought to deal with these questions (Schmitter 1996; Chryssochoou 1998; Scharpf 1999; Stavridis & Verdun 2001; Follesdal & Hix 2006; Micossi 2008, to name but a few). It seems that Sabel and Zeitlin (2010) fall short of engaging with that literature or its concerns.

Let us summarize the issues. What differentiates the EU from other governance systems is that a large part of this public rulemaking is indeed goals-based – in other words, "output" based. As has been identified by Scharpf (1999) and others, this characteristic means that the democratic legitimacy of the EU is partially achieved through "output" rather than "input" legitimacy. This means that the everyday citizen may not feel that the EU executive has been elected in a way that is comparable to the electoral process in the national context. Yet the idea is that the outcome of the policies made by the executive is desirable. Sabel and Zeitlin have a similar view when they operationalize that it is the EU's business to achieve worthy goals: " 'good water status', safe food, non-discrimination, and a unified energy grid" (Sabel & Zeitlin 2010, p. 3). They highlight

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how deliberative decisionmaking, informalism, and multilevel decisionmaking are part and parcel of the policymaking process. Part of their contribution to the literature is that they review how this process of deliberation, informalism, and multilevel decisionmaking ultimately could be seen as a form of good governance, even if distinct from democratic governance. Indeed, they hasten to warn that EG may never obtain democratic credentials, but they point to some mechanisms that may be an innovation over democratic governance. It is this part of their perspective on EG that is particularly thought-provoking, even if not fully convincing. They point to at least three mechanisms that work as checks and balances: first, deliberative techniques force those around the table to be articulate in their choice of policies and ways to obtain their goals. Peer pressure is to do the job. Second, sometimes even hard laws (regulations, directives, and so on) are changed following this process of deliberation. And third, the rule of law plays a role in advancing European integration – the European Court of Justice is an active partner in this process.

Sabel and Zeitlin (2010, p. 3) make clear that the freedom to determine the exact policy to adopt to reach its goals comes at a price, namely that a member state needs to report on its performance and, at times, the actual procedures are reviewed. Sabel and Zeitlin explain the value of this process as part of making the whole process legitimate – a process they coin "dynamic accountability" (Sabel & Zeitlin 2010, pp. 10ff).

This view of modes of governance in the EU places Sabel and Zeitlin, to some extent, in a different camp from those who have viewed the EU as traditionally en route to becoming more federal, as well as a different camp from those who have argued that the EU's next steps would be more traditional politicization (Follesdal & Hix 2006; Hix & Bartolini 2006, and related papers on the *Notre Europe* website; Papadopoulos & Magnette 2010). Sabel and Zeitlin allocate different roles to these traditional political mechanisms (see also Börzel 2012). One of the novelties in their thinking is to point to the way in which deliberation impacts the policymaking process. In so doing, experimentalist governance is able to draw on some of the feedback loops (albeit not in the same way as democracy) involved in the process. For instance, deliberation and listening could make deputies (or committee members) reconsider their view. Legitimate national government representatives set the goals. Then the next stage is for deliberation. It is followed by best practices and review. The gist of Sabel and Zeitlin's argument is that checks and balances can offset some of the concerns of democrats even if they admit that EG will not be able to obtain full democratic credentials. As much as it is attractive that deliberation, socialization, checks and balances, and peer pressure offer attractive mechanisms of feedback and control, one wonders if it is sufficient to offset the lack of democratic credentials and, hence, whether EG may need to look into how further democratization can be achieved.

4. What's in it for us? Experimentalist governance for students of the EU

EG seeks to shed light on the modes of governance in the EU. The mechanism is one of setting goals at the EU level (Council of Ministers), then translating those goals within the context of the local setting (with the help of experts and stakeholders) into policies and practices. The next two steps are comparing achievements and reviewing the procedures that stipulate the peer review. *Experimentalist Governance* offers an analysis of how actors with experts and stakeholders develop policy goals and proceed to implement them. Another part of the contribution of Sabel and Zeitlin (2010) is their assessment of the

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lack of traditional democratic accountability and legitimacy of this process. Sabel and Zeitlin seek to point to this process being based on other principles. Rather than the principal–agent relations with the electorate, it is peer review that imposes discipline on the actors involved. They go one step further and dare to venture into the territory whereby they say that perhaps this mode of governance may actually be a boon to all those who find it difficult to hold bureaucratic politics, or indeed multilateral cooperation, to account. They point to ways in which peer review, assessment procedures, including regular review of those procedures, could substitute, to some extent, traditional democratic practices. In terms of a new architecture, a challenge contained within is how to explain to regular voters how democratic feedback mechanisms work in this mode of governance. Although the authors explicitly state that a comprehensive study lies beyond the scope of their essay (Sabel & Zeitlin 2010, p. 18), perhaps it would be worth embarking on such a study (see also Fossum 2012). It would be worth delving into political theory to revisit the various modes of steering from a theoretical point of view, asking the question: what are the least problematic modes of governance that will lead to acceptable forms of governance, without a backlash of the lack of democratic legitimacy? For now, Sabel and Zeitlin have provided us with food for thought.

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Notes

1 Henceforth, I will use experimentalist governance (EG).
2 In the case studies reported in our book we identify how in policymaking in a variety of EU policymaking areas, the policy goals often are reached by using hybrid forms (Tömmel & Verdun 2009).
3 Although note Kumm's contribution to this issue, which points out that experimentalist governance may only work in liberal democracies (Kumm 2012).

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Reflections on experimentalist governance

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Abstract
This article critically engages with Sabel and Zeitlin's important notion of experimentalist governance (EG). It is cast as a "recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts." This is a useful heuristic device to capture policymaking and implementation in complex, dynamic, and highly diverse political entities. This article discusses the micro-foundations underpinning EG, how it relates to hierarchical modes of governing, and how well it captures the distinctive traits of the EU. It also discusses EG from a democratic perspective. In democratic terms EG is understood as a form of direct deliberative polyarchy. This article notes that the question of EG's contribution to democratization cannot, however, be adequately addressed unless we pay more systematic attention to representation and representative democracy.

Keywords: European Union, experimentalist governance, democracy, learning, representation.

1. Introduction

It is a great pleasure to engage critically with the important work of Charles Sabel and Jonathan Zeitlin on experimentalist governance. I will discuss this innovative mode of governing with reference to the four questions we were asked to address.

Experimentalist governance (EG) is a mode of governance "based on framework rulemaking and revision through recursive review of implementation experience in different local contexts" (Sabel & Zeitlin 2012, p. 1). It has democratic merit in that it can be understood as a form of directly deliberative polyarchy (DDP). An important merit of EG is that it is able to work within a decentralized structure, marked by great diversity, including great differences in resources and expertise. EG, as a mode of governing, does not differentiate between public and private organizations. This sets it apart from traditional public administration where public organizations are seen as qualitatively different from private ones. EG appears more focused on problem-solving than on conflict resolution. EG, as a mode of governing, therefore, has a clear epistemic bias.

2. Relationship to other theoretical perspectives on EU governance

Sabel and Zeitlin contribute importantly to the process of bringing the debate on EU governance from a focus on the specifics of the EU to broader, more encompassing questions of governing in a more tightly connected and globalized world. I, therefore, find it more interesting to examine the theoretical assumptions that underpin their work than to compare their perspective to those of other theorists on EU governance.

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What are the micro-foundations underpinning EG? EG is of course steeped in a deliberative perspective with an onus on reflexivity, learning, and self-correction. But EG does not seem to provide us with sufficiently clear benchmarks for establishing that actors' orientations are converging in such a manner as to assure us that what is taking place qualifies as learning. There is the methodological issue of distinguishing between learning (as a reflexive activity) on the one hand, and copying, emulation, and isomorphism (less reflexive modes) on the other. There is also the question of what makes actors converge and sustain cooperation, especially when sanctions are not activated. The viability of such a system would seem to depend on norms that the actors have given their explicit consent to, and abide by, because they see the norms as valid or just. As Kumm (2012) points out in his article, EG relies on shared constitutional principles. The question is, how far down in terms of specific institutional arrangements and procedures shared constitutional principles must extend to ensure the viability of EG.

The authors contrast and discuss EG in relation to a "command-and-control" model, which is steeped in a principal–agent notion of accountability. This model is very much cast in the language of rational choice. Very schematically, EG appears to embody deliberation and learning, whereas "command and control" appears to embody rule-based commands and sanctions. The modern system of public administration, however, is based on more than rule-based commands. It is a system that socializes actors as public officials (March & Olsen 1989, 1995). What appears missing is attention to a contextual rationality, a sense of appropriateness that is associated with obligatory action and interpersonal and "systemic" trust. Officials are socialized into distinct role conceptions and sense(s) of self that define and delimit their outlooks and courses of action. Key is internalization. My point is that the discussion of the relationship between EG and the so-called "command-and-control" model should take this contextual logic more explicitly into account. Doing so would give us a clearer sense of whether EG is complementary, restorative, or transformative (cf. Sabel & Zeitlin 2010, pp. 16–17).

This focus on institutional conditioning also naturally brings up the question of values and how specific values are embedded in and condition the nature and workings of various institutional arrangements. In the extension of this, might there be a clearer, more pronounced, set of values and world views underpinning EG than what Sabel and Zeitlin have allowed for? The relative success of the New Public Management (NPM) movement, at least in parts of Europe, in transforming European administrations in a market-oriented and managerial direction underlines the centrality of the value of efficiency, as understood from a market perspective. The question – given that EG draws on some of the tenets of NPM – is to clarify the status of efficiency in actual instances of EG. Sabel and Zeitlin underline the importance of experimentalist governance in unblocking reform processes; given the link to NPM, the question is whether this unblocking might be more efficiency-focused than what the authors are claiming. In the extension of this, is EG capable of avoiding the paradox that lies at the heart of NPM: "these kinds of reforms do not seem to need results to fuel their onward march" (Christensen & Lægreid 2011, p. 12). The experience from NPM shows that the ideology that propels it is quite robust in the sense that it does not need much factual affirmation to be carried further. EG builds on some of the measures (i.e. open method of coordination, OMC) that have allegedly been programmed in an NPM fashion; this raises the question of EG being programmed in a like manner.

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3. How well does experimentalist governance capture empirical developments in the EU?

The question of distinct value programming has direct bearing on the indicators and benchmarks that are fed into EG. These are important for EG to work properly, as a learning system, and as a means of ensuring dynamic accountability. One point is about the quality of indicators and benchmarks: "often there is no detailed social science evidence provided in support of the asserted links between indicators and benchmarks in the EU policy reports" (Lange & Alexiadou 2007, p. 324). Isolated instances of poor indicator and benchmark quality need not be an argument against EG, as they may be corrected through iteration. But if the indicators and benchmarks contain built-in biases, then they will systematically skew patterns of learning. One such example could be that policies are programmed to serve certain sector-specific needs, as is, for instance, the case with OMC in the education field, which is strongly programmed to serve the EU's employment policy (Alexiadou 2005). This in turn can reduce the onus on such social justice goals as socio-economic and gender equality.

The EU's regulatory stance is sustained within a structure with strong and built-in constraints on own resource accumulation and redistribution. The effect is to inject a clear bias into policymaking and patterns of experimentation. Processes of self-correcting learning may take place, but the learning and self-correcting repertoire is, on the one hand, systemically confined or constrained, and at the same time given a strong (market-oriented) steer. This suggests that the learning processes that Sabel and Zeitlin talk about are environmentally conditioned and constrained in an EU that is getting increasingly out of touch with a rapidly changing environment. This problem has clearly been greatly exacerbated by the current crisis, (which is multifaceted – a combination of financial, fiscal, and constitutional crisis). The strong onus on the fostering of economic integration within a narrowly confined field of policy instruments, carefully and strongly delimited fiscal resources, a biased pattern of decisionmaking (favoring market-making and disfavoring market-correction, cf. Scharpf 2010), a monetary union without a compensatory fiscal union, and legal–constitutional constraints (amplified by the ECJ's latest rulings in a neo-liberal direction), has locked the EU into a particular market-making and managerial orientation which renders it highly vulnerable to unpredictable financial markets. Many of the actions taken to remedy the crisis are also deeply undemocratic.

Thus, there appear to be significant constraints on the scope for experimentalist governance in the EU. I would also argue that the very representative-democratic bodies that are frequently sidelined in crisis handling (such as the European Parliament, EP) might be the ones more suitable to undo the constraints. Representative bodies figure as actors in the EG framework but not as the specifically democratically authorized bodies they actually operate as. One issue is to establish what democratic authorization might mean for the policy process. Consider Vos's chapter in *Experimentalist Governance* on the BSE crisis. When the EP entered the process, the issue was not only politicized, but also got reframed with the EP's Medina Ortega Report underlining the public health dimension. That reframing gave a strong steer to the subsequent crisis handling. The EP also set out new guidelines, including a duty of cooperation. The question this example raises is whether the politicization and reframing of the issue that took place during the decision-making process (with the EP playing a central role) has further implications for the manner in which the process is handled in subsequent stages. In relation to EG, we may

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ask whether politicization at the initiative and decision stages mobilize the citizenry and galvanize public attention so that the system insiders become more constrained, which in turn conditions the process of implementation. This is one way of portraying accountable government, which triggers such mechanisms as anticipated reaction: implementers even when given broad guidelines would be keen to ensure that the policy is put in practice in a manner consistent with Parliament's intentions.

The EU has developed a distinct system of representation, which has been labeled a Multilevel Parliamentary Field (Crum & Fossum 2009). Politicization can activate the field and make parliaments exert a stronger programming role on the implementation process than what should normally be expected from such a diverse and pluralistic system as the EU. The EU Services Directive helps to illustrate this point (cf. Crum & Miklin, forthcoming) and shows that the parliamentary dimension matters in the complex EU setting.

4. Normative implications

EG is presented as a form of DDP. DDP has been criticized for overloading deliberation and for failing to pay sufficient heed to the two basic conditions of democracy: autonomy and accountability (Eriksen 2009; Eriksen & Fossum 2012a). Sabel and Zeitlin do not present EG as a self-standing theory of democracy, but focus instead on its democratizing effects. They introduce the interesting notion of democratizing destabilization, and highlight two sets of factors: transparency and participation, and EU accession, as mutual transformation.

The question is whether either would have had any bite, were it not for the presence of democratically elected bodies that actively propounded these. Increased transparency and the democratic conditionality that is a feature of enlargement in turn reinforce democratization, *along representative democratic lines*.

The question of EG's contribution to democratization cannot be adequately addressed unless we pay systematic attention to representation, because EU democratization is, first and foremost, a matter of entrenching representative democracy. That includes examining the role of representation in democracy, and the role of deliberation in representative democracy.

The EG framework does not pay explicit attention to the important issue of democratic authorization. It, therefore, does not differentiate clearly enough between those instances where representative bodies set the framework conditions, and those where they do not. For instance, it seems to me that the case for EG being a recursive learning process would be strengthened if EG had differentiated more clearly between those processes that are subject to the entire parliamentary field (the Community system), and those where they are not (the governance realm proper, namely aspects of the Justice and Home Affairs (JHA) and the Common Security and Defence Policy (CSDP)).

Drawing such a distinction requires paying attention to the relationship between representation and democracy. Sabel and Zeitlin do not explicitly address this. From their analysis it appears as if representative bodies would form part of the principal–agent relationship (they would be part of the EU principal which raises the question of that principal's principal, namely the people of Europe). If we are to properly reconsider the relationship between representation and democracy, then the principal–agent construction is not very useful to get at what is involved in democratic representation: "A political theory of representation requires a *political* notion of obligation or mandate, something

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unique and impossible to understand from within the logic of principal/agent" (Urbinati 2008, p. 157). Further, political representation cannot be confined to the question of electoral authorization, because it is also about the *dynamic* interaction between representatives and society. It is a circular process that links the polity to its attendant society. Here representatives are not delegates: they deliberate and exercise judgment, not through direct instructions from the people, but rather through deliberative interaction with them (also through political parties). This takes place in the shadow of the regulative norm of popular sovereignty: "Popular sovereignty, understood as an *as if* regulating principle guiding citizens' political judgment and action, is a central motor for democratizing representation"(Urbinati 2008, p. 223).

Deliberation, thus, plays a central role in representation. We may think of it as particularly pronounced in certain forms of representation, or as intrinsic to the distinct shape that the political dimension takes in a system of political representation. In that sense representative democracy is also based on reflexivity.

The EU represents an effort at establishing a new system of representation on top of already existing ones. This entails a process of reconfiguring existing constituencies and modes of representation – to work for a more complex multilevel configuration. The process has clear experimentalist traits because it unfolds in a setting marked by diversity, pluralism, and weakly developed hierarchy. It also means that the integration process is giving rise to the emergence of a distinct representation–deliberation interface, whose democratic quality requires specific attention, because this configuration raises new and demanding questions of both authorization and accountability (Fossum & Crum 2012; Eriksen & Fossum 2012b). We depict this as a Multilevel Parliamentary Field, a heuristic device for thinking about representative democracy in the multilevel EU. Its normative quality has yet to be established.

One challenge is to provide an adequate account of the representative relationship in a more dynamic setting of reconfigured constituencies and representative mandates. We need to understand *how* the representatives construct the represented (cf. Saward 2006), and the *dynamic* interaction between the representative and the represented in the complex EU setting. Another challenge is to conceptualize the nature of accountability. It is, as Sabel and Zeitlin have noted, dynamic, but representative bodies play a more prominent role in the task of making accounts, as well as in holding to account, than what Sabel and Zeitlin attribute to them.

These comments underline that the question of the EU's democratic legitimacy remains a theoretical challenge, which I think will benefit from more systematic attention to the distinct deliberation–representation interface that appears to be emerging in the EU.

5. Constitutionalism

Sabel has, with Oliver Gerstenberg (Sabel & Gerstenberg 2010), outlined a model of coordinate constitutionalism with clear links to the EG framework. Does this model adequately capture the EU's constitutional character and development? Sabel and Gerstenberg argue that the system of plural legal orders that has emerged in the EU has a clear analogy to a Rawlsian overlapping consensus. Does this analogy hold? The analogy is based on a convergence of basic principles across legal orders. The question is how this has come about and what kind of structure it is embedded in. Sabel and Gerstenberg see the convergence as having emanated over time. The EU was initially based on a

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Wirtschaftsverfassung, which was subsequently equipped with basic principles. The *Solange* jurisprudence was important in the entrenching of the overlapping consensus.

My point of departure is that the EU represents an effort at establishing a constitutional order in a context of already existing constitutional democracies. This marked the integration process from the very outset. Five out of the original six member states had constitutional provisions that not only authorized, but also mandated, the active participation of national institutions in the creation of a supranational legal order, as the only way to realize fully the principles that underlie the national constitution. The distinguishing post-war feature was that these states recognized that they could only retain democracy through a form of binding cooperation that would also have direct constitutional-democratic implications. This gave rise to a new approach to constitution making which we have labeled the theory of cconstitutional synthesis, which combines elements of the evolutionary and the revolutionary traditions (Fossum & Menéndez 2011). This theory shares with coordinate constitutionalism the onus on pluralism and lack of hierarchy but the ensuing structure has no analogy to a Rawlsian overlapping consensus. Constitutional synthesis refers to how a new constitutional order can be created out of a set of already existing (and persisting) constitutional arrangements. The process is powered by a regulatory ideal, that of a common constitutional law, which forms the leitmotif for an "ever closer" putting in common of national constitutional norms (normative synthesis), and of the development of a supranational institutional structure (institutional development). The latter process is the result of a complex mixture of copying, emulation, and experimentation; it is highly fragile and susceptible to self-subversion.

The constitutions of the participating states take on a new *seconded* role as a part of the emerging collective constitutional law of the new polity. Each national constitution then starts living a "double constitutional life": Each continues as a national constitutional arrangement, whilst it also simultaneously forms a part of the collective – European – constitution. Constitutional synthesis, therefore, presumes a substantive identity between national constitutional norms and Community constitutional norms, with the structure being very different from the one we find in cooperative constitutionalism.

Democratic constitutionalism figures more explicitly in this theory than in coordinate constitutionalism. Constitutional synthesis relies on the notion that the supranational structure (that is established at the EU level) comes equipped with a *conditional* constitutional-democratic license from the member states. This democratic license necessarily has to be conditional (and based on the need for compliance with democratic norms). The license covers the development of an own set of representative-democratic institutions that will be capable of establishing and sustaining a European democratic constituency, and it provides specific requirements for how European-level integration can redeem this in constitutional-democratic terms over time.

6. Concluding comments

Sabel and Zeitlin underline the experimentalist nature of EU policymaking, and they provide us with a powerful set of intellectual tools to capture that important feature. In this brief essay, I have tried to speak to the broader context wherein which the experimentation is taking place. I have argued that it is conditioned by representative bodies and the attempt to develop a unique European constitutional construct, which if it had been permitted to flourish could have given rise to a distinct constitutional tradition. The

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ensuing image of the EU is one of a complex new–old blend, an attempt to reconcile experimentation with deeply entrenched principles, norms, and institutional arrangements. At present, the democratic credence and very sustainability of that entire multilevel configuration is at stake.

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Constitutionalism and experimentalist governance

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Abstract

This comment explores how experimentalist governance is connected to wider constitutional questions and makes two claims. First, there are good reasons to believe that experimentalist governance can only flourish in a world where the precepts of liberal democratic constitutionalism have been widely accepted and institutionalized. Experimentalist governance is part and parcel of the world of liberal democratic constitutionalism. Second, it is not only governance in Europe that can be described in experimentalist terms. The concept is also useful to describe the dynamics of European constitutionalism.

Keywords: constitutionalism, directly deliberative polyarchy, European constitutionalism, experimentalist governance, liberal democracy.

1. Introduction

In the introductory chapter of "*Experimentalist Governance in the European Union*" Chuck Sabel and Jonathan Zeitlin describe an underlying architecture of decisionmaking in the EU that regularly and decisively shapes EU governance that they call experimentalist governance or directly deliberative polyarchy. This architecture is defined by four necessary functions (Sabel & Zeitlin 2010, p. 3). First, framework goals are established; second, lower-level units are given the freedom to advance these ends as they deem fit; third, they must report on their performance to be measured by agreed indicators; and fourth, the framework goals, metrics, and procedures are themselves periodically revised by the actors who initially established them. In this way, the jurisgenerative process is structured as a learning process with institutionalized iterative feedback loops.

The question I will briefly explore in the following is how experimentalist governance is connected to wider constitutional questions. More specifically, I wish to make two claims. First, there are good reasons to believe that experimentalist governance can only flourish in a world where the precepts of liberal democratic constitutionalism have been widely accepted and institutionalized. Experimentalist governance is part band parcel of the world of liberal democratic constitutionalism (I). Second, it is not only governance

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in Europe that can be described in experimentalist terms. The concept also applies to the dynamics of European constitutionalism (II).

2. Constitutionalism and the presuppositions of experimentalist governance

Experimentalist governance, as described by Sabel and Zeitlin, is rich in prerequisites. The authors themselves list strategic uncertainty and polyarchic distribution of power as prerequisites (Sabel & Zeitlin 2010, p. 25), but that list needs to be expanded. There are good reasons to believe that experimentalist governance is part and parcel of the world of liberal constitutional democracies. Only because it is possible for the various actors to understand themselves as partners in a shared enterprise, which is grounded in and constrained by reference to shared constitutional principles, is it possible to establish the presupposition-rich processes that experimentalism describes. Without the absence of deep ideological conflict, the types of mutually engaged and deferential forms of cooperation between non-hierarchically integrated actors demanded by experimentalism would be difficult to sustain and easily drowned out by the dynamics of power struggles and distrust.

Learning in the context of legal and political decisionmaking presupposes that first, the right decision requires knowledge, second, that the relevant actor believes s/he does not know everything there is to know already, and third, even if s/he does not, that there is something cognitively useful to engaging others. These requirements are not banal. Politics is not just about problem-solving, it is also connected to symbolic and expressive concerns (Pildes & Anderson 2000, p. 1503). And even to the extent that it is about problem-solving, actors might feel confident that they already know what the right answers are, they just don't agree with one another. When they are not certain about right answers, they might find it highly unlikely to learn anything from those whom they regard as their opponents and whom they deem to be seriously mistaken, even if they trusted them, which, more likely, they won't. Wouldn't this suggest that politics and the jurisgenerative process should be conceived as a struggle for power, involving tactical and strategic gamesmanship and, at best, forging compromises? Isn't that the world of politics as we know it? That might be the skeptic's challenge.

The skeptic's political world is a world we are not unfamiliar with. But the extent to which it accurately describes legal and political processes is a question of degree and is historically contingent. I think Sabel and Zeitlin might agree that the skeptic's world comes reasonably close to describing the political world of, say, the Weimar Republic. The constitution in place at the time, even though easily recognizable as an exemplar of a genuine liberal-democratic constitution, was understood by many at the time primarily as a value-neutral device through which authoritative decisions could be made and some semblance of order maintained in a context of deep ideological divides. In Weimar by the late 1920s, this included a majority of Communists, Socialists, National Conservatives and National Socialists, all of whom looked at the constitution at best as a modus vivendi, to be tolerated until, after a successful revolution, it could be replaced by a more adequate form of government reflecting more closely the preferred restorative or transformative ideological commitments. Until then, the game was about capturing the levers of power or at least preventing others from effectively putting them to use for their own purposes. Notwithstanding the existence of strategic uncertainty and polyarchy, this is clearly not

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the context in which experimentalism, with its focus on deliberative contestation, mutual engagement and deference, peer review, and revision, could plausibly have flourished.

It is not surprising that the experimentalist literature does not draw its examples from Weimar, but the world of the European Union or US constitutional practice after the Cold War (Sabel & Zeitlin 2010). What characterizes this world is what might be called a *hegemonic constitutionalist consensus*. In a formulaic way that consensus is captured in part of Art. 2 of the Treaty of the European Union that states "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." The Trinitarian formula "human rights, democracy and the rule of law" as the foundations of legitimate authority is central to the liberal democratic constitutionalist tradition. Of course that does not mean that there is a consensus on what exactly these terms mean, what kind of institutional practices and policies they should give rise to, or how these concepts relate to one another. But there is a rich repertoire of paradigmatic examples and a common set of historical references that further specify what this commitment requires and what it excludes. In Europe there is a consensus, for example, that the constitutionalist commitment is connected to some kind of a social market economy – thereby rejecting an unqualified commitment to either central planning or unregulated markets. It also implies some level of transnational integration, even though there is plenty of disagreement how far that should go, which form it should take, and how European law relates to national law. Furthermore, there remains a great deal of space for disagreement and contestation – the ordinary stuff of democratic politics and policy disagreements. But that disagreement and contestation is ultimately framed and constrained by a consensus that claims have to be justified in terms of a commitment to human rights, democracy, and the rule of law. It is this constitutionalist consensus that has enabled and encouraged practices of government and governance that can be described as experimentalist.

3. European constitutionalism and experimentalism

Even though a commitment to constitutionalism may well be a precondition for the successful institutionalization of experimentalism, experimentalism is not restricted to the domain of administrative decisionmaking that is the focus of the Sabel & Zeitlin volume.[1] The dynamics of European constitutionalism, too, can be described as having evolved following the experimentalist model. Using the classical issue of constitutional conflict in the European Union as a prism, I will briefly describe the process by which the dominant understanding of the grounds of legitimate authority in the European Union and the doctrines governing the management of the interface between national constitutional law and EU law have shifted over time. This shift can be described as experimentalist in two distinct ways: first, the process by which it came about can be described in experimentalist terms; and second, the new understanding of constitutionalism which has evolved in Europe – which in the literature is often referred to as Constitutional Pluralism (Avbelj & Komàrek 2012) – itself places iterative learning processes organized around procedures of contestation and debate between different institutional actors at the heart of constitutional life. This means that core features of experimentalism are built into the DNA of European constitutionalism. This is a story that in a somewhat stylized and reductive form can be told in four parts, at least loosely following the four functions of experimentalist governance (Sabel & Zeitlin 2010, p. 3).

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In the beginning, there is the astounding claim by the European Court of Justice (ECJ) in *Costa v. Enel* (1964) that all European law has primacy over all national law, including national constitutional law, and that national courts are under an obligation to set aside all national law that conflicts with EU Law. The radically unsettling nature of this claim should not be lost: a number of liberal constitutional democracies had come together, signed a set of treaties primarily addressing questions of market regulation, which they proceeded to ratify according to their national constitutional provisions, only to be told by the judicial organ established under those treaties that, for all practical purposes, final authority had shifted from national institutions, established and authorized under national constitutions, to European institutions established under treaty law, as interpreted by the European Court. How should national courts respond? Should they follow the ECJ and conceive of themselves and the national constitutional order as hierarchically integrated in a European legal system with European law, as interpreted by the ECJ at the top?

According to conventional national constitutional narratives, reflected in a wide range of national court decisions, the claims by the ECJ could not be taken at face value. On the one hand, the rule of recognition within the national legal system was to accept the national constitution as the supreme law of the land and the national highest courts as the constitution's final arbiter. On the other, there was the dominant strain in constitutional theory that provided normative support for this convention: Wasn't the ultimate authority of the constitution derived from "We the People," imagined as acting as constituent power to establish a national legal framework within which they govern themselves as free and equal? Why should EU law change any of that? Since EU Law was based on a set of treaties and could not plausibly be interpreted as being authorized by a European "We the People," surely EU law derives its legitimacy from the link to national ratification undertaken within the national constitutional framework. And surely that means that EU rules could only be enforced subject to authorizing and constraining national constitutional rules? And didn't national constitutions include rules that specifically address the question under what conditions treaty law was to be enforced as the law of the land domestically? Generally national courts did not accept that national orders were hierarchically integrated in a larger EU order.

The first part of the story, then, is the story of transnational assertiveness and national resistance, which has led to a *polyarchical or pluralist structure* in Europe: European law, as interpreted by the ECJ, was claimed to establish an autonomous legal order that had primacy over all other law and integrated it on its terms, and was not simply derived from member states. And national constitutional law, as interpreted by its respective highest judicial organs, claimed ultimate authority to determine what counts as the law of the land in each member state and to integrate EU law within domestic law on its own terms.

The second part connects the story more closely to the *first two functions* of experimentalism described by Sabel and Zeitlin. The states had, after all, established the European Union at least in part to solve a number of coordination and cooperation problems relating to the establishment of an integrated market, and so, notwithstanding the deep initial conceptual divide between the ECJ and some national constitutional courts, national courts accepted the ECJ's underlying argument in favor of primacy. If you want to have a functioning common market, the market rules have to be enforced in a uniform and effective way everywhere in the European Union and cannot be subject to the additional condition that there are no national rules establishing other requirements. In

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the language of experimentalism, national courts generally accepted the goal of securing the effective and uniform enforcement of EU law and now had to find their own constitutional way to work toward its achievement. And so national courts found ways and means to *interpret their constitutions* in a way that was increasingly deferential to EU law. In an iterative process, equivalent to the *third function* of the experimentalist approach, over time and following a number of further pronouncements and browbeating by the ECJ, states opened up their national legal orders to the application of EU law to an extent that ensured the effective and uniform enforcement of EU law to a considerable extent.

But even though national courts generally were able to interpret their constitutions in a way to considerably open up their national legal orders, they did insist on drawing red lines in the sand – they did not fully comply with the requirements originally laid down by the ECJ. Even if establishing an effective rule of law on the European level in order to have a functioning common market clearly matters, it was not the only thing that mattered. There were also countervailing concerns relating to constitutional principle that in some cases could have greater weight. The following provides an exemplary stylized summary of the Federal Constitutional Court in Germany addressing the issue.

To begin with, the German Federal Constitutional Court (FCC) accepted without much ado that EU law trumps ordinary statutes, even statutes enacted later in time, because of the importance of securing an effective and uniformly enforced European legal order.[2] The principle of ensuring the effective and uniform enforcement of EU law – expanding the rule of law beyond the nation state – was a central reason for the court to recognize the authority of EU law over national statutes. This meant that in Germany, EU treaties were effectively granted a more elevated status than ordinary treaties, to which a "last in time" conflict rule generally applies.

Yet, contrary to the position of the ECJ, the court recognized that that principle was insufficient to justify the supremacy of EU law over all national law. The second issue before the Court was whether it should subject EU law to national constitutional rights scrutiny. Could a resident in Germany rely on German constitutional rights against EU law? Could the protection of national residents against rights violations guaranteed in the national constitution be sacrificed on the altar of European integration? Like other questions concerning the relationship between EU law and national law, the German constitution provided no specific guidance on that question. In *Solange I*[3] the FCC balanced the need to secure the fundamental rights of residents against the needs of effective and uniform enforcement of EU law and established a flexible approach: for as long as the EU did not provide for a protection of fundamental rights that is the equivalent to the protection provided on the national level, the court would subject EU law to national constitutional scrutiny. At a later point in *Solange II*[4] the court determined that the ECJ had significantly developed its review of EU legislation and held that the standard applied by the ECJ was essentially equivalent to the protection provided by the FCC's interpretation of the German Constitution. For as long as that remained the case, the FCC would not exercise its jurisdiction to review EU law on national constitutional grounds. Because the ECJ, through its own jurisprudence, provided the structural guarantees that fundamental rights violations by EU institutions would generally be prevented, it conditionally accepted the authority of EU law. To put it another way: structural deficits in the protection of fundamental rights on the European level were the reason for the FCC to originally insist that it should not accept the authority of EU law, insofar as

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constitutional rights claims were in play. When those specific concerns were effectively addressed by the ECJ, the authority of EU law extended also over national constitutional rights guarantees and the FCC as their interpreter. The authority of EU law, then, was in part a function of the substantive and procedural fundamental rights protections available to citizens as a matter of EU law against acts of the European Union. Only because there are structural concerns relating to fundamental rights protection does the German Court assert jurisdiction. Once the structural concern is addressed on the EU level, concerns relating to uniform and effective enforcement of EU law trump any possibility that, in a given case, the FCC might do a better job at identifying the disputed proper scope and limits of a right.

But there is a third issue. In its Maastricht decision[5] and later in its Lisbon decision,[6] the FCC determined that it had jurisdiction to review whether or not legislative acts by the European Union were enacted ultra vires or not. If such legislation were enacted ultra vires, it would not be applicable in Germany. As a matter of EU law it is up to the ECJ, of course, as the ultimate arbiter of EU law, to determine whether or not acts of the European Union are within the competencies established by treaties.[7] But the ECJ had adopted an extremely expansive approach to the interpretation of the EU's competencies, raising the charge that it allowed for treaty amendments under the auspices of treaty interpretation. Under these circumstances, the FCC believed it appropriate to play a subsidiary role as the enforcer of limitations on EU competencies of last resort. Both in the Maastricht and Lisbon decisions, arguments from democracy played a central role. Democracy in Europe remains underdeveloped, with electoral politics playing a marginal role. The national domain remains the primary locus of democratic politics. Under those circumstances, ensuring that EU institutions would remain within the competencies established in the treaties is of paramount importance. Yet even while insisting that it had the competency to review EU law on jurisdictional grounds, the FCC made it clear that that review would be highly deferential:[8] only if the transgression of the EU competencies is *sufficiently serious* and the act in question leads to a *structurally significant* shift in the allocation of competencies, would the acts be deemed ultra vires and inapplicable in Germany (Payandeh 2011). This deferential standard reflects concerns for the rule of law and effective functioning of a transnationally integrated community, where reasonable interpretative disagreement about the jurisdictional limits of the EU is possible, in particular given open-ended jurisdictional norms, such as subsidiarity and proportionality.

This points to a final line of national resistance. When a national constitution contains a specific rule containing a concrete national commitment – say a commitment to free secondary education,[9] a restriction to national citizens of the right to vote in municipal elections,[10] or a categorical prohibition of extradition of citizens to another country[11] – these commitments will not generally be set aside by national courts. Instead, national courts will insist that the constitution is politically amended to ensure compliance with EU law. This line of cases reflects an understanding that the realm of *the national remains the primary locus of democratic politics and primary focal point for the identification of citizens*. For as long as that remains the case, a commitment to democracy is interpreted by some member states courts as precluding or setting aside specific national constitutional commitments, to the extent they are embodied in concrete and specific rules. It is then up to the constitutional legislature to initiate the necessary constitutional amendments.

When the ECJ made the claim that EU law has primacy over all national law, including national constitutional law, it was making a claim that national courts were right not

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to accept it in an unqualified way. At the time, EU law did not provide for adequate constitutional rights protection, it did not provide for an adequate democratic legislative procedure, and there was no indication that the court took seriously the limits of competencies in the treaty. These concerns became more serious as the decisionmaking moved from unanimity to qualified majority vote in more and more areas after the mid-1980s. To a significant extent, the response of member states' courts can be understood as a general acceptance of the ECJ's claim to primacy, but with the proviso that EU law does not violate fundamental rights, remains within its competencies, and does not encroach on fundamental constitutional commitments that defined the democratic identity of the member state.

This leads to the third part of the story, which takes us back to the European level and reflects *the fourth function* of the experimentalist model: revision of the original framework as a result of bottom-up experience and contestation. At least in part as a response to the challenges by national courts, the EU legal order has accommodated the concerns of principle reflected in court decisions of member states. The story about the evolution of the EU's fundamental rights guarantees is well known and has led to the ECJ's development of its own common-law style human rights jurisprudence, now complemented by the entry into force of the European Charter of Fundamental Rights in December 2009. The concerns relating to competencies have arguably led the ECJ to pay greater attention to delimitation of competencies, even though there are still good grounds for skepticism (Kumm 2006, p. 503). Furthermore, the Treaty of Lisbon (2007) contains interesting procedural innovations involving interactions between national parliaments and the Commission that might make some contribution to help establish a culture of subsidiarity in Europe and reinforce the role of the ECJ as a more credible arbiter of subsidiarity. Finally, the structural problems relating to democracy have not really been addressed so far by EU actors, even though the legal framework established by the Treaty of Lisbon might allow for the evolution of greater electoral accountability of the Commission in the future, thereby making the elections of the European parliament more meaningful (Kumm 2008, p. 117). But more importantly, EU law now specifically requires that member states constitutional identity be respected.[12] A plausible interpretation of that provision suggests that it might not violate EU law if a member state refused to apply EU law in a situation where a fundamental national constitutional commitment is in play (Kumm & Ferreres Comella 2005, pp. 473, 491–492). In this way, European law has accommodated the concerns invoked by national courts either by reforming itself with regard to fundamental rights protection and policing more effectively the jurisdictional boundaries of the EU or by granting exemptions that allow member states to follow their constitutional commitments relating to their identity, even when these are in tension with other EU obligations.

This leads to the final part of the story. As part of the process of engagement, accommodation, and deference between European and national institutionalism, the dominant understanding of standards of legitimate constitutional authority has shifted. Neither the functional justification of the ECJ in *Costa v. Enel* for the primacy of EU law over national constitutions, nor the justifications invoking "We the People," statehood, and sovereignty invoked by some national courts to justify the supreme authority of the national constitution have withstood the process of mutually engaged contestation and deliberation. Instead *a set of principles central to liberal democratic constitutionalism have shown themselves to be central for assessing the relative authority of conflicting legal norms*

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in specific contexts. Neither EU law nor national constitutional law is supreme. Contrary to democratic statism, it is not the case that the idea of "democracy" and "national self-government" connected to statehood and sovereignty provides the decisive principles to determine where ultimate authority lies. Nor is it the case that the idea of legality and the functional reasons in support of it are sufficient to justify a hierarchically structured, source-based monist account of the legal world. Both of these competing conceptions capture some relevant moral concerns, but neither one is persuasive because both are one-sided and remain trapped in their search for a source of ultimate authority. Even if the European Union Law does not establish the supreme law of the land, it could still effectively reconstitute legal and political authority in Europe. The authority of EU law is possibly a question of degree, as is the authority of national constitutions. Its extent depends on the comparative degree to which EU law or national constitutional law realizes constitutional principles. It admits the possibility that neither EU law nor national constitutional law effectively establishes the supreme law of the land. Instead, a better understanding of the range of concerns has given way to a principled reconstructive understanding of constitutionalist authority that has a pluralist structure. That pluralist constitutional structure is not only the result of an experimentalist process. It also perpetuates in the form of constitutional doctrine experimentalist functions as part of an ongoing constitutional process.

Notes

1 Sabel has himself presented experimentalism in wider constitutional contexts in Europe and the US (Cohen & Sabel 1997; Dorf & Sabel 1998; Sabel & Gerstenberg 2010).
2 BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971).
3 BVerfGE 37, 271 (1974).
4 BVErfGE 73, 339 (1986).
5 BVerfGE 89, 155 (1993).
6 BVerfG, 2 BvE 2/08, Judgment of June 30 2009.
7 See Art. 230 ECT.
8 Decision of 6 July 2010, 2 BvR 2661/06 – *Honeywell*. See also Judgment of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (Greece aid and Euro rescue package).
9 Belgian Constitutional Court, European Schools, Arbitragehof, Arrest no. 12/94, B.S. 1994, 6137–6146.
10 Spanish Constitutional Court, Municipal Electoral Rights, 3 Common Law Reports 101, (1994).
11 Polish Constitutional Court, Judgment of 27 April 2005, P 1/05, English summary available at: http://www.trybunal.gov.pl.
12 See Art. 4 Sect. 2 EUT: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (. . .)."

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Experimentalism in the EU: Common ground and persistent differences

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Abstract
Our central claim in this rejoinder is that experimentalist forms of organization in making regulatory rules, organizing social services, and articulating constitutional norms arise and diffuse as the problem that the actors and the state face shifts from ignorance to uncertainty. We argue that this has consequences for forms of accountability and for the conception and organization of democracy and constitutionalism. The EU, founded by diverse states in a period of continuing uncertainty, intensified by growing interdependence, proves to be a natural laboratory for observing urgent efforts to adjust to this new situation, and the symposium focuses on developments there. The symposium has brought us to see that there is more common ground in these debates than prior exchanges may have suggested. We therefore emphasize convergence on large points, while underscoring and, we hope, clarifying persistent differences, with the aim of encouraging the joint exploration of them already underway, in part explicitly, in part implicitly.

Keywords: accountability, constitutionalism, democracy, experimentalism, representation

1. Introduction

Governance or new governance becomes of interest when the familiar mechanisms of parliamentary legislation and the administrative state come under strain. Very generally, these familiar forms of decisionmaking fail for two reasons. One is ignorance. State officials, distant from events, do not know how to respond to a range of circumstances, but the primary actors in civil society and the private sector, because of their proximity to situations that concern them, do. When ignorance is the problem, the solution is to create a mechanism for systematically polling the knowledgeable parties, while ensuring that the polling is public-regarding. By and large, neo-corporatism, with its focus on inclusion of the social partners – Labor and Capital – in legislation and collective bargaining, and its civil society successors on the way to new governance, make just this assumption (though these arrangements are of course also attractive to many for affording possibilities for participation in decisionmaking that render society more just and democratically legitimate).

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The second source of systematic failure is not ignorance, but uncertainty. In this case the official decisionmaker does not know how to respond to current or emergent situations, but neither do the primary actors. The response, correspondingly, is not to organize a system for polling informed insiders, but rather to organize joint exploration of the situation and possibilities for responding to it, on the assumption that joint and continuous learning – arriving at provisional results and then correcting them in the light of further inquiry – makes the risks associated with persistent uncertainty more manageable.

Our claim is that experimentalist forms of organization in making regulatory rules, organizing social services, and articulating constitutional norms arise and diffuse as the problem that the actors and the state face shifts from ignorance to uncertainty. The characteristic sequence of experimentalist decisionmaking – agreement on broad framework goals, giving local actors discretion to advance them in their own way, subject to comparative review of their separate efforts, and revision of both local plans and central goals in light of the resulting comparisons of the implementation experience – is in effect an acknowledgment that no one at the center can have a panoramic view of the situation, but local actors cannot rely exclusively on their immediate experience. The best way to correct the limitations of each vantage point is to view it from the other.

An important implication of this sequence is the breakdown of the distinction between conception and execution. The framework – the conception of the aims of policy – has a normative valence. It is a commitment to do some general thing – assure that water is of "good" quality or (in the US) that children receive an "adequate" education – that accords with society's moral values and ideas of justice. But the commitment comes with the more or less explicit recognition that the doing of that thing through joint exploration may well give new meaning to the original intent. In that sense, the implementation becomes the conception.

From here it is the shortest of steps to the idea that the principal–agent relation is out of place in a world that responds to persistent uncertainty. A principal (the sovereign people with respect to the legislature, the legislature with respect to the administration, the top administrator with respect to subordinates) is an actor with goals and knowledge of the conditions for realizing them precise enough so that, given adequate resources, she can incentivize other actors – the agents – to achieve them. When the situation is persistently uncertain, the principal's "goals" are reshaped by the agent's efforts at implementation, and the principal–agent relationship breaks down. So too does the familiar form of accountability as rule-following, in which agents act accountably when following instructions prescribing how to realize the overarching goal.

When the agent's obligation is to explore possibilities for attaining the goal and even the advisability of modifying it, accountable behavior must mean diligently and responsibly engaging in this kind of exploration, making at least adequate, and preferably optimal, use of all the information and experience available for doing so. The rule to be followed, in other words, is to ascertain the utility of the current rules and to defend alternatives when appropriate to peers facing similar problems. We call this forward-looking or dynamic accountability to mark it off from the rule-following characteristic of principal–agent relations. A central focus of empirical work documenting the existence and operation of experimentalist governance (EG) has been the investigation of these kinds of recursive mechanisms of peer review as devices for simultaneously institutionalizing learning and accountability under conditions of persistent uncertainty. Because

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the EU was founded by diverse states, and has developed during a period when uncertainty, intensified by interdependence, was generally growing, it proves to be a natural laboratory for observing urgent efforts to adjust the capacities of states to this new situation, and this symposium focuses accordingly on developments there.

To judge by the responses of our interlocutors, the existence and mode of operation of such governance mechanisms is common ground. Börzel, for example, whose own work does not necessarily lead her to sympathize with ours, writes that EG "provide[s] a new perspective unveiling a mode of coordination or decisionmaking style that has been largely neglected by the literature on EU governance" (Börzel 2012, p. 382). Verdun, who starts from premises closer to ours, emphasizes experimentalism's distinctive "focus on the process by which member states with the EU achieve common goals, devolve implementation to lower levels and, importantly, the mechanism of peer review, and reviewing assessment procedures" (Verdun 2012, p. 388). Fossum (2012, p. 394), likewise, accepts our notion of EG as "a recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts" as a "useful heuristic device to capture policymaking and implementation in complex, dynamic, and highly diverse political entities," such as the EU. Kumm (2012) sees in experimentalist recursion a template for understanding the dynamics of European constitutionalism.

But beyond this common ground, there are naturally open questions and differences. For ease of exposition, we can group these under four headings. First, scope conditions: What circumstances favor or impede the emergence of experimentalist institutions? Are there some settings where such institutions arise spontaneously and others where their existence is precluded? Second, what to make of the arguments regarding the structural deficit – the putative inability of the EU not only to integrate markets but also to correct their outcomes as social justice requires? Does such a deficit constrain and distort the operation of EG? More fundamentally, does it exist at all? Third, what can be said about the relation of experimentalism to representative democracy, and especially about the relationship of dynamic accountability to representation and the democratic legitimacy of this form of governance more generally? Fourth, and finally, how should we conceptualize the relation of experimentalism to forms of constitutionalism that are emerging beyond the state in the interaction of constitutional courts, each endowed with the authority to reject the authority of the others?

2. Scope conditions

In "Learning from Difference" (Sabel & Zeitlin 2008, 2010), we identify a polyarchic distribution of power and strategic uncertainty as two very general scope conditions for the emergence of experimentalist institutions. In the absence of strategic uncertainty, actors are convinced that they know how to pursue their ends, so joint exploration of possibilities is superfluous (though cooperation in pursuit of overlapping interests may not be). In the absence of polyarchy, one actor is dominant, or there is a struggle for dominance, and the powerful prefer to impose outcomes, rather than pursue them cooperatively with others. In the most straightforward case, where the two conditions are fully met, we should find experimentalism arising spontaneously when actors in a polyarchy anticipate the joint gains from collaborative problem-solving under uncertainty, and indeed there are empirical cases where just this happens.[1]

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But what of the many situations where these conditions are either imperfectly met or where other background conditions for cooperation that we have scanted prove to be relevant? An important example of the first case is when actors have begun to doubt the utility of their strategic convictions, but prefer to protect their current share of returns or their position in some hierarchy of influence and power, rather than engage in cooperative activities that might put their advantages at risk – when, in other words, their interests, conventionally understood, diverge. An important example of the second is when cooperation is obstructed not by an imbalance of power, but by an absence of shared commitments to fundamental values.

Börzel calls attention to the first case in her discussion of the shadow of hierarchy. The argument is that there are many circumstances where power imbalances and concerns to protect the existing constellation of interests impede actors who might otherwise pursue experimentalist solutions from, in fact, doing so, and that under these circumstances, the state induces actors to engage collaboratively by threatening to impose a solution inferior (from their point of view) to those they could devise themselves; and that the experimentalism that emerges under this shadow of hierarchy is dependent on state authority for its existence – with the upshot in some reprises of the argument that experimentalism is a complement or extension to traditional state authority, rather than an alternative to it.

This is one of the issues where we think – and we strongly suspect that Börzel thinks as well – that there is more agreement than usually supposed. There is no disagreement that there are many situations where conflicts over potential divisions of returns obstruct experimentalist cooperation; nor is there any disagreement that the actors in these situations can be, and often are, induced to cooperate by threatening to impose an outcome that puts them in a situation far less desirable than the one that could be achieved through joint efforts. Where Börzel invokes the idea of the shadow of hierarchy to describe this threat and its origin, we speak of the imposition of a penalty default. These terms have related origins in the US literature on bargaining and contract; they have been adapted for and further modified by use in the context that we are currently discussing. It seems to us that the current usage of these terms is often quite similar, even if differences in origin and nuance may often obscure this.

The shadow of hierarchy idea traces back to bargaining in the shadow of the law, which was first developed in the context of divorce settlements. The notion was that the parties could reliably anticipate the settlement that a court unaware of the subtleties of their situation would impose, and in view of that outcome – plausibly called the shadow of the law – bargain instead to an outcome that made them both better off. The idea of the penalty default originates in contract law, where courts intent on reducing information asymmetries among contracting parties establish a default rule governing a particular term of a contract that so burdens the more informed party that it prefers to disclose closely held information and bargain to a result more favorable than the default. As applied to the emergence of experimentalism and other new governance arrangements, both concepts have drifted from their original moorings, while retaining enough of a connection to allow at times for contrary interpretations of developments. Thus, the idea of decisionmaking in the shadow of hierarchy is sometimes used to suggest that the state could, through the exercise of traditional "hierarchical" means, retake control that had been delegated de facto to external actors.[2] And the idea of the penalty default has sometimes been used to suggest that there is a freestanding punitive power that can be

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invoked by authorities when selfish and short-sighted interests prevent actors from pursuing explorations that are likely to prove mutually beneficial and public-regarding. The first view suggests that EG is essentially an adjunct to the traditional state, the second, that it is an alternative to it.

Both of these pristine interpretations are plainly incorrect. Just as the ability to destroy a city does not imply the ability to construct one, so the capacity of the state to impose an *in terrorem* outcome – a threat so menacing that it terrifies the actors into seeking an alternative – plainly does not depend on its capacity to retake control of the situation and devise a solution similar, though slightly inferior, to the one the actors might have reached through deliberation. Börzel (2012, pp. 380–381) sees this possibility quite clearly, noting that

> the threat to hierarchically impose collectively binding decisions [which] helps to unblock deadlock and prevents voluntaristic defection . . . is not confined to the imposition of pareto-optimal solutions but can also involve what Sabel and Zeitlin refer to as "penalty default" and define as the threat to engage in traditional rule-making that is disruptive and produces dysfunctional results. Actors are willing to compromise in order to avert a policy outcome imposed by central authorities that would leave them worse off than a possible agreement among themselves.

Moreover, in related work with Risse, Börzel argues that there can be "functional equivalents to the shadow of hierarchy cast by a strong state," including both the influence of external actors, such as international organizations, and shared social norms and reputational concerns, which motivate non-state actors to contribute to governance (Börzel & Risse 2010, p. 114).

For our part, it needs to be said that the experimentalist discussion has not been attentive to the conditions under which penalty defaults are and are not available, and it is plain that subtle differences in institutional configuration matter in this regard. For instance, courts in the US can find whole institutions – school systems, prisons, child welfare systems – in violation of constitutional and statutory obligations, and put them under the authority of a court-appointed master, with whose help they are to cure the infringing conditions, and – upon demonstration that they have – regain their autonomy. Such sweeping remedies, which in the presence of other conditions have cleared the way for elaboration of experimentalist institutions, are virtually unknown in the EU. Similarly, some NGOs are in a position to impose the equivalent of penalty defaults on private actors – for example, by threatening to boycott their products – and investigation of the conditions under which this is possible is ongoing. The idea that there are functional equivalents to threatening shadows and the creation of penalty defaults by traditional state authorities is, therefore, common ground. Relatedly, and more generally, the question of the relation between the development of experimentalism and the further development or transformation of the traditional state is a question for common consideration.

Kumm raises the question of cultural prerequisites to experimentalism most directly. He is certainly right to say that some shared values must underpin cooperation in general, and experimentalist cooperation in particular, as it is reasonable to assume that actors will not want to learn from direct collaboration with their enemies. The two crucial and related questions are: how much agreement must there be on shared goals and values to permit cooperation, and to what extent, if at all, can such commonality be generated or

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augmented by a process of joint exploration, rather than being a fixed prerequisite or initial endowment. Kumm's discussion of the Weimar example is a useful starting point for analysis. The parties in Weimar, as Kumm advises, spurned cooperation in the conviction that the resulting chaos would (in accordance with their respective theories of inevitable historical development) mobilize their supporters and advance their interests. We would call this a situation of extreme strategic certainty – here departing from Kumm's interpretation – but we are in full agreement that when situations of this kind prevail, experimentalism, and again, cooperation more generally, is futile. If this is the way the world is, then skepticism is the right response to experimentalism.

Of course, we don't think this is generally speaking the way of the world. One reason is that which Kumm provides. There are historical convergences in which diverse actors come to share common values. Kumm refers to the trinity of human rights, democracy, and the rule of law that underpins the formation of the EU and has guided the jurisprudence of its Court of Justice (now the CJEU, but hereafter referred to as the ECJ or just the Court) and the constitutional courts of the member states, a claim to which we will return. But there is a second mechanism. Actors who have come – usually we may assume through disappointing experience – to abandon, in some measure, the Weimar conviction that history will reward unflinching fidelity to principle, may very well entertain the possibility of learning from and with others who have come to similar conclusions. Their disposition to do so would be increased when, as in the case of experimentalism, the institutionalized exchanges of information that make learning possible also make it easy to verify the intentions and capabilities of other parties (and at the least to detect opportunism before it can become ruinously costly). In this case, confidence in and willingness to rely on other parties grows from rather than precedes collaboration itself (Sabel 1994). To the extent that this trust and confidence fosters a common outlook and the sharing of values implicit in it, a common "culture" is, likewise, the product, not the indispensable input, of collaboration. In a broader perspective, the two cases can be seen as symmetrical. As many writers have emphasized, the enmity characteristic of Weimar is itself the outcome of a historical process in which differences lead to misunderstandings, misunderstandings to insults and retaliations, retaliations escalate in intensity, hardening enmity and making it decreasingly possible to arrest the plunge toward conflict by appeals to reason. So from this perspective, enmity, no less than amity, is an historical outcome.

At this point, you will be right to wonder how much of the world is caught up in this strategic certainty-reinforcing cycle of enmity – going Weimar – and how much has entered the reverse cycle of increasing strategic uncertainty and the disposition to construct at least the rudiments of experimentalist cooperation. Of course we can't venture an answer to that question and we doubt that it is possible to do so without relying on a theory of historical inevitability that most will find dubious. Nonetheless, the spread of experimentalist institutions in regions long riven by the bitterest conflict, such as the EU itself, and in policy domains that for decades have been paralyzed by apparently intractable differences of strategy, such as school reform in the US, as well as a drift of transnational governance in the direction of experimentalism, all suggest that the extent of circumstances favoring cooperative experimental outcomes is certainly not trivial, however far it may be from all-encompassing. The success of penalty defaults observed as just noted in a wide variety of settings is especially probative here. For while the willingness of parties to respond with cooperation to an *in terrorem* threat – the threat to turn their institutional lives to chaos – may seem self-evident when seen in isolation, the lesson

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of Weimar is precisely that it is not a uniquely rational context-independent response, but rather reflective of a deep, if unspoken, assessment of other possibilities. To the extent that penalty defaults work today in a wide range of settings – and there is, as we noted, agreement that they do – the skeptic is wrong to see Weimar as the way of the world generally.

3. The EU's structural deficit

Among our interlocutors, Fossum is the only one to raise the question of a structural deficit or imbalance in the EU. His concerns are emphatic: within the EU, "processes of self-correcting learning may take place, but the learning and self-correcting *repertoire* is on the one hand systemically confined or constrained, and at the same time given a strong (market-oriented) steer" (Fossum 2012, p. 396).

Variants of this view are widely shared in many quarters of European social democracy, and understandably so. After decades of neo-liberal deregulation, culminating in the market triumphalism of the Washington Consensus of the 1990s, the concern that preferences have been institutionalized in a way that skews or steers them toward market-making at the expense of regulation and redistribution can hardly be dismissed as an ideological fantasy. But there is a large, and we think thus far insurmountable, step from this understandable concern to a compelling demonstration that the party of deregulation and neo-liberalism has indeed created institutions that perpetuate its preferences, despite profound changes in context.

The most ingenious and intellectually elegant efforts to demonstrate the institutionalization of this structural deficit are the successive formulations of Scharpf, whose authority Fossum invokes. Scharpf initially saw the structural deficit as the treaty-based imbalance between the EU's powers to further negative integration – the removal of obstacles to unified markets – and the capacity to control undesirable social and economic effects of the markets thus created, especially on the delicate balance between public and private responsibilities that embodies the solidarity of the welfare state in each member country. He rendered this broad argument more precise and testable by connecting it to the product–process distinction in EU regulation of goods in commerce. Member states were said to be able to regulate characteristics of products that directly affected the health and safety of their citizens, but not features of the production process that left no trace on merchantable goods, but did of course affect the working and environmental conditions in the country of origin. The result, Scharpf then argued, would be a race to the bottom in the regulation of production or process conditions, as member states competed to reduce the regulatory burden on domestic industries to the levels acceptable in their least exigent rival within the EU. As Scharpf himself would come to realize, with respect for example to environmental protection, this distinction had little explanatory power, though he clung to the idea that in theory his theoretical distinctions were correct (Scharpf 1999, pp. 106–111). Subsequent developments, such as the REACH (Registration, Evaluation, and Authorization of Chemicals) Regulation and the Water Framework Directive, make it clear that the EU has regulatory capacities in this domain that are envied by environmental activists in the US.

Abandoning the product–process distinction, Scharpf subsequently linked the structural deficit to what he sees as the intrinsically skewed jurisprudence of the European Court, committed to extending the reach of liberalization and deregulation through

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negative integration. The criticism that the Court was somehow debarred from protecting social and economic rights was, in view of the ECJ's actual jurisprudence, reinterpreted as the assertion that, in vindicating social rights, the Court interpreted these rights as the claims of individuals to particular publicly provided benefits, thereby perversely creating a mechanism for destabilizing in the name of individual liberty intricate mechanisms of social balance established at the member-state level. Thus, even in conceding that the Court and EU institutions generally are not necessarily neo-liberal in terms of an exclusive fixation on market-making, Scharpf sees them as irremediably dedicated to the furtherance of an individualistic liberalism at the expense of necessarily particular republican ideas of collective freedom and justice that can only be realized within national welfare states (Scharpf 2010, 2012).

This succession of cartwheels is not, to be sure, itself a disqualification. Scharpf may simply be, with admirable persistence and ingenuity, approximating the deep truth of things by trying successive variants of common themes. But the profusion of arguments also raises the possibility of a conclusion in search of a compelling, though still elusive, justification. A key consideration that inclines us to this latter view, and leads us to reject the broader claim about a structural deficit of the EU of which it is the best current representative, concerns the jurisprudence of the ECJ, the prototypically unbalanced EU institution. As Scharpf himself acknowledges, and as Kumm effectively recounts in his experimentalist reconstruction of EU constitutionalism for this symposium, the Court has, under pressure from the constitutional courts of the member states, developed its own jurisprudence of fundamental human and social rights (though of course many will find the distinction between the two artificial and misleading), thus correcting, at least in a very general way, the original treaty-based imbalance. Crucially, moreover, the Court's jurisprudence in these matters typically does not impose either liberal or republican outcomes in the manner that Scharpf suggests. Rather, in rejecting a law or regulation of a member state as infringing EU constitutional protection, the ECJ remands the case to the judiciary of the member state, which has the obligation, but also the autonomy, to elaborate a solution in conformance with EU principles. In practice, this means that it is up to the member state, acting in accordance with its own understanding of the separation of powers, to arrive at a solution that reconciles the particularities of the national understanding of justice with the framework of EU constitutional commitments. Investigation of controversial and, for some, neo-liberal decisions of the Court, such as *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (2007), *International Transport Workers' Federation v Viking* (2007) and *Rüffert v Land Niedersachsen* (2008) in the area of collective bargaining and the right to strike, clearly demonstrates this follow-on process of national adjustment at work (Blauberger 2012). Some will see this national adjustment as a deliberative process provoked and facilitated by the court, allowing reconsideration of rules and procedures that are perpetuated more because of administrative convenience of traditional beneficiaries, rather than serving broader public purposes; others might see these same processes as an occasion for neo-liberal interests at the national level to press the reopening of settled questions. In both cases, the outcome depends on the interplay of national interests and ideas, and in neither, consequently, is it imposed by an homogenizing, structurally determined EU policy. But perhaps the structural deficit simply disrupts existing arrangements without imposing uniformity? Perhaps, but then decisions at the EU level would only be disruptive if they resonated with deep tensions within each national welfare system, and we would still have

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to abandon the (prima facie implausible) idea of thriving, national welfare states beset from without.

Close attention to the origins of constitutionally controversial decisions by the European courts casts additional doubt on any straightforward assertion of the structural deficit thesis. Consider Stone Sweet and Stranz's (2012) reconstruction of the *Mangold v Helm* (2005) decision in which the ECJ rejected German fixed-term employment contracts with weaker protection against dismissal for older workers as an infringement of general EU prohibitions against age discrimination. While the decision appears to impose "European" norms (here accidentally progressive) on a member state in disregard for the latter's own legislatively determined balancing of interests and solidary obligations, the reality was more complex. As Stone Sweet and Stranz show, the ECJ was embracing the more expansive interpretation of rights against age-based discrimination long advanced by the German labor courts against the contractual formalism of the German Constitutional Court. Thus, here, as in other cases, they argue, the intervention of the ECJ is not an alien intrusion but rather intensifies the "constitutional pluralism that existed within many national legal systems" in the EU (Stone Sweet & Stranz 2012, p. 92).

In view of the antecedents and consequences of decisions adduced to support it, the structural deficit thesis in its strong form strikes us as implausible and misleading – more a romanticization of the solidary virtues of the traditional welfare state than a full account of the EU's capacity to support social rights.

4. Representation

Fossum argues that going beyond the bounds of our original contribution and developing an idea of experimentalist representation, as a step toward a more fully-fledged expression of experimentalist democracy, is critical to our project. Verdun joins him in arguing that this is the area that will most repay further effort.

Fossum suggests that we address the problem in two ways. The first is to pay more attention to what he regards as an emergent solution to the problem of democratic legitimacy in the EU by reconfiguring the relation between national parliaments and the European Parliament (EP), thereby constructing what he calls a "multilevel parliamentary field" (Crum & Fossum 2009). While we agree that it is desirable to increase parliamentary control of EU institutions, the expansion of parliamentary influence that has occurred is susceptible to a more prosaic explanation: an expansion through treaty amendment of the powers of the EP as part of efforts by member state governments to enhance the EU's democratic legitimacy, which set the stage for successive efforts at institutional self-aggrandizement without any fundamental change in the relation between "We the People" of the EU and their institutions.[3] More generally, we suspect that any effective parliamentary control of EU institutions will, for reasons anticipated in the discussion of the breakdown of the principal–agent relation above, need to focus more on framework legislation and dynamic accountability, rather than conventional lawmaking. Indeed, given that EU framework directives in setting very broad goals commonly induce highly formalized implementation processes (many with the force of law and subject to judicial review) that often raise complex questions of rights to participation, it would seem at once natural and imperative that the EP, perhaps in association with the parliaments of member states, do just that.

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This brings us to Fossum's second, more fundamental, and, to us, far more promising and innovative, suggestion: the need to reconsider the nature of representation in democracy itself. The aim here, as we interpret it (and precisely as Verdun urges us to do), is not to try to fit experimentalism into the existing forms of representative democracy, but rather to re-examine representation and democracy from the perspective of experimentalism in hopes of finding new sources of legitimacy that help address commonly recognized defects of modern self-government.

Fossum points helpfully to the work of the political theorist Urbinati (2006; Urbinati & Warren 2008) on representation as a means of instigating broad deliberation and exchange of ideas between representatives and the represented that breaks the mold of the principal–agent relation as a useful starting point. We concur. To illustrate the promise of such a program, and in lieu of a fully-fledged treatment of the subject that is plainly out of place here, we carry forward Fossum's suggestion, and say briefly how Urbinati's reinterpretation of Condorcet may serve as a general frame or heuristic for further inquiry into the possibly changing nature of democratic representation.

Urbinati's reading of Condorcet focuses on his 1793 proposals for the constitution of revolutionary France as a "third way" alternative to "mirror-like radical approaches that have marked the debate over democracy since the eighteenth century: the mystique of sovereignty as immediate and existential presence and . . . electoral democracy as the death of sovereignty" (Urbinati 2006, p. 180). Condorcet wanted to avoid a polarization between the constituent power outside institutions and the constituted power residing in them. To do this, he aimed to establish a circulation between the outside and inside of state institutions, at once improving the deliberative quality of collective political judgments and avoiding an oscillation in society between depoliticization and anti-constitutional mobilization. Put another way, Condorcet saw the constitution as an instrument to disseminate broadly the capacity of political judgment.

To achieve this general end, Condorcet unbundled the citizen's right to sovereignty into the right to select and elect representatives, the right to revise the constitution at regular intervals, the right at any time to propose constitutional amendments, and the right to propose new laws or repeal existing ones (which latter could, given the fulfillment of additional requirements, precipitate new elections). Condorcet's institutional system, based on a pyramid of assemblies stretching from the local to the national, was, as Urbinati fully recognizes, highly elaborate and most probably unworkable even in the circumstances in which it was proposed, to say nothing of its suitability for the circumstances we know. But the intent was original and promising. By making judgments both about laws and constitutional norms frequent and corrigible – that is by establishing a continuous "circulation" between enactment within institutions and reflections on their aptness outside them – Condorcet deliberately aimed to make political judgments more deliberate or, in his language, less "immediate" and unreflective. The same rapid circulation of judgments from society to political institutions and back, and thereby their ongoing transformation, as Urbinati observes, puts Condorcet outside standard principal–agent conceptions of representative democracy.

These features of Condorcet's conception that distance it from principal–agent models of democracy approximate it to experimentalism. The increase in uncertainty that leads to the need for framework enactments and shifts accountability from backward-looking to forward-looking, in effect, stretches decisionmaking out in time, replacing a single conclusive judgment with a succession of avowedly provisional and

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corrigible ones and, thereby, creating in the spirit of Condorcet's scheme of facilitated rule-revision the occasion, if not the necessity, for increased deliberation and broader participation.

Reflections at this level of generality do not tell us precisely how to design the institutions of an experimentalist representative democracy; still less do they predict how actors may already be developing such institutions in the EU or elsewhere. Nonetheless, they advance inquiry, perhaps substantially, by suggesting where to focus design efforts and where to look for developments that foreshadow and at least partly embody these novel principles: the mechanisms of peer review and forward-looking accountability more generally, especially as these begin to feed back into and influence the nature of decisionmaking in the standard institutions of representative democracy. What we call "democratizing destabilization effects" – the prod to deliberation often associated with penalty defaults that comes when an oversight institution rejects a current practice as illegitimate without imposing an explicit alternative – is an instance of such mechanisms,[4] but Urbinati's reading of Condorcet should spur us to broaden and intensify the search for others and to think more speculatively about their implications. A good idea of where to look is certainly no guarantee of finding anything, but it is an improvement over the blind hope that in a benign world there must be something worth finding.

5. Constitutionalism

Current debates about the possibility of constitutionalism beyond the state oppose, on the one hand, efforts to extend familiar forms and understandings of constitutionalism to transnational space and, on the other, efforts to vindicate the fundamental rights that constitutionalism aims to protect, relying neither on the conventional process for adopting constitutions nor the mechanisms for disciplining political authority through the separation of powers that constitutions normally prescribe. Fossum's views in this regard exemplify the first position, Kumm's the second. Debates in this area are closely related to, and resonate powerfully with, debates about the need to extend or reinterpret representative democracy so that it accords with current circumstance. Our conviction that representative democracy today cannot simply be extended but needs to be reconceived, thus finds a counterpart in the discussion of constitutionalism beyond the state, and an affinity with Kumm's position rather than Fossum's.

Fossum's views demonstrate the appeal of the efforts to extend traditional constitutional commitments, but also the way these efforts strain credulity. The core of Fossum's position consists of two assertions. The first is that: "Five of the six original member states had constitutional provisions that not only authorised, but also mandated the active participation of national institutions in the creation of a supranational legal order, as the only way to realize fully the principles that underlie the national constitution" (Fossum 2012, p. 399). In effect, exceptionally for such contractual instruments, the Treaties authorized constitution-making. The second is that decisions by what would become the constitutional court of the EU would be closely tethered to doctrines already contained in the constitutional jurisprudence of the member states. At the limit, the ECJ in this understanding is always obligated to rely on "*positive constitutional norms* (the national constitutions) that serve as the reference for each and every decision in the progressive constitutionalization of the fundamental law" (Fossum & Menéndez 2011, p. 61). Just as Fossum imagines that the creation of a multi-level parliamentary field will legitimate the

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European Parliament by anchoring it in the decisions of democratically legitimize national legislatures, here he imagines that the ECJ will achieve a close approximation of traditional democratic constitutional legitimacy by constructing its decisions through the selection and synthesis of norms already validated in the constitutional jurisprudence of one or another member state.

We are in no position to evaluate Fossum's historical exegesis of the founding Treaties and national constitutions. We note, however, that whatever trace evidence there may be in support of his deliberately expansive views of the Treaties needs to be weighed against the widely accepted conventional understanding, reprised by Kumm, according to which assertion of constitutional authority by the ECJ was the belated and unexpected outgrowth of the realization that adjudication within domains specified by the Treaties had profound constitutional implications, and that these needed to be addressed to make the apparently more limited interventions acceptable to the constitutional courts of the member states. In any event, if the founding members of the EU understood that they had committed themselves to a process of progressive constitutionalization, it is hard to understand why they were so profoundly surprised and perturbed when it began to happen.

But it is the second assertion – the insistence on a conspicuous and inviolable link between the ECJ jurisprudence and existing national constitutional norms – that seems, to us, disabling. It is a familiar and intuitively obvious proposition that efforts to discipline agents by the proliferation of rules, each of which taken by itself is legitimate, produces the perverse effect of expanding the agents' discretion by allowing them to choose among inevitably conflicting rules according to their preferences. As there are always likely to be some friendly faces in a crowd, so the ECJ will always find one or another national constitutional court that already hold doctrines that correspond to, and thereby legitimize, its prior preferences. The result will be that the obligation to maintain a democratic pedigree in adjudication can easily become a license for discretion, rather than a check on it. As we see it, trying to extend constitutionalism in the direct way Fossum proposes sacrifices the substance of democratic legitimacy on the altar of its form.[5]

The alternative position, represented here by Kumm's own views and his recounting of the constitutional evolution of the EU as an experimentalist process, starts from two different assertions, neither involving the effort to establish a direct link between the democratic structures of the nation-state and constitutionalism beyond it. The first is that there is partial agreement or convergence among the relevant parties – the states embracing constitutional obligations with other legal orders – concerning the importance of protecting certain fundamental values. The second is that there is some mechanism, typically in the form of doctrines in which constitutional courts set forth the conditions under which they will respect decisions by other coordinate bodies, for registering and clarifying disagreements regarding the interpretation of the common commitments.

Among proponents of this general position, to which we too adhere, there is disagreement about just how thick or broad convergence on values must be to underpin an ongoing process of constitutionalization. There are also open questions concerning the precise mechanisms by which disagreements are identified and addressed, and relatedly, whether the clarification and resolution of disagreements can lead to revision of the participating courts' initial views, and through this and other means, to the deepening or extension of a common culture that binds them. We make no pretense of trying to resolve

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these questions here. Rather, by looking at the nuances that separate our position from Kumm's, we aim to clarify our own views and emphasize the relevance of the fundamental mechanisms of experimentalism for current constitutional debate.

A convenient way to see the relation of our views to Kumm's is to notice a tension within his own position. On the one hand, as we saw earlier, he emphasizes the need for a thick shared culture of constitutional values, including respect for democracy, human rights, and the rule of law. But on the other, he emphasizes in his reconstruction of the development of constitutionalism in the EU, the wariness on the part of national constitutional courts, particularly the *Bundesverfassungsgericht*, that the ECJ did *not* share or would not fully vindicate the core values that they themselves were obligated to defend. It was for this very reason, he emphasizes, that these courts insisted on making acceptance of the ECJ's constitutional jurisprudence conditional on first the establishment and then the maintenance by the latter of encompassing constitutional protections.

Deep and extensive agreement on values would have made mutual monitoring unnecessary; so too would profound divergence and wide-ranging disagreement, because the fruitless outcome of such monitoring would have been obvious from the start. The engagement that Kumm, we, and many others actually see in the jurisprudence of the ECJ, the European Court of Human Rights, and the constitutional courts of the member states makes sense only under some intermediate condition, when convergence and agreement on fundamentals seems possible, but hardly self-executing. Is this middle-range consensus thick or thin? There is no ready answer to this question, especially because how much commonality is needed to begin a process of mutual constitutional clarification plainly depends, at least in part, on responses to the second open question: whether the mechanisms for resolving disputes can influence and transform prior beliefs in a way that eventually deepens fundamental agreement.

With regard to this latter question, Kumm and we are in complete agreement that the mechanisms can have these transformative effects, and indeed have had them in the EU. Recall that Kumm characterizes the development of constitutional law in the EU as an experimentalist process in which, against the backdrop of polyarchic decisionmaking – with no final decider at the apex of a single encompassing hierarchy or legal order, but shared agreement on certain goals and values – the ECJ establishes framework rules; national courts conditionally apply them in differing ways; the differences are gradually contained and resolved in iterated exchanges between the ECJ and national legal systems; and crucially, the ECJ's understanding of fundamental rights in relation to national constitutional traditions is reshaped by this very process.

This to and fro – from an initial limited agreement through the explication of difference to the revision of initial understandings – is closely related to what Rawls (1987, 1993) called an overlapping consensus. By this he meant a common, freestanding political view drawing on the shared liberal ideals of the parties to the consensus, but distinct from their respective comprehensive and persistently differing understandings of justice and fairness. Such an overlapping consensus arises for Rawls in historical practice through the reciprocating reinterpretation of an emerging common political view, here the commitment both to the construction of the common market and to the avoidance of mutual conflict, and the diverse national constitutional traditions underlying it (Sabel & Gerstenberg 2010).

But terminology is secondary. What is fundamental is that mechanisms for forming common understanding from the interpretation of difference build mutual trust or

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confidence and reduce, though they hardly eliminate, requirements for a common cultural starting point. If this is so then much current debate about what precisely is shared among parties to transnational legal engagements is misplaced: Only a "pluralist" disposition for mutual engagement? (But isn't that disposition itself a kind of common culture?) Or a "constitutionalist" commitment to common values? (But what does that abstract commitment entail without some process of mutual engagement for ascertaining commonality with regard to particulars?) Given the process of incremental but cumulatively far-reaching reinterpretation, we are unlikely to need precise knowledge of "feasible" starting conditions.[6]

Indeed it is hard to imagine that we will even be able to form judgments about just what is shared in constitutionalism as we currently know it without relying more or less explicitly on our judgments about the feasibility of constitutional cooperation beyond the state. As we saw in the history of the *Mangold* decision, understandings of what may be possible shape understanding of what has been, and vice versa. Thus Maduro, whose arguments for "contrapuntal" relations among constitutional orders are similar to those which both we and Kumm advance, rejects (rightly in our view) the vision of modern constitutions as foundational charters by which polities come to exist by subjecting themselves to a homogenizing, hierarchical legal order. He argues that the fundamental problem of coordinating constitutional orders beyond the state – the question of "who decides who decides" in the case of conflict – is already present in national constitutions as "a normal consequence of the divided powers system inherent in constitutionalism" (Maduro 2012, p. 79). Kumm (2009) makes analogous claims about national constitutionalism as a frame for the exploration of disagreement, rather than a binding limit on it. In sum, there is reason to think that the road from constitutionalism within the state to constitutionalism beyond it can be built on the way, and, at least in some important regards, the distance to be traversed is shorter than conventional understanding has it.

6. Conclusion

The foregoing suggests some general conclusions that underscore the presuppositions and ambitions of experimentalism.

First, interests matter, but interests are in many settings malleable. Divergences in interest obviously discourage cooperation in general, and efforts at joint learning in particular, even when strategic uncertainty might otherwise make it attractive. But the effectiveness of penalty defaults outside of Weimar conditions is significant evidence that parties can be induced to undertake joint explorations, even when they would not voluntarily do so. That joint explorations can lead to the transformation of goals and strategic aims means that, in the end, interests are more malleable still.

Second, "culture" – in the sense of shared values that foster cooperation – matters, but culture is also malleable in many settings. We are used to thinking of culture precisely as a stock of conceptions which powerfully shape behavior precisely because they are so taken for granted as to be inaccessible to deliberation and change. The development of constitutionalism in the EU, and, indeed, the explosion of debate about constitutionalism beyond the state, suggests, at a minimum, that we should not take this conventional understanding for granted. Under the shock of collision in an interconnected world, constitutional orders can, more frequently than anticipated, open themselves to mutual

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scrutiny and exchange; and the mechanisms of engagement can further augment their reciprocal influence.

Third, history matters, in the sense that novel institutions do not emerge *ex nihilo*. They are typically constructed by modifying, often through recombination, institutions rooted in the past, and they may continue to depend, perhaps for some appreciable time, on the complementary operation of traditional institutions whose organizing principles they disavow. The administrative state cannot effectively govern through the imposition of penalty defaults; EG cannot operate effectively without them. But the fact that the present and future proceed from the past does not mean that origins decide outcomes.

Fourth, what is true of history in general is particularly true of the institutions of representative democracy. Parliamentary democracy, and the ideas of participation and accountability that it presupposes and fosters, is an embodiment – a particular historical embodiment – of a very general and precious skein of ideas connecting respect for individual autonomy and collective self-authorship. There is reason aplenty to think that parliamentary democracy in its historical form cannot respond adequately to a persistently uncertain and highly interconnected world. To say this is neither to reject the commitments to individual autonomy and self-authorship of which modern parliamentarianism is an expression, nor to assert that current parliamentary institutions could not, indeed probably would have to, play a role in a re-imagined form of representative democracy that can respond to the world as it is. But it is to caution against trying to create a new parliamentarianism by projecting the essential features of the old to larger scales beyond the nation-state or treating existing parliaments as rungs in a Jacob's Ladder that reaches to the global heavens.

Experimentalism attempts to conceptualize the institutional innovations that actors in persistently uncertain domains have devised to make best use of the malleability of their circumstances while reducing the dangers it creates. Its promise, often for them and certainly for us, is the possibility it affords of building a bridge between effective responses to urgent problems and the ultimate elaboration of a new form of democratic accountability that can take uncertainty in stride.

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Notes

1 See, for example, the analysis of the California Leafy Greens Product Handler Market Agreement in Sabel and Simon (2012).

2 Thus, for example, Héritier (2002, p. 194) explicitly asserts that "should there be mismanagement or policy failure, public authorities may take on the regulatory functions" delegated to private actors in the shadow of hierarchy. Bartolini (2011, p. 8), similarly assumes that "national and international public authorities are always in a position to regain control of forms of co-production governance, when and if circumstances so require."

3 For a compelling historical account of the empowerment of the EP in these terms, see Rittberger (2012). In the case of the Services Directive, cited by Fossum as a conspicuous example of how

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this multi-level parliamentary field enables representative bodies to enhance the democratic accountability of EU rulemaking, the decisive left–right compromise on its amendment was, as Crum and Miklin (2013) show, a direct result of the shared institutional interest of the two largest European party groups in ensuring that the EP's position would prevail in negotiations with the Commission and the Council, thereby securing recognition from the latter of the Parliament's status as an equal co-legislator.

4 See, for example, Newman's (2010) account of the role of the Article 29 Working Party of Data Protection Supervisors in drawing the Commission's draft agreement with US security authorities on sharing of airline passenger data to the attention of the European Parliament as a breach of European citizens' privacy rights.

5 There are many versions of these ideas. For examples, see Habermas (1998) and Somek (2012).

6 See, for example, the ongoing exchange between Kumm (2009) and Nico Krisch (2009) in *EJIL Talk!* and the broader debate in Avbelj and Komárek (2012).

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