

# 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

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.<sup>1</sup>

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.<sup>2</sup> And the idea of the penalty default has sometimes been used to suggest that there is a freestanding punitive power that can be

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

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

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

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

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.<sup>3</sup> 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.

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

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,<sup>4</sup> 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

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.<sup>5</sup>

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

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

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.<sup>6</sup>

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

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, H eritier (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

- 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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