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THE DEVOLUTION OF IMPLEMENTING POLICYMAKING IN NETWORK GOVERNMENTS

*Charles H. Koch, Jr.**

An undeniable, but often lamented, reality of modern government is that substantial policymaking must take place at the implementation stage. Legislative and executive authorities simply cannot resolve all policy issues, and they often find it politically inadvisable to do so. The danger, of course, is that efficiency or expediency will overwhelm the legitimate allocation of responsibility between the political authorities and the administrative authorities. The balance between democratic legitimacy and effective government thus dictates the delegation of the implementing authority. The more complex the society and the more complicated the demands on government, the more elusive this balance becomes.

Legal principles regulating delegations of authority suggest that authority should be delegated based on hierarchy. Yet even in hierarchical systems, influence moves not only up and down but also horizontally among the decisionmakers and institutions within the system. Moreover, policy is made at the lower levels of the hierarchy without the participation of the hierarchy's upper reaches. Regardless, not all governments, especially supranational ones, can be understood as mere hierarchies. Instead, the realities of governmental policymaking are complicated by questions of legitimacy.

Even more complexity is added when several governmental systems combine in some sort of federal organization. Recently, there has been a strong movement toward such organizations. Regions and ethnic groups in established nations and emerging nations alike are insisting on more autonomy. Nations are coming together to form a variety of supranational organizations, some quite broad in their mandates. These coordinated governments raise increasingly complex implementation and devolution issues. Traditional federal systems, such as the United States, have allocated shared authority

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through a divided federalism in which central and subunit administrative hierarchies are formally segregated and their respective powers are more or less clearly defined.¹

In contrast to this traditional federal organizational concept, the European Union (E.U.) is built around commingled responsibilities.² From the beginning, the member states have been integrally involved in the policymaking from the foundational legislation to implementation.³ Their engagement has only increased over the years, as E.U. institutions tend to give the member states implementing discretion through framework measures and “soft” laws.⁴ For these reasons, the E.U. system is most accurately characterized as a network, comprised of webs of interrelationships among E.U., national, and non-governmental institutions. Walter van Gerven observed, “While public authority was traditionally organized pyramidally along hierarchical lines, it is now also organized through numerous networks of public and private nuclei of power, making power move both vertically and horizontally.”⁵ Policymaking influences may combine in a nearly infinite variety of forms with policy moving down from the central authority, up from the member state governments, and horizontally among the member states and their institutions. Even within the E.U. and national institutions, policy development is not necessarily hierarchical.⁶

¹ See John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 618 (2006) (“The United States . . . has a legislative system that divides lawmaking powers among two legislative houses and the President, who has little ability beyond his veto power to control legislation. It also has robust judicial review and is a federal state in which the states retain extensive lawmaking powers”).

² See J.A.E. Vervaele, *Counterfeiting the Single European Currency (Euro): Towards the Federalization of Enforcement in the European Union?*, 8 COLUM. J. EUR. L. 151, 151 (2002) (“As opposed to Nation States, in the European Union there is no complete separation of powers along the lines of the *trias politica* doctrine. The European Union is based on shared governance between the European Community/European Union and the Member states, being an integrated community legal order.”).

³ DESMOND DINAN, *EUROPE RECAST: A HISTORY OF EUROPEAN UNION* 56–57 (2004).

⁴ See Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe and Vice Versa*, 12 COLUM. J. EUR. L. 645, 676 (2006) (“When the EU has issued a “directive,” setting framework standards that require implementing measures, these measures are commonly—but not invariably—taken by Member States subject to EU controls for their adequacy.”).

⁵ WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLICY OF STATES AND PEOPLES* 159 (2005); see also *id.* (noting recognition of this fact by the E.U. Commission).

⁶ For example, the E.U. Council has nine configurations in which the relevant national ministers represent the member states in approving E.U. legislation. Thus, the E.U. policy that is imposed on the member states is to some extent created by the common member-state ministers, and perhaps more importantly, the combination of the staffs of the member-state departments, the permanent Council staffs, and the relevant Commission staff. PETER STRAUSS ET AL., *NORM CREATION IN THE EUROPEAN UNION* 16–17 (2007), http://www.abanet.org/adminlaw/eu/Reports_Rulemaking_06-07-2007.pdf.

The E.U. network system requires innovations in the concepts and strategies of federalism. It exposes challenges in carrying out a unified, effective, and legitimate implementation of shared programs. Even though the U.S. Constitution aspired to a “more perfect union” among the several states,⁷ it has been held to establish an adversarial relationship between the central government and its states.⁸ This divided federalism combined with the generally hierarchical allocation of authority presents a useful contrast to the E.U. network federalism. Network organization might have advantages and, regardless, may best describe many existing and emerging federal systems, both national and supranational.⁹ Hence, the E.U. and U.S. experiences and mechanisms offer insights into how to design other federal systems.¹⁰

I. IMPLEMENTING POLICYMAKING

Beyond the separation of powers issue, governmental entities must also consider the legitimacy of delegations from the political bodies to the implementing bodies. The E.U. has somewhat paralleled the U.S. in accepting the necessity of delegating implementing policy. The evolution of the U.S. acceptance of that necessity goes back some distance and probably presages the ultimate development of E.U. delegation doctrine.

⁷ U.S. CONST. pmbl.

⁸ See Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 381 (2001) (“While adversary theory plays a central role in the history and philosophy of American political theory, its premises also pervade fundamental provisions of the United States Constitution.”).

⁹ Anne-Marie Slaughter developed the idea of network government. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); see also Anne-Marie Slaughter & David T. Zaring, *Networking Goes International: An Update* (Washington & Lee Pub. Legal Studies Paper No. 2007-12, 2007), available at <http://ssrn.com/abstract=960484> (providing a literature review of the impressive and growing study of network governments).

¹⁰ Much of the discussion in this Article is informed by the study of and experience with U.S. administrative law. As society grows outside national borders, so too do government and, consequently, administrative law. A “global administrative law” is under construction and is recognized as a contributor to the study of network governments. Slaughter & Zaring, *supra* note 9, at 221–22. The leaders of that movement observed, “The construction of a global administrative law is inevitably shaped and constrained by existing institutions and principles as well as the shifting patterns of international ordering and the normative foundations Within these constraints, many strategies of institutional design are possible.” Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 53 (2005). However, these leaders also cautioned: “Many of the emerging mechanisms of global administrative law stem from northern and western initiatives, and any attempt at justifying the need for such a body of law must thus face the challenge of intellectual and political bias.” *Id.* at 51.

U.S. acceptance evolved through a long process. The earliest U.S. case on the need to delegate power to the implementing bodies is the 1892 opinion in *Marshall Field & Co. v. Clark*.¹¹ Relying on a case decided early in U.S. history, *The Cargo of the Brig Aurora v. United States*,¹² the Supreme Court upheld a statute that gave the President authority to impose retaliatory tariffs if he “deemed” that American business was being treated unfairly. Justice Harlan and a majority of the Court claimed that the President could do nothing under this statute but execute the acts of Congress. He claimed that the President “was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”¹³ While Harlan’s opinion suggested limits on the power to delegate, the case is seen as early recognition that Congress may delegate policymaking authority.¹⁴

The evolution of a generous delegation doctrine was slow but inevitable. In 1904, the Supreme Court in *Buttfield v. Stranahan*¹⁵ upheld the delegation of power in the Tea Inspection Act to the Secretary of the Treasury to establish standards of tea purity. Subsequently, in *United States v. Grimaud*,¹⁶ the Court—while analyzing the power of the Secretary of Agriculture to make forestry conservation rules—decided to lay down, as a criterion for delegation, the notion that Congress may establish a general statutory standard and delegate to the executive the power to “fill up the details” by regulation.¹⁷ And finally, in *J.W. Hampton, Jr. & Co. v. United States*,¹⁸ the Court in 1928 upheld another tariff statute and established the principle under which delegations are approved today: “If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹⁹ Over the years, the Court has accepted very general language as satisfying the “intelligible principle” requirement, so that

¹¹ 143 U.S. 649 (1892).

¹² 11 U.S. (7 Cranch) 382 (1813).

¹³ *Id.* at 693.

¹⁴ See, e.g., Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 703 (2006) (“Various scholars have declared the Non-Delegation Doctrine, which was first announced by the Supreme Court in *Field v. Clark*, to be dead.”) (footnote omitted).

¹⁵ 192 U.S. 470 (1904).

¹⁶ 220 U.S. 506 (1911).

¹⁷ *Id.* at 511.

¹⁸ 276 U.S. 394 (1928).

¹⁹ *Id.* at 409 (emphasis added).

no challenge is realistically available.²⁰ A vigorous nondelegation doctrine has had judicial advocates over the years.²¹ But, as Justice Blackmun found in *Mistretta v. United States*,²² “Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”²³ By assuming the role to monitor the implementing authority, democratic accountability is permissibly removed by one level.²⁴

The potential for the same devolution of authority in supranational organizations can be demonstrated by examining the evolution of delegated authority in the E.U. Like in the U.S., the rejection of delegated authority, consistent with basic law, failed. Early in the E.U.’s history, delegation of policymaking authority seemed to be prohibited.²⁵ In the 1958 case of *Meroni*

²⁰ See, e.g., *Touby v. United States*, 500 U.S. 160, 166–67 (1991); *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (Stevens, J., concurring in the judgment) (“[I]t is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power . . .”). A brief adoption of a vigorous nondelegation doctrine, however, occurred in the mid-twentieth century. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). Since 1935, the Supreme Court has not invalidated a statute on delegation grounds.

²¹ See, e.g., *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974); *United States v. Robel*, 389 U.S. 258, 274–77 (1967) (Brennan, J., concurring in the result); *Arizona v. California*, 373 U.S. 546, 624–27 (1963) (Harlan, J., dissenting in part). Legal scholars tend to favor a strong nondelegation doctrine. See, e.g., Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 197–98 (1999); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1406–07 (2000); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 989–92 (1999); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 731–32 (1999); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 413–17 (1999); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

²² 488 U.S. 361 (1989).

²³ *Id.* at 372.

²⁴ Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1749 (2002). Posner and Vermeule state:

Accountability is not lost through delegation, then; it is transformed. Congress is accountable for the performance of agencies generally, and people properly evaluate the agencies’ accomplishments as well as failures when deciding whether to hold members responsible for authorizing the agency, or for failing to curtail its power, fix its mistakes, or eliminate it altogether.

Id.

²⁵ This discussion builds on ideas that I formulated as part of the European Union Administrative Law Project with George Bermann and other administrative law scholars. For additional information on this project, see American Bar Association: European Union Administrative Law Project, <http://www.abanet.org/adminlaw/eu/> (last visited Dec. 3, 2007).

v. High Authority,²⁶ the European Court of Justice (ECJ) severely limited authority delegations.²⁷ Having been decided very early in the history of the European Community, this case set the parameters for delegation in a much simpler governmental context. Specifically, the court held that institutions may not “confer upon the authority, powers different from those which the delegating authority itself received under the Treaty.”²⁸ It also held that the delegation must involve “clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority.”²⁹ The court dictated that the exercise of this power “must be *entirely* subject to the supervision of the [delegating institution].”³⁰ Feeling that the delegation would upset the institutional balance envisioned in the Treaty unless all these conditions were met,³¹ the court ruled that the delegation “gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty.”³²

Still, scholars of European Law argue that limitations on delegation are not overly restrictive in reality. In fact, “the *Meroni* opinion might suggest to U.S. administrative lawyers no more restriction than the current state of the U.S. nondelegation doctrine.”³³ For example, if the court is interpreted to require “criteria determined by the delegating authority,”³⁴ this requirement would be analogous to the “intelligible principle” requirement announced by the Supreme Court at the beginning of the twentieth century.³⁵ However, *Meroni* could be interpreted to require that the delegating institution itself ultimately make the decision. This interpretation would explain the court’s choice to include the language “subject to strict review . . . by the delegating authority.”³⁶ In short, *Meroni*’s restriction may be interpreted in a variety of ways.

²⁶ Case 9/56, 1957/1958 E.C.R. 133.

²⁷ *Id.* at 151.

²⁸ *Id.* at 170.

²⁹ *Id.* at 172.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 174.

³³ Charles Koch, Jr., Primer for U.S. Lawyers on European Union Government and Law 28 (Aug. 2007) (on file with author), available at http://www.abanet.org/adminlaw/eu/Primer_v8-07.pdf.

³⁴ *Meroni*, 1957/1958 E.C.R. at 172.

³⁵ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

³⁶ *Meroni*, 1957/1958 E.C.R. at 172.

Yet, the *Meroni* decision's practical impact is overstated. As Geradin and Petit assert: "the implications of the *Meroni* doctrine should not be exaggerated."³⁷ Geradin and Petit explain that the court's reliance on institutional balance naturally leads to acceptance of delegation to improve the quality of the decisionmaking body both by decreasing the workload on the delegating entity and by transferring technical issues to experts.³⁸ As such, *Meroni* might be seen as the equivalent to the early U.S. case *Field v. Clark*, in which the Supreme Court upheld a statute that gave the President the authority to impose retaliatory tariffs upon a finding that U.S. businesses were being treated unfairly.³⁹ Because the Supreme Court found that the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect,"⁴⁰ the actual opinion could be said to limit delegation. Perhaps it presages European doctrinal evolution to note that this opinion has, over time, been characterized as an early recognition that Congress may make extensive delegations.⁴¹

Arguably, then, E.U. delegation doctrine is evolving in the direction of the liberal U.S. doctrine. In contrast, however, devolution of this authority must be quite different in the U.S. divided federalism and the E.U. network federalism. In the U.S., while the power to create policy is readily conferred (expressly or implicitly) on federal agencies, such policymaking is not and cannot be conferred on state administrative authorities.⁴² On the other hand, the E.U. network, by utilizing member state administrative authorities, necessarily confers substantial policymaking authority on those authorities.

³⁷ Damien Geradin & Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* 15 (Monet Working Paper 01/04, 2004), available at <http://www.jeanmonnetprogram.org/papers/04/040101.pdf>.

³⁸ *Id.* at 15–16.

³⁹ 143 U.S. 649, 692–94 (1892) (discussing *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813)).

⁴⁰ *Id.* at 693, 698–99.

⁴¹ For further discussion of the evolution of the E.U.'s delegation powers, see CARL FREDRIK BERGSTRÖM, *COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM* 94–97, 302–08 (2005). The ECJ has accepted the delegation of the authority to adopt implementing measures, an increasingly large category, so long as the delegation is to either to the Commission or the Council itself under the Consolidated Treaty. See European Union: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 135, art. 202 [hereinafter *Consolidated Treaty*].

⁴² See *Printz v. United States*, 521 U.S. 898, 926–27 (1997) (holding that the federal government may not "commandeer" state executive institutions and hence may not delegate authority to state executive institutions to make implementing policy).

II. THE "CHOICE" BETWEEN NETWORK AND DIVIDED FEDERALISM

The experiences of these two systems, among others, demonstrate that, in modern government, delegations of implementing authority are inevitable and, the law must evolve to accommodate them. The delegation question then becomes largely a practical question. Delegations within a federal system complicate these practical considerations. Federal systems always seem to face substantial pressure to devolve implementing policy choices to the local level. On the other hand, joint action is the *raison d'être* for federalism, and hence, the lines of authority must facilitate unity. U.S. and E.U. federalism approach these problems in nearly opposite ways, and the contrast adds to the variety of potential design strategies.

A. *The E.U. Network*

The E.U. "constitutional" structure incorporates member-state governmental institutions directly into the E.U. governmental structure. The European system relies on a variety of legislative and executive bodies to implement E.U. law. At the first level, basic documents, presently treaties, were accepted and continue to be reviewed by the member states.⁴³ At the second level, legislative institutions controlled by the member states, the Council and Commission, are dominant, despite the fact that the directly elected European Parliament has gained power over the years.⁴⁴ The legislation passed through this legislative process is generally directed at the member states. Some of this legislation, such as "regulations" and "decisions," may have "direct effect," whereby they apply directly to citizens and may be

⁴³ The basic or constitutional documents of the E.U. have been created by the various treaties signed by European nations admitted into the Union. These treaties have been consolidated into one unified document. *See Consolidated Treaty, supra* note 41, art. 1. So far, a European constitution has failed to gain popular support.

⁴⁴ Legislative authority is divided among three institutions: Commission, Council, and Parliament. *See id.* art. 251. Parliament has the weakest role, although that role has increased over the years. Most legislation today follows the co-decision process. The Commission proposes all legislation. *See id.* The Council adopts legislation from this proposal usually through a weighed voting called "qualified majority," which is generally proportioned according to member state populations. *See id.* The proposal is sent to Parliament which may adopt it, whereby the legislation is enacted, or reject it, whereby it fails. *See id.* If Parliament amends the proposal, then the proposal returns to the Council and the Council and Commission develop another proposal. *See id.* If Parliament rejects that proposal as well, then the Council President, with Parliament President, convenes a "Conciliation Committee" within six weeks with equal members from the Council and Parliament. *See id.* Again, the Commission enters the process and facilitates reconciliation. If the Committee agrees on a "joint text," that text must be approved by the Council and Parliament. *See id.* If either does not approve the joint text, the measure fails. *See id.*

enforced by citizens.⁴⁵ Nonetheless, these measures, in fact, mostly operate through the member states. Other E.U. instruments, such as “directives,” formally operate only through the member states.⁴⁶ In sum, even at the central legislative level, the member states generally must take steps to give practical effect to the E.U. legislation.⁴⁷

The actual system for carrying out these constitutional powers commingles responsibilities further. The core legislative institution is the Council. Each member state is represented on the Council and participates through weighed voting depending largely on population.⁴⁸ However, different individuals represent the member states depending on the subject matter at issue. For example, all national ministries with agricultural portfolios would constitute the Council in meetings dealing with that subject. Therefore, the Council itself not only reflects the interests of the member states but joins together those in the member states concerned about particular matters. This necessarily results in inter-agency conversation establishing one web of the network.

Even Brussels-based staffs have become part of the network. For example, permanent representatives of the member states are called the Committee of Permanent Representatives (COREPER) and carry on Council affairs one level below the Council.⁴⁹ The committee facilitates a very high level Brussels-based staff network. On occasions, COREPER members will sit as state representatives on the Council and vote to refer a matter to COREPER.

⁴⁵ A definition of “direct effect” is the capacity of an E.U. law to confer rights on an individual directly, as opposed to through action by the member state. *See generally id.* art. 72.

⁴⁶ However, a so-called “vertical direct effect” compels member-state institutions, as well as their legislatures, to implement directives so that national courts and administrators may be bound in practice to apply the provisions of directives. PAUL CRAIG & GRAINNE DE BURCA, *E.U. LAW: TEXT, CASES AND MATERIALS* 208–09 (3d ed. 2003). “Vertical direct effect” has also been referred to as “administrative direct effect.” *Id.*

⁴⁷ The involvement of the member states allows for special attention to cultural diversity. Protecting diversity is an overarching concern of the E.U. Any future constitution-making can be expected to at least maintain and perhaps further protect that diversity. *See* Armin von Bogdandy, *Constitutional Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 3, 42–49 (Armin von Bogdandy & Jürgen Bast eds., 2006); *see also id.* at 42 (“Principles protecting diversity became necessary when principles furthering unity began to shape reality.”).

⁴⁸ Less is done by unanimous voting, and more is accomplished by a “qualified majority.” *See Consolidated Treaty*, *supra* note 41, art. 205.

⁴⁹ TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT: TEXT, CASES AND MATERIALS* 30 (2004).

The E.U. Commission serves several functions. One function is as the executive body, thereby operating as an implementing institution.⁵⁰ In that regard, the E.U. Commission interacts with the other E.U. institutions and the member state administrative authorities. Each commissioner has a “competence” and works with member state administrations across those designated interests.⁵¹ The commissioners are nominated by a member state and often signify a special concern of the member state.⁵² The Commission formally acts as a “college” in which it discusses and furthers certain policy agendas upon which any number of institutional and member state influences might work.⁵³ The Commission also initiates all legislation and reenters the legislative process at various points in the negotiations between the Council and the European Parliaments.⁵⁴ Again, this legislative function necessitates other webs. In short, the webs around the functioning of the Commission are numerous and perhaps beyond identification, even by the Commission itself.

The European Parliament is directly elected by the citizens of Europe. Nonetheless, these elections take place in the member states.⁵⁵ The Members of the European Parliament (MEPs) are designated and seated by parties. These parties run the gamut from conservative to liberal. Thus, European Parliament also fosters a web among the state parties and pan-European parties, as well as officials from those parties.

Rattling around inside this amorphous governmental system are various committees. The Treaty itself establishes a committee to represent local interests, “the Committee of the Regions,”⁵⁶ and a committee to represent special interests, “the Economic and Social Committee.”⁵⁷ In addition, a large number of “comitology” committees have been constituted to supervise

⁵⁰ See JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 16–17 (3d ed. 1992); see also K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 854 (2006) (“The European Commission is a quasi-executive body appointed by the governments of each of the member states.”).

⁵¹ See STEINER, *supra* note 50, at 16; see also Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125, 145 (2005) (describing the competence of the trade commissioner).

⁵² See STEINER, *supra* note 50, at 16.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Francis G. Jacobs, *Constitutional Control of European Elections: The Scope of Judicial Review*, 28 FORDHAM INT’L L.J. 1049, 1052 (2005) (noting that “elections are, broadly, organized by the Member States, and largely in accordance with national rules”).

⁵⁶ *Consolidated Treaty*, *supra* note 41, art. 263.

⁵⁷ *Id.* art. 257.

implementing measures.⁵⁸ The policymaking function of these committees will be discussed further below. It suffices here to note that these committees provide additional avenues of access and policy influence. Moreover, although designed for specialized purposes, they are appointed by the member states and result in another type of interaction among those governments. The committees then add another web in the E.U. network.

Even the briefest description of the network, which this is, may not ignore the “civil society.” European governments, including the E.U., have formally invited and facilitated participation by the public interest community, the “civil society,” and public interest nongovernmental organizations (NGOs). The Commission has included in this category organizations that are not-for-profit, voluntary, have some institutional or otherwise formal existence (as opposed to ad hoc and/or informal), are independent (particularly of government), and are not pursuing the commercial or professional interests of their members.⁵⁹ To date, much of these organizations’ influence occurs inside the Commission. Thus, the dialogue within a specialist directorate may include private organizations.⁶⁰ Special access to Parliament and the Council is more problematic, but growing.⁶¹

The European Council (separate from the above-described Council) is an institution in which the member states meet summit-style to discuss more general policy.⁶² In addition, the E.U. presidency (not an individual) passes from state to state every six months.⁶³ Together, these institutions tend to create yet other webs between the prior and following summits and presidencies and among member states supporting or resisting certain pan-European policies in these forums.

The court system is nominally more hierarchical than these other institutions, but it too has its network aspects. For one thing, an uneasy peace

⁵⁸ See Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499, 511 (1998).

⁵⁹ European Commission, *The Commission and Non-Governmental Organizations: Building a Stronger Partnership*, at 3–4, COM (200) 11 final (Jan. 2000) (Commission discussion paper, on file with author).

⁶⁰ Giampiero Alhadeff & Simon Wilson, *European Civil Society Coming of Age*, Global Policy Forum (May 2002), <http://www.globalpolicy.org/ngos/int/eu/2002/05civsoc.htm>.

⁶¹ *Id.*

⁶² See Treaty on European Union, art. 4, Feb. 7, 1992, O.J. (C 224) 1 [hereinafter *EU Treaty*].

⁶³ Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT’L L.J. 1092, 1126 (1995) (“From the inception of the European Community, the presidency of the Council has rotated in alphabetical order among the States, each holding it for six months.”).

exists between the E.U. courts, the European Court of Justice (ECJ) and the Court of First Instance (CFI), and the national courts. Slowly, the E.U. courts have exerted their supremacy, but that status is unstable.⁶⁴ A judicial dialogue, rather than bottom-down command, has emerged. Added to this judicial web is the reference process whereby any “tribunal” may refer an E.U. question to the E.U. courts and, hence, may bypass the highest national courts.⁶⁵ The European judicial web is expanded by the opinions of the European Court of Human Rights, which, while not an E.U. court, nonetheless contributes to the European judicial dialogue.

The E.U. network includes several national and E.U. administrative authorities. Chiti characterizes these authorities according to the “indirect administration” model and the “co-administration” model.⁶⁶ Under the indirect administration model, the E.U. authorities are not vested with any power and instead rely on the national bodies to attain E.U. objectives. Under the co-administration model, competences are shared between the E.U. and the member state administrations.⁶⁷ At present, member state agencies (which European scholars tend to lump together as “national regulatory agencies” or “NRAs”) perform much of the European administrative functions. A growing number of E.U. agencies (which Europeans call “European agencies” or “EAs”) have taken on some of the administrative responsibilities, but even so, they tend to coordinate with NRAs.⁶⁸

⁶⁴ See THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE 95–98 (Anne-Marie Slaughter et al eds., 1998) [hereinafter EUROPEAN & NATIONAL COURTS].

⁶⁵ *Consolidated Treaty*, *supra* note 41, art. 234.

⁶⁶ Edoardo Chiti, *Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies*, 10 EUR. L.J. 402, 408, 410 (2004).

⁶⁷ *Id.* at 409.

⁶⁸ Chiti notes an “explosion of the agency model” in the E.U. Edoardo Chiti, *The Emergence of a Community Administration: The Case of European Agencies*, 37 COMMON MKT. L. REV. 309, 311 (2000). The number of European Agencies (EAs) has increased from four in 1993 to fifteen in 2003. *Id.* It is expected that this number will continue to increase. *Id.* at 309–11. General understanding of these E.U. administrative bodies might be built around Geradin’s identification of seven common features. Damien Geradin, *The Development of European Regulatory Agencies: What the E.U. Should Learn from American Experience*, 11 COLUM. J. EUR. L. 1, 24–27 (2004). Geradin identifies the following seven features:

1. Agencies generally have a limited mandate, which is laid down by the establishing legislation and consists of tasks of a technical, scientific, and managerial nature.
2. Most have very limited powers, usually relating to information and coordination, and may not issue binding decisions;
3. All operate under the direction of an executive director;
4. They have an administrative or management board, usually made up of representative from the member states;
5. They generally function through committees, or committees form some part of their structure;

The avenues of policy influence, whether ultimately expressed in what Americans would identify as legislation or in some implementing measure, are extensive and growing. The above describes only some of the more apparent webs in the network. It suffices for this Article to state that relevant policy agendas are buffeted by winds from many directions. Policymaking goes down, up, and sideways. Different institutions, E.U. and national, have input and yet are affected by others. Hence, the E.U. governance has been in the process of developing mechanisms to rationalize its policymaking functions in network government.

B. The Simple U.S. Model

While there is certainly a dialogue between the U.S. government and its constituent states, the structure is much more hierarchical and responsibilities can be more confidently determined. Because the competences (in European terms) are divided between the national government and the states, the dialogue is more transparent. Because the policy processes are more hierarchical, both within the national and state governments and between the national government and the states where cooperation takes place, lines of authority and influence are usually easier to follow.

6. They are decentralized in the sense both that they are withdrawn from the centralized responsibility of the Commission and they are located in various parts of the E.U.; and

7. Most are created under Article 308, the generalized "necessary and proper" provision of the Treaty, sometimes in conjunction with more specific authority.

See id. *See generally Consolidated Treaty, supra* note 41, art. 308. Although not all agencies have all these characteristics, identification of these actual or potential characteristics creates some coherence. *See* Xenophon A. Yataganas, *Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies* (Jean Monnet Center for International and Regional Economic Law and Justice, Working Paper No. 3/01, 2001), available at <http://www.jeanmonnetprogram.org/papers/01/010301.html> (dividing existing agencies into four functional categories: (1) agencies serving the operation of the internal market (regulatory model); (2) agencies providing information through a network of partners (monitoring model); (3) agencies promoting social dialogue (cooperation model); and (4) agencies operating as subcontractors to the European public service (executive model)); *see also* Damien Geradin & Nicolas Petit, *The Development of Agencies at E.U. and National Levels: Conceptual Analysis and Proposals for Reform* 48–49 (Jean Monnet Center for International and Regional Economic Law and Justice, Working Paper No. 01/04, 2004) (stating that "executive agencies . . . comprise all European agencies that are responsible for (i) purely managerial tasks . . . ; or (ii) observatory roles . . . ; or (iii) missions of cooperation"); *id.* ("[D]ecision-making agencies . . . comprise all agencies that have the power to enact legal instruments . . . or . . . enjoy considerable influence over the adoption of final decisions by the Commission," even though they lack formal decisionmaking authority); *id.* at 49 ("Regulatory agencies comprise all European E.U. agencies that enjoy the types of powers enjoyed by the NRAs, . . . including a discretionary power to translate broad legislation guidelines into concrete instruments.").

Throughout its history, the power of the U.S.'s central government over the states has been unstable and contestable. In the beginning, the U.S. Constitution brought together thirteen "states," which considered themselves independent sovereigns. Many of these states, hungering after nationhood, reluctantly traded the ideal of confederation for "a more perfect union."⁶⁹ Union was in fact a very near thing from the start and continued to be for sixty-plus years; it had to be settled by the bloodiest war in U.S. history.⁷⁰ In global terms, the U.S. faced, and still faces, a conflict between the intergovernmental ideal and the supranational ideal. "States' rights" are well respected in U.S. constitutional doctrine and popular opinion.⁷¹ The supranational ideal reached its peak in the 1970s, and its power has been eroding since.⁷²

This legal construction of the strong sense of state sovereignty starts with the judicial interpretation of the Eleventh Amendment to the U.S. Constitution. In an early decision, the Supreme Court in *Chisholm v. Georgia*⁷³ ruled that a state could be sued by a citizen of another state in federal court.⁷⁴ The Eleventh Amendment—which withholds federal court jurisdiction over suits against a state by a citizen of another state—was very quickly passed in response. It took one-hundred years after its ratification for the Supreme Court to decide that the Eleventh Amendment prohibits all private suits against the states in federal court.⁷⁵ Because the limited scope of the Eleventh Amendment is expressed in some of the clearest language in the U.S. Constitution, the Court had to "find" state sovereignty that transcends the actual language of the Eleventh Amendment in the original Constitution.⁷⁶

After the Court's decision in *Hans v. Louisiana*, the seeds of state sovereignty grew. In a reaction to an extreme commitment to the central, federal government, the Supreme Court evolved a version of state sovereignty that limited *congressional* action as well as protected the states from private

⁶⁹ U.S. CONST. pmbl.

⁷⁰ See Gloria J. Browne-Marshall, *Early American Conflicts and Modern African Practices: A Comparative Commentary on Constitutionalism*, 10 ILSA J. INT'L & COMP. L. 305, 307 (2004).

⁷¹ See Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 223–24 (2004).

⁷² See *id.*

⁷³ 2 U.S. 419 (1793)

⁷⁴ See *id.*

⁷⁵ See *Hans v. Louisiana*, 134 U.S. 1 (1890). This protection may be circumvented through the dubious device of so-called "officer suits" whereby a state official may be sued to stop implementation of state law allegedly violating federal law. See *Ex parte Young*, 209 U.S. 123 (1908).

⁷⁶ *Hans*, 134 U.S. at 11–21.

lawsuits.⁷⁷ Some of the law that permitted Congress to “abrogate” state sovereignty, which had emerged in the heyday of nationalism, began to deteriorate. The Court expanded the constitutional limits on national authority so that Congress, not just federal courts, could not derogate state sovereignty.⁷⁸

This trend led to two Supreme Court decisions that prohibited Congress from “commandeering” state governments. *New York v. United States*⁷⁹ invalidated federal efforts to direct state legislatures, and *Printz v. United States*⁸⁰ invalidated federal efforts to command state and local executive officials. That is, Congress could not force state governments to implement federal law. Of particular relevance here, the Court in *Printz* ruled that Congress could not commandeer state officers, even as a temporary expedience.⁸¹ Since these two decisions, federal administrative programs have no longer been able to co-opt state authorities. Instead, if Congress wishes to employ state or local administrative officials, it must now induce or coerce the states into cooperating.⁸²

These two rulings solidified the U.S.’s divided federalism. The wisdom of divided federalism, however, is much in doubt. U.S. federalism does not exist in isolation, and comparisons to other forms of federalism might have been useful. As Justice Breyer observed in *Printz*,

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the

⁷⁷ See, e.g., *Gregory v. Ashcroft*, 502 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455 (1990); *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Lane County v. Oregon*, 74 U.S. 71 (1869).

⁷⁸ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that the Commerce Clause, article I, section 8, did not authorize Congress to regulate the states). But see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (holding that the Bankruptcy Clause, article I, section 8, empowers Congress to affect the states in bankruptcy).

⁷⁹ 505 U.S. 144 (1992).

⁸⁰ 521 U.S. 898 (1997).

⁸¹ *Printz* established the principle that Congress may not commandeer state administrative officials. *Id.* at 935. *Printz* involved an injunction action brought by two county sheriffs who found themselves in the statutory category of “chief law enforcement officers” (CLEO). The sheriffs objected to being compelled to implement certain requirements of the “Brady Act,” which regulated firearm sales. *Id.* at 902–04.

⁸² See *id.* at 929 (“[This Court] upheld the statutory provisions at issue precisely because they did not commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field . . .”) (distinguishing *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 761–62 (1982)).

liberty-enhancing autonomy of a small constituent governmental entity.⁸³

However, the author of the *Printz* opinion, Justice Scalia, resisted referencing to other systems.

Several commentators have identified defects in Justice Scalia's constitutional reasoning in *Printz*.⁸⁴ The constitutional language in support of the anti-commandeering holding is virtually nonexistent. Justice Scalia, who has been skeptical, to the say the least, of legislative history in general, based his majority opinion largely on legislative history and "off-stage" legislative history at that.⁸⁵ Moreover, it is incontestable that the federal-state relationship radically and fundamentally changed in 1865, as codified in the Fourteenth Amendment in particular.⁸⁶ As precedent, the case is weakened by the 5-4 majority.⁸⁷ Regardless of the skimpy majority, the absence of supporting constitutional language, and the vague historical support presented, *Printz*'s anti-commandeering principle has passed into U.S. constitutional jurisprudence as established doctrine.

In the end, the supporters of this anti-commandeering doctrine cannot escape the charge that it is unabashedly result-oriented, driven by a view of good (U.S.) government principles.⁸⁸ Yet, good government might be

⁸³ *Id.* at 976 (Breyer, J., dissenting).

⁸⁴ See, e.g., Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998) (arguing that Congress's Article I power to employ the state courts also supports the power to commandeer state executive officials).

⁸⁵ *Printz*, 521 U.S. at 928-29.

⁸⁶ See CONST. amend. XIV.

⁸⁷ *Printz*, 521 U.S. at 900-01.

⁸⁸ Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 893-94 (1998). Hills explains:

When the national government commandeers services from nonfederal governments, it essentially demands that such governments provide in-kind contributions to the national government. But such demands can inefficiently deter voters and politicians from participating in state and local politics. In effect, when the national government commandeers state and local regulatory processes, it undermines the very institutions that the national government seeks to exploit.

Id.

Ernest Young has observed that federalism design should not only protect the sub-governments, but it should also protect individuals through its "dual security." See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1729 (2002) ("While the strength of [U.S.] federalism may have declined in tandem with the danger of strife arising from internal differences, it is not at all clear that the need to guard against centralized encroachments on individual liberty has likewise decreased.").

furthered by giving Congress the flexibility to choose and justify various types of state implementation.⁸⁹ In *Printz*, Justice Scalia worried that federal command of state governments does not show sufficient respect—perhaps required by the Constitution—for the state governments.⁹⁰ In his dissent in *Printz*, however, Justice Breyer observed that other federal systems “do so in part because they believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well.”⁹¹ The E.U. experience suggests that a cooperative-dialectic philosophy may in fact temper antagonism between the states and the central authority. Furthermore, it seems significant that the E.U. member states agreed to an integrated system because they felt such system respected their sovereignty while still getting the job done.

The U.S. hierarchical conception of delegation contributes to the states’ defensiveness. Even in those programs in which the states “voluntarily” participate, there is no question as to which sovereign is dominant. Were U.S. federalism constructed more along the lines of a multidimensional network, rather than divided and hierarchical, legal doctrine might not have moved towards insulating the states. Certainly, one designing or reconstructing a federal system elsewhere might take heed.

⁸⁹ Daniel Halberstam and Roderick Hills found that rigidity in German federalism prevents more tailored design: “The responsibilities of federation and *Länder* bureaucracies are defined ex ante by the Grundgesetz [the German Constitution or “Basic Law”]; thus the German system does not allow for greater or fewer enforcement responsibilities to be allocated to the *Länder* based on any *Land*’s track record of enforcement.” Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 173, 181 (2001).

⁹⁰ *Printz*, 521 U.S. at 907–15.

⁹¹ *Id.* at 976–77 (Breyer, J., dissenting). “Believe” may be the operative word here. As Daniel Kelemen’s empirical work suggests,

The impact of fragmentation on state discretion is counterintuitive Where the power of the federal government is highly concentrated, state governments will enjoy wide discretion in implementing federal laws. By contrast, where the power of the federal government is highly fragmented among a number of veto players, state governments will be subject to more stringent controls and enjoy less discretion.

III. CITIZEN EXPECTATIONS AND THE IMPLEMENTATION MECHANISMS

Although federalism analysis usually concentrates on governments and people, federal governments actually face a more perplexing challenge: satisfying a diverse citizenry. Citizens have expectations and any system must be sensitive to those expectations. These expectations are formed from a myriad of influences, of which social, political, and legal culture is particularly potent and mysterious. For network systems, meeting these expectations is extremely problematic. Since ordinary citizens become engaged when policy is actually applied to them, implementing machineries must make significant contributions to citizen comfort levels.

In general, implementing policy is developed through two major types of actions. The process may focus directly on formulating general and prospective policy. This category of implementing policymaking is known in the U.S. as "rulemaking" and in the parliamentary governments of the E.U. as "delegated legislation" or as "decrees."⁹² The network devices for implementing policy of general, prospective application strain to deal with diversity, and hence, new innovations have proven necessary. While the procedures discussed below are useful, more development in general implementing policymaking procedures for network federalism will be necessary.

Implementing policymaking may also evolve from administrative resolutions of individual disputes. The E.U. treaty regime carefully controls centrifugal judicial policymaking in individual dispute resolution.⁹³ However, U.S. experience teaches that a focus on judicial proceedings is substantially underinclusive.⁹⁴ Necessarily, the vast majority of individual implementing disputes are resolved by administrative adjudicators.⁹⁵ Technically, policy confronted by these adjudicators could be submitted to the E.U. courts. However, because these administrative agencies are numerous and facially carry out member state implementing policy, they are unlikely to be so

⁹² While the E.U. is not precisely a parliamentary system, its processes naturally evolve along those lines so that an understanding of its general implementing processes is informed by reference to the parliamentary model.

⁹³ The Treaty allows lower national courts to bypass the highest courts and go directly to the E.U. courts. *Consolidated Treaty*, *supra* note 41, art. 234 ("[A]ny court or tribunal . . . may . . . request the Court of Justice to give a ruling [on a question of E.U. law].").

⁹⁴ See Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 1-3 (1992).

⁹⁵ *Id.*

referred. E.U. policy implications are likely to reach only beyond the local process if the decisions are reviewed by a court. Again, experience teaches that only a small percentage of policies are reviewed by a court.⁹⁶ So, along with processes for generalized implementing policy, network federalism presents special challenges regarding implementing policy in individual dispute resolutions.

A. *General and Prospective Implementing Policymaking*

For years, Europeans have been considering the advantages of the U.S. process for general implementing policymaking, known as “notice and comment rulemaking.” Francesca Bignami is among those who have made a strong case for transposing that process into the E.U. implementing processes.⁹⁷ However, the E.U. experience suggests that while this process may be useful, it is of limited value in the network government. In the end, it may even be found that it is simply inappropriate in that context.

U.S. administrative law has trumpeted for generations its notice and comment rulemaking. In the 1940s, the uniform act, the Administrative Procedure Act (APA), adopted that procedure as the basic rulemaking process.⁹⁸ Generally, the process requires public notice of the proposed rule, an opportunity for comment, publication of the final rule, and a written justification with findings supporting the final rule.⁹⁹ The final rule is subject to judicial review by generalist courts, but that review is generally severely limited.¹⁰⁰ Rules so promulgated, “legislative rules,” have the “force of law” and, hence, are binding on the public, the agency, and the courts.¹⁰¹

In the notice and comment process, participation is unlimited. All “interested persons” have that right, and that term refers literally to anyone “interested.”¹⁰² Over the years, this process has proven to be a largely cost-effective mechanism for fostering transparency and open access to general

⁹⁶ See James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 430–31 (2005).

⁹⁷ See Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451, 514–15 (1999).

⁹⁸ See 5 U.S.C. § 553 (2006).

⁹⁹ See *id.*

¹⁰⁰ See James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMP. L. REV. 503, 535–44 (2000).

¹⁰¹ *Id.*

¹⁰² See 5 U.S.C. § 553(c) (“[T]he agency shall give interested persons an opportunity to participate in the rulemaking . . .”).

policymaking at the implementation stage. It is not without claims of procedural paralysis.¹⁰³ Nonetheless, the notice and comment process remains the bedrock of U.S. regulatory decisionmaking and often leads to important policymaking and major policy shifts—results that are perhaps impossible through legislative action.¹⁰⁴ Still, other legal cultures, even common law ones, have not adopted this procedure, although they are well aware of it.¹⁰⁵

While a useful device for developing national policy, the notice and comment process serves cooperative federalism less well. That is, the states do not have any more standing than other “interested persons” because they are not the promulgators of national implementing policy. Instead, the E.U. is compelled to “privilege” the member states in the regulatory process. The member states are direct and active participants both within the E.U. government and at implementation stages.

¹⁰³ See, e.g., Thomas McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (asserting that “the rulemaking process has become increasingly rigid and burdensome”); see also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (calling for a better balance between unbridled participation and facilitating deliberation).

¹⁰⁴ One particularly pervasive example is the Federal Energy Regulatory Commission’s rules that completely reorganized the electricity industry, starting with Order 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. pts 35 & 385). The Supreme Court addressed the permissibility of the agency’s actions in *New York v. Fed. Energy Reg. Comm’n*, 535 U.S. 1 (2002) (holding that FERC policy choices were not outside the scope of its authority). Another example is the Social Security Administration’s rule defining a core element of the disability benefits program. Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55349 (Nov. 28, 1978) (to be codified at 20 C.F.R. pts. 404 & 416). The Supreme Court addressed the permissibility of these regulations in *Heckler v. Campbell*, 461 U.S. 458 (1983) (holding that reliance on agency guidelines was consistent with the Social Security Act and that such guidelines were not arbitrary or capricious); see also 16 C.F.R. § 423.6 (2007) (Federal Trade Commission rule resulting in “care labels” on nearly all apparel); 21 C.F.R. § 101.9 (2006) (Food and Drug Administration rule requiring nutritional labels on “all products intended for human consumption and offered for sale”).

Some 4,000 new rules and 3,000 proposed rules are published each year. OFFICE OF MGMT. AND BUDGET, 2006 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBUNAL ENTITIES (2006), http://www.whitehouse.gov/omb/infoereg/2006_cb/2006_cb_final_report.pdf. Indeed, U.S. agencies produce well over 4,000 final rules each year. See *id.* The Office of Management and Budget’s 2006 report to Congress stated that between 1981, when it began to compile records, and 2005, 118,375 final rules were published in the *Federal Register*. The annual average would then be 4,375 over twenty-five years. *Id.* at 29 n.54.

¹⁰⁵ Janet McLean, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 167, 168 (2005) (“For the most part, the ex ante notice and comment rulemaking procedures that characterize U.S. administrative law have not been embraced in other common law jurisdictions.”).

With few exceptions, the member states will provide the implementing authorities. The E.U. may command the states to do so. Indeed, in the end, citizens will likely not perceive that the national regulation was motivated by an E.U. measure. In fact, member states do not have “deniability”; hence, they have justifiably insisted on active involvement in the development of the regulation itself. They participate at every level: from the delegation of legislation, through the implementation of legislation, to necessary administrative implementation, and the resulting policy.

Nonetheless, the absence of a clear hierarchy and division of authority requires additional participatory devices. One device is the specialist committees.¹⁰⁶ The treaty itself establishes committees that must be consulted—a directive Americans would characterize as the legislative process.¹⁰⁷ These committees bring regions and economically significant groups within the legislative process.¹⁰⁸ Similarly, “comitology” committees blend expertise and special interests.¹⁰⁹ Formally, these committees monitor the Commission’s exercise of delegated power to promulgate “implementing measures.”¹¹⁰ The committees are forums for discussion and dialogue with the Commission. The procedures which govern relations between the Commission

¹⁰⁶ See Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499, 513 (1998) (defining “specialist committees” as “a number of national specialists in various policy fields”).

¹⁰⁷ *Consolidated Treaty*, *supra* note 41, art. 257, 263.

¹⁰⁸ *Id.* art. 257 (The Economic and Social Committee); *id.* art. 273 (The Committee of the Regions).

¹⁰⁹ Alexandra Gatto, *Governance in the European Context: A Legal Perspective*, 12 COLUM. J. EUR. L. 487, 501 (2006) (“Comitology *strictu sensu* defines those committees composed of national representatives which assist or control the Commission in the exercise of its implementing powers.”). Gatto further explains:

The term comitology, however, has acquired a broader meaning to include not only committees which intervene at different stages of the decision making process (the policy-making and implementation committees), but also those that provide the opinion of broad socioeconomic interest groups (interest committees) and scientific expertise and information (scientific committees).

Id.

¹¹⁰ Currently, there are some 247 committees broken into three major categories: advisory committees, management committees, and regulatory committees. Under the “advisory procedure,” the Commission must submit its proposal to a committee but a negative reaction does not affect the Commission’s powers. PAUL CRAIG & GRÁINNE DE BÚRCA, *E.U. LAW: TEXT, CASES AND MATERIALS* 151–52 (3d ed. 2003). Under the “management procedures,” the relevant committee must approve the Commission’s draft by a qualified majority. *Id.* at 152. Or, the Commission may adopt the committee recommendations and the amended proposal proceeds. *Id.* Even if the Commission does not adopt the committee’s recommendations, the Commission’s proposal may still go forward but the Council is notified. *Id.* Under the “regulatory procedure,” if the committee disagrees, the Commission must put its draft before the Council, which may reject it. *Id.*

and the committees are based on models set out in the Council's "comitology decision" of June 28, 1999.¹¹¹ The member state governments are engaged in all of these committee processes by, at least, appointing their memberships. The committee system overcomes practical obstacles, such as language, ethnicity, and resources, to obtain broad and diverse views, as well as to incorporate expertise and satisfy member state governments.

The committee mechanism is not without its problems. Comitology was intended to increase accountability, but many observe that, in fact, it has decreased transparency and added to the democracy deficit.¹¹² For example, Ian Ward described the comitology system as a "network [that] strengthens its own power whilst further distancing governance from the principles of democracy, accountability and transparency."¹¹³ Bignami described the comitology process as "shrouded in secrecy," because it prevents MEPs from checking bargaining within the committees.¹¹⁴ In *Rothmans International v. Commission*,¹¹⁵ the CFI attacked the problem of transparency by ruling that the committees were under the Commission's control.¹¹⁶ Despite improvements to the committee system, these criticisms persist.¹¹⁷ Nonetheless, the potential for real inclusiveness in network government cannot be denied.

Formal inclusion of the "civil society" also helps assure that diverse interests are included. As discussed above, European governments, including the E.U., invite and facilitate participation by the public interest community, the civil society, and public interest nongovernmental organizations. These organizations, at both the E.U. and national levels, facilitate broad participation in implementing policy throughout the network. The danger is that, having been brought into the system, these organizations may, to some extent, be co-

¹¹¹ Council Decision 1999/468/EC, O.J. (L 184) 23, 26 (laying down the procedures for the exercise of implementing powers conferred on the Commission), *amended by* Council Decision 2006/512/EC, O.J. (L 200) 11.

¹¹² See, e.g., Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645, 682 (2006) ("[I]t is unclear that these processes, either, result in exposure to or engagement of the public.").

¹¹³ IAN WARD, A CRITICAL INTRODUCTION TO EUROPEAN LAW 68 (2d ed. 2003).

¹¹⁴ Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451 (1999). The Second Comitology Decision sought to increase access but with little success. See BERGSTRÖM, *supra* note 41, at 271–78.

¹¹⁵ Case T-188/97, 1999 E.C.R. II-2463.

¹¹⁶ See *id.*

¹¹⁷ STRAUSS ET AL., *supra* note 6 at 74–75.

opted by the governmental institutions.¹¹⁸ This danger, however, seems manageable. Since this device might help solve certain network problems, the rewards clearly outstrip the risks.

It is often observed that the E.U. is a work in progress. The network system itself continues to invent new mechanisms. Nowhere is that more evident than in “soft law.”¹¹⁹ One major device, particularly relevant to the nature of E.U. federalism, is “open method of coordination” (OMC).¹²⁰ Under OMC, the European Council establishes guidelines, or soft law, in a particular area, and the states are obliged to take the guidelines into account in establishing their domestic policies in those areas.¹²¹ In doing so, the states are to cooperate and learn from each other’s experiences.¹²² The process appears to have been effective, considering that states are cooperating to develop and propagate “best practices” based on the guidelines.¹²³

Assuming that a network character of a national or supranational federal government is desirable or inevitable, the E.U. experiences provide valuable lessons. First, it is not enough to formally provide for general public access to the process. Obstacles, such as cultural diversity and resource disparities, will inhibit inclusion of all the various interests. If affected citizens do not perceive a realistic opportunity to influence the formation of regulation, they will not perceive the implementation as consistent with good government and, perhaps, the rule of law. Instead, governments may establish devices whereby the subunits as such are active participants. Specialty representative bodies, such

¹¹⁸ For example, it has been called “a rigged dialogue with society.” *Charlemagne: A Rigged Dialogue with Society*, *ECONOMIST* (U.S.), Oct. 23, 2004, at 31.

¹¹⁹ Craig and de Búrca observe: “The EC also has numerous *soft law methods* for developing Community policy. These include guidelines, policy statements, and declarations by the European Council.” CRAIG & BÚRCA, *supra* note 110, at 111 n.ii. But they also reflect: “It may be difficult for those affected to understand what the ‘law’ actually is in a particular area. Recourse to informal law may also prevent the Council and [European Parliament] from having effective input into the content of the resulting norms.” *Id.* at 117.

¹²⁰ D. COYNE, THE EUROPEAN COMMISSION, INVOLVING EXPERTS IN THE PROCESS OF NATIONAL POLICY CONVERGENCE 5 (2001), available at http://ec.europa.eu/governance/areas/group8/report_en.pdf.

¹²¹ *Id.* at 56.

¹²² For example, notice the “soft law” influence of the Organization for Economic Cooperation and Development on member states. James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 *LAW & CONTEMP. PROBS.* 189, 219 (2005) (observing that OECD studies acquire influence: “[t]he net effect can be a subtle but significant form of advocacy”). Hence, Salzman calls for consideration of proper administrative procedures and safeguards. *Id.* at 219.

¹²³ This process has been somewhat incorporated throughout the proposed constitution. One example is Article III-213, which provides in part: “With a view to achieving [social objectives] . . . , the Commission shall encourage cooperation between Member States and facilitate the coordination of their action in all social policy fields under this Section.” Consolidated Treaty, *supra* note 43, art. III-213. This Article lists seven social policy fields in particular. *See id.*

as the various E.U. committees and nongovernmental public interest organizations, provide access for various specific categories of citizens as well as expertise and perspective. More importantly, they give these interests real influence. The E.U. laboratory in network government has advanced the understanding of the operation of network government.

B. Evolving Policy Through Implementing Adjudications

Many individual claims and disputes must be decided at the implementing stage, and the devolution of this authority impacts on these adjudications.¹²⁴ Often, these claims and disputes will be resolved at some administrative level or by other specially designated tribunals, rather than through the general court systems. The tendency is to view adjudication as primarily a fact-gathering process for the purpose of the specific application of general policy, generated by either legislative or delegated authority. However, it is the rare law or general pronouncement that answers every question at individual application, or rather, it is the rare individual application that can be clearly determined by hard law. Thus, at the implementation stage, adjudicators, whether judges or officials, must tailor the hard law to the case at hand.¹²⁵ The aggregate of these individual decisions forms a potential source of the implementing policy. Different legal cultures treat this source differently. Indeed, legal cultures can be distinguished by comparing their treatment of this source. A federal system, national or supranational, must confront a potential legal culture clash, both horizontally and vertically. A network federal system faces even more complicated questions about conduct, equality, and consistency when implementing adjudications.

Again, the contrast between U.S. federalism and E.U. federalism offers several insights into the creation of implementing policy in the resolution of individual rights and duties. Indeed, the E.U. provides a better study vehicle

¹²⁴ A useful working definition: "Adjudication is a determination of individual rights or duties *In general*, adjudication is the decision making process for applying preexisting standards to individual circumstances." CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* 45 (2d ed. 1997) (emphasis added).

¹²⁵ Interestingly, Justice Scalia, in *Printz*, suggested that Congress could require "state administrative agencies to apply federal law while acting in a judicial capacity" as a state court would. *Printz v. United States*, 521 U.S. 898, 929 (1997). His somewhat vague suggestion that Congress could assign policymaking to state agencies might support the notion that, even in the U.S., the central government could expect state administrative adjudicators to participate in the development of federal policy in a given program. *See id.* at 928 ("Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields . . .").

because it works with various legal cultures. In the U.S., while states vary somewhat among themselves and within the federal system in their adherence to hard law, in general, the U.S.'s legal culture is to some extent defined by our approach to adjudicative policymaking.¹²⁶ The E.U., at the very least, must deal with two major legal cultures: civil law and common law.¹²⁷ It has been necessary for the E.U. to accommodate those legal cultures at the implementing stage.¹²⁸

Many federal systems no doubt confront even more complex problems when implementing blending approaches to adjudicative policymaking. Many federal systems that combine regions or groups that are strongly committed to varied or even conflicting notions of "judicial" law-making discretion must find the means to deal with fundamentally diverse approaches to implementing policymaking in individual disputes.¹²⁹ In this regard, the blending of common law and civil law systems seems a simplistic analytical vehicle. Still, the realities of accommodating even these two approaches to "judicial" policymaking are instructive.

1. Case-by-Case Evolution of Implementing Policy

A classic distinction between common law systems and civil law systems has been the effect of precedent. While the adjudicative process of these two legal cultures differs significantly, many find a convergence in the use of precedent.¹³⁰ Reminiscent of the common law law development, civil lawyers refer to precedent, civil law judges recognize prior judicial decisions, and these judges use those decisions to guide their own decisions. Indeed, in some areas, such as French tort law, code provisions are so general as to invite judicial development.¹³¹ Civil law judges are technically free to use precedent as they see fit, whereas common law judges technically *must* rely on precedent or explain their failure to do so.

¹²⁶ This generalization is confused by the mixed legal system of Louisiana. VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 257 (2001).

¹²⁷ There is probably some variation within these overarching categories.

¹²⁸ See *supra* text accompanying note 47.

¹²⁹ See generally PALMER, *supra* note 126.

¹³⁰ See e.g., Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 775 (2005) (finding that "many jurisdictions, both common law- and civil law-based, are gravitating to 'systemic respect for jurisprudence' and away from strict use of the traditional stare decisis and jurisprudence constante doctrines").

¹³¹ JOHN BELL ET AL., *PRINCIPLES OF FRENCH LAW* 355-56 (1998).

The key theoretical difference is expressed by the term *stare decisis*. Theoretically, common law judges are bound by prior cases. Civil law judges have absolute control in their courtroom and are not bound by the work of their colleagues.¹³² Hence, paradoxically, civil law judges are more powerful in their own court rooms but weaker in that their opinions have no impact outside their court. Even appellate court decisions are not binding on the lower courts, even though the appellate court “reviews” the lower court *de novo*. The *Cour de Cassation*, the private law supreme court, reviews only law, but even then, that court’s legal conclusions are not binding on the lower court.¹³³ In short, precedent is not ignored but it does not have a *stare decisis* effect.¹³⁴

In practice, the force of precedent in the U.S. is much weaker than prescribed by theory. The highest courts seem more than willing to escape their prior cases.¹³⁵ Lower courts often reason around higher court opinions.¹³⁶ The U.S. system is more one of dialogue than hierarchy. In addition, precedent is not held to have binding effect in administrative adjudications.¹³⁷ Administrative adjudicative bodies must be consistent, but their decisions do not have *stare decisis* effect. Consistency requires that they treat like cases alike or justify any deviation.¹³⁸ At the implementing stage, then, precedent has an ambiguous force in U.S. adjudications.¹³⁹

In both legal cultures, judges use prior judicial decisions and lawyers refer to precedent; still, the impact of prior opinions varies. Civil law judges often follow the opinions of their colleagues, and U.S. judges and administrative adjudicators often stray from the opinions of theirs. The two systems seem to converge in practice even as to this fundamental distinction. Still, culture

¹³² ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 56 (1998).

¹³³ Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT’L L.J. 57, 66 (1994) (“The Cour de Cassation is not a court of appeals, but rather a court of review The Cour de Cassation blurs the line between advisory opinions and decisions on the merits through its initial inability to substitute its judgment for that of the *cours d’appel* or the *cours d’assises*.”).

¹³⁴ WEST, *supra* note 132, at 55 (“[Article 5 of the Code Civil] makes it clear that the rule of *stare decisis* has no place in French law.”).

¹³⁵ See, e.g., Malia Reddick & Sara C. Benesh, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*, 21 JUST. SYS. J. 117, 124 (2000) (explaining that “[i]n [their] study, [they] f[ou]nd several lower-court rulings thwarting Supreme Court precedent that are ultimately affirmed as the Court overrules the offended precedent”).

¹³⁶ *Id.*

¹³⁷ An administrative agency generally is not bound by the principle of *stare decisis*. See, e.g., *Yellow Robe v. Bd. of Trs. of S.D. Ret. Sys.*, 664 N.W.2d 517 (S.D. 2003); *Riedmiller v. Harness*, 34 P.3d 474 (Kan. Ct. App. 2001), *review denied*, (Mar. 20, 2002).

¹³⁸ 330 Concord St. Neighborhood Ass’n v. Campsen, 424 S.E.2d 538 (S.C. Ct. App. 1992).

¹³⁹ KOCH, *supra* note 124 § 5.67[4].

matters. It is impossible to believe that adjudicators raised in the two different cultures will not approach precedent differently.

A necessary, and perhaps questionable, aspect of the common law system is the inherent unfairness of holding a litigant to law that was created in the course of their litigation. Somehow, they are to know not only what the law is but also what the law will be. U.S. administrative adjudicators have long had the same authority, so that an agency may find a person in violation of a standard that was not previously articulated.¹⁴⁰ Although this power parallels that of common law courts, it has been contested for generations in U.S. administrative law. Many believe that, unlike courts, U.S. agencies generally have the power to announce policy through rulemaking and, hence, have no justification for applying new policy for the first time in an individual adjudication. U.S. legal culture at present trumps this sense of unfairness.

Nonetheless, the inherent unfairness of this aspect of case-by-case evolution of policy implementation may irritate those who expect some faithfulness to existing law from their adjudicators.¹⁴¹ These cultural expectations, then, should be confronted as implementing decisions devolve to subunit adjudicators. From the public's perspective, the expectation of the various groups of citizens must be identified and dealt with. From the adjudicators' perspective, some uniform principles must guide their use of, freedom from, and development of case-derived law. If an adjudicator, judicial or administrative, in a civil law system is faced with an opinion from a central adjudicative authority, should that adjudicator treat it the same as one in a common law system? Should judges sitting in supranational dispute resolution bodies treat case law according to their legal culture, or should there be some prescribed or agreed approach to consistency and equal treatment? Again, network government makes resolution of these potential conflicts both more difficult and more important.

This choice of case-by-case or unified policymaking is further complicated by the sensitivities in national federal systems and by the strength of the sense of sovereignty in supranational bodies. For example, some national courts in the E.U. system resisted the European Court of Justice's expansion of

¹⁴⁰ Two classic cases are *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), and *SEC v. Chenery Co.*, 332 U.S. 194 (1947).

¹⁴¹ In the context of individual administrative dispute resolutions between a citizen and the government, the continental doctrine of legitimate expectation might inhibit retrospective administrative policymaking in individual cases. See JURGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 949–53 (1992).

European law. First, supremacy had to be judicially established in the absence of expressed supremacy.¹⁴² But that was nowhere near the end. The judiciaries of different member states submitted at different rates to this supremacy.¹⁴³ Indeed, since continental judiciaries tend to be functionally divided, different courts systems in the same member state conceded to the central judiciary differently. Many national courts still claim authority to decide for themselves whether a matter is within European competence.¹⁴⁴ These are expressions of divided federalism much like the U.S., in which separate sovereignty is insisted on.¹⁴⁵ The general adjudicative network, blending national and E.U. judiciaries in the E.U. policymaking process, needs a judicial dialogue rather than a power struggle.

There seems to be a natural tendency in the formative stages of a society or in implementing a program to evolve the detail in dispute resolutions. For example, much of E.U. law has been developed through the decisions of the E.U. courts. Implementing adjudications in a new supranational organization, or an emerging national one, can be expected to rely on individual applications to fill out the general law. Yet again, culture matters. At a subsequent developmental stage, the legal culture might begin to affect acceptability. In a network federal structure, the cultural imperatives can be expected to kick in among the groups at different points and in different degrees. And yet, the mechanisms for dealing with the cultural expectations are difficult to monitor.

In the E.U., precedent floats around the implementing network, and adjudicators make of it what they might. To what extent will or should an official's individual decision in France affect the same E.U. law in England? Coming to grips with such questions is a challenge for network federalism. In the end, however, diverse expectations must be satisfied or at least accommodated.

¹⁴² Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, 1964 ECR 1141.

¹⁴³ See generally *EUROPEAN & NATIONAL COURTS*, *supra* note 64.

¹⁴⁴ Even today, several member-state courts have insisted on the power to engage in *ultra vires* review. *Id.* at 95-98.

¹⁴⁵ In the U.S., state administrative determinations may control federal authorities. See, e.g., *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986). Even when state determinations do not bind federal authorities, U.S. folk wisdom is that the states constitute governmental laboratories in which federal policy may form. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ."). In this way, at least, decisions by state adjudicators affect the evolution of federal policy.

2. *Binding Effect of Language*

A similar complex cultural clash arises from diverse judicial treatment of authoritative language as applied in implementing dispute resolution. Again, the European and U.S. legal cultures are theoretically distinguished by their approaches to language, and again, the reality is more ambiguous. Adjudicators in the two systems approach language differently, and it is predictable that implementing adjudicators will as well. This cultural difference might provide some insight into authoritative treatment of positive law in federal systems.

Theoretically, the ordinary European judiciary should be faithful to the language of statutes. The civil law aspect of this prescription grows out of the French revolutionary experience, in which the judges abused their power and are believed to have prevented the developments that might have saved the country from disaster.¹⁴⁶ Many societies that have adopted the civil law system have had equally bad experiences with the judiciary and wish to keep them under the control of the political institutions. They perceive that limits on the judiciary are a necessary aspect of reform. In short, judicial restraint and democratic accountability demand that adjudicators honor statutory language and, perhaps, policy statements issued pursuant to legislatively delegated authority.

The U.S. has been luckier with its courts and, hence, accepts a good deal of judicial policymaking. Of course, the common law culture depends on judicial lawmaking. No U.S. lawyer would challenge the observation of Henry Hart and Albert Sacks: "The body of decisional law announced by the courts in the disposition of these [individual] problems tends always to be the initial and continues to be the underlying body of law governing society."¹⁴⁷ U.S. judges have acquired considerable freedom from statutory language. Indeed, the Supreme Court has felt compelled on several occasions to admonish lower courts to obey "clear language" and not use the device of interpretation to impose their own policy judgments over that of Congress or its delegates.¹⁴⁸

¹⁴⁶ See JOHN P. DAWSON, *THE ORACLES OF THE LAW* 431 (1968) ("The chief legacy of the [French] Revolution was not judicial submission to the discipline of the codes but a deep-seated, widely-held conviction that judges lacked lawmaking power.").

¹⁴⁷ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 163–64 (1994).

¹⁴⁸ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def.*

Despite such opinions, U.S. judges engage in “interpretation”—which has none of the aspects of true interpretation—to interject themselves into policymaking, and in general, their reach is accepted in U.S. legal culture, if not in other segments of U.S. society.¹⁴⁹

Thus, we might expect implementing adjudicators from the two systems to approach authoritative language differently. However, dealing with this difference as with case-by-case policymaking requires nuance. John Henry Merryman, in his famous guide to the civil law for U.S. lawyers, captures the subtlety of the distinction:

The distinction between legislative and judicial production of law can be misleading. There is probably at least as much legislation in force in a typical American state as there is in a typical European or Latin American nation The authority of legislation [in the U.S.] is superior to that of judicial decisions; statutes supersede contrary judicial decisions (constitutional questions aside), but not vice versa If, however, one thinks of codification not as a form but as the expression of an ideology, and if one tries to understand that ideology and why it achieves expression in code form, then one can see how it makes sense to talk about codes¹⁵⁰

In short, judges in civil law systems feel more constrained by statutory language than judges in a common law system in which they are expected to “make law.”¹⁵¹ More to the point, citizens of different cultures, for example

Council, 435 U.S. 519, 548 (1978) (noting that the lower courts continued to ignore statutory language after admonishment from the Supreme Court by stating that “nothing in the [several relevant acts] . . . permitted the court to review and overturn the . . . proceeding . . . so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case”).

¹⁴⁹ See Emery G. Lee III, *Policy Windows on the U.S. Court of Appeals*, 24 JUST. SYS. J. 301, 318 (2003) (finding that “judges possess policymaking discretion when a Supreme Court precedent disrupts a settled area of the law and creates legal ambiguity that must be resolved”).

¹⁵⁰ JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 27–28 (3d ed. 2007).

¹⁵¹ A civil law judge may engage in “teleological” interpretation, the continental equivalent to U.S. purposive approach. See D. NEIL MACCORMICK & ROBERT S. SUMMERS, *INTERPRETING STATUTES: A COMPARATIVE STUDY* 511, 514, 518 (1991). While more activist than many national courts, even E.U. courts are reluctant to use this device too liberally. HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN UNION* 10 (6th ed. 2001) (finding that “the Court may lay more emphasis on some methods than on others. In particular, teleological interpretation, which is rarely used in more traditional legal systems”). But see L. Neville Brown, *The Linguistic Regime of the European Communities: Some Problems of Law and Language*, 15 VAL. U. L. REV. 319, 321 (1981) (The Court of Justice “commonly prefers a teleological or schematic interpretation of a provision of Community Law; the wording, of course, is not ignored, but primary importance is not given to ‘les termes.’ The Court looks rather to ‘l’objet, l’esprit, la nature’ or ‘l’économie’ of the text under scrutiny.”).

civil and common law societies, will expect different degrees and perhaps types of respect for statutory language.

These expectations will be further directed by the political system. Even English common law judges are compelled to give binding effect to statutory language.¹⁵² They must honor legislation with more sincerity than U.S. judges.¹⁵³ Citizens of the United Kingdom share the parliamentary tradition with those on the continent. The separation of the executive and the legislative in a presidential system empowers the judiciary to act as arbiters between the two. If they are combined, as in most parliamentary systems, the judiciary is in conflict with the legislative and executive powers and vulnerable to charges of usurping functions that are assigned to the political branches in a democracy.

E.U. courts are often found to be more activist than traditional civil law and parliamentary courts. Partly, this is the result of their French administrative court roots.¹⁵⁴ Yet, all but three of the member states are civil law, and all are parliamentary in some sense. If culture matters, it is interesting that the Council and Parliament have issued "communications" that encourage specific rather than general code.¹⁵⁵ Perhaps this development merely manifests a cultural instinct for codes. As would be predicted if that were the case, the United Kingdom is a strong dissenter to the concept of a European code.¹⁵⁶ However, it is not farfetched to suggest that the code movement, as it happened in many civil law countries, is the result of a cultural aversion to freewheeling judicial policymaking. Not only have the E.U. courts assumed a dominant role in shaping European law, but their activism has encouraged national courts to ignore traditional judicial restraint.¹⁵⁷ Judicial activism may, at least subconsciously, offend European expectations. It would then be predicted that traditional and, perhaps, new devices will emerge to reassert democratic

¹⁵² See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 29 (1994) ("The sovereignty of Parliament . . . exerts a constant and powerful influence. [I]t is an ever-present threat to the position of the courts . . . inclin[ing] the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive's control.")

¹⁵³ See *id.*

¹⁵⁴ See, e.g., ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 54 (1998) ("In Administrative law, however, fewer of the rules of substantive law are found in legislative texts, and the role of the judges has therefore, of necessity, been more creative.").

¹⁵⁵ Mel Kenny, *Constructing a European Civil Code: Quis Custodiet Ipsos Custodes?*, 12 COLUM. J. EUR. L. 775, 787-94 (2006).

¹⁵⁶ See *id.* at 792 ("[T]he common law reactions were the least enthusiastic.").

¹⁵⁷ See WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES* 113-18 (2005) (observing and supporting this development).

accountability. Regardless, implementing adjudicators will not be in position to challenge traditions without repercussions.

True judicial interpretation implements democratic policymaking; in contrast, independent judicial policymaking subverts it. Cultures that are unaccustomed to, or even wary of, cavalier judicial treatment of democratic action can be expected to see danger. The more autonomous the dispute resolution body, the more vulnerable it is to claims of lawlessness and trenching on individual rights. In the context of individual adjudications, faithfulness to both legislative and regulatory language is fundamental to democratic accountability—both real and perceived. The concept of the rule of law demands that officials, more than judges, be constrained by positive law. At the application stage, people directly affected are likely to resent assertion of common-law-type license by their implementing adjudicators. The confusion of authority inherent in network implementation confuses accountability and can be expected to increase uneasiness. The network needs to develop mechanisms for controlling its adjudicators and, at the same time, protect its adjudicators from influence. The very stability of such systems requires that citizens see that justice is done at the implementation level.

IV. OVERVIEW

Federalism in general is a challenge. While the concept envisions a jointly beneficial government, the sense of joint enterprise deteriorates as generalized policy moves down to individual citizens. Ideally, the constituent parts of a federal regime should reach some agreement on the development of implementing policymaking. But a government that mixes social, political, and legal cultures is especially challenged in meeting expectations about fair decisions and decisionmaking at the individual-citizen level. Large-scale failure to meet popular expectations as to fairness and legitimacy among its citizens will ultimately undermine a federal system. While structured diversity seems to be the answer, diversity also presents the danger of unequal and inconsistent treatment.

These challenges are magnified in network federalism. A hierarchical regime can build a common understanding of fairness and justice, and a divided regime allows each subunit to find its own norms that are consistent with the expectation of its citizens. The concept of network government attempts to legitimize a somewhat chaotic policymaking processes, but this chaos is its weakness as well as its strength. Unless a network government can

engender a sense of justice and legitimacy as policy is applied to its citizens, it will be unstable. This may be the gravest challenge for network federalism.