"DELIBERATIVE," "INDEPENDENT" TECHNOCRACY V. DEMOCRATIC POLITICS: WILL THE GLOBE ECHO THE E.U.?

MARTIN SHAPIRO*

I
INTRODUCTION

The building blocks for a future transnational and sometimes global administrative law are not difficult to identify, though there are quite a number. Some can be derived almost entirely from past U.S. experiences. The European Union, lying somewhere between an international treaty-based organization and a constitutional federalism, is particularly instructive—so, too, are the WTO and NAFTA, which share the free trade aspects of the E.U. Finally, parallel or converging developments in administration and its law in a number of advanced post-industrial states also are highly suggestive of future transnational developments.

II
REGULATION

The first great building block is regulation. Health, safety, environmental, consumer protection, and labor regulations designed to mitigate the downsides of capitalist free markets have been a major feature of the political economies of individual states for a long time. By the late twentieth century, they had multiplied enormously, due in part to the great ideological upswing in environmentalism, to the fear of risk, and to the movement away from socialism and toward markets—thus, the perceived need for more market regulation.[1] By the twenty-first century, some of this blossoming of regulation has moved on from parallel national development to transnational arenas. Most notably, the E.U. transitioned from clearing away a dense web of national regulations inhibiting cross-border trade, to itself creating a dense web of transnational regulation. Both the WTO and NAFTA now show comparable potential.

This Article is also available at http://law.duke.edu/journals/lcp.

* James W. and Isabel Coffroth Professor of Law, University of California at Berkeley School of Law.

1. *See*, *e.g.*, TRANSATLANTIC POLICYMAKING IN AN AGE OF AUSTERITY: DIVERSITY AND DRIFT (Martin Levin & Martin Shapiro eds., 2004).

The dynamic of extended free trade and extended regulation is simple enough. Differing national regulations are an impediment to trade. Variations in costs to producers imposed by differing national regulations lead to competitive advantages and disadvantages among national trading partners, and fears of deregulatory competition among them lead to a rush-to-the-bottom-of-regulation mentality to gain competitive advantage. The obvious answer is to level the playing field by substituting transnational for national regulation. This "upward" movement of regulation-making, both in free trade areas organized as federal states and those organized further toward the pure treaty-based international organization, leads to questions about which level of governance shall do how much implementing of the new transnational regulations.

Long and detailed study (mostly of the American experience) has demonstrated that policymaking and policy implementation can never be wholly separated.[2] The problem is particularly acute in government regulation—as opposed to service delivery—because the matters being regulated experience rapid and complex economic and technological change and incredible variation in detail over time and place. In regulation, the devil is in the details. Failures of regulation are most obvious when regulations are actually being implemented. Given the complexity of what is being regulated and the consequent complexity of the necessarily over-general regulations being written, the attainment of regulatory goals and purposes depend heavily on the many and continuous detailed interpretations of the general rules that must be made by implementers. So, alas, policymaking from on high and administration from the bottom is never wholly feasible, even if desirable.

If administrative law is, among other things, the set of rules for the creation and implementation of regulation, then as we anticipate the growth of transnational regulation with its endemic problems—problems created by the question of which level of governance does how much of what—we might anticipate the growth of transnational administrative law.

III

THE TENSION BETWEEN DEMOCRACY AND TECHNOCRACY

A. Democracy v. Technocracy

Because much of this regulation will be of relatively high-tech economic activity, we can also anticipate that this growing transnational administrative law will encounter the same issues that the administrative law of high-tech national regulatory schemes has faced in the past. For some high-tech states that purport to be democratic, one central issue has been democracy versus technocracy. Precisely because what is being regulated is technologically complex and

2. *See, e.g.*, THE NEW POLITICS OF PUBLIC POLICY (Marc Landy & Martin Levin eds., 1996); SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY (Martin Levin et al. eds., 2001).

rapidly changing, regulators must have high technical skills themselves. One cannot regulate what one does not understand. It has become widely recognized, however, that by virtue of the very specialization of knowledge required for the achievement of high technological skills, experts are themselves special interest groups whose perspectives and self-interests render them nonrepresentative of the demos as a whole.

There is an inevitable tension between democratic control of public policy, including regulatory policy, and regulation by experts. This tension is a second major building block of a transnational or global administrative law, and this tension is aggravated in a number of dimensions. One traditional solution, having the experts "on tap but not on top," does not work very well. Given one set of people who know something and another who do not—and our normal Western belief that brain surgeons, not the man off the street, should do brain surgery—the experts supposedly on tap are likely in reality to end up on top. The non-experts on top might seek to shield themselves by soliciting rival expertise, but ultimately such a tactic will render the policy discourse more elaborately technical and further beyond the comprehension of the non-expert. Faced with deciding something they clearly cannot understand, the non-experts must either appear arbitrary or seek consensus among contending experts, thus again reversing who is really on top.

A second solution, apart from contending experts, has been the proclamation of a special expertise topping other expertise. This approach can be seen in the traditional, now largely defunct, British civil service tradition of the "administrative class," in talks of "leadership" in the professional military corps, and in "diplomacy" in the professional diplomatic corps. In such settings there is need for but a denigration of specialized experts, and a preference for the generalist who can see the big picture and coordinate the tunnel visions of all the experts. Accordingly, the generalist is called the general and commands, not because he is no longer the infantry man, the artillerist, or tanker, but because he can coordinate all arms.

However much this view has survived in the military, it is largely absent from the general public service, a victim of the dreaded new public management (NPM). Such corps of elite, generalist, career civil servants—which were targeted in the United Kingdom by the *Yes, Minister* television series—was the epitome of the hated bureaucracy that NPM was to destroy. It sought to replace this bureaucracy with a new set of people having "management" skills directed at getting the job done, which meant producing the particular service assigned to their particular agency.[3]

Moreover, from the perspective of currently in-vogue, rational choice acolytes, the generalist high civil servant, serving the public interest rather than the narrower interests of technological specialists or of the clients who seek to cap-

3. There seems to have been little attention among NPM types to the fact that, in the private sector they so wish to emulate, the big bucks go not to managers who produce services but to corporate strategists.

ture them, is a mere fiction. There really is no "public interest," but only the special interest of whatever actor is projecting that interest onto the public. The civil service mandarin has the disadvantage of lacking the technical knowledge to understand what she is doing, without the advantage of actually pursuing any public interest beyond cultivating her own perquisites—which are most easily defended by maintaining the status quo.

Concomitant with this withdrawal of faith in a public service mandarin has been the politicization of the executive strata of the public service.[4] In order to make government more politically responsive and responsible, more and more government executives should be politically appointed. In one sense, this move does address the problem of democracy versus technocracy. It seeks again to put the technocrat on tap but not on top, and to place on top that genuinely non-expert, generalist reflector of the public's perspectives: the politician. Political executives, however, might find themselves even more easily captured by the experts than by civil service mandarins because they do not spend as much time in government executive positions as do senior civil servants, and so have less opportunity to learn how to keep experts on tap. Furthermore, the very distrust of government that led to the politicization of the executive is exacerbated when political executives are perceived by the public as using executive office for partisan advantage.

An acute problem at national levels, the balance between technocratic and democratic government is even more acute at transnational levels. National, technocratic bureaucracies are embedded in democratic states—at least formally, subordinately embedded in national governments—and are directly, electorally accountable to the people. At transnational levels technocratic administration is likely to precede directly, electorally accountable government. Even if one does not subscribe to functionalist or neo-functional theories of international organization, our immediate practical experiences with transnational organizations certainly support this point. The E.U., with its thick web of regulation and notorious "democratic deficit," is an obvious example. It is difficult enough to put the expert on tap but not on top when there is an elected, politically accountable top, yet it is much harder when there is not.

B. Technocracy and Democracy in the U.S. and E.U.

The United States and the E.U. provide instructive examples of the two ends of the spectrum. In the United States, the New Deal ushered in a renewed respect for the virtues of an executive branch dominated by a super-democratic President, F.D.R. That led to a sweeping judicial deference in administrative law to the so-called expertise of the newly expanded and empowered bureaucracy. At this stage technocracy was seen as a virtue because it was supposedly subordinated to a President with the greatest democratic mandate in U.S. history.

4. EZRA SULEIMAN, DISMANTLING DEMOCRATIC STATES (2003).

The reformation of U.S. administrative law consists of an up-welling of judicial suspicion of technocracy. The judge's weapon is the imposition of participation and transparency requirements on the technocrats, which in effect create a new variety and level of democratic control over bureaucracy, substituting the pluralist democracy of interest group surveillance for the electoral democracy of Presidential control.[5] This pluralism is supplemented with policy intervention by the judges themselves as virtual representatives of the non-expert demos.[6] The next and inevitable stage in this evolution is a resurgence of technocracy. Under interest group scrutiny, the government learns to armor its policy choices in real rather than assumed expertise, and litigation becomes the clash of opposing experts offered by government and interest groups.

The result is not only far more thoroughly tested and justified government policies, but also the much-complained-of long delays in and high costs of decision. A second result is the retreat of the judge as lay assessor of agency performance, as the very records demanded by judges become far too technically complex for judges themselves to understand. Thus, the very developments in administrative law designed to subject technocrats to democratic control have rearmed the technocracy. At best, what is achieved is a kind of competition among technocrats, some in government and some employed by interest groups, rather than the previous monopoly of technical data granted to government by that old judicial deference to administrative expertise. There might be some offsetting democratic pressure from allegedly increased Presidential partisan influence on regulatory decisions,[7] but if so, it occurs not with the assistance of but in the teeth of an administrative law that requires agencies to pretend that their decisions are fully technically justified.

In the E.U., comparable dynamics of judicial demands for transparency, participation, and full justification may be emerging,[8] but the far more prevalent trend has been an attempt to recruit technocratic legitimacy for government regulation as a substitute for democratic legitimacy.[9] The Council is the general lawmaking body for the Union. It is not directly elected. Its members are delegates, typically cabinet members, of the Member States. Given the parliamentary form of all those states, such delegates are indirectly democratic in that they are members of and sent by the elected governments of the Member States. A further democratic element is that voting in the Council on most questions reflects more populous states, whose delegates cast more votes. The

5. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

6. MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 54 (1968).

7. *See* Walter Mattli and Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225 (Summer/Autumn 2005).

8. CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 159-65 (2002); H.P. NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN E.C. LAW (1999); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION ch. 4 (2002); Martin Shapiro, *The Institutionalization of European Administrative Space*, *in* THE INSTITUTIONALIZATION OF EUROPE 94 (W. Sandholtz et al. eds., 2001).

9. REGULATING EUROPE (Giandomenico Majone ed., 1996).

increasing role of the directly elected Parliament in the lawmaking process is another element. Yet for a variety of reasons—most notably the merely incipient development of Union-wide political parties—the E.U. itself enjoys a far less democratic lawmaking process than do each of its Member States.[10]

As the experiences of all developed modern states make clear, secondary, detailed norms—called "rules" in the United States and "delegated legislation" in the United Kingdom— are vital elements in regulation. It is the rulemaking process that was transformed with the transformation of U.S. administrative law. In the E.U., the Council passes a great deal of regulatory legislation that delegates the making of such rules to committees—also known as the practice of "comitology." Typically, each particular Council enactment of this sort creates an ad hoc committee—ad hoc in the sense that it is created solely to draft rules for one statute. The membership of each such committee is chosen by the E.U. Commission and must consist of technical experts from each of the Member States. At first, committee proceedings were totally opaque. Now some transparency has been added. The Commission itself is a non-elected technocratic body. If the expert committees and the Commission agree on a draft rule, it becomes law. If not, the committee draft is subject to a kind of legislative veto device wielded by the Council. The comitology process thus exhibits an extremely attenuated democratic control over technocratic decisionmaking.

This vice is celebrated as a great virtue by the defenders of comitology.[11] They argue that precisely because the E.U. government as a whole is deficient in democratic legitimacy, there is a need to substitute a technocratic bureaucracy for democratic legitimacy. Indeed, they argue regulatory decisions should be kept out of politics entirely and be made instead purely on objective, technical grounds—on considerations of technological feasibility and economic efficiency. Any untoward consequences of such objective decisions—for instance, geographically or sectorially concentrated employment losses—should be handled by compensatory measures enacted by the political process rather than by politically motivated "distortions" of the objective regulatory process. Their very objectivity will recruit publicly perceived legitimacy for comitology generated rules.

As a purely practical matter, it is highly doubtful that European citizens endow technical bureaucracies with very high levels of legitimacy. Whatever endowment exists has been gravely drawn down by such recent scandals as the failure of both U.K. and E.U. regulators to promptly identify and stop the spread of mad cow disease, by the criminal conviction of French health officials for failure to take action to purge blood banks of possibly HIV-infected blood, and by corruption allegations that led to major reforms at the Commission. All modern governments are highly technocratic, and the contemporary withdrawal

10. THE EUROPEAN UNION: HOW DEMOCRATIC IS IT? (Svein Andersen & Kjell Eliassen eds., 2000).

11. E.U. COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos eds., 1999).

of popular trust in government hardly distinguishes between its political and technocratic elements. Indeed, anti-E.U. sentiment is far more often expressed as anger with the Eurocrats than as distaste for its explicitly political organs. Technocratic legitimacy may be a very weak reed to substitute for democratic legitimacy.

More generally, the hope of dividing regulatory decisions into two categories—purely technical, non-political ones that should be handled by technocrats and compensatory ones that should handled by politicians—seems hollow. First, it seems highly improbable that all regulatory questions have isolated, fully known, technically and economically correct solutions devoid of discretionary elements. It is very late in the day to argue for a wall of separation between politics and political science.

Second, it is utopian to expect that politicians, who will ultimately be held responsible for the costs imposed by regulation, will wait until after regulation has done the damage and then scurry around to try and make repairs through compensatory welfare programs. It is more likely that they would rather seek to prevent the damage by intervening in the regulatory process. Regulation frequently involves gaining diffuse benefits involving concentrated costs—for example, cleaner air at the cost of less profit and fewer jobs in the auto industry. Geographically elected politicians such as those of the E.U. are likely to be particularly sensitive to such regulations, but all elected politicians are necessarily more concerned with concentrated costs, no matter what the diffuse benefits, than are technocrats. Voters are more likely than technocrats to weigh concentrated costs more heavily than diffuse benefits.

Third, interest groups, aware that the devil is in the details and mindful of the advantages of getting in early, will not wait around until their particular interests are damaged by "objective" technocratic decisions and thereafter limit themselves to seeking compensation from politicians. The growing demands for and attempts at comitology transparency foreshadow this point. Interest groups want to participate in the earliest stages of the regulatory process. If they are told that those stages are technical, they are more than happy to offer their own technical experts to assist.

IV

E.U. COMITOLOGY AND TRANSNATIONAL ADMINISTRATIVE LAW

The E.U. comitology process is particularly instructive for anyone considering the future growth of transnational or international regulation and its concomitant administrative law. Given the difficulties of achieving political consensus among nation-states, particularly when proposed transnational regulatory decisions potentially concentrate costs to some to achieve benefits for all, the appeal of transnational committees of experts fashioning objective regulatory norms is obvious. Some would argue that the current stage of E.U. comitology is a good model for future international regulatory regimes and for other transnational schemes beyond the E.U. because, at their pure first stage,

the E.U. committees were subject to no administrative law and no judicial review. I would argue that comitology points more to a problem than a solution. The long and hard campaign of the E.U. Parliament to intervene in the comitology process and the recent Commission initiatives toward greater committee transparency both indicate that many Europeans do perceive comitology as creating rather than resolving "democracy versus technocracy" issues.[12]

Yet the comitology process also yields another major building block for imagining a global administrative law: it was originally designed not to empower technical experts, but to empower nations. The committees consist of members from each of the Member States. While these persons are chosen by the Commission and are not literally representatives or delegates of their home states, they are almost invariably drawn from experts serving directly in their national governments' civil services, researchers in government-financed research organizations, or faculty serving in government-controlled universities.

The logic seems simple enough. If the Council is the meeting place of the Member States, then committees wielding the delegated lawmaking powers of the Council should also be the meeting place of the Member States.[13] What this logic does not quite comprehend is that when the delegates are not nationally elected politicians but are instead national technical experts responsive to universal professional norms, it is not nationalism but professionalism that is likely to dominate the meeting. A French nuclear engineer and a Greek nuclear engineer are far more likely to see eye to eye than a French politician and a Greek politician, and they are likely to see through the eye of nuclear engineering. Thus, what may have been intended as the projection of national political interest actually becomes an elevation of technocracy, with all the professional deformation or parochial perspectives endemic to specialized expertise.

Experts chosen on a national basis will not, of course, be totally free of national bias. Nor will all of them be dependents of their home governments. Some committee members will be drawn from among relatively independent academics and some from private sector employment—even employment by the relevant regulated industries. Yet, without formal mechanisms for committee participation by experts affiliated with non-governmental organizations (NGOs) and by national and transnational politicians, the dominant norms of comitology will be expert norms. Expert norms, however, are not necessarily the norms the rest of us share.

Most international or multi-national regimes are going to be, at best, indirectly democratic, governed by persons representing elected governments but who are not themselves elected.[14] Precisely because political consensus in such regimes is perceived as difficult to achieve, there is a strong temptation to move

12. *See* Koen Lenaerts & Amaryllis Verhoeven, *Towards a Legal Framework for Executive Rule-Making in the E.U.? The Contribution of the New Comitology Decision*, 12 COMMON MKT. L. REV. 645, 645-60 (2000).

13. J.H. WEILER, THE CONSTITUTION OF EUROPE ch. 6 (1999).

14. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

toward more easily achieved expert consensus with a national basis for the choosing of the experts. This serves as a screen of national representation behind which a transfer of decisional power occurs from national (sometimes democratic) regimes to various technocracies whose norms, paradoxically, are both universal and parochial.

Transnational regulation is more likely than national regulation to be dominated by technocratic decisionmaking for another related reason: transnational regimes are likely to involve the standard logic of cartels. Each member of the cartel becomes and remains a member because each sees the joint cartel rules and practices as more advantageous to it individually than uncoordinated action by all members. Yet each member is under the constant temptation to seek to initiate rules and practices most advantageous to itself. In a nation-state setting, intervention by elected politicians against technocrats might appear democratic. In a transnational setting, however, attempts at political intervention in "technical" regulatory decisions largely will be attempts by politicians representing particular nation-states. They will be seen not as democratic interventions against technocracy but as national interventions intended to gain national advantage at the expense of other members of the transnational regime. Therefore, in a transnational regulatory regime, politics and politicians tend to be identified with bad national self-interest, and international technicians with the common good.

The U.S. experience suggests one, highly problematic counterweight to self-interest: experts affiliated with interest groups. The flourishing of transnational NGOs and networks is much celebrated; and nationally defined interest groups are learning to act on the international scene. Just as U.S. administrative law opened the closed circle of government experts to experts affiliated with rival interest groups, so future international or multi-national comitology regimes might provide transparency and participation rules fostering expanded pools of experts. That is precisely the movement that I believe is at its early stages in the E.U. comitology process. But of course, the U.S. experience also points to the dangers of regulatory inertia lurking in the potential battles of the experts fostered by interest group participation in expert decisionmaking.[15] The intersection of national interest representation and the empowerment of experts is one requiring careful attention by those constructing transnational regulatory regimes.

15. *See, e.g.*, Paul Verkuhl, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453-58 (1995).

V
DELIBERATION

A. Deliberation, Democracy, and Technocracy

Yet another building block in our construction of a global administrative law is the current appeal of the discourse of "deliberation." From true believers comes the assertion that policy decisions can be reached not by bargaining, log-rolling, and compromising among the differing fixed interests of the various players at the table, but instead by a discussion at the table that can result in transcending interest aggregation to arrive at an unselfish achievement of truly good conclusions.[16] A major feature in the collapse of faith in bureaucratic government has been the conclusion that the public interest is a will-o'-the-wisp that is beyond definition or achievement by anyone, let alone a specialized expert bureaucracy under pressure from interest groups and electorally oriented politicians. The vogue in deliberation is a reassertion of faith in the public interest—one that cleverly substitutes a procedural definition for a substantive definition that is impossible to obtain. If there is enough talk, some take it as a matter of faith that the public interest will emerge.

There are a number of reasons to be agnostic if not atheistic about deliberation. Most fundamentally, there is little reason to believe that people with substantial, long-term, material interests in achieving a particular outcome are going to abandon those interests and their dedication to those outcomes as sweet reason emerges from the talk fest. Moreover, there is the serious methodological question of how we could ever discern whether a particular discussion had shifted from a mode of interest aggregation to deliberation. Pluralist and deliberative models of decisionmaking both prescribe the same observable procedures. All concerned interests are to have a seat at the table. A maximum exposition of relevant data and the most scientifically valid analysis of that data possible should be achieved. All relevant questions should be asked and answered. And, in many versions, the resulting decision should be subject to a further independent judicial review. If all these procedures have been observed, does it result in a perfect pluralism presumably leading to Pareto optimality, or in a good deliberation presumably leading to a converging and reordering of particular interests that ultimately achieve the public interest? The only way to tell would be to calculate what particular policy would have been achieved by mere interest aggregation and compare that imagined outcome with the actual one. If all the procedural norms have been met and the actual outcome is different *and objectively better* than the imagined outcome, then one would conclude that deliberation had occurred. Both imagining the aggregation outcome and objectively evaluating the actual outcome seem beyond current research capacity.

16. *See* Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).

B. Technocracy Disguised As Deliberation

Quite apart from the inherent difficulties of the deliberative vision, a grave danger lurks that is well illustrated by E.U. developments. The great friends of the comitology process previously described are wont to defend it on the grounds that while the Council engages in national interest aggregation, the committees are deliberative, precisely because they are composed of subject matter experts dedicated to achieving economically and technologically best policy outcomes.[17] The whole paraphernalia of deliberation is employed as a cover for technocratic government. Indeed, a kind of super-deliberation is imagined in which very knowledgeable people, devoid of any interests except the interest in truth, talk together. It is not even necessary to transcend the selfish interests brought to the table because all those interests are excluded in favor of disinterested, scientific decisionmakers. Deliberation brings back New Deal blind faith in agency expertise, or rather is an attempt at reviving a European faith in the public service serving the public order that has severely eroded. In transnational regimes, the desire to transcend national logrolling, the need to establish some sort of non-electoral legitimacy, and the very real technical complexity of transnational regulatory issues create a natural push toward technocratic government under the camouflage of deliberation.

VI

OPAQUE REGULATION

The next building block in this structure of transnational administrative law is a complex of interacting regulatory ideas and practices that combine to achieve an opaque regulatory process not easily subjected to any set of exterior norms. One element of this complex is the disenchantment with command-and-control regulation. Preferred substitutes are government-provided financial incentives; the construction of regulatory markets (for example, transferable pollution licenses); "soft law"; "open methods of coordination," such as government pronouncements and jawboning; "benchmarking"; negotiated, mediated, or consensual rulemaking; and, even more preferred, intimate and direct forms of corporatism, such as government ownership of significant stock holdings or public directorships.[18] Only one such device, regulation by reporting and publication requirements, renders regulation more transparent. The rest tend to add up to a kind of big, soft pillow that is very hard to punch legally. No one has ever quite broken the law or ever quite obeyed it because nothing is ever quite the law. Regulation ceases to be a regiment and becomes a chat room.

The metaphor may suggest a solution. Perhaps the chat can be put online and thus subject to some degree of public scrutiny and even democratic con-

17. Christian Joerges & Jürgen Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving*, 4 J. EUR. PUB. POL'Y 609 (1997).

18. *See* Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE 197 (Samuel Martin ed., 1994).

trol.[19] But the languages in which regulatory chats are conducted tend to be highly complex—technical ones that privilege those with the greatest resources and highest incentives to attain fluency. Here again, the growth of transnational NGOs, and particularly those opposing multinational business enterprise, might provide a window into transnational regulatory corporatism. Our faith in NGOs, however, is partly built on the American pluralist experience, and that experience is in turn partly built on the American practice of private causes of action in regulatory matters. The farther away we move from command-and-control regulation, the more difficult it is to frame justiciable private actions, and so the less likely that interest group control can serve as a surrogate for direct electoral control.

VII

INDEPENDENT AGENCIES

Next, again drawing on the U.S. and E.U. experiences, it is worth contemplating the vogue in "independent agencies." There was a time, within the memory of living man, when American independent agencies were out of vogue. There was much talk of "capture" and much talk of the need for Presidential coordination of executive branch policies—coordination rendered difficult by the independence of the independent agencies.[20] Much of the regulation that was the target of deregulation was the regulation conducted by the alphabet soup of independent agencies. Indeed, in the current scene of American business scandal, questions are raised about why prosecutors rather than the SEC have led the way.

The American experience with independent agencies looks much better from the other side of the Atlantic than from this one.[21] The recent U.S. relative happiness with the Federal Reserve has obscured earlier Presidential complaints about its potential for disrupting any possible coordinated government financial management of the economy. The dismantling of the International Chamber of Commerce and the Foreign Policy Centre and the sporadic travails of the FCC has been largely ignored in Europe. Perhaps most importantly, most Europeans—and probably most Americans—think that the EPA is an independent agency rather than what it really is: a Cabinet department denied an official seat in the Cabinet. Nor do most Europeans understand that the American independent agencies were rendered quasi-independent of the President not by Congressional design but by Supreme Court opinion, and that many

19. Joseph Weiler made this suggestion.

20. MARVIN H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941); JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

21. *See* THE NEW EUROPEAN AGENCIES (Alexander Kreher ed., 1996)

of them were designed not to be politically neutral but to institutionalize a partisan balance between the two major political parties.[22]

The rather misunderstood U.S. experience is supported by a further misunderstanding. One of the thrusts of the NPM movement has been the creation of new independent agencies designated to administer or implement certain government programs, while policymaking, and political responsibility for those programs, is retained by Cabinet departments. Like the scientific deliberation vision of comitology, the goal is a separation of politics and administration. The agency approach has been most extensively followed in the U.K., where, with some quibbles, it is viewed as relatively successful and certainly more successful than some of the privatization schemes.[23] What those favoring independent agency development in the E.U. tend to neglect is that NPM concentrates on agency development for the service delivery rather than for the regulatory functions of government. There is a fairly obvious, although not necessarily correct, argument in favor of government adopting business organization and practices when it is delivering goods and services to consumers—an argument that does not apply when it is regulating business rather than doing business.

So far, the potential risks to policy coordination posed by the proliferation of E.U. independent agencies has been camouflaged by the insistence that these agencies are only information-gathering entities as opposed to command-and-control regulatory entities. In reality, some of the agencies do have some regulatory functions, such as drug licensing, and most are engaged, not perhaps in command-and-control regulation, but in a variety of "soft" regulation modes.[24] Certainly, at best it would be naïve to assert that the European Environment Agency is not regulating when it gathers data and publishes an analysis of that data purporting to show that French industrial pollution is adversely affecting German vineyards.

The E.U. independent agencies parallel comitology not only in the purported separation of politics or policy from administration but in the masking of technocracy by national representation in a transnational body. Typically, each independent agency is staffed by technical experts but supposedly overseen by a board composed of one director representing each Member State. Given the high-tech subject matters of the agencies, there can be little doubt about who is in control between everyday career technicians and occasionally appearing, lay boards of directors. And, like comitology, the basic raison d'être of the agencies is the substitution of technocratic legitimacy for a supposedly deficient democratic legitimacy.

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22. *See* Martin Shapiro, *The Problems of Independent Agencies in the United States and the European Union*, 4 J. EUR. PUB. POL'Y 276 (1997).

23. NEW STEPS: IMPROVING MANAGEMENT IN GOVERNMENT (Barry J. O'Toole & Grant Jordan eds., 1995).

24. R. De Housse, *Regulation by Networks in the European Community: the Role of European Agencies*, 4 J. EUR. PUB. POL'Y 246 (1997).

VIII

CONCLUSION: FUTURE DEVELOPMENTS IN TRANSNATIONAL ADMINISTRATION LAW

When all of these building blocks are taken together, one can certainly build a very dismal castle. Future transnational regulatory regimes are likely to arise in relatively high-tech or otherwise complex spheres of activity. They are likely to face the usual national paradox. States will not become members without strongly institutionalized Member State representation in the regulatory bodies. And given the near impossibility of creating genuine, direct electoral responsibility for such bodies, national representation will provide the only available means of achieving any sort of democratic legitimacy. Yet if the institutional structure of the regime is highly politicized in the sense of providing for veto-like or near veto-like powers, or even very strong logrolling capacities for participating states the substantive, transnational rationality of the regulations produced will be at grave risk.

The difficulty of achieving electorally based legitimacy, the high-tech nature of the sought-after regulation, and the potentially disruptive force of national political interests may, á la E.U., provide a heightened appeal for technocratic government. Turning over key decisions to technical experts with one or more drawn from each Member State can provide the appearance of national representation while in reality achieving only the representation of the interests technical experts derive from their particular expertise. Given current anti-command-and-control sentiment and the resulting vogue in soft law and quasi-corporatist regulatory negotiation,[25] technocratic decisions may be conveyed by various murmurs among insiders—among the regulators and the regulated. But these decisions by their very nature are difficult for the supposed regulatory beneficiaries to follow, let alone challenge. In response, those transnational interests with the resources to organize proficiently will, with more or less success, form NGOs that will seek to bully their way into both the technocratic decision processes and the corporatist negotiation processes.

One appealing mode of moving toward technocracy, with a sop to national interest and the promise of neutrality among national interests, is the independent agency with some sort of nominal board of directors of national representatives. This would likely result in the proliferation of independent agencies, creating both severe problems of coordination and extreme diffusion of authority, which in turn would render any sort of democratic accountability even more difficult. And finally, the technocratic, corporatist, nondemocratic nature of these transnational regulatory networks would be disguised and lauded as the newest triumph of deliberation, one that by definition produces the best, most rational achievement of the shared values of mankind.

25. *See* discussion *supra* Part VI.

All other things being equal, the role of judicial review in the regimes I have imagined would be minimal, with judges of whatever transnational courts might be established deferring to technocratic expertise once they had assured themselves that minimal procedural requirements had been met. But all other things are not equal. Environmentalism may have been the great religious movement of the late twentieth century. Human rights may well be the great religion of the early twenty-first century. And with the fall from grace of socialism, human rights, quite apart from its intrinsic appeal, also provides a convenient channel for venting anti-capitalist sentiment. Rightly or wrongly, many human rightists believe that judges are a better potential target for their "–ism" than other policymakers, and that judges waving the rights baton are likely to be successful in imposing the rightists' preferences on both the technocratic and democratic fronts. Moreover, the human rights movement, while still notably busy trying to assure negative rights—that is, rights against government misconduct—is also more and more involved with the promotion of positive rights, such as the right to employment, subsistence, housing, health care, and so on.

These "new property" rights are heavily implicated in transnational regulatory regimes. Thus, it may reasonably be anticipated that future transnational regulatory institutional arrangements are likely to include reviewing courts with some sort of mandate to defend positive rights against regulatory deprivations. The European Court of Justice (ECJ) has proclaimed its dedication to human rights but without saying whether its vaguely stated vision encompasses positive rights. So far, the regulatory transparency and human rights jurisprudences of the ECJ have not intersected. But there is enough here and in the recent proliferation of transnational courts and flourishing of transnational arbitration tribunals to suggest that future transnational regulatory regimes will provide for judicial review that might serve as some check on technocratic and neocorporatist deliberative governance. The pessimist, however, might expect that there might be just enough judicial review to further legitimate such governance without really ameliorating its insider trading.

Much depends on the skill and motivation of judges and the style of their review. Reviewing judges could emphasize procedures facilitating transparency and participation, at least opening corporatist deliberation to outside observation and influence. To some degree, judges acting as surrogates for the lay public can demand that technocrats present an explanation of regulatory decisions in a sufficiently non-technocratic way so that the public can understand them. They can avoid demanding perfect decisions defined in every detail—the kind of demands that have generated huge technical records in the United States, records that judges cannot understand and that camouflage rather than admit regulatory uncertainties.[26]

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26. *See* Martin Shapiro, *The Frontiers of Science Doctrine*, *in* INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING: NATIONAL DECISIONS AND EUROPEAN INNOVATIONS 325, 340 (Christian Joerges et al. eds., 1997).

One historical lesson, however, to which politicians repeatedly appear singularly blind is that the junk yard dog of judicial review, once unleashed, will likely have a much larger bite than anticipated. Perhaps a future transnational administrative law will emerge, creating sufficient transparency and participation such that transnational technocracy will achieve some meaningful level of pluralist, even if not electoral, democracy.

Here, the U.S. experience may be instructive. As already noted, the initial response of courts to the New Deal technocratic explosion was extreme deference to technocratic expertise.[27] In the longer run, however, the federal courts came to demand very high levels of transparency and public participation in the decisionmaking process of the experts and indeed demanded that the experts demonstrate that they had not only invited but taken into account public inputs. Courts even came to demand that the experts both fully lay out those inputs on the record and defend the rationality of their decisions.[28]

Again, some tendencies in the same direction can be identified in the E.U.[29] In both situations, these judicial efforts to inject elements of democratic control into technocratic decision making are the result of expansive judicial interpretations of legal norms requiring that decisions by expert regulators be accompanied by "statements of basis and purpose" or "reasons." Future transnational regimes can create reviewing courts and provide similar textual hooks for aggressive judicial review requiring the experts to open their decisionmaking processes to public scrutiny. The recent American backlash against aggressive review[30] and the hesitation of the ECJ to go too far down this path, however, signal that the costs of such review in terms of agency resources and delay are very substantial. Consciousness of those costs tends to restore the attractiveness of technocratic deliberation.

Activist judicial review in the United States certainly has enhanced the ability of NGOs to inject themselves, by lawsuits and threats, into expert decisionmaking processes. Either with or without such judicial assistance, at least those content with pluralist democracy might seek to construct transnational regulatory regimes in ways that provide substantial opportunities for NGOs, if not electorates, to breach the walls of the technocratic castles I have been envisioning. Surely, the major battle to be fought is between those who envision transnational regulation as properly placed in the hands of technically expert deliberators and those who seek a gate through which politics may enter.

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27. *See* discussion *supra* Part II.B.

28. *See* Stewart, *supra* note 5, at n.2.

29. *See* sources cited *supra* note 8 and the discussion *supra* Part II.B.

30. *See* Richard Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).