

GLOBAL DEMOCRACY?

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I. GLOBAL POLITICS

In this Article, we describe an emerging arena of global administration. We claim that this arena, not bounded by a state, raises accountability problems of a kind different from those addressed by conventional administrative law. And we argue that measures designed to address these problems will have potentially large implications for democratic theory and practice.

Our argument starts from the premise—stated here without nuance—that something new is happening politically beyond the borders of individual states and irreducible to their voluntary interactions. To distinguish these developments from what is commonly called “international law and politics,” we use the term “global politics.” The emergence of global politics is marked by a proliferation of political settings beyond domestic boundaries. This proliferation expands the range of relevant political actors, while shifting our understanding of political units and of relations among them: the emergence of human rights as limits on Westphalian sovereignty was a first step in this shift, but not the last.

Making no pretence to completeness, precision, or novelty, we begin by listing some of the main elements of global politics:

- (1) Increasing economic integration. As measured by decreasing communication and transportation costs or increasing trade and trade dependence and larger, more rapid movements of capital, the greater interconnectedness of markets has made the global economy a substantial presence in the economic lives of virtually all states.

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(2) Persistent diversity. Cultures, economic circumstances, and political institutions and traditions vary widely and much more widely between states than within them.

In response to increased interconnection under conditions of persistent diversity there is:

(1) Increasing global rulemaking. While states remain essential players, to a considerable and growing extent, rulemaking, as well as rule elaboration and application—especially in the arena of economic regulation, but also in areas of security, labor standards, environment, rights, food safety standards, and product standards, among others—is taking place in global institutions that, even if established by states (and many regulatory functions are provided by private or public-private bodies), make, elaborate, and apply rules with some *de facto* decisionmaking independence from their creators.

(2) These global rules are increasingly consequential for the conduct and welfare of individuals, firms, and states, in part because they provide standards for coordinated action and in part because national rulemaking itself proceeds subject to rules, standards, and principles established beyond the national level.

(3) The global rulemaking bodies, whatever their origins, are expected—by states, firms, individuals, and organizations—to continue to exist and to make consequential decisions, so that agents (including states, firms, and NGOs) and movements need to take them into account in making decisions.

(4) These rulemaking and rule-applying bodies guide conduct by providing incentives and permitting the imposition of sanctions, even when they lack independent coercive powers. Moreover, as membership in these bodies often confers substantial benefits, the threat of exclusion is itself often tantamount to a sanction.

(5) A transnational politics of movements and organizations—beyond the intergovernmental politics between states—now routinely contests and aims to reshape the activities of supranational rulemaking

bodies. Those efforts work in part through protest, in part by representing interests to those bodies, and in part by advancing norms, values, and standards of reasonableness—that is, by suggesting potential elements of a global public reason that might serve as a common ground of argument in assessing the practices and performances in global politics.¹

Global politics is thus not an occasional matter of sparse agreements; it seems, despite all the uncertainties of the situation, to be enduring and institutionally dense.² To a substantial and growing extent, then, rulemaking directly affecting the freedom of action of individuals, firms, and nation states (and the making of rules to regulate this rulemaking) is taking place, undemocratically but not entirely unaccountably, in global settings created by the world's nations but no longer under their effective control. Call this the *global-administration-in-the-making* claim.

Because global rulemaking does not operate in the shadow of a state and is not subject to an encompassing authority, its accountability cannot be understood as a matter of strengthening the incentives of rulemaking agents to implement the plans of an authorizing principal. In general, the principal-agent models that deeply shape our ideas about the effective and legitimate delegation of such authority seem irrelevant to the global administrative space. Ensuring the accountability of an emerging global administration will require the elaboration and diffusion of new forms of governance. Call this the *new accountability* thesis.

1. MARY KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* 1-15 (2003); JOHN KEANE, *GLOBAL CIVIL SOCIETY?* (Ian Shapiro et al. eds., 2003); John Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in *TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE* 93 (David Held & Matthias Koenig-Archibugi eds., 2003).

2. Confining attention to intergovernmental organizations with permanent administrative staffs, the world's least integrated country is a formal member of 14 organizations, and virtually all other countries are formal members of more than 100 organizations. In addition, there are agreements that establish rights and obligations but do not create administrative capacity. See Cheryl Shanks, Harold K. Jacobson & Jeffrey H. Kaplan, *Inertia and Change in the Constellation of International Governmental Organization, 1981-1992*, 50 INT'L ORG. 593, 611 tbl. 6 (1996).

If these two claims are true, then current changes in the political world—the emergence of global politics—may be as profound as the early-modern changes associated with the emergence of a world of sovereign states. What are the implications of these potentially profound changes?

We present two speculations. The first is that establishing new forms of accountability at the global level will—because of the way that global administration connects with national rulemaking—reshape national politics, perhaps helping to reinvigorate democracy there by opening areas of domestic rulemaking to a wider range of information, experience, and argument. Call this the *democratizing destabilization* hunch.

The second is that those same accountability-enhancing measures have the potential to democratize emergent global administration itself, not by creating institutions of electoral accountability for a global government, but, in the first instance, by forming the people and public sphere that lie at the heart of democracy. To be sure, if the accountability of global administration depends on arrangements that are elsewhere anomalous and exceptional, then the demos to which it is ultimately accountable may be a comparably anomalous global demos that does not comprise the members of a single ethnically-defined people, nation, or state. Still, the anomalous demos may be sufficiently familiar to give substance to the now-fugitive idea of a global democracy without a global state or nation.

In this Article, we sketch these two claims and the corresponding speculations about democracy. In Part II, we underscore the force of the global-administration-in-the-making claim and show how the terrain of global administration may help provide a new agenda for normative political thought, comparable to the shift in agenda that emerged with the development of the modern state. In Part III, we broach the new forms of accountability, which anticipate learning among principals and agents in ways that blur the distinction between the two roles, cannot be encompassed within an enlarged conception of the agent as the principal's trustee, and yet (as explicitly recognized by close students of EU governance formed in the principal-agent tradition) can be reached by apparently modest changes in current administrative practice. Finally, we suggest in Parts IV and V that the forms of participation native to the new accountability may well, in the short to medium

term, expose domestic rule and lawmaking to heightened and constructive public scrutiny in the light of international standards (a version of the democratizing destabilization effect) and, in the long run, may foster interactions between global rulemaking and global publics roughly analogous in their effects to the reciprocal shaping of state and demos that gave rise to modern mass democracy.

Whether these short-to-long term interactions foster democracy nationally and globally remains a very open question. But if the facts are as we stipulate, then dismissing the possibility of global democracy, as often done, by saying “no demos, no democracy” is no more helpful than responding to the chicken and egg problem by saying “no chicken, no egg.”

II. A DISTINCT GLOBAL ADMINISTRATIVE SPACE

In a recent essay, Benedict Kingsbury, Nico Krisch, and Richard Stewart (KKS) present a crisp formulation of the global-administration-in-the-making claim. Endorsing the idea of a relatively autonomous space of global administration that operates even without a state and rejecting “the classical dichotomy between an administrative space in national polities and inter-state coordination in global governance,” they say:

The rise of regulatory programs at the global level and their infusion into domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level; the formal need for domestic implementation thus no longer provides for meaningful independence of the domestic from the international realm. At the same time, the global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states.³

The conjunction of two related features, then, makes global administration relatively autonomous: (1) global rulemaking is not simply the product of state power and inter-

3. Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 26 (Summer/Autumn 2005).

est, and (2) domestic rulemakers are constrained in their procedures, policy deliberations, and decisions by that global rulemaking. Moreover, both independence and constraint are of sufficient weight to warrant the claim that there is a now a global administrative space.

Endorsing global administrative autonomy, and embracing the project of a global administrative law—distinct from international law—to cabin that autonomy by reference to rule of law values, KKS reject the realist understanding of global politics as an international anarchy of sovereign states and its utopian inversion, a globe-circling state of cosmopolitan citizens. They thus break with the analytic categories that arose in Weimar debates and became—as Martti Koskenniemi has elegantly shown⁴—the foundations of the U.S. variant of international relations theory. This break of course has antecedents, most notably, for present purposes, in the work of Robert Keohane and Joseph Nye on the decline of the “club” system of inter-governmentalism and the Chayes and Chayes “process” view of sovereignty.⁵ To underscore the distinctiveness of the KKS formulation and provide further justification for their emphasis on accountability, we briefly contrast their view of the global administrative space with two others, one quite similar, the other apparently contrary.

The first is Anne-Marie Slaughter’s view of informal, de facto global governance formed by networks of administrators, tribunals, and quasi tribunals.⁶ Slaughter and KKS agree substantially on the empirical accounts of global administrative development. As Slaughter notes, the core idea derives from the Chayes and Chayes idea of new sovereignty as “the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish acting

4. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960*, 465-74 (2001).

5. Robert Keohane & Joseph Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 219 (Robert Keohane ed., 2002); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

6. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 1-3 (2004).

alone within a defined territory.”⁷ Still deeper roots of the conception are in the founding assumption of the American Legal Process view developed by Hart and Sacks that interdependence—the condition between sovereignty and servility—is jurisgenerative.⁸

But unlike KKS, Slaughter seeks to strike a fine balance between global constraint on domestic law and domestic constraint on global governance, thus avoiding any clear declaration of a relatively autonomous global administrative space—with considerable “de facto independence and discretion” from authorizing states and a large impact on domestic rulemaking. Thus, in recent writing Slaughter offers an account of “constrained independence” that both vigorously and successfully demonstrates the effectiveness and growing importance of international tribunals and quasi tribunals (especially those able to hear complaints presented directly by private parties) independent of the states party to their authorization, refuting the claim by Posner and Yoo that only tribunals recognized to be fully controlled by their founding authorities can be effective, and argues that the independent tribunals are substantially constrained by their chartering members’ influence over appointments, dockets, and their own participation (generally, in the language of principal-agent theory, the power of principals to recontract with their agents), as well as the background socialization of officials.⁹

Of course all institutions, legal or otherwise, are constrained by their contexts and have some independence from their context: no institution (whether domestic or global) is entirely unconstrained or fully constrained. When the contextual constraints are considerable and the independent institutional effects on the context are minimal—as realists claim about international institutions—we ignore the institution and study the context. When the institution reshapes the context we say it has a measure of effective autonomy, even if we ac-

7. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 286 (2004).

8. See generally HENRY MELVIN HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958).

9. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 942 (2005); see also ERIC A. POSNER & JOHN C. YOO, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

knowledge—with institutionalists and constructivists—that the autonomy is “relative.” When Slaughter describes the growing importance of independent global institutions and also says that they are “substantially constrained,” she seems undecided between the conceptually coherent views of the constraints on global governance. It is as if she were hoping to tack between an assertion of their autonomy and an assertion of their dependence by affirming the undeniable: that neither the autonomy nor the dependence is complete. Right or wrong, and we go with right, the KKS formulation forcefully directs attention to the features of global administration to which we will have to attend if there is indeed a distinct phenomenon under that name.

A second useful point of reference for highlighting the global-administration-in-the-making claim—focusing now less on the content of the claim than on its implications—is Thomas Nagel’s recent argument that there is no justice outside the state.¹⁰ Nagel’s argument is about justice, not global administration, and he does acknowledge an intensification of global interdependence and the emergence of new forms of global governance. Still, he denies that this intensification and emergence has produced an autonomous administration of a kind that would trigger norms of justice. With the compression required for current purposes, the argument proceeds as follows:

- (1) Nagel affirms, against the “monist,” that there is no set of basic moral principles from which we can derive both moral requirements for individuals and principles for institutions.¹¹
- (2) Instead, norms of justice—beyond the humanitarianism that binds us even in the absence of any organized cooperation—apply to us only when we stand in certain kinds of relations. Moreover, the content of the principles vary according to the nature of the relations (what Rawls calls the political view of justice).

10. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005). We discuss Nagel’s view in detail in Joshua Cohen and Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147 (2006).

11. For an explanation and defense of monism, see Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251 (1998).

(3) There could in theory be (infinitely) many constellations of norm-generative relations, with corresponding norms of justice, on the notional continuum between a state of nature regulated by humanitarian norms and a world state that makes all humanity subject to the same Hobbesian sovereign and equally entitled to authorize its conduct.

(4) But, Nagel argues, the *only* situation that actually triggers supra-humanitarian norms of justice is one in which a group of people are all subject to a common sovereign, who imposes coercive rules on the members of group and whose conduct is understood as co-authorized by them—only, that is, a group of people who live together as both subjects in law’s empire and citizens in law’s republic.

(5) And given the evident absence of Hobbesian sovereignty on a world scale, neither the increase in global inter-dependence, nor global-administrative efforts to coordinate response to the effects of this globalization, are justice-generative.

Most attendees of any meeting of the World Social Forum¹²—and most of the officials of the World Bank or IMF who have been yelled at by persons who have attended the World Social Forum—will wonder if there is not a third possibility: that interdependence and organized cooperation in the absence of a state trigger normative demands that are greater than humanitarianism even if they fall short of the full measure of equal respect and concern that underpins arguments for domestic distributive justice. A common name for the process norms arising from the organization of interdependence and cooperation is accountability (including transparency,

12. In its Charter of Principles, the World Social Forum describes itself as:

an open meeting place for reflective thinking, democratic debate of ideas, formulation of proposals, free exchange of experiences and interlinking for effective action, by groups and movements of civil society that are opposed to neo-liberalism and to domination of the world by capital and any form of imperialism, and are committed to building a planetary society directed towards fruitful relationships among Mankind and between it and the Earth.

World Social Forum Charter of Principles ¶ 1 (2001), *available at* <http://www.wsfindia.org/charter.php>, (last visited Jan. 1, 2006).

reason giving, and standing of those affected). And once there is a rationale for norms more demanding than humanitarianism on the process side, there is also a case for norms more demanding than humanitarianism on the outcome side: that is, for claims to basic rights and to fair distribution of benefits and burdens.

We can, then, understand the global-administration-in-the-making claim as asserting both that global administrative law is a relatively autonomous source of rules for individuals, firms, and states, and that because it is, it triggers procedural and substantive norms to which rulemaking needs to be held accountable.

III. ACCOUNTABILITY

Suppose we accept that there is an emerging global administrative space and that it is subject to normative demands. How, then, might the new rulemaking institutions be made accountable for meeting those demands? One answer, suggested by KKS—starting with the title of their paper—is that we are on familiar terrain: global administrative law is administrative law, except global. It applies, but at a world level, the procedural safeguards—a mix of hearings, judicial review, requirements of representation, transparency, notice, and reasoned rule choices—honed over the last century in the domestic administrative law regimes of the rich democracies.

But there is an obvious problem: “administrative law might be defined as legal control of government.”¹³ While global administrative law is certainly global, then, it is not a familiar kind of administrative law because it does not operate within a state. The problem is substantive, not taxonomic, and, upon reflection—writing is of course a way of thinking—KKS came at one point in the drafting of their article to the right conclusion:

Anomalous forms of domestic administrative law—informality, networks, cooperative structures—dominate the global level, and while in the domestic context the problems they create can perhaps remain unsolved without too much harm so long as most important regulatory programs are carried out

13. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES* 3 (5th ed. 2002).

through traditional legally binding instruments, this condition does not hold true globally.¹⁴

Why these “anomalous” forms of administrative law, rather than the standard ones, diffuse at the global level is clear:

Domestic administrative law is, despite all changes in recent decades still built around a core of command-and-control administration: of rules and decisions binding on private actors, emanating from a defined administrative actor. In global administration, no such core exists: most of it consists of international institutions with the power to make recommendations but not binding rules, or of regulatory networks with informal decision-making procedures and agreements. . . . [All in all] the use of tools from domestic administrative law faces important limits, stemming mostly from the different structure of global administration: from the informality of its institutions, its multi-level character, and the strength of private actors in it.¹⁵

But what tools—what form of administration—will work when “command-and-control administration” through “rules and decisions binding on private actors, emanating from a defined administrative actor,” will not? When there is no state, no central authority giving directives to formally subordinate agents, and no clearly defined public in whose name the authority is exercised, what could administrative law and accountability be? What happens when the anomaly becomes the rule?

A. *Principal-Agent Accountability*

One way to understand authority relations is as relations of principal and agent. So we approach this question by considering a key possibility condition of principal-agent relations and then exploring the class of accountability mechanisms

14. Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law* 42 (Inst. Int'l Law and Justice, Working Paper No. 1, 2004) (omitted from final published version in Kingsbury, Krisch & Stewart, *supra* note 3).

15. *Id.*

that will work when that condition does not obtain: the kinds of accountability that can exist without centralized authority.¹⁶

The key condition is that some actor among those seeking to coordinate their efforts have a determinate enough idea of the goal to either give precise instructions to the others or reliably recognize, as new information comes in, when their actions serve the specified end. So long as at least one actor can assess possible solutions with the precision required by this condition, principal-agent relations are possible, though it turns out to be trickier than one might think to identify who is the principal and who the agent. But suppose we start with only a loosely specified set of goals; suppose that the goals are only clarified as they are pursued; suppose, in other words, that actors have to learn what problem they are solving and what solution they are seeking through the very process of problem solving.¹⁷ Under these circumstances, principal-agent models are of no use. Cooperative sovereignty as described by Chayes and Chayes captures just this interdependency of the actors, regardless of the degree of autonomy nominally accorded them.¹⁸

Taken together, two recent analyses of accountability, approaching the problem with contrary goals, demonstrate the centrality of this assumption to principal-agent models and the possibility of establishing accountability when the assumption no longer holds. The first, by Grant and Keohane, arose in the context of discussion with KKS and is a deliberate effort, prompted by the manifest difficulties of applying domestic accountability standards globally, to situate and transcend principal-agent analysis.¹⁹ But their analysis assumes, without discussion, that in every situation there are some actors who understand their goals *ex ante*. It therefore winds up describing

16. We all know from life about the idea of accountability without authority: think about friends, spouses, and colleagues.

17. Even Humeans, skeptical about the independent powers of practical reason, can accept that practical reasoning is not simply instrumental and can also fill in the content of goals that are initially specified in very broad terms. See, e.g., BERNARD WILLIAMS, *Internal and External Reasons*, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973-80, 104 (1980) (finding “constitutive solutions”).

18. CHAYES & CHAYES, *supra* note 4, at 1-28.

19. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

varieties of principal-agent accountability and situations without accountability, but not, as was intended, forms of accountability not based on the principal-agent relation. The second analysis, by Phedon Nicolaides, takes for granted the universal applicability of principal-agent analysis and seeks to extend it to the domain of EU governance.²⁰ But, responding to actual developments in that domain, the analysis relaxes the assumption of an *ex ante* specification of goals and, in doing so, “discovers” a model of administration that provides non-principal-agent accountability.

Grant and Keohane distinguish “participation” and “delegation” models of accountability. In the former, power-holders are evaluated by those affected by their decisions, in the latter by those who entrust them with powers. Each model, moreover, comes in one variant in which the power-holders are wholly subordinate agents of the public, and another in which the power-holders are seen as having discretionary authority.²¹ Table 1, taken from Grant and Keohane, captures the essentials of a taxonomy intended to create the universe of accountability types, including principal-agent and non-principal-agent variants.

TABLE 1: TWO GENERAL MODELS OF ACCOUNTABILITY FOR NATION-STATES²²

	<i>Who is entitled to hold the powerful accountable?</i>	
<i>Power-wielders regarded as:</i>	<i>Those affected by their actions – Participation</i>	<i>Those entrusting them with powers – Delegation</i>
<i>Instrumental agents</i>	I(a) “Direct” Democracy Actions of power-wielders are what those affected (the people) instructed them to do in this contingency.	II(a) Principal-Agent: Powerwielders act as faithful agents of principals who empower them.
<i>Discretionary authorities</i>	I(b) Populist: Policies followed by the power-wielders lead to outcomes approved by those affected; which leads those affected to confer additional powers.	II(b) Trustee: Power-wielders perform the duties of their offices faithfully.

20. PHEDON NICOLAIDES WITH ARJAN GEVEKE & ANNE-MIEKE DEN TEULING, *IMPROVING POLICY IMPLEMENTATION IN AN ENLARGED EUROPEAN UNION: THE CASE OF NATIONAL REGULATORY AUTHORITIES* (2003).

21. Grant & Keohane, *supra* note 19, at 31.

22. *Id.*

On inspection, however, it emerges that, labels aside, the models that establish any form of accountability also exhibit key features of the principal-agent relation, suggesting a confusion about the domain of such relations, as well as the possibility of alternatives, and so illustrating the grip of the principal-agent scheme even on those who recognize its practical limits. Thus in direct democracy (participation without discretion for officials) the electorate writes a detailed rule for elected officials, and they execute it. This is a principal-agent relation, where the people are principal and the agents execute directives. In contrast, populism, as presented here (participation with accumulating discretion), is not a principal-agent relation. But it is also not a form of accountability. It is a device for producing unaccountable officials: populist successes on this view ultimately result in a grant of power to the populist leader so great that she can, as the grim Brecht joke goes, more easily replace the people than the people can replace her. But if direct democracy is an agency relation, and populism involves no accountability, we are left with Burkean trusteeship (delegation with discretion) as a candidate for accountability outside the principal-agent setting labeled as such. But a glance at Burke's *Letter to the Electors of Bristol* and a moment's reflection will suggest that this is not so.²³

In the *Letter*, Burke readily admits that he knows nothing about the particular affairs of Bristol or its electors: he has, he says, entered the contest just before the election and can not be expected to have any of what we would call local knowledge. But, he goes on to say, he does understand the connection between a city such as Bristol and England, and between England and its Empire, and between the many parts of the unwritten British constitution. This, and not local knowledge, is what will serve his electors; and he appeals on this basis for their votes. Burke in office can indeed be thought of as a trustee. But he is not a trustee of the interests of the electors of Bristol, and he is accountable, as trustee, to no one. On Burke's theory of office-holding he would control a trust made by the electors of Bristol. The beneficiary of the trust would be England, or the English people, but only accidentally the

23. See EDMUND BURKE, MISCELLANEOUS WRITINGS 10-15 (Francis Canavan ed., Liberty Fund 1999) (1874).

electors of Bristol.²⁴ (Perhaps for this reason they preferred Burke's rival in the election.) Electors wise enough to acknowledge the superiority of his overall institutional judgment to their own by voting for him once should, in theory, recognize that they are not equipped to question his particular decisions in subsequent elections. To be sure, they can fire him, but not because they sensibly judge him to have failed at the faithful fulfillment of his duties. They, by assumption, are in no position to make such a judgment. Burke the trustee would be accountable to no one. Today we would call this Burke a technocrat—an expert whose authority is unaccountable precisely because it rests on expertise beyond the grasp of laypersons, whose knowledge is purely local. Or put another way, in the trustee the nominal agent becomes the knowing principal, the actor with the effectively directive knowledge of what to do, and as the principal is in effect accountable to no one. Thus trusteeship, like populist dictatorship, is a system for generating unaccountability, and in the Grant-Keohane universe, the only forms of accountability are principal-agent.

That this typology is not in fact exhaustive is evident from the work of Nicolaidis on policy implementation in the EU. The explicit aim is not to transcend the principal-agent framework, but rather to apply that framework to the EU's ramshackle structure. For this purpose, two oddities of using the principal-agent framework need to be taken into account even after assuming, with breathtaking heroism, that the European Parliament and Council of Ministers together amount to something approximating a unified principal. The first is that this principal, the EU, has multiple agents: the national administrative authorities who implement EU law in their respective jurisdictions. Agents being what they are in principal-agent theory, each of these national administrations can be expected to interpret the EU's instructions—a directive, say—in a self-serving way; and the principal will be kept busy minimizing the resulting "drift" away from its original intentions.

The second is that, in the EU, the principal is realistically presumed to have only a vague or provisional idea of its own goals. Sometimes, then, "self-interested drifting" by national administrative agencies will therefore be only that; at other

24. Thanks to Jeremy Waldron for confirming in discussion this interpretation of Burke's relation to the electors.

times, departures from prior expectations may reveal possibilities that the principal has overlooked and prefers more than any of the options entertained *ex ante*. In other words, the principal can sometimes learn from the agents. Since accountability cannot under these circumstances be established by evaluating performance by reference to an antecedent goal—the performance may change the goal—how can it be achieved? According to Nicolaides:

Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to explain and justify his actions to those who have the necessary knowledge to understand and evaluate those actions. We conclude, therefore, that effective delegation must confer decision-making discretion to the agent, while effective accountability mechanisms must remove arbitrariness from the agent's actions by requiring him to (a) show how he has taken into account the impact of his decisions on others, (b) explain sufficiently his decisions and (c) be liable to judicial challenge and, preferably, to some kind of periodic peer review. The latter is very important because only peers have the same knowledge to evaluate the agent's explanations.²⁵

Accountable behavior in this setting no longer is a matter of compliance with a rule set down by the principal, as if the principal knew what needed to be done, but rather a provision of a good explanation for choosing, in the light of fresh knowledge, one way of advancing a common, albeit somewhat indeterminate project (as all projects are). At the limit, then, principal-agent accountability gives way to peer review, in which decisionmakers learn from and correct each other even as they set goals and establish provisional rules for the organization. Peer review in this sense is a form of dynamic accountability—accountability that anticipates the transformation of rules in use—and dynamic accountability becomes the key to “anomalous” administrative law: the exceptional kind of administrative law that must emerge as the rule when administration is not built on a “core of command-and-control,” and cannot be because it does not operate in the state's shadow. Accountability

25. NICOLAIDES ET AL, *supra* note 20, at 46.

generically understood means presenting the account of one's choices that is owed to others in comparable situations. Here then, finally and essentially, is a form of accountability that does not require a central, delegating authority.

Elsewhere we have referred to a form of accountable governance that embodies this ideal of dynamic accountability as "deliberative polyarchy" and have argued that much that happens in EU administration can be understood as an embodiment of the deliberative polyarchy.²⁶

B. *Deliberative Polyarchy*

Deliberative polyarchy is shaped by mutually re-enforcing moral and practical concerns. Its appeal within global politics (and national politics as well) is precisely to create the prospect of an accountable, responsive, inclusive form of problem solving when interconnectedness creates many problems to solve but conditions of extreme diversity seem to preclude solutions that are either broadly effective or generally legitimate.

As deliberative polyarchy is first and foremost deliberative, decisionmaking works through mutual reason giving. Deliberation subjects the exercise of collective power to reason's discipline, to what Habermas famously described as "the force of the better argument," not the advantage of the better situated.²⁷ Questions are decided by argument about the best ways to address problems, not simply exertions of power, expressions of interest, or bargaining from power positions on the basis of interests. More particularly, the aim is to find solutions that others can reasonably be expected to support as well—or at least to acknowledge the relevance and importance of the supporting reasons, even if they disagree about the precise content of those reasons and the best way to balance them.

26. See Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L. J. 313 (1997) (defending concept of deliberative polyarchy and discussing implications of deliberative polyarchy for design and expectations of basic political institutions); Joshua Cohen & Charles Sabel, *Sovereignty and Solidarity: EU and US*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 345, 364-66 (Jonathan Zeitlin & David Trubek eds., 2003).

27. See JUERGEN HABERMAS, LEGITIMATION CRISIS 108 (Thomas McCarthy trans., 1973).

In deliberative polyarchy, deliberation is situated: the actors are presumed to know a good deal about their current dilemmas, but relatively little about the implications, for themselves or others, of the options from which they choosing. Aware of these bounds on their knowledge, they aim to find measures that address their immediate problems while suggesting next steps and allowing evaluation of choices so far. Their uncertainty, moreover, and the consequent need for mutual learning, makes it costly to game the information they provide, and limits on the strategic use of information make it more difficult to pursue self-serving solutions. Because of this prudent forbearance, deliberation's normative requirement—of finding solutions that others can reasonably be expected to embrace as well—is easier to meet. The normative and the practical may be happily congruent.

Though the choices in this situated deliberation are informed by the facts as known and addressed to solving specific problems step by step, deliberative polyarchy is not technocracy. Technocratic reasoning focuses exclusively on selecting the best means to achieve well-defined goals. Deliberative polyarchy is founded in part on the idea that the actors' goals are too broadly and diversely defined to allow for means-ends calculations. Thus situated, deliberation acknowledges, indeed underscores, that all complex practical problems—from trade and security to organizing schools and transportation, providing clean water and public safety, allocating health care and ensuring fair compensation—are political in the sense that they implicate a range of distinct values, that reasonable people disagree about the precise content of and weights to be assigned to those values, that some form of collective decision is needed despite these disagreements, and that a normatively desirable way to make such collective decisions is by a process in which participants offer reasons that others can be expected to acknowledge, even as they disagree about how the variety of relevant reasons add up.

What makes deliberative polyarchy *polyarchic* is its use of situated deliberation within decisionmaking units and deliberative comparisons across those units to enable them to engage in a mutually disciplined and responsive exploration of their particular variant of common problems. It resembles federalism insofar as it authorizes yet limits diversity, and anarchy insofar as it does away with an ultimately authoritative center;

but it is a novel form of each precisely because of its resemblance to the other. Polyarchy addresses a dual problem: (1) comparable problems, arising in different settings, need solutions appropriately tailored to those settings, and (2) solutions in each setting need to be subjected to the pressure of deliberative comparison with solutions adopted in the others so that all reflect understanding of what was done elsewhere, and why.

Put another way, deliberative polyarchy is suited to conditions in which the very different circumstances in which problems arise suggest a need for differences in solution, while the commonality of problems indicates a need to discipline local solutions against those adopted elsewhere: the aim is not to achieve uniformity, but to pool information, identify best practices, and compare solutions across locations. Thus the basic architecture of deliberative polyarchy is to have situated deliberation within and among distinct decisionmaking units.

For the individual decisionmaking units, diversity implies that decisionmaking in each needs to be friendly to local experimentation in the policy area in question, drawing on local knowledge and values. As each unit is distinct, none does best by simply copying solutions adopted by others, though they may do well to treat those solutions as baselines from which to move, or at least as providing some information about possibilities. Deliberative participation helps because it encourages the expression of differences in outlook and the provision of information more generally.

But the same concern for a form of decisionmaking that is attentive to unexplored possibilities and unintended consequences requires institutionalization of links among local units—in particular, the institutionalization of links that require separate deliberative units to consider their own proposals against alternatives provided by other units. A natural place to look for promising alternatives—including alternatives previously unimagined in the local setting—is in the experience of units facing analogous problems. So we need deliberative coordination: deliberation among units of decisionmaking directed both to learning jointly from their several experiences and improving the institutional possibilities for such learning—a system with continuous discussion across separate units about current best practice and better ways of ascertaining it. Peer review and the dynamic accountability it affords is a modality of deliberative coordination. The idea of

deliberative polyarchy is thus to have a mix of flexibility for adjustment to distinct conditions along with a discipline of comparison/learning that respects a norm of accountability.

Consider the EU variant of deliberatively-polyarchic, “anomalous” administrative law. It typically takes this form: initial, broadly defined framework goals—full employment, social inclusion, a unified energy grid—and measures for gauging their achievement are established by joint action of the Member States and EU institutions. Lower-level units (such as national ministries or regulatory authorities and the actors with whom they collaborate) are given the freedom to advance these ends as they see fit; but they must report regularly on their performance, especially as measured by the agreed indicators, and participate in a peer review in which their results are compared with those pursuing other means to the same general ends. Finally, the framework goals, metrics, and procedures themselves are periodically revised by the same combination of actors that initially established them. Under the name of *fora*, *networked agencies*, *councils of regulators*, *open methods of coordination*, or, more generally, *processes*, these “anomalous” forms of administrative accountability, with their reliance on deliberation about ends and means and efforts to unsettle past methods, have become pervasive, indeed all but ubiquitous in EU governance: for instance in the regulation of telecommunications, energy, pharmaceutical licensing, environmental protection, occupational health and safety, food safety, maritime safety, rail interoperability and safety, financial services, employment promotion, social inclusion, and pension reform. Similar arrangements are incipient in other key areas such as health care and anti-discrimination policy, and the basic architecture of framework making and revision is now routinely used to address new problems such as GMO regulation and the fight against terrorism, and to renovate solutions to familiar ones such as competition policy, state aid, and fiscal coordination. Finally, a body of “EU administrative law” requires that decisionmaking at key steps in these iterative process be transparent, accessible to relevant parties in civil society as well as affected administrations, and deliberative in the sense of providing reasons for decisions.²⁸

28. Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: the Experimentalist Architecture of European Governance*, (2005) (unpub-

Note that in blurring the distinction between principals and agents, deliberative polyarchy also blurs the distinction between the national and supranational (or inter-governmental) levels of rulemaking, as well as the boundaries between distinct domestic administrations at the national level. Domestic rulemaking in each member state of the EU must thus take into account general EU goals and the reinterpretation of these that emerges as other member states implement these ends in rules of their own. In this sense, and in the jurisprudence of procedural protections it offers, the “anomalous” administrative law of the EU is a particularly well-articulated, salient, and effective²⁹ regional model of the “anomalous” administrative law that KKS detect globally.

But note too that the dynamic accountability of EU governance has a potentially democratizing destabilization effect

lished draft, on file with author) (synthesizing and interpreting a vast specialist literature). On fora, see Burkart Eberlein, *Regulation by Cooperation: the “Third Way” in Making Rules for the Internal Energy Market*, in LEGAL ASPECTS OF EU ENERGY REGULATION: IMPLEMENTING THE NEW DIRECTIVES ON ELECTRICITY AND GAS ACROSS EUROPE 59, 59-65 (Peter Cameron ed., 2005). On networked agencies see Damian Geradin & Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* (Jean Monnet Working Paper No. 1/04), available at <http://www.jeanmonnetprogram.org/papers/04/040101.pdf>; Eduardo Chiti, *Decentralization and Integration into the Community Administrations: A New Perspective on European Agencies*, 10 EUR. L. J. 402 (2004); R. Daniel Kelemen, *The Politics of Eurocracy: Building a New European State?*, in WITH US OR AGAINST US? EUROPEAN TRENDS IN AMERICAN PERSPECTIVE 173-89 (Nicolas Jabko & Craig Parsons eds., 2005). On the OMC, see THE OPEN METHOD OF COORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES (Jonathan Zeitlin & Philippe Pochet eds., 2005). On the recursive interplay of these forms of regulation, see Joanne Scott & Jane Holder, *Law and ‘New’ Environmental Governance in the European Union*, in LAW AND NEW APPROACHES TO GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., forthcoming 2006).

29. Although it is even more difficult to assess compliance with open-ended rules that are rewritten in application than with black letter law, an elaborate and thoughtful comparison of compliance with national (German), EU, and WTO rules in two domains—regulation of food safety and public subsidies to private firms—finds that actors are more likely to comply with EU regulations than WTO rules, and (counterintuitively) least likely to comply with traditional, state-made law, at least as fashioned in Germany. LAW AND GOVERNANCE IN POSTNATIONAL EUROPE: COMPLIANCE BEYOND THE NATION-STATE (Michael Zürn & Christian Joerges eds., 2005).

on domestic politics.³⁰ The requirement that each national administration justify its choice of rules publicly, in light of comparable choices by the others, allows traditional political actors, new ones emerging from civil society, and coalitions among these to contest official proposals against the backdrop of much richer information about the range of arguably feasible choices and better understanding of the argument about their merits than traditionally available in domestic debate. Whether or not the potential participants avail themselves of the possibilities thus created and whether, if they do, the result is more fully democratic decisionmaking (on any of the many dimensions on which this could be counted) are of course of matters of domestic institutional and political context. But to the extent this potential is realized, the linkage of domestic and supranational rulemaking in (regional) anomalous administrative law in the EU does indeed create a democratizing destabilization effect. How global administrative law might achieve similar effects in the near and long term are the speculative themes to which we turn next.

IV. DEMOCRACY IN THE GLOBAL ADMINISTRATIVE SPACE?

In the near and medium term global anomalous administrative law could well produce potentially democratizing destabilization effects through two possibly convergent mechanisms. The first concerns the vast web of regulatory rules whose aim is to safeguard public health and safety; the second, more roundabout, concerns the vindication of human rights against, for example, racial discrimination, as well as special protections for groups such as children, migrant workers, and women.

A. *Global Health and Safety Regulations*

The first mechanism, which operates through the international trade system housed in the World Trade Organization (WTO), closely approximates the system of EU governance just described, although it is of course less well developed. Architecturally the similarity is this: both the EU and the WTO

30. The notion of a democratizing destabilization effect builds on arguments presented in Charles F. Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

anticipate that the freedom of (regional or international) trade they seek to foment will frequently conflict with, and need to be modified to accommodate, a wide range of normative concerns embodied in the domestic laws and regulations of member states trading in the relevant markets. Furthermore, both permit member states to make domestic rules that inhibit trade on condition that the inhibiting rules adequately reflect the relevant regional or international standards. Thus the WTO Agreement on Sanitary and Phytosanitary Measures (SPS)³¹—which applies to agricultural, health and safety regulation—and the WTO Technical Barriers to Trade (TBT) Agreement³²—which has been interpreted to apply to a broad range of domestic regulation not covered by the SPS—require that the trade-inhibiting rules, animated for example by a concern to protect public health or ensure product safety, have a “basis” in international standards. To show that a basis exists, in the relevant sense, states must either use those standards or show through an acceptable rulemaking process that the domestic rules are a reasonable departure from those standards, motivated, for example, by an assessment of health risks.³³ Put another way, membership in the WTO and the EU is not

31. For an overview of the SPS, see World Trade Org., *Understanding the Sanitary and Phytosanitary Measures Agreement*, http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (1998).

32. Agreement on the Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 163 (1999), 1867 U.N.T.S. 14.

33. The TBT (along with SPS) “represents as big a paradigm shift to international economic law as, say, the prohibition on the use of force and the introduction of the Security Council with binding resolution and police powers represented within the classical world of international law.” These agreements produce “an internationally determined normativity.” Henrik Horn & Joseph H. H. Weiler, *European Communities—Trade Description of Sardines: Textualism and its Discontent*, in THE WTO CASE LAW OF 2002: THE AMERICAN LAW INSTITUTE REPORTERS’ STUDIES 251 (Henrik Horn & Petros C. Mavroidis eds., 2005); see also Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUR. J. INT’L L. 307, 326 (2004); Robert Howse, *A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and International Standards*, in MULTILEVEL TRADE GOVERNANCE, SOCIAL REGULATION AND THE CONSTITUTIONALISM OF INTERNATIONAL TRADE LAW (Christian Joerges & Ernst-Ulrich Petersmann eds., forthcoming 2006), available at <http://www.sfb597.uni-bremen.de/TransGov/>.

equivalent to an agreement to substitute the particular national rules with the general laws of efficient commerce. Rather, in joining these regimes, member states are agreeing to remake their rules, in domain after domain, in light of the efforts of all the others to reconcile their distinctive regulations with general standards in whose determination they participate and that are assumed to be attentive to the interests of others elsewhere.

But this architectural similarity masks an important difference between the EU and WTO regulatory regimes that bears on the likelihood of the latter producing a democratizing destabilization effect. The processes, fora, networked agencies, and other institutions that set standards in the EU routinely revise those standards, we saw, through peer review informed by the experience of implementation. Civil society actors as well as governments can increasingly rely on a body of EU administrative law to protect certain rights to participate in, or at least be informed of, these deliberations; and it is, again, these features of EU administrative governance that produce a democratizing destabilization effect.

The practice of the international standard setting bodies that produce the rules in which trade-relevant domestic regulation of WTO members occurs is more various. In some cases the arrangements are the same because the same standard setting bodies are active at both the regional and global level. Thus within the SPS-WTO framework the Codex Alimentarius Commission has global responsibility for setting standards for commodities, codes of practice and maximum limits for additives, contaminants, pesticides, residues, and veterinary drugs.³⁴ Both the EU and its individual member states are parties to the Codex, as well as the European Food Safety Agency (EFSA) (which itself cooperates closely with the Codex), and from the standpoint of the leading national food safety administrations, such as the Dutch, the EFSA and the Codex form part of the same regulatory network.³⁵

34. See generally WORLD HEALTH ORG., UNDERSTANDING THE CODEX ALIMENTARIUS (2005) (discussing origins and scope of activity of the CODEX).

35. The Dutch Food and Consumer Product Safety Authority (VWA) presents the relation this way:

The VWA actively participates in international committees in which EU countries draft and implement relevant legislation. The VWA supervises compliance with this legislation. It is therefore es-

Other domains lack fully authoritative, officially recognized, international standard-setting bodies. In such areas, NGO and industry sponsored codes of good practice tend to compete with one other (as in forestry), or among themselves and with the officially recognized, but ineffective standard setter (as in labor matters). Some studies suggest that such competition encourages higher standards.³⁶ But, nonetheless, a self-interested group could in theory establish a code of its

essential that the VWA actively participates in bodies such as the European Food Safety Authority (EFSA) and contributes to establishing and expanding other international networks.

The VWA's activities are increasingly acquiring international dimensions. In future [sic], the organisation's operations will need to adapt to this new scope, especially in view of the following:

Regulations are determined almost exclusively at an international level (EU, Codex Alimentarius and OIE [World Organization for Animal Health]).

The VWA's activities are audited by international organisations (FVO [Food and Veterinary Office of the EU] missions, US third-country missions).

Risk assessments are carried out in an international context (EFSA, Codex Alimentarius).

Products in the Netherlands increasingly originate from beyond the Dutch borders, both from third countries and new EU member states.

An increasing number of consumers in the Netherlands have a non-Dutch background.

Non-harmonised supervision of imports can lead to trade shifts to and via other member states ('back-door problem').

Consumer perceptions in other countries influence Dutch consumers.

International industries benchmark the supervisory arrangements of the VWA.

Various findings from foreign research in the Netherlands demand action.

DUTCH FOOD AND CONSUMER PROD. SAFETY AUTH. (VWA), VISIONS FOR THE FUTURE 2004-2007 29 (2004).

36. On the race to the top in labor standards, see KIMBERLY ANN ELIOT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 63-65 (2003). On forestry, see Errol Meidinger, The Administrative Law of Global Private-Public Regulation: the Case of Forestry (Apr. 22, 2005) (draft paper for conference on Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance, New York University Law School, on file with author); Christine Overdeest, Codes of Conduct and Standard Setting in the Forest Sector: Constructing Markets for Democracy? (2005) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

own liking and offer it as a “basis” for domestic rulemaking to complicit governments. The magnitude of the democratizing destabilization effect depends on the balance between international standard-setting bodies that are accountable or not to peer review, and the pressures to move towards or away from such accountability. Research on such questions is becoming an important focus of investigation of EU governance; and, given the architectural similarities between the EU and the WTO regime, as well as the important role of the former in the latter, it is likely that this will become a focal concern of the study of anomalous global administrative law—to say nothing of reform efforts that would put this development in the service of democracy.

B. *Human rights*

A second source of potential democratizing effects on domestic society lies in the area of human rights. The idea of human rights as a guiding normative ideal in global administrative law might cause concern because the conceptions of individual freedom underlying many human rights are thought to be too parochially liberal to provide an appropriate basis for global law. Moreover, it might be said that human rights concerns focus principally on the protection of citizens and other residents against abuses by state officials, whereas global administrative law deals with regulation of the interdependencies among states and their various civil societies. Human rights thus understood might be thought to depend for their vindication on global or regional tribunals and corresponding executive agencies with the effective power to sanction violations. But the world of anomalous global administrative law lacks anything like a cosmopolitan state with the necessary enforcement powers.

But we need not think of human rights as part of a specifically liberal political outlook so deeply implicated in the mix of individualism, states, and courts. In the first place, human rights claims can be presented as elements of a global standard—a global public reason, itself part of the world of global politics—that sets out conditions of acceptable treatment, requiring in particular that political societies assure conditions of membership for those who live in their territory. The requirement of respecting human rights, understood as a condi-

tion of membership, does not depend on liberal ideas of person and agent, but can find resonances in a wide range of ethical-religious traditions.³⁷

In addition, the alternative argues that even those rights protecting citizens, and persons generally, against abuse by national governments are fostered by global interdependencies and rely at least as much for their vindication on networks of civil society actors and official institutions, with some affinities to those which figure in accounts of EU governance, as on the judicial and executive powers of a cosmopolitan state. These additional arguments are the focus of the transnational legal process school, which observes that even states currently violating the human rights of their citizens have reason—even in the absence of an overarching authority with enforcement powers—to seek acceptance in the community of nations that affirm those rights.³⁸ The chief motive is international legitimacy.

For current rights violators, who often rule more through fear than domestic consensus, it can be especially important to secure respectful acceptance of their regime in the fellowship of states as a mark of legitimacy, hence the willingness to ratify the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and others like it, by states that routinely engage in practices the Convention outlaws. Ratification in turn can provide the signatories with a legitimizing fig leaf or help create the possibility for victims and their allies to seek effective redress.³⁹ Whether it does may depend less on the explicit enforcement powers of the international regime in question than on the capacity of local civil society actors to transmit their grievances to transnational

37. Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 191-92 (2004); Joshua Cohen, *A Human Right to Democracy?*, in *THE EGALITARIAN CONSCIENCE: ESSAYS IN HONOUR OF G.A. COHEN* (Christine Sypnowich ed., Oxford University Press, forthcoming 2006). For example, in an idealized (Confucian) society, where an individual's duties attach to membership in mutually obligated social ranks, rights can be understood as deriving from those role-defined obligations, and as commanding respect even from officials.

38. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997); Harold Hongju Koh, *Address, Bringing International Law Home*, 35 Hous. L. Rev. 623, 633-35 (1998).

39. Oona Hathaway, *The Promise and Limits of the International Law of Torture*, in *TORTURE: A COLLECTION* 199, 208-10 (Sanford Levinson ed., 2004).

actors—international NGOs combating torture—and on the capacity of the latter to ally with some combination of international bodies and governmental institutions in the offending country to actually limit the offenses. This reform trajectory—from local NGO in a recalcitrant, offending state to international NGO, to intergovernmental institution and then back, in the form of compelling pressure for change on that State—has been called a “democratic boomerang.”⁴⁰ A boomerang of this sort played an important role in reducing the number of “disappearances” in Argentina under the military dictatorship from 4,105 in 1975 to 969 in 1978 and less than twenty in 1981.⁴¹

Such boomerangs can contribute to securing the rule-of-law preconditions for democracy by shaking the grip of wrongdoers on power. But they differ from the democratizing destabilization effects described above. Democratic boomerangs operate by informal chains of influence that cause domestic officials to respect, and perhaps ultimately to identify with, international norms, but there is no expectation that the application of the norm will lead to its revision. The formal peer review of the implementation of supranational norms at the core of democratizing destabilizing, on the contrary, improves implementation but in so doing can also lead to improved understandings of goals and shifts in the content of norms. Even acknowledging, then, that human rights are not parochially liberal can involve national interdependencies and need not rely for the rights application on a global state. Perhaps it is best, given these differences, to treat the democratizing potential of human rights as wholly distinct from that of anomalous global administrative law?

Recent developments in human rights, as exemplified in the EU measures against discrimination in 2000, caution against this conclusion and suggest instead that the peer accountability governance model, with its potential for democratizing destabilization, can apply in the domain of rights as well as in administration. Though the case we focus on here is the EU, and not global human rights, the lessons may nevertheless carry over.

40. MARGARET E. KECK & KATHYRN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 12-13 (1998).

41. *Id.* at 103-10.

Thus the anti-discrimination measures consist of two framework directives and an “action program” to combat discrimination. The Race Discrimination Directive addresses ethnic and racial discrimination in a wide range of social and economic settings;⁴² while the Directive on Equal Treatment in Employment and Occupation addresses discrimination in a particular setting—at the workplace and in employment relations—on a wide range of grounds, including sexual orientation, age, disability, ethnicity, and religious belief.⁴³ In unequivocally prohibiting discrimination the Directives are in the spirit of traditional human (and civil) rights; in establishing equality of treatment of potentially disadvantaged groups as an open-ended goal, the Directives are in the spirit of the framework regulation characteristic of EU governance. Thus the Employment Directive obligates employers to provide “reasonable accommodation” to persons with disabilities, where “reasonable” depends in part on the accommodations actually afforded in the practice of various national administrations (whose separate exertions of course will have depended in part on national traditions of rights in this domain).⁴⁴

Courts alone, it is widely acknowledged, have a poor record of giving current and corrigible meaning to requirements of this kind,⁴⁵ or of advancing the far more encompassing goal of the Race Directive, to implement “the principle of equal treatment between persons irrespective of racial or ethnic origin.”⁴⁶ But peer review, subject to judicial scrutiny, by relevant authorities and civil society actors of implementation efforts may, at least in some circumstances, be better suited to make effective sense of such open-ended goals—a more suitable forum of principle than courts alone. Here is where the action program to combat discrimination comes in. Its aim is to increase the capacity of national administrations, EU bodies, networks of experts, and NGOs at the national and EU levels to assess and propose reforms of the rapidly evolving law and

42. Council Directive 2000/43, art. 1, 3, 2000 O.J. (L 180) 32 (EC) [hereinafter Race Directive].

43. Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 32 (EC).

44. *Id.* art. 5.

45. For a canvas of classic and recent objections and the claim that contemporary court practice, in the US at least, is responding effectively to them, see Sabel & Simon, *supra* note 30.

46. Race Directive, *supra* note 42, art. 1.

practice of ending discrimination and promoting equality of treatment. Linked together in forms that are already familiar from the regulatory realm of EU governance, these newly capacitated actors could, as one close observer of both EU law and human rights suggests, extend the system of peer review from regulation to rights.⁴⁷ Once we depart from the idea that arguments of political morality sound only in judicial reasoning and that the determinate content of basic rights must have a uniform interpretation across all circumstances, this extension will seem entirely natural.

The creation of an EU Fundamental Rights Agency in 2003 formalizes and generalizes this synthesis. In response to the populist electoral successes of Jörg Haider in Austria in the late 1990s, and the fears of widespread xenophobia that they aroused, the Treaty of Nice granted, in Article 7 of the Union Treaty, the EU Council the authority to sanction member states for persistently breaching the common values on which the Union is founded, including human rights.⁴⁸ But just as in the determination of a “reasonable” accommodation “reasonable” depends in part on the accommodations actually afforded, so the non-arbitrary determination of persistent breaches of rights depends on a (continually corrected) baseline of practices in member states of identifying and sanction-

47. Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in *NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US* (Gráinne de Búrca & Joanne Scott eds., forthcoming 2006).

48. The following is based on Olivier De Schutter & Philip Alston, *Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency*, in *MONITORING FUNDAMENTAL RIGHTS IN THE EU: THE CONTRIBUTION OF THE FUNDAMENTAL RIGHTS AGENCY 1-21* (Olivier De Schutter & Philip Alston eds., 2005) [hereinafter De Schutter & Alston, *Introduction*]; Olivier De Schutter, *Mainstreaming Human Rights in the European Union*, in *MONITORING FUNDAMENTAL RIGHTS IN THE EU: THE CONTRIBUTION OF THE FUNDAMENTAL RIGHTS AGENCY 37-72* (Olivier De Schutter & Philip Alston eds., 2005). For the most current developments in this area, and especially changes in the relation of the Agency to Article 7, see Olivier De Schutter, *Monitoring Fundamental Rights in the Union as a Learning Process* (2005) (draft paper for conference on A Fundamental Rights Policy in the Public Interest: The Decentralized Implementation of Fundamental Rights in a Single Area, Columbia Law School, on file with author); Kenneth A Armstrong, *The Open Method of Co-ordination and Fundamental Rights: A Critical Appraisal* (Nov. 4, 2005) (draft paper for Fundamental Rights and Reflexive Governance Seminar, Columbia Law School, on file with author).

ing rights abuses. As two leading protagonists in the construction of the new institutions put it:

In order to ensure that such a mechanism [of sanctions] is used in a non-selective manner, it should proceed on the basis of a systematic monitoring by independent experts, providing comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union.⁴⁹

To this end, a network of independent experts in fundamental rights was created to “detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty,” and to “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.”⁵⁰ If, as seems likely, this network becomes the core of the Fundamental Rights Agency, then peer review of fundamental rights will have been in some important measure officialized in the EU.

We said earlier that the lessons of this case may carry over to the global level: we see some suggestive evidence for this claim in related, if slower-paced, developments at the International Labor Organization (ILO). Thus, consider the distillation of the ILO’s many detailed, quasi-legislative conventions into four core standards (freedom of association, abolition of forced labor, equality, and abolition of child labor),⁵¹ and efforts to create a rudimentary form of peer review by enlisting local NGOs and “technical services” supported by the ILO and other international organizations in the implementation and reinterpretation of these core rights.⁵² The medium-term result may be that an “anomalous” form of justice—with

49. De Schutter & Alston, *Introduction*, *supra* note 48, at 7.

50. *Id.*

51. On the background and content of the standards, and a criticism of them as diluting the ILO’s commitment to enforceable, sharp-edged rights, see generally Philip Alston, *Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda*, 16 EUR. J. INT’L L. 467 (2005); Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004).

52. For the counterview that the ILO’s traditional, detailed conventions are vitiated by formalism, and that the core standards, as substantiated by the “technical services” helping to implement them, are a promising alternative, see Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT’L L. 409 (2005).

abstractly described rights given divergent interpretations in different settings—joins an “anomalous” form of administration beyond the confines of the traditional state, and what they have in common is the principle of dynamic, peer accountability that does not depend on the unified authority of the traditional state.⁵³

V. A GLOBAL PUBLIC SPHERE?

Finally, we come to the most speculative but perhaps ultimately most important issue: the possible long-term, global democratizing effects of the emergence of global administration and efforts to make such administration (anomalously) accountable. The history of the nation state is famously the history of the interaction or co-evolution of the nation—the demos—and the state in each sovereign country.⁵⁴ Early state institutions channeled nationalism, and coursing nationalism redirected the institutional embankments through which it ran. Persistent differences in national systems of political representation (consociational or neo-corporatist as against plu-

53. For a comprehensive discussion of the human rights of children that converges with the EU approach to rights against discrimination see CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER (Burns H. Weston ed., 2005). The child labor analysis is framed by these five commitments: first, that child labor—work done by children that is harmful to them for being abusive, exploitive, hazardous, or otherwise contrary to their best interests—constitutes a major blight on human civility and welfare worldwide; second, that it therefore begs to be abolished by all who profess ethical-moral conscience and/or pragmatic self-interest in the well-being of present and future generations; third, that it manifests itself in complex and diverse ways and thus requires both coextensive (multidisciplinary, multifaceted, and multisectoral) and singly focused approaches and techniques to achieve its eradication in whole or in part; fourth, that these approaches and techniques must be informed by frank recognition that no form or level of social organization can claim “business as usual”—that is, exemption from meaningful, even fundamental change—if the goal of abolition is genuinely to succeed in situations large or small over time; and fifth, that such change and the benefits to human dignity that can flow from it are not likely to be achieved except episodically without a dedicated and ongoing commitment to the contextual application of human rights law and policy, including the right of children to have a say about their own lives. *Id.* at xvii-xviii.

54. See, e.g., EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914 (1976); JUERGEN HABERMAS, THE INCLUSION OF THE OTHER 105-53 (Ciaran Cronin & Pablo De Greiff eds., 1998).

ralist or majoritarian)⁵⁵ and of provision of social welfare (the Bismarkian welfare state linking benefits to occupational history contrasted with the Nordic *Folkehjem* providing universal benefits to all citizens)⁵⁶ remind us that the nation state could and did become very different things because of the particularities of these interactions.

Anomalous global administrative law, potentially including anomalous global justice as well, promises to disrupt this historical experience, while potentially reaffirming its fundamental lesson. The emergence of global rulemaking, with direct consequences for individuals and firms as well as states of course puts pressure on existing national arrangements, unsettles the delicate compromises of decades past, and requires national actors to justify what were once sovereign choices to a world of foreigners. But anomalously-accountable global administration, insofar as it is indeed deliberately polyarchic, regularizes and can make broadly accessible to challenge the back and forth between encompassing efforts to frame rights and rules and local experience of adapting those frames to particular circumstance from which the nation state itself emerged.

Could this interaction produce in time a form of global governance that makes rules, vindicates rights, and has—and is experienced as having—significant impact on the fate of individuals without recourse to the hierarchical apparatus of the classic nation state? Could it also produce a global public sphere that includes persons and peoples the world round in decisions that matter to them without making them citizens of a cosmopolitan state? Suppose, in particular, a deepening of global administration in a wide range of areas of human concern, including security, health, education, environment, and conditions of work and compensation. Suppose, too, that such global rulemaking is increasingly accountable: preceded by hearings, shaped by participation of affected parties, subject to review, and defended by reference to what are commonly cognized as reasons in an emerging public reason of global political society. And suppose that accountable administra-

55. See AREND LIPJHARDT, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 104-19 (1977).

56. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 22-24, 48 (1990).

tion, in its deliberative polyarchic form, has a substantial, constructive impact on human well-being. Suppose that its rulemaking activities reduce the current global dispersion in living standards—in mortality, morbidity, income, education, housing, access to clean air and water, transportation, communication—by leveling up, not down. Or, if that seems too ambitious, make the less demanding, but still morally trenchant, assumption that these activities help to reduce, and are understood as helping to reduce, current human destitution. Suppose, finally, that this impact is widely perceived, and the perception fosters further support for the arrangements—for more participation, because the stakes are clear, and for greater willingness to comply with obligations arising under them, because the results are decent.

Couldn't this all be true? Even without a global state? And if so, is it plausible that dispersed peoples might come to share a new identity as common members of an organized global populace, and not only in the humanitarian sense that all are human beings cohabiting the same planet, or the spiritual sense that all are living from dust to dust, or the utilitarian sense that we are all mutually interdependent? Beyond all this, our fates as human beings would—despite our cultural and linguistic differences—be deeply and self-consciously shaped by mutually accountable rulemaking that depends on local debate, is informed by global comparisons, and works in a space of public reasons. We would not belong to a single central state, with uniform rules and rights for all, and global politics thus could not be defined around a competitive process for control of that authoritative center. But accountable global administrative processes would play a significant role in shaping our lives.

To be sure, there would be many such processes of accountable rulemaking in different arenas of rulemaking and—without the state's encompassing shadow or an embrace from the law's long arm—arguably many global public spheres, loosely linked by elements of global public reason and global politics more generally. We cannot explore this possibility here. Suffice it to say that, with so many linkages among the rulemaking activities (trade and environment, environment and security, labor and health, health and trade) and with common strands in the reasons offered in support of rulemak-

ing in different arenas, a common identity as members of a global people might emerge.

And if such common identity were to emerge—not as offspring of a conventional political authority and a contest for control of it or as an outgrowth of a prior and exclusive solidarity, whether ethno-national or constitutional—then we would have a global demos: an unusual demos, to be sure, an imagined community requiring newly capacious acts of imagination, including a reimagination of the separate communities whose imaginary ineluctability now obstructs the political fantasy from which any kind of demos is created. But however unusual or anomalous, this demos would have sufficiently many of the indicia of a people—both subject and dispersed sovereign in a world of global rulemaking—to make sense of talk of a global democracy without a global state.

A powerful reason to exclude that possibility would be a compelling argument that accountable rulemaking can only take place within the confines of the administrative state as we know it. But the new reality of global rulemaking and the global political contests that surround it together cast doubt on that argument and force us to see that we may well be making something new in the history of political inclusion—something for whose accountability and democratic vocation we all in the end will be accountable.

