

# RESEARCH AGENDA FOR A POLYCENTRIC EUROPEAN UNION

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## *Abstract*

This paper sets out the potential of polycentricity as ‘outside’ option for the development of the European Union, juxtaposed with further European centralization and renationalization. It shows the potential of polycentricity in safeguarding several fundamental European principles such as subsidiarity, and establishes a research agenda for a polycentric Europe.

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## I. INTRODUCTION

Between October 1787 and August 1788, Alexander Hamilton, James Madison and John Jay published a series of 85 essays in support of the ratification of the United States Constitution. These essays, together with eight additional papers, are collectively referred to as '*The Federalist*', or '*The Federalist Papers*', and continue to be one of the most important collection of writings in political science to date.<sup>1</sup> Writing during a quintessentially 'constitutional moment',<sup>2</sup> the authors shaped not only the eventual contents of the United States Constitution, but the meaning of American federalism for generations. Its continued relevance, also for the contemporary European-centered context of this paper, can be found in paragraph 1:

*"It has been frequently remarked that it seems to have been reserved to the people of this country, [...], to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. [...] If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made."*<sup>3</sup>

The creation of the European Union, or rather its predecessors the European Coal and Steel Community and the European Economic Community,<sup>4</sup> in the 1950s was a project grounded in a period of crisis – the aftermath of the Second World War – and clearly based in 'reflection and choice' of the European nations involved. Although the consequent evolution of the European Economic Community into the current European Union was subject of continuous 'reflection and choice', the scale of the European Union's involvement in Europeans' lives seems to have gone far beyond what the founding fathers could have predicted.

Joseph Weiler recently argued in front of the European Parliament that the European Union's 'input' legitimacy has all but disappeared; the reasons for founding the original communities – i.e. lasting Peace between the European nations – no longer carry the same weight as they did 60 years ago.<sup>5</sup> Combined with the pressures caused by the Euro crisis, and the continuing disillusionment of Europeans with the European project, the future development of the European Union appears to be at a crossroads. British

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<sup>1</sup> Add ref.

<sup>2</sup> Ackerman

<sup>3</sup> The Federalist, paragraph 1, emphasis added.

<sup>4</sup> Also the European Atomic Energy Community (1958).

<sup>5</sup> Weiler, speech before Parliament 2012. Also Weiler 1992.

Prime Minister David Cameron recently called for “a renationalization of European powers”<sup>6</sup>, without, however, pointing at a clear method through which this “renationalization” may be achieved. Chancellor Angela Merkel made an equally powerful call for greater “Europeanization of national powers”.<sup>7</sup> The political and academic debate appears to be moving back and forth along a continuum with a nation-state centered free trade area at one extreme, and a federal ‘United States of Europe’ at the other.

This paper strives to contribute an original perspective to the continuing, and increasingly repetitive, debate regarding the (constitutional) future of the European Union.<sup>8</sup> This paper’s focus on polycentrism as a system of governance aims to make a case for sidestepping this continuum. Specifically, it proposes an ‘outside’ option to the development of the European Union: a polycentric Europe. In 1961, Vincent Ostrom, Charles Tiebout and Robert Warren, first developed the concept of ‘polycentricity’, as it is applied in this paper.<sup>9</sup> Their initial definition of polycentricity was mostly descriptive, to be used as an analytical tool:

“Polycentric” connotes many centers of decision-making, which are formally independent of each other. [...] To the extent that they take each other into account in competitive relationships, enter into contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior.”<sup>10</sup>

Polycentricity is not alien to, or irreconcilable with, existing governance structures within the European Union; in fact, one may even argue that polycentricity is so inherent to the European Union that it is the ‘inside’ rather than ‘outside’ option.<sup>11</sup> The multi-level nature of the European Union has long been recognized by academics engaged with the European project, and so-called ‘multi-level governance’ scholarship has contributed significantly to our understanding of the European project.<sup>12</sup> However, the multi-level governance literature is mostly descriptive.<sup>13</sup> Polycentric theory can also be used to map governance systems within the European Union, but its normative foundations, as

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<sup>6</sup> Economist, February 9, 2013, p 56

<sup>7</sup> Economist, February 9, 2013, p 56

<sup>8</sup> Add references to loads of EU writers.

<sup>9</sup> First mention of polycentricity was in fact Polanyi 1952.

<sup>10</sup> Ostrom, Tiebout, Warren, 1962, at 831.

<sup>11</sup> Quote Vincent on federalism and polycentrism

<sup>12</sup> Hooghe etc.

<sup>13</sup> Andrew Jordan

developed by Vincent Ostrom since the 1960s, allow us to present normative implications for European governance.

Crucially, Ostrom's theory of polycentricity is built on the principle of self-governance. Vincent Ostrom based his notion of self-governance on an enriched understanding of individual self-interest, the idea that individuals come together 'to seek their own gain, with the knowledge that gain comes through a long-term commitment with other self-interested citizens'.<sup>14</sup> The principle of self-governance is closely linked to the European principle of subsidiarity. Since the Maastricht Treaty, the principle of subsidiarity has been entrenched as a general principle, now formulated in Article 5(3) of the Treaty on European Union (TEU).<sup>15</sup> Nevertheless, empirical legal studies show that centralization has actually increased since the formalization of the principle of subsidiarity in 1992.<sup>16</sup> In a 1996 article on the European Union, Vincent Ostrom argued that '[p]rinciples of subsidiarity need to be extended to family, neighborhood, and community far beyond the realm of nation-states as contemplated by the Maastricht Accord.'<sup>17</sup> However, self-governance is not an inherent human quality, rather it is learned behavior which relies on a knowledge base regarding human interactions formed by previous generations. Self-governance presents a way to operationalize the principle of subsidiarity within the European context. It moreover provides us with a descriptive and explanatory criterion for the success and failure for certain polycentric systems already present within the European Union. Beyond the academic, self-governance provides a new source of legitimacy for the European project.

This paper is structured as follows: Section II sets out the concept of polycentrism as developed by Vincent and Elinor Ostrom, and its relationship with, and views on, theories of federalism and multi-level governance. Section III presents the key institutions of government and governance in the European Union and related methodologies, specifically multi-level governance scholarship. Section IV sets out a research agenda for a polycentric Europe by considering the implications of polycentric theory for key aspects of European governance. These include, *inter alia*, the link between self-governance and subsidiarity, the role of the European Courts in establishing and maintaining polycentrism, and the role of information, related to concepts of transparency and secrecy. Section V presents preliminary conclusions on a polycentric Europe.

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<sup>14</sup> Herzberg 2005, at 190.

<sup>15</sup> ADD REF TO article 5(3).

<sup>16</sup> ADD PAPER ON THIS.

<sup>17</sup> Ostrom, Faustian bargains, At 307

## II. OUTLINING POLYCENTRISM

Polycentricity is considered one of the main academic legacies of Vincent Ostrom.<sup>18</sup> He was however not the first to use the term polycentricity. This section sets out the development of polycentricity, starting with the initial introduction of the term by Michael Polanyi in 1951, and its consequent development by Vincent and Elinor Ostrom and other members of the Bloomington School of institutional analysis over the next decades. The second sub-section discusses polycentricity as a system of governance, as compared with federalism and multi-level governance. The third and final sub-section distills several core attributes of polycentricity that will frame our discussion of the European Union as a polycentric system.

### A. Foundations: From Polanyi to the Bloomington School

Michael Polanyi was the first to use the term “polycentricity” in his 1951 book ‘The Logic of Liberty’.<sup>19</sup> In describing this novel, but seemingly ubiquitous, phenomenon, Polanyi used the analogy of the successful organization of the scientific community: “In such organizational systems, participants enjoy the freedom to make individual and personal contributions, and to structure their research activities in the best way they considered fit.”<sup>20</sup> Despite this broad range of freedom, researchers share a common goal of objective truth that provides a center of focus for their individual efforts, which in turn provides a set of implicit and explicit (social) norms around which the scientific community can self-organize. Polanyi showed that the same applied to art, religion, or the law, which are also polycentric activities that are driven by certain ideas, such as beauty, transcendent truth and justice respectively.<sup>21</sup> Polanyi’s reading of polycentricity had a strong normative component, aimed at critiquing the economic rationale of socialism from the perspective of moral relativism: namely that the idea of justice itself is an ideal that can only be approached through a gradual trial-and-error process.<sup>22</sup> Polanyi’s emphasis on justice in relation to polycentricity made his work an important inspiration for legal studies.<sup>23</sup>

Vincent Ostrom explains that he was not aware of the prior use of the concept of polycentricity by Polanyi until after the publication of *The Organization of Government in*

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<sup>18</sup> Herzeberger 2005.

<sup>19</sup> Polanyi 1951.

<sup>20</sup> Aligicia and Tarko 2012, at 238.

<sup>21</sup> Ibid.

<sup>22</sup> See also Aligicia and Tarko 2012, at 238.

<sup>23</sup> See Fuller 1978.

*Metropolitan Areas: A Theoretical Inquiry* in 1961,<sup>24</sup> which explains why Ostrom, Tiebout and Warren do not engage with, nor mention, Polanyi's discussion of polycentricity in their first work on polycentricity. In his later works, particularly his 1994 book *The Meaning of American Federalism*, Vincent Ostrom does pay considerable attention to Polanyi's concept of polycentricity, paying particular notice to Polanyi's distinction between 'deliberate' and 'spontaneous' orders.<sup>25</sup> For Polanyi, polycentricity was equivalent to a 'spontaneous' order of social organization.<sup>26</sup> In Ostrom's view, the reference to spontaneity, as juxtaposed with 'deliberate' orders, implies a development that occurs unintentionally.<sup>27</sup> Ostrom strongly disagreed with this reading of Polanyi's distinction, stating that "[t]o expect a democratic society not only to emerge spontaneously, but to modify and sustain itself in the same way, is not plausible in light of the problems of and probable threats to the viability of democratic institutions. I prefer then, to presume that polycentric systems of order depend upon a good deal of deliberation in their creation, operation, and maintenance over time."<sup>28</sup> Nevertheless, the idea of spontaneity as advanced by Polanyi and Hayek is not completely without merit, when one interprets spontaneity as referring to a practice of trial-and-error that allows for experimentation within a governance system.<sup>29</sup>

For Vincent Ostrom, experimentation and learning are essential features of a self-organizing governance system, which is an aspect of polycentrism that was also central to Polanyi's definition, which he labeled self-coordination:

"[S]elf-coordination of independent initiatives leads to a joint result which is unpremeditated by any of those who bring it about. Their coordination is guided as by an "invisible hand" toward the joint discovery of a hidden system of things. Since its end-result is unknown, this kind of co-operation can only advance stepwise, and the total performance will be the best possible if each consecutive step is decided upon by the person most competent to do so...Any attempt to organize the group...under a single authority would eliminate their independent initiatives and thus reduce their joint effectiveness to that of the single person directing them from the center. It would, in effect, paralyze their cooperation."

Ostrom's concept of self-governance built on observations made by de Toqueville in his treatise *De la Démocratie en Amérique (Democracy in America)*, published in 1835 and

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<sup>24</sup> V. Ostrom 1994, at 225.

<sup>25</sup> Ibid, 225 onwards.

<sup>26</sup> Ostrom 1994, at 226.

<sup>27</sup> Ibid.

<sup>28</sup> Ostrom 1994, at 226.

<sup>29</sup> Ostrom 1994, at 226.

1840.<sup>30</sup> Toqueville also emphasized the importance of smaller societal units and the dangers of excessive centralization, since this could undermine the ability of the people to govern themselves. To Toqueville, one of the great virtues of American society was the rich variety in townships, churches and other non-state centric forms of organization that preceded the federal United States.<sup>31</sup> The success of American democracy was based on generations of social learning on the practice of self-governance: “town meetings are to liberty what primary schools are to science; they bring it within people’s reach, they teach men how to use and how to enjoy it.”<sup>32</sup> De Toqueville’s views must of course be considered within the historical setting in which they were written. Even so, Vincent Ostrom’s view on self-governance was greatly influenced by the more general implications of Toqueville’s work for (polycentric) governance.

In his 1999 book *The Meaning of American Federalism: Constituting a Self-Governing Society*, Ostrom sets out his core views on the role of the individual in democracy. His concept of self-governance is a dynamic one where societies are constantly evolving and reformed by the people that constitute it.<sup>33</sup> In addition, democracy through self-governance relies heavily on people’s willingness to cope with problematic situations.<sup>34</sup>

“With reference to American democracy, my conclusion, then, is that democracy is at risk when “the government” is presumed to “govern”. [...] The institutions of government were there to mediate and resolve conflicts and reach out to larger communities of relationships, but not to exercise command and control over all aspects of life.”<sup>35</sup>

“When the cares of thinking and the troubles of living are left to others, self-government is abandoned, democracy withers away, autocracy emerges, and people being preying upon one another in the name of liberty and equality. The future belongs to those whose covenants are bonds of mutual trust grounded in principles of self-governance and who learn to use processes of conflict and conflict resolution to elucidate information, clarify alternative, stimulate

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<sup>30</sup> REF to Toqueville.

<sup>31</sup> ‘the township was organized before the county, the county before the state, the state before the nation’ (Toqueville [1835-1840] 1945, I:40

<sup>32</sup> V. Ostrom, *Compound Republic*, at 142.

<sup>33</sup> Ostrom, *Meaning of US federalism*, at 257 (“Self-governing societies depend upon achieving a capacity to reform themselves”).

<sup>34</sup> Ostrom, *Meaning of US federalism*, at 256 (“The character of a democratic society is revealed by the willingness of people to cope with problematic situations instead of presuming that someone else has the responsibility for them.”)

<sup>35</sup> Ostrom, *Meaning of US federalism*, at 259.

innovation, and extend the frontiers of inquiry to open new potentials for human development.”<sup>36</sup>

These element of responsibility, ownership, and learning within the concept of self-governance can be found also in de Toqueville’s work, who considered complacency one of the key dangers of the welfare state: “what remains but to spare them [the people] all the care of thinking and all the trouble of living?”<sup>37</sup> It is important to note, that Ostrom’s view of polycentricity through self-governance should not be understood as hostile towards, or incompatible with, governmental action. Rather, he considered “politics as the practical process through which communities act to identify and solve their common problems, and to realize shared opportunities. Public officials play important supportive roles in these processes of self-governance, but their behavior should not be the exclusive focus of public administration scholarship.”<sup>38</sup> This close link between practical action and the political process also led Ostrom to take issue with Woodrow Wilson’s ideal type of governance through the separation of administrative democracy and policy,<sup>39</sup> and call for a democratic bureaucracy instead.<sup>40</sup>

A final observation regarding the development of polycentricity, as a normative methodology developed by the Ostroms, concerns the (perceived) aim and advantages of polycentric systems as compared to monocentric, or unitary, systems. Writing in 2011, Elinor Ostrom and Michael McGinnis stress that the efficiency argument typically applied to choices between governance types does not capture the full range of implications provided by polycentric theory. Put differently:

“Particularly problematic is any assertion that fragmented governance naturally leads to more economically efficient outcomes. But that was never the point – or rather, not the only point. A polycentric system should improve the chances that any existing economies of scale in the production of public goods and services could be realized by an entity operating at the most efficient scale, but there is no reason to presume that these same arrangements also will economize on transaction costs. [Rather] in a polycentric order, individuals or communities might decide, for whatever reason, to sacrifice efficiency for the pursuit of other goals, such as accountability, fairness, or physical sustainability.”<sup>41</sup>

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<sup>36</sup> Ostrom, Meaning of federalism, at 272.

<sup>37</sup> FIND REF IN TOQUEVILLE

<sup>38</sup> Ostrom and McGinnis 2011, at 21.

<sup>39</sup> REF TO WILSON.

<sup>40</sup> Ostrom and McGinnis 2011, at 21.

<sup>41</sup> Ostrom and McGinnis 2011, at 20- 21.



This ‘flexibility’ in goal setting is particularly important in our discussion regarding the European Union since economic efficiency has increasingly replaced other goals of democratic governance, which has greatly contributed to the erosion of input legitimacy of the European project.<sup>42</sup>

Aside from the theoretical and conceptual enrichment of polycentricity at the hands of Vincent Ostrom, the Ostroms and the Bloomington School made crucial progress in the empirical testing and application of polycentricity. Writing in the 1960s and 1970s, the Ostroms were confronted with a deeply ideological debate surrounding the organization of metropolitan areas – also the backdrop of Ostrom, Tiebout and Warren’s 1961 article – which considered the multiplicity of political units “a pathological phenomenon”.<sup>43</sup> Vincent and Elinor Ostrom submitted that the existence of multiple overlapping and interacting agencies might in fact be a natural and healthy situation.<sup>44</sup> The Ostroms stripped these divergent positions from their ideological coating and translated them into testable propositions on the preferences on, and heterogeneity of, public goods provision in urban areas. Together with their team, the Ostroms set up an empirical research agenda and found that, for several large metropolitan areas in the American Midwest, “polycentric arrangements with small, medium, and large departmental systems generally outperformed cities that had only one or two large departments.”<sup>45</sup> More generally, the empirical testing of polycentric and monocentric systems’ functioning made clear that:

“No a priori judgment can be made about the adequacy of a polycentric system of government as against the single jurisdiction. [...] It is doubtful that sub-optimization in Garantua in any easier to accomplish than supra-optimization in a polycentric political system. The performance of a polycentric political system can only be understood and evaluated by reference to the patterns of cooperation, competition and conflict that may exist among its various units. Cooperative arrangements pose no difficulty when joint activities produce a greater return to all parties concerned, if the appropriate sets of public interests are adequately represented among the negotiators. A contractual arrangement will suffice. As a result, this discussion of the behavior of a polycentric political system will focus upon the more difficult problems of competition, of conflict and its resolution. If a polycentric political system can resolve conflict and maintain competition within appropriate bounds it

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<sup>42</sup> This is also an important contrast with the normative claims of multi-level governance theory, which center around the concept of ‘good governance’ – also adopted and recognized by e.g. EU Commission in e.g. White paper on Governance (2001). The concept of good governance emphasizes elements such as transparency, accountability and citizens’ participation but also has an important efficiency component. See in more detail Section III. See also Chapter 3 polycentricity in EU book, at 65.

<sup>43</sup> Aligica and Tarko 2012, at 241 for more detail.

<sup>44</sup> *Ibid*, at 241.

<sup>45</sup> Ostrom 1972 in McGinnis 1999, 148.

can be a viable arrangement for dealing with a variety of public problems in a metropolitan area."<sup>46</sup>

This empirical testing of polycentricity moreover led to the further development of the Bloomington School's approach institutional analysis into the so-called Institutional Analysis and Development framework by Elinor Ostrom.<sup>47</sup>

From this brief discussion of the concept and theory of polycentricity it has become clear that its development was firmly planted in an American social, political and academic context. Although it is important to be aware of this background, the theory of polycentricity encompasses generalizable lessons that can be exported to other governance systems, such as that of the European Union. To that end, the following two sub-sections will briefly discuss the relationship between polycentricity and other forms of non-unitary governance, particularly federalism and multi-level governance, and set out several key features of polycentricity, which will form the basis of our EU centered research agenda.

## B. Polycentrism, Federalism and Multilevel Governance

In the introduction of this article, polycentricity is referred to as an 'outside' option for the development of the European Union. More specifically, it is suggested that polycentricity may offer an alternative to the (seemingly) binary choice between the federal and unitary state. This statement requires additional nuancing in order for us to appreciate the true relationship between federalism – and forms of multi-level governance as applied in the European Union – and polycentricity. Most importantly, it needs to be stressed that federalism and Ostrom's concept of polycentricity are not mutually exclusive. Rather, federalism may be considered a type of polycentricity: "[D]esigning the American constitution could be viewed as an experiment in polycentricity while federalism could be seen as one way to capture the meaning and to operationalize one aspect of this type of order."<sup>48</sup>

The particular species of federalism developed within the American constitution embodied many of the normative elements of Ostrom's theory of polycentricity, such as its

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<sup>46</sup> Ostrom, Tiebout, Warren 1961, at 838.

<sup>47</sup> REF to E Ostrom IAD lit

<sup>48</sup> A&T at 245. See also V Ostrom meaning of Us Federalism, at 239 ("[When the logic of American federalism, (..), is viewed from the perspective of a system of polycentric ordering, we can begin to understand how fragmentation of authority accompanied by contestation and innovation yields resolutions that achieve consensus among the member of society. (..) Any such system of polycentric order is, however, vulnerable to the pursuit of strategies in which some will take advantage of opportunities to gain dominance over others.")

ability “to limit the despotic possibilities of democracy”<sup>49</sup>, and people’s ability to participate in many forms and types of association. Initially, the systems of federalism and polycentricity could almost be considered interchangeable in Ostrom’s work for they both allowed for a high level of diversity in levels of government provision. Put differently, “polycentric forms imply finding the right level for addressing diverse social problems without the need for a one size fits all solution,”<sup>50</sup> something which, in theory, is equally possible under federalism and polycentrism. In addition, federalism allows for contestation of government authority: national action can be questioned at the state level, and state action at the federal level. However, this contestation is only possible when individuals have access to both these levels simultaneously.<sup>51</sup> The access to courts or other institutions to question governmental authority has become increasingly restricted in the American system.<sup>52</sup>

There are, of course, important differences between federal systems. Vincent Ostrom distinguished between “highly federalized” systems, which have a rich structure of overlapping, highly autonomous, jurisdictions, which are subject to an enforceable system of constitutional law, and more unitary forms of federalism, which include a single jurisdiction with a singly ultimate governmental authority or sovereign that expresses the majoritarian will.<sup>53</sup> In essence, polycentrism implies a fragmentation of sovereignty over several levels and numerous institutions. When this fragmentation also constitutes a central feature of the federalist system at hand, the analytical overlap between the two systems increases. Polycentricity and federalism are, however, not identical, or interchangeable. Elinor Ostrom and Michael McGinnis capture differences between polycentricity and federalism as follows:

“[P]olycentricity conveys more than just federalism as it typically is understood. A federal system may consist only of a sequence of neatly nested jurisdictions at the local, state or provincial, and national levels, but a *polycentric system also includes crosscutting jurisdictions specializing in particular policy matters*, such as an agency managing a river basin that cuts across state lines. *In addition, private corporations, voluntary associations, and community-based organizations play*

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<sup>49</sup> Wagner 2005, at 184

<sup>50</sup> Herzberg 2005 at 193

<sup>51</sup> Herzberg 2005 at 194

<sup>52</sup> Wagner 2005, at 185 (“The 9<sup>th</sup> and 10<sup>th</sup> Amendments are clear expressions of subsidiarity, as was the doctrine of interposition [...] Interposition was a state’s assertion of its sovereignty against invasion by the national government. With assertions of state sovereignty negating assertions of federal sovereignty, the very notion of sovereignty as a locus of final domination evaporates. [...] To be sure, the general direction of movement for more than a century has been from federalist governance towards democratic governance.”). This is also a key problem for the European system as shall be discussed in Section IV.

<sup>53</sup> V. Ostrom 1973, at 22.

*critical supporting roles in a polycentric system of governance, even if they have not been assigned public roles in an official manner.”<sup>54</sup>*

As compared with federalism, polycentricity thus allows for an additional dimension of crosscutting ‘issue-specific’ jurisdictions and envisages an explicit role for non-governmental bodies, such as private and community-based organizations. These additional features are also present in the European-based theory of multi-level governance (MLG). The complex development of the European Communities into the present-day European Union defied pre-existing theories of governance, which led to the construction of alternative methodologies, of which multi-level governance has been by far the most influential.<sup>55</sup> A MLG system is one of “continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local – as a result of the broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level.”<sup>56</sup> From this broad definition, Liesbeth Hooghe and Gary Marks have distilled two categories of MLG: Type I and Type II systems.<sup>57</sup>

Type I systems carry a strong resemblance to classic models of federalism, whereas Type II systems are less stable special-purpose jurisdictions that are not necessarily restricted by pre-existing geographic jurisdictions, e.g. institutions set up to deal with cross-border resource management. It is this Type II MLG that is most commonly compared, and confused, with polycentricity. This is however incorrect for several reasons, which in part come back to the descriptive nature of MLG theory, as compared with the normative foundations of Ostrom’s polycentricity. One fundamental problem is that within Hooghe and Marks’ definition, a key characteristic of Type II systems is ‘conflict avoidance’.<sup>58</sup> Since Type II MLG jurisdictions are issue specific, they assume a high level of consensus within the jurisdiction, and less conflict with other jurisdictions since all effects of the actions taken by the Type II jurisdiction are internalized. Regardless as to whether these assumptions are credible, (the potential for) contestation is a crucial element of polycentric systems, which on this dimension clearly differ from Type II MLG jurisdictions.

Moreover, Type II jurisdictions are typically nested within larger general-jurisdiction Type I systems. McGinnis and Hanisch consider the complementarity between the units of the primary governance partition and the special-purpose secondary

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<sup>54</sup> Ostrom and McGinnis 2011 (emphasis added).

<sup>55</sup> MLG will be discussed as length in Section III.

<sup>56</sup> Gary Marks 1999, at 392

<sup>57</sup> Hooghe and Marks YEAR

<sup>58</sup> Hooghe and Marks, Handbook, at 28.

governance units is the essence of polycentric governance.<sup>59</sup> Although this may be true for a system where the underlying values of the different jurisdictions are already polycentric, this interpretation is not in line with the normative drivers that underlie Type I and Type II MLG systems. As Hooghe and Marks stress, “Type I and II governance are not different means to the same end. They embody contrasting visions about collective decision-making. Type I jurisdictions are suited to political deliberation about basic value choices in society: who gets what, when, and how. [...] Type II jurisdictions, in contrast, emphasize problem solving. [...] The assumption underlying Type II jurisdictions is that externalities among jurisdictions are sufficiently limited to sustain compartmentalized decision making.” Although there may be substantial analytic overlap between MLG systems and polycentric systems, the normative bases for these systems is distinctly different. As such, MLG theory cannot serve as a prescriptive model for the further development of a system such as the European Union in the way that polycentric theory can.

A final,<sup>60</sup> more economic, theory of European governance, as developed by Bruno Frey and Reiner Eichenberger, is called FOCJ: *functional overlapping competing jurisdictions*.<sup>61</sup> FOCJ are defined as a form of federal governance that is created as a bottom-up response to citizen preferences and as such comes closest to a truly polycentric theory. FOCJ foresees direct access to federal level courts for all citizens, independence of local communities in order to constitute local governance systems, which would also have the right to level taxes to finance themselves.<sup>62</sup> The main theological difference between FOCJ and polycentricity is the emphasis that FOCJ places on efficiency, whereas Ostrom’s theory of polycentricity also considers other drivers for governance decisions.<sup>63</sup>

### C. Polycentric Governance: Attributes and Institutional Essentials

#### *Attributes*

In order to proceed with our analysis of polycentricity within the European Union, this sub-section sets out several core *attributes* and *institutional essentials* of polycentric governance. The term ‘attributes’ is borrowed from Aliciga and Varko, who define ‘attributes’ as the basic features of the concept under consideration: polycentricity.<sup>64</sup> We

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<sup>59</sup> McGinnis and Hanisch 2005, at 24.

<sup>60</sup> A further discussion of related forms of governance is beyond the scope of this article. A good overview is provided in A&T 2012, 249-252.

<sup>61</sup> Frey and Eichenberger 1996, at 315.

<sup>62</sup> Ibid.

<sup>63</sup> See section II.A above.

<sup>64</sup> A&T 2012

can distill these attributes by considering more closely the definition of polycentricity as given by Ostrom, Tiebout, and Warren:

“Polycentric” connotes many centers of decision-making, which are formally independent of each other. [...] To the extent that they take each other into account in competitive relationships, enter into contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior.”<sup>65</sup>

And the further elaboration of the concept by the Bloomington school:

“The following set of features summarizes the Bloomington school perspective on polycentricity: many centers of decision making, ordered relationships that persist in time; many legitimate rules enforcers, single system of rules, centers of power at different organizational levels, spontaneous order resulting from free entry and exit, the alignment between rules and incentives (rules are considered useful), and the public involvement in rule design (rules about changing rules, connection between rules and consequences relatively transparent).”<sup>66</sup>

From these definitions, four essential *attributes* of a polycentric system can be identified:

- (i) The existence of *many, formally independent, centers of decision making*, which, ideally, are:
  - a. *Multi-level* – i.e. local, provincial, regional, national, global;
  - b. *Multi-purpose* – i.e. general, special, and/or cross-jurisdictional;
  - c. *Multi-sectoral* – i.e. public, private, voluntary, hybrid, and;
  - d. *Multi-functional* – i.e. containing specialized units for *inter alia* the provision, production and financing of goods;<sup>67</sup>
- (ii) ‘Spontaneous’ order, i.e. self-generating or self-organizing patterns of organization;<sup>68</sup>
- (iii) An *overarching* single system of *rules* (institutionally or socially enforced);<sup>69</sup>
- (iv) Continued evolutionary *competition* and *conflict resolution* between centers of decision making.

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<sup>65</sup> Ostrom, Tiebout, Warren, 1962, at 831. See also Vincent Ostrom (1999: 57) defined a polycentric order as “one where many elements are capable of making mutual adjustments for ordering their relationships with one another within a general system of rules where each element acts with independence of other elements.”

<sup>66</sup> A&T 2012, at 253.

<sup>67</sup> McGinnis 2005 – IAD guide.

<sup>68</sup> Ostrom 1972 in McGinnis 1999.

<sup>69</sup> A&T 2012, at 250 (“It is important to hold in mind that polycentricity involves the existence of multiple centers of decision making *within an accepted set of rules.*”)

*Institutional Essentials*

In order to ensure the (continued) existence of these attributes within a polycentric, there are several ‘*institutional essentials*’. Put differently, in order for these attributes of polycentricity to exist, and persist once established, the governance system must incorporate certain essential elements. ‘Institution’ is a loaded term, ubiquitous in many academic literatures and used in many different ways by many different scholars. In order to ensure a common understanding of the terms ‘institution’ and ‘institutional’ as used in this article, a brief discussion of its different applications is needed.<sup>70</sup> Given that our discussion is taking place with the Ostroms’ framework of polycentricity, their definitions of institutions are a logical focal point.

In both Vincent and Elinor Ostrom’s definitions, institutions are perceived of as a system of rules that provide people with the information they need to predict their, and others’, actions within a given situation.<sup>71</sup> Elinor Ostrom also adopted several other complementary definitions of institutions, *inter alia*, as ‘working rules’ that forbid, permit, or require actions by some actor or group of actors, and as ‘prescriptions’ that structure social interactions.<sup>72</sup> Elinor Ostrom also considered ‘institutional statements’, which are defined as linguistic constraints or opportunities.<sup>73</sup> This variation in definitions reflects a variation in analytical application, which can be linked to the different elements that constitute Ostrom’s Institutional Analysis and Development (IAD) Framework. Fundamentally, however, all of Ostrom’s definitions may be interpreted as keeping the decision-making process as the focal point of analysis.<sup>74</sup> This is in line with Douglass North’s understanding of institutions as:

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<sup>70</sup> For a more in-depth discussion of conceptualizations of institutions, see Cole 2013.

<sup>71</sup> See Vincent Ostrom, *Conceptualizing the Nature and Magnitude of the Task of Institutional Analysis and Development*, in VINCENT OSTROM, *THE QUEST TO UNDERSTAND HUMAN AFFAIRS, VOL. 2: ESSAYS ON COLLECTIVE, CONSTITUTIONAL, AND EPISTEMIC CHOICE* 181, 190-1 (B. Allen, ed., 2012) (“[I]nstitutions are defined as systems of rule-ordered relationships,” where “[r]ules are linguistic structures that enable human beings to distinguish the real of all possible actions into those that are prohibited, permitted, and required.... Rules thus establish constraints that allow for predictability in human relationships, while leaving open a range of possibilities to take account of other calculations that impinge on human welfare.”) and ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* 3 (2005) (“Broadly defined, institutions are the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales.... The opportunities and constraints individuals face in any particular situation, the information they obtain, the benefits they obtain or are excluded from, and how they reason about the situation are all affected by the rules or absence of rules that structure the situation.”)

<sup>72</sup> Cole 2013, at ??

<sup>73</sup> Sue E.S. Crawford and Elinor Ostrom, *A Grammar of Institutions*, 89 *AMER. POL. SCI. REV.* 582, 583 (1995), as quoted in Cole 2013.

<sup>74</sup> Cole 2013.

“[T]he rules of the game in a society or, more formally the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.”<sup>75</sup>

When referring to ‘institutional essentials’ in the context of this article, we also refer to ‘rules of the game’ that shape human behavior. More specifically, ‘institutional essentials’ describe those rules that ensure the availability of certain more fundamental societal processes, such as learning and information gathering or exchange. These institutional essentials, or ‘essential rules’ if you will, often exist within the setting of an organization, a group of people that share a common understanding of a set of rules, and often also a common goal.<sup>76</sup> In other words, certain ‘*institutional essentials*’ must be present within organizations in order to ensure the continued existence of the *attributes* of polycentric governance within that organization, and society more broadly.<sup>77</sup>

Vincent Ostrom explicitly sets out a number of institutional essentials in his 1972 work *Polycentric Governance*: in order to ensure that governance within a polycentric system is self-generating – in the sense that “individuals acting at all levels will have the incentives to create or institute appropriate patterns of ordered relationships” – the following essentials are needed:

- (i) Freedom of entry and exit;
- (ii) Enforcement of general rules of conduct that provide the legal framework of a polycentric order;
- (iii) Reformulation and revision of the basic rules that define the framework in an orderly way.<sup>78</sup>

At first glance, these essentials are fairly intuitive, but operationalizing them is no small task.

For one, the reformulation and revision of the basic rules requires that there is a ‘rule on how to change the rules’, and, more importantly, that people understand the relationship between particular rules and the consequences of these rules.<sup>79</sup> This reaffirms the difference in interpretation of the term ‘spontaneity’ as between Ostrom and Polanyi. The safeguarding of these institutional essentials – notably, through an overarching legal framework – implies a certain amount of design and deliberation, which would not fit

<sup>75</sup> DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990), at 3.

<sup>76</sup> For a further discussion of the relationship between organizations and institutions that goes beyond the scope of this article, see Cole 2013.

<sup>77</sup> A&T 2011 set out a more elaborate scheme of attributes and prerequisites.

<sup>78</sup> Ostrom 1972 in McGinnis 1999

<sup>79</sup> *Ibid*, at 247.



with Polanyi’s definition but is compatible with Ostrom’s since it implies learning. The possibility for *learning* is a crucial institutional essential since it also enables individuals to operationalize many other elements of polycentric governance. Without learning, and the correlated aspects of *access to information* and *transparency*,<sup>80</sup> individuals cannot choose properly between alternatives, which in turn undermines the competition attribute of polycentric systems.<sup>81</sup>

Many of these institutional essentials are typically safeguarded in the constitution of a given system of governance. Aside from being an attribute of a polycentric system in itself, an overarching system of rules such as a constitution is also an important place to find rules on access to information, rights regarding freedom of entry and/or exit, conflict resolution, and often also the rules on how to change the rules. With respect to conflict resolution, an independent court system is indispensable but it is not the only path to successful conflict resolution. As highlighted by McGinnis and Hanish, “Ostrom and Ostrom emphasize the importance of formal and informal mechanisms of conflict resolution, through which conflicts of interest and responsibility among public authorities in overlapping jurisdictions are resolved.”<sup>82</sup> Access to judicial review is an important pressure tool for individual, or group, grievances against governmental bodies. With respect to resolving conflicts between private parties or more informal communities, litigation may signal a breakdown in alternative, less costly, forms of dispute resolution, which may moreover be more successful in preserving constructive relationships between the parties.

Polycentric systems are not static, which means that the role of these essentials for the system varies in importance at different stages. They are however all necessary in order to prevent a polycentric system from moving too far away from its balance, into a different form of governance.<sup>83</sup> The maintenance of these essentials is not without cost; information is costly to acquire and to process, which can put a particularly high burden on citizens, and continuous dialogue between multiple groups can increase the likelihood of policy stagnation. Overall the maintenance of a polycentric system can involve high transaction costs due to higher levels of political conflict and controversy.

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<sup>80</sup> See also McGinnis 2005, cost and challenges of polycentric governance, at 17 (arguing that it is the responsibility of academics to inform the public and “resist any efforts to over-simplify the range of relevant political institutions”)

<sup>81</sup> Ostrom, Tiebout, and Warren, 1962, at 837 (“The citizens may not have access to sufficient information to render an informed judgment at the polls.”)

<sup>82</sup> McGinnis and Hanisch – Problems of Polycentric Governance in Growing EU 2005, at 22.

<sup>83</sup> McGinnis and Hanisch – Problems of Polycentric Governance in Growing EU 2005, at 22 “As each system moves away from the polycentric balance, the relevant communities no longer enjoy the benefits of resilience, redundancy, access to local knowledge, adaptability, flexibility, experimentation, accountability, or efficiency in terms of responding to diverse citizens preference. The resulting system may prove much less costly in terms of transactions or governance costs, yet many advantages had to be sacrificed to realize these gains.”

### III. GOVERNMENT AND GOVERNANCE IN THE EUROPEAN UNION

In the early 1830s, De Toqueville's view on European democracies, or rather lack thereof, was rather bleak as compared to the developments taking place in the United States.<sup>84</sup> Toqueville conceives of the American republic as "the tranquil rule of the majority", which is limited by "in the moral world, humanity, justice and reason; and in the political world, vested rights."<sup>85</sup> His view of the European conception of a republic, on the other hand, was one where the people do not predominate, but

"those who know what's good for the people, [...] which allows men to act in the name of nations without consulting them and to claim their gratitude while their rights are being trampled under foot. [...] [I]t is a discovery of modern days that there are such things as legitimate tyranny and holy injustice, provided they are exercised in the name of the people."<sup>86</sup>

Since Toqueville's 1830s writings, much has changed in the United States and the European countries that now constitute the European Union.

The European Community that preceded the current European Union was a set of legal arrangements, created by treaties negotiated by sovereign states under international law. The established doctrine of European constitutionalism shows how this intergovernmental understanding has developed into a "vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within [the sphere of application of EU law]".<sup>87</sup> In the words of Joseph Weiler, "the constitutionalism thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law."<sup>88</sup> For us to set out any meaningful implications of polycentric theory for European governance, and law, a clear understanding must be formed of the constitutive elements of (democracy in) the European Union. This section will set out the European institutions: both the bodies and rules that give effect to European governance, focusing on the doctrines of direct effect, supremacy, and subsidiarity. The second part of this section discusses multi-level governance as a theory of EU governance.

### WORK IN PROGRESS

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<sup>84</sup> Craiutu, Aurelian, and Jeremy Jennings, eds. *Tocqueville on America after 1840: Letters and Other Writings*. (New York: Cambridge University Press, 2009) (showing that his view on American federalism become less optimistic

<sup>85</sup> Toqueville, 1:416.

<sup>86</sup> Toqueville, 1:416-417.

<sup>87</sup> Alec Stone as quoted in Weiler 1997.

<sup>88</sup> Weiler 1997, at 97.

A. European Union Institutions

*European Union ‘Institutions’*

*Direct effect*

*Subsidiarity*

*Supremacy of European Law*

*Voting*

B. Multilevel Governance as a Theory of EU Governance

#### IV. RESEARCH AGENDA FOR A POLYCENTRIC EUROPEAN UNION

“I was struck by the continued relevance that the theory of *The Federalist* has for important political problems in the contemporary world, such as fashioning the institutions of government for a European Union and for European society more generally. To find a theory useful for thinking about problems does not mean that Europe should copy the American model. [...] The task, rather, is to use conceptions and the associated theoretical apparatus as intellectual tools to think through problems and make an independent assessment of appropriate ways for addressing problems of contemporary Europe.”<sup>89</sup>

- Vincent Ostrom

- A. Polycentrism and the EU: prior writings
- B. Subsidiarity & Self-governance
- C. Role of European courts (also national)
- D. The Role of Information: Secrecy/ Transparency

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<sup>89</sup> V. Ostrom, *Compound Republic*, at 10.

## V. CONCLUSIONS

“Those who neglect what can be learned from the past are not prepared to face the future. These are the burdens that life imposes upon the exercise of intelligence.”<sup>90</sup>

*Citizens Initiative*

*Europe of Regions*

*Complexity*

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<sup>90</sup> Ostrom, *Meaning of Federalism*, at 270-271.