

# **REFGOV**

*Reflexive Governance in the Public Interest*

*Services of General Interest / Theory of the Norm Unit*

## **Beyond Neo-institutionalist and Pragmatist Approaches to Governance.**

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# BEYOND NEO-INSTITUTIONALIST AND PRAGMATIST APPROACHES TO GOVERNANCE

by

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## Introduction

Any investigation into the question of “governance in the public interest” requires first of all that the meaning given to the question, and consequently the way the question is constructed, be specified. After addressing these two matters, we will indicate the steps we intend to take to define the sense in which we speak of “reflexive governance.”

In what sense will we use the expression “public interest” (or “general interest”, “common good”, or “public welfare”)? What is the purpose of an investigation into the form that governance should take to satisfy the requirements of the public interest? The expression “public interest” is so general that it is often deployed with little rigor. In a recent article,<sup>1</sup> R. Mayntz has attempted to specify the meaning that the expression has acquired in current research in the social sciences, and more specifically political science. Her work can serve as a useful departure point for our consideration of how to construct the question of “governance in the public interest”.

R. Mayntz’s central idea is that recent developments in political science make it possible at last to broach the question of public interest while avoiding the trap into which modern theory of society has repeatedly fallen. She emphasizes that this trap consists of the fact that “no contradiction was seen between the maximization of individual happiness and the public interest.”<sup>2</sup> She further notes that present-day thinking has grasped that this kind of presupposition is clearly problematic. However, this insight often leads to a skeptical and constructivist position, according to which it is necessary to abandon any claim to a theoretical position about the public interest and by implication any theoretical investigation of the conditions for its satisfaction. And yet, she observes, a second position is possible – one that, while

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<sup>1</sup> R. Mayntz, "Common Goods and Governance", in A. Heritier (ed.), *Common Goods: Reinventing European and International Governance*, New York – London, Rowman & Littlefield Publishers, 2002, 15-27.

<sup>2</sup> *Ibid.*, 16.

eschewing the illusion of the spontaneous convergence of private interests and the common interest, nevertheless reaffirms the possibility for the *objectivization* of the necessary conditions for satisfying the requirements of such public interest. It is this second position that has progressively emerged from present-day research in political science.<sup>3</sup> For this to happen, it was necessary for the question of the public interest or the common good to be redefined in terms of “common goods”. Thus the question was defined as an investigation of “two distinct types of collective problem solutions, namely, the solution of common pool resource problems in addition to the provision of formally defined public goods.”<sup>4</sup>

This modification of the approach to the question of the public interest offers, according to R. Mayntz, two methodological gains, which in turn constitute advances in the method of broaching scientifically the question of the conditions that regulation of a collective action must respect in order to maximize satisfaction of the requirements of the public good. As we will see, although we will argue against the first of these methodological gains, we believe it justified to endorse the second.

The *first methodological gain* is said to consist of a redefinition in terms of “common goods”. Not only (it is argued) does this approach immediately throw into relief the problems of collective action associated with the production of such goods. In so doing, it also makes it possible to surmount the erroneous presupposition of the usual liberal approaches, according to which a spontaneous convergence occurs between private interests and the public interest. And further, it also offers the benefit that “common goods are defined at a lower level of generality than a comprehensive concept of ‘public welfare’ which refers to a systemwide end-state.... [And] it is conceptually much easier to identify (and measure the achievement of) a single concrete ‘good’ than an overall state of public welfare defined at the system level.”<sup>5</sup> This position is quite problematic, however. Undoubtedly, it presents few problems when it is applied to the kinds of “physical” goods that do generally serve as the basis for economists’ and political scientists’

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<sup>3</sup> “Though,” Mayntz says, “it goes back to the arguments of economists trying to specify which goods can be supplied by the market, and which goods it is unlikely to supply.” (*ibid.*, 15).

<sup>4</sup> As we know, “public goods are formally defined as goods characterized by non-rivalry of consumption, and non-excludability from consumption.... Common pool resource problems, like the famous tragedy of the commons, exist where there is rivalry in the consumption of a scarce resource, coupled with non-exclusion from consumption” (*Ibid.*, 19). As R. Oakerson writes (“Analyzing the Commons: A Framework”, in D. Bromley, ed., *Making the Commons Work*, San Francisco (CA), Institute for Contemporary Studies Press, 1992, 42), “Like pure public goods, the commons is shared and unlike private goods, it either cannot be or is not...divided among separate consumers. Yet like the use of private goods, the use of the commons is characterized by individual consumers who appropriate a portion of the flow of benefits (farmers pump water, cows eat grass) and make the portion unavailable to others.... Unlike pure public goods, the commons cannot be shared without limit.” Standard instances of public goods are education and the lighting provided in public spaces, while examples of common goods are “forests, fishing grounds, pastures, parks, groundwater supplies, and public highways” (*Ibid.*, 41).

<sup>5</sup> R. Mayntz, *ibid.*, 19.

reflections on common goods or public goods. Such a description of “public interest” is, however, quite restrictive, as R. Mayntz indeed recognizes,<sup>6</sup> although without drawing the relevant inferences. For instance, let us take the case of such “goods” as public freedoms, interethnic tolerance, or the establishment of the institutional frameworks needed for the setting up and regulation of the market. What is problematic in these examples is less that they are in the nature of “immaterial goods” than the fact that, in contrast to the usual examples analyzed by economists, they may not be desired by members of a given social group. True, in connection with this last example, an economist such as D. North realizes, as will be seen below, that numerous “cultures” do not perceive the setting up of institutional frameworks required by the organization of the market as necessary. Nevertheless, he considers the need for such a setting up to be a given. It is not clear how we arrive at the view that the question of this need has been settled. On the other hand, it is not a matter of adopting the opposite position, according to which research into the public interest is equivalent to research into normative criteria for defining the public interest. R. Mayntz grasps intuitively (without, however, adequately explicating the relevant theoretical basis) the inadequacy of these “normative conceptions of a rational societal discourse à la Rawls or Habermas”, which, according to her, amount to no more than a renewal “of Kant's categorical imperative.”<sup>7</sup> But in assuming that the necessity and justification of such “common goods” are well founded and thus a “given” (whereas, in fact, such a necessity is not currently perceived by numerous social groups), R. Mayntz herself implicitly adopts a theoretical position identical to the one she intends to expose as fallacious. This is the “unthought”, and therefore highly problematic, dimension of any reduction of the question of the public interest or the common good to that of common goods. What must therefore be attained is a point of equilibrium between the rejection of a skeptical position and the identical rejection of a normative position, whether explicit or implicit, which presupposes that it is a priori possible to determine what the public interest consists of. To respect this point of equilibrium, it is necessary to internalize this normative dimension within the collective action by means of which members of social groups construct their public interest, and consequently to integrate the hypothesis of a gap between the requirements of the public interest and the way in which members of a group produce a collective action. It is for this reason that we propose to define the problem of the conditions for satisfaction of the requirements of the public interest or of the common good as conditions that must be respected in order for a (collective) action *to maximize satisfaction of the normative expectations of its members*. Such a definition internalizes the possible gap between the general expectation of rationalization and the way in which the actors themselves conceive of the interests to be satisfied. This internalization yields the benefit of avoiding the presumption of a possible a priori definition of such expectations.

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<sup>6</sup> *Ibid.*, 20.

<sup>7</sup> *Ibid.*, 17.

A definition along these lines also yields what R. Mayntz perceives as the *second methodological gain* of the common goods approach to the public welfare or the public interest. This second methodological gain consists, as R. Mayntz would have it, of the fact that this present-day approach broaches the question of the public interest in terms of *a theory of action*. “It is in fact a distinct characteristic of the common goods approach to public welfare to be action oriented.”<sup>8</sup> As posed within the social sciences nowadays, the question consists of reflecting on the form of governance that should govern collective action in order to ensure that the best possible of all intentions is fulfilled. “The action orientation of the common goods perspective quite naturally directs attention to the actor constellations and action orientations conducive to their achievement. In this way governance becomes a focal factor, and the form of governance which is most conducive to their achievement plays a major role in the discussion about common goods.”<sup>9</sup>

Reflection on governance is thus nowadays directly dependent on a theory of action. that is, on a grasp of the operations by which an intentional action is carried out. Indeed, this approach to the question of the public interest, which frames the question in terms of a theory of action, also accounts for the recent use being made of the term “governance” to designate what has traditionally been called “regulation” or “government”.<sup>10</sup> Use of the term “governance” quite simply reflects the surmounting of the dual attitude mentioned above: one branch of this attitude reflects on the question of the public interest in terms of the spontaneous harmonization of various private interests while the other supposes that the requirements of the public interest are satisfied by virtue of the fact that action has been imposed or produced by an authority (the State or its agents) believed to represent or incarnate this interest. In the process of surmounting this dual attitude, the question of sole recourse to the market or forms of governance by hierarchical control becomes problematic. As R. Mayntz rightly points out, “[T]oday the term governance is most often used to indicate a mode of governing that is distinct from the hierarchical control model characterizing the interventionist state.”<sup>11</sup> “Governance”, she goes on, adopting a formulation characteristic of neo-institutionalist economists, “is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks.” Undoubtedly this formulation indicates very clearly that what is sought nowadays in the way of a form of governance for collective action cannot be reduced either to market self-regulation alone, or to traditional command-and-control forms of regulation. However, it should be handled with care, because it could imply the resolution of many questions that are in fact still unresolved, as is made clear by the current state of discussion on the theory of governance.

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<sup>8</sup> *Ibid.*, 21.

<sup>9</sup> *Ibid.*, 21.

<sup>10</sup> Regarding this change in terminology, see note 110 below.

<sup>11</sup> *Ibid.*

This explains the procedure followed in the present article and what is thereby placed at issue.<sup>12</sup> Our intention is to adopt a progressive procedure. We will not directly address the question of the conditions for governance in the public interest in the comparatively abstract terms of theory of action. Rather, the procedure we mean to follow will take the internal dynamics of current discussion on theory of governance as its point of departure and show how the encounter between the opposing positions makes it possible to expose the “blind spot” that affects them all. What is at issue in this procedure is thus not a critique of existing approaches, but a test of the hypothesis that existing approaches are affected by a limitation consisting of an inadequacy in how they deal with the theory of collective action.

In conducting this critique, we will be less concerned to describe the content of concrete propositions developed under these approaches. The concern will rather be above all to examine how they conceive of the factors that condition the

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<sup>12</sup> This also accounts for the way the research conducted in REFGOV (the Reflexive Governance Network) has been organized and the specific place the present paper occupies therein. That is, the organization of research within REFGOV has two levels.

First, it is organized such that numerous researchers currently attentive to the development of these new, cooperative forms of governance based on public/private partnerships have been brought together. The goal is to lay out the state of current research on three issues: Why are these new cooperative forms of organization of collective action emerging? What are the inadequacies in the traditional forms that they seek to remedy? And what institutional conditions must they respect to ensure the utmost maximization of the actors’ normative expectation? We have chosen various spheres in which the reflection on the necessary transformation of our approaches to governance is being built. The chosen spheres of physical activity naturally have to do with certain traditional kinds of public goods (energy, health care, delivery of environmental services). However, for the same reasons that we oppose the unwarranted reduction of the question of the public interest to that of common goods, we consider that examples of another kind are currently especially instructive in the effort to reflect on this matter of the conditions for governance in the public interest. These other examples are chosen mainly from the sphere of theory of the firm (corporate governance, or the restructuring of inter-firm relations as networks). They also relate to the question of the modes of production of the rule of law, for example in virtue of the need felt to replace accustomed rules of production with standards relating to basic rights, in order to ensure that the intended normative objectives are more effectively implemented.

The second level of reflection is more directly concerned with the twofold challenge framed above to the expression “public/private partnerships”. At this level, there is less concern to deepen the findings of current research on new, decentralized forms of governance. Rather, the concern is to investigate whether, whatever the benefits they yield, the various theoretical approaches currently available in these forms of cooperative governance rest on unresolved difficulties that signal the need to deepen the theory of collective action that underlies them. The present paper is intended to initiate reflection on this question. It seeks only to open up discussion within REFGOV. Representatives, within the network, of the various theoretical positions analyzed herein are invited to enrich and where necessary correct or refine our presentation or their theoretical approaches. Similarly, the beginnings sketched here of a possible advance in the gains made by these approaches call for shared reflection if the institutional consequences are to be better understood. That is, this initial paper constitutes an introductory stage in the forging of a collective heuristic. It is intentionally incomplete, so that this collective heuristic can itself define how it is to be completed and rewritten and can thus lead to a shared synthesis.

possibility that the operation of selection that determines any collective action will satisfy, to the extent possible, the normative expectations of its members. In other words, what we are addressing is the theoretical framework necessarily (and very often implicitly) presupposed by the various approaches to governance when it comes to the “normative nature” they ascribe to the governance mechanisms they advance. By normative nature is understood the capacity of such mechanisms to best satisfy the collective (or public) interest of the actors involved. In effect, if we reconstruct the internal dynamic of contemporary research into governance theory, we observe an increasing will to extend and strengthen institutional mechanisms (i.e., incentives). This strengthening is itself no more than a result of an increasingly broad attention to the conditions needed for the success of the learning operation required for the selection performed by collective action to maximize satisfaction of the normative expectation of its members.

Our own hypothesis is that, in spite of the gains represented by the various categories of incentives suggested by the different successive stages of contemporary research on governance theory, these stages still require a deepening of the analysis of the conditions for success of the learning operation. If we adopt, as our guiding thread through present-day research, researchers’ willingness to delve deeper and deeper into the black box of the learning operation that influences a governance system’s capability for maximizing satisfaction of “the public interest”, our project will consist of reconstructing this dynamic and attempting to shed light on the persisting opacity in researchers’ implicit approach to collective action and to the learning operation that conditions it. In other words, we will be shining a light into researchers’ own persisting black box.

From this perspective, it appears to us necessary for three successive stages to be differentiated in governance theory. To understand these three stages, it must first be shown to what extent the dynamic that underlies them emerges from a shared base, namely what is commonly called the “neo-institutionalist turn” in the social sciences.

As W. Powell and P. Dimaggio have shown,<sup>13</sup> the expression “neo-institutionalist” is ambiguous. It covers various trends that have recently emerged in economics,<sup>14</sup> political science, sociology, organization theory and the theory of law.<sup>15</sup> Clearly, it is in relation to the renewed role of institutions in the theory of

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<sup>13</sup> W. Powell & P. Dimaggio (eds), *The New Institutionalism in Organizational Analysis*, Chicago, University of Chicago Press, 1991, 1.

<sup>14</sup> On the differences between the “old” and the “new” institutionalism in economics, see M. Rutherford, *Institutions in Economics: The Old and the New Institutionalism*, Cambridge (UK), Cambridge UP, 1994.

<sup>15</sup> As found in some of the trends of research on law and economics, as well as the development of the Law and Society movement in the sixties, in particular (as we will show below, at Section 2 §1.1) through the renewal of the contract approach put forward in the field of socio-legal studies.



collective action that the transformed approach (exemplified, as we have seen, by R. Mayntz) to the question of the conditions for satisfying the public interest has been most salient. Recall that this transformation entailed the questioning of the fallacious assumption that there exists harmonious self-regulation among the elements rationally required to satisfy the public interest, whether the foundation for this self-regulation consists of market mechanisms or a given public authority supposed to transmit and impose the requirements for the successful functioning of the social system. What has led to this transformation are twin features present, whether in whole or in part, in all neo-institutionalist undertakings. W. Powell and P. Dimaggio provide a good account of these twin features. One feature derives from an emphasis on the limitations on all individuals' capacity for rational calculation. The other defines a still more significant breach with the form of methodological individualism endorsed by the approach to governance so dear to economists. It emphasizes the role of shared common meanings in all social interactions and thus imposes the obligation to analyze collective actions in terms of interaction mediated by language, and not solely as a simple juxtaposition of calculations for the optimization of individual preferences.

The first of these two features has received its most prominent expression in the New Institutional Economics. But even though other disciplines have not necessarily endorsed the technical framework or the specific consequences yielded by cost transaction economics, the basic principle has turned up everywhere. This principle embodies a willed self-distancing from the usual approaches of rational choice theory. As W. Powell and P. Dimaggio write, “[T]he New Institutional Economics adds a healthy dose of realism to the standard assumptions of microeconomic theory. Individuals attempt to maximize their behavior over stable and consistent preference orderings, but they do so, institutional economists argue, in the face of cognitive limits, incomplete information, and difficulties in monitoring and enforcing agreements.”<sup>16</sup> The second characteristic is not so commonly encountered in the work of economists; but it is highly visible in certain approaches from within political science, as well as in sociological and organization-theory approaches. It is closely linked to H. Garfinkel’s development of the discipline of ethnomethodology and also to the cognitivist turn that has left its imprint on psychology; and it holds a privileged position in the work of the Carnegie School on organization theory. This characteristic consists of emphasizing the role of routine in individual and collective behavior. Neither individual nor collective behavior can be analyzed as the simple product of a calculation to optimize individual preferences: they are necessarily a function of a system of shared rules embodied within institutions. It follows that within these institutions, henceforward, “the new

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<sup>16</sup> The same authors make the familiar point that, according to transaction cost economics, “institutions arise and persist when they confer benefits greater than the transaction costs (that is, the costs of negotiation, execution, and enforcement) incurred in creating and sustaining them” (*ibid.*, 3-4).

institutionalism...locates irrationality in the formal structure itself, attributing the diffusion of certain...operating procedures to interorganizational influences, conformity, and the persuasiveness of cultural accounts, rather than to the functions they are intended to perform.”<sup>17</sup> An approach that will be forcefully and explicitly advanced in H. Simon’s theory of procedural reason (and embraced by R. Cyert, J. March, and J. Olsen) can be discerned here. Support for this approach has come in the form of the work of A. Tversky and D. Kahneman on stereotypes and biases.

These two characteristics describe the framework within which has emerged, in spite of internal divergences, the “neo-institutionalist” dynamic that governs contemporary research on governance theory. The various approaches to which this dynamic gives rise must be understood within the context of this frame of reference. Our own choice of the theoretical positions we consider to be most representative among the current achievements of neo-institutionalist research was made with the aim of doing justice to each of the two traditions that have progressively developed by taking an emphasis on one or the other characteristic as a departure point.

We have chosen to emphasize three theoretical approaches. The first is represented by the efforts of neo-institutionalists, following R. Coase and O. Williamson, to nuance the rational choice theory approach advanced by so called neoclassical economics (Section 1). The second is especially clearly represented in the recent work of certain jurists and political scientists, and it is based on the wish to make possible a “relational and collaborative approach to governance through dialogue” (Section 2). The third consists of an “experimentalist” approach developed by certain authors, in particular C. Sabel, and is based on a wish to develop a “pragmatist” approach to collective action (Section 3).

As has already been indicated, and as will be more fully demonstrated below, these approaches amount to stages within a single research dynamic. The dynamic in question plays out an increasing will to deepen our understanding of the learning operation that influences the capacity for a collective action to choose behaviors that will maximize fulfillment of the normative expectations of its members. As will be seen, this deepening in turn takes the form of a decreasing tendency to assume that the ability of actors to carry out necessary adjustments and learning are a given. Correlative to this, the deepening in question implies a progressive extension of the institutional devices that must be set up to make possible the learning necessary to the success of the operations of choice that will determine collective action.

Beyond their differences and their progressive gains, however, these three approaches also feature a shared trait, which constitutes a symptom of their shared inadequacy. The process we are about to undertake will thus also consist of a demonstration of the recurring difficulties these various approaches encounter and

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<sup>17</sup> *Ibid.*, 13.

the ways in which these difficulties relate to shared unexamined presuppositions. We will show how these presuppositions manifest as a common allegiance to what we might call an institutionalist approach to governance in the public interest. It is true that this approach aims to surmount the traditional dual belief that either market-mechanism-based self-regulation alone or imposition of rule by a public authority, authorized by whatever mechanism for public representation, suffices to ensure maximum fulfillment of the normative expectations of the members of the group. Yet, even though the conditions for such governance in the public interest now oblige us to complicate the institutional design of the mechanism of governance, the assumption persists that the issue of the conditions for such satisfaction of the requirements of normative expectations amounts to defining the good institutional design of a governance mechanism. It is supposed that, by virtue of the revised manner of reflecting on the form of this institutional design (distribution of property rights through reduction of transactional costs; stakeholding approach or institutional incentives to ensure learning by trial and error), this *form* represents conditions for such governance.

As will be seen, the difficulties faced by the various approaches that exist at present within the neo-institutionalist current of thought cannot be met and surmounted unless detachment is attained from this institutionalist belief and attention is granted to what will determine the use made of these institutional mechanisms. The reason is that, contrary to the institutionalist belief, no mechanism, whatever form it takes, has the power to define or entail its own conditions of implementation. In this perspective, no mechanism can produce its intended effects except as a function of the way its use is oriented. Its use in turn depends on how the actors become aware of the necessary detachment mentioned above and on how they intend to implicate themselves in the way the teleological orientation that affects this use is determined. However, we must not get ahead of ourselves as regards the reflexivity<sup>18</sup> that all (neo)-institutionalist forms of governance obscure.

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<sup>18</sup> It should be noted at the outset that the term “reflexivity” acquires a different sense in the present context than that given to it under several present-day neo-institutionalist approaches to governance, be they those that emerge, as discussed above, from relational and collaborative approaches or those that emerge from experimentalist approaches. We will return to this difference in meaning, which must be kept in mind if ambiguity and confusion are to be avoided.

## Section 1: A first neo-institutionalist approach: New Institutional Economics

Our proposal is obviously not to describe exhaustively the richness of the approaches constituting this movement emanating from the work of Coase and of Williamson. It is no longer a question of critiquing their important contribution. Their approaches in terms of transaction costs allowed the completion of those emanating from the theory of agency and of property rights<sup>19</sup> and a better accommodation of the complexity of the institutional arrangements through which economic agents now endeavour to deal with the “uncertain” contexts which have weakened their capacities of “rational anticipation”. Moreover, the will of the neo-institutionalists to pay increasing attention to hybrid forms of governance and to public-private partnerships in order to meet the failings of previous forms of governance, including the decentralised forms suggested by neoclassical economic approaches, very constructively enriched current debates on the reform of public policy. For the rest, a synthesis of these contributions and of the current results of research emanating from this neo-institutional economic approach to public policy is, as has already been indicated, part of the research programme of our REFGOV network and will be taken on by certain of the European representatives of this economic movement.

Our approach will be different. We wish to highlight two characteristic elements of the approach to governance suggested by the neo-institutional economists. The first element relates to the paradox which the neo-institutional approach appears unable to overcome. In effect, even if the point of departure of this approach consists in wishing to free oneself from the illusory belief of the neoclassical economists in a “perfect” rationality of economic agents, under a variety of forms, the recent approaches of the neo-institutional economists express a repeated misunderstanding of this requirement. The second element is the consequence of the first and concerns more directly the question of the governance

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<sup>19</sup> These theories are well-known. As D. Weimar recalls very clearly (“Institutional Design: Overview”, in D. Weimar (ed.), *Institutional Design*, Boston-Dordrecht, Kluwer, 1995, 10), “agency theory sees organizations as bundles of explicit and implicit contracts defining the relationship between principals and agents who take actions on their behalf...Agency theory is primarily concerned with the situations of asymmetrical information between principals and agents. Typically, agents have information, or can take actions, that are hidden from principals...The theory assumes that principals and agents design the most efficient contracts that are compatible with their individual incentives. It also assumes that contracts are complete and enforceable with respect to mutually observable actions and outcomes...transaction cost theory...shares with agency theory a focus on contracts. Unlike agency theory, however, it allows for the possibility that contracts may be incomplete, because all contingencies cannot be anticipated, and imperfectly enforceable, because detecting and punishing noncompliance is costly”.

of the public interest. In effect, the first element ultimately leads neo-institutional economists to have recourse – in a very behaviourist manner – to the classic “public” mechanisms in order to compensate for the deficiencies of decentralised forms of governance. It is moreover on this last level that the critiques are formulated which open the way, as will be seen later (sections 2 and 3), to the approaches to governance developed within the framework of the “relational and collaborative approach” or of experimental pragmatism.

Recent neo-institutional research has clearly perceived the ambiguity in the approach of Williamson, the founding father of this movement. It is not that the transactionalist approach proposed by Williamson remains “anchored in the unevolving character of the economics of equilibrium, as certain overly-hasty critics have tended to think”.<sup>20</sup> Even if it was only late in the day (essentially in his work of 1996), Williamson takes account – in his analysis of the role of institutions as conditions of the effectiveness of forms of governance – of evolutionary processes and of the importance of considering the structures of governance from the point of view of the capacity of adaptation. But, as E. Brousseau very rightly observes, Williamson attributes a highly problematical role to competitive selection which moreover allows him “to reconcile, as in the work of Alchian, a hypothesis of bounded rationality with the idea that agents are led to behave in conformity with the canons of individual and calculating rationality”.<sup>21</sup> This way of conceiving evolutionary processes accordingly leads Williamson to reinstate a form of “perfect rationality”. As Brousseau always reminds us, according to Williamson, “competitive selection disciplines economic agents. They have moreover a calculating (though not primitive) rationality which allows them to learn and anticipate (albeit imperfectly). They foresee accordingly that they will need to adapt *ex post*, although they are not able to foresee the necessary adaptations *ex ante*. This leads them to conceive flexible coordination structures (in hybrid and hierarchical forms). Moreover, thanks to the experience acquired, they complete and improve these initially incomplete and imperfect governance structures. Williamson therefore offers two strong hypotheses with regard to the nature of the process of competitive selection: it selects efficient forms – those which minimize transaction costs – and it is (at least in part) foreseeable”.<sup>22</sup> Such an approach to the selection process thus

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<sup>20</sup> E. Brousseau, “Processus Evolutionnaires et Institutions: Quelles Alternatives à la Rationalité Parfaite?”, *Revue Economique*, vol. 51, n°5 (septembre 2000), 1185-1213, 1203.

<sup>21</sup> *Ibid.*, 1203.

<sup>22</sup> *Ibid.*, 1203. Note, however, that Williamson anticipates to some extent the critical response that is now addressed to the solution offered by the economists of the Chicago School. Williamson, in contrast to property rights and the agency cost theorists (such as Demsetz, Jensen and Meckling; see on this VROMEN J.J., *Economic Evolution. An Enquiry into the Foundations of New Institutional Economics*, London/New York, Routledge, 1995, 60), criticizes the idea that evolution necessarily produces the solution that is most efficient 'in itself': what emerges is only the most efficient solution among those actually tested (O.E. WILLIAMSON, “Transaction Cost Economics”, *Journal of Economic Behaviour and Organization*, vol.8, 1987, 617-625). The reason

reinstates, beyond the hypothesis of bounded rationality, what the economists call a form of perfect rationality. The approach made by learning processes supposes that the processes of the rationalisation of the world (= the establishment of the most efficient possible form of coordination with regard to the agents' normative expectations) are simply the result of the "natural" competences with which economic agents are endowed. No doubt, in contrast to classical economists, one emphasises that the "equilibrium" solutions are conditioned by the establishment of institutional mechanisms and that these, on the one hand, reduce neither simply to the market nor even to the incentive contractual mechanisms which contractualist theorists have recently identified, and, on the other, are the object of re-adaptations and improvements resulting from collective learning. But the conditions necessary in order to ensure the efficiency of these mechanisms and thus to guarantee that they achieve the "hoped-for rationalisation" of the world are always presupposed as already given as capacities inscribed in the minds of individuals. Brousseau, following several neo-institutionalists, has clearly perceived that this Williamsonian approach to learning processes – and, as a consequence, to governance mechanisms – ends up failing to respect the initial project which was to break with the epistemological presuppositions of the marginalist analysis in terms of equilibrium.<sup>23</sup>

This "epistemological incoherence" has certainly not prevented neo-institutionalist research from deepening – as Coase had moreover suggested in his Nobel Prize acceptance speech – its descriptive analysis of the complexity and variety of hybrid forms of governance attesting to the current attempt to establish public-private partnerships. But various authors have nevertheless been attentive to the theoretical issue and have tried to deepen the way in which Williamson has conceived the operation of "selection" of the form of coordination of collective action and constructed the triangle of bounded rationality – institutional dynamic – institutional design. Moreover, we could add, this "epistemological difficulty in considering the limit of rationality" does not only concern the level of theoretical speculation. Insofar as this difficulty is not resolved, one will be led, at the level of the theory of governance, to this "practical difficulty" which consists in avoiding always supposing as already given the conditions of emergence of these "public" mechanisms which must be added to private arrangements of decentralisation in order that the coordination of collective action may be as efficient as possible (=

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for this, of course, is his partial borrowing of Simon's idea of bounded rationality. This also explains why, by referring explicitly to Simon, Williamson emphasises that only a "weak form of selectionism" is acceptable (see, for a definition of this expression, O.E. Williamson, *The Mechanisms of Governance*, Oxford, Oxford UP, 1996, 379). This restriction, however, does not prevent the ultimate reinstatement of a form of perfect rationality which he set out to move beyond.

<sup>23</sup> "Thus, even if the Williamsonian analysis represents a break with a marginalist analysis in terms of equilibrium, it is nevertheless the case that it does not draw out all the conclusions of this position" (*Ibid.*, 1203).

maximize as far as possible the normative expectations of the members of the social group). And the hypothesis that we would like to propose is that the attempts developed in order to meet the “epistemological difficulty” encountered by the Williamsonian approach turn out ultimately to be deficient and, on the contrary, to reproduce despite themselves the same epistemological ambiguity as they rightly identified in the work of the founding father of neo-institutionalism.

It seems to us that there are two principal attempts to overcome Williamson’s epistemological shortcomings. The first is that of the evolutionists and the second is represented mainly by the work of D. North. We will also extend our examination of North’s position by looking at that of E. Brousseau who aims to develop a position synthesizing the contributions of the evolutionists and of North. This will also have the advantage of allowing us to clarify the problematical presuppositions – both at the epistemological level and at that of the theory of governance – which we will have highlighted as implicit in the work of D. North.

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An initial clarification is required. From a terminological point of view, it is obviously insufficient to present evolutionist theory (which was essentially developed, as one knows, on the basis of the works of R.R. Nelson and S.G. Winter)<sup>24</sup> as a “neo-institutional” attempt to overcome the problems posed by the Williamsonian approach to bounded rationality and competitive selection. The evolutionist approach does not intend to address the question of the dynamic of economic processes in terms of transaction costs as proposed by the adherents to New Institutional Economics. It is accordingly only in a wide sense that one could locate this attempt to overcome Williamson’s epistemological ambiguities within what we call the neo-institutional approaches. In effect, beyond the evident difference between these two movements in contemporary economic research, they constitute two of the most significant expressions of the recent attempts of economic theory to address the question of the most efficient possible forms of collective coordination on the basis of a denunciation of the unrealistic psychological and epistemological presuppositions of rational choice theory, and of a will to take account in a radical manner of the consequences of the limit of economic agents’ rationality.<sup>25</sup> This explains their common interest in completing the approaches of

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<sup>24</sup> R.R. Nelson and S.G. Winter, *An Evolutionary Theory of Economic Change*, Cambridge (MA), Belknap Press of Harvard UP, 1982.

<sup>25</sup> Here we join with E. Brousseau’s position which also emphasizes, within recent economic research, the analysis of these two movements: Transaction Cost Economics (principally represented by the works of O.E. Williamson and D.C. North in the tradition of R.H. Coase); and evolutionist economics (principally represented by the works of R.R. Nelson and S.G. Winter, G. Dosi, L. Marengo, C. Freeman and with which one could associate those of P.A. David and B.W.

incentive contract theory by extending attention to more complex forms of governance (the hybrid and hierarchical arrangements linked, to different degrees, to the fields of intra- and inter-firm relations). But this also and especially explains the current will of the economists in these two movements to move beyond recourse to the hypothesis of natural selection which the economists (including Alchian, Friedman, Machlup, but also Williamson) have proposed in order to meet the anti-marginalist critique of the neoclassical theory of the firm developed in the thirties and forties in the UK (by the Oxford Research Group) and in the US (principally by R.A. Lester).<sup>26</sup>

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Arthur on path-dependency) : “One of the reasons why we emphasize the analysis of these two theoretical movements in contrast to others, such as dynamic games (Schotter), property rights (Demsetz), law and economics (Posner), constitutionalism (Vanberg), the neo-Austrian approach (Hayek), (etc.) is that these are distinguished by the capacity they have had in recent years to move beyond the stage of the programmatic approach. Without claiming that the approaches cited above have not been the object of any attempt at verification, we nevertheless think that the neo-institutional theory, on one hand, and evolutionary theory, on the other, are distinguished from these movements because a certain number of essential contributions...have generated theoretical and empirical works which have allowed one to clarify and homogenize the conceptual base of these two bodies, to express and test conjectures, to validate the explanation of a certain number of stylized facts. These works have simultaneously generated numerous analytical developments and allowed the precise identification of certain limits of these theories.” (E. Brousseau, “Néo-institutionnalisme et Evolutionnisme : Quelles Convergences?”, in *Economies et Sociétés*, HS 35, 1/1999, 189-215, 192).

<sup>26</sup> As J. Vromen recalls (op. cit., 14): “The main target of the criticism of the antimarginalists was the neoclassical theory of the firm...in this theory it is assumed that entrepreneurs, who are supposed to determine the behaviour of firms single-handedly, are profit maximizers. Profit is maximized if marginal revenue and marginal cost are equal...the assumption of profit maximization implies that the price and output policy of entrepreneurs is that they expand production up to the point where marginal revenue and marginal cost are equal...the antimarginalist criticism is inspired by empirical findings that are taken to show that entrepreneurs do not adopt such a price and output policy based on marginalist deliberations.” The response of Alchian and others in terms of natural selection is well known. Alchian proposed that the theorems of the neo-classical theory of the firm remained true even if it turned out to be inaccurate that entrepreneurs are ‘profit maximisers’. Perhaps, in fact, the behaviour of entrepreneurs did not result from deliberations involving an optimizing calculation. No doubt, noted Alchian, in a context of uncertainty, rational actors do not have at their disposal all the elements necessary to calculate the balancing of costs and benefits ‘at the margin’. But this consideration is irrelevant. It does not invalidate the laws established by the neoclassical theory of the firm concerning the evolution of the industrial market. The logic of the ‘impersonal forces of the market’ effectively operates such that in the end only those firms survive which develop strategies identical to those that would permit a definition of the optimizing calculation: ‘those who realize profits are survivors; those who suffer losses disappear’ (A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 *Journal of Political Economy*, (1950), 213). The logic of current results is therefore sufficient. It is of little importance to presuppose the ways in which the behaviour of entrepreneurs would ensure the realization of these results. Friedman, and later Becker, proposed the same thesis. The market functions ‘as if’ the actors were ‘profit maximisers’. Only those survive who, by chance, by rational calculation or by some other way, have adopted strategies corresponding to the



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How do the evolutionists modify the approach to competitive selection deployed by Williamson? And in what way does this evolutionist reinterpretation remain epistemologically problematical and ambiguous?

The contribution of the evolutionist approach as compared to Williamson is not the idea of learning. Williamson, in relation to the hypothesis of bounded rationality which he borrows from H. Simon, already considers the question of the choice by economic agents of governance arrangements on the basis of the idea of learning. As E. Brousseau rightly observes, “drawing one part of the consequences of the hypothesis of bounded rationality, Williamson admits that the choice of economic agents with regard to the structure of governance may be wrong or at least not optimal. Consequently, the economic agents want to improve the existing governance structures according to what they have learned about their difficulties of coordination and the effective properties of their solutions.”<sup>27</sup> Perhaps, it is true, Williamson has been influenced by the work of the founders of the evolutionist movement, Nelson and Winter. It is certainly the case that his work emerging after the publication in 1982 of Nelson and Winter’s “An evolutionary theory of economic change” attest to the endorsement by the founder of Transaction Cost Economics of this idea of learning.<sup>28</sup> Moreover, Nelson and Winter are victims of the same ambiguity – not to say incoherence – as that already observed in the work of Williamson. Williamson, as has been seen, despite the hypothesis of the bounded rationality of agents, intends to maintain the idea that these will nevertheless proceed to the choice of “efficient” forms of governance, that is, those which minimize transaction costs. In order to achieve that result, Williamson presupposes the existence of a “natural” selection process which will select the efficient forms of governance and “constrain” the cognitive operations of the agents. But no explanation is given of the manner in which this selection mechanism operates and in which it combines with the learning process. Nelson and Winter, like Williamson, maintain just as problematically the duality of processes: process of natural selection

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most efficacious strategy, which is the only one that is able to ensure success. “The process of ‘natural selection’ thus helps to validate the hypothesis or, rather, given natural selection, acceptance of the hypothesis can be based largely on the judgment that it summarizes appropriately the conditions for survival” (M. Friedman, “The Methodology of Positive Economics”, in *Essays in Positive Economics*, Chicago UP, 1953, 22).

<sup>27</sup> Ibid., 9.

<sup>28</sup> O.E. Williamson, *The Economic Institutions of Capitalism*, NY, The Free Press, 1985; and especially “Comparative Economic organization: The Analysis of Discrete Structural Alternatives”, in *Administrative Science Quarterly*, 36 (1991), 269-296; “Transaction Cost Economics and Organization Theory”, *Industrial and Corporate Change*, 2 (1993), 107-156; *The Mechanisms of Governance*, *op. cit.*

and process of learning. But, in contrast to Williamson, they are not content to postulate this combination. On the contrary, they want to try to open this “black box”. And, in so doing, they want, at the same time, to highlight indirectly the extent to which this perspective combining “efficient equilibrium constrained by a process of natural selection and adaptive learning by agents” is epistemologically problematical. Thanks to this, they want to oblige evolutionist theory to transform its hypotheses relative to the conditions to be respected so that the agents “select” forms of governance which “maximize” their normative expectations. But before seeing what this transformation will be, let us rapidly see how Nelson and Winter have tried to open the black box this operation constitutes, when one wants again to maintain the dual idea of learning/natural selection.

Nelson and Winter wish to unify an approach to the individual behaviour of firms in terms of routine and of “satisficing” and an approach to equilibrium at the collective level of the industry in terms of natural selection. They propose that routines defining the behaviour of firms<sup>29</sup> corresponded to genes in the biological theory of natural selection. The selection operated on the routines, or more exactly on the rules, which the actors adopted to fix their behaviours, that is, the rules the actors applied when they carried out learning activities. Nelson and Winter try, in a very subtle and innovative manner, to establish an analogy between “routines” and “genes” so as to provide an account of a plausible mechanism of “genetic transmission” (replication mechanism) as every technically rigorous theory of natural selection requires. It is moreover within this framework that the authors claim to adopt a “Lamarckian” theory of natural selection. Accordingly, the routines transmitted (in the sense of being reproduced by several firms) are themselves the result of learning activities undertaken by firms confronted with unsatisfactory profits.

The problem appears, however, when it is a matter of articulating this approach of individual behaviour with the idea that changes at the collective level would be the result of a mechanism of natural selection.<sup>30</sup> It is all the more apparent in the work of Nelson and Winter because they aim to describe the whole process in formalized language. The problem results from the different modes of operation of the mechanisms of adaptive learning and of natural selection, even if both operate reflexively, that is, by way of a feedback loop. This difficulty is well described by J.J. Vromen: “The first difference is that adaptive learning typically implies changes within individuals. Learning individuals typically improve their behaviour in the

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<sup>29</sup> R.R. Nelson and S.G. Winter develop their reflection in the framework of the theory of the firm which also constituted the framework of the debate conducted by Alchian and Friedman on the basis of the anti-marginalist critique. Hayek, on the other hand, developed his reflection in the framework of a theory of cultural evolution on the basis of a theory of individual learning.

<sup>30</sup> In terms of the theory of natural selection, this change, constitutive of a new equilibrium, signifies a change in the frequency of ‘genes’ within the ‘gene pool’ – that is to say, within the framework of a theory of the firm, a change in the population of rules of behaviour adopted by firms.

sense they learn to behave in ways that lead to satisfactory results... The results that are brought about by adaptive learning pertain to another level of analysis than the results that are produced by natural selection. Whereas natural selection produces changes at a *populational* level, adaptive learning generates changes in *individual* organisms... Natural selection as an explanatory concept presupposes individual stasis. It presupposes that there are stable, inheritable traits in a population of individual organisms.”<sup>31</sup>

The articulation of the two mechanisms in one unified process therefore poses a problem. How to maintain that the process of change at the level of firms will operate prior to that of natural selection? Without being able to do that, the process of “search” integral to learning will not have allowed the reconstitution of a sufficiently stable population of routines allowing change by means of natural selection to operate. In their formal models, “natural selection and adaptive learning are assumed to have different time scales. Natural selection typically is assumed to work slower than adaptive learning. It is assumed that natural selection comes in only after learning processes have come to an end”. But, as Vromen furthermore notes, “it is also clear that this assumption is questionable, to say the least. There is no reason to assume *a priori* that the process of selection is slower than the process of search, let alone that the selection forces are waiting patiently in the wings for all firms to terminate their search.”<sup>32</sup>

This difficulty, which Nelson and Winter fail to deal with except at the cost of an artificial and unrealistic postulate, can obviously be connected with another difference between the two mechanisms which concerns the level of the mechanisms

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<sup>31</sup> J. Vromen, *op. cit.*, 119.

<sup>32</sup> J. Vromen, *op. cit.*, 125–126. It is symptomatic that in their informal comments, R.R. Nelson and S.G. Winter (*op. cit.*, 169), themselves recognize that it is nevertheless more realistic to recognize that the two processes work simultaneously. But their project is to construct a formal evolutionist model integrating and unifying both the theory of learning and the theory of natural selection. Interestingly Vromen also notes that Nelson and Winter, in their informal comments, sometimes adopt another strategy in order to cope with this difficulty. They suggest, in agreement with the notion of organizational learning developed by Simon, Cyert and their successors, that learning is itself regulated by second-order rules and that there is thus a hierarchy of ‘routines’. Natural selection does not work on the first-order routines but on the second-order learning rules. The question is, however, only deferred. It is important to know if this change concerning the rules relating to learning procedures itself generates stability and, on the other hand, if it makes it possible to predict, at the level of individual firms, sufficiently stable (and therefore repetitive and predictable) ‘first-degree’ behaviours. In a lucid but nevertheless surprising manner, as regards the success of his own theoretical approach, Winter, as Vromen (*op. cit.*, 124) notes, observes that ‘this condition for predictability is not likely to be met in reality’ (see S.G. Winter, “The Research Program of the Behavioural Theory of the Firm: Orthodox Critique and Evolutionary Perspective”, in B. Gilad and S. Kaish (eds), *Handbook of Behavioural Economics*, Greenwich (Conn.), JAI Press, 1986, 151-188).

generating equilibrium at the collective level.<sup>33</sup> By leaving it to the mechanism of natural selection to explain this equilibrium, one effectively avoids having to ask how it is possible to consider this equilibrium on the basis of the resources provided by a theory of learning alone.

As has been said, it is this difficulty, emerging from Nelson and Winter's attempt to provide a technically better construction of the articulation simply postulated by Williamson between learning and natural selection, that leads to the effort on the part of the neo-institutionalist economists (in the broad sense, that is to say including especially both the evolutionist economists and the transaction cost economists)<sup>34</sup> to better construct the dynamic of economic phenomena and, as a consequence, to better understand the conditions required for this dynamic to produce the most effective possible forms of the governance of collective action. The transformation of the schema, whether Williamson's or Nelson and Winter's, consists precisely in only considering the dynamic of collective action on the basis of the idea of learning and in no longer having recourse to the idea that social processes would be guided, as in the biological world, by a process of natural selection. But this autonomisation of a process of "selection by learning" in relation to a process of "natural selection" forces a reconsideration of the question of knowing whether the learning process leads automatically to the most effective possible form of collective governance (by coordination or by cooperation) – that is to say, which maximizes as far as possible the normative expectations of the members of the social group. It is this that explains the very particular attention paid to the learning process itself – especially by evolutionist authors. But their teachings would, however, be followed by transaction cost economists, notably D. North. In order to clarify the modification in approach resulting from this evolution and to show the difficulties still affecting them, we will concentrate, as regards the evolutionist economists, on the position developed by L. Marengo and G. Dosi in one of their latest articles<sup>35</sup> and, as regards the neo-institutionalist transaction cost economists, on the position of D. North as extended by that of E. Brousseau.

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<sup>33</sup> 'The criterion for reproductive success in natural selection is the same for all individuals in the population. The criterion can hence be said to be objective. In the economic domain, this means that having positive material means is a sine qua non for persistence; whether firms are profit seeking or not, in order to stay in business they have to acquire material means. Adaptively learning individuals, on the other hand, may all have different aspiration levels. They may have different motives and targets. Hence, there may be a multitude of subjective criteria here' (J.J. VROMEN, *op. cit.*, 120).

<sup>34</sup> As Williamson himself moreover explicitly says, following Arrow, "transaction costs economics (is only) a part (of) the New Institutional Economics movement" (*The Mechanisms of Governance*, *op. cit.*, 40).

<sup>35</sup> L. Marengo and G. Dosi, "Division of Labor, Organizational Coordination and Market Mechanisms in Collective Problem-Solving", *Journal of Economic Behaviour & Organization*, 58-2 (October 2005), 303-326.

But before analyzing these two positions, an introductory remark will allow us already to highlight an indication of the problematical character of the efforts made whether by the evolutionists or by the recent works of the transaction cost economists to resolve the epistemological ambiguity of Williamson and of Nelson and Winter.

In effect, it is necessary to know that the abandonment of every reference to the biological theory of natural selection and, as a consequence, the will to have recourse only to a theory of learning in order to understand the dynamic of the organisation of collective action cannot be achieved without an intermediary step. This intermediary step has found one of its most significant expressions in evolutionary game theory principally developed in the eighties and nineties. This intermediary step consisted in taking account of the fact that the social world was irreducible to the biological world.<sup>36</sup> For this reason the dynamic of collective action and the selection of the most effective possible forms of coordination cannot be considered in terms of “natural selection”. This also indicates that, in the social order, one cannot base the optimality (even in Williamson’s “weak” sense) of strategies of equilibrium on the evolutionary mechanism of natural selection alone. But at the same time it is supposed that processes “analogous” to the process of natural selection guides the selection of equilibria appropriate to collective action. These operations are those of learning (individual and collective) and of cultural imitation. And this analogy is supposed to allow the generation, at the level of collective action, of the conditions for a dynamic of optimal equilibrium.<sup>37</sup> Of course, the two positions we are considering here – that of the most recent evolutionist economists or that of the neo-institutionalist transaction cost economists such as North – do not endorse such a supposition and are thus, one could say, conscious of the failure of the attempt to demonstrate this supposition which is at the heart of evolutionary game theory.<sup>38</sup> But it is interesting to note that despite the will

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<sup>36</sup> See especially, J. Maynard Smith, *Evolution and the Theory of Games*, Cambridge, Cambridge UP, 1982.

<sup>37</sup> As J. Vromen says, “In a sense evolutionary game theory can be regarded as a generalization of ‘optimization theory’ in biology. Optimization theory in biology studies what features of individuals optimize their fitness. Optimization theory is suited to deal with frequency-independent selection: selection processes in which the fitness of individuals depends only on the *natural* environment. Evolutionary game theory is devised to analyse *frequency-dependent* selection. In frequency-dependent selection, the fitness of individuals depends not only on their natural, but also on their *social* environment. That is to say, the fitness of particular phenotypes in a population depends on their frequencies in the population” (*op. cit.*, 136).

<sup>38</sup> As U. Witt, a contemporary evolutionist author, says, perhaps somewhat radically, “...evolutionary game theory – of which the sole pertinent application in economics is the demonstration of the fact that preferences can be inherited – cannot, by itself, provide an account of the significance in economics of the term ‘evolution’. Economic behaviours adapt much more rapidly than is allowed by genetic evolution, which stretches over generations. Consequently, other forms of variation and of adaptation must play a decisive role” (“Des Présupposés Sociaux

of the economists adopting these two positions to move beyond this intermediary step, the approaches they propose to the dynamic of collective action and to the conditions required so that these dynamics maximize as far as possible the satisfaction of normative expectations end up reproducing the same theoretical framework as that implicitly adopted by the most representative of the evolutionary game theorists. The observation is only underlined by the fact that, in the end, the same analytical framework is also found in the work of the contemporary Law and Economics authors who also attempt to reflect upon this question. Everything seems to happen as if current economic research, even where it perceives the limits of a theory of collective action and of governance inspired, whether indirectly or by analogy as in evolutionary game theory, by the idea of natural selection, turns out to be incapable of overcoming these limits. What is the analytical framework that evolutionary game theory ultimately leads to? We will see next, very briefly, how it is reproduced by one of the most representative writers in the field of the theory of social norms currently developed within Law and Economics and finally how it supports both the evolutionist approach of Dosi and Marengo and the neo-institutionalist approach of North. In our current perspective, two lessons may be drawn from the work of the evolutionary game theorists.

A first lesson is that the most significant authors in this movement have themselves had to recognize the relative failure of their initial project which was to show that the simple dynamic “internal” to the collective game leads to the establishment of the most efficient strategies. In what sense do we mean “relative failure”? In the sense that these authors have had to recognise that the adoption by the members of the group of an optimal strategy ultimately depends on conditions external to the simple dynamic (or learning) of the collective game itself. Without developing here<sup>39</sup> the reasoning of these authors, one can recall the two principal attempts and their results.

The first is that of E. Ullmann-Margalit and of A. Schotter<sup>40</sup>. We know Hayek, like H. Simon and Nelson and Winter, considers that the actors (individuals or firms) do not really behave like the “profit maximisers” of neo-classical theory that had already been questioned by the anti-marginalists. On the contrary, the economic actor has a routine behaviour. He is content to apply the rules of behaviour that he has used satisfactorily in the past. Nevertheless, where this routine leads to unsatisfactory results, a search for new rules will be carried out. A process of learning, by trial and error, thus guides the way in which an individual or a firm takes decisions and fixes behaviours. But Hayek proposes that the adaptive

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de la rationalité”, in *Les Limites de la rationalité, vol. 2 Les Figures du Collectif*, (B. Reynaud ed.), Paris, La Découverte, 1997, 68).

<sup>39</sup> On this point, see our work, *The Action of Norms, op. cit.*, 58ff.; and especially J. Vromen, *op. cit.*, 174-189.

<sup>40</sup> E. Ullmann-Margalit, *The Emergence of Norms*, Oxford, Clarendon Press, 1977; A. Schotter, *The Economic Theory of Social Institutions*, Cambridge, Cambridge UP, 1981.

resources of individual members of a social group are such that they adopt the rules of behaviour capable of creating the conditions of an optimal global coordination. Collective action is guaranteed to generate an optimal coordination by the organicist presupposition according to which individual actors automatically integrate the constraints linked to the organic relationship with the social unity. The competitive mechanism of coordination thus ensures an optimal equilibrium by the internalisation of the norms necessary for the coordination of individual behaviour. The organicist presupposition allows Hayek to guarantee that all individuals have the same common interest in coordinating their plans in an optimal manner. The hypothesis of a conflict of interest generating a different meaning given to the ends pursued is, therefore, immediately neutralized. Thus, the presupposition at work in the orthodox economic theory of the general equilibrium<sup>41</sup> is restored. According to Hayek, the transmission of efficient rules of behaviour to the entirety of individual actors is supposed to be achieved by a mechanism of imitation, which accordingly plays the role of the transmission (or replication) mechanism. The critique is straightforward and often made. Indeed, the thesis only holds if it turns out, in effect, that relationships between individuals can be considered on the basis of the model of a game of pure coordination where no conflict of interest is capable of leading to a deficit in the optimal equilibrium. The development of cooperative games, and notably the exemplary hypothesis of the prisoner's dilemma, has shown that competition alone can lead to dominant sub-optimal strategies.

It is precisely this that Ullmann-Margalit and Shotter have well understood. They try to take up the Hayekian project, but by developing it within the framework, no longer of a pure coordination game, but a cooperation game (one single shot or repeated cooperation game). But, unlike Hayek, Ullmann-Margalit and Shotter end up recognizing that the neutralization of the non-cooperative strategy and the establishment of respect for the convention ensuring cooperation can only result from the prescriptive intervention of a third party as in Hobbes.<sup>42</sup> We are obviously far from the cooperative equilibrium established by evolutionary self-regulation alone. Moreover, a second lesson can be added to the first. It is, in effect, that not only must these authors recognize the necessity of a condition "external" to the game itself in order to generate the cooperative equilibrium and the form of governance which maximizes the collective satisfaction; but, in addition, they recognize, as Vromen recalls, "that the external authority can only enforce an

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<sup>41</sup> Note that the social coordination considered by Hayek on the model of the market is not exclusive of the necessary support of rules. These are proposed as the very conditions of an optimal coordination. The difference is that these rules are supposed to emerge from social interaction alone and not by means of the authoritarian mechanism of a hierarchical and centralized organization. Hence his classic reevaluation of customary law or precedent at the expense of written rules promulgated by a legislator.

<sup>42</sup> As A. Shotter says, 'it is common knowledge that the famous prisoner's dilemma game can be solved through the use of a binding contract that is enforceable by an external authority' (*Ibid.*, p.11).

already existing tacit agreement among the individuals”<sup>43</sup>. It must also be noted, however, that these same authors do not define the conditions required in order to enable the emergence of such a tacit agreement and, ultimately, they suppose them as “given”.<sup>44</sup>

The second attempt – well represented by the work of R. Axelrod and R. Sugden – leads to the same two lessons, even if it is elaborated on the basis of different strategies. Indeed, although both these authors want to demonstrate that the emergence of an efficient strategy does not require the help of an external authority, they also end up having to recognize (implicitly or explicitly) that the cooperative strategy results from a process of learning which would itself only be possible on the basis of conditions exterior to those which define the rules of the initial game. This exterior condition is particularly well explained by Sugden, who recognizes that the establishment of such a strategy necessitates the members of the group interpreting, in an identical and unanimous way, the meaning of the basic rule of this strategy which states that in a situation U, one plays “hawk” (aggressively) and, in an asymmetrical (contrary) situation V, one plays “dove” (pacifically). If the players interpret the asymmetry (that signified by the opposition between U and V and that signified by the correlative behaviours “aggressive and pacific”) differently, then it will not be possible to maintain the equilibrium of the efficient cooperative strategy. Nevertheless, Sugden supposes that the framework ensuring the fixing of this unique meaning is given by the cultural tradition of the social group. In this way, one finds again here both the idea of an exterior necessary condition (cultural tradition) and the idea of a supposed given capacity of this cultural tradition to fix a unique framework of interpretation of the expectations of the members of the social group. In order to better understand the type of presupposition deployed by Sugden, it is interesting to describe a little more the reasoning recently used by one of the most representative authors of the Law and Economics literature in relation to this question of the “emergence of social norms” which condition the establishment of an efficient cooperative strategy (that is to say in our language of a form of governance in the public interest). This example effectively allows us to highlight the presuppositions at work in evolutionist reasoning and, as will be seen below, in that which is taken up both by L. Marengo and G. Dosi and by D. North.

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<sup>43</sup> J. Vromen, *op. cit.*, 180.

<sup>44</sup> As J. Vromen again recalls, “Ullmann-Margalit explicitly announces that she is not going into this question. She does not analyze the mechanisms and processes that are responsible for the generation of the tacit agreement. Likewise, Shotter states that the most that a game-theoretic account can do is to show that some institution is stable. Shotter does suggest, however, that the mechanism that produces the emergence of institutions is learning. Individuals are assumed to learn not only to restrict themselves, but also so that they can rely on the self-restriction of the others”. And Vromen does not fail immediately to raise the obvious objection that such a “belief” gives rise to: “the problem is that long before the new rule of self-restriction establishes itself as the rule that is followed by all individuals, the first pioneers or innovators must have found their way in a hostile environment” (*Ibid.*).



R.D. Cooter<sup>45</sup> attempts to consider the effect of the internalisation of social norms on strategies of cooperation. One of the author's theses is that the internalisation of norms increases the offer of "local public goods" and modifies the equilibrium in favour of the number of persons who adopt the cooperative strategy in the framework of the "mixed equilibrium" specific to evolutionary equilibria. We are not focused here on the problems posed by this thesis which depends on a form of reasoning directly inspired by the (problematical, as we have just seen) efforts of Axelrod and of Sugden. What interests us here is that the author nevertheless notes the conditions of efficiency which this social norm must meet in order that it does not lead into "evolutionary traps", that is, into "inefficient equilibria". The announcement of these conditions leads the author to what he calls a *weak utilitarianism*<sup>46</sup> which takes the form of the following theorem: "strategies that evolve into social norms in a free business community will be efficient in the absence of non-convexities or spillovers to other communities". Far be it from us to contest these two conditions. But it is clear that they have similarities with those very particular engagements by which "one gives with one hand what one takes with the other". These conditions are the following ones. The non-convexity of the norm means that there cannot be multiple equilibria within the community.<sup>47</sup> In parallel, there will be spillover when the community norm being considered causes damage to another community. The author's thesis is that a judge (or a public authority) must only uphold a "spontaneously" emerging norm, that is, one emerging from the self-regulation of the evolutionary dynamic alone, if that norm meets the two conditions of efficiency detailed. But how do we define this non-convexity or this character of being injurious to another community? The example of the "mountain with several summits" would let us believe that such a definition could be made from a point of view external to the community itself. We must not of course fall into the facile game of interpretative and postmodern relativism. But just as problematical is the "objectivist" presupposition of an external point of view according to which the distance between the global optimum and the local

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<sup>45</sup> R.D. Cooter, "Structural Adjudication...", 215-231; Id., "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant", *University of Pennsylvania Law Review*, vol. 144, 1996, 1643-1657; Id., "The Theory of Market Modernization", *International Review of Law and Economics*, vol. 16, 1996, 141-172; Id., "Normative Failure Theory of Law", *Cornell Law Review*, vol. 82, 1997, 947-979.

<sup>46</sup> *Ibid.*, 226. To the contrary, Cooter notes, "'Strong utilitarianism' would hold that every efficient equilibrium in a game will evolve into a social norm".

<sup>47</sup> "One kind of evolutionary trap occurs when local progress is global regress. To illustrate, suppose that some climbers try to ascend a mountain in a fog by following the rule, 'Always go up'; if the mountain has a single peak, this rule will get them to the summit. If the mountain has several false peaks, this rule will get the climbers to a local peak, but not necessarily to the summit. In technical terms, local improvements lead to a global maximum on a convex surface, whereas local improvements lead to a local maximum on a non-convex surface" (*Ibid.*, 225).

maximum<sup>48</sup> could be “measured” or the amount of “externalities” expressing the harm inflicted on another community. In other words, what the author misses here is the question of the conditions that make it possible to judge these conditions of efficiency. Everything seems to happen as if, again, the resources of formal reasoning (which every actor must necessarily share) were sufficient to define the significance of such conditions or for the abstract identification of the consequences which must be anticipated in order to define this significance.

If one translated Cooter’s supposition, one could say that he adopts an epistemological position based on an externalist realism. He supposes the existence of an external measure allowing the true definition of the meaning of the judgement by which the members of a social group can define questions as contested as that which is damaging for a group. As is already attested to by the simple sociological experience of our contemporary societies, that is a highly problematical and debatable supposition. This supposition expresses an epistemological operation that has already been noted in the work of the preceding authors. It consists in supposing as given—by a formal mechanism inscribed either in the collective history or the individual mind of each economic agent—a capacity to produce the conditions necessary for the establishment of a collective governance which maximises the satisfaction of the normative expectations of the members of the group. And, as we shall now see, it is this same operation that is reproduced both by Dosi and Marengo and by North, despite their desire to move beyond the framework of epistemological ambiguities deployed both by neoclassical economics and by Williamson and all those who, whether directly or indirectly, retain a reference to the idea of natural selection in order to consider the theory of learning and the conditions which would allow this collective learning to generate a “governance in the public interest”.

Let us first of all deal with the recent effort of the evolutionists to consider this theory of learning outside the framework of the idea of natural selection. We will then examine North’s neo-institutionalist efforts.

As has already been indicated, the way in which the evolutionist economists try to understand the dynamic of collective action on the basis of a theory of learning liberated from the illusory effects of an analogy with the biological idea of natural selection is very clearly expressed in the recent article already cited by L. Marengo and G. Dosi: “Division of Labor, Organizational Coordination and Market Mechanisms in Collective Problem-Solving”.<sup>49</sup>

We are not so interested here by the well-known critique of the evolutionists which Marengo and Dosi recall and which denounces the insufficient attention paid,

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<sup>48</sup> Recall this expression of Cooter’s, cited above, to describe non-convexity: an “evolutionary trap occurs when local progress is global regress”.

<sup>49</sup> L. Marengo and G. Dosi, “Division of Labor, Organizational Coordination and Market Mechanisms in Collective Problem-Solving”, *Journal of Economic Behaviour & Organization*, 58-2 (October 2005), 303-326.

whether by mainstream economics or by transaction cost economics, to the relation that exists between “the efficiency properties of different organizational forms” and “the learning opportunities which they entail” and that “*independently from any issue of incentive compatibility and transaction governance*”.<sup>50</sup> One knows that this shortcoming explains, according to the evolutionists, the failure on the part of mainstream economists and the transaction cost economists to take account of the role played by technological development in the organization of intra- and inter-firm relations, as well as their insufficient attention to the conditions favouring the development of capacities of innovation on the part of the units of production within an economic market. It is this critique that obviously explains the special attention that the evolutionists wish to accord to the “learning process” and, as a consequence, to the conditions that must be respected if one aims to favour the collective problem-solving capacities and, therefore, the forms of governance which are collectively most desirable. It is this last aspect of Marengo and Dosi’s reasoning that we wish to highlight here.

The principal thesis of these authors is easy to understand. As they themselves say, “the main argument can be stated as follows: the division of problem-solving labor into decentralized decision units coordinated by markets determines which solutions (i.e. technological and organizational designs) can be generated and tested by the selection process. On one hand, this division is necessary for boundedly rational organizations in order to reduce the dimensions of the search space, but on the other hand, it might well happen that the division of physical and cognitive labor is such that the best designs will never be generated and therefore never selected by any selection mechanism whatsoever. In particular, we show that everything being equal, the higher the degree of decentralization, the smaller the portion of the search space that is explored and therefore the lower probability that the optimal solutions are included in such a portion of space. Finally one can easily prove that computing the optimal division of problem-solving activities is more difficult than solving the problem itself; thus we cannot assume that boundedly rational agents in search of solutions to a given problem do possess the right decomposition of the problem itself”.<sup>51</sup> Of course, as H. Simon has already well noted, “rational agents must necessarily proceed by decomposing any large, complex and intractable problem into smaller sub-problems that can be solved independently”. But, “at the same time, note that the extent of the division of problem-solving labor is limited by the existence of interdependencies. If sub-problem decomposition separates interdependent elements, then solving each sub-problem independently does not allow optimisation”. Thus, “it is important to remark that the introduction of any decentralized interaction mechanism, such as competitive market for each component does not solve the problem... Thus, interdependencies undermine the effectiveness of the selection process as a device for adaptive optimization and they

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<sup>50</sup> L. Marengo and G. Dosi, *Ibid.*, 306.

<sup>51</sup> *Ibid.*, 308.

introduce forms of path-dependency with lock-in into sub-optimal states that do not originate from the frictions and costs connected to the selection mechanism, but from the internal structure of the entities undergoing selection”.<sup>52</sup> After having tried to formalise these properties and to confirm experimentally the necessary trade-off that must thus be realised between “decomposability” and coordination integrated in the organisation of the division of learning tasks, the authors accordingly arrive at the following conclusion. The “speed of adaptation” is, of course, greater at the level of locally decentralised units. But the question remains: “can optimal organizational structures (or optimal technological designs) emerge out of decentralized local interactions?” And the authors note at the end of their work that ultimately “this is only possible under some special and rather implausible conditions and that, on the contrary, the advantages of decentralization usually bear a cost in terms of sub-optimality...Our model also highlights the subtle trade-offs between decomposition levels, degrees of suboptimality of the achievable outcomes, and adaptation speed. Together, it casts strong doubts on the general validity of an “optimality-through-selection” argument in the sphere of organizational and technological designs and, more in general, of any “optimistic” view of market selection processes that can be found, for instance, in Alchian and Friedman, as forces that substitute individual optimization with evolutionary optimization”.<sup>53</sup> It is this that explains the necessary function of strongly integrated organisations that must somehow compensate or counterbalance the form of coordination specific to “decomposed tasks (possibly coordinated via market-like mechanisms but also via mechanisms based on the interaction of quasi-independent units within simple organizations)”.<sup>54</sup> Such results, the authors conclude, “are fully consistent with vast empirical evidence suggesting that new technologies develop in highly integrated organizations because of the need to control the strong interdependencies that characterize difficult problems”. In this perspective, it may be suggested that “organizations could actually play the even more fundamental role of building collective representations of the problem to be solved, and that such representations could act as frames within which the division of labor takes place inside and across organizations”.<sup>55</sup>

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<sup>52</sup> *Ibid.*, 309-310. The authors note that this property of learning processes is no longer linked with that other property “that, in general, the search space of a problem is not given exogenously, but is constructed by individuals and organizations as a subjective representation of the problem itself. If the division of problem-solving labor is limited by interdependencies, the structure of interdependencies itself depends on how the problem is framed by problem-solvers....As shown by many case studies, major innovations often appear when various elements that were well known are re-combined and put together under a different perspective. Indeed, one can go as far as to say that it is the representation of a problem that undermines its purported difficulty and that one of the fundamental functions of organizations is precisely to implement collective representations of the problems face” (*Ibid.*, 310-311).

<sup>53</sup> *Ibid.*, 323.

<sup>54</sup> *Ibid.*, 323.

<sup>55</sup> *Ibid.*, 324.

This position, representative of current evolutionary theory, calls for three comments that will allow us to show its intrinsic limits.

1. First of all, the position of Marengo and Dosi allows a clear understanding of the implicit conception that they have of the operation of learning. This conception presents two characteristics. Firstly, the operation of learning is conceived, in a perspective opened in economic theory by H. Simon, as an operation of selection by trial and error allowing the selection of forms of coordination judged to be the most successful by the members of the group. Secondly, contrary to the approaches based on a biological approach in terms of “natural selection”, this operation of selection is conceived as directly dependant on its basic “restriction”. As has been seen, this is a point already clearly highlighted by evolutionary game theorists and most especially by Maynard-Smith.<sup>56</sup> The operation of selection can only be selected on the basis of an initial given which is not supposed as transformable by the operation of learning itself. This second characteristic leads to what we could call an “externalist” conception of learning. We will see below that the contribution of the pragmatist and experimentalist approach to governance currently suggested especially by Ch. Sabel will differentiate itself precisely from the evolutionist approach on this exact point and will try, in conformity with the pragmatist requirement, to develop an “internalist” approach to learning and to the governance of collective action. For the evolutionists, the only way of modifying the possibly too restricted character of the initial given consists in deploying an external factor with a view to “extending” the set of basic hypotheses (or routines, in Simon’s terms) which would be tested by the operation of learning with a view to selecting the one that appears the most capable of resolving the problem engaging the collective action. The innovation—that is, the extension of the given representation by the extension of the existing initial possibilities—does not result from the learning operation itself. This is why Marengo and Dosi consider that “a selection mechanism can indeed, under certain conditions, select for the fittest structures, but only if the latter exist in the first place. Selection can account for the convergence of a population toward some given form, not for the emergence of such a form”.<sup>57</sup>

2. This “externalist” approach to learning simultaneously explains the approach to governance, that is, the institutional arrangements which must accompany the learning operation so that this leads to “optimality” or, at the very least, to the form of the organization of collective action which satisfies as far as possible the normative expectations of its members (governance in the public interest). It is necessary, as the authors themselves say, to “extend” the

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<sup>56</sup> As was said above (n.37), “Evolutionary game theory is devised to analyze *frequency-dependent* selection. In frequency-dependent selection, the fitness of individuals depends not only on their natural, but also on their *social* environment. That is to say, the fitness of particular phenotypes in a population depends on their frequencies in the population”.

<sup>57</sup> *Ibid.*, 306.

representation of local actors by way of an external mechanism which “imposes”, one could say hierarchically, a collective representation. E. Brousseau<sup>58</sup> is right to say that the evolutionists poorly define the form of organization that must impose from the outside this “extension” of the local representation of decentralised actors and ensure that the learning leads, not to what Marengo and Dosi call a local maximum, but to a global optimum. But even if the form of this organization thus remains a black box, it reproduces in many respects the institutional form of the solution arrived at by the evolutionary game theorists or by R. Cooter in the framework of Law and Economics. On one hand, it is supposed that a point exists external to the local actors where “the” collective representation ensuring adequate foundations<sup>59</sup> can be defined so that, by an operation of trial and error, the most adequate possible form of collective action is selected. On the other hand, this “integrated” representation will be necessary for the actors in their local learning operations. Decentralised self-regulation does not “naturally” lead to an “optimal” form of governance. It only leads to such a form of governance insofar as it is “guided” from the outside by a representation of the problem to be solved and of the constraints to be respected that are “integral” to all the particular points of view and thus guarantees a global collective representation of the problem. We find again here, though differently expressed, the approach already presented in the work of Schotter who conditioned the production of an optimal strategy on a hierarchical mechanism—and therefore one external to the agents—and to its necessary foundation in a “tacit agreement” of all the members of the group; or again in the work of Sugden who conditioned such an optimal strategy on the necessity for all the members of the social group to share a unique collective representation which he supposed was guaranteed by this external mechanism, which was the dynamic of the cultural tradition. Note incidentally that by adopting such an approach, these different recent orientations of economic reflection in fact adopt a model of thought well known to political philosophy. This is, in effect, the way of thinking about the question of collective action adopted by the first phase of modern political philosophy, and more precisely in that period of thought from Hobbes to Rousseau. But this is to consider the question of collective action while forgetting that, thereafter, research in political philosophy—and especially Kant and Fichte from the beginning of the 19<sup>th</sup> century—well understood the difficulties, not to say the impasses, of such a way of thinking. An indication of these difficulties can already be found moreover in the work of the evolutionists in certain of the presuppositions

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<sup>58</sup> As E. Brousseau says, “the organisation remains the “black box” of evolutionist theory” (“Néo-institutionnalisme et Evolutionnisme: Quelles Convergences?”, *loc. cit.*, 194). In the same way, somewhat later and more explicitly, it is said that: “...at base, the evolutionist firm, and with it all organizational forms, is no more than a black box comparable to the firm of traditional neoclassical theory within which one ignores how the resources are combined” (*Ibid*, 196).

<sup>59</sup> In the language of R. Cooter, this representation will allow forms of regulation avoiding evolutionary traps to be selected (cf. below especially n. 47).

that their approach to learning endorses and leaves unquestioned. Let us see some of these presuppositions.

3. This way of thinking about the hybridity between the forms of decentralised coordination<sup>60</sup> and their necessary external and hierarchical complement effectively rests on three presuppositions. These presuppositions concern in each case the “capacities” that the evolutionists suppose as given and whose conditions of possibility they do not consider. In effect, if one analyses in more detail the way in which Marengo and Dosu conceive the hybrid arrangement which must allow the optimisation of the learning operation, one observes that there are ultimately three operations whose necessary capacities are in each case always supposed as “naturally” given in the mind of economic agents.

The first is, obviously, an operation of generalisation. This operation is deployed in order to construct the collective representation at the level of the social group. At this first level, two “capacities” are supposed as given. It is first of all supposed that this operation of generalisation (of integration, as Marengo and Dosi put it less technically) of points of view occurs naturally. It is supposed that the actors have a “natural” capacity to align symmetrically their particular point of view, that is, to put themselves in the place of the other, to see the other as another similar to him and, for that reason, to adapt his own perception so as to construct a representation of the problem to be solved which integrates this necessary generalisation. It is then supposed that the framework adequate to this operation of generalisation is automatically given. It is effectively supposed that one may consider the problem on the basis of this “Archimedean point” which allows the identification of the particular points of view to be taken into consideration with a view to their generalisation (integration). It is necessary to “extend”, say the evolutionists, the local representation deployed by the decentralised agents. This extension must allow one to pass from a restricted local representation to a larger global (collective) representation. But how is it that one may suppose as “naturally” given the capacities necessary for this operation of determining what the good *collectivity* takes into consideration so as to have an adequate representation of the problem to be solved?

The second operation is an operation of the “general” on the “local”. The “institutional” hybridisation suggested by the evolutionists supposes, in effect, a “graft” of the collective representation on the local representations deployed by the decentralised agents. How does this “application” of the general (that is, the central) on the local work? Once again here, by not analysing the conditions of possibility of such an operation, it is supposed that there exists a “capacity” either of representative collective institutions to impose efficiently the necessary adaptation

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<sup>60</sup> That is, as L. Marengo and G. Dosi say, forms of coordination “via market-like mechanisms but also via mechanisms based on the interaction of quasi-independent units within simple organizations” (*Ibid.*, 323).

on the local representations or of local agents to transform automatically their “local” representations so as to adapt them to “global” representations.

The third operation concerns the “local” learning operation. Contemporary evolutionists of course admit self-regulation alone does not necessarily lead to the selection of the best possible collective action. They consider that decentralised coordination only leads, as a result of local learning, to a “local maximum” and not to a global optimal. But by already supposing this simple local “success” of the learning operation, one supposes as given a very problematical “local learning competence”. Because, by supposing such a capacity, one again supposes these capacities as “naturally given” and, as a consequence, draws attention to what would be essential to ensure that they were effectively produced. One supposes, in effect, that the group of actors in this local interaction are ready to proceed with every change in behaviour required by adaptation to this local maximum. Not only are they supposed able to assume the constraints and limitations required by the best possible coordination with the other in view of the local context and the representations of each, but they are also supposed naturally capable of perceiving and of consenting to all the necessary adaptations to their own representations so that they may find their best possible satisfaction in the local context.

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These three characteristics of the way in which the evolutionists envisage the learning operation and the hybridity of the governance arrangements allowing collective action to satisfy as much as possible the normative expectations of its members explains why the evolutionists, despite their project of moving beyond, on these two levels, the limits of the previous steps of the economic theory of collective action, reproduce its epistemological framework and basic schema. This also explains the recent dual effort in social science research to take up this move and to question more deeply the issue of the conditions of possibility of a collective learning and of the institutional construction of public-private partnerships. But, before analysing this new step in the current theory of governance, a final point remains to be examined in the framework of recent efforts in neo-institutionalist theory. As has already been indicated, the transaction cost economists have in effect also tried, by drawing support moreover from the attention drawn by the evolutionists to the learning operation, to overcome what has previously been called the “epistemological ambiguity” of Williamson and, more generally, of the usual economic approaches to the processes of economic change. The reference here is obviously to the recent efforts of D. North.

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It is obviously not for reasons of historical completeness that we wish to make this rapid detour via the work of D. North. We will not, moreover, describe North's approach here. We will limit ourselves to a single aspect of his thinking that will permit us to more clearly highlight what it is that remains "unconsidered" or "supposed as given" in the neo-institutionalist economic approach to governance and which explains at the same time the need felt by many today to overcome its limits or, in any case, to extend its contribution.

One knows that North wished to complete the Williamsonian approach by highlighting the fact that the economic dynamic of a social group was not only to be analysed at the level of what Williamson called the "mechanisms of governance" but also at the level of the institutional environment composed of formal and informal norms which condition and frame social interactions. It is not this question that interests us here, even if this is an essential point within transaction cost economics. What is important for us in our perspective is the way in which North tries to reflect the dynamic of historical learning at this level of institutional framing. North's question, on this latter level, is in effect that of knowing how to explain both the evolution of each of the socio-economic systems and the fact that they do not all seem to produce, on the basis of their internal dynamic, the same economic results. His response found its principal expression in an article published with J. Knight.<sup>61</sup> It was then developed in his latest work appearing in 2005.<sup>62</sup>

This response is not always easy to discern. In effect, even if North clearly endorses the same desire as Marengo and Dosi to free himself from every "biological" understanding of the operation of selection<sup>63</sup> and to draw support from the resources of a theory of learning alone,<sup>64</sup> in contrast to those same authors he develops neither a very deep or rigorous analysis of learning nor, for this reason perhaps, a clear statement of the solutions he proposes in order to avoid the effects of inefficiency which the path-dependency attached to every learning operation risks

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<sup>61</sup> J. Knight and D. North, "Explaining Economic Change", *Legal Theory*, 3 (1997), 211-226.

<sup>62</sup> D. North, *Understanding the Process of Economic Change*, Princeton, Princeton UP, 2005.

<sup>63</sup> "...it is important to emphasize two significant distinctions between biological and economic evolution. In the former variation occurs through mutation and sexual recombination along Mendelian lines. There is no close analogy in economic evolution. And...the selection mechanisms in evolutionary theory are not informed by beliefs about the eventual consequences as they are in economic evolution. And indeed in the latter it is the intentionality of the players as expressed through the institutions they create which shapes performance" (D. North, *op. cit.*, 66); see also "Cultural traits do not possess attributes parallel to those of genes and indeed the growing literature of the new institutional economics makes abundantly clear that institutions must be explained in terms of intentionality of humans. Informal norms develop that blend the moral inference of genetic origin with the intentional aims of humans, which together provide the backbone of what we should mean by the term culture" (*Ibid.*, 42).

<sup>64</sup> North moreover explicitly refers to G. Dosi for what he calls a theory of the "building blocks" of an "evolutionary theory of learning", cf. *Ibid.*, 25.

provoking. In the same way again, albeit more subtly, North aims to open his approach to the dynamic of collective action to a theory of “human intentionality” and, therefore, to an epistemological approach. This, however, remains largely undeveloped: North is content to refer in a quasi-allusive manner to the connectionist approach and to certain debates within anthropology or cognitive psychology, without constraining himself to confront the recent analytical philosophical work that nevertheless constitutes their epistemological extension and which would undoubtedly oblige him to re-examine certain of his implicit presuppositions. Such an approach accordingly forces one to be cautious when one claims to reconstruct it in a more theoretical manner. This caution is all the more necessary since North is the first to emphasise the current limits of our scientific understanding of the operation of the social transformation of modes of governance and, a fortiori, of the conditions which would allow such a transformation to be “efficient”.

But what we want to highlight is the fact that, even at the risk of “hardening” North’s approach, this remains prisoner to what we have called above an externalist conception of learning. Even if this externalism is less “radical” than that of the evolutionists Marengo and Dosi, it nevertheless does not allow the *construction of the question* of the conditions of an “efficient” transformation of social governance in terms which would allow an escape from the problematical presuppositions of this evolutionist position (2). It is also this, it seems to us, that explains—although North does not deal with this sort of question—why the transaction cost economists who have integrated North’s advances in relation to Williamson have recourse to such an “externalist” position and to its consequences with regard to the manner of understanding the hybridity of public-private partnerships, that is, with regard to the manner of compensating for the deficiencies of *pure* decentralised coordination. In order to show this, we will refer to the exemplary position of E. Brousseau in the domain of the regulation of the Internet market (3). But before seeing in what way, therefore, North’s approach remains problematical—despite its real advances—let us very rapidly describe its principal elements, which are, for the rest, easy to understand (1).

1. One can return North’s position to the question we are concerned with in relation to three principal elements.

The first element concerns the emphasis North places on what he calls a theory of human intentionality and on the consequences for his cognitive understanding of culture and economic evolution. North’s basic idea is that, in the social world, the basic process is that economic change is a function of a dynamic of collective learning. The process is effectively a function of an uninterrupted search by which the group of individuals is forced each time to solve the new problems

they are faced with.<sup>65</sup> And this search by trial and error is always a function of the beliefs which guide them and which are incorporated in their social institutions. The economic dynamic is thus the expression of an intentional aim of human society in general which operates by a learning approach which on each occasion tests its belief systems in order to adapt them to new contexts. The emphasis is thus placed on the role of culture. The idea is that the evolution of the social system is the expression of a constant intentional learning approach influenced by the collective beliefs embodied in the institutional context of each society. “There is an intimate relationship between belief systems and the institutional framework. Belief systems embody the internal representation of the human landscape. Institutions are the structure that humans impose on the landscape in order to produce the desired outcome”.<sup>66</sup> North draws support here from the theory of culture developed by Hutchins: “culture is not any collection of things, whether tangible or abstract...It is a human cognitive process that takes place both inside and outside the minds of people...Culture is an adaptive process that accumulates partial solutions to frequently encountered problems”.<sup>67</sup> Thus, through the construction of these “artifactual structures” which are the belief systems and institutions, societies proceed to a constant learning, that is, to a constant “adaptive reorganization in a complex system”.<sup>68</sup> Thus, the learning process, North emphasises, “appears to be a function of (1) the way in which a given belief system filters the information derived from experiences, and (2) the different experiences confronting individuals and societies at different times”.<sup>69</sup>

The second element aims to clarify the idea that this collective learning process by which human intentionality is produced does not always lead to results

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<sup>65</sup> “If uncertainty is a constant in explaining institutional change, what difference does it make when the uncertainty changes from that associated with the physical environment to that associated with the human environment? All three of the sources of economic change – demography, stock of knowledge, and institutions – have been fundamentally altered...The growth of population has led to a world of ubiquitous externalities as humans were forced into ever closer proximity to each other, but in the additional context of the revolutionary changes in technology it has produced new social problems to be solved. The driving force in the development of the human environment has been the growth in the stock of knowledge which has revolutionized production technologies and provided the potential of a world of plenty. Equally it has created weapons of mass destruction capable of destroying us. The resultant institutional development has created more and more complex structures designed to deal with the consequent novel problems facing societies. Institutions as the incentive structure of societies have produced diverse inducements to invest in, expand, and apply this growing knowledge to solve problems of human scarcity. The implications for consciousness have been that such inducements have expanded the human creative potential and in combination with diverse cultures produced widely varied responses to the novel problems confronting human as a result of these changes. But the responses have not always been creative and productive.” (*Ibid.*, 43-44).

<sup>66</sup> *Ibid.*, 49.

<sup>67</sup> J. Knight and D. North, “Explaining Economic Change”, *loc. cit.*, 221.

<sup>68</sup> *Ibid.*, 220.

<sup>69</sup> D. North, *Understanding the Process of Economic Change*, *op. cit.*, 47.

which North qualifies as productive: “...the responses (of such learning process) have not always been creative and productive. Sometimes, the way experiences have interacted with consciousness has led to institutions that resulted in stagnation with resultant human frustration in the context of more dynamic societies”.<sup>70</sup> In the context especially of the well-known work of B. Arthur,<sup>71</sup> North effectively highlights the phenomenon of *path dependence* which affects every learning operation: “Path dependence is a fact of history and one of the most enduring and significant lessons to be derived from studying the past. The difficulty of fundamentally altering paths is evident and suggests that the learning process by which we arrive at today’s institutions constrains future choices”.<sup>72</sup> How can one ensure that such change will work and that the learning operation will be *productive*, that is, will lead to the transformation of existing institutions required to meet the *intention* (normative expectation) that justifies this operation?

North’s response to this question—and this is the third element—has two aspects,

First of all, the key to “economic performance”—and therefore to successful learning—is the presence in a society’s institutional framework of institutions making possible and incentivising learning: “Put simply the richer the artifactual structure the more likely are we to confront novel problems successfully. That is what is meant by adaptive efficiency; creating the necessary artifactual structure is an essential goal of economic policy”.<sup>73</sup> And North gives examples here drawn from

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<sup>70</sup> *Ibid.*, 44.

<sup>71</sup> W.B. Arthur, *Increasing Returns and Path Dependence in the Economy*, Ann Arbor, Michigan UP, 1994.

<sup>72</sup> *Ibid.*, 77; see also this other helpful passage: “The interaction of beliefs, institutions, and organizations in the total artifactual structure makes path dependence a fundamental factor in the continuity of a society. Path dependence is not ‘inertia’, rather it is the constraints on the choice set in the present that are derived from historical experiences of the past. Understanding the process of change entails confronting directly the nature of path dependence in order to determine the nature of the limits to change that it imposes in various settings” (*Ibid.*, 52). As J. Knight and D. North say again, “belief systems exhibit path-dependence such that history matters, and this can significantly affect the trajectory of growth in economy. Our analysis has the following methodological implication: explanations of economic performance should place primary emphasis on social context as opposed to failures of individual cognition or rationality” (“Explaining Economic Change”, *loc. cit.*, 224).

<sup>73</sup> D. North, *Understanding the Process of Economic Change*, *op. cit.*, 70; “Successful economic development will occur when the belief system that has evolved has created a ‘favorable’ artifactual structure that can confront the novel experiences that the individual and society face and resolve positively the novel dilemmas. Failures will occur when the novel experiences that the individual and society face are so far removed from the artifactual structure of the evolved belief system that individual and society do not have the building blocks of the mind and artifactual structure to resolve the novel problems” (*Ibid.*, 69). “What I have termed adaptive efficiency is an ongoing condition in which the society continues to modify or create new institutions as problems evolve. A concomitant requirement is a polity and economy that provides for continuous trials in

history to illustrate this hypothesis. Thus, it is this that explains, he observes, the difference in economic performance between the Genoese traders and those of other contemporaneous Mediterranean societies. The cultural norms of the Genoese allowed the development of institutions adapted to a vast and complex market.<sup>74</sup> The capacity of societies to adapt and to adopt the institutional framework adapted to a new environment thus depends on existing institutions, not only the formal rules but also and especially the informal norms of the cultural belief system. The more the institutional framework develops cognitive competences, that is, learning capacities, the more productive its adaptation will be. One could even go further. North intuitively in some sense the “reflexive gain” of modernity. This is effectively what has also produced the particular economic success of the western world and its adoption of institutions characterized by the fact that they favour learning. North draws support here from Hayek in considering that “the best recipe for confronting such novel situations is the one that Hayek put forth many years ago and that has been the source of U.S. material success, which is maintenance of institutions that permit trial and error experiments to occur. Such a structure entails not only a variety of institutions and organizations so that alternative policies can be tried but also effective means of eliminating unsuccessful solutions. Adaptive efficiency evolves only after a relatively long period of evolving informal norms and we know of no shortcut to this process”.<sup>75</sup>

But at the same time—and this is the second aspect of his solution—North claims to be cautious also with regard to the perspectives opened by such a perspective. Not only with regard to the guarantee of future success of these institutions which have characterized the “United States’ societal development”,<sup>76</sup> but also and even especially because we no longer have, North emphasizes, a complete explanation of the operation by which one could “manipulate” cultural norms. The process by which this transformation is managed remains incompletely

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the face of ubiquitous uncertainty and eliminates institutional adaptations that fail to resolve new problems” (*Ibid.*, 169).

<sup>74</sup> “Avner Greif has done the most systematic study of the effect of cultural values upon economic performance in comparing Genoese traders with traders who adopted the cultural and social attributes of Islamic society in the Mediterranean trade of the eleventh and twelfth centuries. The traders from the Islamic world developed in-group social communication networks to enforce collective action. While effective in relatively small homogeneous ethnic groups, such networks did not lend themselves to the impersonal exchange that arises with the growing size of markets and diverse ethnic traders. In contrast, the Genoese developed bilateral enforcement mechanisms which entailed the creation of formal legal and political organizations for monitoring and enforcing agreements – an institutional/organizational path that permitted and led to more complex trade and exchange” (*Ibid.*, 75).

<sup>75</sup> *Ibid.*, 163.

<sup>76</sup> “...there is no guarantee that (this) flexible, adaptively efficient institutional structure will persist in the ever more complex novel world that we are creating. The ubiquity of economic decline of civilizations in the past suggests that adaptive efficiency may have its limits” (*Ibid.*, 169).

understood: “while formal institutions can be changed by fiat, informal institutions<sup>77</sup> evolve in ways that are still far from completely understood and therefore are not typically amenable to deliberate human manipulation”.<sup>78</sup> It is because knowledge of this process is still insufficient that we still have difficulties today in successfully grafting the institutional conditions which produced the current success of the rich economies onto other less productive societies.<sup>79</sup> “we still do not know how to create polities that will put in place economic rules with the correct incentives. We still have an incomplete understanding of the complex institutional and technologically interdependent structure of political economies which is necessary to improving their performance”.<sup>80</sup>

2. This position of North’s calls, in our perspective, for two comments which will allow us to see how he remains prisoner of what we have called, in commenting on the conception of learning developed by Marengo and Dosi, an *externalist* approach to learning.

A first comment concerns North’s methodological approach. Even if such a consideration may appear far from the precise question of learning and of the conditions of social change, it will allow us to make clearly understandable the “externalist presupposition” that North adopts *unconsciously* when he analyses these questions. Let us pause, then, for a moment at what will perhaps appear obvious to many but what ultimately is much more problematical than it seems. Two elements can be called upon here. A first directly concerns the theory of science. We have already cited North’s passage where he tells us that, in the domain of human actions, every naturalist (or biological) approach to selection necessarily ignores the “constructivist” dimension of intentionality. The decisions of humans are necessarily constructions of meanings submitted to a constant reinterpretation in accordance with the interaction with the environment. But if in the human domain one is always in a “belief” system, how do we understand North’s approach which aims to deploy an instrument external to a belief system in order to measure and evaluate the

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<sup>77</sup> “The intimate interrelationship of beliefs and institutions, while evident in the formal rules of a society, is most clearly articulated in the informal institutions – norms, conventions, and internally held codes of conduct. These informal institutions not only embody the moral codes of the belief system, which tend to have common characteristics across cultures, but also embody the norms particular to individual societies, which are very diverse across cultures” (*Ibid.*, 50).

<sup>78</sup> *Ibid.*, 50.

<sup>79</sup> “In a country without a heritage of formal and informal consensual political institutions, the road to an effective political system requires either an authoritarian ruler with an understanding, desire, and ability to put in place the necessary economic rules and enforce them, or the much more lengthy process of piecemeal development through non-governmental (NGOs) and effective foreign aid in which educational, health, judicial, or other assistance is effectively designed and delivered with the objective of transferring the essential knowledge and skills to the resident population” (*Ibid.*, 164).

<sup>80</sup> *Ibid.*, 168.

success of learning constitutive of the economic history of different cultures? North in effect evaluates the capacity of cultures to adapt themselves productively to the requirements of their “economic performance”. But why may one suppose that this “normative measure” can be defined externally to the cultural system which North recognizes determines all collective action? Is this not to suppose that the “meaning” of this intentional aim is not itself defined by the belief system of the social group which realizes the learning and can therefore be defined independently by a science—economics—which would have a meaning that is not linked to a belief system? The presupposition goes even further. In effect, is it not common sense that every aim to increase wealth by a social group is an aim which, simultaneously, is accompanied by a set of value judgements aiming to integrate other concomitant objectives? And it is the totality of these integrated objectives that defines the complex—and moreover inexplicit—objective which the social group is trying to realize. To isolate an objective and to define it according to measures provided by economic science such as are developed today is obviously an admissible approach. But to measure the success of the collective learning operations one supposes underlie every collective action, as North does, is a quite different matter. It supposes that one could define, from outside the social group, the *meaning* of the objectives that it assigns itself. It thus supposes that there would exist an “objective” measure of the meaning of a statement (of intentional action) which is external to the practice by which this statement is produced. Not only does this epistemological option of North’s appear incompatible with the culturalist constructivism he intends to adopt in order to explain his approach to collective action, but also and especially, this option rests on a form of externalist realism which has now become highly problematical since the work of Quine and of Putnam.<sup>81</sup>

The same approach—and this is our second comment—is found at the base of his approach to the theory of learning. It consists in supposing that the conditions of “success” of the learning operation are ultimately guaranteed by a mechanism external to that operation, a mechanism whose conditions of possibility are supposed as given and are not, therefore, the object of specific attention. This is what we have called an externalist conception of learning. What, indeed, is North’s model? If one endeavours to reconstruct this model, it seems that one may discover two basic ideas. A first idea may be distinguished if one endeavours to understand the conditions of possibility of success, according to North, of the collective learning that defines all collective action. One will recall that North considers that every

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<sup>81</sup> Quine and Putnam on the contrary are concerned to develop an “internalist” approach which is also called a “semantic holism” and, correlatively, to denounce every epistemological mentalism. The semantic holism and the rejection of mentalism consists precisely in considering that the meanings (that is, the intentional aims of the operation of judgement), far from being physical or computational entities located in the mind, are always dependent on the meaning of other elements whose meaning cannot itself be supposed fixed and determinable by the application of formal rules (see especially on this H. Putnam, *Representation and Reality*, chapter 1 “Meaning and Mentalism”, Cambridge (MA), MIT Press, 1988, 1-18).

social group is always in the process of adapting itself. But, as he refuses the reductive hypothesis of natural selection, he recognizes that operations of selection by learning do not lead to “efficient” forms of governance.<sup>82</sup> As has been seen, everything depends on the presence or otherwise, within the social belief system, of institutions (formal or informal norms) which enable the learning required by the nature of the new problems with which the social group is confronted. The more a social group accumulates cognitive experiences rendering it able to experiment with new solutions adapted to the nature of new problems to solve, the greater the chances it will have to realize efficient learning. And the word “chance” is appropriate here. Moreover, North himself says it expressly with regard to the success of the learning that led the US to select the productive institutional system. Such a development, North notes, “was more good fortune than intent”.<sup>83</sup> Note that this position of North’s does not contradict his desire to account for collective action and for processes of social change in terms of the intentionality of human action. The intentional dynamic means that human history, through the action of culture, is deployed as an intentional activity of constant learning. Humanity is supposed as engaged in a constant activity of the reinterpretation—and thus of the increase of its stock of knowledge—of its symbolic systems with a view always to adapt itself better and thus to be more productive in the realization of its objectives. Of course, individual humans are the actors in this collective process. But the intentionality of agents is itself predetermined by the intrinsic possibilities (path-dependence) of the form of social knowledge which constitutes the “cultural network” in which they are rooted. “Good fortune” therefore emerges from the properties of this network. North basically takes up here the classical argument of economic approaches to selection that one also finds in Marengo and Dosi: the “performance” of a selection by learning is a function of the initial elements: one can only select what already exists. What must exist, North emphasizes, is a cognitive practice capable of adequately resolving the problem. Thus, if the Genoese traders were capable of being economically more productive than their “Islamised” colleagues, it is because they were no longer subject to forms of communitarian responsibility.

But a second idea complexifies North’s system. In the end, North himself seems dissatisfied with this simple idea of a collective intentionality submitted to the game of chance. His presupposition of a “learning” historical intentionality brings him to envisage a second operation in order to define the conditions of performance of collective learning. In contrast to Marengo and Dosi, he does not have recourse to the idea of a hierarchical social mechanism to “extend” the strategies available *ex ante*. But adopting the classical “technological and formalist” approach of modern

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<sup>82</sup> That is to say, in North’s objectivist language, which are economically productive, and in our more internalist language, which maximize as far as possible the satisfaction of the normative expectations of its members (=governance in the public interest).

<sup>83</sup> *Ibid.*, 169.



science,<sup>84</sup> he asserts that scientific research must be pursued in order to reveal the internal mechanisms which would allow the “manipulation” of the informal norms which constitute the culture and thus to control the intentional operation of learning which constitutes all collective action. This is precisely the meaning of the formulae we have recalled above (cf. notes 77-79). Modern western society has already been able to benefit, thanks to the multiplication of its cognitive practices, from a form of reflexive gain: this society, better than any other, has been able to equip itself with institutions managing society as a society consciously organised with a view to learning. But, North recognizes, this gain in reflexivity does not guarantee its perpetuation. It is possible that this success will stop. These institutions do not guarantee that new future problems will be resolvable with the aid of the same cognitive practices. One is therefore still in the “frequency-dependent” selection mechanism.

By contrast, North’s implicit position is that this still incomplete reflexive gain may eventually be extended thanks to the development of science—a better understanding of the operation of the “human manipulation” of informal norms.<sup>85</sup> A supplementary—and perhaps definitive—“reflexive” gain could be achieved: it would allow an assured control of the operation guaranteeing the success of the learning process; it would thus allow society to learn how to learn. By developing the scientific understanding of the formal mechanisms of the operation of intentionality, one would thus be able to “manipulate” *technologically* social nature just as physical or biological science allows us to “manipulate” Nature. Such a position, which seems to us to be implicitly linked to North’s positions recalled above, is quite coherent with his conception of the collective intentional subject which he summons on the basis of this theory. The idea of a culture as constant learning by a humanity engaged with its always new environment is ultimately a subject endowed with a capacity and a desire to learn which leads, by the very logic of cognitive accumulation, to the desire and the ability eventually to acquire the knowledge of the laws of its own intentional operation.

It is precisely here that one again sees, as in Marengo and Dosi, albeit less radically, the recourse to an exterior which will ensure the conditions of success of the learning operation. The exterior here is ensured by the historical dynamic of the collective subject, that is, by the hermeneutic dynamic of culture. The position is, however, less radical because North conceives this dynamic, not only as still incomplete, but also and especially on the basis of the classical mode of modern reflexivity: it is by a return of the intentional subject on the laws of its own intentionality (learning to learn) that the conditions of a finally controlled self-regulation are overcome. This approach certainly recalls that form of reflexive

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<sup>84</sup> Which is obviously not without links with his very classical epistemological conception of externalist realism.

<sup>85</sup> In a similarly explicit manner, North speaks of a better elucidation of what he calls the “sources of human decision-making” (*Ibid.*, 70).

modernity discussed by U. Beck and A. Giddens; this anticipates the approach of pragmatist experimentalism that we will examine below. But, in contrast to this pragmatist experimentalism, North does not intuit the need to try to internalise the necessary conditions of such a reflexive gain: this gain is supposed to be acquired by the dynamic of science, that is, by the internal dynamic of the requirements of the intentionality of history.

The institutional consequences at the level of the theory of governance are certainly not non-existent. Of course, as we know, North has not really discussed this question.<sup>86</sup> His proposal is either more theoretical or from the economic historian. But this externalism at the level of the theory of learning perhaps explains why the transaction cost economists, who rightly wish to integrate the advances North has enabled in the theoretical framework of neo-institutionalist economic theory, end up considering the mechanisms which compensate for the deficiencies of a pure decentralised coordination on the basis of the hierarchical model of a recourse to the public authority. A particularly representative model perhaps appears in the work of E. Brousseau on the regulation of the Internet.

3. The idea of a hierarchical framing of the development of the digital economy, advanced especially by E. Brousseau,<sup>87</sup> effectively adopts the major characteristics of a model of governance such as one may conceive on the basis of North's approach, and aims to ensure the control of the operation guaranteeing the success of the process of social learning. The main issue for Brousseau is to arrive at a better account of the selection processes already implemented by economic agents themselves in order to integrate them in a better account of the constraints exerted by the institutional framing of individual behaviours to the extent that these operate as frameworks for selection processes.<sup>88</sup> Let us start with the example of the digital economy in order to apply this schema.

On the one hand, there are opportunities for growth which are concentrated in the technological bubble emerging from the digital society. These result in essence

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<sup>86</sup> Recall, however, the citation above in n. 79: there is a position there which is typical of the politics fashionable today in the domain of international institutions and which, supposing the efficiency of the activities of NGOs, ignores an important question: why is it that the effects of the action of NGOs in the countries one is trying to transform would not also be a function of such actions by the members of the host country; why, therefore, is it that “the essential knowledge and skills (transferred) to the resident population” would not be reinterpreted according to the perceptions of the “belief system” of that population?

<sup>87</sup> E. Brousseau, “Régulation de l’Internet. L’auto-régulation nécessite-t-elle un cadre institutionnel?”, *Revue Economique*, 52 (2001), Hors Série : “L’Economie de l’Internet”, 349-377 ; and E. Brousseau et N. Curien, “Economie de l’Internet, économie du numérique”, *ibid.*, 7-36.

<sup>88</sup> E. Brousseau, “Processus évolutionnaires et Institutions : Quelles alternatives à la rationalité parfaite ?”, *loc. cit.*, 1206-1207.

from a set of socio-historical factors of a similar order to those which encouraged the emergence of financial capitalism in the Genoese families in Machiavelli's time. One could say that in the same way that "the Genoese developed...mechanisms which entailed the creation of...organizations for monitoring and enforcing agreements – an institutional/organizational path that permitted and led to more complex trade and exchange"<sup>89</sup>, so the digital society has created a new set of behaviours which have allowed the emergence of a new framework of cooperation and exchange, symbolized in particular by the development of the open source society.

On the other hand, it is necessary to stabilize such a process in order to guarantee the perpetuation of learning and to avoid its capture by particular interests to the detriment of social development as a whole. In the domain of the Internet, the risk is in effect all the more tangible given the rapid pace with which new problems emerge whether at the technical or at the political level.<sup>90</sup> Even at the simple level of the coordination of the technical operations allowing the development of the system, the question quickly arises of an optimal mode of framing and of control allowing the preservation of the interests of an increasing number of users in the face of the formation of de facto monopolies capable of diverting the development of the system to their advantage and of simultaneously diminishing its potential for diversification and innovation.<sup>91</sup> In order to avoid this risk, it is considered necessary to "frame" the norms established in a decentralised manner in order to mitigate their "incompleteness", that is, to ensure that the chances of opportunistic behaviour are sufficiently reduced and that future access to new growth opportunities is thus kept open. A third-party mechanism accordingly seems necessary to ensure a

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<sup>89</sup> D. North, *Understanding the Process of Economic Change*, op. cit., 75.

<sup>90</sup> "The essence of the debate over ICANN's Mission lies in the nexus between ICANN's technical coordination role, its operational role, and its policy role. There are some who see ICANN as merely an agent to carry out technical, operational instructions. The ERC does not support this view because it leaves unanswered the question of responsibility for the policy-development work necessary to provide answers to precisely what instructions should be followed, that is, answering the question: 'if not ICANN, then who?' We have not found any credible answers to that question offered by those who favor a purely technical operational ICANN, other than transferring such responsibilities to some international treaty organization, a direction that is viewed with disfavor throughout most of the community (as judged by the comments we received), or to a constellation of organizations that would again beg the question of who will coordinate these organizations' (Committee on ICANN Evolution and Reform, "ICANN: A Blueprint for Reform", 20 June 2002, downloadable on <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm>).

<sup>91</sup> Thus, in 1997, the President of the USA adopted a directive on electronic commerce recommending "to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis" (M. Mueller, *Ruling the Root, Internet Governance and the Taming of Cyberspace*, MIT Press, Cambridge (MA)/London, 2002, p. 157; Mueller refers to the directive of the president W.T. Clinton and the vice-president A. Gore Jr., "A Framework for Global Electronic Commerce", The President's Information Infrastructure Task Force, 1st July 1997).

hierarchisation of the rules: this must guarantee the *extrapolation* towards the widest possible interest of a community of the system's users and, in this way, reinforce the development of the system (frequency dependent). It is such a mechanism that E. Brousseau proposes. He proposes to create a hierarchy between, on the one hand, different private and specific institutional frameworks which could elaborate "collective coordination solutions", "applying to more specific types of case",<sup>92</sup> and, on the other hand, a final regulatory tribunal which must settle disputes between the rules and private norms.

This tribunal would not have the function of directly commanding the contents of the solution which the actors would have to envisage. It acts from the exterior in order to arrange conflict resolution procedures and in this way to keep open the possibility<sup>93</sup> of validating new goods and products and new behaviours in their potential extension. In this proposition of hierarchical framing, the third-party dispute resolution mechanism certainly aims to "take account of the widest possible interest of the community",<sup>94</sup> but by limiting the role of the framing arrangements to favour the negotiation between the actors *already engaged*. This mechanism thus aims to complete the network's capacity for openness in order to avoid the possibility that self-regulation is not diverted by particular interest groups. With regard to the internal capacity for openness, it is thus supposed as given. It is effectively supposed, in such a framework, that the particular "virtual" communities already manifest a principle of openness in their operation. The idea here is that the *culture of use* of these communities involves the generation of externalities which have implications beyond their own interests, such as that of allowing the diffusion of information in the public interest linked to education or to non-profit organisations, or of allowing citizens access to certain services, etc.<sup>95</sup> Moreover, the opportunist monopolising of these "public goods" by certain users may already be sanctioned in relatively large communities by a certain management of directories and of means of access to the network.<sup>96</sup> But this mechanism of openness can prove to be incomplete faced with certain unforeseen ethical situations (how to forbid access to racist sites) or faced with certain monopolistic tendencies inherent in the management of the scarcity of available addresses and of available traffic capacity.

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<sup>92</sup> E. Brousseau, "Régulation de l'Internet. L'auto-régulation nécessite-t-elle un cadre institutionnel ?", *loc. cit.*, 370.

<sup>93</sup> Formally by State guarantee, concretely by the combined rejection of monopolizing strategies and of de facto monopolies.

<sup>94</sup> E. Brousseau, "Régulation de l'Internet", *loc. cit.*, 370.

<sup>95</sup> *Ibid.*, 12. Cf. also, for an analysis of positive externalities specific to network public goods, the work of Adrienne Héritier (see, for example, A. Héritier, "After Liberalization: Public Interest Services in the Utilities", in *Preprints aus der Max-Planck-Projektgruppe, Recht der Gemeinschaftsgüter*, Bonn, n° 5, 1998, available at <http://www.mpp-rdg.mpg.de/publik1.html>) and the Max Planck project on network public goods directed by Adrienne Héritier and Christoph Engel (cf. the presentation on the website at <http://www.mpp-rdg.mpg.de/netgood.html>).

<sup>96</sup> *Ibid.*, 360.

This is why a *third-party mechanism* of dispute settlement and of “monitoring” against monopolistic behaviours is necessary in order to reinforce and maintain the network’s capacity of openness which is already evident at the level of the self-regulation of different communities of users. What is involved in the hierarchisation is thus the capacity to “supervise self-regulation” so that “the dynamic of the competing processes is guaranteed in the long term”.<sup>97</sup>

The formula used by Brousseau can therefore be reduced to a proposal for action at two levels: on the one hand, favouring the proliferation of self-regulation mechanisms based on the aggregate competences of the actors (the famous “culture of use”) so as to complete the contractual arrangements; on the other hand, also to construct, on the model of a negotiated decision (of the alternative dispute resolution mechanism variety), a third-party mechanism of regulation of the common good, endowed with control powers. This role could be fulfilled by specialized intermediary institutions: closer to the practices of a particular domain of activity (shared meanings), more able to circulate information so as to reduce opportunist behaviours, and more effective in the resolution of disputes specific to the domain in question.<sup>98</sup> In its brief existence, it is in fact in this role that ICANN has obtained greatest recognition and reinforced the interest in a form of hierarchical framing of the sector where commercial disputes may be amicably settled.<sup>99</sup> The third party mechanism of hierarchical framing enables processes of alternative dispute resolution (ADR).<sup>100</sup>

The prevalent reasoning in the neo-institutionalist economic movement has consisted in taking account of the specificity of a culture of technical innovation linked to the free diffusion of information in the technical community in order to try to frame this “Genoese” process of self-development and to avoid limiting its chances of survival by the simple reproduction of contractual mechanisms directing competition on the market. The hybrid mechanism consists in constructing

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<sup>97</sup> E. Brousseau, "L'auto-régulation des réseaux numériques : quelques réflexions d'économiste", *Les Cahiers du Centre de Recherches Informatique et Droit*, n° 22, 2002, 127-132, 132.

<sup>98</sup> E. Brousseau, “La gouvernance des processus de coopération”, in C. Voisin, A. Plunck and B. Bellon (eds), *La Coopération Industrielle*, Paris, Economica, 2000, 29-43, 42.

<sup>99</sup> M.A. Froomkin, "ICANN's “Uniform Dispute Resolution Policy” – Causes and (Partial) Cures", 67 *Brooklyn Law Review*, (2002), 605-718.

<sup>100</sup> However, by using the control of Internet addresses as a lever of global information public policy, ICANN has perhaps provided the regulatory schema for a new social order seeking to combine the technical neutrality and the weak legitimacy of governance mechanisms based on the self-regulation of the majority actors (A. Klein, "ICANN et la gouvernance d'internet, La coordination technique comme levier d'une politique publique mondiale", *Les Cahiers du numérique*, 3 (2002), n° 2, 93-128, 122-123). But it has simultaneously favoured an awareness with regard to the inefficiency of these mechanisms from the point of view of defence of the interests of the widest possible community of users (cf. M.A. Froomkin, "Habermas@Discourse.net: Toward a Critical Theory of Cyberspace", 116 *Harvard Law Review*, (2003), 751-871 ; ID, "ICANN 2.0 : Meet the New Boss", 36 *Loyola of Los Angeles Law Review*, (2003), 1087-1101).

coordination arrangements (dispute resolution mechanism) allowing the innovative culture to select from among offers of contractual relations a set of measures preventing the capture of common resources by exclusive property rights. In this regard, the public authority plays a supporting role in relation to the intermediary coordination mechanisms and a monitoring role to mitigate the risks of collusion<sup>101</sup> and thus to safeguard the interest of all the potential users of future developments.

If one tries to analyze the approach thus followed by E. Brousseau, one clearly sees that it rests on a dual characteristic which allows us to see how it remains inscribed in what we have called the first step of the contemporary dynamic of research in the theory of governance, that is, the neo-institutional economic approach. The first characteristic can be placed in parallel with the “Northian” reference of Brousseau’s reasoning, that is, the particularly strong (even if highly problematical) supposition of a given capacity (as in the Genoese traders of North’s example) of the reflexive self-development of the community of users of the Internet. This supposition ultimately explains the very *economic* approach to negotiation, that is, an approach which remains inspired by the theory of rational choice and which sees competition as a coordination by negotiated compromise. The supposition of a culture of use guaranteeing by itself the capacities of self-development and of learning required by the best possible (and thus not necessarily optimal) satisfaction of the normative expectations of the members explains, in effect, why, in contrast to the second and third steps (sections 2 and 3 below), a specific attention to the resources—that is, to the conditions—necessary for the interaction to produce the effects of self-development and of learning is not questioned further because one supposes these conditions as given from the start. Of course, the self-regulation is supposed as incomplete. But the first supposition explains how this incompleteness is understood and the externalist dimension on which the solution to this incompleteness is conceived. The incompleteness remains considered in the traditional terms of opportunist behaviour and of the necessary “imposition” of a framework of competition or of negotiation. Even if one aims to escape the traditional schema of hierarchical intervention by way of commanding the “content” of good behaviour and one thus refers to an arrangement for negotiation between actors, the approach remains profoundly externalist. In effect, on one hand, it is difficult to see the differences between such an activity of “control” and “monitoring” and Ullmann-Margalit and Sholler’s recourse to Hobbes’ Leviathan in order to guarantee the cooperative solution and to safeguard respect for competition law by eliminating monopolistic behaviour. But, on the other hand, even supposing that one considers that this intervention expresses a specificity in relation to the traditional “power of sanction” of the hierarchical State, this leads to a relatively “weak” ADR approach which it would be necessary to impose on the actors engaged in disputes. The simple fact of a formal dispute resolution framework—of the sort that we know today, for example, within the WTO—is

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<sup>101</sup> E. Brousseau, “La gouvernance des processus de coopération”, *loc. cit.*, 43.

supposed to be able to ensure the adequate cooperative solutions required for the adequate self-development of the community of Internet users. This is why one can suppose that the simple fact of the imposition of such a framework by an external authority would be sufficient to ensure respect for the conditions for “good governance”. The concept of “negotiated competition” is not at all developed with regard to the conditions required *either* at the level of an extension of the participants necessary for such a negotiation *or* at the level of the conditions required to guarantee the emergence of a common culture of confidence *or* at the more general level of the conditions of “empowerment” *or finally* at the level of the conditions which would allow the development of a common culture of learning. As we will see below, like Williamson, Brousseau, as a transaction cost economist, even if not explicitly such, makes a “restrictive” use of the relational theory of contract and is prevented from developing a more extensive approach to the conditions required by a more extensive approach to the relationality of contracts such as that developed, for example, by P. Vincent-Jones in the framework of a “relational and collaborative approach to governance”.

One can even detail further the scope of this “externalist” approach to learning which underlies this analysis in terms of transaction costs, whatever the contribution already made by the attention to the role of intermediary mechanisms associated with ADR arrangements in Brousseau’s schema. Such intermediary arrangements are thus limited to enabling the elaboration of “collective coordination solutions”.<sup>102</sup> It is the third party mechanism of organizational framing that is supposed to allow, alone and from the exterior, a redefinition of roles and of codes in the collective search for solutions. The hybridisation allows protection, in one game, against vulnerability to opportunist entrants and, in another game, against the capture of the cognitive motivation by overly-high institutional framing costs. The problem of coordination is thus supposed to be capable of being settled simultaneously at the individual level and at the collective level.<sup>103</sup> The solution consists in the hierarchisation of the two functions: one inherent in the organizational experience and the other in the cognitive capacities of the actors, the first being supposed as entailing the second. The process of organizational framing allowing the selection of the most effective solutions is supposed to entail a logic of anticipation in the actors concerned which allows them to foresee “the result of the process of selection and to integrate this foresight in their choices”.<sup>104</sup> The extrinsic reference to hierarchical

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<sup>102</sup> E. Brousseau, “Régulation de l’Internet : L’auto-régulation nécessite-t-elle un cadre institutionnel ?”, *loc. cit.*, 370.

<sup>103</sup> *Ibid.*, 40. The arrangement is considered to be “capable not only of channelling individual behaviours, but also of accumulating experience and of allowing experimentation” (E. Brousseau et A. Rallet, “Une nouvelle pratique de l’interdisciplinarité ? Quelques réflexions à partir d’innovations et Performances”, *Revue Economique*, 49 (1998), 1601-1611, 1609).

<sup>104</sup> E. Brousseau, “Néo-institutionnalisme et Evolutionnisme : Quelles convergences ?”, *loc. cit.*, 201.

objectives is supposed to complete the innovative effect of the initiatives based on decentralised participation and intrinsic motivation.<sup>105</sup> But at the same time, it also has the effect of “decompleting” the political culture of centralised control of collective processes in order to “imagine organs of public regulation capable of understanding the singularity of the issues and the practices” specific to the actors’ situations of inventiveness.<sup>106</sup>

If Brousseau often refers to North, it is nevertheless necessary to clarify that what subsists from the Genoese process identified by North, and which we have applied by analogy to the actors involved with information technology, is the “augmentation of the capacity to play”<sup>107</sup> of one part of the actors concerned by the traditional economic regulations of this market. Faced with such a situation, the main issue for Brousseau is to “avoid the locking” of this dynamic and innovative population around inefficient equilibriums. The advantage of recourse to an externalised third party mechanism in this situation consists in acting upon the institutional design rather than intervening directly on the practices in order to favour the implementation of flexible arrangements between the actors, who could thus once again increase their chances of making their networks denser and of interconnecting while running fewer risks.

The advantage of the external mechanism is to keep open the principle of the *amendability* of the institutions in accordance with the injunctions of the social context. Public action can thus be organised on two levels: the attention to favour the adaptation of institutional design; and the attention to avoid the capture of these

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<sup>105</sup> The sector of free software (D. Foray et J.-B. Zimmerman, "L'économie du logiciel libre, Organisation coopérative et incitation à l'innovation", *Revue économique*, 52 (2001), HS, 77-93) offers, on the contrary, an example of a proposition with regard to governance which suggests doing without such an “extrinsic” reference to hierarchical objectives. In effect, Foray and Zimmerman no longer present mechanisms favouring an external regulation of new public good to be protected. They suggest instead another way which consists in exploring mixed arrangements which would allow private operators and restricted innovative communities to engage with a hierarchical framework on common issues (intermediary arrangements). According to this second way, the State is no longer charged with intervening as a referee in order to protect a new type of collective good from capture by opportunist interests, but it proposes a framework to resolve conflicts which directly call into question the diversity of the development and the widest possible accessibility of the resources of the information society. The third party mechanism is thus shifted towards the guarantee of exchange of knowledge between operators appealing to licences and the developers of free software (J.E. Post, "Moving from Geographic to Virtual Communities: Global Corporate Citizenship in a Dot.com World", *Business and Society Review*, 105 (2000), n° 1, 27-46, 36-38). What is therefore presupposed is that the third party mechanism will be sufficient to enable the adjustment of practices and to elaborate reciprocal expectations. In such a perspective, to proposed approach to governance is already closer than Brousseau’s to the model we have identified as the second step in the dynamic of current research in governance and which we qualify as a “relational and collaborative approach to governance” (cf. below section 2).

<sup>106</sup> E. Brousseau, "La gouvernance des processus de coopération", *op. cit.*, 43.

<sup>107</sup> E. Brousseau, “Processus évolutionnaires et Institutions : Quelles alternatives à la rationalité parfaite ?”, *loc. cit.*, 1206, n.3.



opportunities for flexibility through collusion between actors. This action serves to complete the process of coupling the dynamic of innovation and of flexibilisation in institutional frameworks.

The external mechanism is thus supposed to be able to mitigate a sort of “endemic ignorance” of the actors with regard to optimal institutions: since one cannot judge a convergence of institutional choices towards optimality, it is necessary to act on the frameworks which orient these choices by limiting the possibilities that may be envisaged. This selective property of frameworks comes from their process of formation or social emergence. It is this process which, in the end, determines the possibilities of choice by increasing or decreasing the capacity of adaptation or of self-amendment of a given framework. The shift that is effected in relation to North is precisely in the way in which the action on the process of formation of frameworks is extended. In Brousseau, this is reduced to the transformations of institutional design following the presupposition that it is sufficient to pay attention to the requirement for flexible arrangements in order to prefer institutional frameworks enabling this flexibility. In North, the requirement for a progressive control of processes of innovation thanks to the transformation of institutional frameworks is supported by a search for the metastabilisation of social reflexivity which is therefore not supposed as given, but which supposes the capacity to construct it on the basis of the development of the social culture of innovation and adaptation. It is in this way, according to North, that the conditions for a finally controlled self-regulation could be met. In contrast to Brousseau, North therefore perceives the necessity for a better accommodation of the operation guaranteeing the adaptability of institutional frameworks, even if believes, as has been seen above, that this operation will be able to be acquired and constructed in itself by the simple evolution of scientific culture.

## Section 2: The second neo-institutionalist approach: Towards a relational and collaborative governance through dialogue.

### §1 Background

If we work to reconstruct the current process being conducted by those who reflect on the question of governance (or regulation),<sup>108</sup> we can, we believe, identify two recent efforts to deepen and indeed surpass the neo-institutionalist approaches developed by economists. While not ignoring the economists' debate, these efforts nevertheless rarely rely directly on them.<sup>109</sup> In fact, the theoretical instruments used to build approaches to governance are largely borrowed from other disciplines than those made use of by evolutionary and transaction cost economists. The three-stage reconstruction of the internal dynamic of current research is therefore not immediately apparent solely from a reading of the relevant literature. Reconstruction of their shared dynamic and a comparative evaluation will only emerge from our adoption of an external perspective on the three processes. This perspective consists of examining the various current approaches to governance (or regulation) from the point of view of the theory of collective action they explicitly or implicitly make use of. As we have seen, the first stage includes responses by evolutionary and transaction cost economists to approaches from neoclassical economics and agency theory that are deemed reductive or incomplete. Two other responses that embody a

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<sup>108</sup> As we know, the term “governance” is currently often used in preference over “regulation”, or, in other contexts, “government”. As M. Hajer and H. Wagenaar point out in their introduction to the excellent recent collection they edited on the subject of governance in a network society, “[T]he emerging vocabulary of governance speaks to a widely acknowledged change in the nature of politics and policymaking. The prominence of the new vocabulary also illustrates a widespread dissatisfaction with the limited reach of ‘set solutions’ to thorny political issues imposed through top-down government intervention” (“Introduction”, in *Deliberative Policy Analysis*, Cambridge, Cambridge UP, 2003, 2; these same authors appropriately refer readers to a collection edited by J. Pierre for an analytical overview of this terminological change within the scholarly community: *Debating Governance*, Oxford, Oxford UP, 2000). This does not, however, prevent certain authors whose works are at the heart of the current reflection on decentered forms of governance from continuing to use the word regulation. For example, see the work of J. Black (“Decentering regulation: Understanding the role of regulation and self-regulation in a ‘post-regulatory’ world”, *Current Legal Problems*, 54 (2001), 103ff.).

<sup>109</sup> We must, however, point out a notable exception. C. Sabel has developed his own pragmatist experimentalist undertaking (on which, see below section 3), making direct reference in particular to alleged inadequacies of the neo-institutionalist economic approaches. Two of his texts especially testify to this purpose: C. Sabel and J. Zeitlin, “Neither Modularity nor Relational Contracting: Inter-firm Collaboration in the New Economy”, *Enterprise and Society*, vol.5, n°3, 388ff.; C. Sabel, “A Real Time Revolution in Routines”, in *The Firm as a Collaborative Community: Reconstructing Trust in the Knowledge Economy*, C. Heckscher and P. Adler (eds.), New York, Oxford University Press, 2006, 106-156.

progressive deepening of this first stage emerge mainly from the work of jurists and political scientists.

A convenient way of presenting the main features of these latter two responses is to situate them in relation to the discussion raised in the judicial and political science literature by the movement to proceduralize law and politics, which gained strength in the USA during the fifties and subsequently spread to the world's social democracies. This movement brought about a significant transformation in the ways public action is exercised, in order to ensure broader participation by citizens and interest groups and thereby develop a more *responsive* judicial system<sup>110</sup> and a more participatory model of political life. We have written elsewhere<sup>111</sup> about the dynamic opened up by that development and we will not revert to the topic here. In any case, it is now generally familiar. We will only recall that, beginning with the seventies, the first form for restructuring public action that was proposed – group interest politics<sup>112</sup> – was subjected by economists to a significant critique. The idea behind this critique was simple: it was a matter of questioning the presuppositions of the procedural approach advocated by interest group politics.<sup>113</sup> Not only, economic critics said, did interest groups act on the public stage solely from a strategic perspective, so that public action was often monopolized by the most powerful groups. But as well, nothing guaranteed that the compromises resulting from such a public decision-making process would satisfy the requirements of an optimizing

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<sup>110</sup> This is the expression that has been used since 1978 by two authors who were among the first to attempt a reflection on this development from a sociological perspective, namely P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law*, New York, Harper and Row, 1978.

<sup>111</sup> J. Lenoble and M. Maesschalck, *The Action of Norms, op. cit.*, Chapter 1, Section 1.

<sup>112</sup> Inherited from the pluralist political theory of the fifties known as interest group politics, group interest politics was based on the idea of ensuring the rationality of public policy developed by the administration by enabling all the concerned interest groups to provide the authorities with their input and thereby making regulatory compromises possible. This led judges to subordinate the legality of administrative actions to respect for the procedural conditions guaranteeing this form of participation. In a parallel development, judges themselves, in the context of a dispute on fundamental rights (principally that of respect for racial equality), were enabled to carry out new kinds of intervention (within public law litigation). The goal, in the context of certain public policies (those relating to the management of prisons, public sector housing, hospitals for the mentally ill, etc.), was to create negotiating spaces, under judges' ultimate supervisory control, in which to develop the substantive conditions which public policy had to satisfy to ensure the effective implementation of the rights to equality and human dignity. Thus, whether at the level of judges or of administrative authorities, the conditions for rationality of public policy (legitimacy and efficiency) were presumed met by the opportunity provided to concerned interest groups to communicate their views.

<sup>113</sup> See especially E. Elhauge, "Does Interest Group Theory Justify More Intrusive Judicial Review?", in *Yale Law Journal*, 101, 1991, 31ff. See also the well known articles by R. Stewart, "The Discontents of Legalism: Interest Group Relations in Administrative Regulation", in *Wisconsin Law Review*, 1985, 655ff.; and R. Stewart, "Madison's Nightmare", in *University of Chicago Law Review*, 57, 1990, 335ff.

rationality. Finally, such a model for collective organizing remained unalterably dependent on the command-and-control regulatory model and consequently reproduced its unintended consequences. Although this critique evolved and gained strength using the theoretical tools provided by agency and transaction cost theory, a third perspective evolved alongside it. This last perspective sought to integrate and synthesize the dual dynamic opened up by group interest politics and its economic critique.

Since the nineties, numerous authors have stressed, like J. Braithwaite and I. Ayres,<sup>114</sup> that “the regulation-deregulation dichotomy has long outlived whatever usefulness it may have had: it is no longer very useful to speak in terms of governmental versus private institutions. Instruments of public policy appear increasingly to involve a blend of public and private resources.”<sup>115</sup> We believe that in relation to the research opened up by this third perspective, it is possible to identify two new approaches to governance that have worked to deepen how neo-institutionalist economists understand the conditions needed for collective action to maximally satisfy the normative expectations of its members. Three factors define the process that underlies these approaches.

1° The first factor consists of an endorsement of the critique, initiated by economists, of the unintended consequences of what is customarily referred to nowadays as command-and-control regulation. Whatever the theoretical way of constructing the argument, the basic idea is that this traditional form of regulation suffers from a fundamental weakness: it cannot anticipate the effects of its application. The operation of applying a rule is in fact autonomous, and cannot be anticipated by the intentionality that governs choice of the rule by the hierarchical authority in place. For this reason, if it is desired to adapt the regulatory procedures by incorporating factors that will condition how the regulation will be applied, forms of *decentering regulation* must be organised.<sup>116</sup>

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<sup>114</sup> J. Braithwaite and I. Ayres, *Responsive Regulation: Transcending the Deregulation Debate*, New York-Oxford, Oxford UP, 1992.

<sup>115</sup> P. Grabovsky, “Using Non-governmental Resources to Foster Regulatory Compliance”, *Governance: An International Journal of Policy and Administration*, vol. 8, n°4, October 1995, 529.

<sup>116</sup> As J. Black summarizes: “As many have noted, ‘command-and-control’ is more a caricature than an accurate description of the operation of any particular regulatory system, though some are closer to the caricature than others. Essentially the term is used to denote all that can be bad about regulation: poorly targeted rules, rigidity, ossification, under- and over-enforcement, unintended consequences. The extent to which command-and-control does or does not live up to its caricature is an empirical question which has been debated elsewhere (see R. Baldwin, “Regulation after Command-and-Control” in K. Hawkins, ed., *The Human Face of Law*, Oxford, Oxford UP, 1997; N. Cunningham and P. Grabovsky, *Smart Regulation: Designing Environmental Policy*, Oxford, Oxford UP, 1998, 38ff.) Relevant for our purposes, command-and-control regulation posits a particular role for the state against which ‘decentring’ analysis is counterposed. It is ‘centred’ in that it assumes the state to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling. It is assumed to be

2° However, decentralization is conceived from a different perspective than that from which economists usually address it. Viewing private actors as simple maximizing agents, even with limited rationality, as conceived by H. Simon, is here deemed too reductive. Instead, emphasis is placed on the communicative resources the various actors possess, which, if deployed and set in motion, make it possible to ensure the adjustments required to solve the problems a social group is continuously faced with. The form of governance here sought as a replacement for classical hierarchical forms (consisting of unilateral decisions made by the public authorities) is thus conceived on the model of an aggregation of the various actors' communicative competencies. What is needed is to set up negotiated forms of decision-making. The various actors' participation thus takes the form of a collaboration and dialogue organized among the actors involved. As R. Stewart has written, “[V]arious forms of flexible agency-stakeholder networks for innovative regulatory problem-solving have developed in order to avoid the limitations of top-down command regulation and formal administrative procedures.”<sup>117</sup>

Thus a displacement takes place. Granted, it is not a matter of giving up either the participatory dynamic specific to group interest politics or the usefulness of economic incentives. Rather, the emphasis will now be on planned organization of the collaboration among the actors involved. J. Freeman thus quite rightly points out, “[W]hile it is undoubtedly possible to show there are elements of interest representation in collaborative governance, I distinguish them to underscore that collaboration requires us to focus on adaptive problem solving whereas interest representation seems riveted on controlling agency discretion.”<sup>118</sup> In the same vein, she notes as well that the formal administrative procedure used in the framework of group interest politics “also undermines the implementation of rules by failing to

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unilateral in its approach..., based on simple cause-effect relations, and envisaging a linear progression from policy formation through to implementation. Its failings are variously identified as being, inter alia, that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (information failure), that implementation of the regulation is inadequate (implementation failure), and that those being regulated are insufficiently inclined to comply (motivation failure)” (J. Black, “Decentering Regulation: Understanding the Role of Regulation and Self-regulation in a ‘Post-regulatory’ World”, *loc. cit.*, 105-106).

<sup>117</sup> R. Stewart, “Administrative Law in the Twenty-First Century”, *NYU L.Rev.*, 78 (2003), 448; R. Stewart provides a few examples of these new forms of regulatory device: “agency-supervised regulatory negotiation among representatives from industry, public interest, and state and local government to reach consensus on new agency regulations outside the formal administrative law rulemaking processes; cooperative arrangements involving governmental and nongovernmental entities in delivering family services or administering medicare, and negotiation, in the draconian shadow of the Endangered Species Act, of regional habitat conservation plans by federal natural resource management agencies, private landowners, developers, and state and local governments” (*ibid.*, 448-449).

<sup>118</sup> J. Freeman, “Collaborative Governance in the Administrative State”, *UCLA L.Rev.*, 45 (1997), 6.

encourage dialogue and deliberation among the parties most affected by them. This is one of the key criticisms that motivated proposals for stakeholder negotiation of rules. Reformers believed that if parties had no 'ownership' over the rule-making process, they would be less likely to view rules as legitimate.”<sup>119</sup>

True, this results in an emphasis on the need to privatize certain forms of governance, as the economists suggest. This privatization, however, is conceived from a different perspective than that of economic theory.<sup>120</sup> Although, as will be seen below, the theoretical frameworks developed by various authors who subscribe to this approach to governance vary – ranging from systemic functionalism through

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<sup>119</sup> *Ibid.*, 12. Moreover, “[T]he nature of the participation sought in collaboration differs from that contemplated by interest representation. Meaningful participation enables the contributions of the most affected parties to be institutionalized and gives them some responsibility for the regulatory regime. By ‘institutionalized’ I mean that participation should be an ongoing feature of the decision-making process. Instead of inviting responses to the agency’s proposed solutions, which are themselves offered to fix preconceived problems, institutionalized participation involves opportunities to formulate questions as well as potential answers: it requires a blurring of lines between those inside and outside of institutions responsible for governance” (*ibid.*, 27).

<sup>120</sup> As indicated earlier, economic reflection on governance has largely focused on what O. Williamson calls private ordering, which mainly concerns private relations. Within this perspective, what he calls hierarchical relations are mainly theorized on the basis of the theory of the firm. To the contrary, the reflections of the authors associated with the second stage of current research in the theory of governance generally deal with governance devices that bear on broader social relations than these private ones. This is the reason why the same terms have acquired different ranges of extension. Thus we saw that, for L. Marengo and G. Dosi, decentralized forms of coordination refer to coordination “via market-like mechanisms” or “via mechanisms based on the interaction of quasi-independent units within simple organizations” (cf. above, n. 60). Those authors who have studied what J. Black calls “decentring regulation”, in the context of what we are referring to as the second stage of governance scholarship, use the term “self-regulation” with a broader meaning. In this perspective, “[S]elf-regulation encompasses a wide range of arrangements, from private ordering without resort to legal rules to state-enforced systems of delegated rules.... When used in a legal context, ...it connotes some degree of collective constraint, other than that directly emanating from government, to engender outcomes which would not be reached by individual market behavior alone” (A. Ogus, “Self-regulation”, in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics, Volume 1. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, 587-588; for the expression “co-regulation” see also the works of F. Cafaggi, cited below at n.143). It should, however, be noted that, within transaction cost economic research, it would appear that attention is being increasingly paid to those intermediate forms of self-regulation that fall between mechanisms for private ordering and a society’s general institutions, which interest D. North (on this, see E. Brousseau and E. Raynaud, “The Economics of Private Institutions”, 2005, working paper, on file with the author). These differences in terminology are not, however, significant for the purposes of our reflection. The question we are concerned with relates to the theoretical framework necessarily presupposed by (and very often implicit in) the positions defended by the various governance approaches as regards the normative nature that they attribute to these mechanisms. By “normative nature” is understood the capacity of these mechanisms to optimally satisfy the collective public interest of the actors concerned, that is, to produce what we refer to as the best possible satisfaction of their normative expectations.

communitarian republicanism, Habermas' formal pragmatics, and pragmatism – J. Braithwaite and I. Ayres effectively pinpoint their shared divergence from economic theory. In this new perspective, they write, governance rests on “republican institutions that are oriented to persuading actors to deliberate in a socially responsible way.” They continue: “Under such institutions, the public interest is fostered as a result of such public-regarding modes of deliberation. These republican institutions are contrasted with market institutions that seek to foster the public interest by aggregating the endeavors of actors who all pursue their private interests.”<sup>121</sup> It is thus possible to speak of a “public-regarding privatization.”<sup>122</sup> It is true that the “republican” or “communitarian” language used here by J. Braithwaite and I. Ayres in discussing P. Petit represents just one possible theoretical approach.

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<sup>121</sup> *Ibid.*, 47. The building of governance institutions intended to organize a form of dialogue sets up what the authors call a “regulatory culture” or “regulatory communitarianism”. It is helpful to cite J. Braithwaite and I. Ayres’s account of what they mean by this. The passage in question displays very clearly their assumption that merely establishing a form of ongoing dialogue and laying out the communicative ethic it requires will suffice to ensure the performance of the adjustment and learning operation that conditions the efficiency of governance, such that governance will optimally satisfy the normative expectations of group members (see below). They write: “It is the notion of regulatory communitarianism that brings the empowerment theory within the republican tradition of normative theory. Liberal theory finds special attraction in market institutions that assume that individuals will behave in a self-interested way; institutions are designed so that such self-interested actions will aggregate to produce the public benefit. ... While market institutions purport to leave the psychology of individuals untouched, socializing institutions are designed to affect citizens in such a way that they behave as if they were primarily concerned with the public benefit. Although liberal theory finds special appeal in market institutions, republican theory finds special appeal in socializing institutions. Socializing institutions seek civic virtue by changing the deliberative habits of citizens.... The regulatory culture advocated seeks to modify the deliberative habits and behavioral dispositions of actors, not just to tinker with payoffs of actors whose psychology is untouched. Through mobilizing social disapproval against those who sell out to cheaters and those who are unreasonable with cooperators, the regulatory culture seeks to foster an internalization of a concern for the other player that is in the public interest” (*ibid.*, 93). True, the authors discern that deliberative organization does not suffice on its own. But in failing to construct the institutional conditions specific to the deployment of “civic virtue”, they rely exclusively on “social disapproval”, that is, on the mobilization of natural, “pregiven” cooperative capacities found within every social group. As will be seen below, they thus fall short of what the pragmatists have sought to develop.

<sup>122</sup> See J. Freeman, “Extending Public Law Norms through Privatization”, *Harvard L. Rev.*, 116 (2003), 1285ff.; “Private Role in Public Governance”, *NYU L. Rev.*, 75 (2000), 543ff. Other relevant work by political scientists includes J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions*, London, Sage, 1993; and R. Rhodes, who concentrates mainly on a decentered theory of governance, itself linked to an understanding of governance as network: R. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Buckingham, Open University Press, 1997, and “Governance and Public Administration”, in J. Pierre (ed.), *Debating Governance, op. cit.*, Chapter 4. See also G.G. Peters, “Managing Horizontal Government: The Politics of Co-ordination”, *Public Administration*, 76 (1998), 295ff., and “The Two Traditions of Institutional Design: Dialogue versus Decision?”, in D. Weimer (ed), *Institutional Design*, Dordrecht-Boston, Kluwer, 1995, 133-179.

As was observed above, it is far from being the only one or even being widely shared.

What it is important to emphasize, however, is how it diverges from the methodological individualism of rational choice theory, as specific to economists. It is this divergence that the concept of governance by what we call the aggregation of communicative competencies is intended to identify. This mode of structuring deliberative dialogue makes clear that what is at issue is no longer rational anticipation through the maximization of individual preferences. We find here a dimension consisting of the transformation of individual preferences by taking into account a requirement specific to the whole that the individuals are a part of. It matters little whether the requirement is conceived of in terms of civic virtue, in the republican manner, a moral principle of universalization, in the Habermasian and Rawlsian manner, or even as systemic codes, in the systemic functionalist manner. This is also the reason why the mechanisms of governance are viewed as incapable of optimally satisfying the expectations of the group members unless they are built on other resources than those associated with exclusive calculation of the maximization of individual preferences, and thus of market mechanisms only. Individual actors are viewed as the repositories of other resources and capacities than those they deploy when “seeking to maximize their individual preferences”. But in order to activate the potential for satisfying the collective requirements entailed by these other capacities of the individual actors, a specific mechanism is required, which is precisely that of planned organization designed to aggregate these deliberative and communicative competencies. Such a form determining collective requirements. This also explains how come the whole question of cooperation is no longer analyzed solely in terms of game theory. It is assumed that it is possible to cast issues in a deliberative form, and that doing so produces the expected adaptive effects, because it rests on cooperative resources that an economic analysis made exclusively in terms of individual preferences cannot take into account. It now becomes clear to what extent this approach to governance will result in extending the phase in the process of reflection reached by the economists. The inadequacies in cooperative capacities of a pure decentralized coordination, which the most clear-thinking economists encountered when they recognized the aporias produced by employment of analogies with the theory of natural selection, are henceforward compensated for, not only by an recourse to hierarchical mechanisms, but by recourse chiefly to an extended range of participants in the negotiating mechanism, and by attending to the organization of the conditions for deliberation such that these stakeholders’ empowerment could be assured. This did not at all rule out recourse to contracts and economic incentives nor the granting of a continuing major role to public authority; but the contractual mechanism was now situated in a broader context, which compelled reflection on the requirements of an approach framed in terms of communicative collaboration.



From this perspective, this new approach to governance marks an effort to attend to the *internalization* of the conditions for adjustment required by the learning operation that conditions the success of the governance operation. It remains the case, however, that this will to attend to the internalization of the conditions for satisfying the learning operation, although it explains why present-day research on governance theory has experienced the need to continue within the dynamic initiated by neo-institutionalist economists, also accounts for the internal dynamic of this second governance approach. The fact is that, as will be seen, this will has expressed itself in stages. What is more – and this thesis is at the heart of the present reflection – even in the “pragmatist and experimentalist” version that is the most highly developed and most recent version of the second approach, this will to internalize the conditions for learning remains imperfect and assuredly insufficiently fulfilled. Before demonstrating this last point, however, it will first be necessary to show how the second approach displays an internal progression that proves this approach is itself not reducible to the mere model of an aggregation of communicative competencies.

3° This element of the potentiation of the actors’ deliberative and communicative competencies, even though it operates within all the positions currently working to deepen the new institutionalist process inspired by rational choice theory, is not sufficient as a characterization of those positions. A third element must be adduced, which in turn requires the differentiation of two distinct perspectives among these positions. That is why we pointed out above that there were two successive stages in the current effort to deepen the gains made by neo-institutionalist economic approaches to governance.

As was indicated above in the references to J. Freeman, it is correct to say that the emphasis placed on the need for the planned organization of a collaboration, in order “to encourage dialogue and deliberation among the parties most affected”, is conceived from a perspective focusing “on adaptive problem solving”. But this relationship is not conceived of by all authors in the same way. On one hand, some consider that organization of the collaboration alone – i.e., the aggregation of communicative competencies alone – suffices to generate the adaptive capability needed to solve problems in the most satisfactory way possible from the point of view of group members’ normative expectations. On the other hand, some authors reason that such an aggregation does not suffice on its own, and that it is necessary to grant, besides, *specific attention* to the conditions required to generate this learning capability. On the first view, these learning capacities are believed to be provided and activated simply by placing the various actors in dialogue. In contrast, the second view considers that supposing the learning capability to be conferred by communicative aggregation on its own is theoretically problematic, and that, on the contrary, specific supplementary conditions are needed. It is true that this theoretical issue is rarely explained for its own sake in the work of the jurists and political scientists interested in this approach to governance. The very great majority of

authors who have sought to reflect on this question of governance are little concerned to flesh out the theoretical underpinnings they implicitly rely on. Nevertheless, if careful attention is paid to the theoretical models explicitly or implicitly relied on by these authors, a dynamic emerges that is internal to all present-day approaches to governance that are in the process of furthering the gains made by economists' neo-institutionalist research. To explain this dynamic we will identify texts that lay out the two approaches referred to above.

The first approach – the one according to which learning capacities are conferred by the aggregation of communicative competencies alone, which we have named the approach of relational and collaborative governance – is itself found in two versions. One of these succeeded the other, as if, from within this approach to governance, many people perceived the difficulties produced by its epistemological presuppositions. In order to present the first of these two successive versions, we will rely on I. Macneil's relational theory, and, to expose its limitations, on the support it sometimes derives (mainly in British scholarship) from systemic and functionalist theory such as G. Teubner's. The second version, which succeeded the first, in itself constitutes an intermediate stage in the progress towards the second approach, because it emerges from the will to reflect on specific conditions superadded to the aggregation of communicative competencies alone. An expression of this intermediate position found in the recent legal literature is an article by de S. Burris, P. Drahos, and C. Shearing entitled "Nodal Governance".<sup>123</sup>

The second approach – which we propose to call hereafter the experimentalist pragmatist approach to governance – deepens the reflection on learning conditions. Contrary to the first, it considers that the deliberative cast alone, even when so managed as to respect the conditions for stakeholders' empowerment or to ensure respect for the conditions for rational argumentation, does not suffice to guarantee the learning operation required for the best possible problem solving. This second approach thus aims to better reflect upon the conditions internal to the learning operation, and to reflect on the institutional conditions necessary to prompt the actors to acquire the adaptive capacities needed for the deliberative mechanisms to be effective at problem solving and thus meet, to the extent possible, the requirements of the collective interest. Numerous authors are currently working with this experimentalist approach.<sup>124</sup> Two current trends of research in particular, however, exemplify it more specifically and in a more fully developed manner. E.

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<sup>123</sup> S. Burris, P. Drahos & C. Shearing, "Nodal Governance", *Austl. J. Leg. Phil.*, 30 (2005), 30ff.

<sup>124</sup> See among others, besides these two main movements, J. Forester, *Planning in the Face of Power*, Berkeley-Los Angeles, University of California Press, 1989; "Learning from Practice Stories: The Priority of Practical Judgment", in *The Argumentative Turn in Policy Analysis* (F. Fischer and J. Forester, eds.), Durham, Duke UP, 1993, 186-209; *The Deliberative Practitioner*, Cambridge (MA), MIT Press, 1999; D. Farber, "Environmental Protection as a Learning Experience", *Loyola of Los Angeles L. Rev.*, 27 (1994), 791ff.; *Eco-Pragmatism*, Chicago, University of Chicago Press, 1999.

Ostrom and V. Ostrom have spearheaded the first of these trends.<sup>125</sup> The second was initiated by C. Sabel and is being developed in our time by several authors writing in his wake.<sup>126</sup> Both were developed in direct relationship with economic governance

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<sup>125</sup> Although we will not be examining these authors' approach to the conditions that must be respected for a self-organized system to best satisfy the requirements of adequate regulation, we should like to note here that those conditions are far from being reducible to the interpretation that R. Mayntz and A. Héritier appear to give to the Ostroms' theory, in particular in the work cited above at n.1. In reducing this to an incentive theory based essentially on a principal-agent approach to collective action, they appear to forget the other essential element of E. Ostrom's work, which consists of her accurate perception that such an approach is inadequate to define the necessary conditions for the adjustment and learning operations required by any diachronic analysis of the conditions for efficiency of a collective action. Besides discussing the incentives that determine the economic theory of agency, E. Ostrom has developed the idea that a system of governance should be polycentric governance system. In so doing, she has relied on the V. Ostrom political philosophical theory (see V. Ostrom, *The Intellectual Crisis in American Public Administration*, Tuscaloosa (AL), University of Alabama Press, 1973; *The Meaning of American Federalism*, San Francisco, ICS Press, 1991; *The Meaning of Democracy and the Vulnerability of Societies: A Response to Tocqueville's Challenge*, Ann Arbor, University of Michigan Press, 1997) See E. Ostrom, "Coping with Tragedies of the Commons", *Annual Review of Political Science*, 2 (1999), 493ff. See also R. Wagner, "Self-Governance, Polycentrism, and Federalism: Recurring themes in Vincent Ostrom's Scholarly Oeuvre", *Journal of Economic Behavior & Organization*, 57 (2005), 173ff. In a system of this kind, the actors are assumed to behave like players in a series of games that are both simultaneous and sequential, in which each action can be construed as a move made in several simultaneous games. To produce the appropriate meta-player behavior, these actors must use "time outs" to resolve conflicts by organizing themselves deliberately and collectively learning from their failures and reinforcing the shared rules (*The Meaning of Democracy and the Vulnerability of Societies: A Response to Tocqueville's Challenge*, *op. cit.*, 227-228). These rules must, as a matter of priority, turn critical attention to the equal positioning of all the payers and prevent opportunistic behaviour (*ibid.*, 242).

<sup>126</sup> The underlying idea is easy to understand. It's a matter of restructuring the "institutional design" of our liberal democracies, so that a true ability to learn by trial and error is ensured. This transformation of our democratic institutional models would result in a form of democracy that J. Cohen and C. Sabel sometimes call "directly deliberative polyarchy": "In directly deliberative polyarchy, collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions. But in deciding, those citizens must examine their own choices in the light of the relevant deliberations and experiences of others facing similar problems in comparable jurisdictions or subdivisions of government. Ideally, then, directly deliberative polyarchy combines the advantages of local learning and self-government with the advantages (and discipline) of wider social learning and heightened political accountability that result when the outcomes of many concurrent experiments are pooled to permit public scrutiny of the effectiveness of strategies and leaders" (J. Cohen and C. Sabel, "Directly-Deliberative Polyarchy", *European Law Journal*, 1997, vol. 3, no. 4, 313). The idea, then, is to see to the empowerment of the actors involved, which would guarantee that their collaboration would generate an effective problem-solving capability, i.e., the learning capability required by the necessary adjustment to the desired transformations of context. The main institutional mechanisms suggested are those that would establish "iterated co-design", "benchmarking", and a mechanism for "error-detecting" (see the highly illuminating text by C. Sabel cited above at n. 109, "A Real Time Revolution in Routines"). We will deal with this experimentalist and pragmatist governance approach in greater detail below (in Section 3), mainly to identify its theoretical presuppositions

approaches<sup>127</sup> and seek to extend and surpass them by relying on more philosophical instruments.

In the case of V. Ostrom, the theoretical framework is mainly of political philosophy. He bases his position on an interpretation of the potential inherent in the American federalist model supported by Montesquieu, J.J. Rousseau, the Scottish Enlightenment, and A. de Tocqueville. From this perspective, the idea of a polycentric democracy can be viewed as consisting of an intellectual and cultural break making possible a passage from “power over” to “power with” – a formula adopted from T. Jefferson.<sup>128</sup> “Polycentric orders are open systems that manifest enough spontaneity to be self-organising and self governing. But the maintenance of such orders depends on intelligent deliberation to correct errors and reform themselves.”<sup>129</sup> The passage to power-with is believed itself to open up new horizons in the science of politics, featuring an art of association and self-

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and the justifications for the changes it proposed to the neo-institutionalist approaches (both the economists’ and the relational-deliberative approaches) presented above. We wish to note here merely that this experimentalist and pragmatist approach to governance is currently being developed and promoted by numerous jurists and political scientists. Besides, of course, C. Sabel, these include M. Dorf (who has applied the model to the question of the judge’s role), W. Simon (who has applied it to the issue of fundamental rights), J. Liebman and A. Fung (who apply it to the issues of labor law and school reform), and B. Karkkainen (who applies it to the issue of environmental protection). See A. Fung & E. Wright (eds.), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, London, Verso, 2003; A.Fung, “Deliberative Democracy and International Labor Standards”, *Governance: An International Journal of Policy, Administration and Institutions*, 16 (2003), 51ff.; A.Fung, “Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing”, *Politics and Society*, 29 (2001), 73ff; A. Fung, D. O’Rourke and C. Sabel, “Realizing Labor Standards”, in *Can We Put an End to Sweatshops ?* (J. Cohen & J. Rogers, eds. for Boston Review), Boston, Beacon Press, 2001, 3-40; J. Liebman & C. Sabel, “A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform”, *NYU Rev. L. & Soc. Change*, 28 (2003), 183ff.; B. Garrett & J. Liebman, “Experimentalist Equal Protection”, *Yale L. & Policy Rev.* 22 (2004), 261ff.; C. Sabel, A. Fung & B. Karkkainen, “Beyond Backyard Environmentalism”, in *Beyond Backyard Environmentalism* (J. Cohen & J. Rogers, eds. for Boston Review), Boston, Beacon Press, 2000, 3-115; B.Karkkainen, “After Backyard Environmentalism”, *American Behavioral Scientist*, 44 (2000), 690ff; B. Karkkainen, “Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism”, *Minnesota L. Rev.*, 87 (2003), 943ff.; C. Sabel & W. Simon, “Destabilization Rights: How Public Law Litigation Succeeds”, *Harvard L. Rev.*, 117 (2004), 1015ff.; W. Simon, “Solving Problems vs. Claiming Rights: The Pragmatist Challenge to legal Liberalism”, *William and Mary L. Rev.*, 46 (2004), 128ff.; M. Dorf & C. Sabel, “A Constitution of Democratic Experimentalism”, *Harvard L. Rev.*, 98 (1998), 284ff.; M. Dorf, “Legal Indeterminacy and Institutional Design”, *NYU L. Rev.*, 78 (2003), 875ff.; M. Dorf and C. Sabel, “Drug Treatment Courts and Emergent Experimentalist Government”, *Vanderbilt L. Rev.* 53 (2000), 831ff.

<sup>127</sup> On C. Sabel, see above, n. 109.

<sup>128</sup> V. Ostrom, *The Meaning of Democracy and the Vulnerability of Democracies*, *op. cit.*, 274.

<sup>129</sup> V. Ostrom, *The Meaning of American Federalism*, *op. cit.*, 243.

governance<sup>130</sup> designed to enhance the capability for error correction.<sup>131</sup> It is through the systematic organization of a deliberative vigilance,<sup>132</sup> or ongoing self-evaluation by means of public supervisory structures,<sup>133</sup> that the guarantee of enhanced capability for self-correction<sup>134</sup> and a broadened ethos of self-governance is to be sought.<sup>135</sup> But this way of incorporating the fallibility of human intelligence into the procedures of experimentation within democratic self-governance<sup>136</sup> tends to obscure the limitations of the mechanisms for self-supervision within polycentrism that are revealed by V. Ostrom.

On this score, C. Sabel has rightly observed that the institutionalization of cooperative solutions continues to obey internal imperatives other than those that would guarantee the reflexivity of a polycentric system. Thus the fact that the mechanisms for cooperation make it possible to enhance the capacities for self-correction does indeed satisfy an important polycentric requirement. But this does not meet a different requirement of the institutionalization of cooperative solutions, namely to provide a guarantee of the effective and enduring, or sustainable, transformation of behaviors, beyond the provisional alignment of certain instances and circumstances. “Alignment by itself does not secure continuing cooperation.”<sup>137</sup> In some cases, for instance those of common pool resources,<sup>138</sup> it may even be supposed that the specific social context of a problem also places constraints and limitations upon possibilities so that the decision to cooperate is already broadly inferred. In such a case, an appropriate frame is enough to “stimulate” it as the optimal choice. For C. Sabel, the real test of a cooperative mechanism is its capacity to lead to effective changes in behaviors by developing mechanisms that, in incorporating discussion of the new possibilities produced by cooperation, strengthen the process of cooperation under way and thus reduce uncertainty as to its continuation. As he points out, “[People who are cooperating] can never know the outcome of their efforts at cooperation in advance. But the success of learning by monitoring at all levels of economic development shows that in speaking of their possibilities they are exercising the very faculties needed for realizing them.”<sup>139</sup>

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<sup>130</sup> V. Ostrom, *The Meaning of Democracy and the Vulnerability of Democracies*, *op. cit.*, 276-277.

<sup>131</sup> V. Ostrom, *The Meaning of Democracy and the Vulnerability of Democracies*, *op. cit.*, 271.

<sup>132</sup> This is our term for a standing mechanism of intelligent deliberation designed to effect self-correction.

<sup>133</sup> *The Meaning of American Federalism*, *op. cit.*, 227.

<sup>134</sup> V. Ostrom, *The Meaning of Democracy and the Vulnerability of Democracies*, *op. cit.*, 293.

<sup>135</sup> *Ibid.*, *op. cit.*, 271.

<sup>136</sup> *Ibid.*, *op. cit.*, 271.

<sup>137</sup> C. Sabel, *Learning by Monitoring*, in N. Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology*, Princeton-New York, Princeton UP-Russell Sage Foundation, 1994, 159.

<sup>138</sup> C. Sabel, *Learning by Monitoring*, *op. cit.*, 158-159.

<sup>139</sup> C. Sabel, *Learning by Monitoring*, *op. cit.*, 159.

In response to this challenge, C. Sabel derives support directly from the more epistemological tradition of J. Dewey's and C.S. Peirce's American pragmatism,<sup>140</sup> and, in the same vein, from recent work in the theory of language and the theory of meaning.<sup>141</sup> Although this epistemological opening is not explored for its own sake, it certainly accounts for C. Sabel's accurately intuiting the epistemological inadequacies of both the economists' neo-institutionalist efforts and the early versions of the deliberative shift in the stakeholding approaches, and accordingly of the need to better construct an internalist approach to the learning operation that conditions all public interest governance. It is for the same reason that we will take the experimentalist and pragmatist approach developed by C. Sabel as an exemplification of this last stage of current research in the theory of governance. The explicit opening towards a "theory of judgment" that C. Sabel's approach calls for, in its referencing J. Dewey and C.S. Peirce, will make it easier to see how this approach, despite its having already made significant advances, does not itself adequately respect its stipulation of an internalist approach to the learning operation, and how it thereby lays the basis for an extension of the institutional conditions of public interest governance. But we anticipate. Reflection on this experimentalist and pragmatist approach, on the inadequacies that persist in influencing it, and on the nature of the extensions that it calls for will be conducted below (Section 3). We must first briefly explain the two versions of the first approach taken by the deliberative turn towards deepening the economists' neo-institutionalist theory of governance. As seen above, these two versions of what we labeled the relational and collaborative governance approach will be explained by recourse to an examination of three trends of thought that in our view clearly display its spirit and presuppositions: the recent trend of thought based on I. Macneil's relational theory; the trend of thought sometimes encountered that relies on N. Luhmann's systemic approach; and the trend of thought called the nodal governance approach, recently developed by S. Burris, P. Drahos, and C. Shearing.

Before proceeding to our overview of these trends of thought, a final observation. It has already been remarked that all the approaches to governance addressed here, which seek to further the gains made by the neo-institutionalist economic approaches, affirm a form of "self-regulation" based on a deliberative collaboration by all the parties concerned. It is relevant to note that this affirmation does not imply the abandonment of a belief in a role for the public authorities, nor a belief in recourse to hierarchical mechanisms. Certainly, the relational and collaborative approach ends, as we have seen, by modifying exclusive recourse to hierarchical mechanisms, as envisaged by some economists to compensate for inadequacies in cooperative capacities in the possible absence of all recourse to a

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<sup>140</sup> For an explicit reference to these two thinkers, see M. Dorf & C. Sabel, "A Constitution of Democratic Experimentalism", *loc. cit.*, 284-285.

<sup>141</sup> More specifically, see C. Sabel's text cited at n. 109 above, "A Real Time Revolution in Routines".

mechanism analogous to that of natural selection in biology. Here, recourse to a hierarchical mechanism is theorized in relation to the general frame of the relational and deliberative approach. Obviously, public authority itself often participates in the negotiating mechanism.<sup>142</sup> Besides this, however, account is clearly taken of the fact that the activity of self-regulation itself necessitates a form of regulation designed to define and guarantee respect for the conditions required by the self-regulatory mechanism. The nature of this form of “regulation of self-regulation” will vary according to which of the versions presented above of the collaborative and deliberative activity governs self-regulation.<sup>143</sup> It is in relation to this specific role of law that many authors have progressively arrived at the proposal that the expression “reflexive law” be used. This is an ambiguous expression, covering as it does approaches to reflexivity that are diverse and often insufficiently developed. The expression reflexive law was initially proposed in connection with the reductive version of what we have termed the relational and collaborative approach to governance, that is, the functionalist and systemic one, in particular as advanced by G. Teubner. Subsequently, a second use was put forward for the more developed version of the theory of governance that the deliberative turn has lately arrived at. This is the use advanced by adherents of the experimentalist and pragmatist approach. We wish to state as of now that our own use of the expression "reflexive governance (or reflexive law)" is to be placed in relation to the proposal we will make to extend this latter approach by broadening its way of developing the reflexivity internal to every operation of judgment (see below section 3 and conclusion).

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## §2: The theoretical underpinnings of the approach of relational and collaborative governance through dialogue

In this section, we intend to show certain presuppositions underlying the theoretical framework relied upon by authors who espouse the approach of relational and collaborative governance through dialogue. These presuppositions explain why, under this approach (in contrast to the experimentalist and pragmatist one), the relational mechanism or mechanism for dialogue is supposed to suffice on its own to

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<sup>142</sup> See P. Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality*, Oxford, Oxford UP, 2006 (cited *NPL*); J. Freeman, *The Contracting State*, *Florida St. U. L. Rev.*, 28 (2000), 155ff.

<sup>143</sup> It is in this perspective that, in our view, the increasing recourse to a form of co-regulation, at the expense of sole recourse to “self-regulation”, can be understood. On this topic, see F. Cafaggi, “Organizational Loyalties and Models of Firms: Governance Design and Standard of Duties”, in *Theoretical Inquiries in Law* (forthcoming and on file with the author). For a definition of the concepts of self-regulation and co-regulation, see F. Cafaggi, “Gouvernance et Responsabilité des Régulateurs Privés”, *EUI LAW 2005/06*, <http://hdl.handle.net/1814/3326>, 5.

ensure the accomplishment of the learning operation required for collective action to succeed. We have seen that this approach to governance developed essentially during the 1990s, as a direct extension of the economic critique of the command and control and group-interest politics regulatory models deployed in early efforts to reform welfare states. Indeed, the most prolific source of publications dedicated to this approach has been the work of jurists and political scientists who have endeavoured to describe and comment on the institutional reforms initiated during the nineties in the USA,<sup>144</sup> Australia,<sup>145</sup> and the United Kingdom.<sup>146</sup> Among the British and Australian publications in this vein are found, in our view, some of the best efforts to build this new approach to governance. Of these, we will deal principally with two. The first is that of P. Vincent-Jones, who has sought specifically to describe and assess some of the distinctive features of the new governance regime implemented, in the name of the new contractualism, in the United Kingdom during the nineties and since. The other is one presented in a recent article associated with the Australian reflection on this matter, which is being pursued at the Institute run by J. Braithwaite at the University of Canberra.<sup>147</sup> As mentioned, we will also look briefly at the way many Australian and British authors on the subject support their position by invoking N. Luhmann's systemic theory, since his work is especially revealing of the internal limitations of the theoretical framework of the relational and collaborative governance approach.

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1. We begin, then, with the highly suggestive and productive work done by P. Vincent-Jones on the New Public Contracting, with its references to I. Macneil's theory as a means of thinking through the conditions that must be respected by this new contractual mode of regulating the management of public services if it is to be responsive.

As P. Vincent-Jones indicates, there has been "an increasing use of contract as a regulatory mechanism across a broad spectrum of economic and social

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<sup>144</sup> See A. Gore and National Performance Review Staff, *From Red Tape to Results: Creating a Government that Works Better and Costs Less*, (1993).

<sup>145</sup> In this connection, see B. Morgan, "Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia", *Public Management: An International Journal of Research and Theory*, 1 (1999), 50ff, who writes of "the inception in Australia in 1995 of a particularly wide-ranging and comprehensive meta-regulatory regime" (51).

<sup>146</sup> See in particular the Welfare Reform Green Paper, *New Ambitions for Our Country: A New Contract for Welfare* (Cm 3805) (1998), issued by the government of Prime Minister Blair in the United Kingdom; and the link made by New Labour between development and the new contractualism: P. Vincent-Jones, *NPL*, 10-11, and references cited there.

<sup>147</sup> The Regulatory Institutions Network (RegNet) of the Research School of the Social Sciences at the Australian National University in Canberra.



relationships in Britain over the last twenty-five years. Since New Labour came to power in 1997 the trend has accelerated. Contractual governance has spread rapidly beyond the spheres of economics and public administration into social policy. The experience of contractualization, however, has proved highly problematic.”<sup>148</sup> The New Public Contracting is “a subset of government by contract characterized by the delegation of powers to public agencies in contractual arrangements preserving central government controls and powers of intervention.”<sup>149</sup> In the health, education, and social care sectors in which this new regulatory approach is being so applied, quasi-markets are therefore organized. They are distinguished by a “double regulatory structure, entailing regulation by contract within hierarchical frameworks. The purchasing agency's use of contract as an instrument of regulation is dependent on the conditions that have been specified (extra-contractually) in the regulatory regime.” What’s more, besides this articulation of a horizontal relationship (between the public purchasing agency and the service provider) with a vertical relationship (between this public purchaser and the central authority),<sup>150</sup> there is the relationship among all these actors and the individual citizen – who is also the service provider’s customer – to take into account. And in fact, it is essentially as regards the role assigned to the citizen within the regulatory mechanism as a whole that P. Vincent-Jones sees the need for the present regime to bring greater institutional depth. The question asked is in effect about the institutional conditions that must be satisfied for this new, contractual, form of governance to become more responsive. The key

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<sup>148</sup> P. Vincent-Jones, *NPL*, 347.

<sup>149</sup> *Ibid.*, 3. “The three main forms of this novel type of regulation are identified as administrative contracts, economic contracts, and social control contracts” (*ibid.*). “Economic contracts” – to which we limit our own discussion here – “are contractual arrangements directed at improving public services through competition and/or the devolution of management powers to public purchasing or commissioning agencies in a variety of hybrid forms beyond simple market or bureaucratic organisation. The focus on competition and marketisation reflects a part of the New Public Contracting reform agenda which is distinct from managerialism. In addition to efficiency, the regulatory frameworks within which such contracts operate also embody values of social justice, equity and redistribution. Policy initiatives here are about the better use and coordination of resources that lead ultimately to the production of public services...[T]he economic organizational role of the New Public Contracting is evident in the operation of quasi-markets for education, health, and social care resulting from the major structural reorganizations of these public services since the 1980s, but it features in public service provision more generally” (22). In such “quasi-markets”, then, we find a “double regulatory structure, entailing regulation by contract within hierarchical frameworks. The purchasing agency's use of contract as an instrument of regulation is dependent on the conditions that have been specified (extra-contractually) in the regulatory regime” (*ibid.*).

<sup>150</sup> “The advantage of quasi-markets compared with the market as a mechanism for delivering public services concerns the greater level of public control exercised through the hierarchical element in the regulatory structure. The values at stake in the operation of economic contracts therefore include distributive justice and the public interest, in addition to more familiar economic values of economy and efficiency” (*ibid.*, 28).

theoretical instrument P. Vincent-Jones<sup>151</sup> uses to answer this question is I. Macneil's relational contracting theory. However, the use he makes of I. Macneil's work differs from that made by O. Williamson in his theory of transaction cost. As is well known, what interested O. Williamson was I. Macneil's diversification of the modes of contract-based governance and his denunciation of the reductionism of neo-classical economists, who believed contractual relationships could all be reduced to the "spot contract" model.<sup>152</sup>

As noted by P. Vincent-Jones in agreement with D. Campbell,<sup>153</sup> this interpretation of I. Macneil, while accurate, overlooks a more essential dimension of the meaning of contract relationality. Relationality is not characteristic only of contracts that cannot be reduced to spot contracts. In reality, it is a characteristic of any contract, to the extent that it defines what underlies the conditions for possibility specific to every contractual relationship. These underpinnings constitute the "normative context of parties' behaviour."<sup>154</sup> This context is manifested in every contract. At the same time, however, it represents a normative framework. We will come back to its dual factual and normative nature. I. Macneil extracts from it what he calls "common contract norms," which to some extent constitute a form of positive natural law, in the sense that these norms do not necessarily imply their own integration into formal positive law and can be expressed in the form of informal norms that structure the social space and should be acknowledged as obligatory if

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<sup>151</sup> It should be noted, however, that P. Vincent-Jones wishes nevertheless to take other theoretical instruments into account in defining the conditions for "responsiveness" of this new form of governance. To this end, he dedicates a whole chapter of his book to presenting various current approaches to governance. More important, on the basis of this chapter, he suggests that the institutional reforms that will have to take place to improve the deliberative participation by all the actors involved in this new form of governance of public services be structured to allow a "capacity for innovation, learning and adaptation" (see *ibid.*, 88, 91, and 353). Reference is thus explicitly made to the work of C. Sabel. It can thus be said that P. Vincent-Jones intuits the need (which we explain in Section 3 below) to open up the relational and collaborative approach to being deepened by the experimentalist and pragmatist approach.

<sup>152</sup> I. Macneil, says O. Williamson, "argued that it was naive to proceed as if there were only one, single, all purpose law of contract" (*The Mechanisms of Governance, op. cit.*, 370). Alongside the kind of contract that serves as the specific instrument of governance by the market, there exists long-term contracting (alternately, the distinction is often made between discrete and relational contracts), in which, because of the uncertainty that marks their relations over time, the parties must put in place specific institutions to manage the adjustments their relationship will have to make to changing conditions. O. Williamson observes that this second kind of contract constitutes a type of governance mechanism intermediate between the two other institutional forms of "private ordering": the market and hierarchical organization.

<sup>153</sup> D. Campbell, "Ian Macneil and the Relational Theory of Contract", in D. Campbell (ed.) *The Relational Theory of Contract*, London, Sweet and Maxwell, 2001, 3-58.

<sup>154</sup> P. Vincent-Jones, "The Reception of Ian Macneil's Work on Contract in the U.K.", in *The Relational Theory of Contract, op. cit.*, 73.

one wants to ensure an adequate framework for all forms of contractual relations.<sup>155</sup> I. Macneil has expressed this normative framework in the form of “ten contract norms”. It is mainly on this basis that P. Vincent-Jones has defined institutional improvements in the new public contracting regime. He stresses that these improvements should make it possible to find “solutions to problems identified with the operation of contract norms” and they “lie as much in responsive institutional and organisational design as in the reform of legal structures.”<sup>156</sup> These improvements are of two kinds. The first relates to what P. Vincent-Jones calls relational conditions. They are of lesser concern to us here.<sup>157</sup> In our view, they relate to the relationality specific to the contractual relation itself.

But P. Vincent-Jones, in a lucid and subtle fashion, himself recognizes that this relationality to some extent requires reflection on its own conditions for possibility. The relationality specific to contract engages deeper requirements, as a second order relationality: “[T]hese relational elements are necessary, but not sufficient, conditions of responsive regulation. Stable and cooperative relationships that benefit regulators and regulatees might be a mask for inefficiency, ineffectiveness, or fraud or corruption. The result in such a case would be to defeat the overall purpose of the regulatory regime. Again, the efficiency gains of relational contracting might be outweighed by disproportionate damage to other values such as equity or social justice, or harm to the interests of other stakeholders, such as consumers.”<sup>158</sup> It is in order to take this second order requirement into account that it is necessary to enhance the quality of institutional and organizational design by organizing a better deliberative cast for the various actors involved in the complex regulatory mechanism, i.e., at the level of determination of the “standard settings” that will define the general requirements of the regulatory framework. The improved transparency and deliberation that will entail better involvement by the citizens who are the “consumers” of these contractual regimes is thus intended to better organize collaboration among all the actors involved in this new form of complex

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<sup>155</sup> “The contract norms have overlapping internal and external dimensions. External norms include custom, morality, conventions, and a wide range of institutional constraints in addition to those provided by the legal system. Contracting behaviour itself generates and reinforces norms internally within particular relationships; the more long-term the relationship, the more ongoing relation becomes a source of obligation.... In this conception, any adequate description of how the law governs, or prescription of how the ought to govern, must be founded on an understanding of the ways in which social exchange behaviour both gives rise to and is supported by the common contract norms” (P. Vincent-Jones, *NPL*, 5-6).

<sup>156</sup> *Ibid.*, 32.

<sup>157</sup> These conditions consist of “(1) sensitivity on the part of regulators to the circumstances in which regulation occurs, (2) the presence in contractual relationships of norms of planning and consent necessary to support discreteness and presentation; (3) the bindingness of obligations in those relationships, combined with norms of fairness and reciprocity; and finally (4) trust and cooperation in the performance of contracts” (*ibid.*, 348).

<sup>158</sup> *Ibid.*

governance.<sup>159</sup> This requirement for the strengthening of the “public deliberation in policy and decision making on public service issues”<sup>160</sup> thus obviously implies greater transparency and public accountability. But it is enabled, above all, by what P. Vincent-Jones calls “the securing of citizen empowerment through appropriate form of public participation, coupled with effective mechanisms for the redress of grievances.”<sup>161</sup>

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<sup>159</sup> It should be noted that, while P. Vincent-Jones’ line of argument is based on I. Macneil, it brings out in a highly productive way matters that remain implicit in the latter’s work. The question of whether P. Vincent-Jones’ interpretation is or is not consistent with I. Macneil’s explicit position is immaterial. As we know, I. Macneil has been interpreted in numerous ways. Further, as we have observed, P. Vincent-Jones, like D. Campbell, embraces an expansive interpretation of his views, whose well-foundedness we believe emerges if the effort is made to discern the deep insight of I. Macneil’s project. Indeed, the link made here between contract norms, relationality, and the improvement of the deliberative structure bears a family relation to I. Macneil’s tenth contract norm, which he defines as requiring “harmonization with the social matrix” (I. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, New Haven, Yale UP, 1980, 57). The link, under the New Public Contracting, between the requirement for harmonization and the requirement for better deliberative organization among the actors involved (i.e., among the public authorities, service providers, and citizen/consumers of public services) only serves to show that the kinds of actors involved in this new public service regime entail a return to I. Macneil’s social matrix. As P. Vincent-Jones rightly perceives, “[T]his responsive regulation/relational contract approach stresses the need to take into account all the constituencies involved in contractual processes, beyond the interests of ‘the parties’ individually or dyadically conceived” (P. Vincent-Jones, *NPL*, 136). If, like P. Vincent-Jones, we consider that “the quality of regulatory linkages and relationships, analyzed in terms of the relationality of ‘contract’ norms, is a vital factor contributing to effectiveness (and hence ultimately responsiveness) of the New Public Contracting” (*ibid.*, 134), we come to see that the conditions for effectiveness both trigger and entail conditions for legitimacy, i.e., conditions relative to the quality of the public deliberation that must govern the adoption of the contract provisions.

<sup>160</sup> P. Vincent-Jones, *NPL*, 347.

<sup>161</sup> *Ibid.*, 349. In a recent article, P. Vincent-Jones has developed this idea very clearly (“Citizen Redress in Public Contracting for Human Services”, *Modern L. Rev.*, 68 (2005), 887ff.). He notes that this requirement is addressed by the implementation of “hybrid governance structures” (for example, the implementation of a mechanism that enables the citizen/consumer to obtain reparation in the event of a service provider’s failure to satisfactorily deliver the appropriate service. Such reparation would be obtained through an ombudsman working with an “industry specific tribunal”, and the citizen/consumer would not be under obligation to prove a “contractual nexus”. (On this, see *ibid.*, 918-919). Above all, however, the requirement is addressed by strengthening “citizen involvement in contracting regimes”. “Of crucial importance to responsiveness is the manner of determination of service standards.... [R]egulation cannot be responsive where standards do not reflect the needs of service recipients.... The service standards in particular sectors might be collectively established through tripartite consultation between public purchasers and consumers and representatives of provider organisations. The ultimate aim would be to render explicit for all interested parties the quality of services that consumers could reasonably expect, and the terms on which services would be provided. The standards thus established, including procedures for complaints handling and disputes resolution, might govern relationships between contractors and consumers regardless of the public, private, or voluntary sector identity of the service provider” (*ibid.*, 922).

True, as already indicated, P. Vincent-Jones acknowledges that this deliberative method should also guarantee true collective learning,<sup>162</sup> while considering whether this requirement can be deduced from a relational approach to governance or whether it requires its own distinct theoretical model.<sup>163</sup> We believe the answer to this question is no. This is all the clearer if, as P. Vincent-Jones himself states, one accepts that “the reflexive conditions for the successful operation of collective learning...cannot be taken for granted.”<sup>164</sup> This is indeed what we hope to reveal lying within the relational approach of the New Public Contracting. Our aim is to show that, if one reflects on the requirements of contractual governance using the theoretical instruments of relational theory, one observes that the model for the empowerment (or, so to speak, the capacitation) of the actors engaged in deliberative cooperation supposes the adaptive capacities for optimal governance as regards the actors’ expectations to be a given, solely by virtue of the actors being placed in relation with each other. This characteristic is linked to the (epistemological) presuppositions of relational theory itself. That is why this approach ends by conceiving of the conditions for a collective action that optimally satisfies its members’ collective interests<sup>165</sup> as what we have called a simple aggregate of the communicative competencies of the actors involved.

It is therefore not sufficient to interpret the relationality of contract in a broader manner than O. Williamson’s. Certainly, the restricted interpretation he offers is a sign of the insufficient consideration given to the underlying relational conditions that constrain the possibility for effecting the normative expectations borne by a contractual relationship. The expansive interpretation P. Vincent-Jones advances enables a deepening of the transaction cost approach by opening it up to the deliberative approach associated with what some have called the stakeholding approach to governance.<sup>166</sup> This concept of relationality does not however get us any further ahead in opening up the black box represented by the deliberative collaboration. In fact, quite the contrary: it is assumed that the operation of communicative aggregation suffices on its own to effect the adjustment and learning

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<sup>162</sup> P. Vincent-Jones acknowledges that “the value of contractual exchanges may be enhanced through the capacity of regulatory schemes to facilitate collective learning among the various public, private, and voluntary bodies engaged in public service networks” (*NPL*, 353).

<sup>163</sup> “Both regulating and regulated entities need to adapt within and learn from their environments, taking account of new information and adjusting their activities to core values and purposes. A hypothesis that might be tested in further research is that relationality... and collective learning are closely related features of responsiveness, and that the latter is dependant on the former” (*ibid.*, 353).

<sup>164</sup> *Ibid.*, 92. P. Vincent-Jones continues: “Rather the task for institutional designers is both to identify these conditions and to determine the role of the state in their affirmative creation.”

<sup>165</sup> That is, what is customarily called the public interest under a regime such as that of the New Public Contracting.

<sup>166</sup> On this point, see S. Deakin and J. Michie (eds.), *Contracts, Cooperation and Competition: Studies in Economics, Management and Law*, Oxford, Oxford UP, 1997.

required for cooperation to maximize fulfillment of the world-rationalizing expectations that every regulation is designed to effect.

The thought of I. Macneil itself exemplifies this assumption. His concept of contract norms implies it. These contract norms, Macneil indeed notes, are “norms in a positivist sense,” that is, “a pattern or trait taken to be typical in the behaviour of a social group.” “In that case,” he continues, “the norms about to be described would be simply extensions of the basic elements of contract we have already discussed. But I wish to be more expansive and to include in the concept of norm not just the way people *do* behave, but the way they ought to behave as well.... [T]hus, the term is used...to connote both actual behaviour and principles of right action.”<sup>167</sup> In fact, he observes, in relation to the norm regarding solidarity between contractants, that this solidarity corresponds to the organic solidarity brought about by the increasing division of labor that technological developments in modern societies lead to. “The greater the division of labor in a society, the more evident [these contract norms] are in the lives of everyone. And all of [these contract norms], particularly in combination, have integrative effects. These norms become part of the common conscience.”<sup>168</sup> The positivity of this normative imprint on contractual behaviour is not just attested, according to him, by empirical observation; it is also logically deducible: “[I]t is also based on a process of reasoning along lines proposed by David Lewis and Edna Ullman-Margalit, who demonstrate how behaviour leads logically to convention and convention leads logically to norms.”<sup>169</sup> We will not pause to dwell on the error of identifying D. Lewis’ position with E. Ullman-Margalit’s. We have already seen above that this is incorrect, and that E. Ullman-Margalit’s project consists rather of seeking to overcome the aporias found in D. Lewis. What is more revealing to note is that, in relying on D. Lewis, I. Macneil makes clearly manifest what could already be inferred from our previous observations: he considers the relational constraints that define the spirit of every true contractual engagement are inevitably internalized by any social group that is acquainted with the phenomenon of contractualism. These constraints are in effect the product of a collective game of the pure coordination

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<sup>167</sup> I. Macneil, *The New Social Contract*, *op. cit.*, 37-38. As is well known, I. Macneil believes that these norms are present across all modern societies. “These norms, while basic, are only intermediate, intermediate between behaviour in particular contractual relations, and the great flow of modern history. True, they often have immense and fundamental consequences for the shape and direction of societies in which they occur. Moreover, given the premises of basic contractual behaviour, I believe those consequences are inescapable” (*ibid.*).

<sup>168</sup> *Ibid.*, 99. I. Macneil writes as follows, in a highly Weberian vein: “To recognize how strong these norms can become as an element of the common conscience in the presence of great division of labor, we need look no further back in history than to the not yet entirely deceased Protestant Ethic. It was a conglomeration of the common contract norms: strong beliefs in the integrity of roles - mandated by God indeed - in the mutuality achieved by hard work and consensual exchange, in the creation of power through private property, and in restraint of power in favor of a kind of individual liberty” (*ibid.*, 99).

<sup>169</sup> *Ibid.*, 38.

type, as described by game theory.<sup>170</sup> In assuming that any society in which the fact of contractualism is to be found can be reduced to a simple coordination game where the interpretation of the meaning of the contractual requirements is concerned, I. Macneil assumes that a shared culture of cooperation is a given within any society.<sup>171</sup> He thus assumes that all the social actors will spontaneously arrive at the same meaning. The assumption that is corollary to this is that the capacities needed to ensure the application of the rationality requirements needed for the shared fulfillment of the expectations of every partner to the contract are imprinted on the minds of social actors. Of course, I. Macneil does not believe that all individual actors always spontaneously comply with these constraints. In this respect, contract norms are indeed norms. But he takes as granted the social culture that makes possible the application of these norms by means of the collective instruments established for this purpose. Moreover, and this is what concerns us here, he assumes that the game of setting all the actors concerned by the contractual situation (all the stakeholders) into deliberative motion will result on its own in the potentiation of preexisting capacities that condition the fulfillment of the normative expectations harbored by the contractual context.<sup>172</sup> It is quite specifically this assumption, with its implied reference to D. Lewis' model for the origins of the building of a common culture of the adjustment requirements inherent in the cooperative ideal of deliberative action, that justifies a pragmatist and experimentalist deepening process.

Before we explain, by means of one more example from recent research on the theory of governance, how this research has sought to deepen the first version of the relational and collaborative approach, it will be useful to make a rapid tour of a second theoretical instrument found in the European legal literature on regulation. As we will see, several European and Australian authors, mainly British, believe that

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<sup>170</sup> Recall that D. Lewis understands a convention as follows: "A regularity R in the behavior of members of population P in a recurring situation S is a convention if and only if, in any instance of S:

- (1) everyone conforms to R;
- (2) everyone expects everyone else to conform to R;

everyone prefers to conform to R on condition that the others do, since S is a coordination problem and uniform conformity to R is a coordination equilibrium in S" (D. Lewis, *Convention*, Cambridge, MA, Harvard UP, 1969, 58).

<sup>171</sup> Thus I. Macneil supposes that the meaning of the solidarity requirements related to a contractual commitment results from the spontaneous search for coordination among the actors, as if the possible conflicts of interpretation of such meaning lead inevitably and automatically to the choice of a common conventional solution representing a Nash equilibrium (on the best possible solution, or on one of the best possible solutions if, as Nash does, one considers that there are several possible).

<sup>172</sup> For a similar critique of H. Hart's use of D. Lewis' model for understanding the concept of law, see J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, 2001, Oxford, Oxford UP, 94).

their approach is supported by N. Luhmann's systemic functionalism, as interpreted by the sociologist and jurist G. Teubner.

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2. There is no need to describe in depth here the approach to law as an autopoietic system developed by G. Teubner on the basis of N. Luhmann's theory of social systems.<sup>173</sup> The idea is very easy to grasp. The social system is understood to be composed of subsystems said to be "autopoietic", that is, cognitively open to the environment but normatively closed. Each subsystem is regulated by its own internal logic and unceasingly reproduces itself while adapting itself to transformations in its environment such that it is always in balance. From a regulatory point of view, it is this autonomy that explains why "no system can act directly upon another, and attempts to do so will result in Teubner's regulatory trilemma: the indifference of the 'target' system to the intervention, the destruction of the 'target' system itself, or the destruction of the intervening system."<sup>174</sup> According to G. Teubner, it is this that explains that clear awareness of the limits of the capacity of any system, including the legal system, to regulate another system, must lead to the law's evolution towards reflexive law.<sup>175</sup> Its function must not be understood to be instrumental;<sup>176</sup> it should be limited to promoting the self-regulating capability of every social subsystem.

The relevance of invoking this systemic and functionalist theory resides not so much in its having been extensively used by numerous British and Australian authors as a theoretical justification for the initial version of the decentering approach to regulation<sup>177</sup> that we call relational and collaborative. Rather, the pertinence of exploring it here resides in the fact that the aporias and

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<sup>173</sup> See G. Teubner, *Recht als autopoietisches System*, Frankfurt a/Main, Suhrkamp Verlag, 1989 (English translation: *Law as an Autopoietic System*, Oxford, Blackwell, 1993; French translation: *Le Droit, un Système Autopoiétique*, Paris, PUF, 1993); G. Teubner & A. Febbrajo (eds.), *State, Law and Economy as Autopietic Systems*, Milan, Guiffré, 1992.

<sup>174</sup> J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-regulatory' World", *loc.cit.*, 109.

<sup>175</sup> G. Teubner, *Droit et Réflexivité. L'Auto-référence en Droit et dans l'Organisation* (French translation by N. Boucquey and G. Maier), Paris-Brussels, L.G.D.J.-Bruylant, 1994. As P. Vincent-Jones quite rightly comments, in this perspective, the term reflexivity "refers to an organization's 'relationship with itself' or, more simply, to self-regulation" (*NPL*, 96). We will see below the other meaning acquired by the term reflexivity under a pragmatist and experimentalist approach to governance and, lastly, under the deepened version of the pragmatist approach that we propose.

<sup>176</sup> G. Teubner, "After Legal Instrumentalism: Strategic Models of Post-Regulatory Law", in *Dilemmas of Law in the Welfare State*, G. Teubner (ed.), Berlin, de Gruyter, 1985, 299-325.

<sup>177</sup> Recall the evocative title of J. Black's article cited above: "Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a 'Post-regulatory' World", *loc. cit.*



epistemological inadequacies of this “reflexive” theory of law are especially helpful in illuminating the reasons to surpass and deepen that initial version. It is true that, in contrast to the work of other authors (such as J. Braithwaite, C. Parker, T. Prosser, C. Scott, and P. Vincent-Jones) who have recently especially well developed and helped build this version of the theory of governance, the systemic approach to law offers the advantage of opening up reflection on the theory of governance to a more directly epistemological phase. On this score, it anticipates one of the major attractive features of the pragmatist and experimentalist approach developed by C. Sabel. At the same time, however, it reveals all the more clearly through its own deficiencies the epistemological inadequacies of this theory of governance. It thus enables us to throw into even clearer relief the lesson we sought to draw from I. Macneil’s relational contract theory. This is so even though several authors, including P. Vincent-Jones, C. Parker, C. Scott, N. Lacey, and J. Braithwaite,<sup>178</sup> explicitly state that their own approaches to governance do not depend on the deployment of G. Teubner’s systemic approach as a basis for their validity. The fact is that the epistemological inadequacies of G. Teubner’s reflexive law approach manifest in an exemplary and more fundamental way the inadequacies of the form of functionalism implied by any assumption that the deliberative mechanism suffices on its own to ensure the success of collective learning.

What is the reason for this inadequacy? Quite simply, that systemic functionalism itself contradicts the epistemological principle on which it purports to base itself. The notion of the autonomy or autopoiesis of every system merely expresses in more epistemological terms what H. Putnam quite rightly called the principle of semantic internalism or holism, which we referred to above (n. 81). Any critique of command and control regulation is implicitly based on an intuitive grasp of this epistemological principle, even though this principle is rarely formalized and expressed as such. What is always present is the idea that the conditions for applying a rule (that is, the factors that condition its effects) are internal to its implementation and not susceptible of formalization – i.e., the idea that these conditions cannot be reduced to the conditions that formally justified adoption of the rule. Operation of

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<sup>178</sup> “Teubner’s passing reference to Macneil in his analysis of the threat to modern democracy posed by privatisation and the decline of the nation state has created an opportunity for exploring the relevance of the relational theory to the macro-phenomenon of ‘globalisation’. In one view, the reduction in the ‘conscious co-ordination’ of the world economy and the growth of private governance regimes may indicate a need radically to re-think our notions of contract and the role of the state, but this task may be addressed within relational theory, and nothing but confusion is added by the language of autopoiesis” (P. Vincent-Jones, “The Reception of Ian Macneil’s Work on Contract in the U.K.”, in *The Relational Theory of Contract*, *op. cit.*, 84); see, in the same vein, C. Parker, C. Scott, N. Lacey & J. Braithwaite: “One need not adopt systems theory, as Teubner does, to see [questions about effectiveness, responsiveness and coherence] as a useful heuristic for the types of questions that lawyers and regulationists might ask about regulating law” (“Introduction”, in C. Parker, C. Scott, N. Lacey & J. Braithwaite, eds., *Regulating Law*, Oxford, Oxford UP, 2004, 10).

the application is thus autonomous from the operation of formal justification.<sup>179</sup> Now, if one wishes to respect the requirements of a holistic or internalist grasp of the operation of judgment, we cannot, as H. Putnam has so clearly shown,<sup>180</sup> but draw attention to the incompatibility with this principle of any functionalist (and therefore any systemic) approach. To assume, as N. Luhmann and G. Teubner do, that every subsystem is “regulated” by a formal (binary) code which predetermines the development of this subsystem and guarantees its ongoing adaptation to the transformation of its environment, contradicts the principle of autonomy and normative closure with which adherents of this approach counter traditional theories of intentionality (and therefore of regulation).<sup>181</sup> Thus systemic functionalism fails to fully grasp the very insight that drives it.

This internal contradiction in functionalism also explains another incoherency within this project, at least in the form that G. Teubner gave it. Since it relates to law, G. Teubner’s project to promote the attainment of a new stage of development in the legal system, a stage of a reflexive nature, clearly contradicts the functionalist project itself. On this score, N. Luhmann is immeasurably more rigorous, calling attention to the implicit revival in G. Teubner’s work of an instrumentalist approach to law.<sup>182</sup> N. Luhmann’s critique of G. Teubner is defensible not only because G. Teubner’s project ends by indirectly rehabilitating the agenda to use law as in effect an instrument of social engineering (to use N. Luhmann’s terms).<sup>183</sup> It also merits endorsement above all because it recognizes the misconception of functionalism

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<sup>179</sup> This same intuition underlies what is called, in the theory of law, the “interpretive turn”, which also underlies many jurists’ tendency (misplaced, in our view) to see in judges a regulatory instrument for rationalizing the social.

<sup>180</sup> See H. Putnam’s two crucial pages in *Representation and Reality*, *op. cit.*, 103-105. As he writes: “[F]unctionalism started out by rejecting the naive idea that propositional-attitude descriptions (e.g., “believes that there are a lot of cats in the neighborhood”) correspond one by one to brain states, species-independently. Yet – and this is its Achilles heel – it did assume that they correspond to brain states in this way in each individual organism” (105). A postulate of this kind is indeed contradictory. The problem it poses relates to the internalism of the explanation aimed at by functionalism. To remain internal to the use of operative reason, functionalism “cannot postulate an explanatory mode that transcends conditions of usage by trying to fix those very conditions of usage by means of a ‘meta-discursive’ process of ascribing mental states to intentional states. As a theory, computationalist functionalism requires transcendence of the computational usage of reason and the stating of meta-computational conditions which computationalism is expected to validate at the same time as the conditions themselves are understood to justify it” (M. Maesschalck, *Normes et Contextes. Les Fondements d’une Pragmatique Contextuelle*, Hildesheim-New York, Olms Verlag, 2001, 243).

<sup>181</sup> As evidenced, for example, in the case of law, by critiques of any “instrumentalist” approach to law, i.e., any agenda to effectively make law an instrument of social engineering.

<sup>182</sup> On this topic, see J. Paterson’s excellent recent analysis, “Reflecting on Reflexive Law”, in M. King & C. Thornhill (eds.), *Luhmann on Politics and Law: Critical Appraisals and Applications*, Oxford, Hart, 2006, 13-35.

<sup>183</sup> N. Luhmann, “Some Problems with Reflexive Law”, in G. Teubner & A. Febbrajo (eds.), *State, Law and Economy as Autopoietic Systems*, *op. cit.*, 389-415.

itself. Functionalism can only be descriptive, since it entails taking as given the conditions necessary for the operation of collective learning, that is, the adjustment necessary for a system to be as well “balanced” as possible (i.e., using our own terminology, the adjustment necessary for the success of governance that maximizes fulfillment of the normative expectations of the actors involved). In contrast, G. Teubner’s secondary inconsistency expresses his valid insight that the consequences of Luhmannian functionalism are inadequate. G. Teubner’s “normative” will to suggest the promotion of a more reflexive legal system reflects his valid insight that self-regulation on its own does not necessarily result in such an *equilibrium*, and that it requires rather a specific institutional incentive. And yet, given his functionalist epistemological assumptions, he cannot adequately construct this normative requirement.<sup>184</sup> These assumptions prevent him from adequately developing an internalist analysis of the learning operation. It is also for this reason that he is unable to perceive that the aggregation of communicative competencies within a social system does not suffice on its own to enable a collective learning operation. That in fact is the explicit project of the pragmatist and experimentalist movement in the theory of governance, which we will be examining to see if it fully respects the requirements of an internalist approach to the learning operation. A final observation

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<sup>184</sup> An analogous problem underlies a recent analysis of the term “regulation” by J. Black, who suggests that the term necessarily invokes an element of intentionality and can therefore not be used in reference to the operations of the market. (“Or are we, or should we be, concerned with intentional attempts to control or order people or states of affairs [albeit mindful of the unintended consequences of those intentions]? I would argue we should be so concerned: ‘regulation’ is otherwise indistinguishable from all other questions of social control and ordering. To reflect this, regulation could be defined as ‘the intentional activity of attempting to control, order or influence the behaviour of others’. Such a definition uncouples the activity of intentionally attempting to control etc from the actor of government, so enabling a decentred understanding of regulation. However, by retaining an element of intentionality it excludes the categories of market forces, social forces and technologies”, “Critical Reflections on Regulation”, *Austl. J. Leg. Phil.*, 27 (2002), 25.) J. Black is right to want to link the theory of regulation with the theory of intentionality. Nevertheless, it is a mistake to believe that market mechanisms do not entail an element of intentionality. Her project to maintain a dimension of “transcendence” in the theory of regulation is thus wholly appropriate, not only for the methodological reasons she puts forward, but also and above all for epistemological reasons (every theory of collective action necessitates reference to an element of intentionality). But because J. Black makes use of a very classical concept of intentionality, she wrongly concludes that reference to market mechanisms, as defended, for instance, by neo-classical economists, does not also assume a theory of intentionality. This is manifestly an interpretive error about market theory. Every economic market theory is obviously associated with a certain theory of intentionality, as rational choice theory illustrates. Whatever the criticism that could be made of the theory of intentionality deployed by rational choice theory, it cannot be denied that market theory relies on a certain theory of intentionality. Such a denial could only arise out of a classical and highly problematic conception of intentionality. As with G. Teubner (whose thinking J. Black’s seems, indeed, to be quite close to), the difficulty of building an internalist approach to the role played by intentionality (and thus by transcendence) in action accounts for this misinterpretation of rational choice theory and market theory.

is necessary before we proceed to this examination. Several present-day authors have already recognized the inadequacy of a simple version of the relational and collaborative approach through dialogue, even though they have not reached the point of entering on the stage of this experimentalist approach. We can thus speak of the emergence in recent research of a second version of this latter approach, and therefore of an intermediate effort to deepen the dynamic to which the relational and collaborative approach to governance has given rise. To illustrate which, a brief presentation of an article recently published in Australia will be helpful.

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3. Reconstruction of the dynamic internal to current research in the theory of governance brings to light a will within the relational and collaborative approach to governance to throw off the belief that the aggregation of communicative competencies suffices on its own to guarantee respect for the conditions necessary to governance that will maximally satisfy the collective interest. This will is currently being pursued from various perspectives. At present, it is shared by the majority of jurists and political scientists who wish to analyze the various governance techniques developed within the post-regulatory state (to use J. Black's and C. Scott's terminology).<sup>185</sup> This indeed is the essential reason offered for promoting the development of diverse forms of co-regulation and meta-regulation at the expense of techniques of self-regulation. C. Scott writes that, as is suggested by the term itself, "meta-regulation is the process of regulating regulatory regimes and it is what governments are doing when they attempt to stimulate or steer self-regulatory regimes towards public ends (as with co-regulation) or when they seek to develop general instruments of control over public regulation (as with regulatory impact analysis and other processes of regulatory review)."<sup>186</sup> The line of research initiated by J. Braithwaite on the phenomenon of meta-regulation provides us with a typical instance of increased attention to the conditions for capacitating actors. The text we wish to look at is a recent article by S. Burris, P. Drahos, and C. Shearing called "Nodal Governance".<sup>187</sup>

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<sup>185</sup> As already indicated, even P. Vincent-Jones, despite his reliance on I. Macneil's more theoretical tool, defends the usefulness of techniques that might be called "meta-regulatory", for example, techniques designed to promote the collective learning ability (see above).

<sup>186</sup> C. Scott, "Privatization and Regulatory Regimes", in M. Moran, M. Rein & R. Goodin (eds.), *The Oxford Handbook of Public Policy*, Oxford, Oxford UP, 2006 (forthcoming, on file with the author, 20). As noted by B. Morgan, "[T]he notion of meta-regulation is simple at heart: it captures a desire to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated" (B. Morgan, "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality", *Social and Legal Studies*, 12 (2003), 490, as quoted by P. Vincent-Jones, *NPL*, n. 80, Chapter 4).

<sup>187</sup> S. Burris, P. Drahos & C. Shearing, "Nodal Governance", *Austl. J. Leg. Phil.*, 30 (2005), 30-58.

“Nodal governance is an elaboration of contemporary network theory that explains how a variety of actors operating within social systems interact along networks to govern the systems they inhabit.... Our theory posits that governance in such systems is substantially constituted in nodes – institutions with a set of technologies, mentalities and resources – that mobilize the knowledge and capacity of members to manage the course of events.”<sup>188</sup> However, the authors realize that this form of self-regulation through simple interaction among all the actors does not suffice on its own to guarantee the full effectiveness of the action. “[N]odes have different capacities to interact with, and influence, other nodes and the course of events. The capacity of a node to influence or regulate depends in large part upon its resources – broadly defined to include a wide range of forms of capital in the Bourdieuan sense.”<sup>189</sup> In this respect, the authors continue, the organicist vision of F. Hayek (or, we would wish to add, of D. Lewis as used by I. Macneil – see above) is inaccurate. “Nodal conceptions of governance...focus attention on the way in which resources and knowledge are brought to bear through nodes.”<sup>190</sup> They go on to provide examples of the influence on the effectiveness of governance of the ways that capacities for empowerment are organized, that is, the way that actors’ participation in these nodes is organized. The first example they provide, an empirical reconstruction of the discussions that took place when the TRIPS was passed,<sup>191</sup> and specifically of the dominant role played by the alliance between the USA and the multinational pharmaceutical company lobby, “demonstrates why nodal governance is not necessarily democratic governance or governance that secures more ‘goods’ than ‘bads’ for the population as a whole; in order for nodal governance to be democratic the relevant nodes and networks must satisfy tests of representativeness, accessibility and deliberation that were devised in light of some set of democratic ideals.”<sup>192</sup> This conclusion is in line with that reached by P. Vincent-Jones using his expansive interpretation of relational theory. The second example will make it possible to explain, to some extent, the way the authors deepen the concept of empowerment and thus make possible increased attention to the conditions for capacitation. The example they analyze is that of a “South African initiative to create institutions of 'local capacity governance' to govern security and justice”;<sup>193</sup> it illustrates how the local institution’s capacity was strongly enhanced by the attention paid by the central authorities to the resources necessary for organizing meetings and ensuring the possibility for effective participation by the

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<sup>188</sup> *Ibid.*, 33.

<sup>189</sup> *Ibid.*, 39.

<sup>190</sup> *Ibid.*, 40.

<sup>191</sup> World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>192</sup> *Ibid.*, 47.

<sup>193</sup> *Ibid.*, 33.

population, as well as their attention to the resources necessary for information and expertise to be applied.<sup>194</sup>

Devoting attention to the conditions for the enablement of the actors involved in the interaction, these authors are merely opening up a perspective that has already been more fully developed in recent reflections in political theory. Indeed, they remain within what is effectively a classical perspective not far removed from the incentive approach of economists who long ago directed their attention to information asymmetries. Current reflection on collaborative governance through dialogue<sup>195</sup> has broadened the concept of attention in an effort to deepen reflection on the conditions that structure the capacity for such collaborative governance in a network society to maximally satisfy its members' normative expectations. It could be said that this reflection, in a manner of speaking, continues the investigation of this question long ago begun by J. Habermas. As is well known, J. Habermas defined such conditions within the frame of reference of his formal pragmatics.<sup>196</sup> With authors such as J. Innes and D. Booher, for example, the emphasis goes beyond J. Habermas' formal approach and directs attention to the devices needed to generate shared confidence among participating actors and ensure the emergence of "shared identities, shared meanings, new heuristics and innovation."<sup>197</sup> In thus broadening the attention granted to the conditions for empowerment, this reflection poses a new question: "how collaborative planning can result in system adaptations."<sup>198</sup> In posing this question, the reflection mandates the opening up of what had remained a black box in the relational and collaborative approach to governance. It opens up the road to a fresh stage in the dynamic of research in the theory of governance, and it leads to the effort at an internalist approach to the conditions for learning, that is, the pragmatist approach to governance.

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<sup>194</sup> "One critical nodal relationship is with a unit of a school of Government at a South African university that provides administrative, regulatory supervision and research support as the implementing agency for" these local community institutions. Moreover, "[T]his nodal link provides a place through which international funding to support these functions has been channeled. At one point links were established with a Swedish university that provided a link to Swedish Government aid funding" (*ibid.*, 51).

<sup>195</sup> This expression is drawn from J. Innes and D. Booher, "Collaborative Policymaking: Governance through Dialogue", in M. Hajer & H. Wagenaar, *Deliberative Policy Analysis: Understanding Governance in the Network Society*, *op. cit.*, 33-59.

<sup>196</sup> For a reflection on the impact of J. Habermas on the field of governance theory, see J. Black, "Proceduralising Regulation", Part I, *Oxford Journal of Legal Studies*, 20 (2000), 597ff. and Part II, *Oxford Journal of Legal Studies*, 21 (2001), 33ff. For a defense of a position inspired by J. Habermas in the literature on the regulation of public services, see T. Prosser: "Competition Law and Public Services: From Single Market to Citizenship Rights?", *European Public Law*, 11 (2005), 543ff., and *The Limits of Competition Law: Markets and Public Services*, Oxford, Oxford UP, 2005.

<sup>197</sup> *Ibid.*, 39.

<sup>198</sup> *Ibid.*, 47.

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### Section 3: Democratic Experimentalism and Social Attention

The experimentalist and pragmatist approach developed by C.F. Sabel constitutes, in our view, the most highly developed effort to conceive of the internal conditions of the learning operation and of how to translate these internal conditions into institutional mechanisms that foster the actors' acquisition of the adaptive capacities required for participation in a pragmatic and deliberative problem-solving process. This approach firmly distances itself from all mechanisms based on the reinforcement of external mechanisms for coordination or hierarchical supervision. Rather, it explores, in a more concrete manner, the internal transformations of collective action that are likely to foster the learning of new behaviors. In diametrical opposition to evolutionism, pragmatists work from the hypothesis that innovation, i.e., the transformation or displacement of the representations provided by extending existing possibilities at the outset, can only result *from* the learning operation itself.

The *internalist* solution that constitutes the contribution of pragmatist experimentalism is to be found in the way that collaboration internal to the process of collective action is conceived. According to this conception, such collaboration forms an internal teleology that guides the selection of new possibilities. For C.F. Sabel, this teleology results from the inter-group relationships framed by the pragmatic mechanisms that themselves lead to the setting in motion of a logic of inquiry that ultimately allows not just for choice, but for *choice as to how to choose*. The more specific contents of this process of shared inquiry remains, however, as we will see, essentially a black box in C.F. Sabel's work.<sup>199</sup> Yet this constitutes the key element that enables understanding of how social attention can be transformed and make the transition from a relationship of selection in the face of a given set of possibilities to a broadening of the set of available possibilities by means of a change of perception of the problems to be solved. Moreover, this element has a direct relationship with J. Dewey's pragmatist perspective. For J. Dewey, inquiry is an operation of "the controlled or directed transformation of an indeterminate situation."<sup>200</sup>

In seeking to open up this black box, we must resort to D. Schön's explanation of the process of reframing. According to D. Schön, the internal process, which C. Sabel assumes to be a given, rests on a conceptual displacement. If we

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<sup>199</sup> That is why we suggest a fourth stage in the development of institutionalist theories of governance, a stage that is understood to rely on the elucidation of new conditions associated with exploration of the black box, in so far as the deepening of our understanding of these conditions through recourse to the thought of D. Schön, as presented in this section, will prove to be insufficient.

<sup>200</sup> J. Dewey, *Logic: The Theory of Inquiry*, in *The Later Works, 1925-1953*, Volume 12, 1938, ed. by J.A. Boydston, Carbondale, Southern Illinois UP, 1986, 108.



grant that this displacement is made possible by pragmatic problem-solving deliberation,<sup>201</sup> it nevertheless poses a problem in connection with its dependence on a source of internal guidance (that of the inquirer and that of the reflective practitioner) that is capable of directing the attention of the interacting groups, so that a transition occurs from selective attention to genetic attention, and the end result is a reframing of problematic situations. We thus arrive at the limitations of this effort to conceive of how innovation occurs within the learning processes specific to collective action. A further lack of the pragmatist undertaking is the elucidation of the specific internal mechanism that would make capacitation for displacing behavior operational; i.e., that would enable the transition to another kind of attention and another kind of relationship with the possibilities by the actors involved in the process.

It thus appears important to differentiate two aspects of the solution proposed by pragmatism to the question of the learning operation that conditions the capacity for a collective action to select behaviors that will maximize satisfaction of the members' normative expectations. On one hand, the acknowledgement of a teleology internal to the learning process relies on recourse to a collaborative model of inter-group relations that replicates the presuppositions of the linguistic turn and concentrates on the conversational process available to discussion groups, as well as the process of justification that is assumed to guarantee trust among members of these groups. On the other hand, acknowledgement of the capacities for innovation of the actors involved in collaborative processes leads the pragmatist proposal to explore the black box of the conditions for transforming behaviors. Under this second aspect, it surpasses the conversational model and seeks to better understand how the redefinition of behaviors during a search for solutions that follows a logic of inquiry takes place. However, the pragmatist proposal does not, in our view, manage to satisfactorily combine these two aspects of its solution. It continues to presuppose that action taken on institutional design could somehow stimulate a rule for action that already exists in one corner of the minds of the actors involved in the problem solving.

In order to understand these more epistemological issues associated with democratic experimentalism, we must resituate them in the context of the broader theoretical discussion surrounding developments in political pragmatism. This exercise will make it possible to better grasp the tension between the conversational model on one hand and the metaphorical learning model on the other. The revelation of this tension first requires that we differentiate between two contributions made by recourse to pragmatism in current theoretical discussion in the social sciences and political philosophy. Pragmatism's first contribution consists, specifically within political philosophy, of *an effort to surpass* deliberative theories of democracy. Its

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<sup>201</sup> S. Helper, J.P. MacDuffie and C.F., Sabel, "Pragmatic Collaborations: Advancing Knowledge by Controlling Opportunism", *Industrial and Corporate Change*, vol. 9(3), (2000), 443-483, 473 (cited hereafter as PC).

second contribution consists, specifically within the social sciences, of *an epistemological break*, in the theory of action, with comprehensive and ideal-typical approaches to the normativity of norms. The reason it is necessary to distinguish between these two contributions is that there exists between them a link that obscures their distinctness. As has been observed by authors such as H. Joas, the engagement with deliberativism has played the role of a kind of screen as regards the epistemological resources of the American founders of pragmatism. This discussion, focused on the figure of R. Rorty, is the one that tends to be spontaneously cited as an approach to grasping the issues raised by the pragmatist turn in the social sciences. And yet this turn has been driven by a more radical dynamic, epistemologically speaking, than the discussion emerging from political philosophy.

Nevertheless, this first discussion has been significant, in that it has made it possible to open up perspectives for surpassing the deliberative orientation, even though the epistemological resources were lacking to make that orientation operative at the level of a new theory of collective action. Thus, in this first discussion will be found an opening up to the role of the imaginative world and to metaphorization, linked, however, to a linguistic philosophy of social deliberation/conversation that is attentive to the public role of the descriptions and vocabularies constructed by social actors. On the other hand, what is not found therein is any specific attention to the conditions for the conceptual displacement necessary to assign an effective role to this function of metaphorization within the process of collective action and instituting of shared norms. Thus, whereas, generally speaking, the first discussion obscured the second as regards the philosophical reception of political pragmatism, in order to grasp its epistemological issues it is necessary to illuminate it by means of the second discussion and show how the latter accomplishes the purposes of the first discussion in a more radical way. This it does while shifting the centre of attention to the building of collective capacities for action and away from the strengthening of the communicative competencies of the individuals involved. It is only thus that we are able to understand how, while it surpasses the Rortyan model of pragmatism through its conception of organizational learning, democratic experimentalism nevertheless remains dependent on the black box associated with the first aspect of linguistic deliberative pragmatism, namely the notion of conversational mechanisms available within the minds of the actors involved.

### 1. The contribution of political pragmatism to the linguistic shift

In the first stage of our reflection, we will briefly revisit certain aspects of R. Rorty's political thought in order to show that his conception of the transformation of social meanings in the public sphere remains obscure: on one hand, this conception does incorporate J. Dewey's requirement that social intelligence about the conditions for collective action be displaced (pragmatic virtue); but on the other

hand, it continues to refer to a conversational-type model that assumes that the identity of action emerges spontaneously through the praxis of discussion. Rorty thus recognizes the internal teleology of the conversational dynamic without referring to standard norms of discussion; but at the same time, he refers to the actors' practical inclination to arrive at shared reference points within this process without highlighting the need to acquire or build this disposition, that is, to act on it.

A fundamental aspect of J. Dewey's thought that has been highlighted by the Rortyan critique of deliberativism resides in its handling of the distinction between public and private.<sup>202</sup> This handling requires that two aspects of the public-private distinction be taken into account: on one hand, the need for a consequentialist approach to the two concepts (private and public); and, on the other hand, the need to keep the individual and groups of individuals on the same level as constitutive entities within social interactions. The result is the conception of the public that, as defined by *specific attention* to "the extent and scope of the consequences of acts,"<sup>203</sup> insofar as they are capable of affecting other individuals than those directly involved in a transaction. But this consequentialist conception of the consideration of interest as regards a broader community assumes, in a more radical manner, that this communitarian potential is taken into account, both in relation to isolated individuals and in relation to individuals as members of various groups in society. The issue, then, is to establish a link between the fulfillment of potentialities within joint activities and the need for a shared order to guarantee interaction among these different activities. The link thus established concerns the fulfillment and expression of collective identities on one hand, and, on the other hand, the principles entailed by these collective identities' enrichment and mutual interchange in a shared space. Thus we have, on one side, the question of the creation of multiple "we"s whose consequences are manifested beyond a private understanding between parties and, on the other side, the requirement that confirms or disconfirms these trials or experiments, namely whether they can be part of a process of interchange and strengthening of shared values.

To do justice to these two dimensions of J. Dewey's thought about the public, R. Rorty adopts an anti-representationalist position concerning the requirements for individual fulfillment and an anti-foundationalist position concerning the requirements for justification of a shared order. The problem consists of conceiving of the public sphere as framed by the question "Who are we?" (in a consequentialist perspective: commitments to a potential "we") and as framed by the question "Who could be affected by our promises?" ("What future goals, what openings, are available within the contingent order of the vocabularies allowed").<sup>204</sup> These two

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<sup>202</sup> J. Dewey, *The Public and Its Problems*, in *The Later Works, 1925-1953*, Volume 2: 1925-1927, ed. by J. A. Boydston, Carbondale, Southern Illinois University Press, 1986, 244-245.

<sup>203</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 245.

<sup>204</sup> Cf., for example, R. Rorty, "Moral Universalism and Economic Triage", *Diogenes*, 44 (1996), 3-15.

questions make it possible to discern a process of differentiation of social identities within a given conventional space and the process of opening up (non-closure, detotalization) of this space itself to new expressions that challenge its capacity to express human potentiality. Thus a tension is set up between given capacities for fulfilling fertile identities and the exclusion of other capacities assumed to negatively affect those first capacities. In other words, the criterion of differentiation of identities (the anti-representationalist thesis) is insufficient on its own to guarantee a public space if the beliefs in a foundation that guarantees this differentiation cannot themselves be challenged (the anti-foundationalist thesis). A space is public, then, when it guarantees revision of the beliefs in its self-preservation, that is, when it theorizes the *experimentalist* relationship between exclusion and inclusion. The question is thus not to know whether a breach is acceptable or not, since no breach in the space of differentiation can assess itself, under the foundational model. The question is rather to determine what is assumed by a revision of beliefs; how a breach can open up and come to be an acceptable expression; how it can find a niche for itself within the shared space and progressively manage to *displace* the acknowledged foundational beliefs.

In R. Rorty, the mediation in question remains essentially *linguistic*. It assumes as a given the conversational practice (capacity) that animates public space as a totality in process of self-expression or as an experimental process. Capacities for differentiation and inclusion stand out from this conversational habitus of the public space. With this conversational background as a foundation, metaphors clearly appear as the alternative to the formal pragmatics of argumentation. “Ways of speaking” have their own inferential resources: they train the feelings, that is, the ability to attend to new expressions of suffering and expectations for the fulfillment of human potential. By destabilizing beliefs, metaphors – or ways of speaking – *broaden* beliefs’ linguistic receptiveness and *predispose* their vocabulary to enrichment, such that it (the vocabulary) can be reformulated and continue its process of differentiation.

For R. Rorty, the pragmatic (and not the logical) process that metaphor makes possible is adequately accounted for by the breach that, at the prompting of metaphor, feelings become capable of realizing within a given vocabulary. According to this approach, this process thus shares with the deliberation that Rorty aims to critique a dual presupposition: that of a conversational habitus that is already a given within any democratic public space, and that of linguistic mediation as being necessary to guarantee the self-preservation of this public space. In a word, it presupposes identity and virtue.

In the field of political philosophy, this dual presupposition has opened up two movements in the pragmatist effort to surpass deliberativism. There is on one hand a movement to show the need to take into account the usual process of identity formation as a condition of the use of deliberative procedures (thereafter operating as one function among others in the social differentiation entailed by involvement in

decision-making processes). On the other hand, there is a movement to reveal the need to reinforce the role of pragmatic virtues in guaranteeing a concern for minority opinions and values within public decision-making procedures.

From the perspective of the first movement, pragmatists have defended the idea that adequate forms for participation cannot be determined in advance, that is, independently of social *experimentation* and the usual actor identity formation made possible by this experimentation. Thus, according to C. Misak, “[T]he kind of deliberation that is appropriate is something that will come out only through thought and deliberation.”<sup>205</sup> The question is thus not what are the conditions to trigger individual argumentative competencies in an interaction space that guarantees “a cooperative search for the truth, within the force of the better argument alone can influence the outcome.”<sup>206</sup> Rather, and more radically, the question is that of a method of social experience capable of guaranteeing new forms of collective action. “Indeed the self will only be formed through thinking and decision-making. It is only in the midst of inquiry that we discover who and what we are, what we want, and what fits best with the evidence and argument.”<sup>207</sup>

From the perspective of the second movement, authors like M. Festenstein<sup>208</sup> aim to defend the need to surpass the exclusive internal constraints of adherence to the most universal point of view or the most acceptable behavior. In that context, the only behavior assumed to guarantee all participants’ adherence is the one that affirms the rational acceptability of majority rules for deliberation. And yet other pragmatic virtues can be deployed to guarantee the realization of a shared interest, in particular that which validates *attention* to minority preferences. Minority preferences are not only the source of capacities for experimentation that allow for the creation of actors’ identities and collective motivation. They also safeguard pluralism of motivation as regards respect for the results of the deliberative process of justifying public decisions. Further, they thereby avoid restricting the deliberative process of justifying public decisions to a mechanism that is coercive and demotivating to groups placed in the minority.<sup>209</sup>

Certainly, these two movements are more attentive to the processes of collective decision making than are R. Rorty’s reflections. But this is so solely with a view to freeing these processes from their subjection to the deliberative perspective, and thus confirming the appropriateness of R. Rorty’s revisiting of J.

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<sup>205</sup> C. Misak, *Truth, Politics, Morality, Pragmatism and Deliberation*, London/New York, Routledge, 2000, 108.

<sup>206</sup> J. Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp, Frankfurt a. M., 1991, 154-155; (*Justification and Application: Remarks on Discourse Ethics*, translated by C. P. Cronin, Cambridge (Ma), MIT Press, 1993, 50).

<sup>207</sup> C. Misak, *Truth, Politics, Morality, Pragmatism and Deliberation*, *op. cit.*, 108.

<sup>208</sup> Cf. M. Festenstein, *Pragmatism and Political Theory: From Dewey to Rorty*, Cambridge: University of Chicago Press/Polity Press, 1997, 168-169.

<sup>209</sup> Cf. *ibid.*

Dewey. It is the *identity-virtue* tension that produces the frame for attention to capacities for participation in the public space. Engagement in the decision-making process must be viewed in light of this framing.<sup>210</sup>

## 2. The contribution to political pragmatism of the pragmatist turn

The ambiguity we have identified within the Rortyan position makes it possible to illuminate the specific meaning of the reference to pragmatism in the social sciences. Unlike Rortyan pragmatism, on one hand, the pragmatist turn in the social sciences does not take for granted an internal teleology supported solely by the pragmatic virtue of conversational mechanisms or structures of deliberative framing. It seeks to determine the conditions for a mechanism likely to prompt the deroutinization of practices through the cooperative incentives it provides. Thus it seeks to provoke a shock or a state of disequilibrium within practice as already standardized through participation in problem-solving processes. On the other hand, the pragmatist turn in the social sciences seeks to extend this initial action taken in relation to the organizational conditions for learning towards a second action that directly concerns the transformation of practices themselves and the reframing of the conditions for collective action. This second action has to do with the logic of inquiry, to the extent that it alters the relationship between collective action and the range of possibilities. Now even though the need for this second action has been clearly perceived, we will see that it remains essentially a black box that recourse to D. Schön's thinking seeks to open up. This black box consists, as we will see, of an assumed self-reflexive property of collective action.

In the field of the social sciences, the pragmatist turn assumes a fuller epistemological break with the presuppositions of deliberativism. Deliberativism is understood more radically as a form of subsystem constituting a standard regulatory mode that intervenes directly in the public space. But public space constitutes a much broader system formed from the set of all collective decisions made and aiming at the best possible fulfillment of the potentialities of all the individual and collective entities involved. Thus it is the search for shared solutions and involvement in decision making that, *prima facie*, constitutes the public space: J. Dewey could define it thus in viewing it as a communitarian process based on cooperative collective action:

Wherever there is conjoint activity whose consequences are appreciated as good by all singular persons who take part in it, and where the realization of the good is such as to effect an energetic desire and effort to sustain it in being just because it is a good shared by all, there is in so far a community.<sup>211</sup>

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<sup>210</sup> And not the reverse, namely, that experience of participation is itself to be viewed as a frame of reference in relation to the differentiation of identities and the reinforcement of virtues.

<sup>211</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 328.

J. Dewey distinguishes two foundational moments in the development of this cooperative collective action. First, he identifies the moment of association that allows for the accumulation of goods from which all can derive benefit and “which gives a direction to the conduct of each one.”<sup>212</sup> In this first moment, cooperation with others is a condition for the liberation and “the fulfillment of personal potentialities”.<sup>213</sup> The second moment is that of the “flow of social intelligence”<sup>214</sup> that results from the various local groups’ mutual emulation as a result of the exchange of experiences and discussion about them.<sup>215</sup> This flow of social intelligence constitutes the moment that corresponds to the liberation of collective potentialities properly so called. It is the result of a process of inter-group learning.<sup>216</sup> As H. Putnam writes:

For Dewey the democracy that we have is not something to be spurned, but also not something to be satisfied with. The democracy that we have is an emblem of what could be. What could be is a society which develops the capacities of all its men and women to think for themselves, to participate in the design and testing of social policies, and to judge results.<sup>217</sup>

The pragmatist turn in the social sciences may be viewed in this light: for the pragmatist, it is necessary to *experiment*, i.e., to take into account the training of individuals’ capacity for self-destination, a capacity for involvement and cooperation in problem-solving processes. The pragmatist establishes a tension between the moral “we” that is given and implicit and the explicit potential “we”, the “we” of the community that must be built and that calls for a force for social creation in order to make the transition from a centralized social process aiming at the division of labor to a decentralized social process aiming at the involvement of all the various groups in a process of innovation.

This kind of approach shows that it is possible to identify stages in the transformation of actors’ competencies in relation to their involvement in a process of collective action. The vector of learning then becomes the building of those processes of collective action likely to fulfill the requirements of participatory mechanisms directed towards problem solving.

To organize a "joint action" between the actors involved and initiate learning processes, certain conditions must be filled such that intermediate cultures of

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<sup>212</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 329.

<sup>213</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 329.

<sup>214</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 371.

<sup>215</sup> J. Dewey, *The Public and Its Problems*, *op. cit.*, 370.

<sup>216</sup> “From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common. Since every individual is a member of many groups, this specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups” (J. Dewey, *The Public and its Problems*, *op. cit.*, 328). See also J. Dewey, *Reconstruction in Philosophy*, in *The Middle Works, 1899-1924*, Volume 12, 1920, ed. by J.A. Boydston, Carbondale, Southern Illinois UP, 1982, 186.

<sup>217</sup> H. Putnam, *Renewing Philosophy*, Cambridge (MA), Harvard UP, 1992, 199.

collective action are constituted. These conditions are usually omitted when they are simply confused with the mechanisms assumed to motivate participation. In order to make it possible to take ownership of a process of collective action, it is necessary for members of the subgroups involved to experience confidence in a project conceived of as a *joint action*,<sup>218</sup> involvement in mutual support in the implementation of the project, and ultimately the emergence of new spokespersons to intervene in the decision-making process and make the joint action ever more susceptible of ownership. And this must first take place at the local level, in order to find solutions through collective organization and management of shared problems.

Democratic experimentalism, especially as it is understood by C.F. Sabel, without any doubt constitutes one of the most characteristic expressions of this pragmatist turn in the social sciences, in that it radically surpasses solutions (discussed in the first two sections of this paper) that neglect the conditions for learning mechanism to be susceptible to ownership. For authors writing from the perspective of the pragmatist turn, “democratic experimentalism”<sup>219</sup> designates “the overall system of public problem solving that combines federal learning with the protection of the interests of the federated jurisdictions and the rights of individuals.”<sup>220</sup> The advantage of such a system of collaboration, in which individuals learn from each others’ successes and failures, is that it has the capability to reduce the vulnerability created by the decentralized search for solutions.<sup>221</sup> A second advantage of this kind of system resides in the attention it pays to the specific function of groups in the process of internalizing learning mechanisms. This system is based mainly on the “self-reflexive sociability”<sup>222</sup> of the groups of actors that have been constituted as “publics” capable of learning by evaluating their collective actions.<sup>223</sup>

Under the deliberative models, an underlying psychology of moral development remained tied to a mentalist conception of the development of social norms. The issue was clearly the development of individual competencies for judgement, as for example in L. Kohlberg’s model.<sup>224</sup> The idea was that the process

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<sup>218</sup> We think in particular of M. Bratman’s model of “shared cooperative activity” (“Shared Cooperative Activity”, *Philosophical Review*, 101/2, 1992, 327ff), used by J. Coleman in the context of the analysis of the concept of law (*The Practice of Principle, op. cit.*).

<sup>219</sup> On the more theoretical issues related to this approach, cf. J. Lenoble and M. Maesschalck, *Towards a Theory of Governance, op. cit.*

<sup>220</sup> Cf. M.C. Dorf and C.F. Sabel, “A Constitution of Democratic Experimentalism”, *loc. cit.*, 288.

<sup>221</sup> *Ibid.*, 287-288.

<sup>222</sup> C.F. Sabel, “Learning by Monitoring: The Institutions of Economic Development”, in *The Handbook of Economic Sociology*, N.J. Smelser & R. Swedberg (eds.), Princeton/New York, Princeton UP, Russell Sage Foundation, Princeton/New York, 1994, 137-165, 159; cited hereafter as LM.

<sup>223</sup> LM 158.

<sup>224</sup> Cf. F.C. Power, A. Higgins, L. Kohlberg & J. Reimer, “The Just Community Approach: Democracy in a Communitarian Mode”, in F. C. Power, A. Higgins, & L. Kohlberg (eds.) [*Lawrence Kohlberg’s Approach to Moral Education*, New York, Columbia UP, 1989, 33-62. L.



of acquiring individual competencies for argument depended on the setting in motion of argument within settings organized to promote deliberation on a participatory model. Thus the group constituted a kind of *intermediate cultural setting*, with its own references and codes whose function was to strengthen participants' mental capacities by acting on the expected practical effects of the behavior of a member who tries to be loyal and honest with regard to the group.

In democratic experimentalism, it is clearly the competencies for collective action of groups themselves that are at stake. This kind of approach relies simultaneously on the capacity for self-regulation of the actors involved at the local level and the capacity of the regulatory power to guarantee an exchange of knowledge and practices that is based on equal status and on freedom within each experiment and among experiments themselves. What is sought is twofold social learning: the social learning that results directly from participating in the cooperative search for solutions within a local process of experimentation; and the learning that results from evaluating and comparing different local solutions at the level of the framing mechanisms. At each of these levels, *inter-group relations* are at issue. That is why, in the view of authors such as M.C. Dorf and C.F. Sabel, the contribution of pragmatism lies in its model of learning by monitoring, in which practical incentives such as comparative assessment, co-design, and error detection are implemented to promote the exchange of knowledge and experiences during the testing of workable solutions.<sup>225</sup> Under such a model of governance, at the national level, the goals and content of public policies must be minimally defined, vague, and general, in order to allow for experimenting with solutions at the level of the federated local entities.

The major features of pragmatism retained by C.F. Sabel assume the acknowledgement of an epistemological break with the presuppositions of deliberativism. This break radically differentiates his thinking from the Rortyan perspective. It relies, on one hand, on a conception of inference that is not limited to the pragmatic matter of the revisability of beliefs, but also deals with the rules of engagement in collective action. According to this conception, what matters in a learning process is the conditions under which the methods selected manage to transform themselves internally into their own implementation.<sup>226</sup> On the other hand, it also rests on a conception of the relationship with new social goals or possibilities that calls for a more complex theory of the contribution to action made by inquiry. On this score, C.F. Sabel emphasizes the metaphorical nature of the learning

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Kohlberg's thought represents a significant bridge between that of J. Rawls and J. Habermas as regards the presuppositions of deliberativist proceduralism (cf. J. Lenoble & M. Maesschalck, *Towards a Theory of Governance*, *op. cit.*, 156ff).

<sup>225</sup> M.C. Dorf & C. Sabel, "A Constitution of Democratic Experimentalism", *loc. cit.*, 286-287.

<sup>226</sup> According to H. Putnam, "Dewey and James extended Peirce's observations by making explicit the idea that methodology itself is something that evolves in the course of inquiry" (*Realism with a Human Face*, Cambridge, MA/London, Harvard UP, 1990, 219).

associated with the pragmatist mechanisms of benchmarking.<sup>227</sup> On the social level, the pragmatic function of inquiry consists of placing the identification of problematic situations on the same level as the theoretical explanation of their consequences, since these two actions result from the same practical operation of discriminative attention to the interactions elicited by normative choices.<sup>228</sup>

On this score, C.F. Sabel's theory of the "non-standard firm" is highly characteristic. It constitutes a typical example of the institutionalization of cooperative solutions in a non-constraining situation, i.e., in a situation where other valid choices of solution could have been made. The issue of the choice of this kind of solution is thus unequivocally central, because the organizational process relates to zones of ambiguity where reference to the interests, values, and standards of organization remain unclear. In these zones of ambiguity, what the actors *will* or *will not* do "depends on the particulars of the situation, including, of course, the actors' changing understandings of their possibilities."<sup>229</sup> How these situations are made to yield benefits is what makes it possible to differentiate two kinds of organizational culture of the firm, only one of which is based on a pragmatist option. According to C.F. Sabel, the non-standard firm can be considered to be a *process of collective action*. Contrary to the standard model of the firm based on the *routinization* of tasks and their incorporation into a hierarchical structure,<sup>230</sup> non-standard theory favors the systematic revisiting of routines and the exploration of the ambiguities within a decentralized (polycentric or federalist) structure. The non-standard firm thus has a relationship to more dynamic and open learning: whereas the standard firm combats the ignorance endemic among its human resources by simplifying tasks, the non-standard firm promotes cooperative behaviors as the means to find new solutions vis-à-vis complex tasks. The strategy of the non-standard firm thus proves fruitful not just in the short term, that is, during the time needed for a problem-solving process to yield the solution to the problem identified. It is also fruitful in the medium term, because it enables the learning not only of how to choose solutions but also of *how to choose how to choose solutions*.<sup>231</sup>

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<sup>227</sup> Cf. C.F. Sabel, "A Real-Time Revolution in Routines", *op. cit.*, 130 (cited hereafter as RT). See as well page 135: "The process of re-evaluating goals parallels the process of searching out and assessing narrower design choices. Thus the 'center' of the encompassing pragmatist institution – acting on behalf and with the help of representatives of the individual subunits – metaphorically or openly benchmarks its overall objectives, looking for goals like the current ones, but arguably better on some dimension."

<sup>228</sup> In his *Logic: The Theory of Inquiry* (*op. cit.*, 502), J. Dewey writes of making use of discriminative or selective observation to determine, for example, whether or not a given legislative measure works, relying on a comparative method that situates it within a system of well thought-out alternatives.

<sup>229</sup> LM 158.

<sup>230</sup> Cf. RT 111.

<sup>231</sup> PC 478.

C.F. Sabel emphasizes the pragmatic mechanisms that make possible the setting in motion of a *pragmatic collaboration*. In the context of the non-standard firm, all these mechanisms – benchmarking, simultaneous engineering, and the error detection method – are incorporated into a “just in time” problem-solving procedure and based on a process of inter-group exchange that assumes *rules of engagement* that require mutual monitoring of each participant’s contribution (detection of performance failures), information sharing for a shared understanding of the situation to be explored, and the mutual assessment of each participant’s reliability in relation to the joint activity. These rules of engagement constitute the frame of reference for *learning by monitoring* via the pragmatic mechanisms established.

Beyond these pragmatic mechanisms governed by rules of engagement, however, a further dimension of the process of collective action remains to be determined. This is the joint activity properly so called, namely the *inquiry*. The role of the mechanisms and their procedural monitoring is only to create a path that will lead the actors to seek solutions within a “circumscribed space of possibilities”<sup>232</sup> whose contours and contents are not known to them ahead of time. This path confirms the actors in their inclination to an “urgent suspicion that habitual beliefs are poor guides to current problems”.<sup>233</sup> it imparts the force of *quasi-routine*<sup>234</sup> to the critique of the “suitability of current routines.”<sup>235</sup> As C.F. Sabel, writes, “[W]here hierarchy produces the information asymmetries of mutual ignorance, learning by monitoring in effect creates an information symmetricizing machine.”<sup>236</sup> A force of this kind is necessary because at the moment when it is set in motion, action (properly so called) on routines, acquired habits, and beliefs intensifies uncertainty and the awareness of difficulties. But it is always just a preliminary to the action of inquiry.

The question of *shared inquiry* is fundamental: it is a question of managing to free problematic situations of ambiguity by means of the process of inter-group cooperation put into place. C.F. Sabel writes of the “collaborative investigation of ambiguity”<sup>237</sup> and “problem solving deliberation”.<sup>238</sup> Clearly these expressions

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<sup>232</sup> PC 468/RT 124.

<sup>233</sup> PC 469.

<sup>234</sup> Formulations such as “routinely questioning the suitability of current routines” (PC 468) and “the routines they use for interrogating and altering their routines” (PC 468-469) are cast paradoxically for rhetorical effect. Standard “routinization” has a wholly different meaning than that of collection action. It results from options for the division and simplification of labor in order to produce a chain of limited operations that are externally related to each other (PC 461). That is why the formulations just mentioned seek to convey the need to engage with existing routines by adopting an analogous force that is at least as powerful as they are in order to destabilize them. Pragmatic mechanisms and the rules of engagement can thus be viewed as playing the role of *quasi-routines* in order to “systematically provoke doubt” (PC 469/RT 121).

<sup>235</sup> PC 468.

<sup>236</sup> PC 472.

<sup>237</sup> PC 470.

<sup>238</sup> PC 473.

emphasize the organization of inter-group exchanges in discussion spaces.<sup>239</sup> But they also reveal a particular dimension of the rules of engagement that is designed to protect the shared process from opportunistic behaviors, or “free-riding effects”, that could hijack the benefits produced in common. The pooling of information thus plays a twofold role: it protects against opportunism and it symmetricizes information, thus making possible an increase in shared knowledge. But this increase depends above all on another practice that is more directly connected to the activity of inquiry properly so called. Beyond the sharing of information about each participant’s intentions and capacities, what is at stake in this process is also mutual teaching designed to make the relations between the technical competencies and the strategies of research and development understandable. It is only in this way that it becomes possible to open up existing routines and undertake the joint redeployment of the resources invested in the process of inquiry.

In this perspective, the *alignment of interests* by means of the process of collective action becomes a practical effect that cannot be dissociated from the reconfiguring of solutions through the joint activity of inquiry. Indeed, the inquiry incorporates this construction of a shared view of the problems and goals to be pursued in solving the problems, because it broadens all the actors’ attention to include the context of their action and thus the interest-based factors specific to the ways the various groups operate in solving a problem.

Nevertheless, C.F. Sabel is silent on the how construction process that is supposed to lead to the transformation of the perceptions and logic of action takes effect. The *logic of inquiry* that is at the heart of pragmatism remains a black box. The only indication we are given is the example of inquiry by the method of the “five whys”.<sup>240</sup> This example names two properties needed by the joint activity of inquiry in a pragmatic context: the mechanism of shared experiences between collaborators, and the reconstruction of long causal chains (*without being detained by immediate causes or causes assumed to be obvious*). In other texts, C.F. Sabel uses other formulations for these two properties but still does not open up the black box of the logic of inquiry. In “Learning by Monitoring”, for example, he describes the mechanism for sharing experiences as a “process of continuous discussion of the possibilities and of joint goals.”<sup>241</sup> This mechanism is understood to allow for an exploratory use of communication in such a way as to investigate the limitations of each participant’s underlying positions. The second property takes shape through the reconstruction of identities and of representations of the world, that is, as a revision of beliefs based on the reciprocal identification of the limitations of each position in the perspective of shared action (in other words, it takes shape through a cooperative game).<sup>242</sup> In this kind of mechanism, attention is shifted to create an informative

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<sup>239</sup> PC 469; LM 145.

<sup>240</sup> PC 468; RT 121.

<sup>241</sup> LM 145 : “a continuous discussion of joint possibilities and goals”.

<sup>242</sup> LM 146.

*disequilibrium*<sup>243</sup> that allows for the envisaging of new forms of cooperation. We thus see how the actors *learn how to learn*.<sup>244</sup>

To learn how to learn, then, a *shift* is necessary and this implies specific *attention* within the collaborative process. “The notion of rule governed learning by monitoring can ... accommodate evidence of diversification and disruption of relations by shifting attention from the extent to the character of collaboration.”<sup>245</sup> It is not just a question of paying attention to what one is learning: one must also pay attention to how one is learning. C.F. Sabel focuses on the mechanism of *disequilibrium*<sup>246</sup> produced by the exploration of other points of view and interpretations of a situation. In going beyond the limits of their own position, a group of actors will be brought to redefine the parameters that led them to adopt that position and build new positioning. They thus derive a benefit from the very *vulnerability* of their initial position (that is, from its limitations) by being willing to explore other positions that are caught up in the same disequilibrium that is driven discursively by the mechanism of joint inquiry. But this mechanism itself remains under-explained. One enters into it following an induced disequilibrium and one emerges from it with a new understanding of one’s role in solving a problem and more broadly in taking part in a joint activity. All this happens because of a shift in attention. A group can thus learn to organize and define itself vis-à-vis other groups. In fact, it is desirable that this paradigm be applied to public-private partnership situations:<sup>247</sup> learning by monitoring helps in “creating a common framework of understanding that allows [groups] to assess the shortcomings of their joint activities.”<sup>248</sup>

What of the conditions for this awareness: in what conditions, and how, does it manage these transformations? On this point, C.F. Sabel offers no more than a comparatively weak social notion of reflexivity, conceived on the deliberative model and thus far removed from pragmatist requirements for a concept of "joint" learning:

[R]einterpretations proceed through argumentative encounters in which the individual attempts to establish an equilibrium between his or her views and social standards by recasting both. It is this reflexive capacity to embrace different forms of self-expression that defines persons as individuals and creates new interpretative possibilities for society.<sup>249</sup>

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<sup>243</sup> LM 148.

<sup>244</sup> LM 158.

<sup>245</sup> LM 146.

<sup>246</sup> LM 148 and 149.

<sup>247</sup> LM 150.

<sup>248</sup> LM 155.

<sup>249</sup> LM 156.

This concept of reflexivity is supplemented by a concept of inter-group learning that assumes it is possible to determine what rules guarantee a redefinition of roles that goes beyond individual reflexive competencies.<sup>250</sup>

Thus, if the model deployed by C.F. Sabel calls for a second-order attention as a key aspect of the logic of inquiry, the process of producing such second-order attention remains a black box. Informative disequilibrium, the exploration of ambiguities, the revision of beliefs: these are all mechanisms that can result in increased *first-order* attention, i.e., direct attention to a new solution for a problematic situation. What is at play here are the conditions for “disentrenching inquiry”<sup>251</sup> in order to turn one’s attention away from the usual information about advantages and disadvantages. The result is *choosing better* rather than *choosing differently*. Choosing differently means shifting attention to the choice of how one chooses. It requires a change in the overall approach, the approach that operates in the selection of projects at the company level and that governs the selection of reform plans at the state level. It is when choosing how to choose is in question that the issues of errors on a major scale and with long-term effects come into play.

Now in the experimentalist model, all this happens as if merely making the shift beyond accustomed habits and forms of evidence must not just result in an immediate impact on the choice of solutions, but also produce, in some spontaneous fashion, an indirect effect on how solutions are chosen. But the specific properties of the inquiry that are expected to make this form of *self-capacitation* of second-order attention possible are not specified. All we know is that what is involved in these properties resides in a *displacement* inherent in the inquiry itself, by virtue of its being an unaccustomed project. Thus it is by adopting the pragmatist method itself as a method of social experimentation, i.e., by linking the idea one can form of a state of affairs to the imaginative capacity one has for changing that state of affairs, that the self-reflexive property of collective action is manifested.<sup>252</sup> Reason achieves attention to a possible displacement *and* attention to how one pays such attention *simultaneously*.<sup>253</sup>

On this score, the concept of *metaphoric learning* is hardly of any help to our progress, because it reproduces the juxtaposition of the two orders of attention by once again reducing the second order to the first. Metaphor does not teach (in the strict sense) how to learn nor how to choose how to choose. It teaches how to identify the limits of the representations and descriptions conveyed by the various groups involved in a conversational exchange and how to opt for a *revision of*

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<sup>250</sup> LM 158.

<sup>251</sup> R.T 124. This concept of self-reflection is already to be found in D. Schön: “Our technology and our institutions affect thought not only directly, by the changes in behaviour they force upon us, but indirectly – by presenting themselves as projective models for our theories” (D. Schön, *Displacement of Concepts*, London, Tavistock Publications, 1963, 197. Hereafter cited as DC.).

<sup>252</sup> LM 159.

<sup>253</sup> PC 478.

categories that will make it possible to clear away ambiguity, i.e., for the *reciprocal clarification of meanings* through a creative compromise similar to that of translation.<sup>254</sup> The indirect result is a process of social construction of meanings through cooperative meaning-making and recourse to metaphorical comparisons.<sup>255</sup> These two mechanisms do not, however, explain on their own how it is possible on one hand to learn to give priority attention to this kind of social construction or on the other hand to learn to use it collectively.

### 3. The contribution to political pragmatism of the theory of learning: D. Schön's contribution

It remains, then, to elucidate this twofold move which the pragmatist turn in the social sciences has identified as necessary but which it has not managed to fully construct: one move that requires the specific reframing of the conditions for learning in collective action and another move that requires determination of the conditions for learning how to do this learning, or more simply the reflexive property of the social that enables it to have recourse to "reflection- in-action".<sup>256</sup>

We can find an attempt at such a more radical explanation of the logic of inquiry in D. Schön's theory of metaphorical learning. The departure point for this explanation, which was initiated during the sixties, is obviously "mentalist". Metaphor is conceived as work done by the individual imagination, and it is in acts of individual creativity that the sources of paradigm shift must be found.<sup>257</sup> But this revelation of the metaphorical power of language offers the benefit of identifying its central displacement mechanism and its specific role in learning. The theory of metaphor thus points towards the pragmatic question of the production of new behaviors capable of changing the initial givens of a situation and acting on actors' capacities.

As [the child] learns to ride a bicycle after he has learned to ride a little one; as he learns for the first time to run, or to eat with a fork; in virtually all learning, the child can be seen shifting old patterns to new situations, using the old as projective model for the new, just as he treats his first encounter with school through the metaphor of his family.<sup>258</sup>

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<sup>254</sup> RT 126.

<sup>255</sup> RT 127.

<sup>256</sup> D.A. Schön, *The Reflective Practitioner, How Professionals Think in Action*, Aldershot, Ashgate Publishing Limited, 1996, 163 (cited hereafter as RP).

<sup>257</sup> DC 98. Cf. D. Schön, *Beyond the Stable State*, London, Temple Smith, 1971, 130: "Freud, for example, during the time he was working on *The Interpretations of Dreams* existed, in the medical and the larger social worlds of Vienna, as a marginal man. Norman Thomas occupied a marginal position in American life for decades until his ideas (not his person) found their way into the mainstreams of public policy."

<sup>258</sup> DC 108.

While avoiding over-estimating the imaginative and individual nature of these examples, we can retain the underlying definition of the metaphoric process as such: it is understood to reside in *seeing as*, that is, more precisely, in the *projective displacement*<sup>259</sup> of past models onto new situations, which allows for a *framing* of the production of new behaviors.

This concept of framing, though implicit in D. Schön's early work, is a key factor in his transition to a theory of the role of metaphor in collective action. At the collective level, it is the way groups of actors equip themselves with interpretive frames for their interests that makes their positions incommensurable with those of other groups of actors. These frames are what conduce to groups' *selective attention*. Group members become more attentive to some aspects of a given situation and in consequence also become capable of reinterpreting the facts in light of the selected aspects. In this kind of situation:

The adversaries do not disagree about the facts, they simply turn their attention to *different* facts. Further, when one is committed to a problem frame, it is almost always possible to reject facts, to question data (usually fuzzy, in any case), or to patch up one's story so as to take account of data without fundamental alteration of the story.<sup>260</sup>

The force of such positions resides in the *normative function* played by their frames. This normativity derives from the metaphoric power of language. The frame functions at the collective level as does metaphor at the individual level. It elicits a kind of "policy-analytic literary criticism".<sup>261</sup> A group of actors' shared frame of reference is based on an interpretive rule that consists of relating all the features of a situation and the events that can arise within it to the internal coherence of a foundational metaphor. It is in this sense that D. Schön talks of "generative metaphor", as N. Chomsky talks of "generative grammar."<sup>262</sup> He writes as follows of generative metaphor:

The metaphor which accounts for centrally important features of the story – which makes it understandable that certain elements of the situation are included in the story while others are omitted; that certain assumptions are taken as true although there is evidence that would appear to disconfirm them; and, especially, that the normative conclusions are found to follow so obviously from the facts.<sup>263</sup>

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<sup>259</sup> DC 88.

<sup>260</sup> D. Schön, "Generative Metaphor: A Perspective on Problem-setting in Social Policy", in *Metaphor and Thought*, A. Ortony (ed.), Cambridge (UK), Cambridge UP, 1993, 137-163, 151, (cited hereafter as GM).

<sup>261</sup> GM 149.

<sup>262</sup> Cf. the reference to T. Kuhn in RP 183-184.

<sup>263</sup> GM 149.



This generative metaphor is the principle of selective attention within the collective frame that justifies actors' positions. It is also its principle of reproduction and thus its implicit principle of learning.

To elicit a logic of inquiry, it is necessary to become attentive to the role played by this framing, that is, to pay attention to the generative metaphor in which it originates and that produces the rule for interpreting and incorporating the facts. In so doing, one focuses one's attention on the *projective mechanism*, which consists of transposing habit (or the familiar) onto the unaccustomed (or the unfamiliar) or of associating neutral subject matter with familiar images.<sup>264</sup> What the attention retains from the operation of this projective mechanism is the *connection* established between two levels of consciousness: one that is spontaneous and undirected and another that is reactive and seeks to compensate for the undirectedness of the first level by means of an idea or form capable of conferring meaning. "We are asked not merely 'What do you see in X?', but 'Find Y in X.'<sup>265</sup> The moment one tries to grasp this meaning-generating process specifically, one passes from *selective attention* (first-order attention) to *genetic attention* (second-order attention). And from the moment such attention is established, inquiry is possible. In situations of conflict of interest between different groups, the advantage of such attention is that it allows for the opening up of the black boxes that the various groups are relying on to justify their positions. If the diverse processes for specific trait selection and for guided rereading of the facts are revealed through "shared inquiry,"<sup>266</sup> a different structuring of the frames the various actors relate to becomes possible. Such a restructuring of frames is valuable not just because it eases conflict by providing a fresh perspective on the situation. Reframing a situation means above all making new roles possible, opening oneself up to the possibility for new behaviors.<sup>267</sup> Thus a connection is established between the *cognitive work* of restructuring frames, based on the features of the concrete situation, and *redescribing* as participants themselves grasp what is at stake in their relationships with each other.<sup>268</sup>

D. Schön is thus surely the thinker who has presented the fullest account of the black box of *joint inquiry*, which represents the pivotal point of the pragmatist turning in the theory of collective action. It is the transition to second-order attention, that is, to genetic attention, that makes it possible to grasp the projective mechanism that can broaden the field of agonistic behaviors.

A major difficulty does however persist in this full version of the pragmatist turn: it resides in the mechanism for *intelligent learning*.<sup>269</sup> Conflict situations require intervention by an invisible hand, that of the *inquirer* who is capable of

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<sup>264</sup> DC 89.

<sup>265</sup> DC 88.

<sup>266</sup> GM 151.

<sup>267</sup> GM 155: "The new question leads to a reframing of the roles of the various parties."

<sup>268</sup> GM 158.

<sup>269</sup> DC 89.

*directing attention.* The prompting provided by the inter-group relation is not sufficient: outside guidance, the gaze of an onlooker, is needed to launch the process of redescription.

In his later work D. Schön envisaged two solutions to this problem of the guiding of attention. On one hand, he sought indicate what conditions make it possible to incorporate a form of such guidance on the part of the professional practitioner; on the other hand, he refined his conception of inter-group relations so as to better specify the particular conditions of the process of inquiry that make it possible to reframe action.

### 3.1. Building the attention of the reflective practitioner.

All the significant developments of D. Schön's theory in the field of professional practice have considerably enriched his theory of the role of attention in organizational learning. This process of evolution in his research also resulted in his focusing on the assumed capacities of actors facing problematic situations. In one context, actors appear to be the prisoners of sterile mechanisms that lead them to harden the deadlocks within problematic situations by intensifying the conflicts among viewpoints. In another context, they appear to be explorers supported by mechanisms that stimulate their reflexive potential and lead them to interact constructively with other points of view by making an effort to understand them from inside and to revisit their own points in light of what they have learned.

Recalling the question he was asked by the director of security in a chemicals company, D. Schön again delineates two kinds of behavior.<sup>270</sup>

In one division of his company, people had learned a way of working with federal regulators that they had found extraordinarily effective. As they developed new chemical products and gathered data on their environmental effects, they made full and immediate disclosures to the federal regulators. They had discovered that when regulators had early access to data and were able to participate in its interpretation, they were inclined to work cooperatively with the industry's representatives. ...But in other divisions of the firm ... regulators were considered as adversaries who should be fed tailored information packaged in carefully prepared cases submitted for approval.

D. Schön thus pinpoints two possible types of behavior. One is to develop an oppositional strategy towards a group identified as harboring opposing interests to one's own. In this case, that group consisted of federal civil servants with the power to block or delay, for reasons of health or environmental safety, the granting of consent for the use of a substances in production processes. The other type of

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<sup>270</sup> RP 352.

behavior is to develop a strategy of collaboration with that same group. In the example before us, this collaborative strategy included early information sharing. The strategy banked on transparency and included involvement in the interpretation of the regulations in force. Thus, in this strategy, the risk of early refusal was accommodated as a trade-off for the indirect benefits generated by an ethos of cooperation. And indeed, the strategy did succeed in reducing procedural delay, because mistrust related to the suppression or distortion of information was removed.

One can see how, with strategies of the second kind, the correlation is made between the removal of unclarity and the enrichment of previously opposed stories (or just stories that previously had the potential to harbor conflicting interests). The innovative employees discovered a factor that undermined their existing strategy for preparing their dossiers: federal representatives were led to suspect bias in the presentation of results. What could be viewed by one side as preparation time made longer by the intent to transmit results that were full and impervious to challenge could be viewed by the other side as the suppression of information in order to better cover up deficiencies and questionable results. The logic of contradiction of these two causal stories could have been extended. But instead, the innovative strategy took off from a different approach to the problem: it tried collaborating in order to remove doubt about the interpretation of results. It therefore tried out a different way of managing the reciprocal flow of information and interpreting the regulations in force.

For the professional, then, the question becomes knowing how to direct and validate reflection-in-action so as to decide whether she or he will follow a new path. Since what is in question is the validation of the signs professional actors observe by making use of their reflexive skills, D. Schön proposes recourse to a test based on K. Popper's theory of inquiry.<sup>271</sup> This consists of devising a test of validity by means of a process that makes possible the trial, the falsifiability, and the proposal/revision of the pre-given frames. How should a practitioner proceed in order to test her or his reflexive observations in action? Under what conditions can the practitioner succeed in testing the validity of her or his observations? The answer is to view these observations as hypotheses that are subject to invalidation. To succeed in doing this, the practitioner has no choice but to confront these observations with other, invalidating, hypotheses, while progressively developing the frame for a new story that unites her or his reflexive requirements to the fresh observations that emerge from the mechanism of inquiry. This process assumes that three conditions are satisfied:

- the elicitation, identification, and multiplication of stories capable of providing causal representations of reality that invalidate each other;

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<sup>271</sup> Cf. D.A. Schön, "Concluding Comments", in D.A. Schön (ed), *The Reflective Turn, Case Studies In and On Educational Practice*, New York/London, Teachers College Press, Columbia University, 1991, 343-359, 348, (cited hereafter as RT).

- verification of the robustness of these hypothetical stories;
- choosing among these stories according to the practitioner's basic categories and his approach to the setting in which action is taking place, in order to build a potential frame for a new story (the story that will be produced by the change in practice).

D. Schön clearly specifies under what conditions a practitioner succeeds in transforming defensive behavior into collaborative and creative behavior within the process of inquiry. The practitioner must begin from the destabilization of acquired positions (a *shock*) and then aim at comprehensive displacement supported by critical attentiveness to the boundaries crossed. The role played by the *underlying story* of the inquiry itself, however, remains vague. It is inter-group relations that will make possible its specification.

### 3.2. The role of inter-group relations in the guiding of attention

The Popperian test plays a role in guiding the practitioner's reflexive skill, just as it can play a role in guiding a researcher faced with the different stories associated with a problematic situation. Its application, however, supposes the exercise of this skill to have been prompted by the idea that a cooperative story may open up new possibilities for solutions by changing the positions currently held by the various actors involved. D. Schön even believes that, in order to surmount blockages, it is necessary to elicit a kind of direct transplant of elements from one group to another, so that a *shock* is provoked and displacement is achieved by the coming into contact of mutually invalidating perceptions.<sup>272</sup> We must therefore specify the role played by inter-group relations in D. Schön's theory, since this role sheds light on the significance of the *underlying story* for the process of inquiry, which will open up onto a new framework for action for a new collective history.

In the examples he chooses, D. Schön always succeeds in distinguishing different subgroups within a given population, according to their ability to collaborate with their adversary. This he does by adhering to two principles. First, he relies on the way the various subgroups report on their relationship with another group that is identified (by virtue of its divergent interests) as an adversary. Second, based on these narratives, he compares the subgroups with each other, and in so doing he reveals an independent variable, such as age group or geographic location. The usefulness of the second principle lies in the fact that it confirms the out-group

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<sup>272</sup> RP 350: "In order to achieve such outcomes as these, professionals engaged in the political contention of the policy-making process would have to be capable of inquiry within an adversarial setting. They would have to be capable of advocating and acting on their own views of reality while at the same time subjecting them to reflection, of taking an adversarial stance toward their opponent's views while at the same time striving to understand them. Professionals in conflict with one another would also have to be capable of reciprocal reflection-in-action".

nature of the differentiation D. Schön is examining. The stories reflect the cultures of groups that perceive themselves as distinct. The origins of the difference between groups which share the same adversarial position depend on the specifics of each situation.

Telling of one of his encounters with activists working for a consumers' association, D. Schön recounts as follows the reactions he drew by suggesting "a new strategy which combined adversarial process with cooperative inquiry":<sup>273</sup>

The oldest participants found the suggestion unthinkable: how could they cooperate with their traditional enemy? The middle-aged participants were intrigued but skeptical. The youngest asserted that the idea was a familiar one, which some of them were already pursuing. They were helping consumer products manufacturers to develop programs of products safety, reliability, and quality assurance in order to comply with the regulations which the consumer movement had helped to put in place.<sup>274</sup>

But why define out-group relations in a population so sharply, if the distribution of group membership can be assumed to be random when different situations are placed side-by-side? For instance, if this last example is placed beside the one from the chemicals industry, age and class variables become irrelevant. The interpretive hypothesis related to the variables comes into play strictly in order to anchor the building of the underlying story the inquirer is telling himself and, at a more basic level, to aid in the specific search for a suitable path to a solution. In applying these two principles, the inquirer can confirm and enrich his own generative story, which seeks to reveal the comparative benefits of strategies for behavioral transformation that will enable a form of cooperative attitude to the adversary within a process of shared search for solutions.

Two kinds of out-group relations are thus necessary to the inquirer's story: the relation between groups that share an adversarial attitude towards another group, and the relation between a group and one or more groups identified as its adversaries. It is in the various narratives of the second type of out-group relation that mutually invalidating elements will be encountered, prompting the turn towards the first type of out-group relation. The question then becomes whether or not to cooperate, in what state of mind, and with what goals (within what process). Next, it becomes possible to differentiate overt opposition, marked by a complete refusal to collaborate, from latent opposition, which consists of engaging in biased or curtailed collaboration by concealing information and maintaining suspicion towards information received. A final strategy invalidates these two: it consists of overt, timely, and constructive collaboration that effectively creates the conditions for a true third culture produced by a change of attitude regarding divergent interests and regarding the possibility for setting common goals.

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<sup>273</sup> RP 351.

<sup>274</sup> RP 351.

By crossing the two kinds of out-group relations with each other, D. Schön succeeds in constructing his own underlying story and presenting adversarialism as a variable datum that is capable of broadening the range of possible behaviors as previously identified. Two conditions affect this broadening: the way it can be applied to the divergent stories of the groups involved, in order to enable collaborative ownership; and its ratification by other situations in which this broadening process made it possible to develop better solutions.

This approach to inter-group relations reveals two requirements to supplement the Popperian test. To falsification (trial-error-elimination) must be added a test of reciprocity of the underlying story proposed by the practitioner to the groups concerned and a generalization test allowing for reference to be made to other processes of collaborative enrichment.<sup>275</sup> Thus we can distinguish among three test requirements. Together, they produce the conditions for building a new framework for action:

- the requirement for a falsifying test, consisting of envisaging all the experiments it is possible, in practical terms, to carry out in order to refute all the assumed constructions of reality (or causal stories), including the researcher's;
- the requirement for a reciprocity test, consisting of creating a behavioral world open to shared-collaborative reflection-in-action (possible uses of the categories deployed by the collaborative story);
- the requirement for a generalizing test, consisting of relating the case of story enrichment in a given frame to other experiences of the same kind (this assumes there is a tie-in with a more general research program).

### 3.3. The limitations of this learning model

The relationship between the two types of stories and the possibility for a new framework for action complicates and enriches the link previously established between the two types of attention. It also shows how much importance D. Schön attaches to pinpointing the conditions that will guarantee the transition to innovative reframing within a process of inquiry. Nevertheless, two factors always seem to be presupposed for the learning process to be implemented: first, the actors' mental capacity to generate possibilities thanks to their ability to develop "reflection-in-action"<sup>276</sup>; second, the institution's capacity to identify problems and seek

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<sup>275</sup> It is thus that, for example, in various contexts, D. Schön can note the role played by the norms that are assumed to regulate opposing interests. Here, the conflict appears tied to dissatisfaction with the consequences of this kind of regulation. The shared search for a solution consists of making a different application of the normative frame possible through the collaborative process.

<sup>276</sup> In practical terms, it is a question of participating while "holding back" in order to pay attention to a broadening of the possibilities emerging from the various reconstructions of a given problematic situation. Cf. RT 356.

mechanisms likely to overcome them. The inquiry banks on the potential for congruence between these two presupposed conditions, by assuming that it is possible to formulate a rule for institutional action that affirms the skill of generating possibilities in the course of action, on condition that this rule is in turn underpinned by an internal rule of operation. In this way, it would be possible for an institutional mechanism for inter-group relations to exist and be coupled with an inquiry-based rule for learning.

In organization management terms, we can hypothesize that a strategic choice of selective attention – single loop – might suffice to set in motion the *genetic attention* with which the actors could revise routines – double loop. As for how to learn how to learn, that question would be relegated beyond the field of action and become the concern of more specialized work to reveal general rules that account for the success of this kind of choice. Thus, an existing extended skill at reflection-in-action would need to be updated by a new kind of action-science.<sup>277</sup> This solution is close to D. North's hypothesis about the progress of scientific rationality and fits well with J. Dewey's conception of the emergence of a new science of practice.

There exists a scenario less burdensome, however, than that which relies on waiting for science to take the measure of human actors' assumed practical capacities. D. Schön himself notes that there is a limit to the application of a rule for objectivizing inquiry,<sup>278</sup> because the objective knowledge that it works to produce remains dependent on how the rule engages in problem solving and thus on the link it establishes between its procedures and its objectives, according to the specific features of its pragmatic frame. Reference to the building up of a science of practice assumes wholly different verification methods than those used for practical experimentation. And it is not so much this kind of reflexive closure that is in question when reference is made to the rule for inquiry on which the whole process of innovation in collective action rests.

Rather, the question is, more simply, whether at the end of the day the only action capable of setting this process in motion consists of using an appropriate mechanism to stimulate the use of a rule that already exists in the actors' minds. The issues are entirely different if we cease to assume that, one way or another, pre-given rules and always-already available capacities exist, as though what we wished to do were to explain innovation a posteriori. It is the underlying story that snags the conception implicit in collective action, specifically the belief in "the existence of a widespread capacity for reciprocal reflection-in-action,"<sup>279</sup> when in fact this belief invalidates itself by simultaneously pointing to a society in which "each contending party sees a piece of the reality and embodies his perception in a view which he treats as a battle-cry."<sup>280</sup> This story, which underlies the pragmatist ontology that

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<sup>277</sup> RP 353-354.

<sup>278</sup> RT 358.

<sup>279</sup> RP 353.

<sup>280</sup> RP 350.

over-estimates capacities for redescription while emphasizing the precariousness of their implementation by means of appropriate conversational mechanisms; this story of the production of the social imaginary world, itself made top-heavy by excess or abundance because of the perspectivism of viewpoints in relation to the limited resources of social coding: this underlying story could wipe out the gains made by the pragmatist turn. In our view, these gains number three and they constitute the epistemological framework needed in order to arrive at what was called, at the end of Section 1, an internalist approach to learning:

1/ Collective action is not defined by the fact of coming to terms with an external shock that forces a turn towards the resolution of a disequilibrium alien to the collective action. Collective action is structurally a problem-solving process. Its openness to the problematic situation and its relation to the shock are constitutive of it. Without this relationship to the shock, it fades into routine.

2/ Collective action is exclusively defined neither by a selective relationship with the existing set of possibilities nor by a creative relationship with new possibilities; i.e., its identity is not determined exclusively by kinds of relationship that could be triggered from the outside (to the extent that they are optional). Rather, collective action is defined from within, by a kind of relationship with the possibilities that results from a reflexive balance between the selection and the generation of possibilities.

3/ Collective action does not develop according to pre-defined rules and capacities. Rather, collective action builds its rules and capacity to evolve in accordance with the coupling of its reflexivity to its process of social experimentation. Even if the mere notion of a “reflexive skill” does not constitute an adequately developed framing of the condition for reflexivity, it still allows for better delineation of the significance of an internalist approach to learning. Under this approach, collective action evolves in accordance with the yoking together of an internal teleology and a form of self-capacitation. It broadens its range of possibilities by its inquiry and it applies those possibilities to a reframing of its fulfilment.<sup>281</sup>

The question posed by such a conception of inquiry brings us back once again to J. Dewey’s fundamental concern with integrating *new ways of acting* on prior experiences by means of a definite plan for observing the transformations that these new ways have thus produced.<sup>282</sup> According to this conception, the achievement of the just social order is not a regulative horizon, but rather a moment to be experienced as a kind of realization of the internal potential of a system of rules in process of self-development. This kind of more strictly inferential and internal teleology allows for conceiving of the destination of a system of rules in relation to

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<sup>281</sup> Recoding is thus always a function of new possibilities, is directly generative, and does not constitute a return to the selective.

<sup>282</sup> J. Dewey, *Logic: The Theory of Inquiry*, *op. cit.*, 107



an internal “vector” for potentiating capacity, to self-capacitation, and to experimentation capable of broadening the range of problem-solving possibilities.

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## Conclusion

The argument presented in the three preceding sections consisted of demonstrating how what call the neo-institutionalist dynamic has driven current approaches in governance theory. The most significant aspect of this dynamic consists of how it conceives the collective learning operation necessary for the transformation and extension of actors' representations required for any collective action.<sup>283</sup> Every approach to the institutional design required for governance of a collective action to ensure, to the extent possible, satisfaction of its members' normative expectations (that is, to ensure it constitutes public interest governance) is a function of the way the conditions of success for this learning operation are conceived. We have differentiated three approaches found at the heart of the institutionalist dynamic. The first led neo-institutionalist economists to resort, in a highly behaviorist fashion, to public mechanisms to compensate for the deficiencies of decentralized forms of governance. The second and the third constitute efforts to react to that first venture. They lead either to the approach we have termed relational and collaborative or to the experimentalist approach developed as part of the pragmatist turn. These three approaches embody three very different ways of envisaging the coupling of the extension of representations with collective learning. Yet they can also be interpreted as three stages of a process in constant progress, a process leading to an ever deepening understanding of the conditions necessary for the success of this learning operation, and to growing recognition of the necessity for the internalization of these conditions. This progression implies a simultaneous extension of these conditions, because the requirement for internalization entails displacing the question of conditions. That is, the question of the conditions for learning becomes, as well, the question of the conditions required for the actors to be capable of learning; and it must ultimately arrive at the requirement for actors' *self-capacitation*, that is, the requirement that actors organize *themselves* to learn how to learn. It is true that this ultimate condition has not yet emerged from the three current stages of the neo-institutionalist dynamic. Indeed, it points to their internal limitation. However, as we will see, at the same time it constitutes the step further they require and thus, in a sense, their logical fulfillment.

What, then, is the dynamic internal to the three successive approaches we have differentiated in discussing the representation/learning coupling? The first stage consists of producing this coupling from the outside, as the consequence of the shock triggered by an external factor. The second stage consists of internalizing the coupling by acting on the conditions for bringing together the actors involved (extension of the interaction to include all the stakeholders, empowerment of the

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<sup>283</sup> I.e., required if the collective action is to fulfill the intentionality that drives it.

actors, or respect for the conditions of rational argument) in such a manner as to give rise to a kind of internal extension of what is possible. The third stage deepens this process of internalization by asking the question of what conditions are required in order to acquire *the capacity to learn*. It seeks, in effect, to internalize the shock that should provoke the actors involved to acquire the adaptive capacities needed to transform their representations.

The difficulty encountered by the two first ventures in perceiving the need for an internalist approach to the learning operation (a need discerned by the pragmatist turn) relates specifically to a restrictive conception of learning. If the first two stages are compared to the third, one sees that the first two share a restrictive conception of learning according to which a datum that serves as a departure point cannot be understood to be subject to transformation by the learning operation itself. Given this, the extension of the representations cannot be conceived except in terms that remain external to the learning operation itself. The consequences of such a theoretical approach are significant. A restricted approach to learning results in not extending attention to the learning conditions necessary to make possible the necessary adjustment of actors' representations, such that the intervention by external mechanisms can produce the desired effects.

Thus, according to L. Marengo's and G. Dosi's evolutionary schema, a collective representation can be imposed in an external manner, hierarchically, that is by a "grafting" operation. The success of this graft is understood to result from the competency to integrate this more "general" point of view that is assumed to be conferred upon actors involved in a decentralized interaction – that is, the competency to adjust their local point of view according to the desired grafting on of the more general representation imposed from outside.<sup>284</sup> The learning operation plays out only at a second stage, enabling a circling back *from* this embrace of a more general point of view *towards* local situations, in such a manner as to take account of the constraints and limitations demanded by the best possible coordination with other people from a local-context point of view.

Similarly, according to the relational and collaborative schema, the question of adjusting representations is reduced solely to organizing collaboration by meta-regulations, as in the case of nodal governance. We now have a full juxtaposition between the learning process and the aggregation of deliberative competencies. The deliberative process that regulates the regulation is assumed to engender, by itself, the adaptive capacity necessary to resolve problems in the most satisfactory way possible from the point of view of group members' normative expectations. In both perspectives, it is impossible to conceive under what conditions the extension of the

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<sup>284</sup> On this point, see above, Section 1. Note that it was also observed that, besides this grafting operation, the evolutionary approach also assumes that two other operations can be carried out solely on the basis of actors' natural competencies: the "generalized" operation necessary for determining this more general point of view, and the operation of integration required by the evolutionary assumption of a "natural" capacity to construct the "local maximum".

possibilities existing at the outset could result from the learning operation and consequently *be itself dependent on the learning operation*: the learning operation is either understood to take place after the extension in question; or else to act directly only on the extension of the actors involved, on the assumption that they possess a capacity for self-revision which the extension is therefore not required to construct but rather to stimulate (or, to use an economists' expression, "to incent").<sup>285</sup> There exists, then, a close relationship between a restrictive conception of learning and an expansive conception of the capacities required for the operation of the adjustment and extension of the representations of the actors involved in a collective action.

It is here that what we have called the reflexivity operation arises. The notion of reflexivity refers to the operation by which a social group seeks to respond to its perception of the need to adjust its capacities for action. Restrictive conceptions of learning lead to incomplete approaches to reflexivity. In opening up the question of learning to a consideration of the conditions required for learning how to learn, adherents of the experimentalist and pragmatist approach to learning call for a broadening of the field of the learning operation, and, by corollary, a broadening of the field of the conditions required for its success. This pragmatist turn in governance theory thus opens up towards a fuller approach to the reflexivity of collective action, even though it is its own internal dynamic that makes possible the recognition of the supplementary stage that it requires.

To explain the various approaches to the reflexivity of collective action that lie behind the successive stages of current research on governance theory, we can revert to a consideration of one of the most prominent writers on neo-institutionalism today. D. North makes it possible to clearly reveal the limitations of the conceptions of reflexivity implicitly deployed by the first two stages of governance theory research, while pointing to the contribution, as well as the persisting limitations, of the experimentalist and pragmatist approach. He is, in effect, a hybrid figure. Granted, he continues to work within the framework of the first stage, that of economic neo-institutionalist research. We saw above that he is closely linked to the recent efforts by transaction cost economists to synthesize the contributions of R. Coase and O. Williamson, as well as those of evolutionary economists. Nevertheless, at the same time, D. North has laid down the foundations for surpassing the limitations he is working in. We have already indicated that his theoretical perspective cannot be reduced to either that of the evolutionary thinkers, or to that of transaction cost economists, for example E. Brousseau, who have sought to apply it in governance research. That is why we can speak of the hybrid nature of D. North's theoretical position. As a neo-institutionalist economist, he remains dependent on a conception of learning theorized within the frame of reference of an external factor. But in his undertaking to deploy a form of reflexivity external to its construction of learning, and whose function would be to guarantee the internal development of the culture of learning, he opens the way to a form of

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<sup>285</sup> C. Scott, "Privatization and Regulatory Regimes", *loc. cit.*, 20.

reflexivity that exposes the limitations of the forms of reflexivity deployed in the first two stages. These limitations are more fully addressed by the pragmatist approach, and in particular by D. Schön.

Thus D. North's thinking allows, first of all, for the incompleteness of the forms of reflexivity implicitly deployed by the first two stages of the coupling between representation and learning. The first kind of incomplete reflexivity corresponds to the idea of the equilibrium of subsystems in a decentralized model of coordination. Such a concept of equilibrium assumes that the actors involved have a local learning capability capacity ? that will enable them to select a local maximum, that is, the best possible satisfaction within the local context, in light of their perceptions, and their capacity for reflexive adjustment of their local representations to the collective representation being imposed upon them. It is a question of seeking to adjust individual positions in light of an external reflection on the part of "the public interest", projected from outside. The second form of incomplete reflexivity makes recourse to the idea of extendability and to the incorporation of different possible positions within the framework of a rule of argument. In this instance, reflexivity operates according to a predetermined institutional frame of reference, which relies on the ideal requirement for a rule of collaboration. The issue here is to act at the level of the standard settings that define the general requirements of the regulatory framework in such a manner as to strengthen the quality of the institutional and organizational design by proposing a better placing in deliberative relationship of the various actors involved in the complex regulatory mechanisms. Recourse must be had to a broader rule for cooperation (extension to include the various stakeholders among actors in the interaction; extension of these stakeholders' requirements for empowerment; extension of the constraints on the organizing of the aggregation of communicative competencies, such as respect for the rules of argument and respect of fundamental rights; and so on). As well, the institutional cooperative frame of reference is applied as an internal requirement for an extension of the actors involved, or of the positions to be taken into account. Under this second approach, it is assumed that greater transparency and better public deliberation will entail better involvement by citizens, who are the consumers of contractual regimes, such that collaboration among all the actors involved in this new form of complex governance is better organized.

But D. North also opens up a perspective on a third possible form of reflexivity. This third form requires, on one hand, the adjustment of representations, without relying on competency to act that is taken as a given (as, for example, in the thinking of evolutionary economists); but on the other hand, it also wishes to take into account the conditions for the transformation of the capacities for representation, without relying on a simple institutional rule whereby "the process of regulation itself becomes regulated"<sup>286</sup> (as with the work of adherents of the

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<sup>286</sup> B. Morgan, "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality", *loc.cit.*, 490.

relational and collaborative approach). That is, D. North is careful, as we indicated above, to identify the internal mechanisms that would make it possible to act on the constituent norms of the learning culture specific to the rationality of any collective action, while internalizing this action to a shared culture of collective action. The question would be how to guarantee mastery of the operations by which society comes to learn how to learn, through this culture's reflexivity on itself. Like W. Dilthey and J. Dewey in their own times, D. North sees in this question the stakes of a new social science, which would be capable of technologically manipulating social nature by progressively acquiring knowledge of the laws governing its own intentional operations.

True, D. North's solution is limited to conceiving of this synthesis, once again, in an external manner, as being determined by the development of collective rationality itself. The reflexive advance internal to the culture of collective action is supposed to necessarily be acquired by means of the dynamic of science, that is, the dynamic specific to the intentionality of history. But this solution points to still another perspective appearing as if in recess, because it gives access to the question of the acquisition of adaptive capacities by the actors themselves; and it envisages a solution that, in its own way, takes account of conditions internal to a collective learning process without erasing reference to the shock that elicits reflexive advance.

The advantage of pragmatist experimentalism is that it seeks to internalize the necessary conditions for such a reflexive advance by adopting a new solution in relation to reflexivity. This solution consists of internalizing the process of meta-stabilization of the reflexive shocks that D. North discerned; in this instance, the process is internalized by being made to apply to a test internal to practice. This test is an investigative operation on the frameworks for practice, designed to produce a shock in those frameworks and result in displacement of the framing capacity itself in favor of innovation. This model for reflexive practice (*reflexivity 3*) offers the benefit of combining use of an external constraint that imposes limits on interaction (*reflexivity 1*) with internal constraints (extension of the stakeholders, empowerment, deliberative rules, and so on) imposed on the way interaction is organized (*reflexivity 2*) within a process internal to the collective action itself. This process is based on the capacity of the practices themselves to reassess their frameworks by trying out new forms of cooperation.

What the reference to D. Schön brings to this trajectory consists of a deepening of C. Sabel's experimentalist approach and a better grasp of the meaning of this third form of reflexivity, which is internal to the process of collective action. D. Schön makes it possible, first of all, to show that the issue of such a reflexivity cannot be reduced to a displacement of selective attention, as if, in order to act reflexively, it were sufficient to displace the usual attention that guides one's selection from among possible choices of behavior towards meta-regulations enabling the regulation of the regulations themselves. While it is true, as we indicated in our introduction, that all the institutional incentives revealed by the

three neo-institutionalist approaches are necessary to guide the selection operation, they remain inadequate and need to be supplemented with attention to conditions of another kind. Displacement in the manner of asking the question of the conditions for learning proves necessary as an opening onto second-level conditions, in relation to the three categories of conditions brought to light by the three first stages in current governance research. This is the displacement that D. Schön discerns and reveals, although he falls short of outlining it in full. For him, the issue does not reside in the displacement of selective attention, but rather in changing the attention itself in line with the construction of collective action that makes it possible to learn how to learn. To change the attention, it is necessary to set in operation pragmatic conditions for experimentation and, depending on the nature of the shock they produce, seek to give rise to a generative advance by questioning routines and reframing practices. This is the form of attention to openness that is made possible by experimentation itself, and that ought, on its own, to constitute learning how to learn, and guarantee a constant program of deroutinizing vigilance or reflexive shock. This attitude of genetic attention characterizes the work of the reflective practitioner whose professional practice is unceasingly subjected to second-level examination in order to identify new representations of the causal processes capable of invalidating the previous ones and enrich the operation of selection from among all possible choices by expanding the available possible choices. It is thus that such a practitioner acquires what D. Schön calls double vision. She or he adheres firmly to her or his framework for action, but is always ready to change it and cause it to evolve.

But the attention thus brought to the problem of the capacities needed to organize such that one can learn to learn, itself leads to the necessity to extend D. Schön's work, and, as we have just said, supplement the three categories of conditions for public-interest governance already identified through the three stages of present-day discussion on theory of governance. That is, the limitations of this fuller conception of reflexivity proposed by D. Schön resides in the mentalism that underlies it. Internalization of the process of learning is carried out at the cost of postulating a rule, already given as a datum, within the minds of the actors involved in the pragmatic process, which allows them to undo the closure of a practical organization on its own routines while remaining attentive "in one corner of their minds". And, indeed, D. Schön considers that this rule for behavior, once integrated, could even become a kind of ethics of research. But if, in order to learn how to learn, once again, the question consists of deploying an already-given rule for guaranteeing the start-up of this specific learning operation, we cannot strictly speak of the self-capacitation of learning, even at a second level. Rather, the reflexivity in question does not fully play its own operative role, but is reduced to separating out possible levels for the application of existing competencies; it is, in fact, conceived in the same way as in the approach seeking to displace selective attention from regulations towards meta-regulations. In pragmatist experimentalism, we do indeed find attention of a specific kind, but it does not constitute the possible result of adaptive

learning. It too is an existing resource that requires appropriate stimulation. The pragmatic mechanisms revealed by C. Sabel play this role of stimulant or of incentive. And as for the investigation's innovatory process, it assumes the incentive provided by the collaborative shock as a basis for focusing on the experience of the shock itself, and transforming it into a reflexive/de-routinizing shock, thanks to the rule for the metaphorical broadening of frameworks for action. Learning is thus the process that results from application of this rule for metaphorical broadening, in the context of a shock that has been reflected upon and theorized as regards its de-routinizing effect.

The idea that there could exist a more radical version of such an internal process remains outside the scope of this approach, because of the mentalist nature of the rule for learning it relies on. If no rule of this kind were assumed at the outset, but were rather considered to need to be acquired directly through the pragmatic process, then the action itself would incorporate *in itself* an effective transformation of the capacities for cognitive framing of the action. It is, indeed, the manner of producing such a cognitive framework within a given setting that should be transformed by this action. We would then have *reflexivity in a fourth sense*, not hitherto explored and yet constantly sought for: the reflexivity of the self-transformation of the capacities for the cognitive framing of action, by means of a process internal to collective action itself and supported by internal conditions for its fulfillment.

To understand the *condition for reflexivity* that we suggest be taken into account, it is necessary to place it in the perspective of the gains made during the three preceding stages we differentiated in our reconstruction of the neo-institutionalist dynamic. These gains already make it possible to grasp the conditions for recourse to learning within governance mechanisms. Recourse to learning requires elicitation of those reflexive capacities of social groups that enable them to respond to their perceived need to adjust their practices.

Neo-institutionalist economists have shown the need, in order to achieve this objective associated with the ways of using learning mechanisms, to diversify existing incentive frameworks and multiply them, specifically by taking action on property rights, incomplete contracts, rules for interaction, and so on (stage 1 of the neo-institutionalist dynamic).

For their part, jurists and political scientists have stressed the need to extend the range of ways of participating, with a view to taking into account the interests of the maximum number of actors involved (extending the range of actors to all the various stakeholders). At the same time, they have joined to this extension of the range of those involved, empowerment mechanisms such as constraints on argumentation, cognitive resources, financing conditions, and so on (stage 2 of the neo-institutionalist dynamic).



Last, the experimentalist path that has emerged from the pragmatist turn in the social sciences has shown the value of recourse to specific pragmatic mechanisms for eliciting a collective problem-solving dynamic that allows for internalization of the shock of interaction within the learning process. This is a matter essentially of benchmarking, simultaneous engineering or co-design, error detection methods, and so on. Further, this problem-solving dynamic is articulated with the taking into account of the investigative conditions within a *collective action process*. Such a taking into account endows the problem solving with a kind of internal teleology that leads to surpassing the sole immediate goal of learning, and arrives at the simultaneous acquisition of the capacity to learn how to learn. In this pragmatist vein, D. Schön proposes a way of incorporating these two dimensions into the attitude of the reflective practitioner that brings to the fore the conditions for vigilance “in the course of action on action” by means of a displacement of attention, or “double vision” (stage 3 of the neo-institutionalist dynamic).

All these institutional incentives aim to produce effects at two distinct levels of action. On one hand, they aim to act on actors’ capacity for adjustment, by identifying pragmatic mechanisms that are assumed to potentiate collective action (we therefore refer to them as “actions”). On the other hand, as if the authors in question wished to ensure that these mechanisms incorporate a teleology which is not guaranteed solely by an incentive action for the actors involved, these incentives also aim to strengthen the action of the initial mechanisms and ensure the desired results (we therefore refer to them as “actions on actions”).

<div style="text-align: center;">Actions on actions</div> <div style="text-align: left;">Actions</div>	Multiplication of incentive frameworks	Empowerment	Experimentation (Genetic attention)
Diversification of incentive frameworks			
Extension of range of included stakeholders			
Experimentalist mechanisms (Selective attention)			

These two levels of action, however, even if they are assumed to provide a kind of self-correcting virtue (action on action), do not address the inadequacy that results from the fact that these institutional mechanisms have not been designed with attention paid to the internal learning conditions that must accompany their own construction. Indeed, the proposed institutional incentives, whether they be actions intended to stimulate actors' capacity for adjustment or incentives intended to better ensure that the use made of the first incentives is in line with the intended effect, share the same inadequacy. They presuppose that collective action has a self-reflexive property: that, through a process of double vision (reflection on action during action), reason achieves attention to possible displacement *and* attention to this way of paying attention. The result is a failure to attend to the internal conditions of collective action needed in order to learn how to learn. Even the principle of double vision fails to account, on its own, for how it is possible to learn to prioritize attention to this kind of vision on one hand and learn how to use it collectively on the other. And that is what our own hypothesis on reflexivity aims to develop. This new approach to learning makes it possible to stop presupposing that somehow there exist pre-given rules and capacities always already available and proposes instead a conception of learning as an inferential teleological process that constructs its rules and capacities for transformation as a function of its reflexivity and the broadening of its range of possibilities.

From our reflexive perspective, the absence of attention is an indication of a dual problem that requires a specific coming to awareness and accounts for the fact that our proposal leads to the complementing of neo-institutionalist incentives on two levels: on one hand, the level of the attention needed for the effective transformation of accustomed behaviors to be organized (that is, the transformation of the cognitive frameworks that determine the use actors will make of the various incentive mechanisms); on the other hand, the level of the attention needed in order for collective use to be made of this specific position vis-à-vis the tested learning mechanisms.

Following this dual approach, it is necessary first to take account of the fact that any institutional intervention derives its point from the behavior that it seeks to engender, and that it cannot be implemented without provision being made at the outset for a mechanism for assessing the adjustments it elicits in customary behaviors (transformations of existing perceptions and efforts at adjustment). We therefore believe that it is necessary to be able to determine, at the institutional level, upon a mechanism to assess behaviors related to how actors take ownership of the learning processes and adapt them to existing perceptions of constraints.

Next, it is necessary to be able to assess, in relation to the actors themselves, whether the choice of this institutional solution enables them to perform the

transformations of the behaviors and representations linked to the problems identified. To enable this shared learning of how to construct a specific position respecting the selection of solutions, it is necessary to pay specific attention to actors' internalization of the conditions for the transformation of accustomed behavior made possible by the learning process.

In contrast to D. Schön, for whom this internalization depends on a twofold, selective and generative, attention (see above, Section 3), we propose a dual test that allows for the *desemanticization* of D. Schön's proposition, with a view to effectively taking into account the pragmatic conditions for learning how to learn. With this test, we intend to ensure that the learning processes put in place do not rely on the assumed effects of rules for behavior that guide toward best cooperative practices and the role adjustments they would entail. By idealizing the rule for experimentation that makes possible a gradual advance to a cooperative optimum, Schön semanticizes his conception of learning. It thus becomes impossible to grasp under what conditions the transformation of positions within a new framework for interaction truly allows for avoiding a repetition of blockages and failures that have already been identified. Nor does this conception allow for an identification of the difficulties that may arise during the necessary reconstruction of the positions that contributed to this blockage.

The issue for our test, then, consists of assessing the limitations of the new frameworks tested from a dual perspective internal to the learning process itself, that is, carried out by the actors involved in these processes. Under one perspective, it's a matter of assessing the risks of repeating the blockages already identified as having been produced by the positioning of others actors on whom one remains dependent in terms of interaction. From another perspective, it's a matter of assessing the difficulties specific to a particular actor positioning, in order to reconstruct the kinds of position it identifies as needing to be surpassed.

This dual test should be conducted by the actors involved in the learning process in such a way as to pragmatically extend their commitment to a specific position vis-à-vis their learning, that is, in such a way as to enable them to become themselves actors in their learning, by assessing the internal limitations of its experimental framework and thus taking on the necessary task of that framework's decompletion as a process of collective action.

Our proposal for a radical pragmatization of learning processes thus consists of putting forward a twofold assessment, institutional and actantial, of the processes under way. The first, institutional, assessment is a mechanism for vigilance over the limitations associated with implementation of the process in given usage cultures with their own capacities for the adjustment and transformation of the goals of learning. The second, actantial, adjustment consists of the requirement for a test by the actors involved, enabling them to identify the internal limitations of the cooperative framework being tried out: limitations in relation to both the difficulties

in transforming blockages engendered by adverse positionings and the difficulties in reconstructing their own positionings, which contributed to these blockages. This dual test should enable the actors to transform their own involvement in the experimental framework into a self-testing of the framework's limitations with respect to its own indeterminacy as regards results, as well as with respect to the correlative requirement for the actors involved to make the transition to a position specifically appropriate to the direction taken by the learning process.

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