Bogdan Iancu

Legislative Delegation

The Erosion of Normative Limits in Modern Constitutionalism

Springer

Chapter 4
Delegation and Contemporary Implications: The Erosion of Normative Limits

> Nicht der Inhalt sucht sich seine Form, sondern die über der inhaltlichen Entleerung des Gesetzesbegriffs erhalten gebliebene Form sucht sich (wieder) den ihr angemessenen Inhalt.[1]
>
> Ernst-Wolfgang Böckenförde, Gesetz und gesetzgebende Gewalt – Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus (Nachwort, zweite Auflage, 1981 (1958)).

4.1 (Non)Delegation Redux: Constitutionalism, Reason, and Rationality

4.1.1 Nondelegation Redux: The Limits of Reason

But before we proceed further with the inquiry at hand, into whether a positive rule of constitutional law can compensate for systemic changes in the structure of the liberal constitutional state, pause must be taken to retrace, up to this junction, the essential course of the book's argument. Delegation, as we have seen, is a term whose immediate and indiscriminate use in observing and assessing constitutional phenomena is commonly misleading. This is due to the intertwined and irregularly overlapping multiplicity of assumptions informing the notion. Unless careful analytical observance is paid to the relevant presuppositions, proper understanding, and thus also the epistemologically fruitful use of the delegation concept in theoretical debates, can easily be preempted by hasty prejudgment or ideological prejudice.

[1] Not the content searches for its proper form, but rather the emptied form preserved after the disappearance of the initial legislative purview seeks (once again) an appropriate [constitutional] substance.

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Furthermore and related at a more pragmatic-technical level, the conceptual complexity and irreducibility of the notion inevitably affects the operation of constitutional law rules purporting to check the practice of delegation by way of substantive limitations on the constitutionally permissible scope and precision of parliamentary enactments. If positive legal rules cannot be reduced to their operating principles, adjudication will be unable to devise intelligible tests for consistent application. An extrapolation from Albert Venn Dicey's observation is particularly pertinent in this context, that "every law or rule of conduct must, whether its author perceives this fact or not, lay down or rest upon some general principle. . .if a law fails at attaining its object, the argument lies ready to hand that failure was due to the law not going far enough, i.e., to its not carrying out the principle upon which it is founded to its full logical consequence."[2] The inverse consequence is equally detrimental. An inability to reduce nondelegation rules to a manageable delegation principle will either render the effect of such provisions nugatory or will result in an inconsistent, haphazard application of the rules. Needless to say, this general observation holds true in all legal fields. But its veracity in constitutional law is exponentially compounded by the nature of fundamental legal questions and the premise of constitutionalism as a political-philosophical and historical backdrop for the operation of constitutional law proper. What is true in general of legal doctrine (the dependence of written, positive law, on extra-textual notions) is all the more true of constitutional doctrine. The open-ended references of fundamental law provisions render many constitutional law rules and institutions intrinsically reliant, if they are to be at all intelligible, on political theory and constitutional history.[3]

Thus, as it was argued throughout the text, the delegation concept, as a foundational notion of modern, normative constitutionalism, must be accounted for by way of tracing its constitutional-philosophical and historical genealogy. The conceptual lineage of delegation, as we have seen, places this construct at the constitutional-philosophical crossroads between older understandings of fundamental law and the modern paradigm. Unlike the pre-modern, "descriptive" and "organic" fundamental law of the Middle Ages and also unlike currently emerging post-modern trends (e.g., more fluid notions such as "governance" or "transnational (societal) constitutionalism"), modern constitutionalism is intrinsically and structurally reliant on the idea of delegation and hierarchically structured, delegation-related patterns of justification. In his book on the constitutive role of the feud in

[2] A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2d ed. (London: Macmillan, 1962), pp. 41-42, quoted after Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: The Free Press, 1993 (1978)), pp. 421-422.

[3] *See generally*, on the interdependencies between political theory and constitutional law, Christoph Möllers, *Gewaltengliederung; Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Tübingen: Mohr Siebeck, 2005) and the abridged and revised version of the argument, *Die drei Gewalten: Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung* (Weilerswist: Velbrück Wissenschaft, 2008).

medieval constitutionalism, Otto Brunner made the observation, particularly apposite to illustrate this point, that "the derivative nature of public authority, the delegation [of the exercise of public power by the sovereign], even if only in the concealed form of a implicitly recognized usurpation, became a characteristic of public law in the modern sense. The comprehension of the delegation sequence fulfilling this derivation of authority is essential to the understanding of the inner structure of the state."[4] In modern meliorist projects, this recognition of an ultimate source of authority, from which all legal and legitimate exercises of public power derive, also entails the presupposition of a profession of faith to the ultimate source of authority ("general will", "the sovereignty of the people"). However, since the will of the delegator is an abstraction and can be manufactured and ascribed fictitiously by the delegate, the chain of delegation becomes a logically inescapable but practically perverse formality. In the logic of constitutionalism, contrariwise, the structure of delegation pervades, as a matter of legality and legitimacy, both the architecture of structures of justification and the logic of fundamental legal relations. Under limited government, all exercises of delegated public power are held in trust and confined within the limits of the specified authorization.

Aside from the observation regarding the centrality of delegation to constitutionalism, a second insight, equally useful to our current inquiry, can be derived from the general analytical context of the quoted fragment. Brunner's general argument regarding the foundational role of the feud in medieval constitutionalism[5] was a retort to the recurring tendency of public law scholars to read modern or contemporary ideological representations into past constitutional realities, rather than seeking to properly understand past realities and concepts in their own terms and according to their own logic. In his study on the law of the feud (*Fehderecht*), he proposed, more particularly, that only an unhistorical and anachronistic understanding of constitutionalism could either regard the Middle Ages as devoid of a constitution or impress retroactively upon that period the procrustean models of nineteenth century liberal constitutionalism ("state", "the rule of law", etc.). To Brunner, such exercises were reductively stultifying and ideologically charged. Thus read in an anachronistic key, everything in the past that did not fit the adventitious modern mold could be disregarded as normatively irrelevant facts,

[4] Otto Brunner, *Land und Herrschaft: Grundfragen der territorialen Verfassungsgeschichte Österreichs im Mittelalter* (Wien, Wiesbaden: Rudolf M. Rohrer Verlag, 1959 (vierte, veränderte Auflage)), p. 145: "Ja die Ableitbarkeit, die Delegation, wenn auch selbst in der verstecken Form einer stillschweigend anerkannten Usurpation, wird geradezu zu einem Charakteristiken des öffentlichen Rechts im neuzeitlichen Sinne. Für die Erkenntnis der inneren Struktur dieses Staates ist die Einsicht in den Delegationszusammenhang wesentlich, in dem diese Ableitung sich vollzieht."

[5] The book's supporting historical research is ostensibly restricted to medieval developments in the territories of present-day Austria and Bavaria. But *see* Howard Kaminsky, "The Noble Feud in the later Middle Ages," 177 *Past and Present* 55 (2002), arguing that the essential argument of *Land und Herrschaft* can be easily extrapolated to the constitutional situations of medieval England and France.

lawless brutality, the "rule of the fist" and suchlike. Contrariwise, as Brunner argued, once it is noticed that the exercise of the medieval right to wage feuds had been fettered within a juristically ritualized and highly formalized structure (i.e., formal letter of challenge—*diffidatio*, rules regarding the terms of engagement, the inclusion and exclusion of third parties in the feud, the personal, temporal, and 'subject-matter' exemptions regarding the actual carrying out of the conflict, the formal way of closing disputes—*Urfehde*—and the formalized consequences thereof, etc.), a different conclusion was inescapable. The right to wage feuds had constituted in its constitutional environment the means within the confines and constraints of which a medieval man essentially pursued—ideal-typically—a quest for law and justice. Anachronistic analysis had, according to Brunner, missed the essence of a constitutive element of pre-modern constitutionalism: behind the alleged "law of the fist" stood "one of the strongest moral forces of all social life, namely the passionate sense of justice (*Rechtsgefühl*) of the individual."[6] Whether or not one fully agrees with the historical specifics, the argument draws on a keen insight that applies with equal force to our current inquiry. Thinking about constitutional institutions in abstract terms, defining them by means of *genus proximum* terms of comparison, and approaching them within an anachronistic framework of reference, is an exercise that usually misses the essence of constitutional phenomena.

The notion of delegation that sheds proper light on the contemporary import of positive delegation-related constitutional rules can be unraveled only within the context from which such constitutional limitations arose, that of the conceptual and phenomenal conditions of the possibility of classical constitutionalism. As it was argued here, the normative constitution was from the onset a Janus-faced achievement of the Age of Enlightenment. On the one hand, the project of synthesizing the essential rules of a polity and thus legally predetermining, potentially in perpetuity, the political life of the state, is highly indebted to the dominating philosophical/ideological theme of the eighteenth century. The written constitution poses very intensive demands of and on rationality and, in this respect, normative constitutionalism marked a stark departure from its earlier, "descriptive" and "organic," pre-modern counterparts.[7] On the other hand, as the discussions of Rousseau and Bentham in the first part of the book have argued, the intellectual presuppositions of classical constitutionalism avoided the Enlightenment-derived extremes of reason unbound. Thus, to paraphrase Kant's 1784 metaphor, the "walking aids" of reason (*Gängelwagen der Vernunft*) were not fully removed in the philosophy and practice of liberal constitutionalism.[8] Classical liberal constitutionalism has straddled from the onset the pre-modern belief and systemic presupposition in "natural" or unquestionable boundaries to the operation of rationality and the newly emerging faith in the power of human reason, now liberated

[6] *Id*., at p. 109.

[7] Grimm 1988, 2005.

[8] Immanuel Kant, "Beantwortung der Frage: Was ist Aufklärung?" in: *Berlinische Monatsschrift*, Dezember-Heft 1784, S. 481-494.

from past hindrances, to master and reshape the world. The normative constitution and the constitutional systems of the late eighteenth and nineteenth centuries managed to reconcile in their operation the inevitable contradictions arising from this antinomy.

As we have seen in the previous section, classical constitutionalism operated, not only at the level of justifications but also in terms of the actual operation of the legal system, on the essentialist presupposition of natural, pre-political—and thus pre-constitutional—limits to state action. This premise was most evident in the review of the US developments. In the American case, the distinction between the core "natural" and "private" rights to personal security, i.e., "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation",[9] personal liberty (i.e., freedom from imprisonment or restraint without due process), and property, on the one hand, and, on the other, the legally constructed "public" or "political" rights, can be easily substantiated not just as a matter of theory but also in actual constitutional law practice. The "natural" rights implied full recourse to the protection of the law, in the sense of engaging to their defense the entire panoply of judicial guarantees. Correlatively, the constitutional protection of private rights perceived as pre-constitutional implied as well the presupposition—as of constitutional right—of "Lockean" legislative rules, "a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule proscribes not and not to be subject to the inconstant, uncertain, arbitrary will of another man."[10] Obversely and by categorical contrast, in the case of the second category, "adjudication" of "political rights" was to be had primarily, if at all, in the political branches. [11] These foundational and structural presuppositions of substantively differentiated degrees of requisite legislative specificity and categorically distinct levels of judicial protection represented precisely the understanding of nondelegation in the classical age of liberal constitutionalism. If looked at against this background of conceptual-historical context, the meanderings and apparent inconsistencies of US constitutional jurisprudence on delegation are relatively easy to reconcile.

The delegation question cannot be answered in formal terms, because the text as such, without the overhanging classical constitutional context and worldview, invites precisely a formal question but is at the same time of very little help in addressing it: "The Federal Constitution is written as if the 'legislative Powers' vested in Congress, the 'executive Power' vested in the President, and the 'judicial Power' vested in the federal courts are Platonic forms. But efforts by modern formalists to define these separate powers founder on the fact that all three branches

[9] 1 Blackstone's *Commentaries* 129.

[10] Second Treatise, Par. 22.

[11] Caleb Nelson, "Adjudication in the Political Branches," 107 (3) *Colum. L. Rev*. 559 (April 2007).

perform similar functions."[12] Asking the question in formal terms and across the board resulted throughout the nineteenth century in a constitutional affirmation of the doctrine as such and the correlative denials that it applied to the cases at the bar, whenever the particular provisions impugned did not fit the classical ideal-type of law and legislation 'proper'. As we have seen, the court's nondelegation tests as such were formulated in substantive terms, mirroring the ideal-typical, substantive understanding of legislation as private rule of just conduct that dominated classical constitutional thought. The tests posited parliamentary enactments as self-sufficient rules of just conduct, whose enforcement would be more or less automatic (the executive does not make the rule but determines the factual background upon which enforcement is contingent) or whose implementation would be relatively unproblematic (the implementing decree only "fills in the details").[13]

The point is in need of restatement that this ideal-typical vision of legislation evoked by the courts in fashioning nondelegation tests did not (and did not need to) fully correspond to the reality of legislative practice (to give the most conclusive example, common law rules are "found" by judges). Relatedly, the English developments were edifying, where, as we have seen, accusations of delegation started to be vented precisely when Parliament became a well-functioning, disciplined and industrious law-making machine. The latent but essential question was not the ostensible and formal one, i.e., what kind of legislation should the legislature pass, in the sense of how unspecific a law should be before it would constitute an unconstitutional delegation, but what kind of trespass would automatically trigger a constitutional duty of judicial protection. To put it differently, delegation was understood as unprincipled public intervention in a domain of legal relations regarded as essentially private and presumptively protected by constitutional law from unjustified interference by way of public regulation. The limitation of the legislature with respect to the private sphere presupposed as a flip-side corollary the legislative freedom to assign discretionary implementation and enforcement powers in areas considered "public" in nature. Therefore, in the US, both the nondelegation tests and their application simply mirrored the classical foundational presuppositions that there were fields of state action where a certain degree of legislative/legal vagueness was "natural" and thus pursuant discretion was legitimate and fields of private action where the state had a clearly confined duty of safeguard and calculable, exceptional intervention.

This systemic essentialist structure of classical constitutionalism was not difficult to observe in the analysis of the American developments, due to the evolutive, uninterrupted simultaneity of constitutionalism, constitutional law, and constitutional adjudication. But its main features are evidenced by relatively analogous constitutional patterns in other jurisdictions. For instance, the constitutional progression of the German dichotomy between state and society up to its legal crystallization in the 1882 "Kreuzberg Decision" served the same purpose of

[12] *Id.*, p. 561.

[13] Congress may not delegate "powers which are strictly and exclusively legislative," *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

differentiating in kind areas of state action fully and "naturally" governed by law proper, where public interference had to correspond to clearly defined normative standards, and areas of discretion, where the state "made" the rules more or less freely and administered them discretionarily. Classical constitutional law could be defined as a science discerning the natural limits of the state from the axioms of individual freedom. In turn, classical constitutional review was—thus aptly Edward White—"guardian review",[14] judicial policing of those principled, immutably drawn systemic boundaries. This is how judges themselves perceived their purview: "[judges] make no laws. . .establish no policy, [and] never enter into the domain of public action. . .[t]heir functions. . ..are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law."[15]

The 1928 enunciation by the US Supreme Court of a formal delegation test, according to which a congressional enactment must contain an "intelligible principle" (i.e., it must have a constitutionally requisite degree of precision) marked the implicit recognition of an upheaval in foundational structures. It expressed the transition from substance to degree. This legal transformation, which was fostered by and gave expression to mutually reinforcing processes of structural social-economic change and overlapping worldview and ideological metamorphoses, had by then long been underway. As we have previously seen, various tendencies of the Progressive movement had announced, already during the waning decades of the nineteenth century, a new social-scientific "mood" in partial response to the reinforcing phenomena of massive urbanization and standardized, concentrated, technologically advanced capitalism. This new world of the urban and industrial machine needed to be regulated with bureaucratic-scientific methods and law (understood as general rules with normative force, addressed to individuals) was perceived as an important but by no means paramount instrument in the social-scientific toolbox. Expert modalities of social and economic control, namely, the bureaucracy and new means of technocratic administration, seized the progressive imagination with much greater appeal than rules and courts. In the new paradigm "[t]he focus had shifted from essences to actions," from the individual to the social group, and from essentialist truth to "truth as a process."[16] As we have seen, the liberal constitutional system reacted unsurely to both a new reality of overwhelming industrial, economic, and social concentrations and the ideological impetuses for change foisted on it by critics of those processes. This reactive insecurity translated into vague legislative mandates and the initially hesitant trial of new bureaucratic methods to implement those tentative, relatively open-ended provisions. In the case of the Interstate Commerce Commission Act, a genuine

[14] G. Edward White, *The Constitution and the New Deal* (Cambridge, Massachusetts and London, England: Harvard University Press, 2001).

[15] Justice David Brewer, "The Moment of Coercion," 1893 address before the New York State Bar Association, quoted in White, *id*., p. 206.

[16] Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967).

battle was fought in Congress over the implementation method. Only after protracted debates were regulation by commission and a broader legislative mandate favored over narrower rules and enforcement by private damage suits in federal court.[17] But after the adoption of the 1914 Clayton and Federal Trade Commission Acts an understanding had begun to settle in that such kinds of legislative mandates and administrative innovations were already securely entrenched and there to stay. By 1916 Elihu Root felt justified to proclaim that a point of no return had been reached: "There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not; because such agencies furnish protection. . .[which] cannot be practically accomplished by the old and simple procedure of legislatures and courts.. . ."[18]

Although at different constitutional paces, similar and roughly contemporaneous observations were being made by continental lawyers. In a brief yet path-breaking 1938 study, Ernst Forsthoff argued that the inability of the classical state and law to grapple with new phenomena was largely due to the increasing inadequacy of the dominant classical presupposition of private individual/social autonomy to address new kinds of structural dependency created by technologically advanced industrialization. True, contemporary man had acquired a historically unparalleled range and expanse of capabilities (his "effective space" had been extended by widening possibilities to travel and communicate). This freedom to project one's existence into ever wider spaces had nonetheless been gained at the price of and was increasing in proportionally inverse lockstep with deepening dependence on the external provision of the basic preconditions of existence (in Forsthoffian jargon, the "controlled space" of human existence was continually shrinking).[19] The distance between the average individual and the state had been quite literally much wider a mere century before, when, even though most human beings died a few hundred yards from the place where they had been born, they controlled to a much higher degree the general conditions of their livelihood (took water from the well, grew their own food, lived on the land, etc.).[20] Forsthoff concluded that the classical dichotomies of German administrative law, as canonized by Otto Mayer's notion of exceptional "intervention administration"

[17] The Reagan bill, reported by the House Commerce Committee in 1878, provided for treble damages suits, filed in federal courts by the aggrieved shippers and, for each offense, 1000$ fines against the railroads, the amount to be divided between the state and the "informant." *See* the study on the ICC Act adoption by Morris Fiorina, "Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power," 2 *J. L. Econ. & Org*. 33 (1989).

[18] Quoted in Wiebe 1967, pp. 295-296.

[19] Forsthoff 1938.

[20] The interdependence of economic conditions and constitutionalism finds ample support in eighteenth-century literature. For instance, Jefferson believed that republican government was only possible in America, where, due to the wide sparsely populated spaces and the abundance of arable lands, most men literally depended, for their survival, on the cultivation of their lands and characters. *See* Stanley Katz, "Thomas Jefferson and the Right to Property in Revolutionary America," 19 *The Journal of Law & Economics* 467 (1976).

(*Eingriffsverwaltung*) and the assumption entailed by it, namely exceptional public interference with the autonomous private-social sphere, no longer offered a satisfactory conceptual and practical legal way of grappling with the new conditions of social life. Private social-economic and legal arrangements had themselves suffered structural changes, which could no longer be related to their initial individualistic assumptions. The replacement of the contract as a "meeting of the minds" by the reality of standardized contracts had for instance substituted systemic coordination and risk-allocation purposes for the initial individual-centered premises of the juridicial institution. These changes from individualistic essence to structural-systemic degree, as Forsthoff opined premonitorily, even though more fluid or opaque in nature and thus more difficult to define legally, were inescapable and would inevitably reshape the law: "The adaptation of the modern man to the technical world results in a juristically less easily definable, and yet for that reason no less effective, curtailment of the juristic autonomy of the individual."[21] The responsibility of the state for the provision of public services necessary to sustain life (*Daseinsverantwortung des Staates*) such as water, waste disposal, transportation, provision of electricity, etc. and consequently an administrative duty of intervention had to replace the failing, fictitiously and factitiously presumed collective responsibility of the nineteenth century. The new relation between the state and the individual had to be reassessed theoretically and reconceived constitutionally.[22] But this practical and theoretical reassessment would prove much more difficult than the realization that society vs. state, "liberty and property" constitutionalism had come to an end.

4.1.2 Delegation Rephrased: A Degree of Rationality

The reminder is useful at this point, that nothing in the argument should be understood to imply a sentimental-elegiac melancholy and surreptitious longing for a "golden age of constitutionalism" or—much less so—the latent desire to return to prior terms of reference. A historically empathetic understanding of shifts in constitutional paradigm cautions only striving for the detached posture of the observer,

[21] Forsthoff 1938, p. 39.

[22] Given the time when the book was published, this conclusion may strike a cynical chord in the English language reader. Since, unlike his one-time mentor Schmitt, Forsthoff's work is untranslated and relatively unknown outside of Germany, the note is justified that the 1938 argument was untainted by National-Socialist ideology. In the Bonn Republic, Forsthoff pursued (unsuccessfully and with an increasing degree of dissatisfaction) his attempt to reconceive administrative law through the conceptual lens of *Daseinsvorsorge*. He tried to give the concept the same doctrinal consistency and pivotal role that Otto Mayer had achieved for *Eingriffsverwaltung*. *See* Forsthoff's classic monograph, *Lehrbuch des Verwaltungsrechts*, 10. Auflage (München: C.H. Beck, 1973). *See generally*, Florian Meinel, *Der Jurist in der industriellen Gesellschaft. Ernst Forsthoff und seine Zeit* (Berlin: Akademie Verlag, 2011).

neither embracing change enthusiastically as liberating nor deploring as a loss inevitable transformations that cannot be undone. No normative conclusions are made here with respect to contemporary constitutional law. My argument has simply been that classical constitutionalism operated according to a legality and legitimacy model which, like all ideal-types, never fully corresponded to the justified and regulated realities but functioned, up until the end of the nineteenth century, with a reliable degree of consistency. Constitutionalism could master its facts and, therefore, as long as both the constitutional system of reference and the referenced reality corresponded, foundational legal assumptions could appear to those living within their intellectual confines as natural.

To be sure, the disenchantment of constitutionalism, namely the erosion of the preconditions for and the corresponding demise of belief in the existence of natural limits to constitutional and legislative intervention, has made it possible to perceive law and adjudication as essentially political exercises. From the vantage point of the metamorphosis, it became possible, for instance, to recreate "triumphalist narratives" within an ideological framework of reference, reinterpreting and denouncing or praising past practices by ex post attribution of noble or nefarious motives. This instrumentalist key in which fundamental law is approached or through which its history can be ideologically rewritten in hindsight is a conspicuously contemporary phenomenon: "[C]haracterization of the general performance of individual Supreme Court justices in ideological terms did not exist in commentary during the nineteenth century."[23] The phenomenon is relevant to our current inquiry, since it evidences a crisis, namely a systemic inability to make sense coherently of fundamental legal practices, without either falsifying the reality observed or simplifying the normative framework of reference in a rudimentary-procrustean way. The detachment between law as a practice and the normative plane, i.e., an inability to relate the two dimensions other than either at the technical level of mere description or in the distorted normative terms of instrumental manipulation/normative misconstruction, tells a relevant structural story about the state of fundamental law and about the possibilities of constitutional science. A refreshingly terrestrial example will help illustrate this point.

The ambivalence with which turn of the century regulation pioneers, lawmakers, and courts approached the new phenomenon of industrial concentrations in the United States was discussed at some length in the preceding part of the book. As we have seen, the political and legislative debates giving birth to the Sherman, Clayton, and Federal Trade Commission Act, and the contradictory tendencies in the New Deal approach to the problem of monopoly, evidenced that generalized sense of hesitancy. This widespread foundational irresolution was due not only to the multifarious and interacting pragmatic considerations and yet unsolved questions (was 'bigness' always bad, as Brandeis certainly believed? was it always the fruit of

[23] G. Edward White 2001, p. 272. *See generally* the discussion of this general problematic in Chapter 9 "The Canonization and Demonization of Judges," 269 ff. *Also see* by same, "The Lost Origins of American Judicial Review," 78 *Geo. Wash. L. Rev.* 1145 (September, 2010).

predation?, did it always foster predatory behavior? etc.) or to the understandable human fear of the unknown. Obversely, these secondary tensions reflected the irreconcilable dissonance between the political, legal, and economic presuppositions of the system and the looming reality of an increasingly de-individualized, seemingly impenetrable and inescapable economic reality. As Judge Learned Hand would later put it in his famous *Alcoa* dictum, referring to the "belief that great industrial combinations are inherently undesirable, regardless of their economic results": "In the debates in Congress Senator Sherman himself…showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[24] And yet what to do about this helplessness and how precisely to do it escaped Hand just as much as it had eluded Theodore Roosevelt, the pioneer "trust buster," half a century before. Once the initial knee-jerk reaction of assigning blame by way of primitive ideological cliché ("the evil trust") had yielded to an understanding that an irreversible but somewhat untractable change had occurred, a new legal question found itself always on everyone's table, industry included.[25] The challenge to be addressed was how one could maintain the optimal measure of 'honest' competition without hobbling the economy.

Indeed, the provisions of the competition laws (tentative, broadly formulated, sometimes announcing conflicting goals, in short: "delegations") evinced from the onset this general perplexity and the ensuing inability to grapple with the phenomena. Courts inevitably joined in the general conundrum, interpreting antitrust law in an equally tentative and therefore often inconsistent manner. This was to be expected; in the absence of a common normative standard of reference, one way of solving the problem of conflicting goals is to try to reconcile them ad hoc. Another possibility, legal-rationally more consistent (and perhaps, in view of judicial limitations, also a more institutionally legitimate way out of the dilemma), is the reduction of the uncertainty by postulating one purpose as the dominant criterion of implementation. Robert Bork's 1978 monograph on the topic influentially advocated the latter option, both anticipating and spurring the future path of antitrust in the US (and the EU).[26] *The Antitrust Paradox* cut the Gordian knot by arguing that the only cogent solution to the jurisprudential quagmire was to apply the criterion of consumer welfare as a yardstick for the enforcement of antitrust legislation, to the complete exclusion of competing goals, most notably industrial deconcentration as a purpose in itself or the welfare of small competitors. By consumer welfare Bork understood the increase in productive efficiency effected by the impugned industrial and commercial practices, whenever a productive efficiency increase would offset countervailing decreases in allocative efficiency (productive efficiency increases consumer welfare by reducing costs and thus, potentially, prices).

[24] *United States v. Aluminum Co. of America*, 148 F. 2d 416, 428 (2d Cir. 1945).

[25] William H.Page, "The Gary Dinners and the Meaning of Concerted Action," 62 *SMU L. Rev.* 597 (2009).

[26] Bork 1978.

Consequently, for example, a monopoly position achieved by purely internal growth (as opposed to one resulting from a recent merger) would be economically and legally unimpeachable,[27] as achievement of monopoly status by "natural" internal growth constitutes by definition the proof of superior efficiency.

Bork's analytically crystalline, undoubtedly brilliant argument is replete with criticism, often amounting to scathing disdain, aimed at defenders of the non-economic, "social and political purposes of antitrust." According to Bork, the defenders of this "jumble of half-digested notions and mythologies" with their "loosely Jeffersonian" hopes for "the preservation of a sturdy, independent yeomanry in the business world"[28] had only been muddling the law—while harming the economy in the process—and leading courts astray from their proper function. In the 1978 "Summation" to the book and the "Epilogue" to the 1993 reprint edition, Robert Bork conjured and saluted, respectively, in retrospect the aptitude of courts to "speak the language of economics rather than pop sociology and political philosophy."[29] This entreaty, its colloquially dismissive tone notwithstanding, is in line with the general tenor of the book, which makes a strong claim to scientific objectivity and methodological neutrality. If one heeds the propounded efficiency-oriented method, prior shamanistic judicial incantations about "small dealers and worthy men" oppressed by "big business" would be inevitably replaced with sound professional analysis, consistent and predictable in its application. At the same time, interestingly, the author felt compelled to use political-philosophical arguments in support of his theses. Throughout the book, he extemporizes in tropes recognizably drawn from the classical linguistic arsenal of the individual vs. the state constitutional tradition. Thus, the post-1978 jurisprudential swerve towards efficiency is praised as a move away from "populism", "statism", "the authoritarian ethos" and "equality of outcome" and towards the rosier horizons of "liberty", "the general welfare", and "the ideal of equality of opportunity": "The regime of capitalism brings with it not merely unexampled economic performance and a social and cultural atmosphere that stresses the worth of the individual, but, because of the bourgeois class it creates, trains, and raises to power, the possibility of stable, liberal, and democratic government."[30]

This encomium goes to exemplify both the depth of the rift between practices and justifications and the inevitable tendency towards falsification embedded in attempts to conceal this fissure. It may be inevitable that "Christmas tree" legislation, given the methodological and institutional limitations of adjudication, ought to be reduced to a dominating principle and thus to a clear, rationally manageable test. It may also very well be that there is no other way out of the dilemma, either at the level of norm-application or at the level of predictable and

[27] "Antitrust should have no concern with any firm size or industry structure created by internal growth or by a merger more than ten years old." *Id*., p. 406.

[28] *Id*., at p. 54.

[29] *Ibid*., p. 427.

[30] *Ibid*., p. 425.

thus efficient economic regulation. But this legally and economically necessary simplification of a delegation comes at a price and the trade-off must be soberly seen for what it really is. Equality of opportunity, liberty, and desert according to individual merit are, when applied wholesale to the reality of standardized and concentrated capitalism, the terms of a somewhat different world. They do not find full substantiation in a reality dominated by overweening aggregations of industry and capital. Besides, the possibility of manufacturing consumer choice can render the general coordinates of efficiency much more lax than Bork explained or perceived, in a way which parallels transformations of the relationship between voters and representatives in modern mass democracies. All these mutations are epiphenomenal manifestations of "the unsetteldness of the individual . . .in an environment dominated by large-scale systemic structures."[31] In short, social and economic transformations entail legislative metamorphoses, which in turn make structural judicial trade-offs all but inevitable. While these processes are as such perhaps inescapable, an embellishment of the ensuing tensions, cloaked in the language of a bygone age has a reductive and disingenuously obfuscating character. Neither the Founding Fathers nor even the drafters of the Sherman, FTC, and Clayton Act were *neo*liberal in their foundational beliefs and premises.

This observation about the incapacity of an inherited constitutional vocabulary to satisfactorily describe current practices leads us to the contemporary problematic regarding the constitutional regulation of legislative delegations. When the distance between foundational justifications and legal practices, on the one hand, and the political, social, and economic realities, on the other, became impossible to bridge, the liberal constitutional system had to undergo foundational transformations. In America, the change was effected "within" the old constitution, by means of interpretation, namely through the transition from the "guardian review" of classical constitutionalism to the post-New Deal "bifurcated review." The judiciary redrew the baseline, adopting as of principle a blanket presumption of constitutionality in the review of democratic legislation. That presumption would be in the future questioned only in enumerated and exceptional cases.[32] In other jurisdictions, the retrenchment was a result of post-WWII constitution-making. In these latter cases, delegation-related provisions were part of the general attempt to preserve and recreate equilibriums devised prior to the emergence of the modern administrative state, by readjusting constitutional rules to fit an older horizon of normative expectations (about individual autonomy under the rule of law, the representativeness and accountability of legislative decisions, the legitimacy of

[31] Ernst Forsthoff, *Der Staat der Industriegesellschaft. Dargestellt am Beispiel der Bundesrepublik Deutschland* (München: C.H. Beck, 1971), p. 160 "Die Folge ist die Verunsicherung des Einzelnen. Er sieht sich in einer Umwelt, die von Großstrukturen besetzt ist und beherrscht wird. Diese Großstrukturen, in denen sich die Industriegesellschaft darstellt, sind seinem Verständnis unzugänglich, da sein Lebens- und Erfahrungsbereich nicht an sie heranreicht."

[32] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *See generally* Edward White 2001, *passim*.

executive and administrative decisions, and the separation of powers) to the new realities. The success of this attempt depends in no small measure on the extent to which normative constitutionalism can be severed from its initial systemic presuppositions.

If the argument thus far is correct, the entire structure of classical normative constitutionalism was underpinned by the existence of constitutive limitations on the operation of constitutional rationality. Such limitations are fused at the hip with the institutional and legal-rational constraints of public law adjudication. The relationship between adjudication and procedurally formalized reason is the stock in trade of a jurist. Any lawyer worth his salt knows, if only intuitively, that the entire architecture of the legal system is tailored toward the attainment of juristic, i. e., rationally cognizable (and within rational limits manipulable) truth. The correlative implication, as Lon Fuller's classic piece on the topic reminds us, derives from the implicit limitations of judicially administered rationality: "Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering"[33] Fuller argued that the intrinsic merits of adjudication as "a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments"[34] were linked with its limits. As a direct consequence of the contingency of adjudication upon a rationalized procedure and rational patterns of argumentations, he derived the need to restrict this kind of institutionalized decision-making to the resolution of countervailing and individualized claims of right and duty, more amenable to rational solution. Obversely, "polycentric" matters, namely, issues whose consideration 'ricochets' into a web of interrelated problems, would be more amenable to resolution by political choice. A majority vote or an executive decision grounded in prudential considerations are types of decision-making much less subordinated to formal rationality needs.

The overarching constitutional implications of this need to separate law from politics by legal-rational means have been anticipated already during the review of nineteenth century constitutional transformations. Public law adjudication functioned with a very high degree of predictability and consistency as long as judges could relate the solution of constitutional claims to essentialist categories (internal/external and public/private). Those underlying structural dichotomies helped tabulate decisions from the onset as falling within the category of law proper or politics, respectively. Consequently, the degree of judicial control could be adjusted accordingly, in terms of how intrusively the judge would probe the substance

[33] Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353, at p. 367 (December, 1978) [emphasis in original].

[34] *Id.*, at p. 369.

(merits), legality, and procedural propriety of the decision subject to review. This categorical way of relating to public action concerned the decisions of the legislature as well. By the same token, as the survey of nondelegation-related US Supreme Court decisions has showed, the nondelegation doctrine did not police those distinctions but simply reflected, at the expressive level, the existence of substantive boundaries internal to the constitutional system and external to constitutional regulation.

The general essentialistic-relational approach to the constitution concerned also fundamental rights adjudication. The claim of constitutional right did not receive a "preferred status," that is, an independent, self-standing existence but was equally contingent upon systemic line-drawing. All students of American right/privilege distinction developments know the two Holmesian one-liners on the subject, trenchantly written in his characteristic epigrammatic-apodictic manner. In *McAuliffe v. Mayor of City of New Bedford* Holmes dismissed with very little ceremony the free speech claim made by a police chief fired according to a regulation restricting his political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."[35] In *Commonwealth v. Davis*, he gave equally short shrift to a claim of right to exercise free speech on the Boston Common, in violation of an ordinance which forbade public speaking without a permit from the mayor: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[36] This reasoning found a contemporaneous German counterpart in the notion of "special relationships of subservience" (*besondere Gewaltverhältnisse*), according to whose exquisitely Manichean logic a citizen entering a special relationship with the state, whether by obligation (prisons, the military, public schools) or by volition (public servants) would forfeit or relinquish his fundamental rights at the doorstep of the state, upon leaving the sphere of society.[37]

But the issue of essentialist boundaries to rights ran deeper and had a more sophisticated constitutional dimension than the all or nothing pigeonholing

[35] 155 Mass. 216, 29 N.E. 517, 517-518 (1892), per Holmes, J.

[36] 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), aff'd, 167 U.S. 43 (1897).

[37] According to the current doctrine, fundamental rights have effect in the case "special legal relationships" (*Sonderrechtsverhältnisse*), although special legal restrictions may be justified in the context. *See*, for instance, the 2003 "Headscarf Decision" of the Federal Constitutional Court, BVerfGE 108, 282 (*Kopftuch-Urteil*).

according to the law/politics (right/privilege, state/society) set of affiliated distinctions. The constitutional limits of the rights were drawn by the judges and justified by constitutional theorists by means of a "police powers" structure of analysis, symmetrically identical with the determination of limitations on noxious uses of property. For instance, in Christopher Tiedeman's celebrated late nineteenth century treatise on police power limitations, the author conceded, not without a measure of regret, that both the First Amendment and underlying prudential considerations concerning the susceptibility of censorship to abuse would preclude prior restraints to "newspapers, in whose columns we find arguments and appeals to passion, designed to incite the individual who may be influenced thereby to the commission of crimes, appeals to 'dynamiters,' socialists and nihilists, and all other classes of discontents, who believe the world has been fashioned after a wrong principle, and needs to be remodeled."[38] Nonetheless, as Tiedeman hastened to add at the close of the section, while prior censorship as such was barred by the Constitution, this would not protect those availing themselves of the constitutional right in an abusive manner. Socialists, "dynamiters", and nihilists would have eventually found their due desert meted out to them after printing "inflammatory appeals to the passion of discontents", since "he who used [the liberty of the press] was to be responsible in case of its abuse; like the right to keep fire-arms, which does not protect him who uses them for annoyance and destruction."[39] Speech tainted by its "bad tendency" "to injure public morals or private reputation or to lead to other socially injurious acts" would therefore receive no constitutional protection.[40]

Constitutional rationality functioned in a predictable and thus institutionally legitimate manner while it was moored to clear and systemically uncontested premises and dichotomies. It is true that the constitutional changes that accompanied the transition to the modern administrative-bureaucratic state partly took into account the emerging impossibility to keep law fully insulated from politics. This acknowledgement was implicit, for instance, in the explicitly ambivalent design of the newly created European constitutional courts, whose members are, unlike the ordinary judiciary, politically appointed for fixed and often nonrenewable terms of office. It was also implicit in the post-*Carolene Products* retreat of the Supreme Court from the field of social and economic legislation. But these institutional and doctrinal changes have to take into account the systemic demands of normativity and do not compensate for a substantive loss of legal consistency and predictability. The hackneyed description of public law as "political law" only means that administrative and constitutional law are situated at the interface between law and politics and deal with politically and ideologically charged subject-matters. But unless one can confine constitutional and administrative adjudication to a clearly

[38] Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis: The F. H. Thomas Law Book Co., 1886), at p. 190.
[39] *Id*., at p. 192.
[40] White 2001, p. 132. ff.

delineated domain, separated from ordinary law, public law adjudication is subordinated to the usual institutional demands on and of rationality.

Post-war constitutions and post-New Deal constitutionalism had to find a structural replacement for the disappearance of the set of concrete presuppositions and substantive limits within whose framework classical constitutionalism had functioned. Fundamental law provisions limiting the degree of specificity of statutes are attempts to take over, by means of express constitutional regulation, the function of those constitutional systemic presuppositions which had, up until the twentieth century, regulated constitutionalism itself. As it was argued, even in the peculiar case of the US Constitution, where the affirmation of this limitation long preceded the New Deal and the subsequent constitutional upheaval, the nondelegation doctrine as such had been simply reflective of nondelegation assumptions, not an enforceable instrument used in the policing of those presuppositions. When the substantive, essentialistic premises started to change, so did the reflection. The "intelligible principle" test anticipated the transition to occur a mere decade later, by expressing an emergent uncertainty about prior distinctions. As it was also already intimated, what is intelligible, i.e., how specific a statute has to be, is not a question that admits of a clear answer in the form of an enforceable principle, unless one relates 'intelligibility' to a normative background standard of legislation. The Supreme Court used this degree-based test to strike down New Deal legislation and post-WWII constitutions in Europe adopted, as we will further see, analogous institutions. The question of this last chapter is whether such delegation-related provisions can predetermine consistent constitutional adjudication on the matter. A negative answer would reflect not only on the constitutional applicability of this particular type of rule; a deeper implication revealed by the impasse would be the erosion of normativity in contemporary constitutionalism.

The argument thus far was that a constitution as enforceable, supreme law depends on extra-constitutional normative assumptions and that constitutional law operated predictably as long as fundamental law constituted a form of posited natural law.[41] Only with this strong caveat can one say with Niklas Luhmann that the modern, written, normative constitution replaces older, "external" criteria of legality and legitimacy deriving from natural law and natural right with "its own transcendental-theoretical kernel of self-referentiality evinced by the reflexive reason (*die sich selbst beurteilende Vernunft*)."[42] Reason and "reflexive reason" are categorically different things. The replacement of external criteria by positive law was, as we have seen, only partial and remained structurally dependent on a particular natural law/natural rights paradigm. In other words, classical constitutional reason functioned relationally and was itself 'constituted' by natural law/rights presuppositions. The overarching question of contemporary constitutionalism, as revealed by the problem of delegation-related provisions, is precisely

[41] Grimm 1970.

[42] Luhmann 1990, at p. 187.

whether constitutional rationality can double back on itself or, to put it in more exacting terms, whether constitutional law can supplant constitutional metaphysics.

4.2 (Non)Delegation After *Schechter*: The Prerogatives of Obscurantism

> The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures.
> *U.S. v. Nova Scotia Food Products Corp*., 568 F.2d 240 (1977), per Gurfein, Circuit Judge.

The political-constitutional background of nondelegation in American fundamental law raises at the institutional level a somewhat different functional problematic than that posed by delegation-related provisions in European constitutions. To begin with, the separation of powers effects of a delegation have immediately apparent distinct implications. Unlike in the case of European parliamentary democracies, where governments are theoretically the agents of parliaments and practically their political masters, under the US Constitution the President and Congress are, by virtue of composition, staggered terms of office, and distinct constituencies, fully autonomous actors in political reality as well as at constitutional law. This inevitably affects both the motivations of Congress (inasmuch as we can attribute intentionality to any collective body) in delegating law-making discretion to the executive and the actual balance of powers consequences resulting from the practice of delegation. For instance, a degree of institutional tension is built into the system by virtue of the presidential veto power, which acts as an implicit disincentive to delegate law-making power that, once delegated, is more often than not lost to Congress. This risk of loss is due not only to the obvious imbalance resulting from the much higher transaction costs of preference formation and aggregation in legislative decision-making but also to the already-mentioned veto-related retrieval difficulty. In order to reverse a previous delegation to the executive, Congress may have to override a likely presidential veto, through an onerous procedure that rarely succeeds.[43]

Furthermore and related, the unitary or plural character of the executive branch is, as we have already seen, constitutionally contested matters. An idiosyncratic modern tendency concerning the institutional identity of the delegates is for instance the "fourth branch of government," *Humphrey's Executor*-related

[43] Between 1789 to 2004, out of 2250 presidential vetoes (regular and pocket), only 106 had been overridden. US Congressional Research Service. Presidential Vetoes, 1789-present: A Summary Overview (CRS Report 98-148, April 7, 2004), by Mitchell A. Sollenberger. Text in: Congressional Research Service Reports, http://democrats.rules.house.gov/archives/crs_reports.htm (accessed August 28, 2011).

peculiarity of the US balance of powers.[44] The practical implications of this constitutionalized difference should of course not be exaggerated. On the one hand, there is an entrenched degree of bureaucratic autonomy from the executive in Europe, just as a counter-tendency towards increasing executive control over the administration, including the autonomous agencies, has been observed in the US.[45] On the other hand, the general problematic of administrative autonomy from politics, predicated upon expertise and/or impartiality ("independent agencies") has by now long ceased to be an American constitutional idiosyncrasy, given the generalized tendency to "neutralize" the administration, i.e., to insulate increasingly more kinds of decisions from the routine control of majoritarian democratic politics through the political branches.[46]

But even with respect to the "ordinary", executive departments, the control over law administration is a contentious matter. After all, Congress could theoretically abolish any office under the Presidency and the Vice-Presidency, which are expressly mentioned in the text of the Constitution. This assertion certainly drives the point to a reality-blind extreme of positivistic formalism; the normative power of the factual is very much at home in constitutional law. Nonetheless, the truth behind the observation is apparent: since all executive departments are statutory creations, statutory language and the allocation of subsequent interpretative authority will confine or not administrative attributions. Consequently, the precision of a delegation as well as the identity of the delegate are also factors of (the predictions regarding) the degree of presidential and congressional control of the administration, respectively. Therefore, the constitutional battle over the meaning of delegation is also part of a larger institutional contest over the control of the administration. By the same token, judicial decisions regarding the requisite degree of statutory specificity as well as the related question of who will decide authoritatively statutory meanings have inevitable repercussions on the balance of power in the administrative state. Deference to the administrative interpretation/implementation of vague statutory provisions is for example a form of judicial acquiescence in or validation of delegation. At the risk of slightly anticipating further discussion, Monaghan's keen observation needs to be cited to substantiate this claim: "A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the

[44] *Mistretta v. United States*, 488 U.S. 361 (1989), upheld against a nondelegation challenge the Sentencing Reform Act of 1984, authorizing the United States Sentencing Commission, an independent agency 'located in the Judicial Branch,' to create uniform sentencing guidelines for federal offenses.

[45] This tendency can be aggravated but is not necessarily determined by the degree of legislative and judicial control over Congressional delegations. *See generally* Farina 1989 and Elena Kagan, "Presidential Administration," 114 *Harv. L. Rev.* 2245 (2001).

[46] *See* Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge UP, 2007). Linz, Juan J. "Democracy's Time Constraints," 19 (1) *International Political Science Review* 19 (1998).

agency."[47] Law-making authority also means relatively unfettered policy discretion and, since political decision inevitably 'moves in' to occupy these fields, the branch most capable by design and capability to profit from this form of judicially sanctioned delegation is inevitably the executive.[48] According to a number of commentators, this danger was increased by the invalidation of the legislative veto in *INS v. Chadha*, which deprived Congress of one of the principal means by which it could have checked delegations *ex post*.[49] But the complementary argument can also be made. Formalistic decisions such as *Chadha*, *Bowsher v. Synar*,[50] *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise Inc.*,[51] or *Clinton v. City of New York*,[52] insisting on the punctilious observance of the constitutionally requisite procedural proprieties regarding congressional law-making and law-implementation and interpretation, respectively, may function as substitutes or surrogates, compensating for the unenforceability of the substantive nondelegation doctrine.[53]

Conversely, the structural effects deriving from the enforcement of a nondelegation rule would also be different than in other jurisdictions. Arguably, due to the relatively much more lax party discipline in Congress, the enforcement of a nondelegation rule could likely have the immediate consequence of delegating

[47] Monaghan 1983, at p. 6.

[48] *But cf.* Sanford N. Caust-Ellenbogen, "Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era," 32 *B.C.L. Rev. 757*, at pp. 813-814 (1990-1991) (the President exercises no control over the independent agencies and relatively little over the executive ones; the agencies are in effect either "laws unto themselves" or captured by the regulated interests) and Jerry L. Mashaw, "Structuring a 'Dense Complexity': Accountability and the Project of Administrative Law," *Issues in Legal Scholarship*, The Reformation of American Administrative Law (2005): Article 4. http://www.bepress.com/ils/iss6/art4 (arguing that the post-"interest balancing" attempts, notably represented by Kagan 2001, to provide a new comprehensive explanatory model for administrative law practices overstates their case, at p. 4: "That Ronald Reagan campaigned on regulatory relief for the automobile industry was as legally impotent in *State Farm* as Bill Clinton's Rose Garden 'authorization' of the FDA's regulation of tobacco in *Brown and Williamson*. '*Presidentialism' may have more descriptive than normative significance*." (last emphasis supplied, citations omitted)).

[49] 462 U.S. 919 (1983). Yet, the opinions on both the practical import of the legislative veto and on the effect of the decision as such are by and large divided. Corwin, in his 1957 study on the Presidency, considered the legislative veto as the main if not the only Congressional delegation-related control mechanism on the Executive. So did, with more reservation, Sotirios, in his delegation study. *But cf* Tribe, § 2-6, pp. 141-152, arguing that the effects of *Chadha* were overall beneficial, raising the quality of the legislative process, enhancing responsibility, heightening visibility.

[50] 478 U.S. 714 (1986).

[51] 501 U.S. 252 (1991).

[52] 524 U.S. 417 (1998).

[53] *See* John F. Manning, "Textualism as a Nondelegation Doctrine," 97 *Colum. L. Rev.* 673 (1997), arguing that procedural guarantees function as "structurally enforced nondelegation doctrine" and substitutes for "executory delegations": "In contrast with legislative self-delegation, the transfer of some policymaking discretion to agencies and courts is understood as a matter of constitutional necessity, and as less amenable to control through judicially administrable standards." (at p. 725).

legislative power from the floor to the committees, therefore to powerful committee and subcommittee leaders, and thus ultimately to interest groups.[54] Woodrow Wilson's 1885 study on congressional government is now primarily remembered because of Wilson's frequently cited quip about Congress in session being "on public exhibition", whereas Congress in its committees had allegedly been "Congress at work."[55] But a few pages farther down in the book, one can find a more sobering remark with respect to the shortcomings of congressional committee work: "I know not how better to describe our form of government in a single phrase than by calling it a government by the chairmen of the Standing Committees of Congress."[56] The correctness of this latter statement was not fully vindicated during the presidential tenure of the former Bryn Mawr professor and, in the wholesale form it was made, it is certainly not true in the present age of strong presidential administrations. Yet, irrespective of how the US government as a whole has evolved in the meanwhile, the decision-making process of Congress itself is still dominated by committee leaders and this bias could be aggravated by a rule shifting more power from the floor.[57] All redistributions of power have systemic ripple effects and produce long-term unintended consequences; but this general tendency is aggravated in a system of multiple autonomous institutional actors and a relatively less streamlined political process.[58]

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[54] Strauss 1989.

[55] Woodrow Wilson, *Congressional Government: A Study in American Politics* (Cleveland, OH: Meridian Books 1956) (1885), p. 69.

[56] *Id*., at p. 82.

[57] *See* Fiorina 1986, at p. 45 "[M]any substantive committees are overpopulated by 'interested' congressmen." Fiorina argues more generally that delegation is a function of a number of interacting factors i. the breadth of the language and therefore discretion; ii. the identity of the delegate (courts or administration); iii. the post-adoption expectations of strategically located committee members and chairpersons to control implementation. Strategic behavior would often be according to the author more explanatory of delegation than the complexity of governmental processes. *Also see*, regarding the impact of congressional structural biases on the control of statutorily conferred administrative discretion, J.R. DeShazo and Jody Freeman, "The Congressional Competition to Control Delegated Power," 81 *Tex. L. Rev*. 1443 (2002–2003).

[58] Arthur Macmahon's 1943 cautionary warning still carries therefore the same purchasing power: "The hazard is that a body like Congress, when it gets into detail, ceases to be itself; it acts through a fraction which may be a faction." Cited by Strauss 1989 at p. 434. *See generally* the study by David Epstein and Sharyn O'Halloran, *Delegating Power- A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge: Cambridge University Press, c1999), arguing that the imposition of across the board constitutional restrictions on the practice would produce perverse effects, shifting power from the floor to the committees and thus to powerful committee and subcommittee leaders and ultimately also to interest groups; the reasoning is summated in this paragraph: "[D]elegation is not only a convenient means to allocate work across the branches; it is also a necessary counterbalance to the concentration of power in the hands of the committees. In an era where public policy becomes ever more complex, the only way for Congress to make all important policy decisions internally would be to concentrate significant amounts of authority in the hands of powerful committee and subcommittee leaders, once again surrendering policy to a narrow subset of its members. From the standpoint of floor voters, this is little better

If the structural implications of (non)delegation present these jurisdiction-specific particularities and potentialities, the normative and rationality-related functional aspects of the nondelegation doctrine are perfectly comparable to the problematic of delegation-related constitutional provisions in the other jurisdictions under review.

4.2.1 Schechter *Obscurantism: Where is the Constitutional Limit?*

> There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislature. The problem is one of limits.
>
> *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737 (D.C. Cir. 1971), per Leventhal, J.

> We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.
>
> *Industrial Union Department, AFL-CIO v. American Petroleum Institute* 448 U.S. 607, 686 (1979) per Rehnquist, J., concurring in the judgment.

The retreat of the Supreme Court from the review of social and economic legislation implied the authorization of legislatures to speak in "Delphic" commands with respect to matters not affecting fundamental rights and thus a partial retrenchment of the pre-New Deal, property-liberty line of constitutional assessment. Yet, nondelegation was not directly associated with substantive due process (remember that *Schechter* was a unanimous decision) and, moreover, the values purported to be served by enforcing the doctrine (separation of powers, democracy, the rule of law) are not related to any ideological propensity for or against free markets.[59] The doctrine was therefore spared from the brunt of post-New Deal "demonization" narratives and maintained relatively sound constitutional credentials and an aura of respectability in the administrative state. To wit, the issue of delegation was recurrently brought up in the platforms of several presidential

than complete abdication to executive branch agencies. As it now works, the system of delegation allows legislators to play committees off against agencies, dividing the labor across the branches, so that no one set of actors dominates. Given this perspective, limits on delegation would not only be unnecessary, they would threaten the very individual liberties they purport to protect." (at pp. 237–238).

[59] *But cf.* Sandra B. Zellmer, "The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal," 32 *Ariz. St. L. J.* 941 (2000) (arguing that nondelegation is inextricably linked to the *laissez faire* judicial propensities of the early New Deal).

campaigns (of political persuasions as distinct as those of Carter and Reagan)[60] and the concept has been central to the arguments of equally diverse political scientists and constitutional scholars (e.g., John Hart Ely, Marci Hamilton, Gary Lawson, Theodore Lowi, Martin Redish, David Schoenbrod, etc.).[61] Furthermore, the rationales adduced by advocates of a stricter enforcement of nondelegation are procedural and ideology-blind, such as the frequently iterated democratic argument. As its essential logic runs, by passing vague statutes Congress evades responsibility for hard political choices. Legislators are thus enabled to pass the buck to the administrators, claiming credit with their constituencies for having voted for the law, while at the same time shifting the decision and the blame for future unpopular choices to the bureaucrats charged with fleshing out the substantive rules.[62] A rule against nondelegation would unmask this structural exercise in hypocrisy, forcing the representatives to make the hard choices themselves and allowing the voters to assign credit properly or place the blame where it should lie. Since, especially in jurisdictions where a representative is more dependent on his constituency than upon the party, voting can only fulfill its functions upon the predicate of a certain degree of normative commitment "[it] seems reasonable to demand as the prerequisite for legislative action some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives. . ..Statutes that fail to make such a commitment, instead effectively amounting to nothing more than a mandate to an executive agency to create policy, should be deemed unconstitutional delegations of legislative power."[63] Hence, representative democracy and the ensuing values of legitimacy, accountability, and transparency of decision-making would be served by the doctrine.

This is a respectable, relevant, and coherent concern, in the best tradition of constitutionalism. More often than not, criticism aimed at the democracy-related tenets of this position caricaturizes the seriousness of the general argument and unfairly dismisses the constitutional stakes. Censors can be ascribed to two main strains, the line of pragmatism (adopted by those who respond with no-nonsense arguments to normative objections) and that of normative agnosticism (standing for the position that general concepts are multi-faceted, they admit of too many understandings to be of any use when immediately applied to doctrinal problems).

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[60] Fiorina 1986 p. 35 FN 3 (Wallace in 1964, Wallace and Nixon in 1968, Carter in 1976, and Carter and Reagan in 1980).

[61] *See supra*, the general discussion in the section on conceptual associations and constitutional constraints at p. 80f.

[62] David Schoenbrod, "Politics and the Principle that Elected Legislators Should Make the Laws," 26 *Harv. J. L. & Pub. Pol'y* 239 (2003).

[63] Martin Redish, *The Constitution as Political Structure* (NY: Oxford University Press, 1995), at 16, 137, quoted after Patrick M. Gary, "Accommodating the Administrative State: The Interrelationship between the Nondelegation and *Chevron* Doctrines," 38 *Ariz. St. L. J.* 921 (2006), at p. 939.

For instance, exemplary of the first category is Jerry Mashaw's commonsensical response to the Ely-Schoenbrod line of critique about broad delegations hampering electoral accountability. Mashaw retorted that voters could just as well sanction their representatives for broad delegations as they do for clear choices, so the nondelegation position, as stated, would be fatuous.[64] But this argument, underneath its apparent matter-of-factness, makes unrealistic demands of electoral accountability. This is due first to the fact that democracy does not operate on the presumption that the median voter disposes of the same levels of philosophical sophistication, political acumen, and knowledge of government, constitutional, and administrative affairs as possessed by Yale Law School Sterling Professors. We usually hold people accountable for punctual "first-order decisions," i.e., in the case of representatives, voting for or against something specific. To hold them accountable for not making a salient choice about a choice (a "second-order decision," namely a decision about the primary, substantive decision about an issue) is something altogether different. This redefined accountability mechanism expands exponentially, and democracy-wise to an illusorily taxing degree, the knowledge and time demands (both decision-specific and about the general environment of the decision-making process) that are made of the mean voter.[65] Second, more important, and related, one cannot expect individuals to be able to solve by means of discrete and intermittent decisions structural systemic deficiencies, since the individual's choices are themselves warped, distorted, and conditioned by the systemic bias, which can only be corrected at the relevant level, by a structural systemic decision (such as—in this case—an enforceable nondelegation rule).

Dan Kahan's debunking attack on the use of the concept of 'democracy' as "the trump card in the antidelegation hand"[66] is representative of normative agnosticism. According to Kahan, the concept of democracy is of little normative use in nondelegation debates, since "democracy" is an emphatically polysemantic concept and no meaning of the notion (as he identifies them: market-pluralist, populist pluralist, and the dialogical and communitarian varieties of civic republicanism) can be given *a priori* normative precedence. Thus, all conceptions will have a role in the assessment of each delegation, since any delegation will serve a concept of democracy (say, populist pluralism) and disserve another (for instance, dialogical). A concept of democracy that would reconcile these semantic offshoots would be equally unavailing. It could not be brought to bear on institutional structure

[64] Jerry L. Mashaw, "Prodelegation: Why Administrators Should Make Political Decisions," 1 *J. L. Econ. & Org.* 81 (1985), at p. 87: "The dynamics of accountability apparently involve voters willing to vote upon the basis of their representative's record in the legislature. Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is that we are not being represented?".

[65] On first- and second-order decisions, *see* Cass R. Sunstein and Edna Ullman-Margalit, "Second-Order Decisions," 110 (1) *Ethics* 5 (Oct. 1999).

[66] Dan Kahan, "Democracy Schmemocracy," 20 *Cardozo L. Rev.* 795 (1998-1999).

problems since "an ecumenical conception" cannot establish orders of precedence, it is not a meta-concept. Establishing a ranking among these assumptions would of necessity be a function of subjective normative preference, not of normative imperative. Only complete legislative abdication would be clearly detrimental to all possible conceptions and assumptions informing them but that is, opines Kahan with some good reason, "hyperbole bordering on hysteria."[67] Since democracy is "an essentially contested concept" and can tell us little about institutional structure and due to the fact that the Constitution favors neither facet of the general open-textured concept, Kahan proposes assessments in terms of particular policy constellations ("the normative priority of policy to democracy").

Deconstruction with a touch of "no-nonsense" pragmatism and a whiff of relativism is a relatively undemanding endeavor. Knowledge-wise, however, the exercise brings in meager pittance. To begin with, confining normative judgments to micro-policy implications does not do away with the normative problematic as such, since "efficiency expectations are conditioned by normative representations."[68] Related, an "ecumenical concept of constitutional concepts" does not break the normative circle due to the conceptual priority of "normativity over policy." The use of concepts in constitutional jurisprudence and doctrine is not so unconstrained as in a philosophy seminar. Notions have to be subordinated to the idea of limited government under a written constitution and, therefore, one does not have the intellectual leisures of the 'God perspective,' the unbounded spaces, the unconstrained view from above. It is not political–philosophical democracy that would be served by a nondelegation limitation in the arguments of nondelegation advocates, but representative democracy as constrained by the constitutional duties resulting from the limited mandate of Congress. The constitutional limitation takes normative and analytical precedence over the representative democracy-enhancing effects. The actual implications of vigorous nondelegation enforcement are a policy matter, open to many plausible speculations and impossible to predict with certainty. In normative terms, however, the argument against delegation is compelling, irrespective of which feature of representative democracy is emphasized and independent of policy representations.

That the constitutional concept is not just chimerical, a product of fanciful-dogmatic imagination, answers in no way the question as to its practical legal feasibility. The concept of delegation is inescapable in normative constitutionalism due to the overarching idea of legally limited government, to which the notion of representative democracy proper to constitutionalism is in turn subordinated. Thus, once the assumption of a normative limitation on government was thought through

[67] *Id.*, at p. 803: "Indeed, my guess is that no democratically organized community would ever enact a delegation scheme that couldn't be seen as making its government more democratic under some plausible conception of that term."

[68] "Leistungserwartungen sind von Geltungsvorstellungen geprägt." P. Graf Kielmannsegg, "Legitimität als analytische Kategorie", in *Politische Vierteljahresschrift* 12 (1971), 367 (393), quoted after Möllers 2008, at p. 14.

to its inevitable conclusion, this corollary was inescapable in Locke's argument. For symmetrical reasons, the notion is unavoidable in constitutional theory and constitutional law proper: it responds, as Gary Lawson trenchantly observed, to "very fundamental—indeed, almost primal beliefs…To abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government. That is a price that most people are unwilling to pay in return for the modern administrative state but it is not surprising that people would look for a way to reduce that price—or at least persuade themselves that they have not really paid it."[69] We cannot relinquish the concept, as long as we want to hold fast to the notion of normatively limited government. But the crucial practical legal question nowadays is whether the limitation on government provided in classical constitutionalism by substantive criteria can be replaced by a formal, positive constitutional limitation on legislation applying across the board. This limitation would have to constrain the legislative choice by virtue of a principled, rule-bound test, which would at the same time constrain judicial discretion, for instance by establishing a constitutional presumption regarding the priority of rules over goals-statutes[70] or the requisite specificity of legislative choices.

Several decisions of the Supreme Court, where, although the majority did not use nondelegation to strike down broad provisions, the opinions mentioned the doctrine as a viable rule of constitutional law, gave credence to hopes for a revival of *Schechter*. In *Benzene*,[71] for instance, the Supreme Court decided that, to the extent that a statutory provision enabled the Secretary of Labor "… in promulgating standards dealing with toxic materials or harmful physical agents … [to] set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity,"[72] the mandate imposed on the administrator a duty to refrain from prescribing very large burdens on the industry for trivial gains. The court derived from the provision a corresponding obligation to demonstrate "significant risk of harm" before adopting an exposure standard and noted in dicta that, if the interpretation given by the administrator had been correct, the impugned provision "might" have been vulnerable to a nondelegation challenge.[73] Moreover, Justice Rehnquist would have preferred to strike down the

[69] Lawson 2002, at p. 332.

[70] *See* David Schoenbrod, "Goals Statutes or Rules Statutes: The Case of the Clean Air Act," 30 *UCLA L. Rev*. 740 (1982-1983) and Schoenbrod 1993.

[71] *Industrial Union Department, AFL-CIO v. American Petroleum Institute* 448 U.S. 607 (1979). *See also* "Cotton Dust", *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981). In both cases, the majority considered that the locution "to the extent feasible" supplied a limiting standard and saved the statute from a nondelegation challenge, whereas Rehnquist's dissents countered that precisely the insertion of that phrase had "rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation of legislative authority to the Executive Branch" (Rehnquist, J, dissenting, 452 U.S. 490, at p. 545).

[72] Section 6 (b) (5) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590.

[73] 448 U.S. 607, at 646 (1979).

provision for delegating legislative power, as he argued in an impassioned concurring opinion that glossed extensively on John Locke's political-theoretical defense of the nondelegation principle. Rehnquist stressed that the nondelegation test ("intelligible principle") was reliable enough to allow for predictable enforcement of the doctrine and added that broad statutory vagueness was only justified in the general regulation of fields marked by rapid technological change, where the fluidity of the domain made a clear legislative command impossible or undesirable. Once a value choice was brought to bear on technological uncertainty (as in the case of setting standards of exposure to dangerous chemicals, where the dose-response curve cannot be established), Congress had to choose between the conflicting values of saving statistical lives and safeguarding the economic health of an industry. Whereas Rehnquist admitted that an amount of delegation and therefore discretion in execution of the law was inevitable, he pointed out that the selective enforcement of the doctrine according to the "intelligible principle" test would promote political responsibility, the accountability of the administration, and viable judicial review of administrative action.[74]

But even when the court held the doctrine inapplicable in the particular case at bar, it did so in carefully worded arguments that distinguished the specific situation as exceptional but did not question the viability of the nondelegation rule as such. For instance, in *Touby v. United States,*[75] the Court held that an expedited procedure in the Controlled Substances Act, enabling the Attorney General to schedule temporarily "controlled substances" when temporary scheduling was "necessary to avoid an imminent hazard to public safety" (the procedure was necessary in order to combat the problem of "designer drugs") did not violate the nondelegation doctrine. Legislative certainty in that context would have easily defeated the purpose of the criminal act, allowing traffickers to deflect prosecution by slight modifications in the chemical composition of a drug, as to make it different from those already scheduled. Moreover, as the court noted, there was a procedure for contesting the scheduling and provision for incidental judicial review in the course of the criminal prosecution: "[temporary scheduling] does not preclude an individual facing criminal

[74] 448 U.S. 607, at 685-686: "As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. . .Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. . .Third, and derivative of the second, the doctrine ensure that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."

[75] *See Touby v. United States*, 500 U.S. 160 (1991), at pp. 165-166: "Petitioners suggest. . .that something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions. They contend that regulations of this sort pose a heightened risk to individual liberty and that Congress must therefore provide more specific guidance. Our cases are not entirely clear as to whether more specific guidance is in fact required." *See* comments and discussion in Mashaw et al., at pp. 77–78.

charges from bringing a challenge to the temporary scheduling order as a defense to prosecution."[76] In other cases, such as areas where the President has independent constitutional authority the nondelegation argument was addressed in received and orthodox delegation categories. In *Loving v. United States*,[77] for instance, the promulgation by the President of aggravating factors in court-martial cases (under his statutory authority over military criminal procedure), factors leading to the imposition of capital punishment, was held constitutional against a nondelegation challenge: "There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief... The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and *the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter....'*"[78] [emphasis supplied].

Given the careful treatment of and occasional sympathetic judicial nods towards the doctrine, the U.S. Court of Appeals decision in *American Trucking*, initially appeared to vindicate the hopes for a revival of the doctrine.[79] In 1999, the D.C. Circuit invalidated, on nondelegation grounds, an interpretation of the Clean Air Act by the Environmental Protection Agency. At issue was a provision of the act directing the EPA to set primary pollution standards (national ambient air quality standards or NAAQS) for certain pollutants as "requisite to protect the public health" with "an adequate margin of safety."[80] Pursuant to this mandate, the agency had issued a regulation on ozone and particulate matter, replacing a previous 0.12 ppm standard, based on 1-h average concentration levels, with a more stringent 0.08

[76] 500 U.S., at 161.

[77] 517 U.S. 748 (1996).

[78] *Id.*, at pp. 769-771. *See* "Steel Seizure", *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), holding that independent constitutional authority does not extend to restriction on civilian property (seizure of steel mills by Executive Order), in times of domestic peace, without express congressional authorization. Compare with the effects of congressional "silence" in foreign affairs, especially executive control of international claims settlement, *Dames & Moore v. Regan* 453 U.S. 654 (1981) and the more recent *American Insurance Association v. Garamendi, Insurance Commissioner, State of California*, 539 U.S. 396 (2003), which held that the president can settle claims of American nationals with foreign governments (and foreign corporations), through executive agreements (which do not need to be ratified by the Senate or approved by Congress) and can preempt state legislation. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), emphasizing "the lead role of the Executive in foreign policy." *See* Alfred C. Aman, *Administrative law in a Global Era* (Ithaca, N.Y.: Cornell University Press, 1992), for an exposition of and an argument regarding the way in which the 'Global Presidency' of more recent times influenced delegations and more generally imbalanced inter-branch relations.

[79] *Am. Trucking Ass'ns v. EPA*, 175 F3d 1027 (D.C. Cir.), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *and rev'd in part sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

[80] Clean Air Act, § 109 (b) (1), (d), 42 U.S.C. § 7409 (b), (d) (1994).

ppm standard, based on 8-h measurements. The agency explained the chosen concentration value by pointing out that, although science could not pinpoint a cutoff limit, a threshold under which a concentration would be absolutely safe, a lower standard (0.07) was close to concentrations of ozone produced by non-anthropogenic sources and "[t]he most certain O3-related effects [at 0,07 levels] are transient and reversible."[81] Unusual in the DC Circuit's decision was its unorthodox use of nondelegation. Instead of invalidating the congressional enactment for vagueness and thus delegation, the Court of Appeals remanded the regulation to the EPA and directed the agency to supply an "intelligible principle" to constrain its own implementing discretion. The nondelegation part of the decision was however reversed on appeal by the Supreme Court and thus "[f]or many administrative law scholars, the most awaited case of the year [quickly] turned out to be the most disappointing."[82]

In an opinion written by Justice Scalia, the Supreme Court explained why the nondelegation-related disappointment was inevitable. The opinion noted that the intelligible principle was a limitation on Congress; the very idea that a congressional dereliction of constitutional duty could be substituted by the agency was a contradiction in terms. The question had always been and still remained whether this limitation could be judicially enforced against Congress. But, whereas Justice Scalia provided a litany of examples to show that the provision at issue (section 109 of the Clean Air Act) was not much broader than past, sustained "delegations", he also hinted at the deeper causes of the unenforceability of the constitutional limitation: "It is. . .not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are 'nonthreshold' pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. '[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.'"[83]

The intricacies, both knowledge-wise and axiological, lurking in the background of both *Benzene* and *Whitman*, go to underline with particular forcefulness the difficulties posed by such modern kinds of delegation. The administration of vague provisions in these areas (of technology forcing risk-regulation) boils down to the need to put a price on (statistical) human life. Since science is of little help to such choices, be it only due to the unreliability of data or the limited usefulness of extrapolations from experiments, the solution to the problem does not appear to lend itself to principled or normative line-drawing, least of all at the constitutional level.[84] Unless a background normative constraint supplies a principle for gauging

[81] National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,868.

[82] Lisa Schultz Bressman, "Disciplining Delegation after *Whitman v. American Trucking Ass'ns,*" 87 *Cornell L. Rev*. 452 (2001-2002), at p. 452.

[83] *Whitman v. Am. Trucking Ass'ns* (quoting *Mistretta v. United States*, 448 U.S. 361, 417 (1989)), 531 U.S. 457, at 475 (2001).

[84] *See generally* the study by (now Justice) Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, 1993), arguing in essence for a primarily political solution (through a committee under the supervision of the Executive Office of the President) to such problems.

the form and specificity of legislative norms, the kind of normativity resorted to in practice (rules, rules with exceptions, standards, presumptions) depends entirely on considerations of regulatory policy.[85] On a more general note, on questions of degree, substantive intelligibility is a matter of policy and/or viewpoint. To put it more bluntly, one man's intelligibility is another man's unprincipled delegation. Taking the above examples, short of the absurd solution of forcing Congress to come up with a reasoned standard itself, which is absurd not only due to prudential institutional considerations but also due to epistemological reasons, all remaining imaginable positions present Louis Jaffe's "Chinese puzzle" dilemma: "policy . . .contain[s] the potentialities of an infinite recession of lesser and lesser policies."[86] In the absence of a normative constitutional "metric for [statutory] clarity,"[87] entrusting the judge with such tasks at the level of constitutional law would overtax the institutional demands and possibilities of the judicial function. Instead of disciplining discretion, the enforcement of a nondelegation limitation would simply transfer unconstrained policy discretion to the judges under the guise and with the imprimatur of constitutional principle, but without any of the democratic safeguards and safety valves provided by the political and administrative processes. This would displace, rather than solve, and possibly aggravate the nondelegation problem. The difficulties of enforcing a nondelegation limitation would be, moreover, complicated even further if one imagines the nondelegation doctrine analysis to consist of two steps, namely (1) an inquiry into the level of constitutionally requisite statutory clarity, beyond which a provision would be held to "delegate" law-making and, dovetailing with it, (2) a second inquiry into whether Congress delegated due to an acceptable cause (technology-forcing legislation, for instance) or a nefarious irresolution motive (credit-taking, blame-shifting; carelessness; indolence). This structure is implied in a decisive proportion of academic proposals to reinstate nondelegation, insofar as most critics do not want to make wholesale accusations against the administrative, welfare- and risk-management state but seek only to separate the good delegation wheat (delegations that are needed to optimally run the administrative state) from the bad delegation chaff (delegations that undermine representative democracy). The law has trouble enough determining individual intentionality (indeed, it often bridges gaps by way of fictional attributions). Determining the collective 'intent' and 'motivations' of large groups of individuals raises insuperable difficulties and moves tremendous discretionary policy decisions to judges who are neither legitimated nor qualified to exercise them.[88] It is therefore

[85] *See* Diver 1983 and Cass R. Sunstein, "Problems with Rules," 86 *Cal. L. Rev.* 953 (1995).

[86] Jaffe 1947, at p. 369.

[87] Frank Easterbrook, "The Role of Original Intent in Statutory Construction," 11 *Harv. J. L. & Pub. Pol'y* 59, at p. 62 (1988).

[88] *See* Richard Pierce, "The Role of Constitutional and Political Theory in Administrative Law," 64 *Tex. L. Rev.* 469 (1985-1986), arguing that nondelegation tests —"based on some combination of the relative importance of the policy decision and the relative necessity of the legislature's failure to make that decision" (p. 505)—would endow judges with a "thinly disguised putatively

little wonder that the judiciary consistently refuses the invitation to shoulder these burdens.

A secondary question remains, namely, whether the impossibility of enforcing a rule-bound, across the board nondelegation doctrine could not be substituted by a second-best alternative. The Supreme Court itself alluded to this possibility, with a casual *Mistretta* remark tucked away safely in a footnote: "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[89] A number of prominent theorists have also advocated nondelegation-based canons of statutory construction as a palliative for the phenomenon of overly broad statutory mandates. The most representative argument is Cass Sunstein's defense of nondelegation canons as a form of "democracy –forcing judicial minimalism, designed to ensure that certain choices are made by an institution with a sufficient democratic pedigree."[90] Since the classical doctrine asks a question of degree, it cannot be enforced at the constitutional level by the judiciary against Congress. Enforcement via nullification, large-scale and across the statutory board, would, says Sunstein "violate its own aspirations to discretion free law" and possibly aggravate the administrative state pathologies (rule of law, accountability, legitimacy deficits) its proponents strive to cure by this means.[91] But the strategic judicial deployment of a set of nondelegation-derived clear statement rules, i.e., restrictive interpretations of broad statutory mandates, requiring an unambiguous legislative decision in a number of sensitive areas, would not be fraught with the same perils. In the case of restrictive interpretations of statutory mandates on the basis of nondelegation principles, the delegation-related distinction is qualitative, since "courts ask a question about subject-matter, not a question about degree."[92] A subject matter question is emphatically amenable to normative specification and thus to principled judicial determination. Moreover, since a clear statement rule only invalidates the decision of the agency, it does not create the same tensions

constitutionally based policy dictatorship" (p. 503). According to Piece, the test would pose already insurmountable problems at step i, since: "there is no objective test for distinguishing 'fundamental' policy issue from other policy issues. The characterization of a policy issue as fundamental inevitably is influenced by each judge's values and ideology. Something that is 'fundamental' to a political conservative, for instance, may not be 'fundamental' to a political liberal." (at p. 502).

[89] *Mistretta*, 448 U.S. at 373 n 7.

[90] Cass R. Sunstein, "Nondelegation Principles," in Richard W. Bauman and Tsvi Kahana (Eds.), *The Least Examined Branch-The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006), 139-154, at p. 140.

[91] *Id*., at p. 143.

[92] *Ibid*., at p. 152.

as invalidation, which denies a legislative choice in categorical terms. In the case of canons, Congress can make the choice itself and is, indeed, required to do so.[93]

This observation, that the optimal form for nondelegation nowadays is that of canons of restrictive statutory construction in order to require clear statements from the legislature, is not only validated by the *Mistretta* aside, but also implied by a long string of decisions. In *Kent v. Dulles*,[94] for instance, the Court held that, absent explicit legislative authorization, the Secretary of State had no authority to promulgate regulations under which a passport would be denied on the basis of Communist affiliation, furthering Communist causes, or on the basis of the applicant's refusal to clarify the issue of affiliation in an affidavit.[95] Given the constitutional value at stake, the right to travel, a part of the Fifth Amendment "liberty," Congress alone could speak in the matter. Similarly, in *Hampton v. Mow Sun Wong*,[96] it was held that the United States Civil Service Commission could not presume authority to restrict access to civil service federal jobs, by adopting a citizenship eligibility requirement (and thus discriminating against aliens). Congress and the President have constitutional power to restrict eligibility but the restriction would need to be specific and express.[97] Similar results have been reached in other constitutional sensitive areas. Thus, it was held that the power to tax,[98] to promulgate

[93] *Also see* Sunstein "Law and Administration after *Chevron*," 90 *Colum. L. Rev.* 2071(1990), arguing that 'nondelegation canons' are not rendered inapplicable by the adoption of the 'rule of deference' in *Chevron* with respect to an agency's interpretations of its enabling act, since they relate to constitutional issues distinct from the principle of agency deference, demanding contrariwise "explicit *congressional* authorization before certain results may be reached." (at p. 2113) *See also* Tribe 2000, at pp. 1010-1011.

[94] 357 U.S. 116 (1958).

[95] *Id.*, at p. 129: "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.. . . And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. . .. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Thus we do not reach the question of constitutionality. We only conclude that s 1185 and s 211a do not delegate to the Secretary the kind of authority exercised here." *See also Greene v. McElroy* 360 U.S. 474 (1959).

[96] 426 U.S. 88 (1976).

[97] *Id.*, at p. 105: "We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes; but we are not willing to presume that the Chairman of the Civil Services Commission, or any of the other original defendants, was deliberately fostering an interest so far removed from his normal responsibilities."

[98] *National Cable Television Ass'n, Inc., v. U.S.* 415 U.S. 336 (1974) The Federal Communications Commission could under its organic legislation impose a fee on cable television companies (CATV's) for services equaling the value of its services to the recipients but was not authorized to tax; taxation cannot be presumed to have been delegated by Congress: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles

retroactive administrative rules,[99] and to apply federal law extraterritorially[100] could not be assumed or presumed by Congress' agencies but need to be exercised by means of actual (express) and specific congressional intent. In light of the heightened legitimacy and rule of law concerns raised by delegations to private parties, emphasized in both *Schechter* and *Carter Coal*, a nondelegation canon of construction would attach with particularly good reason to a delegation to private groups of the power to impose private preferences through the use of public coercive authority.[101] This issue has been of actuality in recent years, due to the 'withdrawals' of the state from previously regulated areas (deregulation) and the controversial privatization of some traditionally public functions (contracting out, privatization). Private prisons and the provision of state-funded medical or vocational services by private contractors are conspicuous examples. From this perspective, the problems with delegation are, in the American constitutional context, heightened by the fact that private parties escape constitutional restrictions, due to the limited reach of the "state action" doctrine.[102]

The problem with nondelegation principles or canons as a substitute for the nondelegation doctrine is the impossibility of extracting from the descriptive analysis a workable normative dimension. True, Sunstein provides a taxonomy, distinguishing among canons derived from constitutional principles (such as the rule of lenity or the presumption against retroactive application of statutes), sovereignty-inspired nondelegation canons (such as the presumption against extraterritoriality or the presumption that agencies cannot use statutory ambiguity to waive sovereign immunity) and canons based on public policy (such as the *de minimis* limitation on health and safety regulations, requiring agencies to avoid imposing large expenditures to deter insignificant risks, at issue in the restrictive statutory interpretation in *Benzene*). The problem is that, even though this may well be an accurate description of what the courts have in fact done, no meta-principle(s) can

revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems." (at 342). *See also* Tribe, at p. 987, note 30, observing that: "*National Cable Television* was particularly notable because the policy of clear statement was triggered not by some threatened infringement of a constitutionally protected substantive right or liberty –except perhaps a freedom from 'taxation without representation'- but by the delegation doctrine itself." *But cf. Skinner v. Mid-America Pipeline Co.* 490 U.S. 212 (1989), upholding delegation of the taxing power.

[99] *See Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988).

[100] *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

[101] *See*, for instance, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where a federal regulation was held not to preempt overlapping state law, due to the fact that the content of the federal regulation had been in fact decided by a group of local avocado growers rather than by "impartial experts in Washington or even in Florida." (cited and commented in Tribe, *supra*, at pp. 991–993, *esp.* note 49).

[102] David M. Lawrence, "Private Exercise of Governmental Power," 61 *Ind. L. J.* 647 (1985-1986), Gillian E. Metzger, "Privatization as Delegation," 103 *Colum. L. Rev.* 1367 (Winter, 2003), Ira P. Robbins, "The Impact of the Delegation Doctrine on Prison Privatization," 35 *UCLA L. Rev.* 911 (1988), and Jody Freeman, "The Private Role in Public Governance," 75 (3) *N.Y.U. L. Rev.* 543 (2000).

be derived, to provide courts with a limitative normative criterion for the selection and interpretation of these canons. The insurmountable challenge of the nondelegation doctrine is that of cutting the spectrum of policy degree based on a rule-bound, normative criterion; nondelegation makes a hegemonic constitutional claim on statutory clarity but fails to support it with a normative limitation. Conversely, the problem of canons is too much normative fragmentation. There is, to be sure, a viable, subject-matter explanation for each judicial choice and discrete decisions can be tabulated under a number of broader conceptual categories, just as Sunstein has magisterially done. But, except for a limited number of constitutionally-mandated requirements of specificity such as lenity (which are at any rate normatively self-standing) no common normative-constitutional grammar exists, to guide judges in the enforcement and development of these canons as a countervailing general solution to the systemic problems that led to the revival of interest in the doctrine.[103] Thus, the revival of nondelegation debates reveals itself as a normatively commendable and unavoidable, and yet—from a practical point of view—ultimately fruitless manifestation of a search for normativity in the modern state, a mere epiphenomenon of deeper tensions.

4.2.2 Chevron *Agnosticism: Where is the Legislative Meaning?*

> Congress has been willing to delegate its power broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits.
>
> *Ethyl Corp v. EPA*, 541 F. 2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring).

> Thus, if Congress declines to make policy decisions and to reflect those decisions in meaningful substantive standards, the judiciary can play no constructive role in constraining agency discretion to make political decisions.
>
> Richard Pierce, "The Role of Constitutional and Political Theory in Administrative Law," 64 *Tex. L. Rev*. 469 (1985–1986).

[103] The argument here is not similar to that made by John Manning, related to unadministrability due to the interpretive burdens. *See* John F. Manning, "Lessons from a Nondelegation Canon," 83 *Notre Dame L. Rev*. 1541 (2007-2008), at p. 1563, n. 63, making the subtle hermeneutical claim that "holding one's method of interpretation constant, it entails arbitrary line-drawing to identify the level of background ambiguity at which statutory outcomes cross the line from congressional choice to statutory discretion." My criticism of nondelegation canons is both simpler and more foundational. It relates, namely, to their lack of normative cohesiveness/coherence: nondelegation canons offer disparate and untractable prudential answers to a structural-normative question. *See*, for a parallel criticism in analogous context (of Sunstein's theory of interpretation canons), Richard Stewart (Book Review of Cass R. Sunstein, *After the Rights Revolution*, Cambridge, Mass., Harvard University Press, 1990), "Regulatory Jurisprudence: Canons Redux?," 79 *Cal. L. Rev*. 807 (1991).

> Administrative law is not for sissies.
>
> Antonin Scalia, "Judicial Deference to Administrative Interpretations of the Law," 1989 *Duke L. J.* 511 (1989).

Although often ridiculed as roughly equivalent to medieval scholastic inquiries into how many angels can dance on the head of a pin, contemporary proposals to revive the nondelegation doctrine are not just aloof 'academic' musings. They are also not exclusively related to the constitutional instantiation of first principles (the quality of representative and accountability mechanisms, systemic rule of law implications, etc.). Contrariwise, the attempt to find the proper normative constitutional limit of legislation expresses also foundational concerns about constitutionalism and constitutional law with very pragmatic, down to earth administrative implications. Whether or not it is possible to constitutionally enforce a nondelegation limitation, the stake of the modern search for delegation limits also derives from and translates into practical considerations about the proper role of public law adjudication. As it was argued thus far, public law is an exercise in structurally controlled rationality. In other words, administrative and constitutional law categories rely on normative distinctions and presuppositions, in the absence of which public law adjudication cannot function rationally, that is, in consistent and predictable ways and structurally free from political and ideological biases.

By the same token, the attempt to substitute pure juridical technique for normativity, i.e., procedure for substance, is fated to disappoint. Procedure, as Jeremy Bentham, the master technician himself, astutely observed, is "adjective law."[104] Like all adjectives, it presupposes a noun in need of suitable qualification. That is to say, it has no meaning without a substantive referent (e.g., "blue sky"). For purposes of introductory exemplification into the conceptual complexities at issue, an elegant and elaborate attempt to justify modern constitutionalism in a procedural key is the comparative study of the German law professor Christoph Möllers.[105] The author stipulates, in Rousseauist-Kantian note, that liberal constitutional democracy rests on self-determination (*Selbstbestimmung*), whose complementary individual and collective manifestations presuppose each other (my liberty depends on the collective freedom of my fellow citizens, whereas the 'general will' cannot have an authentic meaning without my being given the possibility to act as a free moral agent). The writer derives from this liberal-democratic equilibrium a theory of the balance of powers (*Gewaltengliederung*) that instantiates and reflects the tension and complementarity between individual and collective self-determination, respectively. Adjudication, on one end of the spectrum, is legally constrained, retrospective, and bound by the individual and concrete character of

[104] "Of the adjective law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law." J. Bentham, *The Principles of Judicial Procedure*, in 2 *Works of Jeremy Bentham* 1, 6 (J. Bowring ed. 1838-1843), quoted after Gerald J. Postema, "The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication," 11 *Ga. L. Rev.* 1393, at p. 1396 (1976-1977).

[105] Möllers 2005, 2008.

specific rights-determinations. Law-making, conversely, is less constrained by norms, bears on general objects, and "looks" to the future. The executive function is positioned in the middle of the spectrum—therefrom deriving also its 'segmented' and dual, "in-between" character. Separation of powers results therefore as a continuum or "scale, in which the normative constraints (*Rechtsbindungen*) are more intensive, when individual self-determination is more directly concerned, and more open-ended, when the decision regards the possibility of law-creation for the purposes of collective self-determination. This process of concretization (*Konkretisierungsvorgang*) ultimately has also a temporal dimension, reaching from the future-oriented democratic decision to the judicial disposition of an individual case. In this process of progressive ascertainment one can already recognize the trajectory of law-production from the legislative over the executive all the way to the individual decision of a court of law."[106] The practice-oriented analytical coherence of Möllers' account allows his theory to have a measure of normative mooring to reality and therefore a certain grip on the evaluation of constitutional practices. The *Chadha* decision of the US Supreme Court, which famously invalidated the ex post disposition by the legislature (a one-house veto resolution) of immigration determinations made by the Attorney General, is praised as a correct constitutional intuition of the proper role of a democratic legislature: "thus [i.e., by means of the legislative veto] the closed political law-making process would have been repoliticized for the purposes of an individual case."[107] By the same token, substantive limitations such as nondelegation are declared by the author as impossible and redundant: "There is no general rule prescribing the normative cast of an ideal statute. One could even say, democratic procedures were developed precisely because there is no such ideal type."[108] And yet, in the end, procedure cannot function well without substantive presuppositions. Short of *Chadha*-like clear-cut situations, how individualized or general should the procedure be (and therefore whether we ought to subject a given determination to adjudication or a political decision) are questions which, when the applicable rule of law does not offer clear guidance, the procedure alone cannot satisfactorily address. Whereas Möllers's theoretical justification corresponds broadly and ideal-typically to the way in which we perceive the separation of powers, it helps us relatively little exactly where answers are most ardently needed and tensions are most acute. In that it explains both too much and too little, its analytical elegance notwithstanding, from a doctrinal point of view the argument shares the procrustean fate of closed analytical systems when they are put to hard practical work.[109] But it is not only global attempts at theorizing contemporary law that glide over the surface of juridical phenomena. By the same

[106] Möllers 2008, p. 90.

[107] *Id.*, at p. 130.

[108] *Ibid.*, at p. 127.

[109] Mashaw 1997, at p. 1, quotes an apposite jibe that Picasso is rumored to have thrown at common friends, in response to their uncomplimentary remarks regarding the accuracy of his Gertrude Stein portrait: "[N]ever mind, in the end, she will manage to look just like it."

token, positive law in itself is often of little help in addressing practice-oriented theoretical conundra.

The post-New Deal intricacies and tribulations of constitutional due process are richly revealing of the general dilemma. As we have seen, the older property-liberty presuppositions of the classical liberal state had already become increasingly untenable before the 1930s but a dogged judicial attachment to the liberty and property, right/privilege distinction was impossible to maintain after the New Deal transformations. As a judicial reaction to the unprecedented expanse of the administrative state, procedural due process safeguards were therefore slowly extended to various forms of 'new property.'[110] The constitutional high tide of these new developments was the characterization of welfare benefits, in the 1970 case of *Goldberg v. Kelly,*[111] as a form of 'property' under the Fourteenth Amendment, which needed to be secured, prior to administrative deprivation, with almost the full panoply of due process protections provided by a judicial process.[112] Forms of state largess, which in the past had been considered "privileges" subject to determinations fully discretionary in nature, would now be accorded constitutional 'property-like protection.' And yet, the characterization of government benefits as a "new form of property," although a deft metaphor, overstates in style its analogical, practical and conceptual, possibilities. To wit, if one would consistently judicialize administrative procedures, so that the administrative deprivation of a social welfare benefit would follow a full court-like procedure, the wheels of government would immediately grind to a halt. Falling back *consistently* on the old distinctions appears however, in light of the intervening transformations, illegitimate.[113] Both the majority decision in *Goldberg v. Kelly* and the dissenting judges' accusations of

[110] Charles A. Reich's article, "The New Property," 73 *Yale L. J.* 733 (1963-1964), was the theoretical forerunner of the subsequent judicial developments, arguing that, to the extent that government — both federal and state — had become a major employer and dispenser of largesse, the traditional right-privilege distinction and the *constitutional characterization of a right in common law*, had become untenable. Government largesse needed to be seen as a new property to which Fifth/Fourteenth Amendments constitutional procedural protections would attach.

[111] 397 U.S. 254 (1970).

[112] *Matthews v. Eldridge*, 424 U.S. 319, at 333 (1976): *Goldberg* required a "a hearing closely approximating a judicial trial."

[113] This is not to deny the fact that, in a limited government, the presumption is necessarily negative, that is, against government intervention. This presumption reflects itself in practices and does indeed render current practices coherent. *Cf.* Nelson 2007, at p. 564: "Indeed, to the extent that the Supreme Court's current approach to these issues has any structure at all, that structure comes from the traditional framework [i.e., the difference between 'private' and 'public' rights]. Nonetheless, the acknowledgement of practical necessity does not necessarily lead to a normatively satisfactory justification. *But cf.* Williams 1983 defending "the Constitution's underlying vision of the proper relation between the state and the individual" (p. 4) by a revamped version of the "liberty and property" boundary as "degree of preclusion of private alternatives." Enough has been said so far to indicate that "degree of preclusion," like all matters of degree, presents a very different justificatory/normative configuration than "natural rights."

"unreality"[114] are therefore, to a good measure, equally compelling and perplexing. But no middle way out of the paradox seems to present itself.

Charles Reich's influential article, on the conceptual structure of which the *Goldberg* decision was reliant, argued in familiar realist key that both older and newer forms of property were positive creations of society, thus categorically differentiated constitutional treatment and a presumption of non-intervention based on natural law justifications were unwarranted.[115] Reich's answer to the right/privilege distinction and its associated natural/positive law divide was primarily procedural and across-the-board: "The post-Realist creation of rights in 'new property' would not depend on traditional, natural rights ideas but on the positive creation of procedural limitations on governmental power."[116] But pursuing the "new property" logic to its conclusion, as the court did in *Goldberg*, analogizing a welfare benefits deprivation with a court procedure, would have made a full mockery out of the administrative process. By the same token, compromise solutions to this deadlock, albeit inevitable, have been of little doctrinal and relatively ambivalent practical comfort. First, recourse to default reliance on positive law for the definition of the protected liberty or property has a pronounced tautological character (one looks to the constitution precisely in order to find supplementary procedural protections). [117] Second, the jurisprudential attempt to fine-tune the level of due procedure by means of a "balancing" test is, like all instrumental responses to analytical-categorical questions, a conceptually unsatisfying surrogate. In *Mathews v. Eldridge,*[118] the effects of the holding in *Goldberg* were significantly 'toned down' by entrenching the now familiar three-prong test used in order to decide the level of constitutionally required procedural protection to be accorded a given interest: "First, the private interest that will be

[114] "It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment." *Goldberg v. Kelly*, 397 U.S. 254 (1970), at 275, per Black, J., dissenting.

[115] Horwitz 1992, at p. 246, arguing that the *Goldberg* decision "prominently relied" on Reich's article. *Also see*, Stephen F. Williams, "Liberty and Property: The Problem of Government Benefits," 12 *J. Leg. Stud.* 3 (1983).

[116] *Id.*, p. 245.

[117] Consider the following definition by Jack Beerman, "The Reach of Administrative law in the United States," in M. Taggart (ed.) 1997, at p. 184: " In all cases raising a due process claim that the government has not employed fair procedures, there is a threshold requirement that the plaintiff establish that he or she has a protected interest, usually liberty or property, at stake. The existence of the protected interest, except when constitutionally defined liberty is involved, is determined by looking to an external source of law, such as the statute governing the benefits programme or regulating the government employment. The existence of a protected interest in such cases involves the purely positive law question of whether governing law creates an entitlement to the benefit or employment. If the benefit is purely a gratuity or if the employment is governed by the at-will rule under which an employee may be discharged without notice, then there is no protected interest and no procedural rights attach." *See Board of Regents v. Roth,* 468 U.S. 564 (1972).

[118] 424 U.S. 319 (1976).

affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[119] But, whereas, balancing makes a generous, almost cornucopian promise of professionalism, no-nonsense pragmatism, and policy flexibility—seeming "functionally oriented and quasi-scientific in its methodology"[120]—it delivers in the end unpredictability and unprincipled adjudication. Since (pace Bentham & intellectual progeny) there is no objective, quantitative means of assessment of optimality in law-application, such tests tell us nothing about the way in which the factors ought to and will be pondered in adjudication. The test constrains the judge only marginally and discursively, in the weak methodological sense of imposing a formally structured framework of decisional justification.[121]

These problems, namely the irreducible complexities posed by the adjustment of constitutionally mandated procedural protections to a displaced and ambivalent fundamental, meta-constitutional normative configuration, have been mirrored by symmetrically analogous difficulties at the level of administrative law proper. As commonly known, the main post-war legislative event, essential for understanding contemporary American developments in administrative law, was the passage of the Administrative Procedure Act (APA) in 1946. The final version replaced with a milder form an initial variant, the 1939 Walter–Logan Bill (inspired by Roscoe Pound's American Bar Association report of 1938 and vetoed by President Roosevelt). The ABA-sponsored Pound proposal had reflected pre-New Deal presuppositions about the proper division of labor between courts and administrative bodies to such an extent that Louis Jaffe sarcastically referred to it as "A Bill to Remove the Seat of Government to the Court of Appeals for the District of Columbia."[122] The enacted form, still "a highly conventional lawyer's view of how to tame potentially unruly administrators,"[123] institutes a number of procedures for administrative rule-making and adjudication, as a "default" or "residual" set of provisions to fill the procedural gaps of the organic statutes establishing various federal programs. The APA provision which ended up having the biggest

[119] *Id.*, at 335 (citation omitted).

[120] Jerry L. Mashaw, *Due Process in the Administrative State* (New Haven, CT: Yale University Press, 1985), at p. 102.

[121] T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 *Yale L.J.* 943 (1987). For a trenchant and sophisticated critique of the "instrumentalist" deficiencies intrinsic in *Eldrige*-like due process balancing, *see* Mashaw 1985, Chapter 3, "The Model of Competence," pp. 102-157.

[122] Horwitz 1992, at p. 238.

[123] Rabin 1986, at p. 1265: "The APA is, in essence, a highly conventional lawyer's view of how to tame potentially unruly administrators. It divides the universe of administrative action in two general decisionmaking categories, rulemaking and adjudication."

impact on contemporary practices is arguably section 553, setting forth the so-called "notice and comment" rulemaking procedural requirements. According to the section, an agency must, as a default procedure for adopting legislative rules, first issue a "general notice of proposed rulemaking," which is published in the Federal Register. Subsequently, comments are provided by interested persons "through submission of written data, views, or arguments, with or without opportunity for oral presentation." The final rule is published in the Federal Register accompanied by a "concise statement of basis and purpose."[124] This was—and still is, compared, for instance, to the standard European rule-making process—a major innovation on administrative rulemaking procedure.[125] Fallback procedural safeguards appended to rulemaking were considered all the more necessary due to the fact that, while administrative adjudication had always been deemed subject to the constitutional requirements of procedural due process, rulemaking, considered legislative in nature, traditionally evaded procedural guarantees.[126]

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[124] Sections 554, 556 and 557 specify the procedural requirements to be followed in adjudicatory actions and require a functionally related separation between the prosecutorial and adjudicatory officers (now Administrative Law Judges) of an agency.

[125] American administrative law emphasizes participation, differing from the standard European patterns, which stress judicial protection of rights (or/and judicial policing of legality as such). *See*, Susan Rose-Ackerman, "American Administrative Law under Siege: Is Germany a Model?," 107 *Harv. L. Rev.* 1279 (1993-1994), arguing that German (and more generally European) administrative law could not be a model for the US, due to its de-emphasis on participation. Proposals have also been made to the contrary effect, namely, arguing for an importation of the American participatory processes, most notably notice-and-comment rulemaking, into European (both domestic or E.U.) administrative law. Whether and how that could be achieved, given the distinct nature of the legislative process and democratic will formation in Europe, is a more problematic matter. *See* Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Aldershot, England: Ashgate, 2001) and Francesca Bignami, "Accountability and Interest Group Participation in Comitology: Lessons from American Rulemaking," European University Institute Working Paper, Robert Schuman Centre No. 99/3 (1999).

[126] The distinction between actions that are judicial in nature and to which, therefore, due process protections attach and those of a legislative character, exempted from the constitutional requirement of due process, was drawn by the Supreme Court in two landmark cases. In *Londoner v. City and County of Denver* 210 U.S. 373 (1908), the Supreme Court voided a tax assessment regarding a street paving in the City of Denver, to be levied on the individual landowners abutting the street, on the ground that the individuals had been deprived of their constitutional due process rights (the assessment had been made behind closed doors and the individuals had not been heard prior to the decision but only been granted the possibility to present objections in writing): "[W]here the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place." (at 286) In *Bi-Metallic Investment Co. v. State Board of Equalization* 239 U.S. 441 (1915), the Court held, conversely, that when a decision concerns a large number of equally affected individuals, due process rights do not attach (in that case, the Colorado Board of Equalization and the Colorado Tax Commission ordered the valuation of all taxable property in the City of Denver to be increased by forty percent): "Where a rule of conduct applies to more than a few

The APA also set up different and graduated standards of review, distinguishing in principle a more stringent "substantial evidence on the record as a whole", standard for formal administrative action, and a more limited (or less intrusive) "arbitrary and capricious" for the review of the informal administrative decisions. This distinction, requiring a more stringent review for decisions made on a record, was meant to reflect the essential nature of the New Deal compromise, as announced in *Crowell v. Benson* and *Schechter*, that, to the extent that individualized decision-making would be partly taken out of the regular courts, governmental intrusions into the private liberty and property domain would need to be accompanied by judicial-type procedures, so that the displacement would be minimized and the legality, soundness, and procedural regularity of administrative action could be subsequently effectively reviewed by the courts.[127] Largely absent from the initial template was a clear position on discretionary agency action. If anything, there appears at first sight to be a contradiction in the statute, between Section 701, which explicitly exempts from review "agency action committed to agency discretion by law" and Section 706 (2) (A), according to which "[t]he reviewing court shall. . .hold unlawful and set aside agency actions, findings, and conclusions found to be. . .an abuse of discretion." In spite of its nominal dissonances, APA generally appeared to contemporary observes as an overall success, a sub- and quasi-constitutional settlement for the new administrative state. In 1950, Justice Jackson referred to it thus, in terms with clear constitutional undertones: "The Act . . .represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[128]

The fragment continues in less lyrically-inclined, less Pollyannaish fashion to concede the possibility of imperfect drafting: "It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects."[129] But the evolution of the APA turned out to be relatively little predetermined by its

people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. . ..There must be a limit to individual argument in such matters if government is to go on." (at 445, per Holmes, J.)

[127] For a concise and illuminating rendition of the APA 'compromise,' *see* Alfred C. Aman, "Administrative Law for a New Century," in Taggart (ed.) 1997, at p. 93: "Prior to the Administrative Procedure Act (APA), there was no generally accepted alternative procedural model to the adversary model provided by the courts, even when policy issues were predominant. Procedures, of course, have substantive effects, as well. The more adversarial the procedures, the fairer the process might appear, particularly to those who objected to the substance of the regulation to be implemented in the first place, but the more difficult and costly it was to carry out the governmental programmes involved. . ..It was, thus, a major step simply to be able, constitutionally speaking, to move adjudicatory proceedings from the courts to administrative agencies, to which the Supreme Court gave its constitutional blessing in *Crowell v. Benson* in 1932."

[128] *Wong Yang Sung v. McGrath,* 339 U.S. 33, at p. 40 (1950).

[129] *Id*., at pp. 40–41.

formal, technical distinctions. Standards of review as such are, as Jaffe observed with trenchant wit, not determinative in themselves but rather indicators of the "spirit or mood in which judges should approach their task."[130] Moreover, even regarded as rough heuristic proxies, the nominal standards have failed to anticipate outcomes in an even marginally satisfactory way. To wit, theoretically, the four primary scope of review standards, (1) arbitrary and capricious, (2) substantial evidence, (3) clearly erroneous, and (4) de novo review,[131] are supposed to provide a sliding scale or "telescopic" degrees of review, from the most generous ("arbitrary and capricious") to the most intrusive (de novo) review.[132] But this formal differentiation has not been reflected by the interpretation of specific standards in actual adjudication. The Supreme Court famously required, for instance, a "probing, in depth review"[133] and a "hard look"[134] in the application of the nominally deferential "arbitrary and capricious" standard. More relevantly, the "scale of review scope" has failed to discipline practices. This discrepancy was evidenced repeatedly by aggregate impact differentials reflecting the application of various standards on discrete fields of administrative action. Some nominally strict

[130] Louis Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 *Harv. L. Rev.* 1233, at p. 1236 (1951). *Cf.,* similar*,* Martin Shapiro, "Administrative Discretion: The Next Stage," 92 *Yale L. J.* 1487 (1982-1983), at p. 1490: "Standards for judicial review are notoriously vague. The degree to which a court will substitute its judgment for an agency's is neither determined nor expressed by the formula it announces." *See also*, Rabin 1986, at p.1266: "[T]he Act spoke in the broad terms of a charter-'substantial evidence,' 'arbitrary and capricious,' 'statement of basis and purpose,' and so forth-employing language sufficiently vague to allow the greatest leeway in the scope of administrative discretion to fashion regulatory policy in a particularized context."

[131] The scope of review in general is specified in Sec. 706 (2) Scope of Review. The first two and the last standard are derived from this section, (A), (E), and (F): "The reviewing court shall. . .hold unlawful and set aside agency action, findings, and conclusions, found to be:

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance to the law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

[132] Paul R. Verkuil, "An Outcomes Analysis of Scope of Review Standards," 44 *Wm. & Mary L. Rev.* 679 (2002-2003), at p. 682: "Think of the word 'scope' in 'scope of review' as a contraction of 'telescope.' Like a telescope, scope of review offers either a narrow aperture to limit the breadth of judicial scrutiny, thereby increasing the area of agency discretion, or a wider lens to expand judicial oversight, thereby decreasing agency discretion."

[133] *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, at p. 415 (1971).

[134] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

standards have resulted in lenient application, whereas, vice versa, theoretically lenient standards have been applied by judges draconically.[135]

In fact, the administration of the APA provisions has reflected a closer relation to the judicial search for normative substance, echoing overarching philosophical-ideological tendencies and waves of social-economic transformation. The formal distinctions of positive law have been overshadowed by the judicial attempt to find some cohesive, overarching account or explanation, an unifying criterion of justification behind the multiplicity of forms, to guide the substantive and procedural posture of the judge towards these new realities of the administrative state. The initial position, deference to experts, corresponded with the inherited beliefs in social science and bureaucratic solutions to collective problems. In the pre-APA *N.L.R.B. v Hearst Publications,* [136] the Court notoriously deferred to a National Labor Relations Board's interpretation of the term "employee" in its organic act to cover 'newsboys' employed by a number of major newspapers. The administrative interpretation, adopted for the purpose of directing the papers to collectively bargain with the said newsboys, was in clear contradiction to the common-law definition of the legal term "employee." Yet the court bowed, in keeping with New Deal orthodoxy, to the expertise of the board and the broad remedial purposes of the Congressional enactment.[137] Nonetheless, belief in expertise soon waned with an increasing realization of the disconnect between New Deal ideals and the realities of agency 'capture' and manipulative administrative behavior during the McCarthy era. It crumbled altogether with the disasters of the Vietnam War.[138]

Procedure as such, now divorced from a substantive justification, immediately became an ideological-instrumental tool in the new power struggles, following a general realization, on both sides of the ideological aisle, that not only is "one man's delay another man's due process" but one mans' due process can very easily become, once a court can be persuaded to lend a sympathetic ear, another man's sorrows. Procedure also became a passe-partout for administrative practices. In his 1975 classic, "The Reformation of American Administrative Law," Richard Stewart described the contemporaneous province of American administrative law in primarily procedural key, through the conceptual placeholder of the "interest

[135] Verkuil 2002-2003, on the basis of a statistical analysis of field-specific scope of review outcomes, notices that, although, for instance, Social Security Administration are reviewed under a substantial evidence standard, the actual, much more stringent, remand rate (50%) would more accurately correspond to de novo review, whereas Freedom of Information Act reviews, nominally de novo, are reversed at the diminutive rate of 10%, corresponding in fact to extremely deferential, arbitrary and capricious review.

[136] 322 U.S. 111 (1944).

[137] *See also Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

[138] *See* general discussion at p. 242 ff in Horwitz 1992. ("But above all, disillusionment with the 'best and brightest,' those arrogant technocrats who had confidently predicted a quick victory in Vietnam, produced a deep reaction to claims of expertise.", at p. 242). *See generally*, on administrative pathologies undermining the "expertise" model, Bernstein 1955.

balancing model." That is, the tendencies he then observed revealed a strong judicial bent and emphasis on taming the administrative process through interest representation. The drive towards provision of the broadest possible participation in administrative processes was, indeed, so pronounced that the administration as such had, according to Stewart, begun to resemble an aggregation of mini-legislatures providing a form of "surrogate political process."[139] Both his description and diagnosis are well summated by a passage, which warrants a somewhat longer citation:

> [T]he problem of administrative procedure is to provide representation for all affected interests; the problem of substantive policy is to reach equitable accommodations among these interests in varying circumstances; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations. *These difficulties are ultimately attributable to the disintegration of any fixed and simple boundary between private ordering and collective authority*. The extension of governmental administration into so many areas formerly left to private determination has outstripped the capacities of the traditional political and judicial machinery to control and legitimate its exercise. In the absence of authoritative directives from the legislature, decisional processes have become decentralized and agency policy has become in large degree a function of bargaining and exchange with and among the competing private interests whom the agency is supposed to rule. Private ordering has been swallowed up by government, while government has become in part a species of private ordering. Where the governmental and private spheres are thus melded, administrative law must devise a process, distinct from either traditional political or judicial models, that both reconciles the competing private interests at stake and justifies the ultimately coercive exercise of governmental authority. The notion of adequate consideration of all affected interests is one ideal of such a process.[140] [emphasis supplied]

Stewart characterized the paradigm shifts of American administrative law as a series of "model" transitions, from classical "transmission belt" (the administration implements faithfully clear legislative mandates), through Progressive Era- and New Deal-style "expertise" (the bureaucratic experts carry out detachedly general legislative goals), and finally to the then current "interest balancing" model. Those transitions had marked, according to Stewart, an increasing degree of separation and aloofness of the administration from the legitimate channels of classical politics, ranging from presumptively complete dependence, passing through the ambivalence of autonomous administrative expertise, and finally culminating in the administrative reality of a multitude of parallel quasi-political fora, reflecting a myriad of interests. "Interest balancing" consisted in the "*essentially legislative process* of adjusting the competing claims of various private interests affected by agency policy."[141] The new task of the judge would be to umpire and prod this representative process.

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[139] Stewart 1975, at p. 1670: "Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision. Whether this is a coherent or workable aim is an open issue. But there is no denying the transformation."

[140] *Id.*, at pp. 1759-1760.

[141] *Ibid.*, at p. 1683.

Even though his argument has often been read in a rosier normative light, a strong undertow of ambivalence and even pessimism careens the article.[142] Stewart's account is still deservedly recognized as a classic because it has the mark of authenticity and the make of first-rate scholarship. It indicates with perfect timing a new phenomenal configuration, points to a fundamental tension and fissure in the structure of public law, and confronts juridical practices with the serious and ideologically unattached normative poise of true scholarship. As Stewart did not fail to intuit, the notion of administratively cognizable "interest" has recognizably fluid denotations and implications. "Interests" are, much like the abuse of "civil society" solutions nowadays, an ambiguous substitute for representative democracy and therefore a questionable palliative for democracy deficits.[143] Moreover and related at a more mundane level, the paradigm of interest balancing imposes very high burdens on the judges, who have to rationally account for the aggregation of these interests in the absence of any common normative scale. In the classical political process, the balance of interests and the substantive rationality of the political decision resulting therefrom are intrinsic in the process. They can be taken by the judge more or less at 'face value' and measured against a rule of law, for instance, a constitutional limitation. Contrariwise, balancing "interests" without a scale in the administrative process provides no stable line of assessment, either procedurally or substantively; indeed, procedural and substantive consistency become complementary tautologies. Therefore, a judicial posture of asking the administrator to take "all affected interests" into consideration and requiring a degree of consistency and rationality in terms of decisional substance, against the background of statutory ambiguity, easily reaches the point of assuming a 'synoptic' judge and a 'synoptic' administrator, while simultaneously undercutting any possibility of achieving rational synopsis.[144] What Stewart was describing in effect, lurking behind the kaleidoscopically splintered imagery of the interest balancing model, was the increasing failure of administrative practices to function according to constitutional presuppositions. A model of administrative process severed *ex hypothesi* from any imaginable connection with the legislative impetus cannot be accounted for constitutionally, since the kind of accountability proper to the classical liberal constitution presupposes normative recursiveness and a global

[142] *E.g.,* Ziamou 2001 (relying on Stewart's account to defend the proposal to adopt US-minted pluralist rulemaking models in Europe). *But cf.* Mashaw 2005, at p. 2 "There is no escaping the overall impression left by *Reformation*. Understood as a project of making administrators accountable to the legislative will, administrative law was failing. The old transmission belt model was in tatters; and, whether others could *see* it or not, Stewart was clearly predicting that its successor, interest representation, would suffer a similar fate."

[143] *See* the "Lisbon Decision" of the German Constitutional Court, for a thoughtful (and skeptical) judicial gloss on the possibilities of substituting "representative associations" and "civil society" participation (Art. 11 Lisbon TEU) to compensate for representative democracy deficits, BVerfG, 2 BvE 2/08 vom 30.6.2009, at para. 290 ff (English translation, at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[144] Shapiro 1988.

sense of consistency of practices and concepts. It presupposes the possibility of tracing public action back to its sources, that is, to a presumptively uninterrupted chain of delegation. Obversely, the archetype of administrative interest balancing, described by the last sentence of Stewart's article as the challenge of "dense complexity," could offer countless ludic possibilities for segmented, fragmentary, ad hoc innovation (and exploitation). After all, the demise of all hierarchical structures has liberating side-effects and implications. But this new reality no longer lent itself to regulation through a constitutionally predetermined kind of normativity. It escaped thus the normative promise of constitutionalism: the possibility of rational control within a meaningful framework for reconciling individual autonomy with collective action.[145]

The expectable judicial reaction was to seek a measure of consistency in a compromised and partial retrenchment towards more stable baselines, in order to thus make this newer administrative paradigm normatively manageable within the framework of limited government. Tellingly, the most coherent attempt at an answer the Supreme Court has given to these pluralist challenges is an administrative law 'mirror' to nondelegation, an administrative law doctrine that seeks a comprehensive reassessment of the judicial positions in the field of policy and value imponderables.[146] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,[147] the Supreme Court was faced with an interpretation by the EPA of the term "stationary source" in the Clean Air Act Amendments of 1977. A statutory provision that required "new or modified major stationary sources" to comply with permit requirements had been reinterpreted to mean an entire plant rather than each individual source of pollution. The EPA had adopted the "bubble concept"

[145] *Cf.* Mashaw 2005, arguing that the major flaw in Stewart's essay was "that article's tendency to take the transmission belt metaphor too seriously –to assume that administrative accountability and administrative legitimacy must flow from or be oriented towards a single source of political authority rooted in electoral processes" (at p. 37). According to Mashaw, accountability is a complex, multifaceted notion. Its conceptual use invites questioning assumptions, whereas its practical instantiations invite complex institutional trade-offs. Mashaw profers therefore, as a counterpart to Stewart's complexity, the complexity of "administrative law as institutional design," in recognition of the fact that "any institutional form is likely to respond to multiple sources of influence and constraint, and thus to participate simultaneously in multiple accountability regimes" (at p. 38). This may be so but Professor Mashaw's answer is the open-ended, managerial challenge of a demiurge, of *constitution-making* even (and one may suspect that he would only relish its complete joys in a world of like-minded demiurges, otherwise the multiplicity of free-floating assumptions, both institution-making and theoretical discussion-wise may veer out of any manageable control). Stewart's question is situated in a completely different paradigm, namely within the conceptual and practical constraints of normative constitutionalism.

[146] Analogous steps back (in the procedural field) are the developments in standing law after *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), holding that pure (mere) "regulatory injury" is not a sufficient standing predicate and (in the field of administrative law proper) *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), putting an end to the "hybrid rulemaking" innovations of lower courts.

[147] 467 U.S. 837 (1984).

(so called since it regards a cluster of buildings as sitting together under a "bubble," for the purpose of applying the permit requirements) primarily for political reasons. During Carter's preceding presidency, "stationary source" had been interpreted to mean each piece of equipment (a furnace, for instance), whereas the "bubble" reinterpretation reflected a comprehensive undertaking by the new Reagan administration to cut the industry a more generous regulatory break.[148] This newer administrative interpretation permitted the installation or modification of individual pieces of equipment that did not meet the standards, as long as the sum total resulting from trade-offs inside the regulatory "bubble" did not exceed the pollution emissions limits.

Apparently breaking with the *Marbury* convention that the "province, to say what the law is" belongs as of right to the judiciary,[149] the Supreme Court announced that questions of law and policy would be reviewed under a standard of deference, comprising a two-step test:

(i) A preliminary determination of "whether Congress has directly spoken to the question at issue"[150];
(ii) A secondary determination of reasonableness. In the absence of a clear congressional statement, "permissible" interpretations given by a federal agency to the statutes it administers would be given deference, meaning that the court would not substitute them with its own (the administrative interpretation will thus, in effect, control the decisional outcome).[151]

That this administrative law statement has constitutional relevance and that its fundamental law import may reside in a relationship between *Chevron* and the delegation doctrine are twin intuitions which have not escaped too many commentators.[152] The heaps of literature over the case express a generalized

[148] *Id*., at 857-858.

[149] Elizabeth Garrett, 101 *Mich. L. Rev*. 2637 (2002-2003) ("One of the most significant administrative law cases, *Chevron v. Natural Resources Defense Council, Inc*. is routinely referred to as the "counter-Marbury." (at p. 2637). Chevron was, ironically, roughly contemporaneous with the "Bumpers Amendment" to the APA which came very close to be adopted in Congress (it passed though the Senate unanimously). The Bumpers Amendment would have required courts to do precisely the opposite to what Chevron directs them, i.e., to decide "independently" (de novo) "all questions of law."

[150] *Chevron*, at 842-843: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" (footnote omitted).

[151] "If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." At 843 (footnotes omitted).

[152] *See* thus Richard Pierce, "Reconciling *Chevron* and Stare Decisis," 85 *Geo. L. J*. 2225 (1996-1997), for whom Chevron is "one of the most important constitutional law decisions in history,

conviction that *Chevron* is momentous and that its importance may lie in the fact that it relates in a foundational way to (1) the practice of "delegation" of power or discretion from Congress to the agencies; (2) the implications entailed by these practices with respect to judicial review of administrative actions; and (3) the nondelegation doctrine and its respective constitutional implications. But the strength of intuition has not resulted in a measure of doctrinal agreement or at least overlap. Indeed, where and wherein that *Chevron*/delegation kinship resides are nebulous matters, judging from the multiplicity of contradictory positions expressed in the literature.[153] Even the practical issue of whether the interrelationship between an unenforced or unenforceable constitutional nondelegation limitation and an explicit judicial admission of deference to administratively delegated "law-making" produces positive or negative effects is under generalized contention. In this latter respect only, contestability and intensity of opposed positions, *Chevron*-related discussions seem to echo nondelegation debates.

Laurence Tribe, for instance, views *Chevron* as a parallel and equally detrimental methodological choice, an example of judicial abdication similar to the failure of nondelegation: "It remains to be seen whether the institutional arrangements with which we are familiar can long survive both *Chevron* and the relaxation of the nondelegation doctrine."[154] To other writers, *Chevron* represents consistency and is therefore simply the logical conclusion to nondelegation. Once the courts allowed the legislature practically unlimited constitutional leeway, they could do no other at the administrative level. As Patrick Garry argues, *Chevron* is perhaps problematic but nonetheless unavoidable once the "institutionalization of ambiguity" was permitted at the constitutional level: "Thus, even though *Chevron* marks a dramatic departure from traditional legal principles, and even though it poses separation of powers concerns, it flows logically and necessarily from the jurisprudential evolution of the nondelegation doctrine."[155] Other authors perceive *Chevron* as

even though the opinion does not cite any provision of the Constitution" (at p. 2227). According to Pierce, Chevron provides a better method of enforcing the nondelegation doctrine, by replacing the failed "use of command and control regulation of Congress" (i.e., direct enforcement of the doctrine, by constitutional invalidation of "delegating" statutes) with a "reconstitutive strategy" that changes the institutional incentives (Congress knows now that the administration of vague statutes will be controlled by the President and this provides the legislature with a strong incentive to legislate with specificity) (at pp. 2230-2232).

[153] *See* Thomas W. Merrill and Kristin Hickman, "*Chevron*'s Domain," 89 *Geo. L. J.* 833 (2000-2001), for an elaboration (and a review of the literature on the diverse positions) on whether the status of Chevron is that of i. a constitutional law doctrine, deriving from the separation of powers; ii. a statutory-level doctrine deriving from Congress in the form of a presumption about congressional intent; iii. a common-law-level, judicial norm (canon) of statutory construction.

[154] Tribe 2000 (Vol. I, Third Ed.), at p. 1002. The literature on Chevron is enormous; citations of general positions are provided here for general exemplificatory purposes only, insofar as they serve the needs of this book's argument.

[155] Patrick M. Garry, "Accommodating the Administrative State: The Interrelationship Between the *Chevron* and Nondelegation Doctrines," 38 *Ariz. St. L. J.* 921, at p. 959 (2006).

representing primarily a propitious *judicial* self-limitation, similar to the demise of nondelegation. Both judicial postures commendably express countervailing admissions of epistemological, methodological, and institutional limitation. As this line of arguments runs, the *Chevron* court admitted that judges have no rational, and thus judicial, instruments for reducing structurally determined statutory vagueness. Attempting to provide a judicial solution to the problems of normative and policy conflict created by open-ended statutes would have been in effect judicial law-making, politics by another name, and therefore an illegitimate abuse of the judicial office. Deferring means, in the logic of this interpretation, appropriately stepping back and leaving the space free for politics.[156] To other critics, *Chevron* is good, well-crafted technique: it represents an optimal administrative response to the downfalls that have plagued the enforcement of nondelegation. *Chevron* combines deference when proper, at step one (no clear position by Congress) with a severe rational probing of the administrative motives and reasoning, where judicially possible and appropriate, at step two (reasonableness of the agency interpretation).[157]

As expressed, the doctrine seems clear enough. Furthermore, the *Chevron* Court has gone to great lengths not only to simplify the deference test as such but also to elaborate on its wider foundations and implications, in a way that would help clear out in advance the morass of potential ambiguities in implementation. In a long passage, the Court explains, for instance, that the "intent" of Congress has no motivational-anthropomorphic undertones for the purpose of determining "whether Congress ha[d] directly spoken to the question at issue." It mattered not, as the majority opinion stressed, whether the legislature had considered the meaning of "stationary source" and whether it had taken a second-order position, if any, on the issue: "[T]he decision involves reconciling conflicting policies. Congress intended

[156] *See* Pierce (1985-1986), according to whom *Chevron* is a positive, fourth-way alternative to the other (flawed) possibilities of disciplining the policy-making powers of agencies under meaningless statutory standards. Unlike the three other alternatives (the meanwhile invalidated legislative veto; de novo review; revival of nondelegation), deference is both judicially legitimate and politically commendable, shifting policy-making power to the President. *Cf.* partly similar Douglas W. Kmiec, "Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine," 2 *Admin. L. J.* 269 (1988), at p. 290: "Administrative discretion even under the practically attenuated, but constitutionally recognized, supervision of an elected president, seems more in keeping with our constitutional structure than judicial legislation. Lawmaking at the hands of an unelected judiciary raises more questions than it answers against a backdrop of separated powers." *Cf.* also Kenneth W. Starr, "Judicial Review in the Post-*Chevron* Era," 3 *Yale J. on Reg.* 283 (1985-1986), at p. 312: "Policy, which is not the natural province of courts, belongs properly to the administrative agencies and, ultimately, to the executive and legislature that oversee them."

[157] *E.g.,* Lisa Schultz Bressman, "Disciplining Delegation after *Whitman v. American Trucking Ass'ns*," 87 *Cornell L. Rev.* 452 (2001-2002), arguing that "the [*Whitman*] Court should be understood as shifting the delegation inquiry from constitutional law to administrative law" (at p. 469) and noting that administrative standards, therefore a narrowing and disciplining of delegated discretion, can be imposed under step two of *Chevron*.

to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred."[158] It continued to gloss, in dicta, on the relative levels of expertise and kinds of accountability of the judiciary and the Chief Executive, respectively. The court bowed to an unclear mix of "technical" knowledge and political choice, in a passage exemplary of unusual, almost apophatic, judicial modesty: "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[159]

It is therefore all the more surprising that, all other things being equal, *Chevron* seems to have been of little avail in simplifying and clarifying the field of administrative law. To begin with, the Court has developed an increasingly sinuous jurisprudence around the limits of *Chevron* itself. The resulting "step-zero" conditions (namely, the prior inquiry into whether *Chevron* deference; or no deference; or more complex, multi-factor, pre-*Chevron* deference, applies) are anything but clarificatory of the statutory predicate, reach, and circumstances of deference.[160] Even decisions that seek to gloss on *Chevron* in an ostensibly rule-like manner are riddled with so many qualifications that in the end they appear to have brought, instead of clarity, an even more byzantine confusion to the field. The 2001 case of *United States v. Mead Corporation*, for instance, denied deference to a "ruling letter" by the US Customs Office Headquarters. At issue was whether a ruling letter classification of three-ring binders as "bound diaries" subject to tariff, in opposition to a consistent prior practice of classifying such planners as duty-free, deserved automatic deference. The Court began by holding that *Chevron* deference applies upon a predicate of formal delegation: "We hold that administrative

[158] 467 U.S. 837, at p. 865 (footnotes omitted).

[159] *Id.*, at pp. 865-866.

[160] *See generally* Cass R. Sunstein, "*Chevron* Step Zero," 92 *Va. L. Rev.* 187 (2006).

implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[161] But the decision continued just a few pages later to qualify this holding by conceding a certain leeway for exceptions from formality (and thus implicitly subverting the clear rule just announced in the holding): "That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[162]

Even the interpretation of the two steps' requirements as such seems at times enveloped in wooly hermeneutical mystery. In the case of *INS v. Cardoza-Fonseca*, for instance, the majority looked to the legislative history and historical legislative environment of the Immigration Act to ascertain the meaning of the term "well-founded fear" in section 208 (a), authorizing the Attorney General to grant asylum to a refugee unable or unwilling to return to his home country because of persecution or a "well-founded fear" thereof.[163] At issue was whether the same standard of proof would control the application of this provision and that of section 243 (h) of the act, requiring the Attorney General to withhold deportation in cases where an alien could demonstrate that his "life or freedom would be threatened" thereby on account of several factors, by a showing that "it is more likely than not that the alien would be subject to persecution" in the country of return. The court denied deference at step one, showing that the intention of Congress was clear on the matter and expounding the judicial role in applying the test: "The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical."[164] Justice Scalia concurred in the result but wrote an opinion to strenuously object to the interpretive methodology. As he saw it, the incursion into history was barred. If *Chevron* was to be understood as

[161] *United States v. Mead Corporation*, 533 U.S. 218, at pp. 226-227 (2001). This appeared in perfect synch with the proposal by Merrill-Hickman 2000-2001 (cited approvingly by the opinion) to reduce Chevron deference to the field of formal actions taken by agencies with the power to take "actions with the force of law" (binding individuals outside the agencies). Informal agency interpretations receive a much weaker, "multiple-factor," pre-*Chevron,* 'presumptive' deference, "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore v. Swift & Co*., 323 U.S. 134, at p. 140 (1944).

[162] 533 U.S. 218, at p. 231.

[163] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Citing footnote 9 in the Chevron majority opinion to that effect: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, at p. 843, n. 9.

[164] *Id*., at 446.

recognizing ambiguity only when no meaning could be attached to the text, then deference was "a doctrine of desperation" and "an evisceration of *Chevron*."[165] The sole legitimate indicator to congressional intentions was, Scalia insisted, the plain meaning of the text itself. To be sure, a doctrine which comes with a specific, mandatory statutory interpretation methodology attached, as a package deal, is a rather strange legal animal. However, since Justice Scalia has been recognized not only as an eminent administrative lawyer but also as the "*Chevron*'s chief judicial champion,"[166] his position deserves respectful attention.

What Scalia pointed out was that "whether Congress has directly spoken" upon an issue is a function of whether and how courts can ascribe meaning to the text. Unless it is associated with a clear hermeneutical benchmark, *Chevron* can provide no objective standard and therefore cannot, by definition, constrain adjudication in any rational way. Through this looking-glass, the relation between *Chevron* and nondelegation becomes much clearer. *Chevron* marks an attempted withdrawal from a nondelegation limitation seemingly unraveled by judicially uncontrollable constitutional normativity into the apparently safer ground of statutory semantics. The text will provide the line of demarcation between law and discretion, adjudication and politics, structurally controlled judicial rationality and the legally arational field of political decision. Justice Scalia's impassionate and repeated profession of faith to interpretative methodologies as the key to law-bound, ideology and politics-free adjudication is well known.[167] This makes it all the stranger that his own methodological position towards the administration of the *Chevron* test has been accused, simultaneously and hence paradoxically, of deferring too much and deferring too little. As the author of a study on the topic, Gregory E. Maggs, observed, it makes little sense to see Scalia equally vilified both for defending a method of interpretation that "poses a threat to the future of the deference doctrine" and being the representative of the "Pontius Pilate school of judging."[168] Logically, it must be either one or the other. Maggs screened all *Chevron* cases in which Scalia voted and defended the latter against the opposite charges, showing that, in fact, the votes cast by the Justice fell uneventfully, most of the time, with the majority of the Court.

Assuming the statistical breakdown to be unassailable, this may have something to do with textualism being embraced by the rest of the Court (as Maggs believes) but that is still no satisfactory response to Scalia critics. An updated, satisfactory statistical response would have to take into account the additional variable of levels

[165] *Ibid*., at p. 454 (Scalia, J., concurring in the judgment).

[166] Merrill-Hickman 2000-2001, at p. 867.

[167] Namely, constitutional originalism and statutory plain meaning textualism. *See*, respectively, Antonin Scalia (Author) and Amy Gutman (Ed.), *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997) and Scalia 1989.

[168] Gregory E. Maggs, "Reconciling Textualism and the *Chevron* Doctrine: In Defense of Justice Scalia," 28 *Conn. L. Rev*. 393 (1995-1996) (quoting at p. 405 Thomas W. Merrill and at p. 394 William D. Popkin, respectively).

of deference before and after the alleged spread of textualism as prevalent methodology. A normative attempt at an answer is much more interesting. Whether one sees textualism determining too much or too little deference depends on whether one believes that a chosen method of interpretation will determine the meaning of vague statutes or contradictory provisions. Neither the text nor the nominal methodology provides a priori a clear limit to the question of "how clear is clear." Thus, the important but logically subordinate question of whether deferential judges of a textualist persuasion will turn out to be machine-like "paragraph automatons" or covert law-makers, deceitfully decked in the borrowed plumes of judicial objectivity remains also unanswered by either *Chevron* or the interpretive methodology.[169] However, the failure as such of a doctrine based on statutory semantics to replace satisfactorily a doctrine embedded in constitutional normativity as a delegation limit is revealing of a foundational tension. It indicates the complementary aspects of structural erosion of foundational normative limits and the dearth and exiguousness of surrogate solutions.

For the purpose of conclusive and epistemologically representative exemplification of this last remark, a recent comment on *Chevron* deserves mention at the end of our review of American developments. On the one hand, the author, Adrian Vermeule, notes that the *Chevron* doctrine is justifiably "a pillar of American administrative law," since "once the bogus nondelegation principle is cleared away, democratic accountability requires that courts should defer to the democratically superior judgments of administrative agencies, where Congress has not spoken clearly."[170] On the other, Vermeule observes that, indispensable though across-the-board deference may be, the application of *Chevron* poses prohibitive conceptual challenges and thus seems bias- and uncertainty-ridden: "*Chevron* is a poor means for promoting accountability in the world without a nondelegation doctrine. . .[because it is] vulnerable to a range of problems: conceptual imprecision, cognitive burdens that affect boundedly rational judges, and manipulation on the part of biased judges."[171] This is, the writer argues, because *Chevron* tried to provide a "soft" doctrinal solution to "what is, after all, an institutional problem: the allocation of interpretive authority between agencies and courts when congressional instructions are silent or ambiguous."[172] Vermeule provides therefore a "hard" institutional solution to the institutional problem. This consists in recasting *Chevron* deference as a voting rule by loading the dice "say, by a six-three vote on the Supreme Court, or by a three-zero vote on a court of appeals panel" and changing at

[169] Justice Scalia himself opined that his strand of textualism predisposes rather to semantic optimism rather than deference at step one: "One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists." Scalia 1989, at p. 521.

[170] Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 1997). pp. 175-176.

[171] *Id.*, at p. 144.

[172] *Ibid.*, at p. 146.

the same time the scope of interpretation to *de novo* review.[173] Such rules, differently calibrating judicial votes, already exist, says Vermeule. As evidence, he points to the American example of the so-called "Rule of Four," which allows four justices of the Supreme Court to grant a writ of certiorari. Consequently, the recalibration of *Chevron* as a voting rule would solve systemic deficiencies. The specification of a qualified majority for *Chevron* cases would transform a rule that now needs to be internalized by each individual judge (in a way that cannot apparently be controlled) into an externally controlled "aggregate property of the judicial system."[174] The "loaded" voting rule and the simplification of the doctrinal question would thus predetermine doctrinal consistency. This transition from the two-level interpretive quest of doctrinal *Chevron* to the simplified "correct"/"incorrect" query of *de novo* review reduces the cognitive burden (and the operation of bias), whereas the existing default (deference) is transformed into a procedural-systemic characteristic of the vote aggregation rule (six to one, three to zero, etc.).

Professor Vermeule's argument showcases well the parallel challenges of constitutional modernity: eroded systemic normativity and the impossibility of "external" (non-normative) answers to this erosion. In that, his proposal is also an epiphenomenal manifestation of self-subverting rationality. Veremule's allegedly pragmatic, "no-nonsense, no philosophy" solution promises much more than it can deliver, since it imposes implicitly normative demands on the constitutional structure compared to which those raised by "the bogus nondelegation doctrine" seem diminutive. To begin with, it is true that there are in many jurisdictions judicial screening rules that do not require a majority voting by the court. This is due to the fact that such rules regard administrative, policy decisions, which are rightly premised upon a different kind of rationality, similar to that of legislative decisions. Screening decisions are an excellent epitome thereof. When judges make those decisions, they make them as administrators rather than in the exercise of judicial duties. To wit, grants of certiorari do not need to be motivated precisely due to the fact that, not reaching the merits,[175] they are not exercises of the judicial function proper.[176] Otherwise, majority voting in judicial decisions is an expression of and contingent upon the kind of formalized legal rationality that constitutes the exercise of core judicial functions. This is why one does not tinker with voting rules to affect outcomes. For analogous reasons, describing a deference doctrine as "an allocation of interpretive authority between agencies and courts" is a conceptual

[173] *Ibid.*

[174] *Ibid.*, at p. 167: "One of the key reasons for the apparent failure of Chevron to eliminate if not significantly reduce uncertainty about deference is that the framework makes deference an individual rather than aggregate property of the judicial system, and relies on underspecified norms that are imperfectly internalized by judges."

[175] *Barber v. Tennessee*, 513 U.S. 1184 (1995).

[176] Even though a denial can inflame passions and particular judges may choose to concur or dissent, in order to motivate their positions. But, in so doing, their posture acquires a political character. *See Knight v. Florida*, 528 U.S. 990 (1999).

misnomer. It is no more true (from a *legal* point of view) than describing a tort case as "after all, about whether Tom will collect 100.000 $ for his broken leg" or a criminal case as "essentially about whether Robert goes to jail." Even though the tort case may seem to the proverbial man on the street or indeed to the plaintiff himself to be "about the money," legally speaking the issue is "about" the interpretation and application of tort rules to facts in a rationally accountable way. This is not narrow-minded positivism, since even a marginally sophisticated legal realist position has to take into consideration and account for the professed internal logic of practices. The whole judicial system is organized in a way that gives expression to the position of the judge as a rational seeker of legal truth (need to motivate decisions, standards of proof, careful specification of grounds for appeal, pyramidal structure of courts, indeed judicial independence and impartiality guarantees, etc.).[177] One cannot change a feature of this rational legal structure in a way that does violence to its internal logic (namely, by positing judges as biased/confused policymakers for purposes of changing decisional rules to *explicit* head-counting) without provoking an uncontrollable domino effect that causes the whole constitutional house to topple down. Once one makes politics and political decision-making explicit features of adjudication, none of the rationality-oriented structural characteristics of modern judicial systems (independence and impartiality guarantees spring to mind) are defensible as a matter of principle. Other, less rationally formalized systemic kinds of dispute resolution have existed in history and return is not impossible. But, within the current setting (limited government predicated upon normative constitutionalism), if foundational normative paradoxes and deadlocks cannot be answered and resolved normatively, then perhaps no solution at all is available.

4.3 Continental Distinctions

4.3.1 The Constitutional Normalization of Delegations

> Cinquante années de pratique constitutionnelle ont permis d'observer, d'une part, que la procédure d'adoption des décrets-lois s'est banalisée au point d'être, aujourd'hui, d'un usage si quotidien que l'exceptionnel s'est mué en durable sans acquérir pour autant la stabilité de la règle de droit.[178]
>
> Maryse Baudrez, "Décrets-lois réitérés en Italie : l'exaspération mesurée de la Cour constitutionnelle en 1996" 32 *Revue française de Droit constitutionnel* 745 (1997).

[177] *See generally*, Fuller 1978.

[178] Fifteen years of constitutional practice have allowed us to observe that the procedure of adopting decree-laws has been 'banalized' to the point where, today, its use is so casual that the exceptional was transformed into norm without however acquiring the presumptive stability of a rule of law.

European constitutions have adopted, after WWII, provisions that allow the limited delegation to the executive of the power to make rules of legislative force and effect. The adoption of subordinate legislation is commonly reined in at the level of fundamental law both with a number of procedural safeguards and with normative limitations. As previously indicated, although the procedural-institutional aspects (e.g., an obligation to lay the subordinate legislative rules before parliament within a certain deadline) are important and instrumental for disciplining the practice,[179] this aspect is tangential to the current argument. We will therefore be interested only in the comparative impact of normative constitutional limits on the practice of delegation, as indicated by the relative capacity of constitutional adjudication to produce workable tests for enforcing these limitations against a trespassing legislature.

Another aspect of the constitutionally-regulated delegation practices, namely the so-called "quasi-emergency delegations," albeit normatively relevant, warrants only brief mention. Provisions regarding delegation can have detrimental effects on a constitutional system to the extent that the unfortunate choice is made to grant the executive an autonomous and exceptional ordinance-making power based directly on the constitution (without, that is, the need of a prior enabling act). Such is the case, for instance, under the current Italian and the Romanian constitutions. Given that a legislative delegation is already postulated constitutionally as an exception to the norm of parliamentary legislation, the possibility of bypassing the parliament by a delegation based directly on the fundamental law itself constitutes—so to speak—an "exception to the exception."[180] In Italy, for example, as a derogation from the ordinary delegation procedure provided by Art. 76,[181] the executive can, by adopting an Art. 77 decree-law, take "provisional measures of legislative force" ("provvedimenti provvisori con forza di legge"). This includes the authority to legislate in unregulated domains and abrogate or amend existing legislative provisions. A safeguard is provided by the second paragraph of the article, which requires that decrees be laid before Parliament for ratification. If left unconfirmed (i.e., it is not transposed into law) within 60 days from the date of its publication, the decree-law becomes void, yet the Parliament can sanction by law rights and obligations arising out of decrees left unconfirmed.

[179] For an up-to-date comparative study of the procedural and institutional aspects respecting the control of delegations to the executive, *see* Pünder 2009 and sources referenced therein.

[180] Marius N. Balan, unpublished constitutional law course notes manuscript on file with the author.

[181] "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes." Official English translation available at www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited August 26, 2011).

In practice, in cases of decrees left by the Houses of Parliament un-ratified over the 60-day ratification deadline, the executive developed the habit of routinely re-issuing the lapsed norms in a new decree, sometimes over the span of several years. This allowed, in the words of a commentator, "the provisional norm to perpetually subsist provisionally."[182] Even though the Constitutional Court would finally, in 1996, declare unconstitutional the practice of reiterating lapsed decrees, the main and most important problem raised by quasi-emergency decrees still remained. By virtue of the constitutional decision of granting the executive this benefit of spontaneous and autonomous law-making by substitution under a (of necessity often false) plea of necessity, the legislative and the judiciary are placed ex ante in a perpetual default position of inferiority. Given the needs of predictability and stability of a modern legal system and the functional nature of the other two branches, the situation makes it very difficult to change or react to this continuous situation of *fait accompli*. This separation of powers problem is an addition to the representation, publicity,[183] parliamentary minority rights, and rule of law problems caused by the phenomenon of habitual executive legislation. In order to discipline the practice, the constitutional judge would have to define the exception through a test amenable to consistent application. This requirement is in itself a textbook antinomy, since one need not be a "Schmittian" to understand that an exception is by definition a circumstance that cannot be normatively controlled by means of a rule.[184]

[182] "la norme provisoire à perdurer, toujours provisoirement," Maryse Baudrez, "Décrets-lois réitérés en Italie : l'exaspération mesurée de la Cour constitutionnelle en 1996," 32 *Revue française de Droit constitutionnel* 745 (1997), at p. 747.

[183] "In principle the democratic and open process of legislation is itself a safeguard of rights." Norman Dorsen, András Sajó, Michel Rosenfeld, and Susanne Baer, *Comparative Constitutionalism-Cases and Materials* (St. Paul, Minn.: West Publ., 2003), at p. 247.

[184] The same pattern can be observed in Romania, where the Constitution gives the Government power to issue "emergency ordinances" without prior parliamentary authorization by an enabling act (Art. 115). Emergency ordinances have as a result become the routine regulatory instrument and their number dwarfs both parliamentary legislation and ordinary delegations. For instance, according to the date on the Chamber of Deputies website, in 2011 as of August 26, 68 emergency ordinances were adopted (http://www.cdep.ro/pls/legis/legis_pck.lista_anuala?an=2011&emi=3&tip=18&rep=0), compared to 12 ordinary ordinances, adopted not on the basis of the constitution but on that of a regular enabling law, hence following the nominally "standard" procedure (http://www.cdep.ro/pls/legis/legis_pck.lista_anuala?an=2011&emi=3&tip =13&rep=0) (both websites last visited August 26, 2011). These general and relative constitutional mechanics are comparable, even though in other respects the normative needs and the general constitutional environment of a transitional post-communist country are distinct from those of the relatively stable Western liberal-constitutional democracies (such as Italy). The epistemological difficulties entailed by the need (and impossibility) to provide a constitutional definition of emergency, for the purposes of judicial review of the predicate for adopting such ordinances are also comparable. *See*, thus, the revealingly tautological definition of emergency given by the Romania Constitutional Court, as "the necessity and urgency of regulating a situation which, due to its exceptional circumstances, requires the adoption of an immediate solution, in view of avoiding a grave detriment to public interest" (Who could, indeed, disagree?) DCC nr. 67/3 februarie 2005, în M.Of. nr. 146/18 februarie 2005.

If procedural limitations are of no direct interest to the book's argument and "quasi-emergency delegations" are unfortunate but idiosyncratic constitutional choices, of limited relevance knowledge-wise, the attempts to limit legislation by way of normative distinctions bears directly on this volume's thesis. As already mentioned, these post-war constitutional rules were adopted in order to counter a broader crisis in pre-war constitutionalism. The crisis manifested itself also through the phenomenon of 'blank cheque' delegations; such delegations had dramatically marked, in both Germany and France, the end of parliamentary democracy and the rise of totalitarianism. By the same token, the failure of European constitutional judges (in France and Germany) to come up with tests for enforcing these limits is the product of and reveals an erosion of contemporary constitutional normativity. In the case of France, delegation is allowed as an exception to parliamentary legislation. Delegation is constitutionally permitted within the legislative domain, which is itself constitutionally posited by the 1958 Constitution as a normative exception to original executive decree-making power. In the case of Germany, the Basic Law allows the delegation of the power to make rules with legislative force and effect (*Rechtsverordnungen*) to specific executive delegates, under restrictive constitutional conditions with respect to the permissible degree of statutory clarity and preciseness. The delegation-related case law of the Federal Constitutional Court is therefore analytically comparable with the US developments under the "intelligible principle" nondelegation test.[185]

4.3.2 France: The Inconsequential Upheaval

> Tout partage a priori résultant d'un système combinant une énumération avec une clause résiduelle—que la première de ces techniques soit appliquée au domaine législatif ou qu'elle le soit au domaine réglementaire, comme l'orientation s'en était précédemment dessinée sans atteindre à une véritable systématisation—est en contradiction avec le caractère continu du processus normatif et le type de cohérence qu'il implique.[186]
>
> Jean Boulouis, "L'influence des articles 34 et 37 sur l'équilibre politique entre les pouvoirs," in Jean Boulouis and Louis Favoreu, *Le domaine de la loi et du règlement* (Paris: Presses Universitaires d'Aix-Marseille, 1981).

[185] Functionally, the reach of the German constitutional provision is more limited than that of the US nodelegation doctrine; Art. 80 (1) of the Basic Law does not apply to delegations to private parties, for instance, and is restricted to delegated legislation proper, i.e., administrative rulemaking (the authorization to make ordinances with legislative force and effect).

[186] "Any a priori division resulting from a system combining enumerated powers with a residual clause—irrespective of whether the first technique applies to the law-making or the regulatory function (the latter case was previously tried, without any systemic effects)—goes against the grain of the continuous character of the normative process and the kind of coherence implicit therein."

After the Fourth Republic, in order to remedy the effects of the "legislative imperialism of a Parliament thought to have been at the same time abusive and powerless,"[187] which had been the norm under the previous two Republics, the founders of the 1958 Constitution chose to allow the delegation of legislation to the executive. The Government was granted the power to legislate within a specified time limit and domain of authorization, by means of ordinances (*ordonnances*).[188]

According to Article 38: "In order to implement its programme, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law."[189] The only mandatory constitutional condition, on sanction of automatic voidance (*caducité*), is that an *ordonnance* must be laid before parliament within the time limit set forth by the enabling act. After being laid before Parliament, an ordinance can only be modified by a *loi* (in respect of the provisions which are within the constitutional domain of legislation, according to Art. 34). The enabling law can be challenged to review its conformity with the Constitution, before the Constitutional Council, whereas the ordinance itself can be controlled by the Council of State in judicial review of administrative action for excess of power, primarily with respect to its conformity with the legislative authorization.

This provision has to be perceived in its constitutional context. The drafters of the Fifth Republic Constitution (the document bore in effect the stamp of General de Gaulle and his Minister of Justice, Michel Debré), sought to rationalize parliamentarism. The primary constitutional tool to this effect was the reversal of the traditional distinction between the *loi* and the *règlement* which had been, ever since 1791, the defining mark of orthodoxy in French constitutionalism. Thus, the Constitution of 1958 specified and enumerated the legislative powers of Parliament in Art. 34. Conversely, the Constitution reserved (Art. 37) residual legislative powers to the executive, who can regulate all areas outside the specified competence of Parliament on the basis of original decree-making power (*règlements autonomes*).[190] This division stood the entire logic of classical French constitutionalism, for which legislation had been the axiomatic first-order value

[187] Jean Boulouis, "L'influence des articles 34 et 37 sur l'équilibre politique entre les pouvoirs," in *Le Domaine de la loi et du règlement* (Paris : Presses Universitaires d'Aix-Marseille, 1981), at p. 195.

[188] An unsuccessful attempt was made early on to challenge the constitutionality of an enabling act by assimilating the notion of "program" in Art. 38 to the "declaration of program" in Art. 49. *See* 72 DC du 12 janvier 1977 (in Louis Favoreu, Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (Paris: Dalloz, c1997)).

[189] Authorized English translation, found on the website of the French National Assembly, at http://www.assemblee-nationale.fr/english/8ab.asp (last visited August 21, 2011).

[190] Art. 37 Matters other than those coming under the scope of statute law shall be matters for regulation.

Provisions of statutory origin enacted in such matters may be amended by decree issued after consultation with the *Conseil d'État*. Any such provisions passed after the coming into force of the

("the expression of general will"), right on its head. In fact, the abstract a priori control of constitutionality through the Constitutional Council and constitutional review as such were introduced precisely in order to maintain Parliament within its limited and defined constitutional competence.[191]

Nonetheless, in subsequent practice, the intricate set of procedures and delineations of competence set up by the Founding Fathers of the Fifth Republic were by-passed by a relative return to the pre-1958 practice of initial legislative authorizations and implementing executive decree. In 1982, in its *Blocage des prix et des revenus* decision, the Constitutional Council gave official constitutional validation to the practical observation made 1 year earlier by a number of prominent French constitutionalists. By expressly confirming that a *loi* could regulate matters outside the scope of Art. 34, the Constitutional Council declared implicitly that the complicated rearrangement of legislative competencies in the 1958 Constitution had made no essential difference with regards to practices.[192] Line-drawing between competences was essentially left by the constitutional judge to political practice.[193]

In the first elaborate decision on the constitutional aspects of delegation as such, the *Economic Authorization Case* of 1986, the Constitutional Council decided that enabling acts based on Art. 38 would need to be specific enough so that the scope of the authorization would be discernable from the text of the enabling law submitted to the Parliament (not stating simply a goal) and that the enabling act would need to be consistent with the Constitution. The Council insisted on the respect of "rules and

Constitution shall be amended by decree only if the Constitutional Council has found that they are matters for regulation as defined in the foregoing paragraph.

The Constitution gives Government the possibility of modifying legislative norms, enacted prior to the Constitution, falling outside the enumerated legislative competence specified in Art. 34, subsequent to a positive reference by the State Council. The Government can defend its legislative competence against legislative incursions by invoking Art. 37 (2) to de-legalize (and replace by decree regulation) post-1958 parliamentary provisions which encroach upon its Art. 34 residual competence (after a reference by the Constitutional Council that the parliamentary provisions do have in effect a *caractère réglementaire*).

[191] Proposals to introduce American-style judicial review of constitutionality had been rejected during the Third Republic. The prevalent opinion of the times was best represented by a study authored by the influential comparatist Edouard Lambert, arguing against the American-style, reactionary "government of judges," *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris: Giard, 1921).

[192] 82-143 DC, Rec. 57 (30 juillet 1982), reproduced and commented in Favoreu and Philip, *supra*, at pp. 539-554: « Un dernier point mérite d'être souligné: la décision du 30 juillet a pour effet de ruiner définitivement la thèse de la définition matérielle de la loi. Car si une loi peut comporter des dispositions réglementaires sans être inconstitutionnelle, c'est que la loi se définit simplement comme l'acte voté par le parlement selon certaines formes, sans prendre en considération la matière sur laquelle porte cet acte. « (at pp. 547-548).

[193] *See* (in addition to the sources and statistics in support of this claim provided in *Le Domaine de la loi et du règlement),* Louis Favoreu, 'Les règlements autonomes existent-ils ?' *Mélanges Burdeau*, Paris, 1977, pp. 405-420 and 'Les règlements autonomes n'existent pas,' *R.F.D.A.* 1987, pp. 872-884, statistical table at p. 884 : between 1982 and 1986, decrees under Art. 37 totaled a meager 76, compared to 6255 other decrees.

principles of constitutional value" and the strict interpretation of the authorizing enactment with a number of constitutional provisions.[194]

In practice, the procedure of adopting an ordinance is more complex than that which applies when the executive simply concretizes by decrees of public administration (implementing decrees) an "ordinary law."[195] As a result, Art. 38 has acquired a minimal practical value with respect to the actual legislative process. Most revealingly, until 1996, the year up to which the elaborate statistical study of Catherine Boyer-Mérentier provides us with sufficient data, the number of enabling laws (*lois d'habilitation*) adopted by Parliament totaled 26 (under which 160 ordinances were adopted and enforced), representing 0.61% of the number of legislative acts passed (3902).[196] In effect, the substantive legislative reservation is thus rendered coextensive with the constitutional guarantees of rights and freedoms,[197] which can be restricted only on the basis of a *loi,* and with the personal liberty guarantee deriving from the constitutional requirement of Art. 34 (3) that the law determine the essential elements of a crime (*crimes* et *délits*). The Constitutional Council gave this latter requirement an interpretation similar to that obtaining in U.S. Supreme Court void-for-vagueness constitutional adjudication.[198]

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[194] DC 86-207 du 25-26 juin 1986 ("Privatisations"), Favoreu-Philip *supra*, pp. 658-682. The strict enumeration of the constitutional limitations on both the enabling act and the ordinance itself is due to the fact that judicial review of administrative action by the Council of State operates traditionally only by strict reference to the law authorizing the decree. The specification was meant to give the Council of State 'supplementary ammunition' by specifying secondary norms of reference by virtue of which the ordinances could be reviewed. In practice, the Council of State only annulled 2 out of 160 ordinances adopted under Art. 38, at the very beginning (from 1959 to 1997, *cf.* Favoreu-Philip, *supra* at 674). The decision is translated and commented in Dorsen et al. 2003, pp. 243-248.

[195] Attempts to by-pass by ordinances, during periods of *cohabitation,* the necessity of presidential signature for the promulgation of *lois*, have failed. Ordinances adopted 'in Council of Ministers' have to be signed by the President as well, *cf.* Arts. 13 and 38. The issue was left open by the Constitutional Council whether the formal condition of presidential signature is a discretionary prerogative (*pouvoir discrétionnaire*) or a constitutional duty of the President (*compétence liée*).

[196] *See* Catherine Boyer-Mérentier, *Les ordonnances de l'article 38 de la Constitution du 4 octobre 1958* (Paris: Presses Universitaires d'Aix-Marseilles, 1996). The figures are provided at pp. 329-330, n. 26.

[197] The express protections provided by the specifications in Art. 34 were extended by the famous 1971 *Associations Law Decision*, 71-41 DC du 16 juillet 1971 (*see* translation and comments in Dorsen et al. 2003, pp. 122-124).

[198] Problems arose, nonetheless, with respect to custodial administrative detentions. *See* Dorsen et al. 2003, at pp. 247-248.

4.3.3 Content, Purpose, and Scope*: Why Simple, When It Can Be So Complicated?*

> Warum einfach, wenn's auch schwierig geht? Nur eine rein formalistische Auslegung des Art. 80 des Grundgesetzes zwinge uns zu einem umständlichen Weg, zu einer Aufzählung aller Einzelheiten, die überhaupt je einmal Gegenstand einer DurchführungsVO sein können.[199]
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> Address of 03.07.1951 of the Federal Finance Minister Fritz Schäffer in Bundestag (Verhandlungen des Deutschen Bundestages, I. Wahlperiode 1949, Stenographische Berichte, Bd. 6, S. 4711).

> Zur Klärung des dogmatischen Verhältnisses zwischen Parlamentsvorbehalt und Art. 80 Abs. 1 S. 2 hat das Bundesverfassungsgericht bis heute keinen befriedigenden Beitrag geleistet. Festzuhalten bleibt, daß das Bundesverfassungsgericht sich von der seiner frühen Rechtsprechung zugrundeliegenden Auffassung gelöst hat, wonach an Verordnungsermächtigungen lediglich formale, von der Wesentlichkeit/Eigenart der Regelungsmaterie unabhängige Bestimmtheitsanforderungen zu stellen sind.[200]
>
> Wolfram Cremer, "Art. 80, Abs. 1 S. 2 GG und Parlamentsvorbehalt-Dogmatische Unstimmigkeiten in der Rechtsprechung des Bundesverfassungsgerichts", *AöR*, Bd. 122, 248 ff. (1997).

Art. 80, Par. 1 provides that the Federal Government, a Federal Minister or a Land Government may be authorized by a federal statute to adopt ordinances (*Rechtsverordnungen*),[201] i.e., delegated legislation, provisions of general character

[199] Why make it simple, when it can be so complicated? Only the formalistic interpretation of Art. 80 in the Basic Law forces us down this cumbersome road, to enumerate in the text of the law of all possible details which could imaginably, at some indefinite point in time, be the object of an implementing decree.

[200] The Constitutional Court has contributed nothing to a satisfactory clarification of the doctrinal relationship between the parliamentary reservation requirement (*Parlamentsvorbehalt*) and the requirements of Art. 80 Par. 1 Cl. 2. It can be only concluded that the Court has departed from its earlier jurisprudence, according to which enabling laws [according to Art. 80 Par. 1 Cl.2] had to correspond only to formal criteria of determinateness (*Bestimmtheitsanforderungen*), substantively unrelated to the specificity and importance of the normative subject-matter.

[201] Sometimes translated as "statutory instruments." For purposes of terminological consistency, I am using "ordinance." The court subjects statutory enabling provisions to a substantial review, in order to determine if the requirements of Art. 80 (1) are applicable. *See* BVerfGE 10, 20 (*Preußischer Kulturbesitz*), holding that the legislative basis of the Charter (*Satzung*) of the Prussian Cultural Heritage Foundation was subject to the requirements of Art. 80 (1). Insofar as the charter was adopted by the Federal Government with the agreement of the Federal Council and comprised provisions with binding force outside the administration proper, it was in effect a substantive "ordinance" (*Rechtsverordnung*). A different interpretation "would have obscured the clear differentiation between the respective normative provinces of the Legislative and the Executive and thus opened a not unobjectionable road to circumvent Art. 80 (1)." (BVerfGE 10, 20 (51).

with legislative force.[202] The "content, purpose, and scope" (*Inhalt, Zweck und Ausmaß,* Cl. 2) of the authorization must be specified by the enabling law.[203] Like many other features of the constitutional rearrangement in the Bonn Republic, this provision represented a direct reaction to a perceived structural deficiency of the Weimar democracy. Most notably, the already mentioned Enabling Act of March 1933 had symbolized the end of parliamentarism, giving the Reich Government power "*to adopt laws*, outside the ordinary constitutional procedures" (*Reichsgesetze können außer in dem in der Reichsverfassung vorgesehenen Verfahren auch durch die Reichsregierung beschlossen werden*), including legislation infringing on fundamental rights. It is easy to notice that the text of the enabling law did not even deign to pay lip service to the formal, nominal constitutional niceties. The "Reich Government"—in fact, the new Chancellor, Adolf Hitler—was explicitly authorized to adopt "federal legislation" proper (*Reichsgesetze*), not just ordinances (*Rechtsverordnungen*) with legislative effect. However, the law-making formalities were duly preserved afterwards, as a grimly ironic gloss on totalitarian legality; the validity of the enabling law was last extended by a personal decree of Hitler in 1943.[204]

In 1947, the Office of the Military Governor of the US (OMGUS) gave partial impetus to the future constitutional regulation of enabling acts, by issuing a directive regarding the authority of state governments in the American Zone of Occupation to adopt regulations on the basis of former Reich legislation ("Authority of Land Governments to Issue executive Ordinances under former Reichs Law" (sic!)). The directive distinguished between "Supplementing or Amending Ordinances" and "Implementing Ordinances" thus:

> Implementing Ordinances (*Aus- und Durchführungsverordnungen*) are involved, where the policy and the legal principles which are to control in given cases are laid down by the basic law with such definiteness as to provide reasonable standards for the executive to fill in details and to carry out the purposes of the law. Such implementing ordinances, if enacted

[202] Delegated legislation adopted on a legislative basis prior to the entry into force of the Basic Law was subjected to the more restrictive requirements of Art. 129.

[203] Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden. Die Rechtsgrundlage ist in der Verordnung anzugeben. Ist durch Gesetz vorgesehen, daß eine Ermächtigung weiter übertragen werden kann, so bedarf es zur Übertragung der Ermächtigung einer Rechtsverordnung. ("The Federal Government, a Federal Minister or the Land Governments may be authorized by a law to issue ordinances having the force of law. The content, purpose and scope of the powers conferred must be set forth in the law. The legal basis must be stated in the ordinance. If a law provides that a power may be further delegated, an ordinance having the force of law is necessary in order to delegate the power." (Translation available at http://www.constitution.org/cons/germany.txt, last visited August 26, 2011.)) Note: The other sections of article 80, which deal with the division of power between states and the federation with respect to delegated law-making, touch on federalism issues that need not further detain us here.

[204] RGBl. 295. In Wilhelm Mößle, *Inhalt, Zweck und Ausmaß. Zur Verfassungsgeschichte der Verordnungsermächtigung* (Berlin: Duncker & Humblot, 1990), at p. 22 n. 58.

> under and in pursuance of the law, are not contrary to the constitutional prohibition against excessive delegation of legislative power. . ..[205]

But the American influence was only tangential and formal. The limitation provided by Art. 80 Par. 1 Cl. 2 expressed a deeper constitutional aversion to open-ended enabling laws, which in itself was neither imposed nor influenced by the Office of the Military Governor. Indeed, the notion of constitutionally controlled delegation was initially perceived as too compromising. For instance, the draft of the Bavarian Justice Ministry following the directions of OMGUS and setting forth, accordingly, a restriction of delegations based on the specificity of the enabling law, was received coldly in the constitutional committee of the provincial Bavarian parliament (*Landtag*).[206] The rapporteur of the committee, Dr. Thomas Dehler considered this an open invitation to preserve "Nazi-laws": "the delegation practices of former Nazi-laws (*Nazigesetze*) ought not to be borrowed into our new rule of law-based state practices." Accordingly, he made the proposal to reserve *all law-making* (including implementing norms) to the parliament itself. Dehler's uncompromisingly unrealistic proposal was only rejected in the ensuing debates following a sarcastic counter by the state chancellery representative "whether in pursuance of this notion the parliament would like to regulate the pricing of parquet blocks itself."[207] A compromise draft, which included the obligation to define "content, purpose, and scope of the thus delegated ordinance-making power," in the enabling statute and provided that only implementing, but not supplementing ordinances could be authorized, was eventually adopted in the provincial parliament.[208] Thereafter, the formula was included in the draft constitution proposal submitted for consideration by the Bavarian State Chancellery to the federal constitutional convention at Herrenchiemsee.

The initial Bavarian draft read: "The right of adopting legislation (*das Recht der Gesetzgebung*) can not be delegated, including to committees of the Federal Parliament (*Bundestag*) or the Federal Council (*Bundesrat*). As an exception from this prohibition, the Federal Government can be authorized to adopt Ordinances (*Rechtsverordnungen*) on the basis of a statute; the content, purpose,

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[205] *Id.*, at p. 44, n. 152 (Bayr. Staatskanzlei G 67/47-Office of the Military Governor, Berlin, 31st of July 1947).

[206] Bavaria and Hesse formed the biggest part of the US-administered zone.

[207] Mößle 1990, at p. 53.

[208] Gesetz Nr. 122 vom 8. Mai 1948 über den Erlaß von Rechtsverordnungen auf Grund vormaligen Reichsrechts (GVBl. S. 82). *See* Bernhard Wolff, "Die Ermächtigung zum Erlaß von Rechtsverordnungen nach dem Grundgesetz" *AöR* Bd. 78 (1952/1953), p. 194 ff., at p. 205 (observing that the provision is almost identical although superior in its formulation to that of the Federal Constitution, in that it provides that the specification of the purpose bears with precision on the *purpose to be pursued by the delegate*—whereas in the case of the Basic Law, one could very well interpret "purpose" as the *legislature's purpose for delegating*). Interestingly, the content-purpose-scope restriction was not explicitly provided for in the text of the Bavarian Constitution (although the state constitutional court extrapolated the limitation, by way of interpretation, from the general rule of law guarantee (*Rechtsstaatlichkeit*)).

and scope of the authorization have to be however determined and limited in a sufficiently precise manner by the enabling law." This formulation would find its way in the text of the Basic Law, after the elision of the first sentence and the qualification: "sufficiently precise manner." The two specifications were considered redundant, especially as faith was placed by the convention members and the Parliamentary Council in the future Constitutional Court. The Court in Karlsruhe, as they hoped, would itself clarify in time what a "sufficiently precise" determination of "content purpose, and scope" meant.[209] The provision was now, or at least so wrote a commentator in 1950 in categorical terms, very shortly after the adoption of the Basic Law, "simply as complete in itself. . .as any formulation possibly could be."[210]

This degree of optimism was, as it would later turn out, premature. And yet, the author had at the time good historical excuses for his sanguine anticipations. During the constitutional monarchy, the theory and practice of constitutionalism were primarily concerned with securing the "liberty and property" sphere against the encroachments of the monarchic state, not with the imposition of constitutional restrictions against the legislature itself.[211] The parliament could be relied upon to jealously defend its "property and liberty" legislative reservation. The classical-liberal "liberty and property" legislative reservation was not fully inherited by the Weimar Republic, whose constitution comprised fundamental rights and whose political system was based on universal franchise. However, the environment of almost uninterrupted emergency in which Weimar democracy unraveled and eventually died and the ensuing ominousness of the practice of delegation as such, had made it much easier to believe that the problem of delegation was a discrete evil, related to avoidable past excesses. Delegation was, that is to say, a matter of parliamentary duty and consequent degree of statutory precision that could be severed from the general problematic of the intervening constitutional transformations and indeed even from structural substantive distinctions. It was a question of degree and could therefore be confronted with relatively formalized means. Parliament would now be authorized to delegate to the executive all necessary powers to address the social

[209] Mößle 1990, at pp. 55-56.

[210] "schlechthin so vollkommen. . .wie eine Formel nur eben vollkommen sein kann", H. J. Müller, *Die Stellung der Rechtsverordnung im deutschen Staatsleben der Gegenwart* (Diss. Köln, 1950, S. 57) quoted after Horst Hasskarl, "Die Rechtsprechung des Bundesverfassungsgerichts zu Art. 80 Abs. 1 Satz 2 GG", *AöR* Bd. 94 (1969), 85 ff, at p. 86.

[211] "The primary task of constitutionalism was the deflection of encroachments from the side of the monarchic administration against the industrial and exchange bourgeois society. Protecting basic rights against the law-maker was, although imaginable, unimportant, since the bourgeoisie was represented in the process of law-making. The right to intervene had to be reserved to the legislature and thus withheld from the administration. No encroachment in the liberty and property sphere without a statute-under this battle flag was carried the fight for legislative reservation, this major legal achievement of the bourgeoisie in its conflict with the crown and its administrative machinery." Bodo Pieroth and Bernhard Schlink, *Grundrechte. Staatsrecht II*, 24.Auflage (Heidelberg: C.F. Müller Verlag, 2008), at p. 10.

and economic needs of a modern bureaucratic-administrative society, provided that the legislature heeded a measure of precision and clarity, providing the "content, purpose, and scope" of the authorization.

Retrospectively, the level of contemporaneous doctrinal confidence in the "content, purpose, scope" provision is surprising. Nonetheless, lack of experience with such constitutional limitations, as well as with constitutional adjudication more generally, and the understandable tendency to relate statutory vagueness to emergency "blanket authorizations" during Weimar and infamous *Nazigesetze*, warranted at the time a measure of hopefulness. For instance, Bernhard Wolff, in his 1952 doctrinal study of Art. 80 and its place in the general Basic Law framework, although proceeding soberly to identify practical and legal caveats, concluded that, all in all, the court could be trusted to administer 'nondelegation' rationally: "it can be conceded that this article does not provide a yardstick, according to which one could measure precisely the permissibility of enabling provisions. But then the use of general concepts is not foreign to the law; one could think of [the "performance according to good faith" provision of] § 242 BGB.[212] Such use, very common in public law (*Staatsrecht*), is in itself not even undesirable."[213]

This is true enough whenever such indeterminate legal concepts and general clauses provide a controllable measure of interpretive flexibility, permitting at the same time consistent interpretation and thus a default rule of predictability. However, as soon as the Constitutional Court started to enforce the "content, purpose, and scope" provision, the interpretation variations immediately started to multiply exponentially and uncontrollably, over a surprisingly short time-span. Horst Hasskarl's 1969 attempt at a synthesis of the first two decades of Art. 80 constitutional enforcement identified five general tests or formulas for applying the provision. Those tests, as the writer noted, were being used by the Constitutional Court by way of an even greater array of variations and permutations. Hasskarl observed at the same time and relatedly, that many of the "formulas" were contradictory, overlapping or constituted reciprocally relational concepts (that is, one could define them circularly through each other's intermediary):

(i) "Foreseeability" (The restriction provided for by Art. 80 (1) could only be interpreted from case to case. However, as a rule, the limitation should be precise enough, so that the "cases of future application and the future general tendency of its use, as well as the content of the adopted ordinance" are already foreseeable on the basis of the enabling provision.)[214];

[212] Paragraph 242 in the Civil Code concerns "performance according to good faith" and reads: "The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration." (Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern. English translation found in Reinhard Zimmermann and Simmon Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000), p. 18, n. 59).

[213] Wolff 1952/1953, at p. 198.

[214] Hasskarl 1969, at p. 87.

(ii) "Autonomous Decision-making" (*Selbstentscheidung*) ("[T]he law-maker should decide itself which specific questions should be handled, it must draw the boundaries of the subordinate regulation and specify what is the goal (*Ziel*) to be pursued.")[215];
(iii) "Clarity I" (*Deutlichkeitsformel*): The degree of concreteness constitutionally expected of an enabling provision requires "in principle explicitness, but at any rate should be determined with unobjectionable clarity (*mit einwandfreier Deutlichkeit*)."[216];
(iv) "Program-Formula" (The "purpose specificity" requirement is fulfilled, when the statute "explicitly provides or one can deduce from the law the 'general program' to be attained by the ordinances.")[217];
(v) "Clarity II" (It is not necessary that content, purpose, and scope, should be provided for explicitly in the text of the enabling provision, as long as one can extrapolate these statutory requirements by means of a holistic interpretation, following general principles of statutory interpretation. The determinant factor in the analysis is the possibility of extracting from the entire body of the enabling act "the ensuing objective will of the law-maker." To this effect, even research into the legislative history can be used, albeit only to confirm interpretive results arrived at through other methodologies.)[218]

The author concluded that the "unequal, fluctuating, partially contradictory character of the case-law could hardly escape even the inattentive observer."[219] This certainly appears so to the reader of his survey. At the beginning, the Constitutional Court had announced a "case by case" application. Thereafter, when it switched to rules, those rules were sometimes restricted to the enabling provision, sometimes extended to the body of the entire law. Sometimes the Court required "unobjectionable clarity," but sometimes demanded only that the general contours of the delegation needed to be drawn. Sometimes Karlsruhe regarded the three components of Art. 80 (1) as three separate yardsticks: *content; purpose; scope,* from which three sets of separate requirements derived. But the court could just as well make an unexpected doctrinal about-face and sometimes conflated them into one single general constitutional principle, with a view to across-the-board *content-purpose-scope* specificity. The most one could discern, if wanting to bring some order into the random mass of decisions, according to Hasskarl, were general tendencies or phases of the Court's jurisprudence. Enforcement had ranged from a very demanding application, bearing on the black letter of the enabling provision as such, towards a second, more generous hermeneutical mood emphasizing "constitutionally conformant interpretation" (*verfassungskonforme Auslegung*) and a

[215] *Id.*, at p. 88.
[216] *Ibid.*
[217] *Ibid.*, at p. 89.
[218] *Ibid.*, at p. 91.
[219] *Ibid.*, at p. 103.

"mollification" of the requirements, leading finally to a third, then-dominant teleological stage which subordinated "scope and content" to the "purpose" requirement and then subsumed the "purpose" requirement to an even more vague umbrella concept or formula of "general program."[220]

Hasskarl tried to establish a taxonomy and divided the formulas into "rules of interpretation" (the two "clarity" formulations) and "determinateness requirements" (the foreseeability, autonomous decision-making, and "program"-related tests). He further observed that there was a precise logic in the "determinateness" formulations, insofar as these regarded the rule from the benchmark of specificity needs related to the three relevant viewpoints, i.e., that of the citizen (who must foresee executive implementation already from the legislative delegation), legislator (who has the duty to decide), and implementer (who must know what program it must implement).[221] This observation is certainly correct. Indeed, as it was repeatedly observed by the German Constitutional Court itself, a requirement of legislative specificity serves a number of important constitutional purposes, among which are (1) representative democracy-related concerns of legitimacy, accountability and publicity; (2) separation of powers and legality of administration purposes, demanding that executive and administrative action be legislatively predetermined, and; (3) rule of law requirements related to the protection of the individual against adverse state action, reflecting "fair notice" demands as well as the more general liberal-constitutional principle that "official action [will] be comprehensible and to a certain extent predictable by the individual."[222]

But, taxonomy notwithstanding (it is surely the professed purpose of legal doctrine to try and seek to bring analytical order into the often-haphazard chaos of the practice), the general sense conveyed by Hasskarl's early survey is one of steep decline and rapid failure. It is striking how the German Constitutional Court ended, in less than 20 years, precisely at the same doctrinal point where the nondelegation doctrine had already been half-abandoned by the US Supreme Court after two centuries. As of 1969, the only thing that was required of the lawmaker was the specification of a "general program" (which is just another way of saying "intelligible principle"). This metamorphosis is all the more intriguing if we consider strictly the positive legal context (all other idiosyncratic things being equal) in which these developments had originated. The German court had initially started on a vigorous disciplinary rampage, striking down rafts of delegating enactments, on the basis of a severe reading of the "content, purpose, and scope" provision. It ended up rather sheepishly reading down broad provisions on occasion, on the basis of a cautious teleological approach.[223]

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[220] *Ibid*., at pp. 103-105.

[221] *Ibid*., at p 111.

[222] "Emergency Price Control Case," BVerfGE 8, 274, English translation in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 1997), at p. 138.

[223] Hasskarl 1969, at p. 107.

At the time, Hasskarl thought, primarily on the basis of a then recent Art. 80-related decision, that he could discern a "slight counter-tendency" towards a fourth phase and partial revival.[224] The object of the decision was a constitutional complaint raised by a number of companies against the fee-setting procedure of the Competition Office (*Bundeskartellamt*) in Berlin. The companies had to pay administrative fees for the processing of price-fixing and price-clearance filing procedures before the *Bundeskartellamt*. One of the main objections stated in the complaint regarded the legal basis of the fee-setting administrative acts, namely, an alleged infringement of the delegation restrictions in Art. 80. The Competition Office had been authorized by ordinance to set fees in order to cover its administrative costs. The legal basis of the ordinance, section 80 of the Law against Competition Infringements, read as follows: "In procedures before the Anti-Cartel Authority fees will be levied to cover administrative costs. Further details (*das Nähere*) regarding such fees . . ..will be set forth by an ordinance of the Federal Government, adopted with the consent of the Federal Council." According to the Finance Ministry, the provision was unobjectionable, since all the requirements had been fulfilled by the enabling provision. It had established the content (the ordinance would set "fees"); purpose (in order to cover administrative costs); and scope (the scope was restricted by the general principles applying to levies, equivalence and costs-covering, as well as the general equality and nondiscrimination provision in Art. 3 of the Basic Law).[225] The Court disagreed and struck down the provision as delegating unconstrained law-making power. According to the holding, only the content and purpose had been specified. The scope of the delegation, which could not be deduced from the other elements, was underspecified and could not be narrowed down solely by recourse to general principles. "Tendency and scope" (*Tendenz und Ausmaß*) needed to transpire from the text, whereas the precise words relating to scope—"further details"—were unconstitutionally vague: "The delegated law-maker can decide by ordinance which administrative acts are subject to fee-setting and which are exempted, who is the fee-debtor, when the fees are due, what is the ceiling, who sets the fees and who collects them, what is the discretionary leeway of the public authority, how are fees to be collected, when and if the duty lapses, when and if the amounts can be reduced or the fees waived. . ..Even when the principles of equivalence and cost-covering are taken into consideration, one can still foresee fully distinct regulations, which would burden the citizen to very distinct degrees."[226] This principle was evident in the case of levies. Given their importance for the citizen, the regulation of essential elements was the duty of parliament: "A legislative delegation has to contain a minimum of material normativity, which must and can serve as 'program' and 'framework' to the ordinance-maker. The enabling act must also set clear boundaries to the exercise

[224] BVerfGE 20, 257 (*Bundesrecht in Berlin*, 1966).
[225] BVerfGE 20, 257 (264).
[226] BVerfGE 20, 257 (270).

of derived authority."[227] This decision proved to be an exception and future developments did not validate Hasskarl's prediction. If anything, the downslope tendencies he noticed at that very early stage, towards invalidation-avoidance and purpose-oriented restrictive interpretation as a substitute, became more entrenched.[228] The general level of clarity and consistency in the doctrine did not increase either.[229] Hasskarl thought the return to a more vigorous enforcement of the nondelegation was also evidenced by the usage, in another contemporaneous decision, of a tamer form of the Clarity I ("with *unobjectionable* clarity" (*mit einwandfreier Deutlichkeit*) test: "content, purpose, and scope have to result *with clarity* (*mit Deutlichkeit*)...from the law itself."[230] For an otherwise perceptive observer, this faith in the power of word permutations, i.e., tautological nondelegation boilerplate, to control adjudication is surprising. These formulations, as the reader already intuits, restate in various forms the question (how clear and precise is clear and precise enough?) rather than provide the answer. But before deriving our own conclusions on the margin of the general transformation, a related aspect of delegation evolutions in Germany must be highlighted, on the basis of another synthesis of the constitutional jurisprudence, three decades forth.

In 1997, looking back over almost half a century of constitutional jurisprudence, another commentator, Wolfram Cremer, observed a disturbing structural anomaly in the case-law. The Constitutional Court seemed to sometimes conflate the logically and dogmatically distinct constitutional problems of legislative reservation (the constitutional need for a formal statute as legal basis/predicate for public action); parliamentary reservation (the constitutional obligation of the parliament to take the essential decisions in a given normative field); and the Art. 80 (1) delegation problem proper (the obligation of the parliament to delegate, when it had the right to do so, with a degree of "content, purpose, and scope specificity"). This latter obligation could very well be regarded, as Cremer observed with a discerning analytical eye, as in essence a formal matter, doctrinally unrelated to the substantive criteria. The inquiry into "content, purpose, and scope" regarded an issue of "how" (if parliament can delegate, how should it do this), not "whether" (whether parliament has an obligation to take the decision itself or the right to delegate). According to the logic of this position, as synthesized by Cremer, the question should always be a tiered two-step analysis of substance and then form: "First with the help of the essentialness criterion (*Wesentlichkeitskriterium*) it is probed whether the

[227] *Ibid.*

[228] *Cf.* the comparative study by Uwe Kischel, "Delegation of Legislative Power to Agencies: A Comparison of the United Sates and German Law," 46 *Admin. L. Rev. 213* (Spring, 1994).

[229] *Cf.* David P. Currie who, otherwise enthusiastically praising the German Constitutional Court's attempt to grapple with nondelegation (which he thought contrasted favorably with the lack of stamina in the US jurisprudence), was in the end forced to admit that: "The decisions are numerous and not all easy to reconcile. They document the difficulty and uncertainty of administering a requirement that is necessarily a matter of degree." (Currie 1994, at p. 133).

[230] BVerfGE 20, 283 (291), quoted after Hasskarl 1969, at p. 107.

law-maker has (no) constitutional authority to delegate the decision over a specific subject-matter, in other words whether a delegation threshold exists. For the enabling ordinances, which have survived this threshold, and crossed over the "hurdle" of parliamentary reservation, another scrutiny ensues under Art. 80 (1), with respect to delegation proper, in other words an inquiry into 'how essential these unessential matters are.'"[231] But, Cremer asked, if the issues were analytically and doctrinally distinct, why did the Court waver between various applications of the delegation restriction? The enforcement of Art. 80 (1) had sometimes proceeded as a formal and separate scrutiny. Conversely, sometimes the Court had treated the essentialness and delegation inquiries as if they were substantively fused at the hip. Although noting that the decisions as such were contradictory beyond reconciliation in their respective methodological approaches, the author concluded that a vague, general, and unrationalized tendency to swerve from form to substance in the enforcement of the delegation provision (and therefore a conflation delegation-essentialness) could be discerned.

To exemplify the essentialness/delegation nexus, in the so-called "Mutzenbacher Decision,"[232] the constitutionality of a federal statute (the "Act Concerning the Dissemination of Publications that Endanger the Youth") was challenged, among other grounds, with the argument that it encroached upon the guarantee of artistic freedom in Art. 5 (3) of the Basic Law. The law had established a Federal Reviewing Authority, charged with administering the substantive provisions by, among other attributions, determining the placement of "writings that are capable of morally endangering children and youths" on a restricted list. Placement triggered an advertising ban and a restriction of dissemination and access (especially to children and youth). A writing could however not be listed according to the law if, inter alia, it "served art" (*wenn sie der Kunst dient*). The act provided that the Federal Minister for Youth, Family, Women, and Health would appoint the chairman and a part of the Federal Reviewing Authority's members (federal states had the right to directly nominate their own respective representatives). The federal minister was mandated to select members from among eight broadly identified categories of professional groups and civil society circles ("art, literature, booksellers, publishers, youth associations, youth services, teachers, the churches, the Jewish Culture Communities, and other religious communities organized as bodies regulated by public law").[233] According to the law, residual competence with respect to listings was vested in a twelve-member body, composed of the chairman, three state representatives, and eight representatives of the above-mentioned collective groups. Decisions could only be made with a quorum of eight

[231] Cremer 1997, at p. 255.

[232] BVerfGE 83, 130 (27 November 1990), The references provided are to the German decision, respecting its pagination. For citation, I am using the English translation by Nomos Verlagsgesellschaft (available online at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=628, last visited September 2, 2011).

[233] BVerfGE 83, 130 (132).

members; for listing decisions a two-third majority vote and a minimum of seven votes were necessary.

The publisher of a pornographic novel (*Josephine Mutzenbacher-The Story of a Viennese Whore, as Told by Herself*) placed on the list eventually lodged an administrative complaint. Criminal court decisions had in 1968 banned the volume as criminally obscene. According to the publisher, in view of the "evolving socio-ethical standards," the work needed to be considered art. The authority refused to take the volume off the list, considering that it appealed solely to prurient interests. The lower administrative court reviewed the decision as unobjectionable. On appeal, the Superior Administrative Court admitted that the work constituted art but pointed out that artistic freedom found its limitation in the constitutional value of youth protection, according to Arts. 6 (2) and 1 (1) of the Basic Law. Subsequently, on appeal to the Federal Administrative Court, it was further decided that the rule of law principle did not forbid the use of imprecise legal concepts (*unbestimmte Rechtsbegriffe*), thus the relatively unspecified procedure directing the federal minister to appoint the administrative authority from among broadly defined groups was unobjectionable. The ensuing constitutional complaint did not raise an Art. 80 delegation objection but emphasized specificity needs deriving from the parliamentary reservation. According to the complainant, the law was overall and substantively in breach of the parliament's obligation to make the essential decisions in areas affecting constitutional rights. It was relatedly argued that the vagueness of the appointment procedure represented a dereliction of parliament's constitutional duty to regulate "the essentials" and thus not leave the door open to executive arbitrariness.[234]

On this latter point, the Constitutional Court decided that, given the necessity of balancing and reconciling conflicting constitutional values (right to artistic freedom and protection of the youth) with a view to their optimization, the legislative regulation of the administrative procedure for implementing the act was insufficient with respect to the Art. 80 (1) requirements. The enabling act had not set forth explicitly the precise procedure for the selection of the respective members and the Court held that this vagueness ran counter to the specificity demands made by Art. 80 (1).

In the economy of the argument, the delegation inquiry seems hard to separate from the general problem of essentialness.[235] The substantive essentialness requirements were interpreted to extend to the "details of the law's administrative and judicial application," since the optimization of the competing values had repercussions with respect to the enforcement: "The mandate to realize basic rights

[234] BVerfGE 83, 130 (136, 137).

[235] Defined at BVerfGE 83, 130 (142): "The principle of the rule of law and the precept of democracy place upon the legislature the duty of formulating essentially by itself those regulations that are decisive for realization of basic rights-and of not leaving this to [the] activity and decisionmaking authority of the executive. . ..As the intensity of potential infringements in areas protected by basic rights increases, the demands on determinacy also increase."

through appropriate procedural provisions is addressed first to the legislature. If the administrative procedure directly affects positions that are protected by basic rights, then the procedural provisions must, in the interest of those positions, be set in legally binding terms (*rechtssatzförmig*). That has not sufficiently occurred here."[236] Constitutionally conformant enforcement was held to depend in turn on the extent to which the procedure genuinely reflected the relevant viewpoints: "The procedure to be set in legal norms (*rechtssatzförmig*) must take account of the interest in obtaining the most comprehensive investigation of all the viewpoints that the FRA must consider when making its decision regarding a listing.. . .[The legislature] further must regulate how individual members are to be chosen. In doing so, it must attempt to completely comprise, at least in their general tendencies, all the views represented in the participating circles."[237] In the argument, the formulation of Art. 80 is not expressly mentioned and the court does not spell out a delegation test, much less one broken down into "content, purpose, and scope" specifics. What the parliament should not have delegated results implicitly from the observations of the court regarding the essentialness-related duty of parliament to regulate substantively in legally binding terms (*Rechtssätze*).

The subject matter of the inquiry, namely, the "optimization" of a clash between fundamental rights and values provides relative normative focus and mooring to the specificity inquiry invited by the delegation-related provision. How far that duty of legislative specificity extends is still obscured by this flight into procedural specificity, itself inevitable due to the normative imprecision of balancing constitutional rights and values without a common normative scale.[238] Consequently, the discussion still evinces a measure of open-endedness, an exercise so-to-speak in "constitutional interest-balancing."[239] By the same token, this observation provides the answer to the conjoined dilemmas raised by Hasskarl and Cremer. Content, purpose, and scope are conceptually distinct problems. Likewise, the problem of substance (what can be delegated) raised by the "essentialness" inquiry into the

[236] BVerfGE 83, 130 (152).

[237] BVerfGE 83, 130 (153).

[238] *See* Pieroth and Schlink 2008, at pp. 60-63, observing parallel transitions from legislative reservation to parliamentary reservation and from legislative reservation to the "reservation of proportional legislation" (*Vorbehalt des verhältnismäßigen Gesetzes*). *But cf.* the acute skepticism expressed by one of the authors with respect to the possibility of the proportionality inquiry to provide a manageable normative criterion for rational adjudication and jurisprudence, Bernhard Schlink, "Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit", *Der Staat*, Bd. 28 (1989) S. 161 ff.

[239] It can be asked almost endlessly why specific groups or viewpoints were included in the procedure and why different interests and groups were not taken into consideration. As the ministry also observed in its position on the complaint, "[i]t would be impossible to include all imaginable organizations; a measure of dispositive discretion of the federal minister was constitutionally acceptable" BVerfGE 83, 130 (137, 138): Es sei unmöglich, alle nur denkbaren Organisationen zu beteiligen; gewisse Dispositionsmöglichkeiten des Bundesministers seien von Verfassungswegen hinzunehmen (at 138).

substantive parliamentary reservation is logically distinct. Analytically, that is, it represents a different doctrinal inquiry from the question relating to the precision/clarity degree raised by the delegation scrutiny (how should the parliament instruct its delegates). But, as it is also revealed by the German developments, degrees of legislative clarity and precision cannot be enforced by constitutional adjudication without a stable, structural normative criterion that would help define constitutionally-ideal legislation. The words of the delegation-related constitutional provisions cannot in themselves provide this criterion. And, as the fruitless German search for delegation tests shows, without foundational normative distinctions, neither formal rationality, namely the analytical rigor of doctrinal categories, nor positive fundamental law, namely the conceptual categories provided by the text of the constitution, can help constitutional adjudication to operate in a coherent way.

4.4 Conclusion: The Unity of What?

> And notwithstanding the said words of the said Commission give authority to the Commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and Law. For discretion is a science or understanding to discern between falsity and truth, between right and wrong, and between shadows and substance, between equity and colorable glosses and pretenses, and not to doe according to their wills and private affections; for as one saith, *Talis discretio discretionem confundit*.
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> Coke, C.J., *Rooke's Case* 5 Co. Rep. 99b (1598)

This dictum, found in a very early English administrative law case (an action brought by a certain Rooke against the Commissioners of Sewers), is a good introduction to the conclusion of this argument. Looked at through the prism of judicial limitations, the delegation inquiry concerns the constitutionally proper level of statutory specificity and thus the judicially-administered border between discretionary and law-bound action. This reflects, looked at through the other end of the telescope, the difference between the formalized, structurally and institutionally constrained rationality of law and the distinct worlds of political or ideological rationality. If the judge cannot draw the normative lines and thus rationally contain and limit his own decision-making, substantive decisions will simply move as exercises of "will and private affections" from the political branches to the bench. As it was argued here, line-drawing has proven ever more difficult the more constitutionalism has departed from its initial presuppositions. The futile nondelegation quests of contemporary constitutional law in the jurisdictions we have reviewed evidence this Janus-faced systemic uneasiness: the difficulty of confronting with positive constitutional law means an erosion of foundational normative presuppositions and a converse necessity for foundational normative borders.

Occasional denials of this need are, albeit discursively possible, ultimately disingenuous and obfuscating of the real stakes. For instance, in a recent

administrative law decision reviewing the denial of a deportation waiver request for "humanitarian and compassionate reasons," *Baker v. Canada (Minister of Citizenship and Immigration)*,[240] the Supreme Court of Canada sought to end a long battle with categorically distinct standards of review. It held thus that legal errors (decisions involving interpretations of rules of law) and discretionary decisions proper could be reviewed in terms of substance using the middle range between correctness and the patent unreasonableness standard, namely reasonableness. Justifying its resort to a single standard, the opinion extemporized in the language of legal philosophical scholarship: "It is. . .inaccurate to speak of a rigid dichotomy of 'discretionary' or 'non-discretionary' decisions.. . . there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legal gaps, and make choices among various options."[241] The Court also held, procedure-wise, that the common law imposed on all public decision-makers a duty to give reasons.[242] But as the court hastened to add, "given the difficulty in making rigid classifications between discretionary and non-discretionary decisions" a multi-factor "pragmatic and functional test" would be used to cut the supposedly unitary spectrum of reasonableness.[243] The denial of distinctions between discretion and law has a distinctive touch of normative hyperbole.[244] It makes, namely, the beautiful promise of complete, gapless lawfulness, of public law triumphant: from hither forth, no more "black holes," no more "Schmittian administrative law."[245] A fine volume, to which many prominent Canadian administrative law scholars contributed, was dedicated to the case, to hail the transition to "The Unity of Public Law."[246] But there is something eerily contrasting in this unity, the lofty normative promise of no

[240] [1999] 2 S.C.R. 817.

[241] Par. 54.

[242] On this issue, more generally, *see* Dyzenhaus and Fox-Decent 2001.

[243] Par. 56: "The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament."

[244] The entire case is pervaded with a general sense of nobility and elation against the grain of trifling legal technicalities. Much of the decisional outcome in the case was, for example, controlled by the "interpretative incorporation" into the factors controlling the administrative process of the Convention of the Rights of the Child, ratified but un-incorporated into domestic law by Canada (and thus technically of no domestic legal effect). The court glossed in Kantian tenor on how it would be hypocritical to allow the executive to ratify treaties but then allow the state to fully escape its international obligations due to the failure of parliament to incorporate them.

[245] *See* Adrian Vermeule, "Our Schmittian Administrative Law,"122 *Harv. L. Rev.* 1095 (2009).

[246] Dyzenhaus 2004.

more law-free spaces, no internal systemic dichotomies, coupled clumsily with the elusive instrumentalism of a multi-factor balancing test. The poetics of normative unity written with the pragmatic language of accounting, a Kantian string concerto played on a broken Benthamite harmonica. This conceptual/methodological chasm seems to have escaped the eulogists, as the technical inconsistencies faded far behind the generous promises of rule of law absolutism. Some of the scholars who had hailed *Baker* as revolutionary, would later be nonplussed by the post September 9/11 deportation review in *Suresh v. Canada (*Minister *of Citizenship and Immigration*),[247] where the exact same test as that applied in Baker, the "pragmatic and functional approach" resulted in a very deferential decision. In terms of what has been said so far, it is clear that, to some extent, both the early reveling and the succeeding dissatisfaction were triggered by the results as such, within a of morally-instrumental rather than legal-rational framework of reference. But the professed appeal to an alleged "unity of public law," coupled with the inevitable failure to deliver on the promise (the diversity-oriented "pragmatic and functional approach") makes instrumentalization inescapable. In their enthusiastic attempt to do away with the tragedy of law- and thus rationality-free spaces of public action (there are questions which admit of no legal, thus rational answer), the Canadian justices made a melodramatic promise (everything has a rational explanation in judicial form, in the end law conquers all).

This book purported to offer no practical solutions to such conundrums, save perhaps by serving as a cautionary warning with respect to the possibility of using non- or limited delegation provisions at the level of fundamental law, in order to promote constitutional values by controlling statutory vagueness. This warning is not fully gratuitous or moot. The Treaty of Lisbon, for instance, introduced the "constitutional" limitation of legislative delegation for the first time in EU law, using a mixed formula strikingly reliant on German constitutionalism: "A legislative act may delegate to the Commission the power to adopt non-legislative acts to supplement or amend certain *non-essential elements of the legislative act*. The *objectives, content, scope* and duration of the delegation of power shall be explicitly defined in the legislative acts. The *essential elements of an area* shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power."[248] [emphases supplied] It is too early to review the jurisprudence of the ECJ but one can suspect that a task that proved impossible in national constitutional law will be all the more difficult to achieve at the level of European Union law. In national systems, constitutional adjudication can to a degree fall back on shared meanings, historical understandings, and tradition in the quest for rational jurisprudence. Contrariwise, the fundamental law of the EU system seems

[247] [2002] 1 S.C.R. 3. Note that in Suresh there was risk of torture attending deportation, so that important Charter values were also implicated in the decision.

[248] Art. 290 (1) TFEU ("Delegated Acts"). The other paragraphs provide procedural controls (possibility of revocation by Parliament and Council or entry into force if no objection has been expressed by these institutions within a deadline set by the enabling act) and the (also German-inspired) formal obligation to expressly state the legal basis in the text of the delegated act.

fully predicated on "the transcendental-theoretical kernel of self-referentiality evinced by the reflexive reason (*die sich selbst beurteilende Vernunft*)".[249]

The argument here was that the rise and fall of nondelegation evidences a larger problem: the simultaneous need of contemporary constitutionalism for foundational normativity and the impossibility of the positive constitutional law to secure the limits and consistency of its practices. A deeper corollary of this erosion of normativity regards the difficulty of foundational legal rationality to operate in the absence of meta-constitutional systemic reason. As it was argued, the general phenomenon for which delegation stands as epiphenomenal proxy is that of a relative incapacity of fundamental juridical practices, severed from their foundational presuppositions, to provide a manageable structure for securing and reconciling coherently collective action and individual autonomy.

[249] Luhmann 1990, at p. 187.

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