

# **A Contribution to the Study of Administrative Power in a Philosophical Perspective**

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## Abstract

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This dissertation explores the challenges that administrative reasoning places on classical theories about the nature of law or adjudication, the structure of the legal process, and the separation of powers, particularly in its relationship with legality and the active role of the administrative power in modern governance. It describes how traditional theories about the nature of law and adjudication have explicitly addressed the philosophical foundations of judicial reasoning in hard cases, but they have been oblivious about how administrative decision-makers should decide them.

This dissertation argues for an eclectic model where administrative reasoning should ideally be informed by publicly validated expert knowledge that requires a moral and political compass oriented towards the fulfillment of the purposes and aspirations of a democratic polity that lives under the rule of law. To that end, it proposes that the administrative power ought to decide hard cases regardless of the empirical, theoretical or meta-interpretive nature of the disagreement they may elicit. It suggests that, unlike the judiciary, the administrative power is ideally endowed with original or delegated lawmaking authority, vested with democratic legitimacy, and equipped with specialized expertise and the procedural mechanisms to allow the active participation of the citizenry in the administrative process.

Furthermore, it proposes that these features entail that administrative decision-makers should reason from principle and policy in deciding hard cases about the planning and allocation of valuable resources in a community by construing the grounds of law or deciding meta-interpretive disagreements based on publicly validated expertise. Finally, this dissertation ventures to speculate that the existence of *administrative novelty* may challenge the truism embraced by traditional jurisprudence according to which the solution to the tension between law's certainty and its responsiveness is usually reserved to the interplay *legislature-courts* that regards the administrative power as a mere executor of legislation.

*A mi madre,  
luchadora infatigable*

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## INTRODUCTION

“But in the night of thick darkness enveloping the earliest antiquity, so remote from ourselves, there shines the eternal and never failing light of a truth beyond all question: that the world of civil society has certainly been made by men, and that its principles are therefore to be found within the modifications of our own human mind.”

-Gianbattista Vico<sup>1</sup>

Once I heard Professor FERNANDO HINESTROSA<sup>2</sup> say that a man’s first reaction when he faces a novel situation is to compare it with previous experiences in an attempt to understand it. It is like when one stares at a photograph of an unknown landscape, the first reaction that comes to mind is to compare that image with landscapes where one has been before. We tend to describe the unknown based on what we know. This is similar to what happens when a man of laws is confronted with an unanticipated situation. Professor HINESTROSA appealed to this metaphor in describing how new transactions evolved from lacking a *legis actio* under the formalistic *ius civile* to the *bonae fidei iudicia*. Let us become time travelers for a moment and go back to ancient Rome. The huge expansion of the Roman Empire challenged, among many other things, the *ius civile*’s aptitude to govern new economic transactions and social relations between Romans and peregrines<sup>3</sup>. As a result, the *praetor peregrinus* introduced the *bonae fidei iudicia* seeking to adapt the old *ius civile*’s formulas to unforeseen situations in order to facilitate trade with peregrines<sup>4</sup>. In his famous *Institutes*, Roman jurist GAIUS explained that the salient feature of the *bona fide iudicia* is that they endowed the judge (*iudex*) with discretionary powers to determine the scope and extent of the compensation in light of broader considerations of fairness and justice (*bonum et aequum*), as opposed to the formalistic *ius civile*’s formulas by which he could not grant more money damages than those initially claimed by the plaintiff<sup>5</sup>. The ongoing struggle between the unknown and legal originality has always been central to legal reasoning.

It is not my purpose to suggest that the answers to the questions about *administrative novelty* or *originality* can be found in Roman law or general considerations about fairness or justice, but I think we can learn at least three things from this example. First, the Roman *praetor* did not only act as an administrator but also dispensed justice, which gives us an historical perspective about the longstanding assimilation between judging and administrating<sup>6</sup>. Second, the evolution of law and its adjustment to new unimagined situations via interpretation and adjudication by appealing to underlying principles and policies as a way to preserve law’s responsiveness to rule the life of a community has not been the creation of

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<sup>1</sup> Gianbattista Vico, VICO: THE FIRST NEW SCIENCE 96 (Leon Pompa trans., 2002).

<sup>2</sup> Fernando Hinestrosa (1931 – 2012). Former President of Universidad Externado de Colombia, former Dean of the Law School, and Professor *Emeritus*. Professor Hinestrosa taught us that to be free one must first embrace the unknown. This dissertation is a tribute to his life and legacy.

<sup>3</sup> C.C. Turpin, BONAE FIDEI IUDICIA, 1965 Cambridge L. J. 260, 261 (1965); Fabio Espitia, HISTORIA DEL DERECHO ROMANO 194 (5th ed., 2016).

<sup>4</sup> Turpin, supra note 3, at 260 (“Huschke’s view, followed by many, was that the *praetor peregrinus* devised the formula as a means of bringing to trial cases involving peregrines, to whom the formal *legis actiones* were neither available nor appropriate”); Espitia, supra note 3, at 194.

<sup>5</sup> Francis de Zulueta, THE INSTITUTES OF GAIUS at 4.62 (1953).

<sup>6</sup> See, e.g., Max Radin, FUNDAMENTAL CONCEPTS OF ROMAN LAW, 12 Cal. L. Rev. 393, 398 (1924) (describing the nature, scope, and extent of the Roman *praetor’s imperium*).

any contemporary theory about the nature of law or adjudication. Rather, this is a practice that has been accepted at least since the time when the Roman *praetor* introduced the *bonae fidei iudicia*<sup>7</sup>. Three, in adjudicating disputes, the *praetor* encouraged the judge (*iudex*) to appeal to broader principles of justice and fairness to provide a *just* solution to the question at stake<sup>8</sup>. These three takeaways for decades have fueled a robust discussion among legal philosophers about how judges should decide hard cases where law seems to run out or is deemed inconvenient to decide the question at issue, as well as to ascertain the limits of judicial reasoning. This prolific jurisprudential enterprise has explicitly addressed the philosophical foundations of judicial reasoning in hard cases but it has been oblivious about how administrative decision-makers should decide them. In fact, back in 1969, Lon Fuller indicated this “chapter of jurisprudence remains at present largely unwritten”<sup>9</sup>. This dissertation tackles that question.

The administrative power is lively and dynamic. Commentators drawn from different legal traditions and legal systems have extensively documented the patent evolution that it has experienced over the past decades. Yet the absence of explicit philosophical inquiry into the foundations of the administrative power and administrative reasoning is surprising. I agree with FULLER’s view that it would be a mistake to think that the construction of the standards of reasonableness and fairness made by what he calls “special administrative tribunals” could provide a solution to all the challenges that modern societies face nowadays due to the development of social life, science, technology, and new economic structures<sup>10</sup>. I must caveat that my purpose is rather narrow, however. My grasp of the administrative power's philosophical foundations seeks only to highlight how the prominent role they play in what I call the path of the law raise questions of a fundamental nature that call for explicit philosophical inquiry. In this dissertation, I explore the challenges that administrative reasoning places on classical theories about the nature of law or adjudication, the structure of the legal process, and the separation of powers, particularly in its relationship with legality and the active role of the administrative power in modern governance. My primary goal is to analyze whether the administrative power ought to decide hard cases, how this task should be done, and how it differs from the way in which the judiciary does so.

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<sup>7</sup> See, e.g., Donald Phillipson, DEVELOPMENT OF THE ROMAN LAW OF DEBT SECURITY, 20 Stan. L. Rev. 1230, 1232 (1968) (“The praetorian office came into existence in 367 B.C.; the praetor's primary function was to review disputes between parties. The praetor was not a judge in the modern sense, but he did have significant control over the form in which parties sought resolution of a conflict. [...] However, in the early second century B.C. the praetor's power to create new remedies was clearly recognized, and from then until the end of the Republic major transformations in the Roman private law flowed from the praetor”).

<sup>8</sup> See, e.g., Radin, *supra* note 6, at 394 (“Just what will constitute equity, the *bonum et aequum*, will vary with the time and place and person, but a new responsibility is placed upon the magistrate. He must in most cases examine the moral basis of the *ius* claimed. [...] The morality enforced by the praetor was a *ius gentium*, adapted to the needs of civilized society as his experience and imagination taught him to believe that civilized society was in fact constituted”). See also Harold J. Berman, THE ORIGINS OF WESTERN LEGAL SCIENCE, 90 Harv. L. Rev. 894, 912n26 (1977) (“The praetor would transmit such a complaint to a judge (*iudex*), who was a layman, appointed by the praetor ad hoc, with instructions to hold a hearing and, upon proof of the facts alleged in the complaint, to grant a remedy”).

<sup>9</sup> Lon L. Fuller, THE MORALITY OF LAW 65 (rev. ed. 1969) (“This chapter would devote itself to an analysis of the circumstances under which problems of governmental regulation may safely be assigned to adjudicative decision with a reasonable prospect that fairly clear standards of decision will emerge from a case-by-case treatment of controversies as they arise”).

<sup>10</sup> *Id.* at 64–65.

My short answer is that the administrative power should decide hard cases about the planning and allocation of valuable resources in a community by construing the grounds of law or deciding meta-interpretive disagreements about law based on arguments of policy and principle. I shall argue that, unlike the judiciary, the administrative power is endowed with original or delegated lawmaking authority, vested with democratic legitimacy, and equipped with specialized expertise and the procedural mechanisms to allow and encourage the active participation of the citizenry in the administrative process. In my view, these features entail that administrative decision-makers should reason from principle and policy in deciding hard cases about the planning and allocation of valuable resources in a community by construing the grounds of law or deciding meta-interpretive disagreements based on publicly validated expertise.

I shall argue, from a philosophical perspective, that the judiciary and the administrative power are two powers government that play different roles in a democratic polity that live under the rule of law, possess different democratic accountability, expertise, and substantive and procedural arrangements that should allow them to decide hard cases differently. I shall introduce, on the one hand, a modified working definition of *administrative hard cases* that emphasizes the moral or political nature of their sources and consequences in the planning and resource allocation in a democratic polity. On the other, I shall propose a framework that portrays how the administrative power actively partakes in the legal process or what I call the *path of the law* by creating, interpreting, enforcing, and adjudicating the law. This view of the administrative power is rooted in the core tenets of *Enlightenment Constitutionalism*. Throughout this dissertation I shall refer to legal institutions endowed with administrative power (*i.e.*, Cabinet departments, executive agencies, independent agencies, commissions, boards, and the like) as “*administrative decision-makers*”. Despite the significant substantive and procedural differences between administrative rulemaking and adjudication in the compared legal systems, I shall argue that what I call the *language of legality* ought to channel the way in which administrative decision-makers articulate publicly validated expertise and politics into the fabric of law based on arguments of policy and principle in a coherent fashion.

As a result, I argue that none of the challenges that have been traditionally raised against *judicial novelty* are successful against *administrative novelty* or *creativity* due to the active and distinct role that the administrative power plays in a modern democratic government and the legal process. I must clarify, however, that this is not a novel argument but just a projection of the core theoretical commitments at the jurisprudential level upon which some accounts of the executive branch and the administrative state have been developed in the public law literature. I describe the existence of different administrative law theories whose core tenets vary according to different theories about the law or adjudication by focusing on how should administrative decision-makers decide theoretical or meta-interpretive disagreements about the law. I suggest, furthermore, that the most influential administrative law theories, either normative or empirical in character, tend to be framed within a particular theory about the nature law or adjudication, albeit most of these jurisprudential theories have been devised to emphasize the *interplay legislature-courts* that tends to regard the administrative power as a mere executor of legislation.

I shall illustrate my arguments by presenting four real-world *administrative hard cases* drawn from the United States and Colombia. This comparative approach has a twofold purpose. First, it allows me to describe how legal institutions endowed with administrative power decide theoretical and meta-interpretive disagreements about law and how these administrative decisions may become final when courts uphold them. In doing so, I shall describe the way in which the administrative power is articulated in the compared legal systems according to different legal traditions, constitutional schemes, political structures, institutional, procedural, and substantive arrangements. Second, I will describe how the evolution of the administrative power in the compared legal systems has been consistent with different theories about the nature of law and adjudication to address the common concern of how administrative decision-makers should articulate expertise and politics into the fabric law without appealing to personal considerations.

Finally, I shall propose a philosophical account of the administrative power and appeal to HERMES, an imaginary administrator, to portray an ideal alternate approach of the way in which I think the administrative power should partake in the path of the law. Pacifica represents, in turn, the complex backdrop against which HERMES discharges his duties in deciding administrative hard cases. Nonetheless, this alternate jurisprudential representation of the administrative power is not meant to provide a normative solution of how such a fundamental task ought to be undertaken in light of a particular theory about the nature of law or adjudication. My aim is to provide a theoretical account of the prominent role of the administrative power in deciding hard cases and how I think that should be made to preserve the underlying values and ideals of a democratic polity that speaks the language of legality. Although I rely heavily on empirical theories that describe, explain, and account for how judicial and administrative decision-making *actually* unfolds in the United States and Colombia, my ideas are normative in nature and they seek to provide a theoretical and conceptual account of the nature, scope, and extent of the administrative power in modern constitutional democracies committed to the core tenets of *Enlightenment Constitutionalism*

## CHAPTER I

### HARD CASES

*"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."*

-Oliver W. Holmes<sup>1</sup>

In 1981, following a political shift in the White House, the Environmental Protection Agency construed the term "stationary source" as to allow States to treat all of the pollution emitting devices within the same industrial facility as if they fell within the same "bubble," for which one overall permit would be sufficient. In *Chevron v Natural Resources Defense Council*, the Supreme Court of the United States upheld the EPA's interpretation. The Court acknowledged that the Clean Air Act Amendments of 1977 was a detailed, complex, and thorough response to a major social issue. Despite such specificity, the 1977 Amendments contain no specific reference to the "bubble concept" or a specific definition of the term "stationary source." The disagreement was not about the Clean Air Act's truth or falsity, which excluded any empirical disagreement. The parties agreed it was a valid piece of legislation but disagreed about the meaning of the term "stationary source."

However, the dispute about the linguistic indeterminacy of such a term was only apparent because the real point of contention was about which interpretive methodology should be used to solve the case. On the one hand, environmental interest groups advocated for an interpretive methodology aimed at improving air quality levels regardless of cost. On the other, business interest groups argued in favor of an interpretive methodology aimed at improving air quality in the most cost-effective manner. Each one of the conflicting interpretive methodologies reflects an underlying political and moral philosophy about the permissible burdens that may be imposed on economic efficiency and production in seeking to improve the environment. The EPA ruled in favor of the pro-business interpretive methodology. The Court of Appeals did not. The United States Supreme Court in a landmark decision reversed the Court of Appeals and deferred to the EPA's administrative meta-interpretation.

Likewise, in 1996, in McBean Lagoon's case, an unprecedented social mobilization that occurred against the backdrop of a conflict of laws urged the newly created Colombian Ministry of Environment to repeal *ex officio* an environmental clearance granted back in 1992 to carry out the project "Caribbean Village Mount Sinai" in the contiguous zone of the mangrove located in Old Providence's McBean Lagoon National Park in Isla Providencia, Colombia. However, at the time the clearance was conferred the McBean Lagoon did not yet have the National Park status that was granted in 1994 with all the legal consequences that it entails. The Great View Company argued for a textualist interpretive methodology aimed at preserving acquired rights over subsequently enacted legislation, invoking the non-retroactivity principle and the legitimate expectation doctrine. Conversely, the Ministry of Environment advanced a purposive interpretive methodology more generous to environmental protection at the cost of acquired individual rights. Each one of the conflicting

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<sup>11</sup> *Towne v Eisner*, 245 U.S. 418, 425 (1918).



interpretive methodologies conveys an underlying political and moral philosophy about the permissible limitations that may be imposed on acquired rights and the non-retroactivity principle in favor of environmental protection. The Ministry of Environment decided the meta-interpretive disagreement in favor of the purposive pro-environmental interpretive methodology and the Higher Courts of Colombia decided to defer to the Ministry's administrative meta-interpretation without any further inquiry.

A common feature of *Chevron* and *McBean* is that both are *hard cases* insofar as law proved to be vague, insufficient, silent or undesired to solve the controversies, which in turn mirrored complex moral and political philosophy disagreements. While in *Chevron* the litigation arose from the vagueness of the Clean Air Act language, in *McBean* the controversy stemmed from the undesired legal consequences elicited by the straightforward application of the plain language of Law 99 of 1993. In both cases, regardless of legal traditions and constitutional arrangements, administrative agencies solved the controversies and the underlying moral and political philosophy conflicts, which entailed significant changes in the politics. The Higher Courts deferred to the administrative interpretations and decisions without any further inquiry.

What is a *hard case* and what we can we learn from it? This chapter addresses this question and analyzes what counts as a hard case in light of the ongoing tension between law's determinacy, its responsiveness, and the discretion allocated to decision makers by the constitutional conventions and legislatures according to different political, constitutional, substantive, and procedural arrangements.

In doing so, I will argue that the study of hard cases is not limited to expose the shortcomings of existing law and to explain how judges solve them. I shall argue, furthermore, that hard cases can also reveal complex moral and political philosophy conflicts whose solution may elicit profound changes in a polity that range from the recognition of new rights to the way in which public policy is made. For instance, in the *Chevron* administrative debate, the EPA ruled in favor of a purposive interpretation of the statutory language aimed at improving air quality in the most cost-effective manner<sup>2</sup> and the United States Supreme Court of Justice in a landmark decision deferred to the EPA's administrative interpretation<sup>3</sup> which entailed a significant change in the way in which administrative decision-making is carried out. Similarly, in the *McBean* case, the Ministry of Environment of Colombia ruled in favor of a purposive statutory interpretation and read two exceptions into the statute as to the application of the transition regime relying on the precautionary principle<sup>4</sup>. The Higher Courts of Colombia upheld the Ministry's decision without any further inquiry<sup>5</sup>, which in my view introduced a broader understanding of the precautionary principle at the expense of property rights and the non-retroactivity principle in environmental protection cases. A

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<sup>2</sup> 46 Fed. Reg. 50766 (October 14, 1981).

<sup>3</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 857 (1984).

<sup>4</sup> R. 024/96, enero 9, 1996, Minister of Environment [Ministerio del Medio Ambiente] (Colom.).

<sup>5</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 24, 2002, C.P: G. Mendoza Martelo, Expediente 5000-23-24-000-1996-6978-01(4027), (Colom.); Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 28, 2010, C.P: M. Rojas Lasso, Expediente 25000-23-24-000-2002-00192-01(4027), (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2012, Sentencia T – 695/12, Expediente T-3431944, (Colom.).

similar approach can be made at the constitutional level. For example, in the Commerce Clause cases in the United States, the recurring litigation about how far the federal government may go in regulating interstate and intrastate commerce led to many different Supreme Court opinions that entailed the fluctuation of the federal power to regulate interstate commerce over time. Likewise, the litigation over the meaning of the term “law’s empire” contained in Article 230 of the Colombian Constitution of 1991 led to an incremental interpretation of the constitutional precedent’s scope and controlling authority in the Colombian legal system.

This chapter proceeds as follows. First, I will describe the predominant theories about the nature of law and adjudication to portray the different accounts of law's determinacy and the challenges that hard cases raise against them. Then, I will present the concept of "hard case" and what are its sources according to traditional literature. In this chapter, I will focus on the different claims about law's determinacy and I will describe briefly the claims about judicial novelty, upon which I shall return on due course in Chapter Four. Second, I will analyze the traditional concept of “hard case” and its sources in light of landmark constitutional and statutory hard cases decisions to show how, regardless of the source, hard cases mirror complex moral and political philosophy conflicts.

I must enter two caveats. First, I will only describe the general structure of the literature of jurisprudence about law’s determinacy and it is not my purpose to make any original claim about it. Second, in the search for a working definition of hard case it is not my purpose, however, to carry out a thorough revision of its concept in light of different political, moral, and legal philosophies. Rather, I will present its concept and sources as they have been developed in the literature of jurisprudence.

\*

### *What Are Hard Cases and Why Do They Matter?*

To understand why hard cases are relevant to the study of the administrative power and its place in the path of the law, we need some working definition of what counts as a hard case and what are its sources. The concept of "hard case," like any other concept of analytical jurisprudence, is not absolute but relative insofar as it varies according to the concept of law that one embraces. Legal philosophy’s conceptual relativity is best exemplified in the famous *Case of the Speluncean Explorers* authored by LON FULLER in 1949<sup>6</sup>. The fictional case involves five amateur explorers members of the *Speluncean Society* who are trapped in a cave following a landslide that blocks the entrance<sup>7</sup>. The rescue task force, which is rapidly deployed to the spot, is able to talk to the explorers via radio and they are told that they are likely to starve to death before they can be rescued due to the lack of provisions and the harsh conditions of the area<sup>8</sup>. The explorers asked the physicians of the rescue task force whether

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<sup>6</sup> Lon L. Fuller, THE CASE OF THE SPELUNCEAN EXPLORERS, 62 Harv. L. Rev. 616 (1949) [hereinafter, Fuller, Speluncean Explorers]

<sup>7</sup> Id.

<sup>8</sup> Id.

they would be able to survive if they consumed the flesh of one of their number<sup>9</sup>. The physicians reluctantly answered this question in the affirmative<sup>10</sup>. After that, no further messages were received from within the cave. When then imprisoned explorers were finally released, it was learned that ROGER WHETMORE was killed and eaten by his companions<sup>11</sup>. The four explorers were convicted and sentenced to death by the Court of General Instances of the County of Stowfield for the murder of ROGER WHETMORE. The defendants appealed<sup>12</sup>.

Chief Justice TRUEPENNY delivered the decision of the Supreme Court of Newgarth<sup>13</sup>. For the Chief Justice, the statutory language is unambiguous, contains no exceptions<sup>14</sup> and ought to be applied regardless of any personal consideration on the matter<sup>15</sup>. Although the Chief Justice affirmed the death sentence, it suggested the Supreme Court issue a joint statement asking the Chief Executive for the application of the principle of executive clemency<sup>16</sup>. Justice FOSTER, on his side, suggested to set aside the conviction under the argument that the explorers were in a “state of nature” where the law’s of Newgarth are not applicable and thus they were allowed to agree to sacrifice one’s life to save the other four<sup>17</sup>. By contrast, Justice TATTING withdrew himself from the case and made no decision due to the complexity of the legal and emotional circumstances<sup>18</sup>. Justice KEEN affirmed the decision in the sense that the statutory language is unambiguous but criticized the Chief Justice’s proposal for the Supreme Court to ask for executive clemency because, in his opinion, such a petition would undermine the separation of powers<sup>19</sup>. Finally, Justice HANDY agreed to set aside the conviction under the argument that the Supreme Court ought to take into account public opinion and common sense in deciding the case<sup>20</sup>.

In this fictional hard case, LON FULLER portrays how the application of a normative provision under certain circumstances may elicit complex disagreements that suggest a myriad of solutions in light of different political, moral, and legal philosophies. Furthermore, commentators argue that FULLER’s fictional case mirrors a “microcosm” of the debate over the proper way to construe statutes<sup>21</sup>. Although FULLER mainly focuses on the conflicting consequences that arise from a hard case and its different solutions, his analysis also contributes to illustrate how different political, moral, and legal philosophies entail different concepts of a hard case and its sources, which sheds some light on how we can understand administrative hard cases.

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<sup>9</sup> Id. at 617 (1949).

<sup>10</sup> Id.

<sup>11</sup> Id. at 618.

<sup>12</sup> Id. at 619.

<sup>13</sup> For other cases from the fictional Supreme Court of Newgarth, *see, e.g.*, Lon L. Fuller, THE PROBLEMS OF JURISPRUDENCE 71-102, 628-36 (1949).

<sup>14</sup> Fuller, Speluncean Explorers, at 619 (“Whoever shall willfully take the life of another shall be punished by death N. C. S. A. (N. S.) § I2-A”).

<sup>15</sup> Id. At 619.

<sup>16</sup> Id.

<sup>17</sup> Id. at 620.

<sup>18</sup> Id. at 626 – 631.

<sup>19</sup> Id. at 631 – 637.

<sup>20</sup> Id. at 637 – 644.

<sup>21</sup> William N. Eskridge Jr., THE CASE OF THE SPELUNCEAN EXPLORERS: TWENTIETH- CENTURY STATUTORY INTERPRETATION IN A NUTSHELL, 61 Geo. Wash. L. Rev 1731 (1992).



Hard cases have been traditionally used to challenge different concepts of jurisprudence like obligation and adjudication, but I want to focus particularly on two of them: law's determinacy and judicial discretion. Such challenges have been raised in many ways and combinations to expose the ongoing tension between law's determinacy and responsiveness and to explain how, when law is ambiguous, insufficient, silent or undesired to solve a given case, judges look beyond legislation and precedent to decide a dispute. In other words, legal scholars disagree about what counts as a hard case and how to describe what judges do in deciding hard cases. For some theorists, in deciding a hard case, judges are *applying* legal norms; for others, they are *creating* legal norms. The point of contention is, essentially, *judicial novelty*<sup>22</sup>.

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### ***Law's Determinacy***

In this Chapter I will focus on the formal aspect of legality developed in detail by LON FULLER in *The Morality of Law*, particularly on law's determinacy and predictability<sup>23</sup>. On FULLER's account, legal norms ought to be general, clear, public, stable, consistent, prospective, and congruent with the way in which their text is administered and implemented by government<sup>24</sup>. For him, a total failure in any of those seven features "[...] does not simply result in a bad system of law; it results in something that is not properly called a legal system at all"<sup>25</sup>. Though FULLER's account of the values of legality have been considered as procedural, I agree with Professor JEREMY WALDRON that it can be best characterized as formal and structural insofar as it accentuates the forms of governance and the formal features that are supposed to distinguish the norms on which state action is based<sup>26</sup>. It must be underlined that FULLER's account finds its equivalent in the HARTIAN *principles of legality*. For Hart, law "[...] should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation [...]"<sup>27</sup>.

In another famous allegory, FULLER describes how a monarch called Rex undertakes the difficult task of creating a new legal system out of scratch for his kingdom and why he fails because he is unable to meet the requirements encompassed by the morality that makes law possible<sup>28</sup>. Regardless of the solution provided by FULLER to these problems<sup>29</sup>, this allegory helps us illustrate law's determinacy, certainty, predictability, and the challenges it faces in

<sup>22</sup> Scott J. Shapiro, LEGALITY, 274 (2011) [hereinafter, Shapiro, Legality]

<sup>23</sup> Lon L. Fuller, THE MORALITY OF LAW (rev. ed. 1969) [hereinafter, Fuller, The Morality of Law]

<sup>24</sup> Id. at 33-45

<sup>25</sup> Id. ("The demands for the inner morality of law, however, though they concern a relationship with persons generally, demand more than forebearances; they are, as we loosely say, affirmative in nature: make law known, make it coherent and clear, see that your decisions as an official are guided by it, etc.").

<sup>26</sup> Jeremy Waldron, THE CONCEPT AND THE RULE OF LAW, 43 Ga. L. Rev 1, 7 (2008).

<sup>27</sup> H.L.A. Hart, THE CONCEPT OF LAW, 273-74 (3rd ed., 2012) [hereinafter, Hart, CL] ("The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality").

<sup>28</sup> Fuller, The Morality of Law, Chapter II.

<sup>29</sup> Id. at 79.

complex legal systems. After many failed attempts, Rex decided to publish a code of general rules yet it is for many a “masterpiece of obscurity”<sup>30</sup>. A group of legal experts conducted a thorough review of the code and concluded that there is not a single sentence in it that could be understood either by an ordinary citizen or a lawyer<sup>31</sup>. Indignation became general among the people and a banner appeared before the royal palace that said: “*How can anybody follow a rule that nobody can understand?*”<sup>32</sup>. Then Rex instructed his staff of legal experts to “purge the code of contradictions” to prepare a code that is general, clear, consistent, and public. Nevertheless, before the new code becomes effective, Rex realized that the revision of the code's original draft took so much time and that the country had gone through important economic and institutional changes that required significant modifications in the law<sup>33</sup>. As soon as the new code became legally effective, it was subjected to daily “amendments.” Popular discontent mounted again and an anonymous pamphlet circulated with the message: “*A law that changes every day is worse than no law at all*”<sup>34</sup>.

In *The Constitution of Liberty*, HAYEK suggests that there is a strong connection between law’s determinacy, predictability, and freedom, in the sense that the laws of the state must establish what are the consequences if one does this or that conduct, in order to plan and act accordingly towards fulfilling personal aims<sup>35</sup>. In practical terms, these two values often appear intertwined and related to the non-retroactivity principle aiming at the preservation of law’s aptitude to rule human conduct. Furthermore, WALDRON explains that law’s predictability implies that “[...] (1) legal practice and legal decision-making should be such as to give rise to expectations, and (2) these expectations should, by and large, be respected by other legal decisionmakers”<sup>36</sup>. On this formal and institutional account of legality, the state should discharge its duties in an orderly predictable way, giving individuals sufficient notice by publishing the legal norms upon which its actions will be based and from which it should not depart even if it is politically advantageous<sup>37</sup>. Fuller's allegories represent the importance of law's determinacy in modern constitutional democracies. On the conception of law's determinacy that I have presented, I think that if a society is to be ruled by law, individuals need to know, or at least be able to predict, the legal consequences that their actions might entail planning how to fulfill their aims. To that end, legal norms ought to be certain and predictable in describing, in an intelligible way, the factual situation they seek to regulate and the legal consequences that its occurrence entails.

The question about law’s determinacy can be tackled from a comparative law perspective and a legal philosophy perspective.

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<sup>30</sup> Fuller, *The Morality of Law*, at 36.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.* at 37.

<sup>35</sup> F.A. Hayek, *THE CONSTITUTION OF LIBERTY* 142, 153 (1960).

<sup>36</sup> Jeremy Waldron, *STARE DECISIS AND THE RULE OF LAW: A LAYERED APPROACH*, 111 *Mich. Law Rev.* 1, 11 (2012).

<sup>37</sup> Waldron, *supra* note 26, at 7.

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### *Law's Determinacy in Comparative Perspective*

Conventional wisdom indicates that law strives to attain its determinacy and predictability by different means that vary according to the legal traditions upon which a legal system can be underpinned. Yet such a division is merely theoretical because practice shows that modern legal systems rely on both legislation and precedent to communicate standards of conduct. In the compared legal systems, the Colombian Constitutional Court read into article 230 of Colombia's Constitution the judicial precedent's controlling authority<sup>38</sup> and the United States Supreme Court has repeatedly ruled that, in reviewing an agency's statutory interpretation, judges should question whether Congress addressed directly the question at issue. Nonetheless, the theoretical and historical division between the civil law and common law legal traditions is relevant to my argument in the sense that it traces back the origins of the methods that have been devised in pursuing law's determinacy and predictability.

On the one hand, the *civil law legal tradition* rests upon the logic and rationality<sup>39</sup> of written laws as the basis of the certainty and predictability of law and legal reasoning<sup>40</sup>. In this context, the values of certainty and predictability are embodied in the truism of legislative supremacy that states "legislation is whatever the legislature wants it to be law"<sup>41</sup>, which suggests that the legislative power shall be exclusively vested in a legislature that shall make, amend, and repeal the law<sup>42</sup>. This truism is best exemplified by the codification method devised to create, unify, and systematize law in a written and intelligible fixed text enacted by the legislature and available to the general public<sup>43</sup>. However, not even the drafters of the *Code Napoleon*, who were reacting against the *Ancien Régime's* unbound case-to-case discretion, were able to attain a total degree of determinacy<sup>44</sup>. In fact, PORTALIS, in

<sup>38</sup> Fort the general discussion on this point, *see, e.g.*, Carlos Bernal Pulido, EL DERECHO DE LOS DERECHOS (2005); Carlos Bernal Pulido, EL PRECEDENTE EN COLOMBIA, 21 Revista Derecho del Estado, 84 (2008); Diego López Medina, EL DERECHO DE LOS JUECES (2002).

<sup>39</sup> C. J. Friedrich, The Ideological and Philosophical Background, *in* THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD 3 (Bernard Schwartz ed., 1956).

<sup>40</sup> André Tunc, The Grand Outlines of the Code, *in* THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD 29 - 30 (Bernard Schwartz ed., 1956).

<sup>41</sup> 1 Bernhard Windscheid, TRATADO DE DERECHO CIVIL ALEMÁN 1 (Fernando Hinestrosa trans. 1987).

<sup>42</sup> Jean Carbonnier, DROIT CIVIL, 13, 14, (2004).; 1 Ambroise Colin & Henri Capitant, CURSO ELEMENTAL DE DERECHO CIVIL, 19, (Démofilo de Buen trans. 1922) ("[U]na ley es una regla o disposición obligatoria para los ciudadanos, dictada por la autoridad soberana y general en su aplicación"); Henri Mazeaud, Leon Mazeaud, Jean Mazeaud & François Chabás, INTRODUCTION À L'ÉTUDE DU DROIT 124 (12d ed. 2000).; C. J. Friedrich, The Ideological and Philosophical Background, *in* THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD 3 (Bernard Schwartz ed., 1956).

<sup>43</sup> C. J. Friedrich, The Ideological and Philosophical Background, *in* THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD, 3, (Bernard Schwartz ed., 1956).

<sup>44</sup> Tunc, *supra* note 40, at 29 - 30. Tunc translated the excerpt of Portalis speech from French to English. "Laws are not pure acts of will; they are acts of wisdom, of justice, and of reason. The legislator does not so much exercise a power as fulfill a sacred trust. One ought never to forget that laws are made for men, not men for laws; that laws must be adapted to the character, to the habits, to the situation of the people for whom they are drafted; that one ought to be wary of innovations in matters of legislation, for if it is possible, in a new institution, to calculate the merits that theory may promise us, it is not possible to know all the disadvantages, which only experience will reveal; that the good ought to be kept if the better is dubious; that in correcting abuses, one must also foresee the dangers of the correction itself; that it would be absurd to indulge in absolute ideas of perfection in matters capable of a relative value only (...)"

expounding the reasons why the *Code Napoleon* should be passed into law by the *Assemblée Nationale Française*, explained that no lawgiver is able to foresee and regulate in detail all the aspects of social conduct and that it is the duty of the judiciary to grasp the general spirit of the law to decide particular cases and update written law<sup>45</sup>. Thus, PORTALIS emphatically concludes that legislation ought to be supplemented by the judicial precedent<sup>46</sup>.

On the other hand, the *common law legal tradition* is rooted in the experience and pragmatism of the *stare decisis* doctrine<sup>47</sup>. For some commentators, the judiciary is subject to the supremacy of the common law as a way to prevent any interference from the other branches of government and judicial arbitrariness<sup>48</sup>. Unlike the civil legal tradition, the common law does not attempt to lay down the law through general principles and written codes<sup>49</sup>, but rather it seeks to discover the law on a case-to-case basis<sup>50</sup> for which the *stare decisis* doctrine emerged as a safeguard against an arbitrary administration of justice<sup>51</sup>. The United States Supreme Court asserts that the *stare decisis* doctrine is a “self-governing principle” entrusted with the crucial task of preserving a judicial system that is not based upon an arbitrary discretion<sup>52</sup>, because it promotes “[...] evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”<sup>53</sup>. The Supreme Court ruled, moreover, that the

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<sup>45</sup> Jean M. Portalis, DISCOURS PRÉLIMINAIRE DU PREMIER PROJET DE CODE CIVIL 19 (1999) (“L’office de la loi est de fixer, par de grandes vues, les maximes générales du droit: d’établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière”).

<sup>46</sup> Id. (“C’est au magistrat et au jurisconsulte, pénétrés de l’esprit général des lois, à en diriger l’application. De là, chez toutes les nations policées, on voit toujours se former, à côté du sanctuaire des lois, et sous la surveillance du législateur, un dépôt de maximes, de décisions et de doctrine qui s’épure journallement par la pratique et par le choc des débats judiciaires, qui s’accroît sans cesse de toutes les connaissances acquises, et qui a constamment été regardé comme le vrai supplément de la législation”).

<sup>47</sup> Roscoe Pound, THE PLACE OF JUDGE STORY IN THE MAKING OF AMERICAN LAW, Am. L. Rev. 676, 41, (1914) (“Continental critics refer to ours as a system of judicial empiricism. For at the basis of our common law is the idea that experience will afford the most satisfactory foundation for standards of action and for rules of decision; the idea that law is not to be made arbitrary by a act of the sovereign will, but is to be discovered by judicial experience of the rules and principles which in the past have accomplished or have failed to accomplish justice”).

<sup>48</sup> Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 20 (1957) (“The supremacy of law, a fundamental dogma of our common law, one, moreover, which we trace back to Magna Charta, is but the supremacy of right divorced at the Reformation from its theological element”).

<sup>49</sup> Frederick Pollock, The Science of Case-Law, in ESSAYS IN JURISPRUDENCE AND ETHICS, 242, (1882).

<sup>50</sup> Roscoe Pound & Theodore F. T. Plucknett, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 14 - 16, (1927).

<sup>51</sup> Tunc, supra note 40, at 19. (“In England, protection against an arbitrary administration of justice was sought in two rules that became fundamental principles of the common law: the rule of *stare decisis* and the rule that prescribes the determination of the facts by a jury after a public trial.”)

<sup>52</sup> Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The Supreme Court held, “[...] that ‘the doctrine of *stare decisis* is of fundamental importance to the rule of law.’ Although we have cautioned that ‘*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision’, [...], it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion’. [...] (*stare decisis* ensures that “the law will not merely change erratically” and ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals’).”

<sup>53</sup> Payne v. Tennessee, 501 U.S. 808 (1991). “[...] [*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. [...] Adhering to

*stare decisis* doctrine preserves the rule of law and judicial legitimacy<sup>54</sup>.

In legal systems built upon the *common law legal tradition* like the United States, legislation plays a crucial role in fulfilling certain goals for which legislative lawmaking appears to be the most appropriate solution, for instance, the legislation enacted to attend the New Deal challenges and the development of a welfare state<sup>55</sup>. Commentators posit that the legislature has the primary responsibility of updating policy preferences to accommodate law to new situations, clarifying obscure statutory or judge-made rules, or even restoring original policy preferences via statutory amendments that might entail overriding Supreme Court statutory interpretation decisions under certain circumstances<sup>56</sup>. Based on empirical evidence, Professor WILLIAM ESKRIDGE suggests that the “[...] evolution of statutes is influenced not just by changing circumstances, but also by changing preferences in the political system”<sup>57</sup>.

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### *A Jurisprudential Approach: Is Law’s Determinacy Attainable?*

As ARISTOTLE observed, the communication of legal norms, either by statutes or precedent, is limited by the nature of the subject matter of the situation that the lawmaker seeks to regulate<sup>58</sup>. Indeed, as I shall explain in Chapter Five, legal institutions often use general, ambiguous, imprecise, incomplete, and open-textured written formulas to attend to the community’s competing interests or to address different audiences at the same time<sup>59</sup>.

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precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right’”.

<sup>54</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, at 866, 868 (1992). For a detailed analysis of this case and the relationship between law’s predictability and the *stare decisis* doctrine, see Waldron, *supra* note 36, at 11.

<sup>55</sup> Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES, 44 (1982); Robert Stern, THE COMMERCE CLAUSE AND THE NATIONAL ECONOMY, 1933-46, 59 Harv. L. Rev. 645 (1946); Eduardo García de Enterría, LA LENGUA DE LOS DERECHOS. LA FORMACIÓN DEL DERECHO PÚBLICO EUROPEO TRAS LA REVOLUCIÓN FRANCESA, 145-153 (1994).

<sup>56</sup> Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS, 164 - 165 (William Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter, Hart & Sacks, Legal Process] (“A legislature has a primary, first-line responsibility to establish the institutions necessary or appropriate in the everyday operation of government. [...] In the American legal system final responsibility for making such changes is entrusted to the legislature, subject to such limits as the governing constitution places upon the legislature’s powers and subject also to the extraordinary procedure of constitutional amendment. The function is inherently discretionary. For the number of potential changes that can be made in existing arrangements is infinite, and choice among the infinity of possibilities can never be controlled by any ‘scientific’ test”); Matthew R. Christiansen & William N. Eskridge, Jr., CONGRESSIONAL OVERRIDES OF SUPREME COURT STATUTORY INTERPRETATION DECISIONS, 1967 – 2011, 92 Texas L. Rev. 1317, 1319 - 1321(2014); Jeb Barnes, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004).

<sup>57</sup> William Eskridge, Jr., OVERRIDING SUPREME COURT STATUTORY INTERPRETATION DECISIONS, 101 Yale L. J. 331, 415 (1991)

<sup>58</sup> 5 Aristotle, NICOMACHEAN ETHICS, 317 (H. Rackham trans. 1926) (“This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality. In fact this is the reason why things are not all determined by law: it is because there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary. For what is itself indefinite can only be measured by an indefinite standard, like the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case”).

<sup>59</sup> Timothy A. O. Endicott, VAGUENESS IN LAW; Timothy A. O. Endicott, Legal Interpretation, in ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW, 31 - 55 (A. Marmor ed., 2012).



Another limitation to the certainty and predictability of law is given, furthermore, by the *realist* claim that law ought to be responsive to the circumstances it purports to rule<sup>60</sup>. Professors SELZNICK and NONET postulated that law should be responsive in order to perceive “[...] social pressures as sources of knowledge and opportunities for self-correction”, for which legal institutions require the “[...] guidance of purpose” understood as a “[...] set of standards for criticizing the established practice, thereby opening ways to change”<sup>61</sup>. Likewise, Professor MIRJAN DAMAŠKA argues that responsive or what he calls “activist law” is likely to be consistent with an activist state that “[...] strives toward a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens”, as opposed to what he calls a “reactive state” whose task is only to “[...] support existing social practices”<sup>62</sup>. In his view, an activist state is called upon to play an active role in the legal process<sup>63</sup>.

This ongoing tension between law’s certainty and its responsiveness elicited an intense debate among legal philosophers. In fact, H.L.A. HART suggests that neither legislation nor precedents are enough by themselves to give law the generality, determinacy, and predictability that it requires for communicating a standard of behavior<sup>64</sup>. Regardless of the method used by the lawgiver, HART considers that legal norms can be neither as close as to paralyze the legal system nor as wide as to make the application of the norm a personal choice<sup>65</sup>. Despite the profound theoretical disagreement with HART’s theory, RONALD DWORKIN also acknowledges that there are cases where existing legal norms do not dictate a solution to the case at hand and that it is the duty of the judge to find the right answer<sup>66</sup>. An intermediate point of closeness and openness is therefore required by the aims or purposes attributed to the legal norm, whose application may call for discretionary judgments.

For jurisprudence, the way in which a legal system strives to attain its determinacy, predictability, and responsiveness is controversial and varies according to the concept of law or adjudication that one embraces. Indeed, different theses have been advanced over the years for and against *law’s conceptual determinacy*, all of which are committed to different core

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<sup>60</sup> Jerome Frank, MR. JUSTICE HOLMES AND NON-EUCLIDIAN LEGAL THINKING, 17 Cornell L. Rev. 568, 586 (1932) (“All those known as legal realists or legal sceptics are eager-perhaps altogether too eager-to improve the judicial system, to make it more efficient, more responsive to social needs, more ‘just’, if you like that word”); Lon L. Fuller, AMERICAN LEGAL REALISM, 82 U. Pa. L. Rev. 429, 434 (1934) (“One of the chief services of the realist school has been to enlarge the field of the legally relevant and to invest “extra-legal” considerations with a species of respectability”).

<sup>61</sup> Philippe Nonet & Philip Selznick, LAW AND SOCIETY IN TRANSITION, TOWARDS RESPONSIVE LAW 77 (1978). SELZNICK and NONET highlight that ROSCOE POUND was one of the pioneers of the responsive law movement. See also 1 Roscoe Pound, JURISPRUDENCE 350 (1959)

<sup>62</sup> Mirjan Damaška, THE FACES OF JUSTICE AND STATE AUTHORITY 72, 80 (1986) (“The other position [activist state] authorizes the state to pursue and impose particular views of the good society and to lead society in desirable directions. According to the progressive variant of this position, existing social institutions can be transformed according to the goals espoused by the government; according to the conservative variant, spontaneous social change can and should be resisted if it detracts from governmental conceptions of the good life”).

<sup>63</sup> Id. at 92.

<sup>64</sup> Timothy A. O. Endicott, Legal Interpretation, in ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW, 127 (A. Marmor ed., 2012).

<sup>65</sup> Id.

<sup>66</sup> Ronald Dworkin, LAW’S EMPIRE 225 – 275 (1986) [hereinafter, Dworkin, LE].

tenets. However, it is not my purpose to analyze whether or not law is *conceptually determinate* or to introduce an original view about law's determinacy or indeterminacy. Rather, I will focus on the relationship between law's determinacy and what counts as a hard case in light of the predominant theories about the nature of law and adjudication.

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### ***Legal Formalism***

Let me go back to the *Case of the Speluncean Explorers*. Recall Justice KEEN's argument to affirm the criminal conviction by enforcing the plain letter of the law regardless of any moral or political consideration about the facts of the case. In his own words, "[...] from that principle [supremacy of the legislative branch of government] flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice"<sup>67</sup>. Examples of this sort abound in the real world. For instance, the United States Supreme Court has advanced arguments of a similar character at the constitutional and statutory levels. Consider *Lochner vs. New York*<sup>68</sup>, where the United States Supreme Court ruled that liberty of contract is implicit in the Due Process Clause and struck down a New York statute that limited the hours that bakers could work in order to protect their health under the argument that this was the only solution in light of the XIV Amendment<sup>69</sup>.

Also, consider *Reagan v. Farmers' Loan & Trust Co.* where the Supreme Court held that administrative agencies were "mere instruments of legislation"<sup>70</sup>. On April 3, 1891, the Legislature of the State of Texas enacted an act to create a railroad commission. The first section of the act introduced the requirements concerning the appointment and qualification of the commissioners, the second structured the organization of the commission, and the third established the powers and duties of the commission<sup>71</sup>. The commission, acting according to the powers given to it by the state legislature, issued a "body of rates" that was challenged, as a whole, by the plaintiff under the argument that it was "unreasonable and unjust"<sup>72</sup>. The

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<sup>67</sup> Fuller, *Speluncean Explorers*, at 633.

<sup>68</sup> *Lochner vs. New York*, 198 U.S. 45, 76 (1905).

<sup>69</sup> For some commentators, *Lochner* is an infamous example of *legal formalism* due to the Supreme Court's argument that striking down the New York statute was the only plausible solution under the XIV Amendment. See Frederick Schauer, *FORMALISM*, 97 *Yale L. J.* 509, 511-12 (1988) ("The formalism in *Lochner* inheres in its *denial* of the political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all. [...] Justice Peckham's language suggests that he is explaining a precise statutory scheme rather than expounding on one word in the Constitution. It is precisely for this reason that his opinion draws criticism. We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion. What strikes us clearly as a political or social or moral or economic choice is described in *Lochner* as definitionally incorporated within the *meaning* of a broad term. Thus, choice is masked by the language of linguistic inexorability".)

<sup>70</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396 (1894).

<sup>71</sup> *Id.* ("Sec. 3. The power and authority is hereby vested in the railroad commission of Texas and it is hereby made its duty, to adopt all necessary rates, charges, and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction").

<sup>72</sup> *Id.*

defendant denied the power of the courts to review the issue under the argument that “[...] fixing rates for carriage by a public carrier is a matter within the power of the legislative branch of government and beyond the examination by the courts”<sup>73</sup>. In an opinion written by Justice BREWER, the Supreme Court asserted jurisdiction to review whether the rates issued by the railroad commission were reasonable and just in the case at hand<sup>74</sup>. On the question of the power of the states to regulate private activities that affect the public interest, the Supreme Court ruled that a “[...] commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation”<sup>75</sup>.

Drawing on Justice OLIVER WENDELL HOLMES' dissenting words in *Lochner* that “general propositions do not decide concrete cases”<sup>76</sup>, some may describe Justice KEEN, Justice PECKHAM, and Justice BREWER as *formalists* for their arguments in favor of the “mechanical” application of the law<sup>77</sup>. However, what is *formalism*? Legal philosophers explain that it is not an easy task to characterize or describe *legal formalism* due to the different statements about what it stands for that abound in the literature<sup>78</sup>, however. Bear in mind Chief Justice JOHN MARSHALL's words in *Osborn vs. Bank of the United States*<sup>79</sup>, where he argued that “[c]ourts are the mere instruments of the law, and can will nothing. [...] Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 397 (“The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation”). See also *Railroad Commission Cases*, 116 U. S. 307, 331 (1886); *Dow v. Beidelman*, 125 U. S. 680, 689, 8 Sup. Ct. 1028, (ruling that the power to regulate is not itself without limit); *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, (ruling that the question of the reasonableness of a rate of charge for transportation by a railroad company fall within the scope of judicial investigation); *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, (“The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates”).

<sup>75</sup> *Reagan v. Farmers' Loan & Trust Co.*, *supra* note 70, at 394. See also *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348; *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 343-44 (1886) (“Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the state. This we held, in *Ruggles v. Illinois*, included laws in force when the charter was granted, and those which came into operation afterwards as well”).

<sup>76</sup> *Lochner*, *supra* note 69, at 76 (Holmes J., dissenting.).

<sup>77</sup> For the discussion about the influence of Justice DAVID J. BREWER in the formation of the transmission belt theory of administration see Chapter Three.

<sup>78</sup> Schauer, *supra* note 69; Martin Stone, *Formalism in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, (J. Coleman & S. Shapiro eds. 2002); Ronald Dworkin, *The Model of Rules I in TAKING RIGHTS SERIOUSLY*, 15 - 16 (1978). On the critics of “mechanical jurisprudence”, Dworkin explains: “They [realists] think that when we speak of ‘the law,’ we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us. The theory that there are such rules and chains they call ‘mechanical jurisprudence,’ and they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule. So far they have had little luck in caging and exhibiting mechanical jurisprudents (all specimens captured-even Blackstone and Joseph Beale-have had to be released after careful reading of their texts)”.

<sup>79</sup> 22 U.S. 738, 866 (1824).



purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law". According to the literature of jurisprudence, *legal formalism* claims that law is "complete" and unequivocal in regulating all cases and that the validity of its content can be established independently from any moral or political argument<sup>80</sup>. On the assumption that law is not only a matter of practice but also a "*rational science*," BLACKSTONE claimed that the "[...] judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact [...]. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on settled and invariable principles of justice"<sup>81</sup>. COKE indicated, furthermore, that judges could identify, through "artificial reason", the solutions dictated by formal or positive legal rules without the appeal to extralegal considerations or personal preferences<sup>82</sup>.

Unlike BLACKSTONE and COKE<sup>83</sup>, LANGDELL suggested that legal outcomes are strictly a matter of "syllogistic deduction"<sup>84</sup> insofar as the straightforward, mechanical, or logical application of formal or positive legal rules such as statutes and reported court cases can produce decisions in the vast majority of cases<sup>85</sup>. Legal philosophers postulate that *legal formalism* rests upon the assumption that law is complete, formal, and rational, and that rules can be deduced from general fundamental principles<sup>86</sup>. On this assumption, commentators suggest that *legal formalism* claims that, in the vast majority of cases, the application of a legal rule is "clear without interpretation" because the law provides a basis for deciding cases "without reference to policy or morality", which implies, in turn, that judges are not required

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<sup>80</sup> Hart, CL, Ch. 7; Schauer, *supra* note 69; Stone, *supra* note 78, at 170 - 171; Thomas Grey, LANGDELL'S ORTHODOXY, 45 U. Pitt. L. Rev. 1 (1983); Morton J. Horowitz, THE TRANSFORMATION OF AMERICAN LAW 1870 - 1960, 199 (1992); Roberto Unger, THE CRITICAL LEGAL STUDIES MOVEMENT, 1 (1986) (explaining that, on the formalist account, law is not an instrument of social policy); Duncan Kennedy, LEGAL FORMALITY, 2 J. Legal Stud. 351, 355 (1973).

<sup>81</sup> William Wiecek, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (NY: Oxford Univ. Press 1998) (quoting Blackstone, and characterizing this as the "canonical justification"). 1 William Blackstone, COMMENTARIES \*69. Schauer explains that "[i]t is important, however, to understand the relationship between the linguistic and the ontological questions for those of Blackstone's vision. Blackstone's view that certain abstract terms definitionally incorporate a wide range of specific results is tied intimately to his perception of a hard and suprahuman reality behind these general terms". Schauer, *supra* note 69, at 513 (1988).

<sup>82</sup> 1 Edward Coke, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON, at 97b (Charles Butler ed., 1985) (1628).

<sup>83</sup> Frederick Schauer, LEGAL REALISM UNTAMED, 91 Texas L. Rev. 749, 753 (2013).

<sup>84</sup> For the discussion about *legal formalism* and *syllogistic reasoning*, see, e.g., Stone, *supra* note 78, at 167 - 170.

<sup>85</sup> Christopher C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii - ix (1871) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer [...]. The number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable in their number."); Christopher C. Langdell, TEACHING LAW AS A SCIENCE, 21 Am. L. Rev. 123,123 (1887) (describing law as a rational science).

<sup>86</sup> Grey, *supra* note 80, at 40 - 41.

to go beyond the law and exercise any law-making power to make a decision<sup>87</sup>.

In short, Professor BRIAN LEITER suggests that *legal formalism* is committed to three tenets<sup>88</sup>. First, he explains, law is rationally complete and determinate. Second, judging is "mechanical." Third, in his view, law's rationality entails that legal reasoning is "autonomous" because formal or positive law suffices to justify an outcome to a legal question without appeal to non-legal reasons<sup>89</sup>. On the *formalist* account, a judge would not face much difficulty in reviewing the validity of a bill that was not presented to the President for his signature, the inscription of a candidate to run for the presidency of the United States who is 33 years old or the issuance of notice of proposed rulemaking without the statement of the time, place, and nature of public rule making proceedings. By a straightforward reading of Articles I Section 7 and II Section 1 of the United States Constitution, it's clear that, in order to become law, a bill ought to be approved by the House of Representatives and the Senate, and ought to be presented to the President of the United States for his signature<sup>90</sup>; and that the President of the United States must be at least 35 years old<sup>91</sup>, respectively. Likewise, Section 553(b)(1-3) of the U.S. Administrative Procedure Act sets forth that notice of rulemaking ought to contain a statement of the time, place, and nature of public rule making proceedings<sup>92</sup>.

Another example of this sort can be found in Article 189 of the Colombian Constitution, which states clearly that the President of the Republic shall appoint the Ministers of the Cabinet without any congressional consent or authorization in that respect. Also, by a simple

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<sup>87</sup> Hart, CL, 129; Horowitz, *supra* note 80, at 9, 16, 254 (1992); Roberto Unger, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 204 (1976); Ernest J. Weinrib, LEGAL FORMALISM: ON THE IMMANENT RATIONALITY OF LAW, 97 Yale L. J. 949 (1988); Schauer, *supra* note 69; Stone, *supra* note 78; Brian Leiter, REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM, 99 Colum. L. Rev. 1138, 1143 - 1146 (1999); Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING, (2009) (describing the historic origins of formalism); Thomas C. Grey, FORMALISM AND PRAGMATISM IN AMERICAN LAW (2014) (describing the core tenets of legal formalism).

<sup>88</sup> Leiter, *supra* note 87, at 1145 - 1146. LEITER introduces a special terminology in support of his characterization of *legal formalism*: "Let us call 'the class of legal reasons' the class of reasons that may be legitimately offered in support of a legal conclusion, and that is such that, when it supports the conclusion, the conclusion is *required*" as a matter of law." The class of legal reasons then will include not only (a) the valid sources of law (e.g., statutes, precedents, etc.), but also (b) the interpretive principles through which such sources yield legal rules, as well as (c) the principles of reasoning (e.g., deductive, analogical) by which legal rules and facts are made to yield legal conclusions. Let us say that the law is "rationally determinate" if the class of legal reasons *justifies* one and only one outcome to a legal dispute. Finally, let us say that judging is 'mechanical' insofar as judges, in reaching conclusions about legal disputes have no discretion. Judges exercise "discretion" if they either (a) reach conclusions about legal disputes by reasoning in ways not sanctioned by the class of legal reasons; or (b) render judgments not justified by the class of legal reasons."

<sup>89</sup> *Id.*

<sup>90</sup> U.S. CONST. Art. 1 § 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it").

<sup>91</sup> U.S. CONST. Art. 2 § 1.

<sup>92</sup> 5 U.S.C. § 553(b)(1-3) ("(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

- (1) A statement of the time, place, and nature of public rule making proceedings;
- (2) Reference to the legal authority under which the rule is proposed; and
- (3) Either the terms or substance of the proposed rule or a description of the subjects and issues involved").

reading of Article 66 of Colombia's General Administrative Procedure Act, it is clear that administrative adjudications shall be published to become legally effective. In all of these cases, regardless of the most sophisticated linguistic, legal or philosophical construction, it would be very difficult to argue against law's determinacy to validly claim that a bill can become a law in the United States before been presented to the President, that notice of proposed rulemaking is valid without the statement of the time, place, and nature of public rule making proceedings, that in Colombia Ministers must be confirmed by Congress, or that a non-published administrative rule is legally effective.

All these cases share three common features that make them *easy cases*<sup>93</sup>. First, law is determinate due to the existence of clear formal or positive legal rules that address directly the question at issue and provide a correct legal outcome. Second, because formal or positive laws are clear as to their text and purpose, they can be applied mechanically insofar as they leave little or no room for interpretation. Third, on the assumption that law is determinate and rules can be applied mechanically, existing law suffices to justify the legal outcome without the appeal to non-legal supplements like politics or morality. In other words, *easy cases* are the cases that can be decided mechanically without resort to politics or morality due to the existence formal or positive legal rules that address clearly the question at issue and provide one legal outcome. Nonetheless, this is not the scenario to discuss whether or not *legal formalism* is a theory of adjudication that only accounts for *easy cases*.

Conversely, on the *formalist* account, one can argue that *hard cases* arise when law is indeterminate because it does not dictate one answer to the question at issue, which entails that the decision-maker cannot decide the case mechanically without the appeal to politics or morality. Think, for example, what would happen if the President of the United States turns 35 on the exact moment of the inauguration? Thus, *hard cases* raise a straightforward challenge against the tenets of *legal formalism*, which is just a rough simplification of the criticism with which it has been grappling for decades. Indeed, *formalists* addressed this objection and claimed that, though there might be cases where the existing legal rules do not provide an answer, the decision maker must derive the rule from existing principles, whose abstract formulation provide an unambiguous coverage of all cases that may arise in a legal system<sup>94</sup>.

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### ***Legal Realism***

Let me go back, one more time, to the cases of the *Speluncean Explorers*, *Lochner*, and *Reagan*. One may argue that, while is true that formal or positive rules are clear in mandating the conviction of the explorers as Chief Justice TRUEPENNY and Justice KEEN claim<sup>95</sup>, the

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<sup>93</sup> For a full discussion about easy cases and the sources of hard cases, see, e.g., Frederick Schauer, EASY CASES, 58 S. Cal. L. Rev. 399 (1985) ("With these types of hard cases in mind, we can tentatively define an easy case as one having *none* of these characteristics of hardness, one in which a clearly applicable rule noncontroversially generates an answer to the question at hand, and one in which the answer so generated is consistent both with the purpose behind the rule and with the social, political, and moral climate in which the question is answered".)

<sup>94</sup> Grey, *supra* note 80, at 12-13.

<sup>95</sup> Fuller, *Speluncean Explorers*, at 619.

jarring interpretations of the statute advanced by the other Justices of the fictional Supreme Court of Newgarth suggest that there is more than one answer to the question at issue in light of different canons of interpretation. Furthermore, one can make the argument that, though striking down New York's Bakeshop Act might seem as the only possible solution under the XIV Amendment of the United States Constitution as Justice PECKHAM argued, the dissenting opinions of Justice HARLAN (joined by Justices WHITE and DAY) and Justice HOLMES suggests the otherwise, under the arguments that liberty of contract may be subjected to state regulations<sup>96</sup> and that the judgment relies on an economic theory not embraced by the Constitution<sup>97</sup>, respectively.

Likewise, one might argue that, though Justice BREWER explained that the commission is a mere instrument devised to execute the fully expressed will of the legislature, the statute passed by the Legislature of the State of Texas did not fix a maximum rate beyond which any charge would be unreasonable and that such an estimation ought to be made by the commission in a piecemeal fashion according to the common law in order to avoid future judicial censure<sup>98</sup>. Although the Supreme Court reached a unanimous decision in *Reagan*, commentators explain in detail the non-legal circumstances that led the Supreme Court to water-down the formalistic *transmission belt theory* and subject the state police power to fix rates to the common law rule of reasonableness<sup>99</sup>.

Hence, the existence of different interpretations of the applicable formal or positive rules in these cases indicate that law is rather indeterminate and that judges may have to look beyond

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<sup>96</sup> *Lochner*, *supra* note 69, at 68 (Harlan J., dissenting.) ("I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety".)

<sup>97</sup> *Lochner*, *supra* note 69, at 75-6 (Holmes J., dissenting.) Justice Holmes explained that "[t]his case is decided upon an economic theory which a large part of the country does not entertain. [...] Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. [...] I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law".

<sup>98</sup> *Reagan v. Farmers' Loan & Trust Co.*, *supra* note 70, at 396 - 400; *Chicago & G. TR. Y. CO. vs. Wellman*, 143 U.S. 339, 344 (1892) ("The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.")

<sup>99</sup> Gerard C. Henderson, RAILWAY VALUATION AND THE COURTS, 33 Harv. L. Rev. 902, 905 (1919) ("But the railroads represented immense property investments. The granger legislation aroused bitter political passions, and grave fears among those who believed that the welfare of the country depended upon the security of property. In case after case, as it came before the Supreme Court, the leaders of the bar appealed to the court not to leave the vast interests of private stockholders at the mercy of radical state legislatures. To have withstood this appeal would have been utterly inconsistent with the individualistic spirit which pervaded American jurisprudence in the latter part of the nineteenth century. Some method must be devised by which the courts could check the assaults of western legislature upon established property rights. The court obviously could not go back on its decision in the granger cases, and hold that railroads were completely free from interference. The principle was too firmly established in the precedents. The problem was to find some midway course which would preserve the power of regulation, but would put a reasonable check on the exercise of that power, when it attempted to cut too drastically into property values".)



formal or positive legal rules to provide a solution to the question at issue<sup>100</sup>. This was exactly the starting point of the *realist* assault on *legal formalism*<sup>101</sup>, whose best characterization can be found in Justice OLIVER WENDELL HOLMES' claim that “the life of the law has not been logic; it has been experience”<sup>102</sup>. Though some commentators are skeptic in defining or characterizing *legal realism* due to the disparity of the concerns raised by the movement<sup>103</sup>, others argue that the major figures in *legal realism* shared the common interest of understanding judicial decision-making and similar substantive views about how adjudication *really* works<sup>104</sup>. Thus, legal philosophers posit that *legal realism* is characterized as an “empirical descriptive theory of adjudication”<sup>105</sup> premised on the assumption that law and formal or positive legal rules are *indeterminate* and that the best explanation for why judges decide cases as they do must look beyond the law itself<sup>106</sup>. In this context, the difference between “paper rules” and “real rules” introduced by KARL LLEWELLYN is central to legal realism’s rule skepticism insofar as it questions the influence of formal or positive

<sup>100</sup> Eric A. Posner & Adrian Vermeule, THE VOTES OF OTHER JUDGES, 105 Geo. L. J. 159 (2016) (arguing that judges on a multimember court should consider the votes of other judges as relevant evidence or information to inform their decisions)

<sup>101</sup> Brian Leiter, American Legal Realism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, 51 (Martin P. Golding & William A. Edmundson eds. 2005).

<sup>102</sup> O. W. Holmes Jr., THE COMMON LAW, 1-2, (1881). Holmes explains that “[t]he law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know that it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into the new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to achieve desired results, depend very much upon its past”.

<sup>103</sup> Neil Duxbury, PATTERNS OF AMERICAN JURISPRUDENCE 65 (1995).

<sup>104</sup> Grant Gilmore, LEGAL REALISM: ITS CAUSES AND CURE, 70 Yale L. J. 1037 (1961); Brian Leiter, LEGAL REALISM AND LEGAL DOCTRINE, 163 U. Pa. L. Rev. 1975 (2015); Schauer, *supra* note 83, at 752; Brian Leiter, RETHINKING LEGAL REALISM: TOWARD A NATURALIZED JURISPRUDENCE, 76 Texas L. Rev. 267, 271 – 74 (1997); Leiter, *supra* note 87, at 1147.

<sup>105</sup> Leiter, RETHINKING LEGAL REALISM: TOWARD A NATURALIZED JURISPRUDENCE, *supra* note 104, at 271 – 74 (1997); Leiter, *supra* note 101, at 51. Leiter claims that legal realism is a “[...] descriptive theory of the causal connections between underlying situation-types and actual judicial decisions. [...] [T]he Realists can be read as advocating an empirical theory of adjudication precisely because they think the traditional jurisprudential project of trying to show decisions to be *justified* on the basis of legal rules and reasons is a failure”.

<sup>106</sup> Karl N. Llewellyn, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951) (describing the manipulability and malleability of law and legal doctrine); Jerome Frank, LAW AND THE MODERN MIND (1930) (arguing that personal, psychological, and accidental factors play a pivotal role in judicial decision-making); Max Radin, THE THEORY OF JUDICIAL DECISION: OR HOW JUDGES THINK, 11 A.B.A. J. 357, 362 (1925) (arguing that judges’ background and experience explain the predictable way in which they respond to different fact-situations); Underhill Moore & Charles Callahan, LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL, 53 Yale L. J. 1 (1943); Underhill Moore & Theodore Hope, AN INSTITUTIONAL APPROACH TO THE LAW OF COMMERCIAL BANKING, 38 Yale L. J. 703 (1929) (arguing that judges attempt to do what is socioeconomically best relying on the underlying facts of the case); Herman Oliphant, A RETURN TO STARE DECISIS, 14 A.B.A. J. 71, 75 (1928) (arguing that judges react primarily to the stimulus of the facts in the concrete cases); Felix Cohen, TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH, 35 Colum. L. Rev. 809, 843 (1935) (arguing that social forces are determinant in judicial decision-making); Joseph C. Hutcheson Jr., THE JUDGMENT INTUITIVE: THE FUNCTION OF THE “HUNCH” IN JUDICIAL DECISION, 14 Cornell L.Q. 274, 284-85 (1929) (describing how judges react to the underlying facts of a case).

legal rules on judicial decision-making<sup>107</sup>.

Put it differently, though *legal realism* admits some “causal relation” between any legal rules and judicial behavior, it denies that “paper rules” produce legal outcomes and claims instead that judges make their decisions based on “real rules”<sup>108</sup>, whose determination and relation to judicial opinions require “empirical investigation”<sup>109</sup>. In *Regulatory Justice*, Professor ROBERT KAGAN explains that the “meaning of a rule is thus determined by cumulative judgments concerning the desirability of applying it in particular cases”<sup>110</sup>. By this, commentators suggest that *realists* mean that there are cases, particularly the *hard* ones that reached the stage of appellate review, where “paper rules” do not dictate “one and only one” outcome to the question at stake due to the proliferation of canons of statutory construction<sup>111</sup>. This entails, furthermore, that decision-makers exert their discretion and reason in “ways not sanctioned” by the paper rules or the paper rules do not justify their judgments<sup>112</sup>. Commentators explain that, on the assumption that law is *indeterminate*, *legal realism* claims that, in deciding *hard cases*, judges react mainly to the underlying facts of the case, rather than to the applicable legal rules or reasons<sup>113</sup>, and that judicial opinions are determined by the substantial influence of “non-legal supplements of variable existence and application”<sup>114</sup>. However, commentators point out that *legal realism* does not claim the trifling thesis that judges must take into account the facts of each particular case and that legal rules have no influence in their decisions<sup>115</sup>. Rather, the *realist core claim* is that formal or positive legal rules have little or no effect on judicial decisions and that, in *hard cases*, judges react primarily to the underlying facts of the case, regardless if the facts are legally relevant or not<sup>116</sup>.

Although all *realists* accepted the core claim<sup>117</sup>, LEITER explains that the movement was

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<sup>107</sup> Karl N. Llewellyn, THE THEORY OF RULES, (Frederick Schauer ed., 2011) (1938); Karl N. Llewellyn, A REALISTIC JURISPRUDENCE – THE NEXT STEP, 30 Colum. L. Rev. 431, 448 (1930). According to Llewellyn, “[p]aper rules’ are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place— what the books there say ‘the law’ is. The ‘real rules’ and rights—‘what the courts will do in a given case, and nothing more pretentious’—are then predictions”.

<sup>108</sup> Leiter, *supra* note 101, at 51.

<sup>109</sup> Llewellyn, A REALISTIC JURISPRUDENCE – THE NEXT STEP, *supra* note 107, at 444.

<sup>110</sup> Robert Kagan, REGULATORY JUSTICE 89 – 90 (1978).

<sup>111</sup> Karl N. Llewellyn, REMARKS ON THE THEORY OF APPELLATE DECISION AND THE RULES OR CANONS ABOUT HOW STATUTES ARE TO BE CONSTRUED, 3 Vand. L. Rev. 395, 395–96 (1950). Llewellyn argues that “[o]ne does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.”

<sup>112</sup> Leiter, *supra* note 101, at 51.

<sup>113</sup> Oliphant, *supra* note 106, at 75. OLIPHANT claims that judges react chiefly “[...] to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises.”

<sup>114</sup> Cohen, *supra* note 106, at 843. COHEN suggests that “[...] [a] judicial decision is a social event. Like the enactment of a Federal statute, or the equipping of police cars with radios, a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decisions are human activities affected by it”; Radin, *supra* note 106, at 362. For RADIN, “[...] the standard transactions with their regulatory incidents are familiar ones to [the judge] because of his experience as a citizen and a lawyer”; Moore & Callahan, *supra* note 106; Moore & Hope, *supra* note 106.

<sup>115</sup> Leiter, *supra* note 101, at 51.

<sup>116</sup> Id. at 53.

<sup>117</sup> Id.

divided into two branches that differed about the arguments advanced in support of the malleability and manipulability of law and legal doctrine, as well as about the determination of what counts as “real rules” and how they might influence judicial decision-making<sup>118</sup>. On the one hand, the “Idiosyncrasy Wing of Realism”<sup>119</sup>, represented by JEROME FRANK and Judge JOSEPH HUTCHESON. They claimed that the judge’s response to the underlying facts of a particular case is determined by idiosyncratic facts about the psychology or personality of that individual judge<sup>120</sup>. On the other hand, the “Sociological Wing of Realism”<sup>121</sup> represented by HERMAN OLIPHANT, UNDERHILL MOORE, KARL LLEWELLYN, MAX RADIN, FELIX COHEN, among others. They rejected the psychological approach<sup>122</sup> and argue that judicial decisions fell into predictable patterns, from which they inferred that diverse “social” forces must influence judges to make them react to facts in a similar and predictable way<sup>123</sup>.

In sum, the *realist core claim* is about law’s indeterminacy and about how formal or positive law is nugatory in explaining judicial decision-making, particularly in the cases that reached the stage of appellate review<sup>124</sup>. On the assumption that statutes and judicial precedents exhaust the formal or positive sources of law, *legal realism* claims that law is indeterminate due to the existence and proliferation of competitive canons of interpretation understood as the methods employed by lawyers, administrative officials, and judges to grasp different rules from statutes and judicial precedents. Thus, for *legal realism*, *hard cases* arise when formal or positive legal rules do not justify “one and only one” outcome to a legal question at stake due to the existence of conflicting canons of interpretation in light of which such rules could be construed and implemented.

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<sup>118</sup> On the different branches of legal realism, *see, e.g.*, Id. at 52; Leiter, LEGAL REALISM AND LEGAL DOCTRINE, *supra* note 104; Leiter, RETHINKING LEGAL REALISM: TOWARD A NATURALIZED JURISPRUDENCE, *supra* note 104, at 271 – 74; Leiter, REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM, *supra* note 87, at 1147; Schauer, *supra* note 83, at 754.

<sup>119</sup> Leiter, *supra* note 101, at 51.

<sup>120</sup> Frank, *supra* note 106, at 111. Frank argues: “the personality of the judge is the pivotal factor in law administration”; Hutcheson, *supra* note 106, at 284-85. Hutcheson claims that, for a judge, “(...) the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause”; Bruce Ackerman, LAW AND THE MODERN MIND BY JEROME FRANK, Daedalus, Vol. 103, No. 1, Twentieth-Century Classics Revisited (Winter, 1974), pp. 119 – 130 (describing the influence of Jerome Frank and the realists).

<sup>121</sup> Leiter, *supra* note 101, at 51 - 53.

<sup>122</sup> Cohen, *supra* note 106, at 843. For Cohen, “[t]he ‘hunch’ theory of law [introduced by Frank, Hutcheson, and Schroeder], by magnifying the personal and accidental factors in judicial behavior, implicitly denies the relevance of significant, predictable, social determinants that govern the course of judicial decision. Those who have advanced this viewpoint have performed a real service in indicating the large realm of uncertainty in the actual law. But actual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches”.

<sup>123</sup> Cohen, *supra* note 106, at 843. Cohen explains that “[a] truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as a concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and index of social consequences.”

<sup>124</sup> Schauer, *supra* note 83, at 756; Shapiro, LEGALITY, at 260 (“Similarly, the realists argued that statutes could be read strictly or loosely, depending on one’s objective. [...] On this view, textual and purposive interpretations are acceptable in American law, and opportunistic lawyers or judges may simply take their pick. Clearly, the realist critique of formalism is a system-specific objection. According to the realists, American legal practice is incapable of securing the formalist dream of complete determinacy. General principles of the sort formalists tout have too little content and, given the standard norms of common law and statutory construction, more substantial ones cannot be derived consistently”).

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### ***Legal Positivism***

The *realist core claim*, like every other theory of jurisprudence, is not undisputed. *Legal positivists*, led by H.L.A HART, emphatically reject *legal realism*'s "rule-skepticism" under the argument that rules are far more than a prophecy of what the courts will do in the future, namely, a prediction of the incidence of public force on social behavior through the judicial department<sup>125</sup>. For HART, the difference between moral duties and legal obligations is that the latter stems from a valid legal rule that prescribes and mandates a specific conduct<sup>126</sup>. He claims, furthermore, that the notion that a person is "obliged to obey someone" denotes only a psychological situation that refers to inner beliefs and motives<sup>127</sup>. By contrast, legal obligations fall under a valid rule that makes certain types of behavior a standard to shape social conduct<sup>128</sup>. HART explains that valid legal rules are rules enacted in pursuance to the rule of recognition, which is a major secondary rule of social nature that dictates how to create new valid rules<sup>129</sup>.

On the assumption that legal obligations stem from positive rules created pursuant to a socially verifiable rule of recognition, HART claims that rules stated in vague or ambiguous linguistic formulations can give rise to *hard cases* insofar as there are cases where one cannot find the correct answer to the question at issue just by a straight reading of the relevant rule<sup>130</sup>. This source of hard cases finds its origins in HART's famous "core-penumbra" duality introduced to explain and justify judicial lawmaking discretion in hard cases where the law seems to run out<sup>131</sup>. HART contends that general rules ought to be the main instrument of social control whereby the communication or teaching of standards of conduct is attained<sup>132</sup>. In such a task, the lawgiver has to deal with the intrinsic indeterminacies of general language that affect popular speech and its communication processes, as well as with human cognitive limitations<sup>133</sup>. He acknowledges the existence of particular fact-situations where, due to the "intrinsic" limitations of language, there is uncertainty as to the application or not of a general rule and as to the form of behavior that such a rule requires<sup>134</sup>. In his own words, "nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules"<sup>135</sup>. On this view, Hart claims that no legal system can be completely determinate insofar as complete guidance of conduct, either by statute or precedent, is impossible<sup>136</sup>.

Therefore, HART considers there will be "plain cases" to which general rules are "clearly"

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<sup>125</sup> Hart, CL, at 136.

<sup>126</sup> Id. at 83.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id. at 94.

<sup>130</sup> Id. at 123

<sup>131</sup> Id.

<sup>132</sup> Id. at 124.

<sup>133</sup> Id.

<sup>134</sup> Id. at 123

<sup>135</sup> Id.

<sup>136</sup> Shapiro, LEGALITY, at 260.



applicable and other cases where is not clear whether they apply or not<sup>137</sup>. For him, plain cases fall under what he calls the "core of certainty" and are characterized to be the "familiar ones," continuously "recurring in similar contexts," and where there is "general agreement in judgments as to the applicability of the general rule"<sup>138</sup>. In plain cases, the general rule seems to "need no interpretation" and the "recognition of instances seems unproblematic or 'automatic'"<sup>139</sup>. Plain cases of this sort abound in practice and fall, *mutatis mutandis*, within the *easy cases* category that I presented above to exemplify *legal formalism*. To the contrary, on the *positivist* account, *hard cases* arise in a continuum somewhere in what HART calls the "penumbra zone" and possess only "some of the features of the plain cases"<sup>140</sup>, which means that the application of general rules to specific unforeseen circumstances may prove indeterminate at the borderline due to their vagueness or "open texture"<sup>141</sup>. Thus, in hard cases, HART posits that it is up to the decision-maker to add a new case to a line of plain cases for which she ought to ascertain whether the new case "resembles the plain case 'sufficiently' in 'relevant' aspects" in light of many "complex factors running through the legal system and on the aims or purpose which may be attributed to the rule" by exercising broad discretion left to her by open-textured language<sup>142</sup>. Examples of hard cases of this sort abound at different levels<sup>143</sup>.

At the constitutional level, the interested parties know that United States Congress has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Commerce Clause set out in Article I Section 8 of the United States Constitution is vague or open-textured in the sense that its application to particular situations as to the meaning of "regulate commerce (...) among different states" may prove uncertain. In fact, numerous particular situations of this sort have questioned over time and in the penumbra of uncertainty whether the Commerce Clause ought to be read as to comprise Congress' power to regulate navigation in interstate waters<sup>144</sup>, activities that place indirect

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<sup>137</sup> Hart, CL, at 126.

<sup>138</sup> Id. at 126.

<sup>139</sup> Id.

<sup>140</sup> Id. at 123. ("This imparts to all rules a fringe of vagueness or 'open texture,' and this may affect the rule of recognition specifying the ultimate criteria used in the identification of the law as much as a particular statute"). See also, H.L.A. Hart, POSITIVISM AND THE SEPARATION OF LAW AND MORALS, 71 Harv. L. Rev. 593, 607 (1958) ("There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were dumb").

<sup>141</sup> Id.

<sup>142</sup> Id. at 127.

<sup>143</sup> For an insightful discussion of the interpretive implications of H.L.A. HART's theory of law in the United States, see, e.g., William N. Eskridge, Jr., NINO'S NIGHTMARE: LEGAL PROCESS THEORY AS A JURISPRUDENCE OF TOGGLING BETWEEN FACTS AND NORMS, 57 St. Louis L. Rev. 865, 867 (2013) ("The public face of judging in this country is positivism, where law's authority is not contingent upon any connection to morals and is determined, instead, by reference to social facts").

<sup>144</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824) ("It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been

effects on interstate commerce such as granting power to the President of the United States to issue price and wage fixing administrative regulations<sup>145</sup>, purely intrastate activities that are not themselves commercial but place a substantial effect on interstate commerce such as the production of wheat for self-consumption<sup>146</sup>, the possession of firearms in public schools to prevent crimes that place substantial effects on the national economy<sup>147</sup>, or to compel individuals to become active in commerce by purchasing healthcare<sup>148</sup>.

Another example of this sort can be found in Article 230 of the Colombian Constitution, which sets forth that judges are only subject to law's empire ("*imperio de la ley*") and that equity, jurisprudence, doctrine, and the general principles of the law are auxiliary criteria. Since the time when Constitution became legally effective in 1991, many hard cases have

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discussed at the bar. (...) The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments. The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes').

<sup>145</sup> A.L.A Schechter Poultry Corporation v. U.S., 295 U.S. 495 (1935) ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government").

<sup>146</sup> Wickard v. Filburn, 317 U.S. 111 (1942) ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'").

<sup>147</sup> U.S. v. Lopez, 514 U.S. 549 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra*, at 1629. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden*, *supra*, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel*, *supra*, at 30, 57 S.Ct., at 621. This we are unwilling to do").

<sup>148</sup> National Federation of Independent Business v. Sebelius, 567 U.S. \_\_\_\_ (2012), 132 S.Ct 2566. ("The Constitution grants Congress the power to 'regulate Commerce.' Art. I, § 8, cl. 3 (emphasis added). The power to regulate commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity.' E.g., *United States v. Lopez*, 514 U.S. 549, 560, 115 S.Ct. 1624, 131 L.Ed.2d 626. The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce").

resulted from the twilight zone of Article 230 inquiring whether the judicial precedent is within law's empire<sup>149</sup>, where should the line between law's empire and jurisprudence, doctrine, equity, and the general principles of the law be drawn<sup>150</sup>, whether the judicial precedent has the same controlling authority as the Constitution as the supreme law of the land, to what extent the constitutional precedent's controlling authority differs from the precedent of the Supreme Court of Justice and the Council of State<sup>151</sup>, whether an statute can be struck down for being contrary to the "constitutional precedent", whether the precedent of the Inter American Court of Human Rights is within law's empire and the extent of its controlling authority<sup>152</sup>, whether administrative authorities are subject to the judicial precedent in the same way as they are to the Constitution and statutes<sup>153</sup>, whether the disregard of the judicial precedent counts as administrative and judicial misconduct<sup>154</sup>, and so on.

At the statutory level, examples of hard cases have resulted from particular situations questioning whether newsboys can be considered as employees under the statutory definition of "employees" contained in §152 of the National Labor Relations Act<sup>155</sup>, whether discrimination against the young count as a discriminatory practice in light of the statutory meaning of "age" contained in §623(a)(1) of the Age Discrimination in Employment Act of 1967<sup>156</sup>, and whether a significant habitat modification or degradation where it actually kills or injures wildlife is reasonable under the statutory definition of "take" contained in § 3(19)

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<sup>149</sup> Corte Constitucional [C.C.] [Constitutional Court], abril 1, 1993, M.P.: A. Martínez Caballero, Sentencia C – 131/93, Expediente D – 182 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 28, 1993, M.P.: E. Cifuentes Muñoz, Sentencia C – 486/93, Expediente D – 244, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 9, 2001, M.P.: R. Escobar Gil, Sentencia C – 836/01, Expediente D – 3374 (Colom.).

<sup>150</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 1993, M.P.: F. Morón Díaz, Sentencia C – 083/93, Expediente RE – 026, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 5, 1994, M.P.: J. Arango Mejía, Sentencia C – 224/94, D – 439, (Colom.).

<sup>151</sup> Corte Constitucional [C.C.] [Constitutional Court], julio 6, 2011, M.P.: L. Vargas Silva, Sentencia C – 539/11, Expediente D – 8351 (Colom.).

<sup>152</sup> Corte Constitucional [C.C.] [Constitutional Court], diciembre 7, 2001, M.P.: R. Uprimny Yepes, Sentencia T – 1319 de 2001, Expediente T-357702 (Colom.).

<sup>153</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 1993, M.P.: F. Morón Díaz, Sentencia C – 083/93, Expediente RE – 026, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 5, 1994, M.P.: J. Arango Mejía, Sentencia C – 224/94, D – 439, (Colom.).

<sup>154</sup> Corte Constitucional [C.C.] [Constitutional Court], agosto 24, 2011, M.P.: L. Vargas Silva, Sentencia C – 634/11, Expediente D – 8413 (Colom.).

<sup>155</sup> *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) ("In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. [...] There is no good reason for invoking them to restrict the scope of the term 'employee' sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given").

<sup>156</sup> *General Dynamics Land Systems, Inc. v. Line*, 540 U.S. 581 (2004). (holding the phrase is open to an argument for a broader construction, since reference to "age" carries no express modifier and the word could be read to look two ways). The Court ruled: "We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one."

of the Endangered Species Act of 1973<sup>157</sup>.

On the Colombian side, hard cases of this sort have arisen querying whether a plaintiff can seek judicial review of an administrative adjudication<sup>158</sup> under Article 84 of Decree 01 of 1984 which incorporates a remedy to challenge administrative rules without being subject to any deadline<sup>159</sup>, whether an administrative adjudication made by a private individual, acting in pursuance to the public authority granted to do so, can be repealed under Article 69 of Decree 01 of 1984 by an administrative authority that, though is not her hierarchical superior<sup>160</sup>, has the statutory power to oversee her actions, and finally whether a popular judge<sup>161</sup> can nullify an administrative adjudication, rule or contract in reviewing a governmental action under Article 144 of Law 1437 of 2011 that regulates the “popular action” (*acción popular*)<sup>162</sup>.

In sum, one can describe *legal positivism* as a theory about the nature of law<sup>163</sup> that is committed to these three core tenets. First, *legal positivism* claims that what counts as law in

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<sup>157</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995). (“The statutory context of “harm” suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define “take.” The Secretary’s interpretation of “harm” to include indirectly injuring endangered animals through habitat modification permissibly interprets “harm” to have “a character of its own not to be submerged by its association.” [...] We need not decide whether the statutory definition of “take” compels the Secretary’s interpretation of “harm,” because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable suffice to decide this case. The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation”).

<sup>158</sup> A plaintiff can seek judicial review of an administrative adjudication made by an administrative agency or a private individual acting pursuant to the public authority to do so under Article of Decree 01 of 1984 replaced by Article of Law 1437 of 2011, which establishes a four-month deadline to file the lawsuit.

<sup>159</sup> Consejo de Estado [C.E.] [Council of State], General Chamber, agosto 10, 1996, C.P.: M. Méndez, Expediente CA - 001 (Colom.) (holding that a plaintiff can only seek judicial review of an administrative adjudication under Art. 84 D. 01/84 when the litigation concerns a matter that has an impact on the “Nation’s political, legal, economic or cultural order”). For the contrary position, see, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 29, 2002, M.P.: R. Escobar Gil, Expediente D - 3798 (Colom.). Sentencia C - 426/02 (holding that a plaintiff can only seek judicial review of an administrative adjudication under Art. 84 D. 01/84 when the litigation is “relevant to protect rule of law values taken *in abstracto*”).

<sup>160</sup> Consejo de Estado [C.E.] [Council of State], Advisory Chamber, junio 2, 2005, Expediente 1.643 (Colom.) (holding the administrative agency’s overseeing power comprises the power to repeal administrative adjudications made by a private individual, regardless of the hierarchical link required by Article 69 D.01/84 to do so).

<sup>161</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 88 (Colom.) Article 88 of the Colombian Constitution establishes the “popular action” as a constitutional remedy devised to enforce popular rights such as the Nation’s treasury, security, sanitation, administrative morality, environment, and the free market. The popular judge has broad powers to issue whatever injunction or decision she deems appropriate to enforce the popular right at stake.

<sup>162</sup> Corte Constitucional [C.C.] [Constitutional Court], agosto 31, 2011, M.P.: J. Palacio, Sentencia C - 644/11, Expediente D - 8422 (Colom.), (upholding the prohibition to nullify administrative rules, adjudications, and contracts set forth in Article 144 L. 1437/11 under the argument that Congress has the power to place restrictions on judicial review of governmental actions). For the contrary position, see, e.g., Consejo de Estado [C.E.] [Council of State], Third Chamber, noviembre 26, 2013, C.P.: R. Ostau de Lafont Pianeta, Expediente 25000-23-24-000-2011-00227-01(AP) (Colom.) (upholding the prohibition set out in Article 144 L.1437/11 contrary to the Inter-American on Human Rights insofar as it undermines the fundamental right to seek judicial review).

<sup>163</sup> Leiter, *supra* note 87, at 1140 - 44 (“Such a theory aims to explain certain familiar features of societies in

any given community is a matter of social fact. The set of special rules used by the community to determine which behavior will be punished by the public power can be identified, regardless of its content, by a pedigree test or the way in which it was created. Second, though this set of valid legal rules is exhaustive of the law, law is indeterminate due to the open-texture of certain legal rules, which entails, in turn, that *hard cases* cannot be decided by applying the law. Third, legal obligations stem only from valid rules. It follows, therefore, that there cannot be a legal obligation in the absence of a valid legal rule, which means that when a decision maker adjudicates a *hard case* by exercising her discretion, she is not enforcing a legal rule. Therefore, for *legal positivists*, hard cases are ungoverned by law<sup>164</sup>.

On the *positivist* account, hard cases like *Lochner*, *Reagan*, the *Commerce Clause* cases, the Colombian cases about the controlling authority of the judicial precedent, and about the scope of administrative remedies are ungoverned by law. It follows, furthermore, that judges, exerting their discretion and acting as interstitial legislators, decided them by appealing to morality. Recall Justice HOLMES' dissenting words in *Lochner*, where he accused the majority opinion of relying on an economic theory that was by no means embodied in the Constitution<sup>165</sup>. Also, consider *Reagan* where the Supreme Court struck down the body of rates fixed by the state because it deemed it "unreasonable" and "unjust"<sup>166</sup>. Similarly, in the absence of positive rules, the Colombian Constitutional Court cited rule of law principles to defend the controlling authority of its precedents against the backdrop of the civil law legal tradition<sup>167</sup>. Finally, bear in mind the Colombian Council of State's narrow interpretation of administrative judicial review actions citing the principle of legal certainty and the opposite interpretation of the rule of law principles advanced by the Constitutional Court in support of a broader interpretation of the same statutory language<sup>168</sup>. All of these hard cases share the salient feature that positive law was apparently insufficient to solve the question at issue and judges appealed to *principles* to decide the question at stake.

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### *Law as Integrity*

Relying on the role of principles in deciding hard cases, RONALD DWORKIN launched a sophisticated defense of law's determinacy<sup>169</sup>. He claims that, in deciding hard cases where the applicable formal or positive rules have apparently run out, judges do not look beyond the law to act as legislators who must compensate for the imperfections or limitations of

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which law exists, and it proposes to do so by analyzing the "concept" of law").

<sup>164</sup> For the discussion about the core tenets of legal positivism and its different branches (exclusive & inclusive legal positivism), see generally Brian H. Bix, Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 29 (Martin P. Golding & William A. Edmundson eds. 2005); Andrei Marmor, Exclusive Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 104 (Martin P. Golding & William A. Edmundson eds. 2005); Kenneth E. Himma, Inclusive Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 125 (Martin P. Golding & William A. Edmundson eds. 2005); Dworkin, *supra* note 78, at 17; Shapiro, LEGALITY, at 83 – 105.

<sup>165</sup> *Lochner*, *supra* note 69, at 75-6 (Holmes J., dissenting.).

<sup>166</sup> *Reagan v. Farmers' Loan & Trust Co.*, *supra* note 70, at 394.

<sup>167</sup> See *supra* notes 149 and 150.

<sup>168</sup> See *supra* notes 159 and 160.

<sup>169</sup> Ronald Dworkin, THE MODEL OF RULES, 35 U. Chi. L. Rev. 14 (1967).



positive rules by appealing to their personal morality<sup>170</sup>. Contrary to HART's thesis, DWORKIN argues that judges do not exercise any legal discretion insofar as they always rely on legal principles that provide the right answer to the question at issue<sup>171</sup>. On this assumption, he accused *legal positivism* of being just a "model of rules" under the argument that it cannot successfully account for the normative nature of principles<sup>172</sup>.

For DWORKIN, the source of *hard cases* is not only limited to the vagueness or open-texture of the general rules. He rather focuses on the cases where there is not a "[...] settled rule dictating a decision either way, then it might seem that a proper decision could be generated by either policy or principle"<sup>173</sup>. In his view, hard cases result in two events. First, when there is an unclear rule and judges apply principles to interpret it<sup>174</sup>. Second, when there is not a rule dictating a decision either way and judges use principles to help establish the existence of rules that had not been previously acknowledged. These two events stem from the cases he cites in support of his argument<sup>175</sup>.

The case *Riggs v. Palmer*<sup>176</sup> is an example of a hard case of the first type. According to the facts of the case, ELMER PALMER was concerned that his grandfather would modify his existing will –which left him the bulk of the estate– and remove him as a beneficiary<sup>177</sup>. To avoid that, Mr. PALMER murdered his grandfather<sup>178</sup>. His crime was discovered; he was convicted and sent to jail<sup>179</sup>. The question at stake was whether Mr. PALMER was legally entitled to the inheritance his grandfather's last will provided<sup>180</sup>. Though Mr. PALMER was sent to jail, he petitioned the probate court for his share of the estate<sup>181</sup>. The residuary legatees under the will sued demanding that the property now goes to them instead of Mr. PALMER<sup>182</sup>. They argued, furthermore, that since Mr. PALMER had murdered the testator –their father– the law entitled Elmer to nothing<sup>183</sup>. Mr. PALMER had nevertheless the plain language of the

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<sup>170</sup> Id.

<sup>171</sup> Id.

<sup>172</sup> Id.

<sup>173</sup> Ronald Dworkin, "Hard Cases," in *TAKING RIGHTS SERIOUSLY* 83 (1978).

<sup>174</sup> Dworkin, *supra* note 78, at, 22 - 39.

<sup>175</sup> Id.

<sup>176</sup> 115 N.Y. 506, 22 N.E. 188 (1889).

<sup>177</sup> Id. at 508 - 509.

<sup>178</sup> Id. ("At the date of the will, and, subsequently, to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him").

<sup>179</sup> Id. at 515 ("The respondent [Mr. Palmer], a lad of sixteen years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison in 1882. For this crime he was tried and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the state reformatory").

<sup>180</sup> Id. at 509.

<sup>181</sup> Id. ("He [Mr. Palmer] now claims the property, and the sole question for our determination is, can he have it? The defendants say that the testator is dead; that his will was made in due form and has been admitted to probate, and that, therefore, it must have effect according to the letter of the law").

<sup>182</sup> Id. at 515.

<sup>183</sup> Id. ("The appellants' argument for a reversal of the judgment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will, or a new will from being made, by his crime, and that he terminated the enjoyment by the testator of his property and effected his own succession to it by the

New York statute of wills on his side insofar as the rules, after all, did not make explicit exceptions for murderous beneficiaries<sup>184</sup>. In this sense, Mr. PALMER's lawyer argued that since the will did not violate any of the explicit provisions of the statute it was valid and, since Mr. PALMER was named as beneficiary in a valid will, he must inherit<sup>185</sup>. He argued, furthermore, that if the court held for the residuary legatees, it would be changing the will and substituting its own moral convictions for the law<sup>186</sup>. On the other hand, he suggested that it appeared highly unlikely that the legislature intended that result<sup>187</sup>.

Similarly to what occurred in FULLER's fictional case about the *Speluncean Explorers*, the judges of the highest court of New York all agreed that their decision must be under the law. They agreed that if the statute of wills, properly interpreted, gave the inheritance to Mr. PALMER, they must order the administrator to give it to him. The judges disagreed nevertheless about the correct result in the case, namely, about how to construct the "real statute" in the special circumstances of that case<sup>188</sup>. On the one hand, the dissenting opinion, written by Judge GRAY, argued for a literal or textual interpretation of the statute. Dworkin explains that this theory of legislation proposes that the words of a statute be given the meaning we could assign them if we had no special information about the context of their use or the intentions of their author<sup>189</sup>. Under such a theory, Judge GRAY voted for Mr. PALMER and argued that the real statute, interpreted properly, contained no exceptions for murderers<sup>190</sup>. On the other hand, however, DWORKIN points out that Judge EARL writing for the majority employed a theory of legislation that gives the legislators' intentions an important influence on the construction of the "real" statute<sup>191</sup>. Judge EARL relied on two principles<sup>192</sup>. First, that a statute does not have any consequence the legislators would have rejected if they had contemplated it<sup>193</sup>. Second, that judges should construct a statute so as to

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same crime. They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong").

<sup>184</sup> Id. at 509 ("It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer").

<sup>185</sup> Id.

<sup>186</sup> Id.

<sup>187</sup> Id.

<sup>188</sup> Dworkin, LE, at 19.

<sup>189</sup> Id. at 17.

<sup>190</sup> *Riggs v. Palmer*, *supra* note 176, at 515 - 516 (Gray J., dissenting) ("But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is, whether a testamentary disposition can be altered, or a will revoked, after the testator's death, through an appeal to the courts, when the legislature has, by its enactments, prescribed exactly when and how wills may be made, altered and revoked, and, apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters").

<sup>191</sup> Dworkin, LE, at 19.

<sup>192</sup> *Riggs v. Palmer*, *supra* note 176, at 513 - 514 ("My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission")

<sup>193</sup> Id. at 513 ("Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed").

make it conform as closely as possible to principles of justice assumed elsewhere<sup>194</sup>. The majority read into the statute an exception for murderous beneficiaries based on the principle that no person should profit from his own wrong<sup>195</sup>. Considering that executing the will as written would enable Elmer to profit from his own wrong, the majority concluded that Mr. PALMER was not legally entitled to his share of the estate<sup>196</sup>.

A hard case of the second type is the case of *Henningsen v. Bloomfield Motors, Inc.*<sup>197</sup>. In this case, Mr. HENNINGSEN bought his wife a car for Mother's Day and signed a contract where the parties "[...] expressly agreed that there are no warranties, express or implied, [m]ade by either the dealer or the manufacturer on the motor vehicle, chassis, of parts furnished hereunder except as follows"<sup>198</sup>. Ten days after the purchase, Mrs. HENNINGSEN was driving the car when "[...] the steering wheel spun in her hands, the car veered sharply to the right and crashed into a highway sign and a brick wall"<sup>199</sup>. Mr. HENNINGSEN sued in damages under the argument that, at least in the circumstances of his case, the manufacturer should not be protected by this limitation and should be held liable for the medical and other expenses of persons injured in a crash<sup>200</sup>. However, DWORKIN explains that Mr. HENNINGSEN was not able to "[...] point to any statute, or to any settled rule of law, that prevented Bloomfield Motors from standing on the contract"<sup>201</sup>.

During the litigation, the lower courts accepted the dealer's argument that Mr. HENNINGSEN had waived liability by signing the contract and therefore denied HENNINGSEN's claims<sup>202</sup>. On appeal, the New Jersey Supreme Court could find no explicit rule that would authorize it to ignore such a waiver but nevertheless ruled for Mr. HENNINGSEN<sup>203</sup>. In support of its decision, the Court cited various principles<sup>204</sup>, including "Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned"<sup>205</sup> and "In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars"<sup>206</sup>.

Relying on these cases, DWORKIN rejects the way in which positivists see principles as

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<sup>194</sup> Dworkin, LE, at 19.

<sup>195</sup> *Riggs v. Palmer*, *supra* note 176, at 513 ("Under the civil law evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered.").

<sup>196</sup> *Id.* at 514 (1889).

<sup>197</sup> 32 N.J. 358, 161 a.2d 69 (1960).

<sup>198</sup> *Id.* at 365 - 367.

<sup>199</sup> *Id.* at 369.

<sup>200</sup> *Id.*

<sup>201</sup> Dworkin, *supra* note 169, at 24.

<sup>202</sup> *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 197, at 365.

<sup>203</sup> Dworkin, *supra* note 169, at 24.

<sup>204</sup> *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 197, at 388 ("In the modern consideration of problems such as this, Corbin suggests that practically all judges are 'chancellors' and cannot fail to be influenced by any equitable doctrines that are available").

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 387.



extralegal supplements, and he instead claims that they are part of the law. He argues, furthermore, it is the duty of judges to preserve *law as an integrity* by deciding hard cases in light of legal principles, which requires the identification of “[...] particular conception or political morality as decisive of legal issues, that conception holds that community morality presupposed by the laws and institutions of the community”<sup>207</sup>.

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### *The Planning Theory of Law*

DWORKIN's alternate approach explaining how decision-makers derive the grounds of law by a complex process of constructive interpretation has been exposed to a high degree of criticism<sup>208</sup>. Nevertheless, for the purposes of this dissertation, I will focus particularly on Professor SCOTT SHAPIRO's critique because it exposes, as a practical matter, the obstacles that DWORKIN's constructive theory *mise en oeuvre* may face and it suggests a “neutral framework” to study how decision-makers disagree about the proper constructive interpretation of a particular legal system. In *Legality*, SHAPIRO accuses *law as integrity* of being “intensely abstract and relentlessly philosophical” insofar as it instructs judges to engage in several phases of constructive interpretation, as well as it ignores the limitations of both interpreters and meta-interpreters<sup>209</sup>.

SCOTT SHAPIRO presents the case *Tennessee Valley Authority vs. Hill*<sup>210</sup> to illustrate his arguments, which is also discussed by DWORKIN in support of his theoretical claims<sup>211</sup>. ELIZABETH GARRETT describes in detail the facts of the case<sup>212</sup>. She explains that an “enthusiastic and virtually unanimous” United States Congress enacted the Endangered Species Act in 1973 where it articulated a set of policies and procedures for the conservation of endangered or threatened species<sup>213</sup>. Sections 4 and 7 of the Act endow the Secretary of Interior with authority to determine, in her opinion, whether any species is an endangered or threatened species pursuant to the criteria established in the Act, which entails that administrative agencies are required to “[...] insure that any action authorized, funded, or carried out by such agency [...] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species”, respectively<sup>214</sup>. Commentators argue that the construction of the

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<sup>207</sup> Ronald Dworkin, *HARD CASES*, 88 Harv. L. Rev. 1057, 1105 (1975); Dworkin, *LE*, Ch. 7.

<sup>208</sup> See generally Richard Posner, *THE PROBLEMS OF JURISPRUDENCE* (1990); Richard Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); Michael McConnell, *THE IMPORTANCE OF HUMILITY IN JUDICIAL REVIEW: A COMMENT ON RONALD DWORKIN'S MORAL READING OF THE CONSTITUTION*, 65 Fordham L. Rev. 1269 (1997); Duncan Kennedy, *CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997); Jules L. Coleman, *RULES AND SOCIAL FACTS*, 14 Harv. J. L. & Pub. Pol'y 703 (1991); Jules L. Coleman, *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO "THE CONCEPT OF LAW"* (2001).

<sup>209</sup> *Legality*, 296, 300, and 305.

<sup>210</sup> *Tennessee Valley Authority vs. Hill*, 437 U.S. 153 (1978).

<sup>211</sup> Dworkin, *LE*, at 20.

<sup>212</sup> Elizabeth Garrett, *The Story of TVA v. Hill: Congress has the Last Word*, in *STATUTORY INTERPRETATION STORIES* 58 (W. Eskridge, P. Frickey & E. Garrett eds., 2011).

<sup>213</sup> *Id.* at 70.

<sup>214</sup> *Endangered Species Act of 1973*, Pub. L. No. 93 – 205 Stat. 884 (1973), codified as amended at 16 U.S.C. 1531 – 1544 (West 2009).

Tellico Dam faced opposition from local conservation groups<sup>215</sup> that found out that the completion of the Tellico Dam and Reservoir with a price tag of over one hundred million dollars would be likely to destroy the only habitat of the snail darter<sup>216</sup>. It must be noted that the construction of the dam began in 1967, Congress made appropriations ever year since, and the snail darter was discovered around the same time the Endangered Species Act became effective in August 1973<sup>217</sup>. Commentators explain that conservation groups led by HIRAM HILL and ZYGMUNT J.B. PLATER persuaded the Secretary of Interior to declare the snail darter as endangered<sup>218</sup>. At the same time, TVA sped up its efforts to complete the dam and deployed technical efforts and resources to prove that the snail darter could survive elsewhere. Furthermore, from a legal perspective, TVA argued that the expression to "jeopardize the continued existence" contained in Section 7 of the Act did not apply to projects underway and that its application would be unreasonable to projects near completion like the Tellico dam<sup>219</sup>. TVA cited various congressional acts and budgetary appropriations made after the Secretary's decision to declare the snail darter as endangered that suggested that Congress wished the completion of the Tellico dam regardless of the Secretary's decision<sup>220</sup>.

Despite the great investment of public funds and TVA's technical, political, and legal efforts, the Supreme Court ordered the dam be halted. In an opinion written by Chief Justice WARREN BURGER, the Court ruled that it was its duty to apply the unambiguous language of the Endangered Species Act in the sense that the expression "carry out" made no distinctions between new projects and those near completion like the Tellico dam regardless of the policy considerations or the waste of public funds<sup>221</sup>. The Court explained that "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated. In any event, we discern no hint in the deliberations of Congress relating to the 1973 Act that would compel a different result than we reach here". By contrast, the dissenting opinion written by Justice LEWIS POWELL and joined by Justice HARRY BLACKMUN, accused the majority of the Court of construing the statutory language in "unreasonable" fashion leading to the "absurd result" of halting an almost completed project like the Tellico dam<sup>222</sup>. In Justice POWELL's words, "[i]t is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in

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<sup>215</sup> Garrett, *supra* note 212, at 69 ("[A] group that included trout fishermen, some local farmers and landowners who did not want to sell their property, a few local businesspeople from the area, environmental groups, and the Tennessee Game and Fish Commission").

<sup>216</sup> Id. at 71 ("The snail darter can survive only in a river environment that both supports the snails it eats and facilitates its reproduction. The proposed Tellico Dam would likely destroy the snail darters living nearby because it would significantly alter the nature of the aquatic environment; indeed, one reason the fish was so rare was the elimination of rivers in the Tennessee River basin by the TVA's aggressive dam policy").

<sup>217</sup> Garrett, *supra* note 212, at 71; *TVA vs. Hill*, *supra* note 210, at 197.

<sup>218</sup> Garrett, *supra* note 212, at 71; *TVA vs. Hill*, *supra* note 210, at 161.

<sup>219</sup> Garrett, *supra* note 212, at 73.

<sup>220</sup> Garrett, *supra* note 212, at 73 - 75; Dworkin, LE, at 21 ("Congress had specifically authorized funds for continuing the project after the secretary's designation, and various of its committees had specifically and repeatedly declared that they disagreed with the secretary, accepted the authority's interpretation of the statute, and wished the project to continue").

<sup>221</sup> *TVA vs. Hill*, *supra* note 210, at 185.

<sup>222</sup> Id. at 196.

this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal<sup>223</sup>. In spite of the Supreme Court's opinion, Congress later passed a statute introducing a procedure for exemption from the Endangered Species Act and the Tellico dam was completed<sup>224</sup>.

For DWORKIN, Chief Justice Burger and Justice Powell did not disagree about the validity of the Endangered Species Act or the facts of the case; rather their disagreement was about the grounds of law, that is, "[...] they disagreed about how judges should decide what law is made by a particular text enacted by Congress when the congressmen had the kinds of beliefs and intentions both justices agreed they had in this instance"<sup>225</sup>. DWORKIN's account is equally applicable to statutory interpretation but with the sharp difference that judges should reason from policy *and* principle. This means that, on the *Dworkinian* account, judges may appeal to policy considerations in deciding statutory hard cases. He explains that Hercules "[...] must consider justifications of policy as well as of principle, and in some cases it might be problematic which form of justification would be more appropriate."<sup>226</sup> DWORKIN's theory of legislation is based on the assumption that Hercules is an expert and his own opinion on every technical question that might arise.<sup>227</sup>

HERCULES' method for interpreting statutes respects textual integrity in the sense that he will not "project his own convictions into the statute,"<sup>228</sup> as well as it is consistent with political fairness because it acknowledges the "public's opinion as this is revealed and expressed in legislative statements."<sup>229</sup> To reject any personal morality consideration from his theory of legislation, Hercules must take into account legislative history, official public statements, and contemporaneous facts, for they embody a community's political morality and represent history in action.<sup>230</sup> On this assumption, Dworkin explains that Hermes would join the dissenting opinion in *TVA v. Hill*. For him, "reading the statute to save the dam would make it better from the point of view of sound policy. He has no reason of textual integrity arguing against that reading, nor any reason of fairness, because nothing suggests that the public would be outraged or offended by that decision. Nothing in the legislative history of the bill itself, properly understood and taken as the record of public decision, argues the other way, and the later legislative decisions of the same character argue strongly for the reading he himself thinks best."<sup>231</sup>

However, SHAPIRO criticizes that *law as integrity's* "doubly interpretive" character requires judges, at the first phase of legal interpretation, to present law in its best moral light by

<sup>223</sup> Id.

<sup>224</sup> Garrett, *supra* note 212, at 85 – 89.

<sup>225</sup> Dworkin, LE, at 23.

<sup>226</sup> Dworkin, LE, at 338 – 339.

<sup>227</sup> Id. at 337.

<sup>228</sup> Id. at 342.

<sup>229</sup> Id.

<sup>230</sup> Id. at 342 – 346.

<sup>231</sup> Id. at 347 ("I assume he [Hercules] has his own opinions (about all the issues at stake in the snail darter controversy. He has views about conservation in general, about public power, about the wisest way to develop the Appalachia area, about the conservation of species – in sum, about whether it would be best, all things considered, to halt the TVA dam".)

construing the grounds of law according to the set of principles and policies that both fit and justify the law, and at the second phase, it requires them to present past legal decisions in its best moral light by determining which moral principles fit and justify past political acts<sup>232</sup>. He argues, moreover, that *law as integrity* ignores the roles and limitations of both interpreters and meta-interpreters, namely, varying levels of competence, character, and diversity that are crucial for meta-interpretation and interpretation<sup>233</sup>. On these grounds SHAPIRO argues in favor of a “neutral terminology” to frame empirical and theoretical disagreements about law<sup>234</sup>. First, he introduces what he calls the *Planning Theory* according to which “[...] moral facts never determine the content of the law. As we saw in connection with the Simple Logic of Planning Argument of the last chapter, the content of plans cannot be determined by facts whose very existence the plans are supposed to settle. Since laws are plans that are supposed to settle moral questions, moral facts cannot be grounds of law”<sup>235</sup>.

On this positivist assumption, SHAPIRO suggests treating theoretical disagreements about whether a “[...] fact should be label as the grounds of the law” as “clashes between different interpretive methodologies”, which are methods for “reading legal texts”<sup>236</sup>. For him, the advantage of talking about “interpretive methodologies is its neutrality as to whether their outputs are preexisting law or not and therefore whether the facts that they express are grounds of the law”<sup>237</sup>. In doing so, SHAPIRO focuses on the issue of choosing between interpretive methodologies and suggests that any theory that tackles this question should be known as a “meta-interpretative” theory. He calls it a theory of meta-interpretation because “[...] it does not set out a specific methodology for interpreting legal texts, but rather a methodology for determining which specific methodology is proper”<sup>238</sup>. Put it differently, a “theory of meta-interpretation” provides participants of a legal system with the tools to determine whether to embrace a “[...] interpretive methodology such as textualism, living constitutionalism, originalism, pragmatism, law as integrity, and so on”<sup>239</sup>. In SHAPIRO’s terminology, *theoretical disagreements* are “meta-interpretive disagreements” about the “proper interpretive methodology” of a particular legal system<sup>240</sup>.

In light of SHAPIRO’s *meta-interpretive theory*, attitudes of trust and distrust presupposed by the law are essential to the determination of which interpretive methodology ought to be applied<sup>241</sup>. He introduces a specific terminology to explain his theory. He calls “economy of

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<sup>232</sup> Shapiro, *Legality*, at 300 – 301 (“For example, suppose a judge wishes to resolve a particular legal issue about negligence law and, in the course of his research, comes across a judicial opinion that is apparently on point and binding. According to law as integrity, in order to determine the resolution of the issue compelled by the opinion, the judge must first determine which principles fit the outcome of the case in question. Once he has established a set of principles that fit the case tolerably well, the judge must go on to determine whether these principles are required by more abstract principles that apply to negligence law more generally”).

<sup>233</sup> *Id.* at 330.

<sup>234</sup> *Id.* at Ch. X.

<sup>235</sup> *Id.* at 302 – 303.

<sup>236</sup> *Id.* at 304.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 305.

<sup>239</sup> *Id.* at 306.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 335.

trust” the distribution of trust upon which the plan is underpinned<sup>242</sup>. Plans play a crucial role in trust management when they respect the economy of trust, which requires the interpretive methodology to allocate decision-making power in a way consistent with the attitudes of trust presupposed by the plan<sup>243</sup>. SHAPIRO proposes, in general terms, that the more generous a plan’s economy of trust, the more discretion the applier should have to depart from the literal meaning of the text in the name of the plan’s purpose<sup>244</sup>. By contrast, a more distrustful set of attitudes should lead to a more restrictive methodology<sup>245</sup>. In other words, SHAPIRO suggests that the proper way to interpret a plan must fulfill its aim to “capitalize” for trust and “compensate” for distrust<sup>246</sup>.

According to the *Planning Theory*, “[...] the law manages trust through social planning”<sup>247</sup>. Thus, “[...] [l]egislators are supposed to identify those who are trustworthy” and assign them duties and responsibilities that “[...] take advantage of their level of trustworthiness”<sup>248</sup>. Conversely, “[...] they are to identify those who are less reliable, plan out their behavior in greater detail” in order to prevent any abuse power<sup>249</sup>. Courts, in turn, “[...] are supposed to resolve disputes over these rights and responsibilities” in a fair and efficient fashion<sup>250</sup>. Finally, law enforcement officials “[...] may be required to impose sanctions on those who break the rules”<sup>251</sup>. These institutional arrangements are crucial in evaluating the different interpretive methodologies<sup>252</sup>. On this account, SHAPIRO explains that the *Planning Theory* regards legal interpretation always as *actor-relative* insofar as a text is correctly construed only with an actor and the particular place he holds “[...] within the system's economy of trust”<sup>253</sup>. To evaluate interpretive methodologies, the meta-interpreter first evaluates the actor’s trustworthiness, which can be of two kinds. On the one hand, SHAPIRO suggests that “[...] absolute judgment of trustworthiness concerns an individual’s level of confidence in the competence or character of another”<sup>254</sup>. A “relative judgment of trustworthiness” relates to the “[...] level of confidence in the competence and character of another *as compared* to some third person”<sup>255</sup>. In light of the trustworthiness judgment, the meta-interpreter assesses any given interpretive methodology by asking what the “world would be like” if the interpreter asserted to be applying the “[...] methodology when interpreting legal texts *and* possessed the competence and character that the designers of the system assigned to him as well as to others”<sup>256</sup>.

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<sup>242</sup> Id.

<sup>243</sup> Id.

<sup>244</sup> Id. at 336.

<sup>245</sup> Id.

<sup>246</sup> Id. at Ch. XII.

<sup>247</sup> Id. at 335.

<sup>248</sup> Id.

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> Id.

<sup>252</sup> Id. at 338 (“In such ways, those who do not know how to solve existing moral problems, or falsely think they do, will be given the appropriate guidance”).

<sup>253</sup> Id. at 358.

<sup>254</sup> Id. at 363.

<sup>255</sup> Id.

<sup>256</sup> Id. at 370.

In SHAPIRO's view, the correct interpretive methodology would be the one that ranks highest after the evaluation process<sup>257</sup>. He contends, furthermore, that the meta-interpretive process is aimed at determining whether an "[...] interpretive methodology is adequate for an interpreter just in case it best advances the goals that legal actors are entrusted with advancing *on the supposition* that the interpreter and certain other actors have extracted competence and character"<sup>258</sup>. On the Planning Theory of Law, Shapiro explains that "the debate between Burger and Powell in TVA concerned the suspension clauses that implicitly attach to congressional statutes. In particular, their disagreement was over whether absurd results defeat a congressional directive, permission, or authorization"<sup>259</sup>. In his opinion, "Burger's position in TVA is an interpretive methodology because it claims that all congressional statutes have implicit suspension clauses that require interpreters to ignore congressional commands, permissions, and authorizations when absurd results obtain and Congress intended that interpreters act this way"<sup>260</sup>. Therefore, Shapiro posits that law's defeasibility entails that it is the duty of the courts to improve the guidance provided by law and create new law by discovering the suspension clauses that *implicitly* attach to congressional statutes in matters of statutory interpretation<sup>261</sup>.

SHAPIRO's Planning Theory is not undisputed. It must be noted that Professor JEREMY WALDRON argues that the Planning Theory failed to settle the disagreement between natural lawyers and legal positivists on the assumption that the determination of the content of law is not only a matter of social facts<sup>262</sup>.

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### *Hard Cases Revisited*

Now that I have a fair view of the pantheon of jurisprudence, I can introduce a working definition of what counts as a hard case for the purposes of this dissertation. As was noted earlier, hard cases have been traditionally used to expose the shortcomings of existing law and to explain how judges solve them in light of a particular theory of law or adjudication. On this traditional view, in this chapter I described the predominant theories of law and adjudication to portray the different accounts of law's determinacy and the challenges raised against them by hard cases. Furthermore, relying on the colors and contrasts of the different thesis about law's determinacy and judicial novelty, I think that hard cases can also reveal complex moral and political philosophy conflicts whose solution might elicit profound

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<sup>257</sup> Id.

<sup>258</sup> Id.

<sup>259</sup> Id. at 303.

<sup>260</sup> Id. at 304.

<sup>261</sup> Id. at 303 – 304.

<sup>262</sup> Jeremy Waldron, PLANNING FOR LEGALITY, 101 Mich. L. Rev. 883, 892 (2011) ("There cannot be human law unless certain social facts obtain; but that certain social facts should be characterized as the existence of law depends on other things besides social facts, such as the rules (whose existence is a matter of fact) partaking of right reason. The same might be true in the case of the Planning Theory. Whether there is (whether we have) a plan or not is a matter of social fact; and if laws are plans (or like plans, in this regard), their existence is at least in part a matter of social fact. But it doesn't follow at all that the social facts associated with plans exhaust the existence conditions of law").



changes in a polity, which can range from the acknowledgment of new rights to the way in which public policy is made and executed.

As I explained, hard cases may reveal complex moral and political philosophy conflicts whose solution might elicit profound changes in a polity, which can range from the acknowledgment of new rights to a shift in the way in which public policy is made and executed. According to the literature of jurisprudence that I presented in this chapter, for *legal formalism*, law is determinate because the existent formal or positive legal rules address directly all the legal questions that may arise and always to provide a correct legal outcome. On the *legal realism* account, law is indeterminate due to the existence and proliferation of competitive canons of interpretation understood as the methods employed by lawyers, administrative officials, and judges to extract different rules from statutes and precedents. For *legal positivism*, law is indeterminate when existing formal or positive legal rules have an open-texture due to the intrinsic indeterminacies of general language. Finally, on DWORKIN's view, law is determinate to the extent that, even if there is not a previously acknowledged positive rule dictating a decision either way, it is the duty of the judge to preserve law's integrity by finding the correct answer in the principles of law through a sophisticated legal reasoning process.

Based on this literature, I consider that hard cases may stem from different sources that are not exclusive but competitive in light of the different views about law's determinacy that I have described. First, hard cases may arise in situations where the formal or positive law seems to run out and there is no legal norm previously acknowledged to decide the question at issue. Second, they may also find their source in the penumbra zone of uncertainty elicited by a general rule's vagueness or open-texture, whose application to a particular situation proved to be uncertain. Third, hard cases may result from situations where, though there is a clear formal or positive legal rule to solve the question at issue, its straightforward application to a particular situation under certain circumstances may appear questionable in the eyes of a given moral or political philosophy. Therefore, for the purposes of this dissertation, I will call "hard cases" the cases that result from the vagueness of a social conduct's factual description contained in a legal norm, from the questionable consequences that the straightforward application of a legal norm under certain circumstances may elicit in light of given moral or political philosophy, or when there is no previously acknowledged legal norm that addresses the question at issue. This is not the claim, however, that these theories of law and adjudication are competitive as well because, as I explained, they are all committed to different core tenets that make them theoretically distinguishable.

Yet hard cases not only raise a challenge against law's determinacy and expose the deficiencies of theories of law or adjudication. They can also reveal complex moral and political philosophy conflicts whose solution may elicit profound changes in a democratic polity, which can range from the acknowledgment of new rights to the way in which public policy is made and executed. Let me go back to the hard cases that I have described to explain this claim. In all of the cases that I presented in this chapter, except for *Henningsen* where the plaintiff was not able to point out to any formal or positive rule in support of his argument, the factual situations which gave them rise are covered by formal or positive rules that have been validly created by a Constitutional Convention or a Legislature to regulate social conduct. Recall the Commerce Clause, the XIV Amendment, the National Labor Relations

Act, the Age Discrimination in Employment Act, the Endangered Species Act, the New York Statute of Wills, Article 230 of the Colombian Constitution, the Colombian General Administrative Procedure Act, and so on.

Despite the existence of the formal or positive rules, they did not provide an unequivocal solution to the questions at issue due to their open-texture or to the undesired consequences that their straightforward application to the specific factual situations may elicit. On this assumption, the interested parties disagree about whether the challenged statutes or administrative rules meet the requirements set out in those rules. Thus, the parties and the judges defended different interpretations of the applicable rules, whether they have been previously acknowledged or not like in *Henningsen*. In the hard cases I presented, however, the disagreement is not only about the open texture of the general rule or about the different canons of interpretation that may be employed to construe it; rather the interested parties and judges disagreed about political and moral philosophy questions that range from federalism to fundamental liberties.

For instance, in the Commerce Clause cases, the disputes were not about the Clause's validity since the parties agreed on its pedigree. Nor the controversies were limited to the Commerce Clause's open-texture or the different canons of interpretation that could be employed. While it is true that many of the cases resulted from the Clause's vagueness, the real controversies shared a common ground given by constitutional questions about how far the federal government may go in regulating interstate and intrastate commerce. Rather than a single answer, such a common question led to many different answers that entailed the fluctuation of the federal power to regulate interstate commerce over time.

In *Gibbons v. Ogden*, the Supreme Court upheld a broad view of the Commerce Clause that comprehends the power to regulate navigation within States. Conversely, in *A.L.A. Schechter Poultry Corporation v. U.S.*, the Supreme Court advanced a narrower vision of the same constitutional provision to rule that Congress is not endowed with the power to regulate State activities that place indirect effects on intrastate commerce. A few years later, in *Wickard v. Filburn*, the Court went back to a broad construction of the clause and read into it Congress' power to regulate activities that exert a substantial effect on interstate commerce regardless of whether such effect is what might have been defined earlier as "direct" or "indirect." However, in *U.S. v. Lopez*, the Supreme Court refused to read into the Commerce Clause a sort of general police power reserved to the States. In a recent hard case, *National Federation of Independent Business v. Sebelius*, the Supreme Court rejected further expand the boundaries of the clause in order to endorse the power to "create" a commercial activity.

The same can be said about the litigation on Article 230 of the Colombian Constitution. Although this constitutional provision is certainly vague, the controversy is not limited to the linguistic indeterminacy of the term "law's empire." Nor the dispute was about the provision's pedigree insofar as the parties did not question whether its enactment was made in pursuance to the rules that governed the Constitutional Convention of 1991. The real point of contention is nevertheless substantive in character insofar as it revolves around the separation of powers and the controlling authority of the judicial precedent in the Colombian legal system. It questions, in other words, the place and role of the courts in what I call the path of the law. Similar to what happened in the Commerce Clause cases, many different answers were

provided by the courts.

However, rather than fluctuating answers like the ones in those cases, the opinions rendered by the Colombian courts were incremental in redefining and expanding the power of the judicial precedent against the backdrop of the civil legal tradition embraced by the Colombian legal system. Back in 1995, the first Constitutional Court ruled that the judicial precedent is essential to the preservation of the determinacy and predictability of a legal system, as well as to the equal protection of law<sup>263</sup>. In 2011, the Constitutional Court, in reviewing the new Administrative Procedure Act, upheld the judicial precedent's controlling authority over courts and administrative agencies. The Court even took one step further and ruled that the disregard of the judicial precedent by judicial or administrative authorities is considered misconduct, which is punishable under criminal and disciplinary law<sup>264</sup>.

The question is why the same normative language gives rise to different questions as to their application and interpretation? If the source of the hard case is linguistic in nature, why one answer provided by the Supreme Court of the land about the provision's language is not enough to shed light on the penumbra zone? If the source is rather about the competing canons of interpretation, why one decision rendered by the Supreme Court of the land is not enough to settle the interpretive disagreement? Times change, and so does the law. The rules that make up a legal system mirror the political and moral philosophy embraced by a community. Nevertheless, as I shall argue in Chapter Five, addressing competing interests within such a complex social and political context raises several challenges to legality and its legal process. Indeed, far from having a political and moral consensus, a community is rather pluralistic insofar as it is comprised of individuals with different interests and sentiments. Hence, regardless of their source, the hard cases that I have presented show how a hard case may question existing law and the political and moral philosophy it represents. This entails, furthermore, that the assessment of the conflicting moral or political philosophies should not only be done in the search for a solution to the question at issue as to preserve law as an integrity, but also to identify the real point of contention.

On this assumption, I think that the decision of a hard case may lead not only to a change in the law, but also to the transformation of the polity as a whole. For instance, federalism or separation of powers hard cases tends to reveal profound moral and political disagreements whose solution might entail the redistribution of the way in which political power is divided and shared among the branches of government. Likewise, fundamental liberties hard cases stem from political and moral mobilizations that might lead to the recognition of new rights and obligations that set new goals or place new limits on government action. Evoking Justice HOLMES' words, the life of the law is not only practice; it is also the political and moral identity that such a practice forges and changes as times go by.

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<sup>263</sup> Corte Constitucional [C.C.] [Constitutional Court], mayo 13, 1994, M.P.: E. Cifuentes Muñoz, Sentencia T-231 de 1994, Expediente T 283325 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 21, 1995, M.P.: E. Cifuentes Muñoz, Sentencia T-123 de 1995, Expediente T 48378 (Colom.).

<sup>264</sup> Corte Constitucional [C.C.] [Constitutional Court], *supra* note 154, Sentencia C – 634/11; Corte Constitucional [C.C.] [Constitutional Court], *supra* note 151, Sentencia C – 539/11.

## CHAPTER II

### ADMINISTRATIVE REASONING & DISAGREEMENT ABOUT LAW

*“There is need also for a technique of appraising the work of administrative agencies, and of establishing the utility of such scientific appraisals. The generalizations, the philosophizing will gradually emerge from specific studies. Intensive studies of the administrative law of the States and the Nation in practice will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the covers of lawbooks to understand law.”*

- Felix Frankfurter<sup>1</sup>

In Chapter One, relying on a description of the general structure of the literature of jurisprudence, I introduced a working definition of *hard cases* as the cases that result from the vagueness of a social conduct's factual description contained in a legal norm, from the questionable consequences that the straightforward application of a legal norm under certain circumstances may elicit in light of given moral or political philosophy, or when there is no previously acknowledged legal norm that addresses the question at issue. In addition to this working definition of what makes a case hard, I claimed that hard cases may also reveal complex moral and political philosophy quandaries whose solution might elicit profound changes in a polity, which can range from the acknowledgment of new rights to the way in which public policy is made and executed.

This Chapter focuses on the administrative power and disagreement about the law. It questions whether the administrative power decides hard cases and gets away with it. My answer is that it does under certain circumstances. I claim that, like the judiciary, legal institutions endowed with administrative power decide hard cases and that their administrative decisions sometimes become final when courts endorsed them. I suggest the administrative power decides complex moral and political philosophy conflicts about the planning and allocation of valuable resources in a democratic polity in the form of theoretical disagreement or meta-interpretive disagreement about law and that these administrative decisions may elicit profound changes in the polity as a whole. It is not my purpose, however, to deny that courts may strike down such administrative decisions or that empirical disagreement about the law may also lead to administrative hard cases. It does, but this dissertation focuses on hard cases that spring from theoretical or meta-interpretive disagreement about law, how administrative decision-makers decide them, and how such administrative interpretations of what the law is become final when courts endorse them.

To do so, I will present four real-world hard cases to portray the nature of the disagreement that gave them rise and to describe how the administrative power decides them. This Chapter proceeds as follows. First, based on the working definition of a hard case that I introduced in Chapter One, I will present four real-world hard cases to describe how legal institutions endowed with administrative power decide hard cases and the complex moral and political philosophy quandaries that give them rise. Second, in light of the literature of jurisprudence, I will describe the empirical, theoretical, and meta-interpretive disagreements that may arise

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<sup>1</sup> Felix Frankfurter, THE TASK OF ADMINISTRATIVE LAW, 75 U. Pa. L. Rev. 614, 620 (1927).

in legal practice. Then, drawing on such theoretical description, I will portray how the administrative power not only decides empirical disagreements, but also theoretical and meta-interpretive disagreements about law. On the account that legal institutions endowed with administrative power decide hard cases, I will describe how they decide complex moral and political philosophy quandaries whose solutions sometimes elicit profound changes in a polity.

In fact, the four administrative hard cases that I will present suggest that the parties do not disagree about whether the grounds of law have obtained or whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature. I argue that these hard cases reveal complex moral and political philosophy quandaries whose solution may elicit profound changes in the polity. For that reason, the solution the complex controversies that give rise to these cases requires more than a judgment about whether the grounds of law have obtained in the particular case. Put it differently, the answer to these disagreements lies beyond the decision about whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature and the constitution. It follows, therefore, that the real point of contention is a theoretical disagreement about what counts as grounds of the law or a meta-interpretive disagreement about the different interpretive methodologies that could be used to construe a legal norm.

I must enter two caveats. First, one is prone to be repetitive in describing in great detail four real-world cases drawn from two different legal systems to portray the different disagreements that gave them rise and how the administrative bodies decided them. Thus, most of the facts that I describe in this section will be recapped in the following Chapters with different purposes that I shall explain on due course. Second, the Colombian General Administrative Procedure Act does not require any particular standing to challenge the validity of an administrative rule. Thus, it is difficult to identify the reasons behind the petitions for judicial review of administrative rules insofar as plaintiffs are not obliged to disclose their policy or moral interests behind the litigation, but only to introduce legal arguments in support of their legal claims. Hence, although it is not possible to identify the interests that lead the plaintiff to challenge an administrative rule's validity, I will trace back the policy origins of the administrative decision to the best of my capacity.

Having explained what this Chapter is about, I must now explain what it is not. Although I will describe in detail the underlying facts and legal arguments of each case, I will not assess the wisdom of the policies as to their causes and consequences. Nor will I discuss whether the decisions rendered by legal institutions endowed with administrative power and later endorsed by courts are good or bad policy.

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### ***Four Real-World Administrative Hard Cases***

I will start off by analyzing in detail four real-world *administrative hard cases* in light of the working definition of a hard case that I introduced in Chapter One. My aim is twofold. First, I shall put in practice my claim that hard cases spring from complex political and moral



philosophy disagreements regardless of their source. Second, I shall show how legal institutions endowed with administrative power solve them. Such administrative decisions later became final when the higher courts of Colombia and the United States endorsed them.

These four examples, two administrative rulemaking procedures, and two administrative adjudications were chosen based on the following criteria: 1. The cases involve statutes and administrative normative provisions regulating competing interests in fields developing at a vertiginous rate; 2. Due to the complexity and the evolving nature of the field, Congress revisits the matter periodically to assess, amend statutes, and restate the law; 3. Although Congress revisits the field periodically to restate the law, vagueness in the statutes prevails as to certain questions that may arise in the given statutory schemes; 4. Legal institutions endowed with administrative power are called upon to resolve such questions relying on their experience and expertise; 5. To do so, administrative authorities engage in rulemaking, adjudicatory, and enforcement proceedings; 6. Courts review such administrative actions upon petition for judicial review; 7. Courts uphold such administrative actions by deferring to an agency's interpretation of the statutes they administer; 8. Congress revisits the matter and decides to endorse or override administrative interpretations of what the law is.

I call them *administrative hard cases* because, regardless of legal traditions, constitutional schemes, and institutional arrangements, administrative agencies were called upon to solve the controversies and their underlying moral and political philosophy quandaries, which entailed, in turn, significant changes in the politics as a whole. The Higher Courts of the United States of America and Colombia deferred to the administrative interpretations and decisions without any further inquiry into the substance of the questions at issue. The first objection that an administrative law expert would make to this approach is that these cases cannot be labeled as "hard" under the argument that they do not fall under the working definition of a "hard case" that I have described in Chapter One insofar as courts decided them in a relatively uncontroversial fashion. This objection does not hold true because, though they are easy cases for the courts to decide, they were hard for the administrative bodies to resolve. This Chapter focuses on the administrative debates.

This section proceeds as follows. In each case, I will describe in great detail the underlying facts of the question at issue, the legal arguments and interpretations advanced by the interested parties, the arguments and reasons provided by the administrative bodies in support of their decisions, and some of the arguments introduced by the parties in their petitions for judicial review due to the absence of a general administrative rulemaking procedure in the Colombian legislation.

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### ***The Story of the "Bubble Policy"***

In 1981, following a political shift in the White House, the Environmental Protection Agency - EPA led by ANNE GORSUCH construed the term "stationary source" as to allow States to treat all of the pollution emitting devices within the same industrial facility as if they fell



within the same “bubble”, for which one overall permit would be sufficient<sup>2</sup>. In *Chevron v. Natural Resources Defense Council*, the Supreme Court of the United States upheld the EPA’s interpretation<sup>3</sup>. The Court acknowledged that the Clean Air Act Amendments of 1977 was a detailed, complex, and thorough response to a major social issue<sup>4</sup>. However, in spite of such specificity, the 1977 Amendments contain no specific reference to the “bubble concept” or a specific definition of the term “stationary source”<sup>5</sup>. This case involves various disagreements that were decided distinctly at two different levels. First of all, the disagreement was not about amended Clean Air Act’s validity. The parties agreed it is a valid piece of legislation, but they disagreed about the meaning of the term “stationary source” set out in the Act<sup>6</sup>. The United States Supreme Court<sup>7</sup> and commentators highlight that, though the new parts C and D of the 1977 amendments mandate states to adopt technology-based standards for certain new and modified sources, “[...] neither of them made any further attempt to define ‘facility’, ‘source’ or ‘stationary source’”<sup>8</sup>. Let us take a closer look at the facts.

In the United States of America, Congress enacted in 1963 the Clean Air Act articulating a set of policies and strategies seeking to balance economic growth and air quality<sup>9</sup>. Indeed, when assessing such competing interests, Congress struggle was in essence “[...] between interests seeking strict regulatory schemes to reduce pollution rapidly in order to eliminate its social costs” and interest groups advocating for the economic concern that stringent schemes would delay industrial growth with related social costs<sup>10</sup>. As a matter of constitutional theory, some commentators question the Framers’ belief to allow such a sweeping delegation of power in times of peace, which, in their opinion, is something that can only be explained after the New Deal confrontations<sup>11</sup>.

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<sup>2</sup> For a thorough exposition and analysis of the legal and policy arguments that led to the enactment of the “bubble concept”: See, e.g., Thomas W. Merrill, “The Story of Chevron”, in *ADMINISTRATIVE LAW STORIES*, 406 (Peter Strauss ed., 2006). *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); Michael H. Levin, “Getting There: Implementing the ‘Bubble Policy’” in *SOCIAL REGULATION, STRATEGIES FOR REFORM*, 66 (Bardach & Kagan eds., 1982).

<sup>3</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 849 (1984).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 851.

<sup>6</sup> 46 Fed. Reg. 50766 (October 14, 1981).

<sup>7</sup> *Chevron v. NRDC*, *supra* note 2, at 851 (“The 1977 Amendments contain no specific reference to the “bubble concept.” Nor do they contain a specific definition of the term “stationary source,” though they did not disturb the definition of “stationary source” contained in § 111(a)(3), applicable by the terms of the Act to NSPS program”).

<sup>8</sup> Merrill, *supra* note 1, at 406 – 407; *Chevron v. NRDC*, *supra* note 2.

<sup>9</sup> Richard L. Revesz, *ENVIRONMENTAL LAW AND POLICY*, 314 (3rd ed. 2015) (“The next major step taken by the federal government was the Clean Air Act of 1963, Pub. L. No. 88–206, 77 Stat. 392 (1963). The 1963 Act continued to vest primary responsibility for abating air pollution with the states, but it also authorized the Secretary of HEW to collect scientific data on air pollution effects, to develop advisory air quality criteria, and to recommend that the Attorney General commence particular enforcement actions. However, the Secretary’s recommendations under the Act were only advisory and could be issued only after the Secretary had held conferences with state and local authorities to discuss the threat. See Fromson, *supra*, at 526”).

<sup>10</sup> *Chevron v. NRDC*, *supra* note 2, at 847 (“The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus”).

<sup>11</sup> John Yoo, *UNITARY, EXECUTIVE, OR BOTH?*, 76 U. Chi. L. Rev 1935, at 1943 (2009) (“The Clean Air Act, for example, orders the Environmental Protection Agency to set air-quality standards the attainment of which

Congress amended the Act in 1970 in reaction to the failure of the states to cooperate with the federal government in fulfilling the purposes behind the enactment of the Act<sup>12</sup>, particularly the commitment “[...] to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”<sup>13</sup>. Under such statutory scheme, commentators explain that Congress established different programs requiring that “stationary sources”<sup>14</sup> of air pollution comply with stringent “technology-based limitations on emissions”<sup>15</sup>. Furthermore, EPA<sup>16</sup>, the Supreme Court<sup>17</sup> and commentators agree on the fact that each of the “[...] programs contained a critical ambiguity about the meaning of ‘source’”<sup>18</sup> to the extent that “[...] it was unclear whether this word referred to each ‘apparatus’ that emits pollution in a plant, or whether it referred to the entire plant”<sup>19</sup>.

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‘are requisite to protect the public health.’ Deciding how much aerial pollutant to allow goes beyond technical expertise and requires tradeoffs between competing values, such as economic growth and improved health. As an original matter, it is doubtful that the Framers believed the legislature could grant such sweeping power absent the necessities of wartime emergency. But after losing the New Deal confrontations, the courts no longer policed the amount of delegation from Congress to the executive branch”).

<sup>12</sup> For a detailed analysis of the legal and policy arguments behind the enactment of the Clean Air Act, its amendments, and its impact on the executive power’s structure, *see, e.g.*, Bruce A. Ackerman & William T. Hassler, *BEYOND THE NEW DEAL: COAL AND THE CLEAN AIR ACT*, 89 *Yale L.J.* 1466, at 1476 (1980) (“In response to this dismal reality, the 1970 Act not only massively increases the federal presence, but takes steps to guard against the repetition of yet another New Deal failure. Instead of permitting a group of “independent” commissioners to run off in different directions, the Act places primary responsibility on a single Administrator squarely situated within the executive branch. Just as the Act refuses to insulate the EPA in a New Deal fashion, so too it challenges the New Deal affirmation of expertise in two very different ways”).

<sup>13</sup> Clean Air Act § 101 (b)(1), 42 U.S.C. s 1857 (b)(1) 1970.

<sup>14</sup> Merrill, *supra* note 1, at 402.

<sup>15</sup> Ackerman & Hassler, *supra* note 12, at 1476, (“First, the Act requires the Administrator to set quantitative clean air targets that would “protect the public health” while allowing for an “adequate margin of safety” and to reach these targets by 1977 at the latest. In taking this step, Congress forced the agency to specify its ends far more clearly than required by the New Deal model. No longer could expertise be used as an excuse for avoiding the inevitably controversial task of defining ultimate environmental objectives; instead, the agency must define its goals in a highly visible way and recognize that Congress will call it to account by a certain date if it finds its performance unsatisfactory”).

<sup>16</sup> 46 *Fed. Reg.* 50766, *supra* note 5.

<sup>17</sup> *Chevron v. NRDC*, *supra* note 2, at 851.

<sup>18</sup> Merrill, *supra* note 1, at 402, (“Under the narrow apparatus definition, if a plant installs a new boiler with a smoke stack, this would either be new source (if the boiler was added to existing processes) or a modified source (if the boiler replaced an existing boiler and emitted more pollution than the original boiler). Hence the new boiler would have to comply with tough technology-based controls. The plant-wide definition of source, in contrast, in effect puts an imaginary bubble over an entire industrial complex and looks at changes in the amount of pollution coming out of a hole at the top”).

<sup>19</sup> *Id.*

In fact, for commentators, Congress passed the 1970 amendments<sup>20</sup> seeking to improve national air quality<sup>21</sup> by requiring the “[...] states to develop pollution control programs (State Implementation Plans or SIPs) that will keep the levels of given pollutants in the atmosphere below the National Ambient Air Quality Standards (NAAQs) set by the EPA”<sup>22</sup>.

<sup>20</sup> Ackerman & Hassler, *supra* note 12, at 1476 (“At the same time it energetically pursued this ends-forcing strategy, Congress treated a second form of agency forcing in a more ambivalent way. Once having set air quality targets, the next step was to define the best means of achieving the clean air targets by 1977. And at this stage, Congress was more reluctant to make a total break with New Deal models. Indeed, so far as existing plants were concerned, Congress remitted the problem of defining individual cleanup obligations to a classical New Deal process: in a low visibility, highly discretionary process, state-level administrators, with federal assistance, develop a State Implementation Plan (SIP). The binding federal constraint is that, taken together, polluters within each airshed must reduce emissions sufficiently to bring local conditions into compliance with federal clean air targets. Because different airsheds have different air quality and contain different polluters with different cleanup costs, various SIPs require old plants to reduce their sulfur dioxide (SO<sub>2</sub>) discharges in widely varying amounts. When viewed through New Deal eyes, this disparity is admirable. Because the pollution problem is of different severity in different parts of the country, why not ask polluters to cut back accordingly? If, due to local conditions, it is relatively expensive for coalburners to reduce their emissions compared to other dischargers, why not allow local compliance plans to take this factor into account? In principle, this decentralized process could harness the energies of knowledgeable experts to work effectively for the public good by designing reduction requirements to meet EPA air quality goals fairly and efficiently”).

<sup>21</sup> *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 - 65 (1975) (“The focus shifted somewhat in the Air Quality Act of 1967, 81 Stat. 485. It reiterated the premise of the earlier Clean Air Act ‘that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.’ *Ibid.* Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so. The response of the State to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub.L. 91—604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle: ‘Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .’ s 107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. s 1857c—2(a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time”).

<sup>22</sup> *ASARCO Inc. v. Environmental Protection Agency*, 578 F.2d 319, at 321 (1978); Clean Air Act ss 109, 110, 42 U.S.C ss 1857c-4, 1857c-5 (1970 & Supp V 1975); Revesz, *supra* note 8, at 315, (“The National Ambient Air Quality Standards (NAAQS) are ambient standards, that is, they set a maximum concentration of pollutants that is acceptable for the air all around us. The NAAQS are nationally uniform and, by design, are set without reference to cost. There is a separate NAAQS set for each so-called “criteria pollutant.” Certain criteria pollutants are specified by statute, and EPA may supplement that list. Setting the NAAQS, however, is only the first step in the regulatory process. The ambient standard is typically translated into an individual emissions standard—that is, the level of pollution that a given polluter may emit, so that the ambient standards are met when all polluters are complying with their emissions standards. In the CAA, this is generally done through state implementation plans (SIPs). The states bear primary responsibility for determining how the NAAQS will be met, and retain great flexibility in the choice of the regulatory tools they may use to distribute the burden of clean air in their state—so long as their distribution of the pollution burden will achieve the federal air standard. SIPs must contain certain statutory features, including enforceable emissions limitations or other control measures, and a program to provide for enforcement. SIPs are particularly important because they are the primary means by which existing sources of air pollution are regulated. Generally, such sources are grandfathered into the system without federal emissions regulation, but states may elect to regulate those sources through their SIPs”).

Additionally, the 1970 amendments introduced Section 111 that required EPA to set specific “[...] limits on the amounts of pollutants that may be emitted from any ‘new source’ of air pollution”<sup>23</sup>. The New Source Performance Standards (NSPSs) set out in Section 111 were “[...] designed to force new polluting sources to employ the best-demonstrated system of emission reduction”<sup>24</sup>. Commentators suggest<sup>25</sup> that EPA’s original 1971 regulations construing Section 111 echoed the statutory definitions of “stationary source”<sup>26</sup> and “modification”<sup>27</sup> “almost word by word”<sup>28</sup> and did not make any reference to the ‘bubble concept’<sup>29</sup>.

Commentators point out that, after a decade of fruitless meetings between administrative agencies and firms, the “bubble policy” emerged as the response to the “[...] threshold issue of balancing regulatory flexibility, less government intrusion, and reduced implementation costs”<sup>30</sup>. The “bubble policy” was first mentioned in proposals from the nonferrous smelting

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<sup>23</sup> ASARCO, *supra* note 22, at 321; Ackerman & Hassler, *supra* note 12, at 1476 (“So far as new power plants are concerned, however, the Act makes a second and sharper break with New Deal ideals. Rather than encouraging policymakers to define each plant's cleanup obligations in the light of local environmental conditions, the Act's provisions for new source performance standards require all plants of the same type, regardless of their location, to meet the same emission ceiling for each pollutant”).

<sup>24</sup> ASARCO, *supra* note 22, at 322; Ackerman & Hassler, *supra* note 12, at 1476, (“The Act also breaks with the New Deal paradigm by limiting the Administrator's freedom in setting the NSPS. Rather than contenting itself with the sententious advice to “protect the environment while assuring a vigorous economy,” the original section 111 required the EPA Administrator to set effluent standards that could be satisfied by the “best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated. Although, as we shall see, this formula is fairly elastic, its general thrust is plain. So far as new plants are concerned, Congress not only forced the EPA to specify its ends with clarity, but also presumed to specify the best means of achieving clean air objectives: only the “best system” would be acceptable in new plants. To some extent, this insistence on better performance from new plants makes good sense. Old plants, after all, have often been designed with little or no thought to pollution control. New imitations would often require expensive retrofitting. In contrast, new plants can be designed from the start to take pollution reduction into account”).

<sup>25</sup> Merrill, *supra* note 1, at 404.

<sup>26</sup> 36 Fed. Reg. 24876, 24877 (December 23, 1971) (“(d) ‘Stationary source’ means any building, structure, facility, installation which emits or may emit any air pollutant”).

<sup>27</sup> *Id.* (“(h) ‘Modification’ means any physical change in, or change in the method of operation of, an affected facility which increases the amount of any air pollutant (to which a standard applies) emitted by such facility or which results in the emission of any air pollutant (to which a standard applies) not previously emitted, except that: [...]”).

<sup>28</sup> ASARCO, *supra* note 22, at 323; 40 C.F.R. § 60.2(h) (1975). The regulations specified that “(r)outine maintenance, repair, and replacement would not constitute ‘physical changes’ and that ‘change(s) in the method of operation’ would not include an increase in the production rate up to the ‘operating design capacity’ of a facility, ‘(an) increase in the hours of operation,’ or ‘(u)se of an alternative fuel or raw material’ that the facility was previously designed to accommodate.

<sup>29</sup> *Id.*

<sup>30</sup> Levin, *supra* note 1, at 66.

industry and the Department of Commerce (DOC)<sup>31</sup> on December 1972<sup>32</sup>. The industry and DOC “[...] urged EPA to define ‘stationary source’ as an entire plant so that no ‘modifications’ of the source would occur unless the total emissions of some pollutant from the plan increased”<sup>33</sup>. Although EPA made some “concessions” in response to the industry’s proposals and the DOC demands<sup>34</sup>, “[...] it did not accept the industry’s position that an entire plant ought to be defined as a single source”<sup>35</sup>. EPA opposed the “bubble” concept until 1974<sup>36</sup> when it revisited its position on the matter “making further concessions” and proposing a “limited” version of the “bubble concept”<sup>37</sup>.

In response to new petitions made by the DOC<sup>38</sup>, EPA introduced the “bubble concept” to allow plantwide bubbles for modifications but not for wholly new or reconstructed facilities

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<sup>31</sup> Id. Levin explains that “[u]nlike some other successes, the origins of the bubble concept are not clouded with claims by competing proud parents. It began in 1972 – 1973 with suggestions from major smelters and the Nixon administration that the EPA redefine ‘sources’ subject to NSPS to include entire plants. This change would excuse plants undertaking major modifications, reconstructions, or expansions from stringent NSPS controls so long as total emissions from the plant did not increase. The proposal came from a heavily polluting and recalcitrant industry, appeared to contravene the Clean Air Act’s directive that better controls be designed into new facilities, and was fiercely opposed by EPA’s Air Programs and Enforcement offices on enforceability and equity grounds”.

<sup>32</sup> ASARCO, *supra* note 22, at 323, 324. Footnote 10 states: “See, e.g., letter from James M. Henderson of ASARCO to Donald F. Walters, then Chairman of the National Air Pollution Control Techniques Advisory Committee, Dec. 27, 1972, at 4 (incorporated by reference in letter from David W. Miller to Don R. Goodwin (EPA), Nov. 27, 1974, Doc. No. 35, at 3); telegram from Dept. of Commerce to Dr. Bernard Steigerwald (EPA), Mar. 3, 1973, Doc. No. 133, at 1; Meeting Report, July 5, 1973, *supra* note 1, JA 8; letter from George Wunder (Anaconda Co.) to Don R. Goodwin (EPA), Feb. 7, 1974, JA 12”.

<sup>33</sup> Id.

<sup>34</sup> Id. at Footnote 12, (“The draft regulations defined a single “stationary source” as containing a “combination of facilities.” See May Meeting Minutes, *supra* note 11, Appendix F at 13. At this stage, however, a “combination of facilities” was not intended to refer to an entire plant. EPA intended to “limit() the scope of a combined emission system to a group of facilities whose emissions can be controlled by an existing common control system.” Id. at 13. Furthermore, the combined emissions approach was to be applied only to “those facilities where a high-quality control system already exists and where substantial savings of control costs or energy could be achieved.”)

<sup>35</sup> Id. (“EPA’s major objection to the bubble concept was that it would make emission standards extremely difficult to enforce. See, e.g., May Meeting Minutes, *supra* note 11, at 13; Draft Memorandum, “Proposed Rulemaking to Clarify the Modification Provisions of Section 111 of the Clean Air Act ACTION MEMO,” July 12, 1974, Tab D at 2. The agency was also concerned that an approach based on maintaining existing levels of pollution would reward those operators who were presently using the fewest controls and use up air that would otherwise be available for new construction complying with NSPS. See, e.g., Minutes of Meeting: National Air Pollution Control Techniques Advisory Committee, Jan. 8-10, 1974, Doc. No. 130, at 7-8; Public Comment Summary, Revised April 1976, at 12-14, JA 110-112 (response to Comment 24)”.

<sup>36</sup> Id. (“EPA continued to resist the bubble concept in meetings with industry representatives, DOC, and the Office of Management and Budget through August 1974. See JA 8-9, 30-34”.)

<sup>37</sup> Merrill, *supra* note 1, at 404; ASARCO, *supra* note 22, at 324, Footnote 14, (“See Proposed Rulemaking to Clarify the Modification Provisions of Section 111 of the Clean Air Act ACTION MEMO., with Tabs A, B, C, and D, Sept. 30, 1974, JA 45-62; 39 Fed.Reg. 36946-36950 (1974), JA 63-67”).

<sup>38</sup> Id. at Footnote 15, (“See letter from William C. Rountree, Assistant General Counsel, DOC, to Alvin L. Alm, Assistant Administrator for Planning and Management, EPA, Dec. 9, 1974, JA 91-93. The proposed regulations permitted emission increases from altered facilities to be offset only by emission decreases from other facilities of the type for which NSPSs were prescribed. This limitation was considered necessary for accurate measurement. It was dropped in the final regulations. See Rulemaking to Clarify the Modification Provisions of Section 111 of the Clean Air Act ACTION MEMORANDUM, Nov. 24, 1975, at 2, JA 95; 40 C.F.R. s 60.14(d) (1976)”.)



in 1975<sup>39</sup>. The EPA explained, in general terms, “[...] ‘sources’ are entire plants, while ‘facilities’ are identifiable pieces of process equipment or individual components which when taken together would comprise a source”<sup>40</sup>. Thus, the EPA set a “dual definition” of “statutory source” in the sense that “[...] ‘facility’ means a single apparatus and ‘source’ means either a single apparatus or a complex of apparatuses”<sup>41</sup>.

Consequently with the “dual definition of stationary source”<sup>42</sup>, EPA amended its previous regulations by redefining “source” to mean any “[...] building, structure, facility, or installation that contains any or one combination of facilities”<sup>43</sup>. Furthermore, the EPA authorized a “qualified” form of the bubble by redefining the meaning of “modification”<sup>44</sup> to mean that a modification would not occur “[...] if an existing facility undergoes a physical or operational change where the owner or operator demonstrates to the Administrator's satisfaction that the total emission rate of any pollutant has not increased from all facilities within the stationary source to which appropriate reference, equivalent, or alternative methods can be applied”<sup>45</sup>. Nevertheless, EPA warned that the bubble would only apply to “changes in the operation of the existing equipment” and therefore it would not apply if an owner replaced an apparatus or added new one<sup>46</sup>.

Environmental groups<sup>47</sup> challenged the validity of EPA's construction of the statutory scheme, as well as smelters arguing that it should cover all three types of new facilities<sup>48</sup>. On January 1978, the District of Columbia Circuit Court of the United States “rejected in toto”

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<sup>39</sup> Id. at 324.

<sup>40</sup> 40 Fed. Reg. 58416 (December 16, 1975).

<sup>41</sup> Merrill, *supra* note 1, at 404; ASARCO, *supra* note 22, at 324, (“The italicized language is not included in the statutory definition of “stationary source” (“any building, structure, facility, or installation which emits or may emit any air pollutant”), nor was it included in the prior regulations. See 40 C.F.R. s 60.2(d) (1975). Thus the present regulations, instead of limiting the definition of “stationary source” to one “facility” as the statute does, make it cover “any one or combination of” facilities. The preamble to the new regulations makes it clear that the purpose of this change is to define a stationary source as an entire plant”).

<sup>42</sup> ASARCO, *supra* note 22, at 325 (“Relying on this new definition of a stationary source, EPA applies the bubble concept to allow a plant operator who alters an existing facility in a way that increases its emissions to avoid application of the NSPSs by decreasing emissions from other facilities within the plant”).

<sup>43</sup> 40 Fed. Reg. 58416, 58418 (December 16, 1975), amending 40 CFR § 60.2.

<sup>44</sup> ASARCO, *supra* note 22, at 325, Footnote 19.

<sup>45</sup> 40 Fed. Reg. 58416, 58419 (December 16, 1975), amending 40 CFR § 60.14

<sup>46</sup> 40 Fed. Reg. 58416, 58416 - 58417 (December 16, 1975), amending 40 CFR § 60.14; Merrill, *supra* note 1, at 405.

<sup>47</sup> ASARCO, *supra* note 22, at 326. The Sierra Club argued “[...] that the Act defines a ‘source’ as an individual facility, as distinguished from a combination of facilities such as a plant, and that the bubble concept must therefore be rejected in toto. [...] The Sierra Club's basic contention is that the new regulations are inconsistent with the plain language of Section 111. [...] This change in the definition of a stationary source is essential to EPA's adoption of the bubble concept. By treating a combination of facilities as a single source, the regulations allow a facility whose emissions are increased by alterations to avoid complying with the applicable NSPS as long as emission decreases from other facilities within the same “source” cancel out the increase from the altered facility.”

<sup>48</sup> Id. at 325, (“In its petition for review ASARCO argued that the bubble concept must be applied to allow emission increases from reconstruction and new construction to be offset. [...] The dispute between ASARCO and EPA centers on how far the bubble concept should extend. ASARCO asserts that a stationary source must be defined as an entire plant for all purposes and that the NSPSs should therefore never apply to an existing plant, even if new facilities are built or old ones are “reconstructed,” unless the net emissions of some pollutant from the entire plant increase”).



the interpretation holding in the case *ASARCO, Inc. v. EPA* that the “[...] regulations incorporating the bubble concept must be rejected as inconsistent with the language of the Act is reinforced when we consider the purpose of the Clean Air Act and Section 111, the confusion generated by the present regulations, and the weakness of EPA's arguments in favor of the bubble concept”<sup>49</sup>.

In an opinion written by Judge WRIGHT<sup>50</sup>, the Court considered that the EPA adopted a position “[...] contrary to both the language and the basic purpose of the Act”<sup>51</sup>. On the one hand, the Court explained that the “bubble concept” was contrary to the Act’s purpose to “[...] enhance air quality and not merely maintain it” to the extent it would defer in time the employment of new technology aimed at the attainment of the Act’s goals<sup>52</sup>. On the other hand, the Court ruled that the challenged regulations were inconsistent and “created confusion” by introducing a dual definition of “stationary source”<sup>53</sup>, which the Court deemed as the outcome of a “compromise” between the EPA’s initial regulations and the position defended by *Asarco*<sup>54</sup>. Furthermore, the Court indicated that the “bubble concept” was supported only by examples drawn from the nonferrous smelting industry<sup>55</sup>, which EPA itself acknowledged that was something that could not be extended to all regulated industries<sup>56</sup>.

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<sup>49</sup> Id.

<sup>50</sup> Thomas Merrill, CAPTURE THEORY AND THE COURTS: 1967 – 1983, 72 Chi-Kent L. Rev. 1039, 1065-66 (1997) (“The majority opinion was written by Judge J. Skelly Wright, a staunch liberal who was prone to see industry capture of administrative agencies in many of the regulatory controversies that came before him”).

<sup>51</sup> *ASARCO*, *supra* note 22, at 328, Footnote 30, (“See *id.* (the only reason given for not rejecting the bubble concept entirely is that this “would meet strong opposition from the smelter industry and the Department of Commerce”). In its brief EPA makes convincing arguments against adopting *ASARCO*'s version of the “bubble concept.” See *br. for EPA* at 24-38. The agency fails to explain adequately, however, why the same arguments do not undercut its own version of the bubble concept”).

<sup>52</sup> Id. at 328 (“The bubble concept in the challenged regulations would undercut Section 111 by allowing operators to avoid installing the best pollution control technology on an altered facility as long as the emissions from the entire plant do not increase. For example, under the bubble concept an operator who alters one of its facilities so that its emission of some pollutant increases might avoid application of the NSPS by simultaneously equipping other plant facilities with additional, but inferior, pollution control technology or merely reducing their production. Applying the bubble concept thus postpones the time when the best technology must be employed and at best maintains the present level of emissions”).

<sup>53</sup> Id. at 328, 329, (“Moreover, the challenged regulations are internally inconsistent and create confusion by defining a stationary source one way (as an entire plant) when determining whether a “source” has been “modified,” and another way (as an individual facility) when determining whether a “source” has been newly constructed or “reconstructed”).

<sup>54</sup> Id. at 328 (“This inconsistency is apparently the result of a “compromise” between EPA's original regulations, which followed the Act in treating a single facility as a source, and the industry position presented by *ASARCO* that a source must be defined as an entire plant. We are unable to understand why EPA should find it necessary to compromise by adopting a position that it admits is contrary to both the language and the basic purpose of the Act”). See also Footnote 29 of the opinion: “See, e. g., Rulemaking to Clarify the Modification Provisions of Section 111 of the Clean Air Act ACTION MEMORANDUM, Nov. 24, 1975, at 2, JA 95 (regulations described as a “compromise” between consistently treating entire plants as single sources and rejecting the bubble concept”).

<sup>55</sup> Id. at 329, Footnote 34, (“Rulemaking to Clarify the Modification Provisions of Section 111 of the Clean Air Act ACTION MEMORANDUM, Nov. 24, 1975, at 1, JA 94”).

<sup>56</sup> Id. (“As EPA itself recognizes in its brief, the problems a particular industry will have in meeting the NSPS is in proceedings dealing with the standards for that particular industry, not in regulations setting standards for all industries”).

Commentators explain that, due to the impossibility of meeting the strict guidelines and avoid stopping economic growth<sup>57</sup>, the Clean Air Act Amendments of 1977 imposed certain requirements on States that had not achieved the National Air Quality Standards established by the EPA<sup>58</sup>, including the requirement that “nonattainment” States ought to establish a permit program regulating “new or modified major stationary sources” of air pollution<sup>59</sup>. Under the new statutory scheme, a permit may not be issued for new or modified major stationary sources unless stringent conditions were met<sup>60</sup>. Although new parts C and D mandated states to adopt “technology-based standards” for certain new and modified sources, neither of them “[...] made any further attempt to define ‘facility’, ‘source’ or ‘stationary source’<sup>61</sup>.

Commentators clarify that Congress passed these amendments after the EPA had issued the “qualified bubble concept” under Section 111, but before the Court had struck down that policy in *Asarco*<sup>62</sup>. Although *Asarco* had been decided by the time EPA adopted new regulations implementing the PSD program<sup>63</sup>, EPA issued “[...] virtually the same qualified

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<sup>57</sup> Levin, *supra* note 1, at 69 (“The 1970 Air Act banned all new construction that might cause or contribute to air quality violations in nonattainment areas after 1977. By 1976 it was clear that many industrialized areas would not meet this deadline. To avoid prohibiting economic growth, EPA issued a 1976 ‘Offset Ruling’ that allowed major modifications, expansions, or wholly new sources to construct in such areas so long as they installed very stringent controls and secured sufficient extra reductions from nearby existing sources to produce a net decrease in emissions. In 1977 Congress confirmed and required revisions in this rule, raising the possibility of a plantwide bubble to avoid these new emission requirements”).

<sup>58</sup> 43 Fed. Reg. 26380 (June 19, 1978) (“On August 7, 1977, the Clean Air Act Amendments of 1977 became law. The 1977 amendments changed the 1970 act and EPA’s regulations in many respects, particularly with regard to PSD. (See Clean Air Act sections 160- 169, 42 U.S.C. 7470-79 (Clean Air Act Amendments of 1977, Pub. L. 95-95, 127(a), 91 Stat. 731 as amended, Pub. L. 95-190, section 14(a) (40)-154). 91 Stat. 1401-02 (November 16, 1977) (technical and conforming amendments). In addition to mandating certain immediately effective changes to EPA’s PSD regulations, the new Clean Air Act, in sections 160-169, contains comprehensive new PSD requirements. These new requirements are to be incorporated by States into their implementation plans (under section 110 of the act). By virtue of section 406(d) of the amendments, such State implementation plan revisions are due nine months after EPA issues these regulations published today which provide the States with guidance on submitting approvable plan provisions. In the interim, implementation of the PSD program under 40 CFR 52.21 will continue but as amended today”).

<sup>59</sup> Merrill, *supra* note 1, at 406 (“These provisions were applicable depending on whether air quality in a particular region is better than or worse than required by the National Ambient Air Quality Standards (NAAQS) established under the 1970 Act”).

<sup>60</sup> *Chevron v. NRDC*, *supra* note 2, at 849 (“Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA’s interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS’s was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP’s were required to contain a number of provisions designed to achieve the goals as expeditiously as possible”).

<sup>61</sup> Merrill, *supra* note 1, at 406, (“The amendments included Part C, the Prevention of Significant Deterioration (PSD) program designed to apply to major pollution-emitting facilities (“stationary sources that emit or could emit 100 tons of pollutants per year”) impose limits on the ability of states to allow clean air to deteriorate toward the NAAQS level. New Part D, called Plan Requirements for Nonattainment Areas (NAP) was introduced to urge states to bring dirty air areas into compliance with the NAAQS; *See also* *Chevron v. NRDC*, *supra* note 2, at 849.

<sup>62</sup> Merrill, *supra* note 1, at 407.

<sup>63</sup> *Id.*

bubble concept” rejected by *Asarco*<sup>64</sup>. On this point, EPA explained that when Congress passed the 1977 Amendments was aware of the definition of "modification" adopted by the EPA under Section 111<sup>65</sup>. In this sense, EPA argued, Congress implicitly ratified the EPA’s qualified “bubble concept” under PSD insofar as it had the same meaning than under Section 111<sup>66</sup>. Therefore, commentators suggest that EPA implemented the qualified “bubble concept” in the PSD regulations by defining “facility” as apparatus<sup>67</sup>, “source” as an entire plant<sup>68</sup>, and by making the definition of “major modification”<sup>69</sup> applicable to “sources” rather than “facilities”<sup>70</sup>.

EPA’s PDS regulations were challenged in the United States District of Columbia Circuit Court in *Alabama Power v. Costle*<sup>71</sup>. In a *per curiam* decision<sup>72</sup>, the Court ruled that there was “[...] no basis in the Act for establishing two different definitions of ‘modification’, one that looks only at net increases for substantive requirements, and a second that looks at all increases, without allowing offsets, for procedural requirements”<sup>73</sup>. The Court explained that if “[...] a particular set of industrial alterations is not a ‘modification’ within the terms of the Act, then it is subject to neither procedural nor substantive PSD requirements”<sup>74</sup>. Furthermore, the Court considered that “[...] an extension of PSD permit requirements beyond the language of the Act is then neither necessary nor appropriate to execute EPA's functions under the Act. Such extension would completely delay and obstruct industrial

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<sup>64</sup> Levin, *supra* note 1, at 69, (“The final Bubble Policy was signed by then EPA Administrator Douglas Costle on 29 November 1979. The event was marked by various forms of hoopla, including statements that the policy would produce ‘less expensive pollution control, not less pollution control’, and a press conference that was treated to competing impromptu addresses on the need for safeguards and flexibility by the agency’s assistant administrators for Air Programs and Policy. Key agency participants were also treated by the administrator to an evening bubble reception that appropriately featured champagne toast. Unfortunately, the champagne was cheap and symbolic; for the agency had formally assigned just three staffers to implement the policy, had made no organizational or funding changes to back its rhetoric, and had only the foggiest notion of the resources that full-scale national implementation might entail”).

<sup>65</sup> Merrill, *supra* note 1, at 407; 43 Fed. Reg. 26380 (June 19, 1978).

<sup>66</sup> *Id.*

<sup>67</sup> 43 Fed. Reg. 26388, 26404 (June 19, 1978) (“(5) ‘Facility’ means an identifiable piece of process equipment. A source is composed of one or more pollutant-emitting facilities”).

<sup>68</sup> *Id.* (“(4) ‘Source’ means any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)”).

<sup>69</sup> *Id.* (“(2) ‘Major modification’ means any physical change in, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the act (including any not previously emitted and taking into account all accumulated increases in potential emissions occurring at the source since August 7, 1977, or since the time of the last construction approval issued for the source pursuant to this section, which ever time is more recent, regardless of any emission reductions achieved elsewhere in the source) by either 100 tons per year or more for any source category identified in paragraph (b)(1)(i) of this section, or by 250 tons per year or more for any stationary source”).

<sup>70</sup> Merrill, *supra* note 1, at 407; 43 Fed. Reg. 26403 (June 19, 1979), amending 40 CFR SSS 52.21 (b)(2), (b)(4), (b)(5).

<sup>71</sup> 636 F.2d 323 (1979).

<sup>72</sup> *Id.* 343, (1979) (“Because of the great number of complex issues, the court's opinion appears in three parts, each written for the court by a member of the panel. Today's opinions supersede the per curiam opinion in this case, issued June 18, 1979. We have entertained narrowly focused petitions for reconsideration, all of which are disposed of by our holdings here”).

<sup>73</sup> *Id.* at 403.

<sup>74</sup> *Id.*

changes that Congress did not intend to regulate”<sup>75</sup>. On these grounds, the Court concluded that PSD procedural or substantive review were not applicable where there was not net increase changes within a source<sup>76</sup>.

Commentators describe that, in response to the *per curiam* order in *Alabama Power*<sup>77</sup>, the EPA determined that the “bubble concept” had to be forbidden under the Part D program insofar as the Circuit Court ruled that such a concept was “[...] inappropriate under programs designed to improve air quality”<sup>78</sup>. Consequently, EPA defined “source” for Part D program purposes to mean, “building, structure, facility or installation”<sup>79</sup>. In August 1980, the EPA introduced a regulation that applied the same reasoning of the Court of Appeals in *Asarco* and *Alabama Power*<sup>80</sup>. Thus, the EPA “[...] adopted again a dual definition of ‘source’ for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant”<sup>81</sup>. The EPA explained that this interpretation was “[...] more consistent with congressional intent” than the plantwide definition of “source” because “[...] it would bring in more sources or modifications for review”<sup>82</sup>.

Shortly after RONALD REAGAN was sworn in as the new president of the United States of America and as a part of the new administration’s policy on the reexamination of regulatory

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> 45 Fed. Reg. 52676, 52679 (August 7, 1980) (“In the September Federal Register notice, EPA also proposed various changes to those nonattainment regulations and guidelines. The purpose of those changes generally was to conform those regulations and guidelines to the decisions in *Alabama Power* concerning the statutory terms “source,” “modification,” and “potential to emit.”).

<sup>78</sup> Merrill, *supra* note 1, at 409.

<sup>79</sup> 45 Fed. Reg. 52676, 52695 (August 7, 1980) (“In the 1978 PSD regulations, EPA defined ‘source’ as ‘any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).’ The Offset Ruling contained the same definition of ‘source.’ In its June 1979 opinion in *Alabama Power*, the Court of Appeals rejected the definition of ‘source’ in the PSD regulations. It concluded that Congress intended section 111(a)(3) of the Act to govern the definition of ‘source’ for PSD purposes. That section defines ‘source’ as ‘any building, structure, facility, or installation which emits or may emit any air pollutant.’” In defining ‘source,’ EPA used the terms ‘building,’ ‘structure,’ ‘facility,’ and ‘installation,’ but then added ‘equipment,’ ‘operation,’ and ‘combination thereof.’ The court held that EPA, in adding those terms, exceeded its authority. It stated, however, that the Agency has substantial discretion to define one or more of the four terms in section 111(a)(3) to include a wide range of pollutant-emitting activities. In its June opinion, the court also focused on the clause ‘which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or persons under common control).’ The court held that the approach, which that clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable, since the Agency had ‘evidenced an intention to refrain from unreasonable literal applications of the definition and instead to consider as a single source only common sense industrial groupings.’ 13 ERC at t 1230”).

<sup>80</sup> Id. at 52694 - 52695 (August 7, 1980) (“In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of ‘source’: (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of ‘plant’; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of ‘building,’ ‘structure,’ ‘facility,’ or ‘installation.’”)

<sup>81</sup> *Chevron v. NRDC*, *supra* note 2, at 857; 45 Fed. Reg. 52697 (1980)

<sup>82</sup> *Chevron v. NRDC*, *supra* note 2, at 857.

burdens and procedures<sup>83</sup>, EPA announced its decision to reconsider issues related to the dual definition of “source” under nonattainment and PSD programs<sup>84</sup>. On October 14, 1981, after experience revealed the inefficiencies associated with separate permits for each pollution source in large and complex facilities<sup>85</sup>, EPA construed the term “stationary source” as to allow States to treat all of the pollution emitting devices within the same industrial facility as if they fell within the same “bubble”, for which one overall permit would be sufficient<sup>86</sup>. To support the regulatory shift, EPA explained that applying the same definition of “source” to

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<sup>83</sup> 46 Fed. Reg. 16280, 16281 (March 12, 1981) (“The decision to reconsider the scope of nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. EPA has also reevaluated all of the arguments on all sides of these definitional issues. The Agency has concluded that the amendments to the August 7 rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals of the Clean Air Act”).

<sup>84</sup> Id. (“For these reasons EPA has reconsidered the concerns it expressed in the August 7 preamble (See 45 FR 52697–8) and has decided that the “dual definition” is excessively and unnecessarily burdensome. In light of the change to the nonattainment area definition of source, there is good reason to abandon the “reconstruction” test for nonattainment area new source review. That test by itself only requires review in cases where there is reconstruction, but a “significant” increase in emissions is absent. With a plant-wide definition of source, the reconstruction provision would only trigger review in cases of plant-wide reconstruction. Few instances of plant-wide reconstruction are expected. Thus, there is little justification for the added complexity this provision entails. Moreover, this change will further reduce inconsistency with the PSD rules which do not have a reconstruction provision. The Clean Air Act, in Section 111, recognizes an independent, long-term interest in making sure that new facilities install state-of-the-art pollution controls when they are built. This results in the most cost-effective long-term air quality improvement by controlling pollution at the design stage, rather than requiring costly retrofits. Of course, this approach, unlike the nonattainment area requirements of Part D, is not based on the location of particular sources. For these reasons, EPA believes that a “reconstruction” definition is appropriate for the new source performance standards under Section 111”). See also Merrill, *supra* note 1, at 410.

<sup>85</sup> 46 Fed. Reg. 50766, *supra* note 5 at 50766 – 50767, (“However, on March 12, 1981, EPA proposed to delete the dual definition for nonattainment areas and to substitute a plantwide definition identical to that of the PSD program. 46 FR 16280, EPA stated that it could, by adopting a plantwide definition, reduce these regulatory burdens and complexities associated with NSR and the construction moratorium without interfering with timely attainment of the NAAQS in accordance with the Act. In particular, EPA argued that by bringing in more sources for review or subjecting them to the construction moratorium, the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air. In addition, EPA noted that a source would still be subject to any applicable new source performance standards (NSPS) and that significant net increases at a plant as well as wholly new plants, still would undergo nonattainment review. Third, EPA stated that its proposal would simplify the regulatory process by adopting the same definitions for PSD and nonattainment permits. Finally, EPA stated that even if a state adopted a plantwide definition, it nonetheless had to demonstrate attainment of the NAAQS and reasonable further progress (RFP) towards attainment by the statutory deadlines. For these reasons, EPA concluded that the dual definition was unnecessarily burdensome, and so should be deleted”).

<sup>86</sup> Id. (“EPA has decided to adopt the plantwide definition of source and to delete the reconstruction requirement as it proposed last March. After evaluation of the comments received, EPA has concluded that two concerns warrant this approach to NSR. First, today's action means that both the PSD and nonattainment programs will use the same definition of “source.” This alone will reduce regulatory complexity. Sources will no longer have to figure out what an “installation” is, which should lessen any confusion engendered by EPA's August 7 rules. Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. See, e.g., Sen. Rep. 95–127 at pp. 10–11; cf. NRDC v. Train, 421 U.S. 60 (1975”).



both the PSD and nonattainment programs would reduce regulatory complexity<sup>87</sup>. EPA stated, moreover, that its action was faithful to Congress' mandate that states "[...] play the primary role in pollution control insofar as the bubble concept allows states much greater flexibility in developing their nonattainment programs"<sup>88</sup>.

Environmental groups led by the *Natural Resources Defense Council*, petitioned for review of the 1981 regulations in the United States Court of Appeals for the District of Columbia Circuit<sup>89</sup>. They raised the issue whether EPA's discretion under the Clean Air Act is sufficiently broad to allow it to apply the "bubble concept" to the nonattainment program contained in Part D, for which they argue that the "[...] plantwide definition of 'stationary source' is contrary to the terms, legislative history, and purposes of the amended Clean Air Act"<sup>90</sup>. EPA opposed and argued that the "bubble concept" "[...] would further the statutory purpose of affording states flexibility in designing revised SIPs by leaving the states with considerable authority to define source as they believe best-advised: they might adopt the bubble concept or, if necessary for timely attainment, a more stringent standard"<sup>91</sup>.

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<sup>87</sup> Id. at 50768 ("Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works. EPA believes that elimination of the dual definition clearly simplifies what any objective observer would agree is a quite complex regulation. First, plants sometimes must get a PSD permit for one pollutant and a nonattainment permit for another pollutant. Using the same definition for PSD and nonattainment purposes simplifies the permit process. Second, by defining "source" in essence as an entire plant, EPA has eliminated the problem of determining what an "installation" is in a given situation"); Thomas W. Merrill, "The Story of Chevron," in ADMINISTRATIVE LAW STORIES, 410 (Peter Strauss ed., 2006).

<sup>88</sup> Merrill, *supra* note 1, at 410; 46 Fed. Reg. 50766, *supra* note 5, at 50767 ("Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since the demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D").

<sup>89</sup> *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, at 727 - 728 (1982) ("The goal of the nonattainment program is undoubtedly to improve air quality in regions lagging behind in meeting the NAAQSs. Offering flexibility to the states may be a method of attaining that objective, but it is not an independent goal of the nonattainment scheme. [...] Allowing the states large leeway to define the sources to which the federal requirement applies is not easily reconciled with the statutory design. [...] This court's prior adjudications in *Alabama Power* and *ASARCO* preclude us from sanctioning EPA's employment of the bubble concept in the Clean Air Act's nonattainment program").

<sup>90</sup> *Chevron v. NRDC*, *supra* note 2, at 842, Footnote 7, ("Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents' contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record").

<sup>91</sup> *NRDC v. Gorsuch*, *supra* note 89, at 727 ("The agency asserts that a fundamental purpose of the nonattainment scheme is to afford the states flexibility in designing revised SIPs which will attain compliance with the NAAQSs. See EPA Brief at 20-23 (quoting H.R.Rep.No.294, *supra* note 38, at 211). Regardless of the method chosen, EPA maintains, the states remain under an obligation to submit and comply with a revised SIP that assures improved air quality. [...] Fulfillment of the other prime purposes of the nonattainment program, timely compliance with the NAAQSs and reasonable further progress toward that goal, EPA asserts, is thereby assured. Thus, EPA concludes, application of the bubble concept to the nonattainment scheme fits neatly within the "purpose" language of *Alabama Power*").



In 1984, in *Chevron v Natural Resources Defense Council*, the Supreme Court of the United States upheld the EPA's interpretation in a landmark decision<sup>92</sup>. The Supreme Court acknowledged that the Clean Air Act Amendments of 1977 was a detailed, complex and thorough response to a major social issue<sup>93</sup>. Despite such specificity, the 1977 Amendments contain no specific reference to the "bubble concept" or a specific definition of the term "stationary source"<sup>94</sup>.

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### *The Story of a Jurisdictional Mirage*

In the United States, Congress passed the Communications Act of 1934 to regulate the "electronic transmission of information" in the form of data, audio or video<sup>95</sup>. Commentators highlight, however, that things were simpler in 1934 because "[...] electronic communications moved through either the air or wires" and the market was dominated by a few companies<sup>96</sup>. In 1996, Congress amended the Communications Act of 1934 to address the threshold issue of turning down entry barriers and letting the "marketplace" forces pave the way of "technological convergence", restructuring the Federal Communications Commission's duties and responsibilities to "monitor" the market's entry points rather than deciding who can access it, and preventing the new competition from harming the "most vulnerable" or "pro-social"<sup>97</sup>. Although President CLINTON said that the Telecommunications Act of 1996 was a piece of "truly revolutionary legislation"<sup>98</sup>, commentators question whether it actually fulfilled its "sweeping aspirations"<sup>99</sup>. In fact, drawing on public choice literature, they point out that the 1996 amendments are rather the outcome of a political system that is responsive to interest groups that push to preserve "the tyranny of the status quo"<sup>100</sup>. It is to be noted, however, that commentators agreed on the FCC's critical role in developing what Congress set out in general terms in the 1996 amendments<sup>101</sup>.

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<sup>92</sup> *Chevron v. NRDC*, *supra* note 2, at 857.

<sup>93</sup> *Id.* at 849.

<sup>94</sup> *Id.* at 851.

<sup>95</sup> Thomas G. Krattenmaker, *THE TELECOMMUNICATIONS ACT OF 1996*, 49 *Federal Communications Law Journal* 1, at 4 (1996); Philip Rosario & Mark F. Kohler, *THE TELECOMMUNICATIONS ACT OF 1996: A STATE PERSPECTIVE*, 29 *Conn. L. Rev.* 331 (1996) (Analyzing the Telecommunications Act of 1996 from state's point of view).

<sup>96</sup> *Id.* at 4. Professor Krattenmaker explains that in 1934 "[...] [t]elecommunication by wire was a natural monopoly, subject to common carrier regulation, characterized by speaker and listener privacy and virtually devoid of censorship. Telecommunication through the air was broadcasting, a conversation open to everyone, that was conducted through workably competitive markets, while censored by the FCC".

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> Monroe E. Price & John F. Duffy, *TECHNOLOGICAL CHANGE AND DOCTRINAL PERSISTENCE: TELECOMMUNICATIONS REFORM IN CONGRESS AND THE COURT*, 97 *Colum. L. Rev.* 976, at 977 (1997); Krattenmaker, *supra* note 95, at 438 – 47, 49, ("Finally, and perhaps most fortunately, I believe we can be quite sure that all the matters I have raised in this Article are relatively short term transitory issues. Telecommunications technology marches forward. We cannot retard it any more than we can catch lightning in a bottle. Some people are now using the Internet for long-distance phone calls. Who knows what technologies will dominate in 2025?").

<sup>100</sup> Price & Duffy, *supra* note 99, at 978.

<sup>101</sup> Joseph D. Kearney & Thomas W. Merrill, *TECHNOLOGICAL CHANGE AND DOCTRINAL PERSISTENCE: TELECOMMUNICATIONS REFORM IN CONGRESS AND THE COURT*, 98 *Colum. L. Rev.* 1323, 1325 (1998) ("The

Among many other things, the 1996 amendments introduced limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of towers and antennas required for the operation of wireless telecommunications networks<sup>102</sup>. Unlike *Chevron*, this case is about an administrative adjudication that allows me to describe how legal institutions endowed with administrative power also decide hard cases and their complex quandaries via adjudication. This administrative debate involves a complex controversy that unfolded at different levels. Although CTIA's petition raised three main issues<sup>103</sup>, I will only focus on the issues related to the authority of the FCC to construe the Communications Act and to the definition of timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites. First, the interested parties disagreed about the extent and scope of the FCC's authority to construe ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling. Second, the parties also disagreed about the meaning of the terms "reasonable period of time" and "failure to act" set out in Sections 332(c)(7)(B)(ii) and 332(c)(7)(B)(v) of the Act, respectively. In an opinion delivered by Justice SCALIA, the Supreme Court of the United States upheld FCC's statutory construction and ruled that an agency's interpretation of its own jurisdiction is entitled to *Chevron's* deference<sup>104</sup>.

On July 11, 2008, the Wireless Association (CTIA) filed a petition requesting that the Federal Communications Commission issue a Declaratory Ruling "[...] clarifying provisions in Sections 253 and 332(c)(7) of the amended Communications Act of 1934" concerning state

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Telecommunications Act contains over 100 pages of new regulatory requirements, directs the Federal Communications Commission (FCC) to commence more than a dozen rulemaking proceedings, and is being implemented through scores arbitrations throughout the states, each of which is subject to judicial review. Like recent changes sweeping the natural gas and electric tries, the Telecommunications Act establishes a very different framework from the one that prevailed before"); Thomas G. Krattenmaker, *THE TELECOMMUNICATIONS ACT OF 1996*, 49 Fed. Comm. L. J. 1, at 2 (1996) ("These seem to be the larger questions that a true reform of U.S. telecommunications law and policy would address. The 1996 Act not only failed to address these questions, but created an even larger Federal Communications Commission, charged with even more responsibilities. One Commissioner reports that the new law will require the FCC to conduct eighty rulemakings!"); William H. Read & Ronald Alan Weiner, *FCC REFORM: GOVERNING REQUIRES A NEW STANDARD*, 49 Fed. Comm. L. J. 289 (1996) (Discussing the FCC's reform in light of the Telecommunications Act of 1996).

<sup>102</sup> *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, at 115 - 116 (2005) ("Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." *Ibid.* One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U.S.C. § 332(c)(7)").

<sup>103</sup> *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 13995 (November 18, 2009) ("Timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act").

<sup>104</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

and local review of wireless facility siting applications<sup>105</sup>. The CTIA claimed the FCC possesses authority to interpret Section 332(c)(7) of the Telecommunications Act in order to fulfill the Act's goals<sup>106</sup>. Consequently, CTIA requested that the FCC "[...] declare that the failure to render a final decision within 45 days of a filing of a wireless siting application proposing to collocate on an existing facility constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)"<sup>107</sup>. The CTIA requested, moreover, that the FCC "[...] declare that the failure to render a final decision on any other, non-collocation wireless siting application within 75 days constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)"<sup>108</sup>. Likewise, the CTIA asks the FCC to find that, if a zoning authority fails to act within the above time frames, the application shall be "deemed granted"<sup>109</sup>. Alternatively, the CTIA requests that the FCC establish a "[...] presumption under such circumstances that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay"<sup>110</sup>.

Many comments and replies were filed in response to the public notice issued by the FCC, including comments from wireless service providers, tower owners, local and state government entities, and airport authorities<sup>111</sup>. Concerning the jurisdictional question, industry commenters supported CTIA's petition "in all respects"<sup>112</sup>. They argued, based on a purposive interpretation of the Act, that the FCC is endowed with authority to interpret Section 332(c)(7) and that the FCC's definition of the reasonable time frames for State and local governments to process facility siting applications will encourage the placement of advanced networks and broadband<sup>113</sup>. By contrast, state and local governments, as well as airport authorities, opposed the CTIA's petition<sup>114</sup>. Relying on a textual interpretation, they asserted that Congress gave the courts, rather than the FCC, the authority to interpret Section 332(c)(7) of the Communications Act, for which they cite statutory text and legislative history<sup>115</sup>. On this basis, they asserted that the FCC lacks the authority to define what is a "reasonable period of time" and when a "failure to act" or a "prohibition of service" has occurred<sup>116</sup>.

Regarding the policy question, wireless providers claimed that defined time frames for state and local governments to process personal wireless service facility siting applications are

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<sup>105</sup> *In re Petition*, *supra* note 103, at 13994.

<sup>106</sup> *Id.* at 13996.

<sup>107</sup> *Id.* at 13997.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 13997, Footnote 34, ("See generally WT Docket No. 08-165. The major commenters and the short forms by which they are cited are listed in Appendix A. Brief comments are not listed but are considered in this Declaratory Ruling").

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 13997 – 13998, Footnote 37, ("See, e.g., MetroPCS Comments at 6-7; NextG Networks Comments at 4").

<sup>112</sup> *Id.* at 13998, Footnote 35. ("See, e.g., Verizon Wireless Comments; AT&T Comments; Rural Cellular Association Comments; PCIA -- The Wireless Infrastructure Association Comments").

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 13998, Footnote 41, ("See, e.g., NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15").

<sup>116</sup> *Id.* at 13998, Footnote 42, ("See, e.g., Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2-3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9").

required in order to avoid facing “undue delay in some localities”<sup>117</sup>. They further contended that time frames are necessary to set out a clear time “[...] when they should seek redress from courts for state and local governments' failure to act in a timely manner”<sup>118</sup>. In this sense, they claimed that the CTIA's proposed timetables are “fair” and ought to be used to determine the “[...] ‘reasonable period of time’ for state and local governments to process facility siting applications in Section 332(c)(7)(B)(ii)”<sup>119</sup>. Conversely, State and local government commenters claimed that there is no ambiguity in the statutory terms “reasonable period of time” and “failure to act” under the argument that Congress “deliberately” employed these “general terms” to preserve state and local government administrative “flexibility”<sup>120</sup>. They also opposed either considering an application granted in the event of a zoning authority's “failure to act” or the creation of a presumption “[...] entitling an applicant to a court-ordered injunction granting the application”<sup>121</sup>.

In November 2009, the FCC issued a *Declaratory Ruling* responding to CTIA's petition<sup>122</sup>. First, the FCC decided in favor of the CTIA's purposive interpretation of the Telecommunications Act's goals and asserted jurisdiction to interpret Section 332(c)(7) of the Act<sup>123</sup>. Second, the FCC found that the “[...] record evidence demonstrates that unreasonable delays in the personal wireless facility siting process have obstructed of wireless services” and that such delays “[...] impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996”<sup>124</sup>. The FCC concluded that, a “[...] reasonable period of time” under 332(c)(7)(B)(ii), is presumptively (but rebuttably) 90 days to process a collocation application and 150 days to

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<sup>117</sup> Id. (“Wireless providers assert that without defined timeframes for State and local governments to process personal wireless service facility siting applications, they face undue delay in some localities [Footnote 38: *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6.]”).

<sup>118</sup> Id. (“They further argue that timeframes are necessary so that they know when they should seek redress from courts for State and local governments' failure to act in a timely manner [Footnote 39: *See, e.g.*, CalWA Comments at 4; Rural Cellular Association Comments at 4; T-Mobile Comments at 9-10.]. They claim that the Petitioner's proposed timetables are fair and should be used to define the “reasonable period of time” for State and local governments to process facility siting applications in Section 332(c)(7)(B)(ii) [Footnote 40: *See, e.g.*, Rural Cellular Association Comments at 4-5; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.]”).

<sup>119</sup> Id. at 13998, Footnote 40, (“*See, e.g.*, Rural Cellular Association Comments at 4-5; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8”).

<sup>120</sup> Id. at 13998 - 13999, Footnote 43, (“*See, e.g.*, NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4, 15-20; City of Dublin, OH Comments at 2-3; California Cities Comments at 13-16”).

<sup>121</sup> Id. at 13999, Footnote 44, (“*See, e.g.*, California Cities Comments at 17-21; NATOA et al. Comments at 15-18; SCAN NATOA Comments at 11-12”).

<sup>122</sup> Id. at 14001.

<sup>123</sup> Id.

<sup>124</sup> Id. at 14007, (“Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion. Wireless providers currently are in the process of deploying broadband networks which will enable them to compete with the services offered by wireline companies”).

process all other applications”<sup>125</sup>. Nevertheless, the FCC makes clear that “[...] the state or local government will have the opportunity to rebut the presumption of reasonableness”<sup>126</sup>.

Regarding the jurisdictional question, the FCC agreed with the CTIA that it was endowed with authority to interpret Section 332(c)(7) of the Communications Act because Congress delegated to the FCC the responsibility for administering the Communications Act<sup>127</sup>. Based on a purposive interpretation of the Act’s goals, the FCC considered this grant of authority necessarily encompasses Title III of the Communications Act in general and Section 332(c)(7) in particular<sup>128</sup>. The FCC found, moreover, that Section 332(c)(7)(B)(v) of the Act did not limit its authority to interpret Section 332(c)(7)<sup>129</sup>. Recall that state and local governments argued nonetheless that Congress gave the courts, not the FCC, exclusive jurisdiction to interpret and enforce Section 332(c)(7)<sup>130</sup>.

The FCC considered that its conclusion was consistent with its previous decision in the *Local Franchising Order*, where the same arguments raised by the state and local governments commenters were rejected<sup>131</sup>. In that administrative decision, the FCC advanced two main arguments that are relevant to the question at issue. First, the FCC held that it “[...] has clear authority to interpret what it means for a local government to ‘unreasonably refuse to award’

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<sup>125</sup> Id. at 14012 (“Based on our review of the record as a whole, we find 90 days to be generally a reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications”).

<sup>126</sup> Id. at 14005.

<sup>127</sup> Section 1 of the Act mandates the FCC to “execute and enforce the provisions of this Act” in order to, *inter alia*, regulate and promote communication “by wire and radio” on a nationwide basis. Moreover, Section 201(b) of the Act authorizes the FCC “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act”. Furthermore, Section 303(r) of the Communications Act dictates that “the Commission from time to time, as public convenience, interest or necessity requires shall [...] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act [...]”. Section 4(i) mandates that the Commission “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions”. See also *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“The *Chevron* framework governs our review of the Commission’s construction. Congress has delegated to the Commission the authority to “execute and enforce” the Communications Act, § 151, and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act, § 201(b); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377–378, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission’s jurisdiction. [...] Hence, as we have in the past, we apply the *Chevron* framework to the Commission’s interpretation of the Communications Act”).

<sup>128</sup> *In re Petition*, *supra* note 103, at 14001.

<sup>129</sup> Section 332(c)(7)(B)(v) dictates that “[a]ny person adversely affected by any final action or failure to act by a State or local government [...] may [...] commence an action in any court of competent jurisdiction”.

<sup>130</sup> *In re Petition*, *supra* note 103, at 13998, Footnote 41, (“See, e.g., NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15”).

<sup>131</sup> Id. at 14002, (“This finding is consistent with our decision in the *Local Franchising Order*, in which we held that the Commission has clear authority to interpret what it means for a local government to “unreasonably refuse to award” a franchise to a cable operator in Section 621(a)(1) of the Act”).



a franchise to a cable operator in Section 621(a)(1) of the Act”<sup>132</sup>. Second, the FCC held that “[t]he mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority”<sup>133</sup>. The FCC concluded, therefore, the fact that “[...] Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7)”<sup>134</sup>.

The United States Court of Appeals for the Sixth Circuit upheld that decision in *Alliance for Community Media v. FCC*<sup>135</sup>. In this case, the Court of Appeals found that the Supreme Court's precedent in *AT&T Corp. v. Iowa Utilities Board*<sup>136</sup> controlled, and it ruled that the FCC “[...] possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1) pursuant to its authority under Section 201(b) to carry out the provisions of the Communications Act”. As to first argument advanced by the FCC, the Court of Appeals held that “[...] the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision”<sup>137</sup>. The FCC considers that the “same holds true in this case” because Section 332(c)(7) “falls within the Act” and it has the “authority to interpret it” accordingly<sup>138</sup>. Concerning the second argument, the Court of Appeals agreed with the FCC, ruling “[...] the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)”<sup>139</sup>.

On these grounds, the FCC emphatically disagreed with state and local government commenters that its interpretation of the limitations that Congress imposed on state and local governments in Section 332(c)(7) of the Act is the same as imposing “new”<sup>140</sup> limitations on state and local governments<sup>141</sup>. The FCC then asserted that its interpretation of Section 332(c)(7) is not the imposition of “new” limitations because it “[...] merely interprets the limits Congress already imposed on state and local governments”<sup>142</sup>. The Commission asserted, moreover, the “[...] legislative history does not establish that the FCC is prohibited from interpreting the provisions of Section 332(c)(7)”<sup>143</sup>, for which it appealed to the Conference Report that states that “[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated”<sup>144</sup>. In this light, the FCC read the legislative history as “[...] intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond

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<sup>132</sup> Id.

<sup>133</sup> Id. at 14003.

<sup>134</sup> Id. at 14002 – 14003.

<sup>135</sup> 529 F.3d 763 (2008).

<sup>136</sup> *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 – 378, (1999).

<sup>137</sup> *Alliance for Community Media v. FCC*, 529 F.3d 763, at 774 (2008).

<sup>138</sup> *In re Petition*, *supra* note 103, at 14001 – 14002.

<sup>139</sup> *Alliance for Community Media*, *supra* note 137, at 775.

<sup>140</sup> *In re Petition*, *supra* note 103, at 14002 (Italicized in the original text).

<sup>141</sup> Id.

<sup>142</sup> Id.

<sup>143</sup> Id.

<sup>144</sup> Id.



those set out in Section 332(c)(7)”<sup>145</sup>.

A group of state and local governments opposed the adoption of the Declaratory Ruling claiming that the FCC lacked “[...] authority to interpret ambiguous provisions of Section 332(c)(7)” such as “reasonable period of time” and “failure to act”<sup>146</sup>. On these grounds, the cities of Arlington and San Antonio, Texas, petitioned for review of the Declaratory Ruling in the Court of Appeals for the Fifth Circuit. Based on Circuit precedent<sup>147</sup>, in an opinion written by Judge OWEN, the Fifth Circuit ruled that *Chevron* applied to the question whether the FCC possessed statutory authority to prescribe the timeframes for state or local governments to act on siting applications for wireless facilities. However, the Fifth Circuit highlighted that the Supreme Court had not yet resolved the question of whether the *Chevron* doctrine was applicable in the context of an agency’s determination of its own statutory jurisdiction and that the Circuit Courts of Appeals had adopted different approaches to the issue. Some circuits used to apply *Chevron* to disputes over an agency’s interpretation of its own jurisdiction<sup>148</sup>, some did not<sup>149</sup>, and some circuits had avoided taking any position on this matter<sup>150</sup>. In *City of Arlington v. FCC*, the Supreme Court of the United States upheld FCC’s statutory construction and ruled that an agency’s interpretation of its own jurisdiction is entitled to *Chevron*’s deference<sup>151</sup>.

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### ***The Story of the “Gratuitousness Principle”***

In 1979, the Congress of the Republic of Colombia enacted Law 9, which is a massive piece of legislation that regulates myriad topics ranging from environmental protection to epidemic

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<sup>145</sup> Id. The FCC explained, however, that its actions in this *Declaratory Ruling* will not preempt state or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. In fact, state and local governments will continue to decide the outcome of personal wireless service facility siting applications according to the authority Congress reserved to them in Section 332(c)(7)(A). In this sense, the FCC makes clear that under Section 332(c)(7)(B)(iii), they may reject such applications if the denial is “supported by substantial evidence contained in a written record”. Nevertheless, the FCC also points out that state and local governments must act upon personal wireless service facility siting applications “within a reasonable period of time” as defined in the *Declaratory Ruling*, and “must not prohibit one carrier’s provision of service based on the availability of service from another carrier, or applicants may commence an action in a court of competent jurisdiction pursuant to Section 337(c)(7)(B)(v)”.

<sup>146</sup> *City of Arlington*, *supra* note 104, at 1867.

<sup>147</sup> *Texas v. United States*, 497 F.3d 491, 501 (5th Cir.2007); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440–46 (5th Cir.1999); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir.1995) (per curiam).

<sup>148</sup> *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145–46 (10th Cir.2010) (en banc) (“Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, [...] including statutory ambiguities affecting the agency’s jurisdiction [...]”); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir.1988) (“When Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one [...] This rule of deference is fully applicable to an agency’s interpretation of its own jurisdiction”).

<sup>149</sup> *N. Ill. Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 846–47 (7th Cir.2002); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed.Cir.1998).

<sup>150</sup> *Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (leaving the question unanswered); *O’Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir.1996) (same).

<sup>151</sup> *City of Arlington*, *supra* note 104.

control<sup>152</sup>. Despite such a significant legislative effort to cover many areas, Congress did not address in detail many of the topics contained in the statute and granted broad rulemaking authority to the Government to regulate said matters<sup>153</sup>. It is noteworthy that Law 9 of 1979 did not say much about the regulation of the donation of human *organs*, tissues or other body parts for the purpose of transplantation. The Act only established the general guidelines of a permit program aimed at the medical and scientific institutions that are interested in developing activities involving the transplantation of human organs for therapeutic or research purposes. Concerning the regulation of the other general and particular aspects of such procedures, Congress granted broad rulemaking authority to Government<sup>154</sup>.

The President, exerting his rulemaking power granted by the Constitution and Articles 564 and 565 of Law 9 of 1979, issued Decree 2363 of 1986 articulating a set of general policies and rules concerning the donation, extraction, storage, distribution, and transplantation of human organs or other body parts<sup>155</sup>. Furthermore, the administrative rule introduced the “gratuitousness principle” into the Colombian legal system. According to this principle, the donation of human organs, tissues or other body parts for the purpose of transplantation or scientific research ought to be motivated only by altruistic purposes<sup>156</sup>. Thus, according to Article 16 of Decree 2363 of 1986, it is strictly forbidden to give or receive any of compensation, monetary or not, in exchange for the donation of human organs, tissues or other body parts, as well as to transfer such anatomical components to foreign countries<sup>157</sup>.

In 1988, Congress revisited the matter urged by the necessity of addressing the increasing human organs and tissues trafficking and the so-called “human organ transplant tourism” situation. In doing so, Law 73 of 1988 amended Law 9 of 1979 in the sense that Congress expressly ratified in Article 7 the “gratuitousness principle” prohibiting any of compensation, monetary or not, for the extraction and trade of human organs and other body parts for the

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<sup>152</sup> L. 9/79, enero 24, 1979, Diario Oficial [D.O.] (Colom.). Congress set out the statutory framework for environmental protection, water treatment plants and procedures, labor safety standards, sanitation standards, food and drug control, epidemiological control, natural disasters prevention and redress protocols, human organs and tissue transplantation procedures control, and the fabrication and distribution control on products for household use.

<sup>153</sup> Id. art. 564. It is to be noted that Article 564 of the Act states: “It is the duty of the State, as the regulator of the commerce and trade, as well as the overseer of health conditions, to issue the necessary provisions to assure adequate hygiene and security conditions in all activities contained herein, as well as it is the duty of health authorities to oversee the compliance of such provisions”. Also, Article 565 of the Act states: “The Ministry of Health shall formalize the technical Colombian norms for all the products contained in this Act. To that end, it can be advised by the National Council of Norms and Qualities or by private expert firms or individuals”.

<sup>154</sup> Id art. 515 (g). Article 515 (g) indicates: “In addition to the provisions contained in the present title [section], Government, through the Ministry of Health, shall issue the norms and procedures to: [...] Control the extraction, preservation, and use of organs, tissues, and fluids from corpses or donated by living donors for therapeutic purposes”.

<sup>155</sup> D. 2363/86, julio 25, 1986, Diario Oficial 37571, agosto 1, 1986 [D.O.] (Colom.). Specifically, the statute established a permit program requiring scientific and medical institutions interested in providing such services to meet a minimum set of standards as to their expertise, experience, and equipment. Under such regulations, if a scientific or medical institution is interested in developing certain activities involving human organs, they obtain a permit granted by the incumbent health authorities.

<sup>156</sup> Id. at art. 15.

<sup>157</sup> Id. at art. 16.

purpose of transplantation or scientific research<sup>158</sup>. Based on his rulemaking authority, the President issued Decree 1172 of 1989 reiterating the “gratuitousness principle”<sup>159</sup>. However, Article 15 allows healthcare organizations to bill for all the costs related to the extraction, storage, and transplantation of human organs and other body parts for the purpose of transplantation<sup>160</sup>. Article 16 indicates, furthermore, that healthcare organizations may bill for all the costs related to the extraction, storage, and preservation of human organs according to the rates issued by the Ministry of Public Health<sup>161</sup>.

In 2004, Congress revisited the matter one more time and reaffirmed the “gratuitousness principle” in Article 1 of Law 919<sup>162</sup>. The legislative history behind Article 1 is consistent with the gratuitousness principle; the senators who sponsored the bill in the Senate concluded that it was highly convenient and necessary measure to prevent human organs trafficking by passing a bill banning the trade of human organs with profit purposes. Furthermore, they deemed necessary to label trading human organs for profit as a crime punishable under Colombian legislation<sup>163</sup>. Likewise, the congressmen who sponsored the bill in the House of Representatives explained that the salient feature of the bill was to treat the trade of human organs and tissues for profit as a crime punishable under Colombia’s criminal legislation<sup>164</sup>. It must be noted that the congressmen who sponsored the bill in both chambers only disclosed statistics regarding the recipient’s waiting lists and the number of human transplantation procedures that have been carried out in Colombia, but did not provide any data or statistics concerning human organs trafficking in Colombia.

That same year, the President of Colombia, exerting his rulemaking power granted by the Colombian Constitution of 1991<sup>165</sup> and the statutory framework<sup>166</sup>, issued Decree 2493 of 2004 allowing for profit healthcare organizations to provide certain medical treatments related to human *organs*, tissues or other body parts for the purpose of transplantation procedures but preventing them from intervening in the extraction, storage, and distribution

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<sup>158</sup> L. 73/88, diciembre 20, 1988, Diario Oficial 38623, diciembre 21, 1988 [D.O.] (Colom.).

<sup>159</sup> D. 1172/89, junio 6, 1989, Diario Oficial 38847, junio 7, 1989 [D.O.] (Colom.).

<sup>160</sup> Id. at art. 15.

<sup>161</sup> D. 1172/89, junio 6, 1989, Diario Oficial 38847, junio 7, 1989 [D.O.] art. 16 (Colom.).

<sup>162</sup> L. 919/04, diciembre 22, 2011, Diario Oficial 45771, diciembre 23, 2004 [D.O.] art. 1 (Colom.). Article 1 states “The donation of anatomic components, organs, tissues, and corporal fluids ought to be made for humanitarian reasons. Any sort of compensation, monetary or non-monetary payment for such anatomic components is forbidden. [...] *Paragraph*. The authorized institutions that operate as tissue or bone marrow banks, as well as the authorized healthcare providers with approved transplant programs, can bill for the costs related to the hospitalization of the living donor, his medical treatment, diagnose, extraction, storage, tests required before the donation is made, transportation, the required immunologic and histocompatibility tests, the transplant procedures, hospitalization, surgery, post-surgery medical treatment of the donor and the recipient, medication and further medical examination”.

<sup>163</sup> Gaceta del Congreso de la República de Colombia No. 142 de 2004.

<sup>164</sup> Gaceta del Congreso de la República de Colombia No. 660 de 2004.

<sup>165</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art 189 – 11.

<sup>166</sup> The statutory framework is contained in articles 515 (f) and 564 Law 9 of 1979; article 8° of Law 73 of 1988; articles 173 (3) and 245 of Law 100 of 1993, and article 42 (3) of Law 715 of 2001. These provisions grant special rulemaking authority to the President to regulate in detail many aspects of Colombia’s public healthcare system and other public health related matters.

of human tissue and bone marrow<sup>167</sup>. The administrative rule also placed a set of limitations on potential human organs or tissues recipients that hold the status of nonresident aliens in the sense that they are only eligible in the cases where there are not Colombian nationals or resident aliens registered on the “waiting lists”<sup>168</sup>.

I must enter a caveat. The analysis of the present case will proceed differently due to a procedural design feature: The Colombian legal system lacks a general administrative rulemaking procedure. Thus, once Congress has endowed an administrative body with rulemaking authority over a specific issue or in the cases where the President has original rulemaking authority granted directly by the Constitution, the administrative authority issues the administrative rule without having to follow any administrative proceedings. In 2010 the President issued a Decree regulating the internal administrative rulemaking procedure that administrative bodies must follow for the issuance of an administrative rule, but the Decree focuses more on the format and other formal requirements than in giving the citizenry a real opportunity to partake in rulemaking procedures<sup>169</sup>. However, in some cases, the administrative power has the duty to “consult” a given ethnical group or community about the issuance of a rule that may affect them, but its not mandatory for the agency to follow or even respond to the comments raised by said groups<sup>170</sup>.

Once the administrative authority has issued the administrative rule, any citizen can challenge its legality *in abstracto*<sup>171</sup> or *in concreto*<sup>172</sup>. There is no particular standing or time requirement to petition for judicial review of any administrative rule *in abstracto* under the argument that the plaintiff is defending the rule of law and not her personal interests, unlike a particular challenge where the plaintiff also seeks compensation for monetary damages<sup>173</sup>.

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<sup>167</sup> D. 2493/04, agosto 4, 2004, Diario Oficial 45631, agosto 5, 2004 [D.O.] art. 8 (Colom.). The administrative rule states: “*Article 8. On the nature of institutions.* Institutions that engage in activities and procedures related to anatomical components shall be non-profit, except healthcare organizations”. It also states: “*Article 21. On the nature of the institutions authorized to obtain anatomical components.* The extraction of human organs and transplantation procedures can only be provided by healthcare organizations with authorized human organ transplantation programs. *Paragraph 1.* The activities of obtaining, extracting, processing, and distributing tissue and bone marrow shall be only carried out by non-profit tissue and bone marrow banks authorized to operate by INVIMA”. In other words, although the executive rule indicates that healthcare organizations for-profit can provide and bill for certain costs related to human and tissues, it only allows authorized non-profit banks to extract, store, and distribute anatomical components for transplantations purposes.

<sup>168</sup> Id. at art. 40 (“*Article 40. Transplantation services for non-resident aliens.* Non-resident aliens are eligible for human organs or tissues transplantation procedures but only in the cases where there are not Colombian citizens or resident foreign recipients previously registered on the national and regional waiting lists, taking into consideration the unified scientific and technical eligibility criteria, as well as having signed beforehand the contract between the institution and the recipient or his sponsoring institution. The healthcare provider that will carry out the procedure shall first request a certificate of the no existence of registered recipients on the national waiting list from the Regional Coordinator of the Donation and Transplantation Network or to certify that, although there is a registered recipient on the national waiting list, it is not possible to transport the recipient or the anatomical component from one region to another to carry out the procedure. The Regional Coordinator shall issue the certification immediately upon request”).

<sup>169</sup> Decreto 1345/10, abril 23, 2010, (Colom.).

<sup>170</sup> L. 1437/11, enero 18, 2011, Diario Oficial 47956, enero 18, 2011, [D.O.] art. 46 (Colom.).

<sup>171</sup> Id. at art. 137.

<sup>172</sup> Id. at art. 138.

<sup>173</sup> Consejo de Estado [C.E.] [Council of State], General Chamber, agosto 10, 1996, (Colom.) (explaining the scope and extent of the legal actions set out in Decree 01 of 1894 - General Administrative Procedure Code).

While it is true that the Colombian Constitution of 1991 instituted an administrative jurisdiction to review governmental action relying on the French *justice administrative* model<sup>174</sup>, Colombian administrative courts are part of the judiciary<sup>175</sup> unlike the French administrative courts that are part of the executive branch of power<sup>176</sup>. Therefore, the debate that usually occurs at the administrative level in the United States takes place before the Colombian bench. Having in mind these institutional and procedural arrangements, I will analyze the arguments advanced by the Colombian President to issue the administrative rule, the reasons behind its enactment, and the arguments raised by the plaintiff to challenge the administrative rule's legality.

Mr. IGNACIO MEJIA VELASQUEZ (Colombian citizen) challenged Articles 8, 21, and 40 of the executive rule on constitutional and statutory grounds pursuant to Article 84 of Decree 01 of 1984, which was the General Administrative Procedure Code effective at the time the petition was filed. As a policy matter, the plaintiff urged that a line must be drawn between the altruistic purposes that shall motivate human organs donations and the medical procedures required for their extraction, storage, and preservation, which in his view tend to be expensive given the need to employ cutting-edge technology and qualified expertise<sup>177</sup>. First, the plaintiff claimed that the President encroached on Congress' power to regulate commerce<sup>178</sup>. The plaintiff explained that the President lacks of the constitutional or statutory rulemaking authority regulate commerce by excluding healthcare providers for profit from providing certain medical services<sup>179</sup>. Second, the plaintiff suggested that the President overreached in exerting his rulemaking authority<sup>180</sup>. The plaintiff contended that the President overreached in his rulemaking authority to the extent that the challenged rule regulates a matter on which

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Corte Constitucional [C.C.] [Constitutional Court], mayo 29, 2002, C – 426/02, (Colom.) (explaining the scope and extent the standards of judicial review and remedies introduced in Decree 01 of 1894 - General Administrative Procedure Code).

<sup>174</sup> For the discussion about the four different administrative justice models and the reasons that led Colombia to embrace an “eclectic model”, see, e.g., Alberto Montaña, DIMENSIÓN TEÓRICA DE LA JURISDICCIÓN CONTENCIOSO ADMINISTRATIVA EN COLOMBIA (2005); Andrés Ospina, DE LA JURISDICCIÓN ADMINISTRATIVA A LA JURISDICCIÓN DE LO CONTENCIOSO ADMINISTRATIVO (2009); Alberto Montaña, “Caracterización de la Jurisdicción Contencioso Administrativa Colombiana con Ocasión de su Reconocimiento como Causa y Producto del Fortalecimiento del Derecho Administrativo”, in 100 AÑOS DE LA JURISDICCIÓN DE LO CONTENCIOSO ADMINISTRATIVO, JUSTIFICACIÓN, RETOS Y APORTES AL DERECHO ADMINISTRATIVO, at 105 (Montaña & Ospina eds., 2014); Andrés Ospina, “La Influencia Francesa en la Creación de la Jurisdicción Colombiana de lo Contencioso Administrativo”, in 100 AÑOS DE LA JURISDICCIÓN DE LO CONTENCIOSO ADMINISTRATIVO, JUSTIFICACIÓN, RETOS Y APORTES AL DERECHO ADMINISTRATIVO at 197 (Montaña & Ospina eds., 2014).

<sup>175</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 236.

<sup>176</sup> For the discussion about the historic, legal, and political reasons behind the French administrative justice system, see, e.g., Jean Rivero, DROIT ADMINISTRATIF 173 (13<sup>th</sup> ed., 1990); Georges Vedel, DERECHO ADMINISTRATIVO 365 (J. Rincón Jurado trad., 1980) (Describing the general structure of the French administrative courts system); Prosper Weil, DERECHO ADMINISTRATIVO 150 (L. Rodríguez Zuñiga trad., 1986) (Explaining the historic evolution of the French administrative justice system); Jean Massot, “The Powers and Duties of the French Administrative Judge”, in COMPARATIVE ADMINISTRATIVE LAW (Rose-Ackerman & Lindseth eds., 2013) (describing the main features of the French administrative justice model).

<sup>177</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, abril 8, 2010, C.P: R. Ostau de Lafont Pianeta, Expediente 11001-03-24-000-2006-00121-00, at 20 (Colom.).

<sup>178</sup> Id.

<sup>179</sup> Id.

<sup>180</sup> Id.



the aforementioned statutory scheme is *silent*<sup>181</sup>. Hence the plaintiff concluded that the challenged rule is not executive but rather “legislative” in character because it introduces or creates “new law”<sup>182</sup>. Third, the plaintiff contended that Article 40 introduces a discriminatory treatment contrary to the “spirit” of human rights’ universality and the equal protection of law because it places unconstitutional restrictions on nonresident aliens’ fundamental right to receive medical treatment in equal conditions<sup>183</sup>. For the plaintiff, all human beings have equal rights in accessing medical treatments and services, regardless of their nationality or place of residency. In his own words, when it comes to the right to receive medical treatment, one should talk about “people” instead of making any distinction with “nonresident aliens”<sup>184</sup>. It must be underline that Mr. ALVARO LONDOÑO RESTREPO (Colombian citizen), Mrs. SIMA RUBISA, and Mr. YEHONATHAN PUONY (Israeli citizens) joined Mr. MEJÍA’s petition for review in all respects. Mrs. RUBISA and Mr. PUONY claimed they had a direct interest in the litigation because they reside in Medellin and they are patients of Hospital Pablo Tobón Uribe’s transplantation program. They claimed, furthermore, that only Congress may place restrictions on nonresident aliens’ fundamental rights pursuant to Article 100 of the Colombian Constitution of 1991 and that Law 919 of 2004 makes no distinction between resident aliens and nonresident aliens<sup>185</sup>.

Government opposed and claimed that the administrative rule is lawful under the argument that it was issued to regulate and improve the technical standards for the procedures that involve the extraction, storage, distribution, and transplantation of human organs, tissues, or other body parts for therapeutic purposes<sup>186</sup>. In this sense, the defendant asserted that it is the duty of the “State” to organize, administer, regulate, oversee, and provide health and environmental sanitation services pursuant to the principles of efficiency, universality, and solidarity set out in Article 365 of the Constitution<sup>187</sup>. In fact, it is to be noted that this article states that public authorities or private organizations shall provide healthcare and environmental sanitation services under the statutory framework set forth by Congress for that purpose<sup>188</sup>. The Deputy General Inspector for the Council of State filed a memorandum supporting the Government's arguments about the President's power to regulate commerce and place restrictions to prevent human organs trafficking<sup>189</sup>. Nonetheless, the Deputy General Inspector disagrees with the President’s power to place restrictions on nonresident aliens’ fundamental rights to the extent that the Constitution clearly vested such a power on Congress<sup>190</sup>.

In this case, the parties disagreed about the executive rule’s validity in two aspects. First, the parties disagree about whether the measure that forbids health care organizations for-profit to partake in any activities related to the extraction, storage, and distribution of human tissues

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<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id.

<sup>184</sup> Id.

<sup>185</sup> Id. at 22.

<sup>186</sup> Id.

<sup>187</sup> Id.

<sup>188</sup> Id.

<sup>189</sup> Id. at 24.

<sup>190</sup> Id.



and bone marrow for the purpose of transplantation as a way to prevent organ trafficking is consistent with the “gratuitousness principle” set forth in Article 7 of Law 73 of 1988 and Article 1 of Law 919 of 2004<sup>191</sup>. Second, the parties also disagree about whether the restrictions placed on the donation of human *organs*, tissues or other body parts for the purpose of transplantation to nonresident aliens is consistent with Article 100 of the Colombian Constitution of 1991<sup>192</sup>. The President embraced the purposive interpretation and placed restrictions on commerce and on nonresident aliens’ fundamental right to receive medical treatment aiming at the prevention of human organs trafficking. The Council of State upheld the President’s interpretation of the statutory scheme and the restrictions placed on commerce forbidding for-profit health organizations to partake in any activities related to the extraction, storage, and distribution of human tissues or bone marrow and on nonresident aliens’ fundamental right to receive medical treatment in equal conditions<sup>193</sup>.

In 2016, Congress revisited the matter in response to the deficit of human organs donors<sup>194</sup>. In the 2016 amendments, Congress endorsed the President’s purposive interpretation and reiterated in Article 10 the restriction placed on nonresident aliens’ fundamental right to receive medical treatment in equal conditions<sup>195</sup>. On this point, the congressmen who sponsored the bill suggested that Colombian citizens ought to be given priority over nonresident aliens due to the human organs deficit in Colombia, for which they provided data and statistics<sup>196</sup>. Concerning the regulation of commerce, Congress decided to override the President’s interpretation that only non-profit human organs banks are allowed to partake in any procedures related to the extraction, storage, and distribution of human tissues and bone marrow for the purpose of transplantation<sup>197</sup>. However, Congress did not provide any data, technical, economic or scientific reasons different from the human organs deficit in support of this policy shift to allow for-profit organizations to partake in said procedures and how it would contribute to reducing the deficit.

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### *The Story of Old Providence’s McBean Lagoon Natural Reservoir*

In this case, an unprecedented social mobilization that occurred against the backdrop of a conflict of laws prompted the Colombian Ministry of Environment to repeal *ex officio* an environmental clearance granted back in 1992 to carry out the project “Caribbean Village Mount Sinai” in the contiguous zone of the mangrove located in Old Providence’s McBean Lagoon National Park in Isla Providencia, Colombia<sup>198</sup>. At the time the clearance was granted

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<sup>191</sup> Id. at 19.

<sup>192</sup> Id. at 19.

<sup>193</sup> Id.

<sup>194</sup> L. 1805/16, agosto 4, 2016, Diario Oficial [D.O.] (Colom.).

<sup>195</sup> Id. at art. 10.

<sup>196</sup> Gaceta del Congreso de la República de Colombia No. 821 de 2015, at 8 – 13; Gaceta del Congreso de la República de Colombia No. 1049 de 2015, at 7 – 9.

<sup>197</sup> L. 1805/16, agosto 4, 2016, Diario Oficial [D.O.] art. 12 (Colom.).

<sup>198</sup> Isla Providencia or Old Providence is a Caribbean Island part of Colombia, lying midway between Costa Rica and Jamaica. With an estimated 5, 011 people in 2007, Providencia is the second largest island in the Department of Archipelago de San Andrés, Providencia, and Santa Catalina with a 17km<sup>2</sup> territorial extension.

in 1992, however, the McBean Lagoon did not have the National Park<sup>199</sup> and *Seaflower* Marine Protected Area status that it holds nowadays under international law since 1994, which experts considered as a “jewel” in the waters of the Caribbean<sup>200</sup>.

Unlike administrative rulemaking, the Colombian Congress set out a general administrative adjudicatory procedure in Law 1437 of 2011<sup>201</sup>. This statute is divided into two parts. The first one, regulates in detail the substantial and procedural requirements that intuitions endowed with administrative power must follow in adjudicatory proceedings aimed at the creation, modification, or repeal of *individual legal situations*, such as individual rights set forth in the Constitution and in legislation<sup>202</sup>. The procedure unfolds through different stages. First, the adjudicatory proceedings can initiate either by petition or by the incumbent administrative authority’s decision pursuant to its constitutional and statutory responsibilities<sup>203</sup>. The administrative authority has the duty to issue a notice informing all potential concerned third parties about the initiation of the proceedings<sup>204</sup>. The administrative authority then proceeds to gather evidence, parties are allowed to introduce evidence, cross-examine witnesses<sup>205</sup>, and to present their final arguments<sup>206</sup>. Finally, the authority proceeds to adjudicate the dispute, for which it is obliged to give reasons as to the factual and legal basis of its decision<sup>207</sup>. Once the administrative decision becomes final, parties may petition

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*See, e.g.*, Adolfo Meisel Roca, “La Continentalización de la Isla de San Andrés, Colombia: Panyas, Raizales y Turismo, 1953 – 2003” in DOCUMENTOS DE TRABAJO SOBRE ECONOMIA REGIONAL N° 37 (2003); Adolfo Meisel Roca, “La Estructura Económica de San Andrés y Providencia en 1846” in CUADERNOS DE HISTORIA ECONÓMICA Y EMPRESARIAL N° 24 (2009).

<sup>199</sup> This 995-hectare Colombian National Park is located on the island's northeast side, and it consists of coral reefs, small cayes, mangroves, lagoons, and tropical dry forest. Providencia is the center point of UNESCO’s Seaflower Biosphere reserve. It must be noted that Colombia ratified the United Nations Convention on Biological Diversity in 1994. *See, e.g.*, Instituto de Investigaciones Marinas y Costeras José Benito Vives de Andrés – INVEMAR, ORDENAMIENTO AMBIENTAL DE LOS MANGLARES DEL ARCHIPIÉLAGO SAN ANDRÉS, PROVIDENCIA Y SANTA CATALINA 93 (2009).

<sup>200</sup> Secretariat of the Convention on Biological Diversity, ECOLOGICALLY OR BIOLOGICALLY SIGNIFICANT MARINE AREAS (EBSAS), SPECIAL PLACES IN THE WORLD’S OCEANS, 36 – 37 (2012) (“Seaflower – both a marine protected area (65,000 km<sup>2</sup>) and a UNESCO Biosphere Reserve (300,000 km<sup>2</sup>) – is an open-ocean area that comprises the diverse coastal and marine ecosystems of the Archipelago of San Andres, Old Providence and Santa Catalina, featuring barrier and fringing reefs, lagoons, atolls, seagrass and seaweed beds, mangroves and beaches. [...] It was established as a UNESCO Biosphere Reserve in 2000, encompassing the entire San Andres Archipelago, and designated an Important Bird Area by BirdLife International four years later. In 2005, an area of 65,000 km<sup>2</sup> within the Biosphere Reserve was declared the Seaflower Marine Protected Area (MPA), becoming Colombia's first MPA and continuing as the largest MPA in the wider Caribbean. The Seaflower MPA contains the largest open-ocean coral reefs in the Caribbean and protects approximately 2,000 km<sup>2</sup> of coral reefs, atolls, seagrass beds, and mangroves. This includes rare, unique and unusual reef environments, remote areas with little anthropogenic influence and a continuum of habitats that support significant levels of marine biodiversity. With the presence of 192 Red List species (marine and terrestrial), it is an important site for endangered and threatened species of global concern”).

<sup>201</sup> L. 1437/11, enero 18, 2011, Diario Oficial 47956, enero 18, 2011, [D.O.] (Colom.). This Act repealed and replaced the General Administrative Procedure Code contained in Decree 01 of 1984.

<sup>202</sup> Id. at arts. 1 – 3, 34.

<sup>203</sup> Id. at arts. 4, 13.

<sup>204</sup> Id. at art. 37.

<sup>205</sup> Id. at art. 40.

<sup>206</sup> Id. at art. 42.

<sup>207</sup> Id. at arts. 42, 44.

for judicial review<sup>208</sup>. The second part of the Code regulates the legal actions devised to challenge an administrative rule or adjudication's validity and to seek compensation for monetary damages regardless if the administrative decision is the outcome of a discretionary action or not<sup>209</sup>.

This is a complex case that involves several issues that contest the adjudicatory proceedings that led to the issuance of the initial clearance by the incumbent agency at the time and its later repeal by the Ministry of Environment. Nevertheless, I will focus exclusively on the disagreement about what interpretation should be used to determine the applicable statutory framework to the case at hand insofar as it concerns the Ministry's jurisdiction, namely, its place and responsibilities within the legal system. Put it differently, the parties disagree about whether the question at hand falls within the transition regime set forth in Article 117 of Law 99 of 1993.

On October 20<sup>th</sup>, 1992, Mr. EDUARDO ROZO filed a petition to develop Project "Caribbean Village Mount Sinai" in the contiguous zone of the mangrove located in Old Providence's McBean Lagoon National Park in Isla Providencia, Colombia<sup>210</sup>. The project consisted of twelve cabins or cottages distributed in a 12.000mt<sup>2</sup> area. On December 1<sup>st</sup>, 1992, Colombia's Natural Resources National Institute –INDERENA– granted environmental clearance to carry out the project in Resolution #029 of 1992<sup>211</sup>. This adjudication was made pursuant to Article 28 of Decree-Law 2811 of 1974<sup>212</sup>, which is Colombia's Natural Resources General Code of 1970 issued by the President based on his delegated lawmaking power. It is noteworthy that the environmental clearance granted by INDERENA was limited to the Project's original blueprints and technical specifications as described in the petition filed by Mr. ROZO. In this sense, the rule emphatically stated that any change or modification in the project's original description would lead to the permit's repeal<sup>213</sup>.

Relying on the environmental clearance granted by INDERENA pursuant to Decree 2811 of 1970 and after having considered that the project fulfills all environmental and municipal zoning requirements, Providencia's Mayor, acting in his capacity of the municipality's zoning authority, approved the project's blueprints and granted a construction permit to the Great View Company on January 7<sup>th</sup>, 1993<sup>214</sup>. The construction permit required the petitioner to start construction works within 6 months after its issuance, or otherwise, the permit would

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<sup>208</sup> Id. at arts. 137 – 138.

<sup>209</sup> Id. at arts. 1 – 4.

<sup>210</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 24, 2002, C.P: G. Mendoza Martelo, Expediente 5000-23-24-000-1996-6978-01(4027), at 4 (Colom.).

<sup>211</sup> R. 029/1992, diciembre 1, 1992, (INDERENA) (Colom.); Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

<sup>212</sup> D.L. 2811/74, diciembre 18, 1974, Diario Oficial [D.O.] art. 28 (Colom.) ("Article 28. An environmental impact statement and a permit are required previous to the execution of works, industrial activities or any other activity which, by their own nature, can cause severe deterioration of renewable natural resources or the environment or introduce considerable or notorious modifications to the landscape. Such study shall take into account all the physical, economic, and social factors to assess the impact that the execution of the works may have on the region").

<sup>213</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

<sup>214</sup> Id.

automatically expire<sup>215</sup>. On June 30<sup>th</sup>, 1993, the company started fencing works in construction area<sup>216</sup>. On December 22<sup>nd</sup>, 1993, in response to the international obligations set out in the Rio Convention of 1992, the Colombian Congress enacted Law 99 articulating a new set of policies, principles, rules, strategies, and responsibilities concerning environmental protection. One of the major reforms was the creation of the Ministry of Environment and the Regional Autonomous Environmental Authorities that took on INDERENA's responsibilities<sup>217</sup>. Another salient feature of the Act was the creation of an environmental permits system<sup>218</sup> and management programs. Article 117 of the Act required ongoing projects at the time when the Act became effective to file environmental impact statements assessing the project's potential environmental risks and suggesting strategies how to mitigate such environmental impact<sup>219</sup>.

It must be underlined that the Act also contains a set of provisions regarding the Archipelago of San Andres, Providencia, and Santa Catalina's special status, such as the explicit interdiction of the approval of construction permits for new business or hotel facilities in Isla Providencia, as well as the suspension of all permits that were being processed at the time when the Act became effective<sup>220</sup>. Nevertheless, Congress anticipated the conflict of laws that may arise between the old and the new statutory framework by setting out a transition regime in Article 117<sup>221</sup>. The President, based on his rulemaking authority, further developed this statutory transition regime in Article 38 of Decree 1753 of 1994<sup>222</sup>. On June 2<sup>nd</sup>, 1994,

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<sup>215</sup> Id.

<sup>216</sup> Id.

<sup>217</sup> The Ministry of Environment took on INDERENA'S responsibilities and jurisdiction according to Section 2.5 of Law 99/93.

<sup>218</sup> L. 99/93, diciembre 22, 1993, Diario Oficial 41146, diciembre 22, 1993 [D.O.] art. 49 (Colom.) ("Article 49. *Environmental Permit Requirement*. The execution of construction works, business operation or the development of any other activity that, according to statutes and administrative regulations, can cause severe deterioration of renewable natural resources or the environment or introduce considerable or notorious modifications to the landscape will require an Environmental Permit").

<sup>219</sup> Id. at art. 117.

<sup>220</sup> Id. at art. 37 ("Article. 37. (...) Paragraph 1. From the time this Act becomes effective, it is forbidden to grant construction licenses or permits to build new business or hotel facilities in the Providencia Municipality and the ones that are currently being processed shall be suspended until the approval of a zoning and development plan by CORALINA's Executive Board and the Ministry of Environment. Paragraph 2. The Archipelago of San Andres, Providencia, and Santa Catalina are hereby declared as biosphere reserve. CORALINA's Executive Board shall coordinate all required actions at both the national and international level to enforce this disposition").

<sup>221</sup> Id. at art. 117 ("Article 117. *Transition Regime*. Granted permits and licenses remain effective for the time they were granted. Administrative proceedings initiated shall continue its consideration by the authorities to assume jurisdiction in the state in which they are. The rules and responsibilities set out in this Act are effective immediately and will apply once the corresponding administrative regulations are issued, when necessary").

<sup>222</sup> D. 1753/94, agosto 3, 1994, Diario Oficial 41427 [D.O.] art. 38 (Colom.) ("Article 38. *Transition Regime*. The projects, works or activities whose environmental permits, licenses, concessions or authorizations were granted pursuant to the norms effective before the enactment of this Decree, shall continue. However, the environmental authority may require from them, in motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of this Decree, initiated all the required proceedings seeking the obtainment of the permits, licenses, concessions, and environmental authorizations required by the laws effective at the time, will continue their course according to them and, in the case they are granted, the project, works or activities may be developed. Nevertheless, the environmental authority may require them, in motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of Law #99

Congress declared the mangroves of San Andres, Providencia, and Santa Catalina as National Parks in in Article 12 of Law 136 of 1994<sup>223</sup>.

On September 19<sup>th</sup>, 1994, the Great View Company raised a formal query to the Ministry of Environment asking about the requirements that “Project Mount Sinai” ought to fulfill in order to comply with the new legislation introduced by Law 99 of 1993<sup>224</sup>. On September 26<sup>th</sup>, 1994, the people of Isla Providencia filed a petition to the newly created Ministry of Environment expressing their opposition to the construction of hotel facilities of this sort in the island, requesting the declaration and territorial delimitation of mangrove McBean as a national park, and seeking the adoption of measures to preserve the island’s ecosystem<sup>225</sup>. However, instead of resolving the formal query raised by the Great View Company, the Ministry initiated adjudicatory proceedings to review the legality of Administrative Resolution #1 of 1992 issued by INDERENA<sup>226</sup>. On March 1<sup>st</sup>, 1995, the Ministry ordered to halt the construction works of Project Mount Sinai, requested the National Parks Authority to initiate all the necessary administrative proceedings to declare the McBean Lagoon as a national park and to set out its territorial limits, and issued notice calling for a public hearing in Providencia to listen the community’s concerns about the project’s environmental and cultural impact on the island<sup>227</sup>.

On June 20<sup>th</sup>, 1995, the public hearing was held in Isla Providencia and islanders massively concurred in raising their concerns about Project Mount Sinai<sup>228</sup>. One of the leaders of that mobilization described it as unprecedented. In fact, he explains it was the first time he saw the people of Isla Providencia standing together for a common cause and defending their position against the construction of any sort of hotel facilities in the island<sup>229</sup>. In short, the inhabitants of Providencia raised three concerns against Project Mount Sinai. First, the project could have a negative impact on the island's ecosystem. Second, the presence of many tourists could affect the island’s “social fabric” and its cultural identity. Third, their concerns about the lack of a comprehensive public utility infrastructure and health care system to attend the needs of the tourists. A group of islanders opposed and argued that the project could improve the island's economy by creating new jobs<sup>230</sup>.

On September 13<sup>th</sup>, 1995, the Ministry of Environment acting pursuant to Article 5.18 of Law 99 of 1993 issued Resolution 1021 of 1995 declaring the McBean Lagoon as a National

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of 1993, initiated their activities will not require an environmental permit. The projects that initiated activities previously to the enactment of this Decree and fall within the jurisdiction of the Autonomous Regional Corporations will not require an environmental permit either. However, this does not prevent such projects, works or activities from complying with the environmental laws in force, except for the environmental permit requirement”).

<sup>223</sup> L. 136/94, junio 2, 1994, Diario Oficial 41377, junio 2, 1994 [D.O.] art. 12 (Colom.).

<sup>224</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 5.

<sup>225</sup> R. 024/96, enero 9, 1996, Minister of Environment [Ministerio del Medio Ambiente] (Colom.).

<sup>226</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 5.

<sup>227</sup> R. 024/96, enero 9, 1996, Minister of Environment [Ministerio del Medio Ambiente] (Colom.).

<sup>228</sup> Id.

<sup>229</sup> 4 Jaime Eduardo Valderrama, CUADERNOS DEL CARIBE, TEXTOS Y TESTIMONIOS DEL ARCHIPIÉLAGO, CRISIS Y CONVIVENCIA EN UN TERRITORIO INSULAR 225 (2002).

<sup>230</sup> R. 024/96, *supra* note 227.



Park and setting out its territorial boundaries<sup>231</sup>. This declaration entailed two main legal consequences. First, a regulatory taking, in the sense that the private property located within the National Park's area was legally transformed into public domain and thus the development of any business within such boundaries is strictly forbidden. Second, because the area became part of the Nation's public domain, the incumbent administrative authority is obliged to proceed to its expropriation with the correspondent compensation<sup>232</sup>. I must caveat that this study do not cover the eventual reparation claims raised by the developer because they were not part of the two cases decided by the Council of State on which I focused. Concerning its application, the Resolution clearly states in Article 5: "This Resolution shall leave unscathed the rights previously acquired pursuant to the existing civil laws before the time this Resolution becomes effective [...]". Also, Article 9 states: "This Decree is effective after its publication in the Official Gazette [...]"<sup>233</sup>.

On November 16<sup>th</sup>, 1995, the Great View Company submitted an amendment proposal to the Ministry of Environment seeking the modification and adjustment of Project Mount Sinai to make it compatible with the new environmental legislation and administrative regulations<sup>234</sup>. However, the Ministry rejected the amendment proposal. Instead, on January 9<sup>th</sup>, 1996, the Ministry of Environment issued Resolution #024 forbidding the construction of "Project Mount Sinai" under the argument that a major change occurred as to the factual and legal basis of the initial environmental clearance granted by INDERENA<sup>235</sup>. The Ministry is specifically concerned about a 300m<sup>2</sup> (984sft approx.) area where the power and water treatment plants were going to be located just 12mt (39ft approx.) away from the mangrove<sup>236</sup>.

Concerning the factual basis of the initial permit adjudication, the Ministry asserted that its decision is based on the technical reports on the construction of the project in Isla Providencia produced during the on-site inspection of the project's premises<sup>237</sup>. In fact, INDERENA's Forests, Waters, and Land Division, as well as the Ministry's very own National Parks Task Force produced the reports. Both reports conclude that construction and operation of Project Mount Sinai place a direct and severe threat on the McBean mangrove and the adjacent biosphere reserve<sup>238</sup>. Also, the Task Force's report questioned the previous environmental clearance granted by INDERENA arguing that it did not result from a thorough assessment of the impact of the project on the mangrove and its adjacent area, nor did it suggested a management plan to mitigate such a negative impact on McBean Lagoon's ecosystem<sup>239</sup>. The Minister also took into account the report on the inspection of premises. In this report, inspectors concluded that initial blueprints and technical description of Project Mount Sinai, on which the environmental clearance and construction permits were granted, differed from the blueprints and complementary technical documentation found during the on-site

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<sup>231</sup> Id.

<sup>232</sup> R. 1021/95, septiembre 13, 1995, Minister of Environment [Ministerio del Medio Ambiente], art. 4 (Colom.).

<sup>233</sup> Id.

<sup>234</sup> R. 024/96, *supra* note 227.

<sup>235</sup> Id.

<sup>236</sup> Id.

<sup>237</sup> Id.

<sup>238</sup> Id.

<sup>239</sup> Id.

inspection<sup>240</sup>. These arguments questioned the factual basis of the initial environmental clearance granted by INDERENA and their assessment is merely an evidentiary matter.

The Ministry of Environment ruled in favor of a purposive interpretation of the law more generous to environmental protection at the cost of acquired individual rights and read two exceptions into the statute concerning the application of the transition regime<sup>241</sup>. In this light, the Ministry construed Article 177 of Law 99 in the sense that permits granted by the incumbent environmental authorities before the time when of Law 99 of 1993 became effective shall remain in effect for the time they were granted, *unless* the Ministry of Environment considers that the permit was “unlawfully” granted or the project places unknown risks on the environment<sup>242</sup>. The Ministry argued, moreover, that its decision was based on the “precautionary principle” set forth in Article 1.6 of Law 99 of 1993<sup>243</sup> to the extent that there was uncertainty concerning the environmental risks that Project Mount Sinai would potentially place on the mangrove and the biosphere reserve, though it was not able to provide any conclusive scientific data to support its conclusion. It must be highlighted that, unlike the United States, the “precautionary principle” is set forth in Article 1.6 of Law 99 of 1993 as a general principle of Colombian environmental law<sup>244</sup>. On the normative nature of the precautionary principle, Professor David Vogel argues that the “[...] role of precaution in shaping American consumer and environmental risks regulations in best understood as a preference or an approach, rather than, as it became in the EU, a legal doctrine or principle”<sup>245</sup>.

The Higher Courts of Colombia upheld the Ministry’s decision without any further inquiry in two separate opinions delivered by the Council of State in 2002<sup>246</sup> and 2010<sup>247</sup>, as well as by the Constitutional Court after reviewing the case via *tutela* in 2012<sup>248</sup>.

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### ***Disagreement About Law***

The four real-world hard cases that I have described share a salient feature: they are *administrative hard cases* because law proved to be vague, insufficient, silent or undesired to solve the controversies at hand, which stemmed from complex moral and political philosophy disagreements. For instance, in *Chevron* and *City of Arlington* the litigations

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<sup>240</sup> Id.

<sup>241</sup> Id.

<sup>242</sup> Id.

<sup>243</sup> L. 99/93, *supra* note 218, at art. 1.6.

<sup>244</sup> Id. The principle's textual formulation is vague and it states that, though environmental policy must be based on scientific data, public authorities and private individuals shall take effective measures to halt actions that have a suspected risk of causing harm to the environment, even in the absence of scientific consensus.

<sup>245</sup> David Vogel, THE POLITICS OF PRECAUTION, REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES 255 (2012).

<sup>246</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210.

<sup>247</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 28, 2010, C.P: M. Rojas Lasso, Expediente 25000-23-24-000-2002-00192-01(4027), (Colom.).

<sup>248</sup> Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2012, Sentencia T – 695/12, Expediente T-3431944, (Colom.).

arose from the vagueness of the Clean Air Act<sup>249</sup> and the Telecommunications Act<sup>250</sup> language, respectively. Likewise, in the human organs case the controversy stemmed from the vagueness of “gratuitousness principle” set forth in Article 7 of Law 73 of 1988 and Article 1 of Law 919 of 2004, as well as from articles 100 and 333 of the Constitution<sup>251</sup>. By contrast, in *McBean*, the controversy stemmed from the undesired legal consequences elicited by the straightforward application of the plain language of Law 99 of 1993<sup>252</sup>.

From a jurisprudential perspective, these hard cases may appear as a simple challenge against the executive rules’ validity that could be solved in light of the legislation that endowed the administrative bodies with decision-making authority. On this point, DWORKIN’S ideas shed some light on how to frame the disagreement about an executive rule’s validity from a jurisprudential point of view, regardless of his theoretical commitments as to the source of a hard case and his view on how it could be decided, as it was discussed in Chapter One. DWORKIN explains that lawsuits raise, at least, three different types of issues: issues of fact (“what happened?”), issues of law (“what is the pertinent law?”), and the joined issues of political morality and fidelity (“is the decision unjust?”)<sup>253</sup>. Let me put DWORKIN’S ideas into context.

DWORKIN argues that law results from propositions of law *and* the grounds of the law<sup>254</sup>. *Propositions of law* refer to all the different statements about the “[...] content of the law in a legal system”<sup>255</sup>, namely, the various statements about what the law allows, prohibits or entitles<sup>256</sup>. These statements about the law can be, at least, true or false according to the *grounds of the law*<sup>257</sup>. Thus it can be said that the grounds of the law set out how propositions of law should be made and interpreted<sup>258</sup>. In light of such a distinction, DWORKIN explains that disagreement of two kinds may result in legal practice<sup>259</sup>. On the one hand, *empirical disagreements* question whether a proposition of law is true or false in the sense that it fulfills the grounds of the law<sup>260</sup>. For instance, in the United States a bill passed by Congress ought to be presented to the President to become a valid piece of legislation. On the other hand, *theoretical disagreements* may result when the concerned parties do not dispute whether the “[...] grounds of the law have obtained”<sup>261</sup>, namely, the parties do not disagree about the validity of a proposition of law<sup>262</sup>. In short, *theoretical disagreements* arise when the parties

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<sup>249</sup> *Chevron v. NRDC*, *supra* note 2, at 849, (“The focal point of this controversy is one phrase in that portion of the Amendments.” Footnote 22 indicates: (“Specifically, the controversy in these cases involves the meaning of the term “major stationary sources” in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6)”)).

<sup>250</sup> *In re Petition*, *supra* note 103, at 13996 – 13997.

<sup>251</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 177, at 20.

<sup>252</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

<sup>253</sup> Dworkin, LE, at 3.

<sup>254</sup> Shapiro, LEGALITY, at 284.

<sup>255</sup> *Id.*

<sup>256</sup> Dworkin, LE, at 4.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Dworkin, LE, at 4-6; Shapiro, LEGALITY, at 285.

<sup>260</sup> Dworkin, LE, at 4-6.

<sup>261</sup> Shapiro, LEGALITY, at 285.

<sup>262</sup> Dworkin, LE, at 4-6.

disagree about whether a proposition of law “[...] exhaust[s] the pertinent grounds of law”<sup>263</sup>, namely, about what needs to be done before a proposition of law can be said to be true<sup>264</sup>. DWORKIN explains that an example of a disagreement of this sort can be found in *Riggs v. Palmer* where, although the plain language of the New York statute of wills did not make explicit exceptions, the majority of the Court read into the statute an exception for murderous beneficiaries based on the principle that no person should profit from his own wrong<sup>265</sup>.

SCOTT SHAPIRO points out that this *Dworkinian* framework has equivalents in HART’s theory of law<sup>266</sup>, *mutatis mutandi*. For HART, a legal system springs from the synergy between two types of legal norms: primary rules and secondary rules<sup>267</sup>. On the one hand, *primary rules* are rules that impose obligations and grant rights on the members of a community<sup>268</sup>. On the other, *secondary rules* articulate the way in which other rules ought to be made in order to be binding<sup>269</sup>. In this light, SHAPIRO suggests the “[...] grounds of the law are those facts set out in the rule of recognition”<sup>270</sup>. For example, if the United States rule of recognition sets out that all bills approved by a majority of both houses of Congress and signed by the President are valid laws of the United States, then the “[...] facts of bicameral approval and executive signature are the grounds of the law [...]”<sup>271</sup> in the United States legal system. In this context, *theoretical disagreements* are discrepancies about the “[...] content of the rule of recognition”<sup>272</sup> and *empirical disagreements* are “[...] disputes about whether the facts set out in the rule of recognition have been obtained in a particular case”<sup>273</sup>.

A recent addition to the canon argues in favor of a neutral terminology to frame empirical and theoretical disagreements about law<sup>274</sup>. In this sense, SCOTT SHAPIRO suggests treating theoretical disagreements about whether a “[...] fact should be label as the grounds of the law” as “clashes between different interpretive methodologies”, which are methods for “reading legal texts”<sup>275</sup>. For him, the advantage of talking about “interpretive methodologies” is its “neutrality” as to whether their outputs are preexisting law or not and therefore whether the facts that they express are grounds of the law<sup>276</sup>. Put it differently, a “theory of meta-interpretation” provides participants of a legal system with the tools to determine whether to embrace an “interpretive methodology such as textualism, living constitutionalism, originalism, pragmatism, law as integrity, and so on”<sup>277</sup>. In SHAPIRO’s terminology,

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<sup>263</sup> Id.

<sup>264</sup> Id.

<sup>265</sup> Id.

<sup>266</sup> Shapiro, LEGALITY, at 285.

<sup>267</sup> Hart, CL, at 81.

<sup>268</sup> Id.

<sup>269</sup> Id.

<sup>270</sup> Id.

<sup>271</sup> Shapiro, LEGALITY, at 285.

<sup>272</sup> Id.

<sup>273</sup> Id.

<sup>274</sup> Shapiro, LEGALITY, at Ch. X.

<sup>275</sup> Id. at 304.

<sup>276</sup> Id.

<sup>277</sup> Id. at 306.

*theoretical disagreements* are “meta-interpretive disagreements” about the “proper interpretive methodology” of a particular legal system<sup>278</sup>.

In light of the jurisprudential framework that I have just described in general terms, I turn now to analyze the type of disagreement about law elicited by the four administrative hard cases.

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### *Empirical Disagreement About Law*

I will begin this analysis by questioning whether the four administrative hard cases raise issues of fact or empirical disagreements about law. Consider that, in resolving empirical disagreements about law, the scope of the decision is limited to reviewing whether a proposition of law satisfies the grounds of the law or whether a primary rule was made in accordance with the secondary rule, depending on the theory of law or adjudication in which the disagreement is framed<sup>279</sup>. A typical empirical disagreement about law is the one that results from an administrative adjudication of welfare benefits or permits for any given activity. It is also the case of the legislature that delegates lawmaking power on an administrative body to further develop what it has been set out in general terms by a statute. While in the former case administrative agencies assess whether the claimant meets the requirements set out in the statute in order to decide about the adjudication of a right, in the latter the administrative agency ought to issue the rule in accordance to what it has been set forth by the legislature in the parent statute. This is not always an easy task to carry out, however.

One could argue that the four real world *administrative hard cases* that I have presented stemmed, *prima facie*, from an empirical disagreement about law. For instance, in *Chevron* there are various disagreements that are solved distinctly at two different levels. First of all, the disagreement is not about the amended Clean Air Act's validity. The parties agreed it is a valid piece of legislation, but they disagree about the meaning of the term "stationary source" set out in the Act<sup>280</sup>. As commentators point out, although the new parts C and D of the 1977 amendments mandate states to adopt technology-based standards for certain new and modified sources, “[...] neither of them made any further attempt to define ‘facility’, ‘source’ or ‘stationary source’”<sup>281</sup>.

In *City of Arlington* there is also a complex controversy that unfolded at different levels. Although CTIA’s petition raised three main issues<sup>282</sup>, I will only focus on the issues related

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<sup>278</sup> Id.

<sup>279</sup> Id. at 285.

<sup>280</sup> 46 Fed. Reg. 50766, *supra* note 5; *Chevron v. NRDC*, *supra* note 2, at 849.

<sup>281</sup> Merrill, *supra* note 1, at 406 – 407; *Chevron v. NRDC*, *supra* note 2.

<sup>282</sup> *In re Petition*, *supra* note 103, at 13995, (“Timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act”).



to the authority of the FCC to construe the Communications Act and to the definition of timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites<sup>283</sup>. First, the interested parties disagreed about the extent and scope of the FCC’s authority to construe ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling<sup>284</sup>. Second, the parties also disagreed about the meaning of the terms “reasonable period of time” and “failure to act” set out in Sections 332(c)(7)(B)(ii) and 332(c)(7)(B)(v) of the Act, respectively<sup>285</sup>.

On the Colombian side, in the *organ donation* case the parties disagree about the executive rule’s validity in two aspects. First, the parties disagreed about whether the measure that forbids health care organizations for-profit to partake in any activities related to the extraction, storage, and distribution of human *organs*, tissues or other body parts for the purpose of transplantation as a way to prevent organ trafficking is consistent with the “gratuitousness principle” set forth in Article 7 of Law 73 of 1988 and Article 1 of Law 919 of 2004<sup>286</sup>. Second, the parties also disagreed about whether the restrictions placed on the donation of human *organs*, tissues or other body parts for the purpose of transplantation to nonresident aliens is consistent with Article 100 of the Colombian Constitution of 1991<sup>287</sup>. Likewise, *McBean* is a complex case with several issues that contested the adjudicatory proceedings that led to the issuance of the initial environmental clearance by the incumbent agency at the time and its later repeal by the Ministry of Environment. The parties disagreed about whether the question at hand falls within the transition regime contained in Article 117 of Law 99 of 1993<sup>288</sup>. This is a critical question because it determines the applicable statutory framework against which the question at stake ought to be assessed.

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### ***Theoretical Disagreement About Law***

However, a closer look into these cases suggests that the concerned parties did not disagree about whether the grounds of law have obtained, namely, whether the administrative decision was made in accordance with the secondary rule or grounds of law. Rather, the parties disagree about what counts as grounds of law. For instance, in *Chevron*, the dispute about the linguistic indeterminacy of the term “stationary source”<sup>289</sup> is only apparent. Instead, the real point of contention is about how to improve air quality in the most cost-effective manner and what role, if any, should states play in balancing those competing interests. Similarly, in *City of Arlington*, the interested parties disagreed about the extent and scope of the FCC’s authority to construe ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling<sup>290</sup>. Put it simply, this is a complex question that requires an administrative agency to construe its own jurisdiction, namely, to construe the rule of recognition or grounds of law that set out the position it holds within the legal system. The

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<sup>283</sup> Id. at 13996 – 13997.

<sup>284</sup> Id.

<sup>285</sup> Id.

<sup>286</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 177, at 20.

<sup>287</sup> Id.

<sup>288</sup> Id.

<sup>289</sup> 46 Fed. Reg. 50766, *supra* note 5.

<sup>290</sup> *In re Petition*, *supra* note 103, at 13996 – 13997.

real disputes in both cases are arguably consistent with the constitutional theory behind the sweeping delegations of power on administrative bodies<sup>291</sup>.

As to the Colombian cases, in the *human organ donation case*, it is noteworthy that the parties did not dispute the textual clarity of the parent's act language<sup>292</sup>. In fact, although this principle's written formulation in Law 73 of 1988 is rather vague or open-textured, the parties did not question the vagueness of the statutory language. Rather than doing so, they disagreed about the permissible restrictions that an executive rule may place on commerce and on nonresident aliens' fundamental right to receive medical treatment to prevent human organs trafficking. Likewise, in *McBean*, the parties did not disagree about the textual clarity or open-texture of Article 117 of Law 99 of 1993, but rather about its legal consequences. In fact, they disagreed about the permissible limitations that may be imposed on acquired rights and the non-retroactivity principle to secure environmental protection in light of the precautionary principle<sup>293</sup>. In other words, the parties disagreed about the undesired legal consequences that the straightforward application of the transition regime may elicit under different moral and political philosophies, which in this case springs from a clash between the non-retroactivity principle and the precautionary principle.

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### ***Meta-Interpretive Disagreement About Law***

These four hard cases suggest that, rather than an abstract philosophical construction of the grounds of law, administrative decision-makers engage in complex and collective decision-making procedures where all the interested parties –including the administrative decision-maker itself– partake by advancing different interpretations that convey underlying political and moral philosophies about how the grounds of law ought to be construed to decide the question at hand. These jarring arguments are introduced by the parties to the administrative debate in the form of *interpretive methodologies* that are based upon reasons of policy and principle. Thus, the administrative decision-makers do not only decide *empirical disagreement* about law by construing legal norms in light of different interpretive methodologies and by making a judgment about whether the grounds of law have obtained in the case at hand, as well as theoretical disagreement about law. They also decide about which interpretative methodology ought to be employed to solve the question at issue, which requires a judgment about the different interpretive methodologies advanced by the parties.

For instance, in *Chevron*, the concerned parties suggested different interpretive methodologies to construe the Clean Air Act's ambiguous language. On the one hand, environmental interest groups advocated for a purposive interpretation of the Act's goals aimed at improving air quality levels. On the other, business interest groups argued in favor of a purposive interpretation aimed at maintaining air quality levels. Each one of the conflicting views on the purpose of the Act reflects an underlying political and moral philosophy about how to improve air quality in the most cost-effective manner by balancing in environmental protection and economic growth. This interpretive disagreement about how

<sup>291</sup> See, e.g., Yoo, *supra* note 11; Kearney & Merrill, *supra* note 101.

<sup>292</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 177, at 20.

<sup>293</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

to read the purposes of the Act suggests that the statutory language is unhelpful to decide the question at stake. In *City of Arlington* administrative debate the parties advance contrasting interpretive methodologies to construe the Communications Act. While the CTIA and its supporters advance a purposive interpretation of the Act's goal to sustain the petition, state and local government commenters oppose by advocating for a textual interpretation of the statute. Nevertheless, the arguments introduced by the parties to defend their views of what constitutes the secondary rule or grounds of the law that set out the FCC's rulemaking jurisdiction go beyond simple textual or purposive statutory interpretations.

In the Colombian *human organ donation case*, both parties cited the same Constitutional and statutory provisions in support of their arguments against and in favor of the administrative rule's legality, yet they construed them in a different fashion<sup>294</sup>. While the plaintiff argued in favor of a textual pro-business interpretation to reassert the constitutional limits of the President's rulemaking authority seeking to strike down the restrictions imposed on healthcare organizations for profit, the defendant advocated for a purposive interpretation to explain how the rule advances the regulatory agenda and fulfills statutory goals like the prevention of human organs trafficking in light of the "gratuitousness principle". Finally, in the *McBean* administrative debate, the Ministry of Environment advances a purposive interpretation of the statutory framework seeking to secure environmental protection at the cost of acquired individual rights<sup>295</sup>. In light of this interpretation, the Ministry reads two exceptions into the application of the transition regime set forth in Article 177 of Law 99 of 1993 and further developed by the President in Decree 1753 of 1994. Conversely, the Great View Company argues for a textualist interpretation of the statutory framework and a purposive interpretation of two principles of law aimed at preserving acquired rights over newly enacted legislation according to the non-retroactivity principle and the legitimate expectation doctrine.

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### *Administrative Hard Cases*

In light of the working definition of a hard case that I introduced in Chapter One, in this Chapter I analyzed four administrative cases to show that legal institutions endowed with administrative power decide hard cases. This chapter has a threefold purpose. First, I described how legal institutions endowed with administrative power decide hard cases, like the judiciary. Second, in light of the literature of jurisprudence, I described the empirical, theoretical, and meta-interpretive disagreement that may arise in legal practice. Then, drawing on such a theoretical description, I portrayed how the administrative power decides empirical disagreement about law, as well as theoretical and meta-interpretive disagreement.

I call them *administrative hard cases* because they may result from the vagueness of a social conduct's factual description contained in a legal norm that fails or neglects to address a question about planning or resource allocation, from the questionable consequences that the straightforward application under certain circumstances of a legal norm about planning or resource allocation may elicit in light of given moral or political philosophy, or when there

<sup>294</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 177, at 20.

<sup>295</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

is no previously acknowledged legal norm that addresses the question at issue about the planning or allocation of resources in a community. For instance, *Chevron* and *City of Arlington* are hard cases of the first type because, in principle, they stemmed from the ambiguous statutory language of the Clean Air Act<sup>296</sup> and the Communications Act<sup>297</sup>, respectively. Likewise, in the *human organs case* the controversy stemmed from the vagueness of “gratuitousness principle” set forth in Article 7 of Law 73 of 1988 and Article 1 of Law 919 of 2004, as well as from articles 100 and 333 of the Constitution<sup>298</sup>. Moreover, in *McBean* the controversy stemmed from the undesired legal consequences elicited by the straightforward application of the plain language of Law 99 of 1993. However, what did the parties disagree about in these cases? To address this question, I described the general structure of the literature of jurisprudence to portray the empirical, theoretical, and meta-interpretive nature of the disagreement that may arise in legal practice.

One could argue that the four administrative hard cases arose from *empirical disagreement* about law that questions whether a proposition of law is true or false in the sense that it “satisfies the grounds of the law”<sup>299</sup>. A disagreement of this kind would be, for instance, whether the “bubble policy” was made pursuant to the substantial and procedural requirements set out in the Clean Air Act and the APA or whether the FTC issued the declaratory ruling according to the requirements contained in the Communications Act. Likewise, an *empirical disagreement* would be whether fencing works fulfill the requirement established in the environmental permit mandating the Great View Company to start construction works within 6 months after the permit became effective or whether the Colombian Ministry of Environment repealed the initial environmental permit according to the requirements contained in Law 99 of 1993 and the General Administrative Procedure Code of 1984.

However, the four case studies suggest that these empirical disagreements about law were not the main point of the controversy insofar as a closer look at the arguments advanced by the parties during the administrative debate and the decisions rendered by the administrative decision-makers indicate that the central source of the controversies sprang from complex moral and political philosophy conflicts about the allocation of valuable resources in a democratic polity in the form of theoretical disagreement or meta-interpretive disagreement about law. Here I want to emphasize the insightful distinction between “objective choices” and “value choices” in administrative decision-making procedures described by Professor CHARLES REICH. He wrote back in 1966:

“In the case of the river valley, the planners must first gather facts, but the decision about where and whether to build a dam is almost purely a value choice. No dam is necessary in any absolute sense; every dam has advantages and offsetting disadvantages, and the choice may be like a vote for inexpensive electricity and against fish, or a vote for free enterprise-expensive electricity and against public power-cheap electricity. [...] Some criteria of choice, such as staff experience and

<sup>296</sup> 46 Fed. Reg. 50766, *supra* note 5.

<sup>297</sup> *In re Petition*, *supra* note 103, at 13996 – 13997.

<sup>298</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 177, at 20.

<sup>299</sup> Dworkin, LE, at 4 – 6.

quality of facilities, are comparatively objective; other criteria, like the desirability of one type of proposed programming over another, are value choices”<sup>300</sup>.

Some commentators suggest that “every creation and interpretation of a right is itself a value choice”<sup>301</sup>, which in the administrative process entails that some are “punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy”<sup>302</sup>. On this assumption, one could argue that *theoretical disagreement* about law arises in the administrative debate when the parties disagree about whether a proposition of law containing a value choice about planning or resource allocation exhausts the grounds of law<sup>303</sup>. Examples of this sort of disagreement can be found in *Chevron* about the question about how to improve air quality in the most cost-effective manner and what role, if any, should states play in balancing those competing interests. In *City of Arlington*, the interested parties disagree about the extent and scope of the FCC’s authority to construe ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling<sup>304</sup>. In the *human organ donation case*, the parties disagree about whether an exception can be read into Articles 100 and 333 of the Colombian Constitution to allow the President to place restrictions on commerce and on nonresident aliens’ fundamental right to receive medical treatment in order to prevent human organs trafficking. Finally, in *McBean*, the parties disagree about the permissible limitations that may be imposed on acquired rights and the non-retroactivity principle to secure environmental protection in light of the precautionary principle<sup>305</sup>. Thus, on the *Dworkinian* conception, one could argue that the construction of the grounds of law in their best moral light would entail a value choice about the planning or resource allocation that ought to be made in the administrative process.

By contrast, based on the planning theory of law, one could argue that *meta-interpretive disagreement* about law questions the proper interpretation methodology of a particular legal system according to which the planning or allocation of resources should be made<sup>306</sup>. For instance, in the *Chevron* administrative debate, the parties agreed upon purposive interpretation as the proper interpretive methodology to construe the term “stationary source” in the absence of a clear statutory definition. Despite such agreement, the parties disagree about how the Act’s purpose should be grasped to define “source,” which reflects a disagreement about the purposes behind the Act’s enactment. This is crucial insofar as the grasp on the Act’s purpose defined what the law is in this case and so it is reflected in the EPA’s “bubble policy” final decision. As opposed to *Chevron* where the parties agreed on the same interpretive methodology but disagree how to read the goals of the Act, in *City of Arlington* the parties advance contrasting interpretive methodologies to construe the

<sup>300</sup> Charles Reich, THE LAW OF THE PLANNED SOCIETY, 75 Yale L. J. 1227, 1236 - 1237 (1966).

<sup>301</sup> Gerald E. Frug, WHY NEUTRALITY?, 92 Yale L. J. 1591 (1983). Professor FRUG suggests, “[...] every creation and interpretation of a right is itself a value choice.” See, e.g., Wesley Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 26 Yale L. J. 710 (1917); Robert Hale, FORCE AND THE STATE: A COMPARISON OF “POLITICAL” AND “ECONOMIC” COMPULSION, 35 Colum. L. Rev. 149 (1935). For the contrary position, see, e.g., Richard B. Stewart, REGULATION IN A LIBERAL STATE: THE ROLE OF NON-COMMODITY VALUES, 92 Yale L. J. 1537, 1539 (1983).

<sup>302</sup> Reich, *supra* note 300, at 1237.

<sup>303</sup> Dworkin, LE, 4 – 6.

<sup>304</sup> *In re Petition*, *supra* note 103, at 13996 – 13997.

<sup>305</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 210, at 4.

<sup>306</sup> Shapiro, LEGALITY, at 306.



Communications Act. While the CTIA and its supporters advance a purposive interpretation of the Act's goal to sustain the petition, state and local government commenters oppose by advocating for a textual interpretation of the statute.

In the *human organ donation case*, the parties invoked the same Constitutional and statutory provisions in support of their arguments in favor and against of the administrative rule's legality, yet they construe them differently. While the plaintiff argues in favor of a textual pro-business interpretation to assert the constitutional limits of the President's rulemaking authority seeking to strike down the restrictions imposed on healthcare organizations for profit, the defendant advocates for a purposive interpretation to explain how the rule advances the regulatory agenda and fulfills statutory goals like the prevention of human organs trafficking in light of the "gratuitousness principle". Similarly, in the *McBean* administrative debate, the Ministry of Environment advances a purposive interpretation of the statutory framework seeking to secure environmental protection at the cost of acquired individual rights. In light of this interpretation, the Ministry reads two exceptions into the application of the transition regime set forth in Article 177 of Law 99 of 1993 and further developed by the President via administrative rule in Article of Decree 1753 of 1994. The Great View Company opposes and argues for a textualist interpretation of the statutory framework and a purposive interpretation of two principles of law aimed at preserving acquired rights over newly enacted legislation according to the non-retroactivity principle and the legitimate expectation doctrine.

The four case studies suggest that, regardless of legal traditions, constitutional schemes, and institutional arrangements, legal institutions endowed with administrative power were called upon to solve the controversies and their underlying moral and political philosophy conflicts in the form of theoretical or meta-interpretive disagreement about law, which entailed, in turn, significant changes in a democratic polity as a whole. For instance, in the *Chevron* administrative debate, the EPA ruled in favor of the pro-business purposive interpretation aimed at improving air quality in the most cost-effective manner<sup>307</sup> and the United States Supreme Court of Justice in a landmark decision deferred to the EPA's administrative interpretation<sup>308</sup>. Similarly, in *City of Arlington*, the FCC ruled in favor of the purposive interpretation of the Act's goals to assert jurisdiction over the question at issue<sup>309</sup>. The United States Supreme Court of Justice upheld the FCC's decision in another landmark decision<sup>310</sup> that arguably expanded the *Chevron* framework<sup>311</sup>. This also occurred in the *organs donation case*, where the Colombian President embraced the purposive interpretation and placed restrictions on commerce and on nonresident aliens' fundamental right to receive medical treatment in equal conditions to prevent human organs trafficking based on the gratuitousness principle<sup>312</sup>. Likewise, in the *McBean* case, the Ministry of Environment ruled in favor of the purposive pro-environmental interpretation and read two exceptions into the statute as to the

<sup>307</sup> 46 Fed. Reg. 50766, *supra* note 5.

<sup>308</sup> *Chevron v. NRDC*, *supra* note 2, at 857.

<sup>309</sup> *In re Petition*, *supra* note 103, at 14001.

<sup>310</sup> *City of Arlington*, *supra* note 104.

<sup>311</sup> For the general discussion on this point, *see, e.g.*, Thomas W. Merrill, STEP ZERO AFTER CITY OF ARLINGTON, 83 Fordham L. Rev. 753 (2014); Peter L. Strauss, IN SEARCH OF SKIDMORE, 83 Fordham L. Rev. 789 (2014).

<sup>312</sup> D. 2493/04, *supra* note 167.

application of the transition regime relying on the precautionary principle<sup>313</sup>. The Higher Courts of Colombia upheld the administrative power's decisions without any further inquiry<sup>314</sup>.

These case studies also indicate that the answer to the complex moral and political philosophy controversies that gave rise to these hard cases was beyond the decision about whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature or required more than a judgment about whether the grounds of law have obtained in the case at hand. It follows, therefore, that the real point of contention could be rather framed as a theoretical disagreement about what counts as grounds of the law or a disagreement about the different interpretive methodologies that could be used to construe a legal norm. However, unlike all of the hard cases that I described in Chapter One that were decided by the judiciary in accordance with a judicial procedure set out by the legislature, these four hard cases share the salient feature that legal institutions endowed with administrative power decided them following the substantive and procedural rules established by the legislature. The Higher Courts of the United States of America and Colombia deferred to the administrative interpretations and decisions without any further inquiry into the substance of the questions that gave rise to these controversies at the administrative level. Here I just described the facts of the cases, the point of controversy, the different type of disagreement about law they may elicit, and how administrative decision-makers decided them in practice. In the next Chapter I shall address the question how these cases could be solved in the light of different theories about the nature of law and adjudication and whether or not the decisions rendered by the administrative decision-makers could be labeled as "novel" because they are arguably not subject to any settled legal norm.

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<sup>313</sup> R. 024/96, *supra* note 227.

<sup>314</sup> For the decision about the human organs donation case, *see* Consejo de Estado [C.E.] [Council of State], *supra* note 177. For the decision about McBean's Lagoon, *see* Consejo de Estado [C.E.] [Council of State], *supra* note 210; Consejo de Estado [C.E.] [Council of State], *supra* note 247; Corte Constitucional [C.C.] [Constitutional Court], *supra* note 248.

## CHAPTER III

### THE PHILOSOPHICAL ARCHITECTURE OF ADMINISTRATIVE REASONING

“But it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness.”

-Lon Fuller<sup>1</sup>

Let us consider again the *Riggs v. Palmer*<sup>2</sup> and *Henningsen v. Bloomfield Motors, Inc.*<sup>3</sup> cases described in Chapter One to illustrate DWORKIN’s concept of a hard case<sup>4</sup>. In *Palmer*, relying on a purposive interpretive methodology, the majority opinion delivered by Judge EARL read into the New York statute of wills an exception for murderous beneficiaries based on the principle that no person should profit from his own wrong<sup>5</sup>. Conversely, based on a textual interpretive methodology, the dissenting opinion written by Judge GRAY voted for Mr. PALMER and argued that the “real statute”, interpreted properly, contained “no exceptions for murderers”<sup>6</sup>. Unlike the *Palmer* case, in *Henningsen* the plaintiff was not able to invoke any statute or settled rule of law that prevented *Bloomfield Motors* from standing on the liability waiver<sup>7</sup>. On appeal, the New Jersey Supreme Court could find no explicit rule that would authorize it to ignore such a waiver but ruled for Mr. HENNINGSEN<sup>8</sup>.

By the same token, the four real-world cases that I described in Chapter Two share a salient feature: they are *administrative hard cases* insofar as law proved to be vague, insufficient, silent or undesired to solve the controversies at hand about the planning or allocation of resources in a democratic polity, which sprang from complex moral and political philosophy conflicts in the form of theoretical or meta-interpretive disagreement about law. On these grounds, I suggest that the administrative power decides complex moral and political philosophy quandaries in the form of theoretical or meta-interpretive disagreements about law and that these administrative decisions may elicit profound changes in the polity that can range from the acknowledgment of new rights to the way in which public policy ought to be made and implemented. Nevertheless, as I explained in Chapter One, legal philosophy has been traditionally concerned with the study of *judicial novelty*, in particular, how judges decide hard cases when the law is vague, insufficient, undesired or seems to run out to solve the question at stake.

Many theories have been written in the effort to describe what judges do in hard cases<sup>9</sup>. For some theorists, in deciding a hard case, judges are *applying* legal norms; for others, they are

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<sup>1</sup> Lon L. Fuller, THE MORALITY OF LAW 64 (rev. ed. 1969).

<sup>2</sup> 115 N.Y. 506, 22 N.E. 188 (1889).

<sup>3</sup> 32 N.J. 358, 161 a.2d 69 (1960).

<sup>4</sup> Dworkin, LE, at 19.

<sup>5</sup> Dworkin, LE 19; *Riggs v. Palmer*, *supra* note 2, at 513 – 514.

<sup>6</sup> *Riggs v. Palmer*, *supra* note 2, at 515 - 516 (Gray J., dissenting).

<sup>7</sup> Ronald Dworkin, THE MODEL OF RULES, 35 U. Chi. L. Rev. 14, 24 (1967).

<sup>8</sup> *Id.* at 24. *See also* 32 N.J. 358, 161 a.2d 69, 388 (1960).

<sup>9</sup> Ronald Dworkin, “Hard Cases,” in TAKING RIGHTS SERIOUSLY (1978).

*creating* legal norms<sup>10</sup>. Surprisingly administrative agencies have not partaken in this debate or have been assimilated to judges as legal institutions in charge of executing *ex ante* what the legislature has announced in general terms<sup>11</sup>. Although the administrative power has experienced an evident evolution over the past two centuries, such institutional amalgam seems to remain unscathed in the eyes of legal philosophy. As it was explained earlier, the prominent law-making enterprise of the administrative power within modern constitutional democracies raises many questions at the jurisprudential level, such as whether there is an untamed version of the administrative power that operates beyond the boundaries of law's certainty with unbound discretion, whether there is such thing as administrative novelty, whether legal institutions endowed with administrative power *enforce pre-existing law* or *create new law* in deciding administrative hard cases, whether administrative decision-makers rely on arguments of policy or principle in deciding hard cases.

This Chapter addresses these questions by exploring the tension between the theoretical or meta-interpretive nature of the disagreement that gives rise to administrative hard cases and how would different administrative law theories explain the way in which administrative decision-makers decide them in light of their theoretical commitments. In doing so, it seeks to map the philosophical architecture of administrative reasoning. Legal philosophers argue that legal reasoning is not an “impersonal, technical, [or] scientific process,” for it requires the exercise of a “considerable degree of *judgment*, which is a mental faculty ungoverned by explicitly specifiable and quantifiable rules and procedures.”<sup>12</sup> On this account, legal philosophers suggest that hard cases challenge the boundaries of “moral knowledge” insofar as their decision requires “normative considerations” of politics, policy, ethics, and so on.<sup>13</sup>

I make four claims. First, the different thesis about law's determinacy and discretion may contribute to a better understanding of the theories of administrative rulemaking and adjudication, insofar as they expose their theoretical commitments at the jurisprudential level and set the backdrop against which I will tackle further questions about administrative decision-making. Second, the judgment about the existence of administrative novelty depends upon a theory of administrative law's core theoretical commitments at the jurisprudential level. Similar to what happens with judges, for some theories of law or adjudication, in deciding a hard case, administrative decision-makers are *applying* legal norms; for others, they are *creating* legal norms. Third, the four administrative hard cases that I present suggest that rather than engaging in several rounds of sophisticated philosophical discussions, legal institutions endowed with administrative power tend to decide hard cases based both on arguments of policy and principle by appealing to their experience and expertise regardless of the form of administrative action. Fourth, on this account, *administrative novelty* arises when administrative decisions are not subjected to

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<sup>10</sup> Scott J. Shapiro, *LEGALITY*, 274 (2011) [hereinafter, Shapiro, *Legality*].

<sup>11</sup> H.L.A. Hart, *THE CONCEPT OF LAW* (3rd ed., 2012) [hereinafter, Hart, *CL*]; Shapiro, *Legality*, at 305.

<sup>12</sup> Shapiro, *Legality*, at 237.

<sup>13</sup> *Id.* at 235 - 245 (“They [moral considerations] range from the ethical (what justice requires in a given case, which behaviors and character traits are virtuous and which are vicious, whether a procedure is fair) to the pragmatic (what will the short – and long-term social, economic, and institutional effects of certain decisions be, who can be trusted to implement which policies, which incentives best promote optimal compliance) and, finally, to the political (who has the greatest legitimacy to decide particular questions, which rights do individuals have against the government, how can the aims and values of the system best be promoted.”)

previously acknowledge legal norms of legislative, administrative or judicial nature, which tends to vary according to different theories of law and adjudication.

This Chapter proceeds as follows. Based on the general structure of the literature of jurisprudence that I described in Chapter One to describe a working definition of hard cases, I will venture to speculate how different theories of administrative law would tackle the theoretical and meta-interpretive disagreements about the law that gave rise to the four administrative hard cases. To do so, first I will make a hypothetical projection of how a theory of administrative law would be like according to the core theoretical commitments of legal formalism, legal realism, legal positivism, DWORKIN's alternate approach, and the planning theory of law. I must caveat that I call it a "hypothetical projection" because, like a map projection, it is not meant to be an exact reproduction of the original picture set out in the theories about the nature of law and adjudication that emphasize the interplay between legislatures and courts of justice. However, I will try to be as faithful as possible to the original terminology employed by the literature of jurisprudence for the sake of the projection's accuracy. Then, based on the projection, I will recap certain relevant facts from the four administrative hard cases to portray how different theories of administrative law would tackle theoretical or meta-interpretive disagreements about the law.

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### *The Transmission Belt Theory*

In Chapter One, I explained that, on the formalist account that law is determinate and adjudication is mechanical<sup>14</sup>, courts and administrative law scholars introduced the traditional model of administration or *transmission belt theory* to describe the role of administrative agencies in executing legislation against the backdrop of the separation of powers<sup>15</sup>. This formalistic view of the *transmission belt theory* was endorsed by the United Supreme Court in *Reagan v. Farmers' Loan & Trust Co.* where Court ruled that a "[...] commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation"<sup>16</sup>. It must be noted that Justices OLIVER W. HOLMES, JR., RUFUS W. PECKHAM, and DAVID J. BREWER took part in the *Lochner* decision<sup>17</sup>. In *Lochner*, Justice PECKHAM wrote the majority opinion, which was joined by Justices

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<sup>14</sup> Hart, CL, at Ch. VII; Frederick Schauer, FORMALISM, 97 Yale L. J. 509 (1988); Martin Stone, Formalism in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, 170 - 171 (J. Coleman & S. Shapiro eds. 2002); Thomas Grey, LANGDELL'S ORTHODOXY, 45 U. Pitt. L. Rev. 1 (1983); Morton J. Horowitz, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 199 (1992); Roberto Unger, THE CRITICAL LEGAL STUDIES MOVEMENT, 1 (1986) (explaining that, on the formalist account, law is not an instrument of social policy); Duncan Kennedy, LEGAL FORMALITY, 2 J. Legal Stud. 351, 355 (1973).

<sup>15</sup> Adolf A. Berle, Jr., THE EXPANSION OF AMERICAN ADMINISTRATIVE LAW, 30 Harv. L. Rev. 430, 434 - 35 (1917).

<sup>16</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 394 (1894). See also *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348; *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 343-44 (1886) ("Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the state. This we held, in *Ruggles v. Illinois*, included laws in force when the charter was granted, and those which came into operation afterwards as well").

<sup>17</sup> *Lochner vs. New York*, 198 U.S. 45, 76 (1905) (Holmes J., dissenting.).



FULLER, BROWN, MCKENNA, and BREWER<sup>18</sup>. Recall, that Justice BREWER delivered the opinion of the Supreme Court in *Reagan v. Farmers' Loan & Trust Co.*, where the Supreme Court reiterated the transmission belt theory according to which administrative agencies are mere instruments devised to execute legislation<sup>19</sup>. Also, consider that Justice BREWER's opinion in *Reagan v. Farmers' Loan & Trust Co.* relied heavily on the *Railroad Commission Cases*<sup>20</sup>, where the decision was delivered by Chief Justice MORRISON WAITE who, in turn, wrote the majority opinion in *Munn v. Illinois*, where the Supreme Court upheld the power of government to regulate private industries that affect the public interest<sup>21</sup>. Hence, I think it is plausible to suggest that Justice BREWER played a significant role in the transition of the formalist jurisprudence from the WAITE Court to the FULLER Court and the construction of the “*transmission belt theory of administration*” in light of the formalistic view about the law predominant at the time.

Relying on the works of French administrative scholar GASTÓN JÈZE, FRANK GOODNOW asserts that it is the duty of administration to execute the law as established by the legislature<sup>22</sup>. In this sense, GOODNOW posited that “[t]he discharge of this function [function of administration] consists in the impartial and efficient execution of the law as laid down by the legislative body”<sup>23</sup>. According to ADOLF BERLE, the *transmission belt theory* suggests that administrative agencies –commissions, boards, and the like– only serve as “mere instruments of a fully expressed legislative will and thus they take no part in the expression of such a will”<sup>24</sup>. Drawing on the works of the most prominent European administrative law scholars of the time such as DUGUIT, LAFERRÈRE, and GNEIST, BERLE explains:

In America the motive power is the popular will. The first step in its transmission is its expression in some authoritative way by legislative enactment or (even before the enactment) by political choice of officers, after a campaign in which some idea of the popular will is gathered. Thereafter the normal machinery for transmission is the system of regularly constituted governmental agencies the legislature, to express and make definite and tangible the popular idea; the executive, to express and make definite the enforcement of it and to apply it to the subject calling forth the expression; the judiciary, to limit the executive and to some extent the legislature to the confines of the expressed popular will. This is all administrative work.<sup>25</sup>

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<sup>18</sup> Id.

<sup>19</sup> *Reagan v. Farmers' Loan & Trust Co.*, *supra* note 16, at 396.

<sup>20</sup> *Railroad Commission Cases*, 116 U. S. 307, 331 (1886). *See also* *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 343 - 44 (1886) (“Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the state. This we held, in *Ruggles v. Illinois*, included laws in force when the charter was granted, and those which came into operation afterwards as well”).

<sup>21</sup> *Munn v. Illinois*, 94 U.S. 113 (1877).

<sup>22</sup> Frank J. Goodnow, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 13 (1905).

<sup>23</sup> Id.

<sup>24</sup> Berle, *supra* note 15, at 434 – 35.

<sup>25</sup> Id.

Moreover, ERNST FREUND suggested an alternate conception of the administrative state in light of the German *Rechtsstaat*<sup>26</sup> that was committed, in my view, to the tenets of *legal formalism*. Bear in mind FREUND's view that "executive interpretation is an important factor"<sup>27</sup> and that interpretation ought to "promote sound law and sound principles of legislation"<sup>28</sup>. FREUND's ideas must be also put into context. Recall that since his early writings, FREUND advocated for the establishment in the United States of an administrative law model devised according to the German ideal of the *Rechtsstaat*<sup>29</sup>. Professor DANIEL ERNST explains that FREUND was deeply concerned about broad administrative discretion and suggested that legislatures ought to "[...] 'narrow as much as possible the sphere of discretionary action' by fixing 'precisely and completely' how and when administrators should act. 'Compliance with these conditions will place all individuals upon a basis of equality, and the administration is bound by fixed rules which are controllable and enforceable by the courts'"<sup>30</sup>. ERNST points out that FREUND was disappointed by the expansion of broad delegations of power to administrative agencies in the United States<sup>31</sup>. In this sense, FREUND asserted "'the progress of law should be away from discretion toward definite rule,' if 'all discretion in administration ... is an anomaly and the modern tendency is to reduce it to a minimum,' had America turned its back on history?"<sup>32</sup>. In my view, FREUND's account of the executive power is committed to the tenets of legal formalism<sup>33</sup>.

On these grounds, some commentators characterize this policy-implementing or decision-making model as *bureaucratic rationality*<sup>34</sup> or *bureaucratic legalism*<sup>35</sup> to suggest that it

<sup>26</sup> Ernst Freund, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); Ernst Freund, *THE LAW OF THE ADMINISTRATION IN AMERICA*, 9 PSQ 403 (1894); Ernst Freund, *HISTORICAL SURVEY, IN THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923); Ernst Freund, *SUBSTITUTION OF THE RULE OF DISCRETION*, 9 Am. Pol. Sci. Rev 666 (1915); Ernst Freund, *INTERPRETATION OF STATUTE*, 65 U. Pa. L. Rev. 207 (1917).

<sup>27</sup> Ernst Freund, *INTERPRETATION OF STATUTES*, 65 U. Pa. L. Rev. 207, 211 (1917).

<sup>28</sup> Id. 231 (1917). *See also*, Freund, *SUBSTITUTION OF THE RULE OF DISCRETION*, *supra* note 26 ("These commissions have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute appear merely as general principles".)

<sup>29</sup> Louis L. Jaffe, *THE ILLUSION OF THE IDEAL ADMINISTRATION*, 86 Harv. L. Rev. 1183 (1973); Daniel R. Ernst, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900 – 1940*, at 11 (2014) ("In order to secure with certainty and predictability a sphere in which the citizen could act free from the interference of the state", writes the historian Kenneth Ledford, 'Rechtsstaat doctrine sought to replace both unwritten customary law and arbitrary bureaucratic law with a system of law that was general and autonomous, public and positive, aiming at generality in legislation and uniformity in adjudication'").

<sup>30</sup> Freund, *THE LAW OF THE ADMINISTRATION IN AMERICA*, *supra* note 26, at 421; Ernst, *supra* note 29, at 12 – 13.

<sup>31</sup> Ernst, *supra* note 29, at 13.

<sup>32</sup> Freund, *SUBSTITUTION OF THE RULE OF DISCRETION*, *supra* note 26. *See also*, Ernst, *supra* note 29, at 13.

<sup>33</sup> Jaffe, *supra* note 29, at 1186 ("His [Freund's] preference as to the character of such administration was much influenced by continental scholarship, with its concepts of administrative law and law in general. [...] Freund's rigid limitation of policymaking to the legislature would make modern government impossible and would deprive us of many fruitful solutions").

For the general discussion about the core theoretical commitments of legal formalism see Chapter One.

<sup>34</sup> Jerry Mashaw, *BUREAUCRATIC JUSTICE* 26 (1983).

<sup>35</sup> Robert Kagan, *REGULATORY JUSTICE* 86 (1978); Robert Kagan, *ADVERSARIAL LEGALISM* 11 (2001).

mirrors the formal-rational rule application model described by MAX WEBER<sup>36</sup>. In this sense, Professors ROBERT KAGAN<sup>37</sup> and JERRY MASHAW<sup>38</sup> explain that this rule application model rests upon the formalistic assumption that a legal system contains a rational and complete set of rules regulating all factual situations that may arise within that system and that administrative agencies must implement what is been set out by the legislature. For KAGAN, though the formal-rational rule application model is illusory in practice, it approximates the idea of formal justice, that is, unbiased, universalistic, prompt, and predictable decision-making<sup>39</sup>. Therefore, the *transmission belt theory* of administration is committed to the two tenets of *legal formalism* and it is thus exposed to the same criticism.

How would the *transmission belt theory* explain the way in which a legal institution endowed with administrative power decides a theoretical or meta-interpretive disagreement about the law? First, on the *formalist* account that law is determinate, the *transmission belt theory* would argue that the legal system contains a rational and complete set of rules regulating all factual situations that may arise within that system and that administrative agencies must implement what is been set out by the legislature<sup>40</sup>. On that premise, the *transmission belt theory* would then assert that it is the duty of administration to execute the law as laid down by the legislature. In other words, administration is entrusted with the execution of the state will or policies as set out in legislation<sup>41</sup>. Yet the four administrative hard cases that I have described challenge the two core tenets of *legal formalism* upon which the *transmission belt theory* is underpinned.

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<sup>36</sup> Jaffe, *supra* note 29, at 1186; Max Rheinstein, ed., MAX WEBER ON LAW IN ECONOMY AND SOCIETY, (1966).

<sup>37</sup> Kagan, ADVERSARIAL LEGALISM, *supra* note 35, at 11 (“A policy-implementing or decision-making process characterized by a high degree of hierarchical authority and legal formality [...] resembles the ideal-typical bureaucratic process as analyzed by Max Weber. Governance by means of bureaucratic legalism emphasizes uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding. The more hierarchical the system, the more restricted the role for legal representation and influence by affected citizens or contending interests. In contemporary democracies, the pure case of bureaucratic legalism is usually softened in some respects, but it is an ideal systematically pursued, for example, by tax-collection agencies”).

<sup>38</sup> Mashaw, *supra* note 34, at 26 (“The general decisional technique, then, is information retrieval and processing. In Weber’s words, ‘Bureaucratic administration means fundamentally domination through knowledge.’ And, of course, this application of knowledge must in any large-scale program be structured through the usual bureaucratic routines: selection and training of personnel, detailed specification of administrative tasks, specialization and division of labor, coordination via rules and hierarchical lines of authority, and hierarchical review of the accuracy and efficiency of decisionmaking. [...] From the perspective of bureaucratic rationality, administrative justice is accurate decisionmaking carried on through processes appropriately rationalized to take account of costs”).

<sup>39</sup> Kagan, REGULATORY JUSTICE, *supra* note 35, at 86 (“Each case can therefore be authoritatively decided by an impersonal syllogistic process: the decision maker 1) ascertains the facts in the case presented, 2) finds the rule that refers to or covers those facts, and 3) applies the rule (or follows its dispositional portion) to impose the correct outcome”).

<sup>40</sup> Kagan, ADVERSARIAL LEGALISM, *supra* note 35, at 11; Jerry Mashaw, *supra* note 34, at 26.

<sup>41</sup> Goodnow, *supra* note 22, at 6 – 15, (“In the case of political beings it is necessary not only that the will of the sovereign be formulated or expressed before it can be executed, but also that the execution of that will be entrusted in large measure to a different organ from that which expresses it. The great complexity of political conditions makes it practically impossible for the same governmental organ to be entrusted in equal degree with the discharge of both functions. The two functions of government which we have attempted to differentiate may, for purposes of convenience, be designated respectively as Politics and Administration. Politics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies”).

First, these *administrative hard cases* expose that law does not dictate one correct answer to the question at issue. In fact, though these four administrative hard cases are just another episode of an ongoing *feedback loop* where all the branches of government have actively partaken over the years, the parties still disagreed about what is the pertinent law to decide the question at issue. For example, in *Chevron*, after various statutory amendments, many years of intense administrative proceedings<sup>42</sup>, and two court rulings addressing the same questions at stake<sup>43</sup>, the concerned parties still disagreed about how to construe the term “statutory source” set out in the Clean Air Act<sup>44</sup>. The same can be said about the jurisdictional question that came up in *City of Arlington*. After many statutory amendments and Supreme Court rulings endorsing the limitations established by Congress on the traditional authority of state and local governments to regulate the location, construction, and modification of towers and antennas<sup>45</sup>, as well as the FCC’s rulemaking authority over such amendments<sup>46</sup>, the concerned parties still disagreed about the FCC’s jurisdiction to construe the ambiguous statutory language of the amended Communications Act<sup>47</sup>.

Similarly, in the *human organ donation case*, the gratuitousness principle is actually a written principle that was first introduced to the Colombian legal system by the President in Decree 2363 of 1986<sup>48</sup> and later incorporated into legislation in Law 73 of 1988<sup>49</sup> and Law 919 of 2004<sup>50</sup> by Congress. However, the parties still disagreed about this principle’s legal consequences on the regulation of human organ and tissue donation for therapeutic purposes, specifically, they disagreed about whether the President has the authority regulate commerce and to place restrictions on nonresident aliens’ fundamental right to receive medical treatment in equal conditions in order to prevent organ trafficking<sup>51</sup>. In *McBean*, the transition

<sup>42</sup> See generally Thomas W. Merrill, "The Story of Chevron," in ADMINISTRATIVE LAW STORIES, 406 (Peter Strauss ed., 2006). *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); Michael H. Levin, "Getting There: Implementing the 'Bubble Policy'" in SOCIAL REGULATION, STRATEGIES FOR REFORM, 66 (Bardach & Kagan eds., 1982); Bruce A. Ackerman & William T. Hassler, BEYOND THE NEW DEAL: COAL AND THE CLEAN AIR ACT, 89 Yale L.J. 1466, at 1476 (1980).

<sup>43</sup> *ASARCO Inc. v. Environmental Protection Agency*, 578 F.2d 319, (1978); *Alabama Power v. Costle*, 636 F.2d 323, (1979).

<sup>44</sup> 46 Fed. Reg. 50766 (October 14, 1981); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, at 849 (1984). "The focal point of this controversy is one phrase in that portion of the Amendments." Footnote 22 indicates: "Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6)".

<sup>45</sup> *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, (2005).

<sup>46</sup> *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 – 378, (1999).

<sup>47</sup> *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994 (November 18, 2009).

<sup>48</sup> D. 2363/86, julio 25, 1986, Diario Oficial 37571, agosto 1, 1986 [D.O.] art. 15 (Colom.).

<sup>49</sup> L. 73/88, diciembre 20, 1988, Diario Oficial 38623, diciembre 21, 1988 [D.O.] (Colom.).

<sup>50</sup> L. 919/04, diciembre 22, 2011, Diario Oficial 45771, diciembre 23, 2004 [D.O.] art. 1 (Colom.). Article 1 states: "The donation of anatomic components, organs, tissues, and corporal fluids ought to be made for humanitarian reasons. Any sort of compensation, monetary or non-monetary payment for such anatomic components is forbidden. [...] Paragraph. The authorized institutions that operate as tissue or bone marrow banks, as well as the authorized healthcare providers with approved transplant programs, can bill for the costs related to the hospitalization of the living donor, his medical treatment, diagnose, extraction, storage, tests required before the donation is made, transportation, the required immunologic and histocompatibility tests, the transplant procedures, hospitalization, surgery, post-surgery medical treatment of the donor and the recipient, medication and further medical examination".

<sup>51</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, abril 8, 2010, C.P: R. Ostau de Lafont Pianeta, Expediente 11001-03-24-000-2006-00121-00, at 20 (Colom.).

regime set out in Article 117 clearly mandates that environmental permits granted before the enactment of Law 99 of 1993 shall remain in effect for the time they were conferred and those permit holders are only obliged to submit a report on how to mitigate the risks their projects may place on the environment<sup>52</sup>. Despite the statutory language's clarity, the parties disagree about the legal consequences that the straightforward application of the transition regime to the case at hand may entail, namely, that the initial environmental clearance granted by INDERENA to the Great View Company back in 1992 shall remain in effect with all the rights pertaining, even if the risks that the project may place on the *McBean* mangrove and the adjacent biosphere are *unknown*<sup>53</sup>.

It follows, therefore, that the theoretical or meta-interpretive nature of the disagreement about law that gave rise to these four cases places a direct challenge on the *formalistic* tenet according to which law is determinate because it does not provide an answer to the question at issue<sup>54</sup>. Hence, on the *formalist account*, these four hard cases are ungoverned by law<sup>55</sup>. Law's indeterminacy entails, furthermore, that administrative adjudication cannot be mechanical. A *legal formalist* would then argue that, though in these four administrative hard cases the existing legal rules do not provide an answer, the administrative decision maker must derive the rule from existing principles whose abstract formulation provide an unambiguous coverage of all cases that may arise in a legal system<sup>56</sup>.

However, this argument would not hold true because the answer to these cases required strong administrative discretion and social policy considerations from the competent administrative bodies<sup>57</sup>. In fact, in resolving the theoretical or meta-interpretive disagreement elicited by these four hard cases, the legal institutions endowed with administrative power engaged in complex administrative proceedings to determine the pertinent law to the question at issue based on both arguments of policy and principle. For instance, in *Chevron*, the EPA ruled in favor of an interpretation of the statutory term "stationary source" aimed at improving air quality in the most cost-effective manner<sup>58</sup>. Similarly, in *City of Arlington* the FCC decided in favor of the CTIA's purposive interpretation of the Telecommunications Act's goals and asserted jurisdiction to interpret Section 332(c)(7) of the Act<sup>59</sup>. In the *organ*

<sup>52</sup> L. 99/93, diciembre 22, 1993, Diario Oficial 41146, diciembre 22, 1993 [D.O.] art. 117 (Colom.).

<sup>53</sup> For the decision on the human organs donation case: Consejo de Estado [C.E.] [Council of State], *supra* note 51; For the decisions on the McBean Lagoon case: Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 24, 2002, C.P. G. Mendoza Martelo, Expediente 5000-23-24-000-1996-6978-01(4027), (Colom.); Consejo de Estado [C.E.] [Council of State], First Chamber, octubre 28, 2010, C.P. M. Rojas Lasso, Expediente 25000-23-24-000-2002-00192-01(4027), (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2012, Sentencia T – 695/12, Expediente T-3431944, (Colom.).

<sup>54</sup> Grey, *supra* note 54, at 40 – 1; Christopher C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii - ix (1871).; Christopher C. Langdell, TEACHING LAW AS A SCIENCE, 21 Am. L. Rev. 123,123 (1887) (describing law as a rational science).

<sup>55</sup> Brian Leiter, REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM, 99 Colum. L. Rev. 1138, 1145 - 1146 (1999).

<sup>56</sup> Grey, *supra* note 54, at 12 – 13.

<sup>57</sup> Unger, *supra* note 14, at 1 (arguing that, on the formalist account, law is not an instrument of social policy); Kennedy, *supra* note 14, at 355.

<sup>58</sup> 46 Fed. Reg. 50766, *supra* note 44.

<sup>59</sup> Section I of the Act mandates the FCC to "execute and enforce the provisions of this Act" in order to, *inter alia*, regulate and promote communication "by wire and radio" on a nationwide basis. Moreover, Section 201(b) of the Act authorizes the FCC "to prescribe such rules and regulations as may be necessary in the public interest



*donation* case, the President embraced a purposive interpretation of the gratuitousness principle's legal consequences and placed restrictions on commerce and on nonresident aliens' fundamental right to receive medical treatment in order to prevent human organs trafficking<sup>60</sup>. Finally, in *McBean*, the Ministry of Environment advanced a purposive interpretation of the statutory framework seeking to secure environmental protection even at the cost of acquired individual rights and read two exceptions into the transition regime set forth in Article 177 of Law 99 of 1993<sup>61</sup>.

Therefore, on the *formalist* account, these four administrative cases would be ungoverned by law and the administrative decision-makers are required to look beyond the law to make their decisions, namely, to appeal to extralegal considerations like public policy or personal morality<sup>62</sup>. Put it differently, if administrative adjudication cannot be mechanical because the law is indeterminate, on the *formalist account*, the answer to these cases is beyond the law to the extent it requires a strong administrative discretion and a social policy consideration from administrative decision-makers to solve the four administrative hard cases. It should be noted, moreover, that the administrative decisions to the theoretical or meta-interpretive disagreement raised by these four hard cases were just one of different interpretations of the law advanced by the concerned parties. In sum, a theory of administrative law or administrative decision-making committed to the tenets of *legal formalism* would regard the administrative power as a mere executor of legislation whose duty is to simply execute the fully expressed will of the legislature<sup>63</sup>. On the assumption that law is rationally determinate, the *transmission belt theory*, which is a formalistic theory of administrative law, would exclude any social policy consideration from administrative decision-making and reject strong administrative discretion<sup>64</sup>.

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to carry out the provisions of this Act". Furthermore, Section 303(r) of the Communications Act dictates that "the Commission from time to time, as public convenience, interest or necessity requires shall [...] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act [...]". Section 4(i) mandates that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions". See also *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) "The *Chevron* framework governs our review of the Commission's construction. Congress has delegated to the Commission the authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, § 201(b); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377–378, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction. [...] Hence, as we have in the past, we apply the *Chevron* framework to the Commission's interpretation of the Communications Act".

<sup>60</sup> D. 2493/04, agosto 4, 2004, Diario Oficial 45631, agosto 5, 2004 [D.O.] art. 40 (Colom.).

<sup>61</sup> R. 024/96, enero 9, 1996, Minister of Environment [Ministerio del Medio Ambiente] (Colom.).

<sup>62</sup> 1 Edward Coke, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON, at 97b (Charles Butler ed., 1985) (1628). Hart, CL, at 129; Horowitz, *supra* note 14, at 9, 16, 254; Unger, *supra* note 14, at 204; Weinrib, *supra* note 14; Schauer, *supra* note 14; Stone, *supra* note 14; Brian Leiter, REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM, 99 Colum. L. Rev. 1138, 1143 - 1146 (1999); Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING, (2009) (describing the historical origins of formalism); Thomas C. Grey, FORMALISM AND PRAGMATISM IN AMERICAN LAW (2014) (describing the core tenets of legal formalism).

<sup>63</sup> Berle, *supra* note 15, at 434 – 35.

<sup>64</sup> Hart, CL, Ch. 7; Schauer, *supra* note 14; Stone, *supra* note 14, at 170 - 171; Grey, *supra* note 54; Horowitz, *supra* note 14, at 199; Unger, *supra* note 14, at 1 (1986); Kennedy, *supra* note 14, at 355.

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### *Administrative Justice*

In *The Path of the Law*, OLIVER WENDELL HOLMES postulated that “[f]or the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics”<sup>65</sup>. On this assumption, the study of administrative justice theories requires an approach to a vast array of empirical and normative streams of diverse scientific nature that merge into a robust *legal realist* account of how administrative decision-making actually works. The study of administrative justice theories faces the same challenge of characterizing legal realism as a theoretical stream due to the different views advanced by many authors in addressing the common concern about how administrative decision-making or policy-implementing *works in practice*<sup>66</sup>. Nonetheless, I will appeal to the core tenets of *legal realism* that I outlined in Chapter One. Consider that, on the *legal realist* account, the existence of different interpretations of the applicable formal or positive rules indicate that law is rather indeterminate and that administrative decision-makers may have to look beyond formal or positive legal rules to provide a solution to the question at issue<sup>67</sup>. This was precisely the starting point of the *realist* assault on *legal formalism*<sup>68</sup>.

On the *realist* assumption that law is indeterminate and decisionmakers react primarily to the underlying facts of the case, *empirically-oriented* scholars introduced a set of *administrative justice theories* to describe how policy-implementing or administrative decision-making work in practice<sup>69</sup>. The theoretical origins of a *realist* account of public administration can

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<sup>65</sup> Oliver W. Holmes, Jr., *THE PATH OF THE LAW*, 10 Harv. L. Rev. 457 (1897). For a similar view, see, e.g., Oliver W. Holmes, Jr., *LAW IN SCIENCE AND SCIENCE IN LAW*, 12 Harv. L. Rev. 443 (1899).

<sup>66</sup> Grant Gilmore, *LEGAL REALISM: ITS CAUSES AND CURE*, 70 Yale L. J. 1037 (1961); Brian Leiter, *LEGAL REALISM AND LEGAL DOCTRINE*, 163 U. Pa. L. Rev. 1975 (2015); Frederick Schauer, *LEGAL REALISM UNTAMED*, 91 Texas L. Rev. 749, 752 (2013); Brian Leiter, *RETHINKING LEGAL REALISM: TOWARD A NATURALIZED JURISPRUDENCE*, 76 Texas L. Rev. 267, 271 – 74 (1997); Brian Leiter, *REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM*, 99 Colum. L. Rev. 1138, 1147 (1999).

<sup>67</sup> Leiter, *LEGAL REALISM AND LEGAL DOCTRINE*, *supra* note 66; Schauer, *supra* note 66, at 752; Leiter, *RETHINKING LEGAL REALISM: TOWARD A NATURALIZED JURISPRUDENCE*, *supra* note 66, at 271 – 74; Leiter, *REVIEW ESSAY: POSITIVISM, FORMALISM, REALISM*, *supra* note 66, at 1147.

<sup>68</sup> Brian Leiter, *American Legal Realism* in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY*, 51 (Martin P. Golding & William A. Edmundson eds. 2005).

<sup>69</sup> Kagan, *REGULATORY JUSTICE*, *supra* note 35, at 87, (“The words of the rule call into mind simplified conventional pictures; but when we are confronted with any concrete case, in all its factual detail, the words cannot tell us whether particular elements in that case render it different from the spare picture drawn in the rule and thus render the rule inapplicable. Conversely, the rule cannot tell us whether factual details present in the particular case are irrelevant, do not make the case ‘different,’ and hence warrant the application of the rule. The decision as to whether a rule “applies” must rest on considerations extraneous to the rule. The American legal realists of the 1920s and 1930s joined the assault on the formal-rational conception. Since general rules do not or cannot decide concrete case, they argued, judges do not ‘find’ the law in preexisting rules, precedents, or eternal legal principles”.); Mashaw, *supra* note 34, at 11, (“We begin, therefore, by conceding the legal realists’ insight. The legally required means of agency implementation, as developed by courts and legislatures, may sometimes inform but cannot control administration. The normative structures created by legislation and by judicial decisionmaking are often, it not usually, removed from the concrete experience of bureaucratic implementation”).

be traced back to the works of JAMES LANDIS<sup>70</sup> and FELIX FRANKFURTER<sup>71</sup>, among others<sup>72</sup>, who claimed that the administrative power combined the three powers of government – legislative, executive, and judicial– and that administrative agencies play a major role in the creation and implementation of public policy. Indeed, commentators agree that LANDIS and FRANKFURTER were responsible for transforming the legal realist view of law as policy into a comprehensive and institutional theory about administrative lawmaking and the modern regulatory state<sup>73</sup>.

I must start off by briefly describing the origins of the American Administrative State in the works of JAMES LANDIS and FELIX FRANKFURTER, which are central to a theory of agency interpretation. Despite FREUND's efforts to introduce the *Rechtsstaat* model in the United States<sup>74</sup>, commentators agree that LANDIS and FRANKFURTER were responsible for transforming the *legal realist* view of law as policy into a comprehensive and institutional theory about administrative lawmaking and the modern regulatory state<sup>75</sup>. LANDIS<sup>76</sup> and FRANKFURTER<sup>77</sup> were concerned about the judicial process' inability to address quick social and economic change<sup>78</sup>, particularly the challenges raised by the Great Depression. On this assumption, LANDIS and FRANKFURTER argued that an expert administration should be in a better democratic position than that of judges to address policy questions. In LANDIS opinion, the expansion of the administrative state “[...] sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems”<sup>79</sup>. The idea of an administrative state is rooted in two pillars: democratic accountability and expertise.

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<sup>70</sup> James M. Landis, *THE ADMINISTRATIVE PROCESS*, 1 (1938).

<sup>71</sup> Felix Frankfurter, *THE PUBLIC AND ITS GOVERNMENT* (1930).

<sup>72</sup> Henry Friendly, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962); Bernard Schwartz, *AMERICAN ADMINISTRATIVE LAW*, (1950).

<sup>73</sup> Ernst, *supra* note 29; Mark Tushnet, *ADMINISTRATIVE LAW IN THE 1930S: THE SUPREME COURT'S ACCOMMODATION OF PROGRESSIVE LEGAL THEORY*, 60 *Duke L. J* 1566 (2011); Louis L. Jaffe, *JAMES LANDIS AND THE ADMINISTRATIVE PROCESS*, 78 *Harv. L. Rev.* 319 (1964); Mariano-Florentino Cuéllar, *JAMES LANDIS AND THE DILEMMAS OF ADMINISTRATIVE GOVERNMENT*, 83 *Geo. Wash. L. Rev.* 1330 (2015); Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES*, 44 (1982); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in Hart & Sacks, *THE LEGAL PROCESS*, at lxi (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>74</sup> Bernardo Sordi, “Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe” in *COMPARATIVE ADMINISTRATIVE LAW* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011); Ernst, *supra* note 29, at 17 - 26.

<sup>75</sup> Ernst, *supra* note 29; Tushnet, *supra* note 73; Jaffe, *supra* note 73; Cuéllar, *supra* note 73; Calabresi, *supra* note 73, at 44; Eskridge & Frickey, *supra* note 73, at lxi; Cuéllar, *supra* note 73.

<sup>76</sup> Landis, *supra* note 70, at 6, 13 – 17. LANDIS explained that “[f]ollowing the economic breakdown of 1929, a perplexed state relied almost entirely upon the administrative approach to its many and staggering problems. As rapidly as—indeed, sometimes more rapidly than—causes could be isolated and problems defined, administrative agencies were created to wrestle with them”.

<sup>77</sup> Frankfurter, *supra* note 71, at 7 – 10.).

<sup>78</sup> Tushnet, *supra* note 73, at 1569; Cuéllar, *supra* note 73, at 1335 – 1337.

<sup>79</sup> Landis, *supra* note 70, at 6, 13 – 17.

On the one hand, LANDIS<sup>80</sup> and FRANKFURTER<sup>81</sup> insisted that policy decisions ought to be made by expert administrative agencies that possessed the expertise and fact-finding methods to produce said decisions based on “neutral criteria”, which in their opinion would remove any democratic concerns from agency decision-making<sup>82</sup>. In this sense, FRANKFURTER asserted that what “[...] we need, above all else, is to know what is happening by objective demonstration of intensive scientific studies, instead of merely speculating, even wisely speculating, or depending on partisan claims of one sort or another”<sup>83</sup>. On the other, LANDIS and FRANKFURTER advanced different arguments to explain administrative agencies’ political or democratic accountability<sup>84</sup>. LANDIS posited, “[i]n terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique, that still divides under three rubrics, to modern needs and, at the same time, to preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government”. Similarly, FRANKFURTER postulated that expertise was itself a method of democratic legitimacy that depended on “very high standards of professional service”, procedural safeguards, and “zealous” public scrutiny<sup>85</sup>.

I must admit that analyzing in detail all of the underlying variables that may have influenced administrative decision-makers in the four real-world administrative hard cases is simply beyond my reach due to the expert knowledge on myriad non-legal considerations that such an analysis would require. Nonetheless, I would attempt to speculate about what variables would a *legal realist* administrative decision-maker consider in making her decision, for which I defer to the variables that have been identified by the generous literature of administrative justice in all of its branches and which has been meticulously backed up by empirical evidence. In explaining how administrative agencies *actually* make their decisions, administrative justice scholars have identified many influential variables, such as statutory clarity or vagueness, agency organization and resources discretion, the agency’s level of expertise, the role affected parties play in the decision-making process, the agency’s rule

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<sup>80</sup> Id. at 23 - 24 (“[E]xpertness [...] springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem. [...] [T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy”).

<sup>81</sup> Felix Frankfurter, *THE TASK OF ADMINISTRATIVE LAW*, 75 U. Pa. L. Rev. 614, 618 (1927) (“But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that ‘in the development of our liberty insistence upon procedural regularity has been a large factor’), easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar”).

<sup>82</sup> Frankfurter, *supra* note 71, at 72 - 73, 83 - 88; Eskridge & Frickey, *supra* note 73, at lxi.

<sup>83</sup> Frankfurter, *supra* note 81, at 620.

<sup>84</sup> Tushnet, *supra* note 73, at 1574; Cuéllar, *supra* note 73, at 1335 - 1337.

<sup>85</sup> Frankfurter, *supra* note 71, at 157 - 160 (“In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding. For these ends, expertise is indispensable. But politicians must enlist popular support for the technical means by which alone social policies can be realized”). *See also, e.g.*, Tushnet, *supra* note 73, at 1575; Ernst, *supra* note 29, at 26.

application style and culture, political influences on the agency, and so on<sup>86</sup>. Generally speaking, empirical studies have found that variation in how administrative agencies *actually* make decisions depends on the interaction among those variables<sup>87</sup>. Hence, I think that *legal realism's core claim* is central to administrative justice theories insofar as they assert that formal or positive law such as statutes or judicial precedents may guide but cannot control administrative decision-making and that administrative decisions tend to be determined by non-legal supplements<sup>88</sup>, which entails, in turn, that every administrative decision is a policy decision<sup>89</sup>.

On this assumption, one could speculate that a legal realist approach would start off by assessing the reasons behind statutory ambiguity or vagueness. Consider the amended Clean Air Act's ambiguous statutory language as to the definition of "stationary source", the amended Telecommunication Act's silence about the FCC's authority to construe ambiguous statutory language such as "reasonable period of time" and "failure to act", or Law 919/2004's statutory silence about placing restrictions on commerce to prevent and deter human organs trafficking. However, Law 99/93 would be an interesting exception because the Colombian Congress was unambiguous in establishing the transition regime in Article 117. A legal realist theory of administrative law would suggest that Congress passes ambiguous statutes because sometimes it simply fails to address "hard questions of social choice"<sup>90</sup> or when it admits "[...] limits to its own knowledge or capacity to respond to changing circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and sometimes because it wished to pass on to another body politically difficult decisions"<sup>91</sup>.

Moreover, a legal realist theory of administrative law would suggest that legal institutions endowed with administrative power are better equipped than judges to make "neutral" policy decisions that best advance the "public interest" due to their democratic accountability, expertise, fact-finding methods, and administrative procedures<sup>92</sup>. On this assumption, a legal realist theory would likely agree that the EPA, the FCC, the Ministry of Environment, and the Colombian President were in a better democratic and expert position from that of judges to decide the four administrative hard cases by appealing to policy and principle

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<sup>86</sup> Mashaw, *supra* note 34; Kagan, REGULATORY JUSTICE *supra* note 35; Kagan, ADVERSARIAL LEGALISM, *supra* note 35; Martin Shapiro, DELIBERATIVE, INDEPENDENT TECHNOCRACY V. DEMOCRATIC POLITICS: WILL THE GLOBE ECHO THE E.U, 68 Law & Contemp. Probs. 341.

<sup>87</sup> *Id.*

<sup>88</sup> For the discussion about the core tenets of legal realism see Chapter One.

<sup>89</sup> Kagan, REGULATORY JUSTICE, *supra* note 35, at 87.

<sup>90</sup> Kenneth Culp Davis, DISCRETIONARY JUSTICE 48 (1969).

<sup>91</sup> Elena Kagan, PRESIDENTIAL ADMINISTRATION, 114 Harv. L. Rev. 2245, 2255 (2001). *See also, e.g.*, Edward L. Rubin, THE NEW LEGAL PROCESS, THE SYNTHESIS OF DISCOURSE, AND THE MICROANALYSIS OF INSTITUTIONS, 109 Harv. L. Rev. 1393, 1399 (1996). *See, e.g.*, Jerry L. Mashaw, TEXTUALISM, CONSTITUTIONALISM, AND THE INTERPRETATION OF FEDERAL STATUTES, 32 Wm. & Mary L. Rev. 827, 827 (1991); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A THEORY OF LEGISLATIVE DELEGATION, 68 Cornell L. Rev. 1, 41 – 45 (1982). In the United States, empirical studies have found that vague statutory language is more common in some substantive policy areas than others. *See, e.g.*, David Epstein & Sharyn O'Halloran, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 198 – 199 (1999).

<sup>92</sup> Frankfurter, *supra* note 71, at 72 – 73, 83 – 88; Eskridge & Frickey, *supra* note 73, at lxi; Richard B. Stewart, REGULATION IN A LIBERAL STATE: THE ROLE OF NON-COMMODITY VALUES, 92 Yale L. J. 1537, 1539 (1983).



considerations. However, drawing on the tenets of legal realism, Professor CHARLES REICH raised a sharp critique against the traditional view of administrative law. He posited that administrative procedures were meant to preserve “[...] the appearance of the rule of law, making it seem that the immensely important allocation and planning process is being carried out at all times subject to fair and equitable guiding principles. It preserves the appearance of constitutional division of power”<sup>93</sup>. Furthermore, Professor REICH describes the planning and resource allocation process as “[...] a process by which some are punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy”<sup>94</sup> that stems from what he calls “value choices.” In short, a *legal realist theory of administrative law* would suggest that the “public interest” is just a “myth” to “disguise” the allocation of “valuable benefits” in a community<sup>95</sup>.

On this account of the administrative process, a *legal realist theory of administrative law* would then study the private and political interests that may influence administrative decision-making and how the administrative decision could be determined by predominant and well-organized interest groups<sup>96</sup>. For instance, in explaining *Chevron’s* underlying circumstances, commentators would emphasize the fact that the “bubble policy” was first mentioned in proposals from the nonferrous smelting industry and the Department of Commerce (DOC)<sup>97</sup> on December 1972<sup>98</sup>. Similarly, a legal realist theory of administrative law would consider that the CTIA and its supporters played a determinant role in the administrative decision by which the FCC asserted jurisdiction over the question at stake and construed the ambiguous terms “reasonable period of time” and “failure to act” in *City of*

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<sup>93</sup> Charles Reich, THE LAW OF THE PLANNED SOCIETY, 75 Yale L. J. 1227, 1237 (1966).

<sup>94</sup> Id. at 1236 – 1237.

<sup>95</sup> Jaffe, *supra* note 29; Louis L. Jaffe, TWO DAYS TO SAVE THE WORLD, 24 Okla. L. Rev. 17, 17 (1971); Louis L. Jaffe, THE INDIVIDUAL RIGHT TO INITIATE ADMINISTRATIVE PROCESS, 25 Iowa L. Rev. 485, 498 (1940); Reich, *supra* note 93, at 1235.

<sup>96</sup> Jerry L. Mashaw, IMPROVING THE ENVIRONMENT OF AGENCY RULEMAKING: AN ESSAY ON MANAGEMENT, GAMES, AND ACCOUNTABILITY, 57 Law & Contemp. Probs. 185, 187 (1994) (“The first assumption is that the rulemaking process in all administrative agencies is shaped by the interaction of the agency's internal and external environments. More controversially, the external environment is assumed to be dominant. The signals that an agency receives from its external, legal and institutional environment will ultimately cause the internal procedural and managerial environment of the agency to adapt in order for the agency to survive or prosper”). For the discussion about the influence of political transitions on agency decision-making, *see, e.g.*, Anne Joseph O’Connell, AGENCY RULEMAKING AND POLITICAL TRANSITIONS, 105 Nw. U. L. Rev. 471 (2015).

<sup>97</sup> Levin, *supra* note 42, at 66. Levin explains that “[u]nlike some other successes, the origins of the bubble concept are not clouded with claims by competing proud parents. It began in 1972 – 1973 with suggestions from major smelters and the Nixon administration that the EPA redefine ‘sources’ subject to NSPS to include entire plants. This change would excuse plants undertaking major modifications, reconstructions, or expansions from stringent NSPS controls so long as total emissions from the plant did not increase. The proposal came from a heavily polluting and recalcitrant industry, appeared to contravene the Clean Air Act’s directive that better controls be designed into new facilities, and was fiercely opposed by EPA’s Air Programs and Enforcement offices on enforceability and equity grounds”.

<sup>98</sup> ASARCO Inc. v. Environmental Protection Agency, 578 F.2d 319, at 323, 324 (1978). Footnote 10 states: “See, e.g., letter from James M. Henderson of ASARCO to Donald F. Walters, then Chairman of the National Air Pollution Control Techniques Advisory Committee, Dec. 27, 1972, at 4 (incorporated by reference in letter from David W. Miller to Don R. Goodwin (EPA), Nov. 27, 1974, Doc. No. 35, at 3); telegram from Dept. of Commerce to Dr. Bernard Steigerwald (EPA), Mar. 3, 1973, Doc. No. 133, at 1; Meeting Report, July 5, 1973, *supra* note 1, JA 8; letter from George Wunder (Anaconda Co.) to Don R. Goodwin (EPA), Feb. 7, 1974, JA 12”.

*Arlington*<sup>99</sup>. In fact, the CTIA and its supporters provided a significant amount of data in support of the petition<sup>100</sup>. In *McBean*, a legal realist could emphasize on the unprecedented social mobilization of the people of Providencia who raised their voice against the development of Project Mount Sinai<sup>101</sup>. A realist could also assess the interests of the newly created Ministry of Environment in making a policy statement about the way in which it would administer the new environmental legislation and administrative regulations concerning environmental protection and risk management. Nonetheless, in the *human organs donation case*, a legal realist would have a hard time in ascertaining the policy or moral interests that motivated the challenge raised against the administrative rule by Mr. VELASQUEZ insofar as the plaintiffs are not obliged to disclose their policy or moral interests behind the litigation, but only to introduce legal arguments in support of their legal claims.

Yet a different some commentators would argue that administrative decision-making is not necessarily “neutral” or solely influenced by interest groups insofar as administrative decisions are rather determined by certain “public values”<sup>102</sup>. In this sense, Professor WILLIAM ESKRIDGE defines public values as “[...] legal norms and principles that form fundamental underlying precepts for our polity-background norms that contribute to and result from the moral development of our political community”<sup>103</sup>. Indeed, ESKRIDGE would suggest that administrative decision-makers decide administrative hard cases by appealing to public values<sup>104</sup>. On this conception of dynamic statutory interpretation, a legal realist theory

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<sup>99</sup> *In re Petition*, *supra* note 47, at 13998 (“Wireless providers assert that without defined timeframes for State and local governments to process personal wireless service facility siting applications, they face undue delay in some localities [Footnote 38: *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6.]”).

<sup>100</sup> *Id.* 14005 - 14006 (“For example, Sprint Nextel asserts that the typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities. Verizon Wireless asserts that “in Northern California, 27 of 30 applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved”; and that “in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months.” NextG Networks describes delays of 10 to 25 months for its proposals to place facilities in public rights-of-way, and states that such delay occurred even when NextG Networks merely sought to replace old equipment. Moreover, two wireless providers offer evidence that the personal wireless service facility siting applications process is getting longer in several jurisdictions. For example, T-Mobile contends that in Maryland, the typical zoning process went from two months to nine months in four years and in Florida, from two months to nine months in two years. Verizon Wireless notes that in the Washington, D.C. metro area, the typical processing time for new tower applications increased from six to nine months in 2003 to more than one year in 2008, and the processing of collocation applications increased from 15 to 30 days in 2003 to more than 90 days in 2008”).

<sup>101</sup> R. 024/96, *supra* note 61; 4 Jaime Eduardo Valderrama, CUADERNOS DEL CARIBE, TEXTOS Y TESTIMONIOS DEL ARCHIPIÉLAGO, CRISIS Y CONVIVENCIA EN UN TERRITORIO INSULAR 225, (2002).

<sup>102</sup> Cass R. Sunstein, INTERPRETING STATUTES IN THE REGULATORY STATE, 103 Harv. L. Rev. 405 (1989); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 149 (1994) (“Although Sunstein and I have categorized these interpretive canons differently, we both emphasize the ways in which the canons reflect underlying constitutional, statutory, and common law principles; the need for accommodation of statutory policies with one another and for general statutory consistency; and the functional requirements for efficacious government in the modern regulatory state and for counteracting patterns of statutory failure”).

<sup>103</sup> William N. Eskridge, Jr., PUBLIC VALUES IN STATUTORY INTERPRETATION, 137 U. Pa. L. Rev. 1007, 1008 (1989).

<sup>104</sup> Sunstein, *supra* note 102; Eskridge, *supra* note 102, at 149; William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, 135 U. Pa. L. Rev. 1480, 1484 (1987) (“The dynamic model, however, views the evolutive perspective as most important when the statutory text is not clear and the original legislative expectations have

of administrative law would assess whether the EPA's "bubble policy" is consistent with the broader principles and policies set forth in the Clean Air Act<sup>105</sup>, whether the FCC's decision to assert jurisdiction to define certain timeframes is coherent with the policies and values upon which the Communications Act is underpinned<sup>106</sup>, whether the precautionary principle invoked by Colombian Ministry of Environment to repeal the initial environmental clearance should be construed as an exception to the non-retroactivity principle<sup>107</sup>, or whether the gratuitousness principle cited by the Colombian President to place restrictions on commerce and on non-resident aliens fundamental rights in support of certain policies to deter and prevent human organs trafficking is consistent with broader principles and policies such as the equal treatment of law or the separation of powers<sup>108</sup>.

Here I have canvassed just a handful of randomly selected variables that a *real legalist theory of administrative law* could employ in explaining how administrative agencies decide administrative hard cases. In this context, a theory of administrative law committed to the *realist* core claim would suggest that "paper rules" may guide but cannot control administrative decision-making and that administrators appeal to extra-legal supplements of distinct nature to make their decisions. Based on CARDOZO's works<sup>109</sup>, Professor ROBERT KAGAN argues that when there is a tension between the wording of existing law and desired social consequences or policy goals, administrative agencies tend to reinterpret existing law, adopting innovative constructions, and articulating principled decisions that support the desired outcome<sup>110</sup>. Put differently, administrative legal creativity is triggered in *hard cases*, namely, in cases where there is a conflict between a legal principle (such as legal formalism, strict application of legal rules) and policy goals<sup>111</sup>.

Thus, a *realist theory of administrative law* would claim that administrative decision-makers react primarily to the underlying facts of each case and, to describe how administrative decision-making works in fact, it would focus on the vast array of variables that influence it. On this assumption, a *realist theory of administrative law* would suggest, in sum, that the answer to the theoretical or meta-interpretative disagreement raised by these administrative hard cases lies in the underlying facts of each case and that decisions rendered by the

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been overtaken by subsequent changes in society and law. In such cases, the pull of text and history will be slight, and the interpreter will find current policies and societal conditions most important. The hardest cases, obviously, are those in which a clear text or strong historical evidence or both, are inconsistent with compelling current values and policies").

<sup>105</sup> 446 Fed. Reg. 50766, *supra* note 44, at 50767.

<sup>106</sup> *In re Petition*, *supra* note 47, at 14001.

<sup>107</sup> R. 024/96, *supra* note 61.

<sup>108</sup> D. 2493/04, *supra* note 60.

<sup>109</sup> Benjamin Cardozo, THE NATURE OF JUDICIAL PROCESS 19 – 25 (1921).

<sup>110</sup> Robert Kagan, The Organisation of Administrative Justice Systems: The Role of Political Mistrust, *in* ADMINISTRATIVE JUSTICE IN CONTEXT 172, (Michael Adler ed. 2010).

<sup>111</sup> Kagan, REGULATORY JUSTICE, *supra* note 35, at 87 ("The words of the rule call into mind simplified conventional pictures; but when we are confronted with any other concrete case, in all its factual detail, the words cannot tell us whether particular elements in that case render it different from the spare picture drawn in the rule and thus render the rule inapplicable. Conversely, the rule cannot tell us whether factual details present in the particular case are irrelevant, do not make the case 'different,' and hence warrant the application of the rule. The decision as to whether a rule 'applies' must rest on considerations extraneous to the rule". *See also*, Eugene Bardach & Robert A. Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 66, 92 (1982).

administrative decision-makers are policy decisions. Therefore, paraphrasing Justice HOLMES' words, it would be the duty of the realist administrative lawyer to assess the underlying facts of every case in a piecemeal fashion in light of myriad variables that may influence administrative decision-making in order to predict what the administrative decision-maker will do in the future and how courts will decide an eventual judicial challenge raised against the administrative decision.

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### *The Hartian Challenge*

From a *legal positivist* perspective, one could defend the paper rule's guiding function to the extent that the administrative decision-makers decided these hard cases acting in accordance to the authority and procedure set forth by the legislature in the parent act. Bear in mind that, for HART, no lawmaker can foresee and regulate all the complexities of human conduct<sup>112</sup>. In this sense, he argues that the law has an "open texture" in order to overcome the complexities of general rules because is impossible for the Legislator to regulate all aspects of human behavior<sup>113</sup>. The open texture of the law denotes the areas of the regulated social conduct that are left to be developed by courts or administrative officials in light of circumstances which vary from case to case<sup>114</sup>.

On this account, HART explains that when it comes to regulating certain conduct through general standards, the legislature faces two possible pathways<sup>115</sup>. On the one hand, the legislature can enact a "general variable standard" identifying a class of specific actions and delegating rulemaking power to an administrative authority to adapt it according to a special set of facts and needs<sup>116</sup>. On the other, the legislature can enact a "variable standard" that leaves to individuals' discretion the task of balancing the facts and social aims involved in their implementation<sup>117</sup>. Although both types of "variable standards" are similar in character, HART explains that it is possible to distinguish between them relying on the moment when the determination of the standard is made and by whom<sup>118</sup>. On the one hand, one can find variable standards whose determination is made *ab initio* by an administrative authority, and on the other, variable standards whose determination is made *ex-post facto* by Courts in light given a specific set of facts<sup>119</sup>.

The legislature can decide to pass a general standard prescribing the model of conduct that ought to be followed and delegating "[...] to an administrative, rule-making body acquainted with the varying types of case, the task of fashioning rules adapted to their special needs"<sup>120</sup>. HART asserts that such a delegated lawmaking power can be only exerted after an inquiry

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<sup>112</sup> Hart, CL, at 131.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

about the facts about the regulated behavior and a hearing of arguments in favor and against the regulation are given<sup>121</sup>. Thus, the administrative authority should have to balance all the facts and the vast myriad of variables that may influence the regulated conduct<sup>122</sup>. Because there is not just one correct way to do so, HART indicates that the administrative authority will have to rely on its discretion to determinate the reasonable answer for the conflicting facts and interests that gave rise to the hard case<sup>123</sup>.

On this account, a *legal positivist* theory of administrative law would argue that the four hard cases stemmed from the “penumbra zone” of the parent statute that sets out the administrative agency’s authority and the procedure how to exert it. Recall that the core-penumbra distinction was meant to highlight the straightforward application of clear legal rules in plain cases<sup>124</sup>. Thus, for HART, this is a case of uncertainty or open texture of a particular statute, where the assessment of the validity of a subordinate authority enactment is limited to the interpretation of the meaning of the “parent act” of the legislature that defines the subordinate authority’s legislative powers<sup>125</sup>. In his own words, “[t]his is merely a case of the uncertainty or open texture of a particular statute and raises no fundamental question”<sup>126</sup>. I call this the *Hartian Challenge*.

Nonetheless, a closer look into the controversies that gave rise to these four cases suggests that the concerned parties did not disagree about the textual clarity of the “parent statute” enacted by the legislature, which means that these administrative hard cases arose in the so-called *core of certainty*. Contrary to HART’s opinion, these four administrative hard cases raised questions of important jurisprudential value that range from the interpretation of secondary rules or grounds of law to the political or moral philosophy basis of the administrative power’s decisions. These cases suggest that the parties disagreed about complex moral and political philosophy questions.

An example of this sort of disagreement can be found in the *Chevron* administrative debate where the dispute about the linguistic indeterminacy of the term “stationary source” was only apparent. First, the parties disagreed about the extent and scope of the EPA’s authority and discretion to construe the term “stationary source” as to give states the maximum flexibility to balance environmental protection and economic growth concerns<sup>127</sup>. Second, the parties

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<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> Frederick Schauer, A CRITICAL GUIDE TO VEHICLES IN THE PARK, 83 N.Y.U L. Rev. 1109 (2008).

<sup>125</sup> Hart, CL, at 148. (“The distinction between the uncertainty of a particular rule, and the uncertainty of the criterion used in identifying it as a rule of the system, is not itself, in all cases, a clear one. But it is clearest where the rules are statutory enactments with an authoritative test. The words of a statute and what it requires in a particular case may be perfectly plain; yet there may be doubts as to whether the legislature has power to legislate in this way. Sometimes the resolution of these doubts requires only the interpretation of another rule of law which conferred the legislative power, and the validity of this may not be in doubt. This will be the case, for example, where the validity of an enactment made by a subordinate authority is in question, because doubts arise as to the meaning of the parent Act of Parliament defining the subordinate authority’s legislative powers”).

<sup>126</sup> Id.

<sup>127</sup> 46 Fed. Reg. 50766, *supra* note 44, at 50769, (“Many commenters adduced legal arguments to the effect that EPA lacked discretion to define “source” for nonattainment purposes. Some commenters claimed that EPA was



disagreed about “[...] the threshold issue of balancing regulatory flexibility, less government intrusion, and reduced implementation costs”<sup>128</sup>. In short, the real point of contention was about how to improve air quality in the most cost-effective manner and what role, if any, should states play in attending those competing interests.

A similar approach can be made to *City of Arlington*, where the interested parties disagreed about the extent and scope of the FCC’s authority to construe ambiguous provisions in Section 332(c)(7) of the Telecommunications Act by means of a declaratory ruling<sup>129</sup>, though the linguistic controversy about the Act’s language is nevertheless apparent. Contrary to HART’s opinion, the present controversy raised questions of important jurisprudential value. First, as a matter of legal theory, the question concerning the FCC’s authority to interpret the ambiguous statutory provisions of the Telecommunications Act requires an administrative agency to construe its own jurisdiction, namely, to construe the rule of recognition or grounds of law that set out the position and responsibilities it holds within the legal system. Second, from a moral philosophy perspective, once the administrative agency asserted jurisdiction to

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legally compelled to adopt a plantwide definition, while others asserted that EPA must as a matter of law use a dual definition”).

<sup>128</sup> Levin, *supra* note 42, at 66. Levin explains that, “[u]nlike some other successes, the origins of the bubble concept are not clouded with claims by competing proud parents. It began in 1972 – 1973 with suggestions from major smelters and the Nixon administration that the EPA redefine ‘sources’ subject to NSPS to include entire plants. This change would excuse plants undertaking major modifications, reconstructions, or expansions from stringent NSPS controls so long as total emissions from the plant did not increase. The proposal came from a heavily polluting and recalcitrant industry, appeared to contravene the Clean Air Act’s directive that better controls be designed into new facilities, and was fiercely opposed by EPA’s Air Programs and Enforcement offices on enforceability and equity grounds”; 46 Fed. Reg. 50766, *supra* note 44, at 50766 – 50769, (“A. Modernization. Many commenters who agreed with the proposal stated that it would be conducive to modernization of existing plants and so would enhance economic efficiency. These commenters also agreed that the dual definition acted as a disincentive to replacement of outmoded dirty facilities with newer cleaner ones, and some cited specific examples where this in fact has happened. Other commenters, however, noted that EPA had cited no data to corroborate its claim that the dual definition impeded modernization, and argued, also without supporting data, that the direct cost of offsets and of the installation (pursuant to Section 173(2)) of technology resulting in LAER was so much less than the total cost of a modified plant that it did not act as a disincentive. [...] B. Regulatory Complexity. Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works. [...] C. Application of Control Technology. Many commenters agreed that adequate use of the most up-to-date control technology is assured, regardless of the applicability of nonattainment area NSR, because NSPS will continue to apply to many new or modified facilities. Other commenters argued, however, that there is no applicable NSPS for many categories of sources, and that NSPS is often not as stringent as LAER. These commenters also claimed that Congress intended that all new sources must install some form of advanced pollution control technology, particularly in nonattainment areas where the maximum possible emission reductions must be obtained. [...] D. Assuring Reasonable Further Progress and Attainment. Many commenters who supported the proposal emphasized that the states will remain subject to the requirement that they demonstrate that each nonattainment area will attain the NAAQS as expeditiously as practicable and will show reasonable further progress toward attainment. These commenters thus agreed with EPA that use of a plantwide definition need not interfere with the fundamental purpose of Part D of the Act (relating to nonattainment areas). Other commenters challenged EPA’s analysis, arguing that most RFP analyses and attainment demonstrations are so imprecise that extensive NSR coverage is essential to assuring attainment and RFP. These commenters claimed that this imprecision is exacerbated by the fact that most Part D SIPs are based on deficient emission inventories”).

<sup>129</sup> *In re Petition*, *supra* note 47, at 13996 – 13997.

construe the ambiguous statutory language, it then proceeded to make new law relying on extra-legal supplements.

As to the Colombian cases, in the *human organ donation case*, it is noteworthy that the parties did not dispute the textual clarity of the parent's act language. In fact, although this principle's written formulation in Law 73 of 1988<sup>130</sup> is rather vague or open-textured, the parties did not question the vagueness of the statutory language. Rather than doing so, they disagreed about the permissible restrictions that an executive rule can place on commerce and on nonresident aliens' fundamental right to receive medical treatment to prevent human organs trafficking<sup>131</sup>. The *Hartian* challenge is nonetheless apparent because none of the parties question the textual clarity of the "parent" act that established the President's rulemaking authority. Although the parties agreed on the textual clarity of the "parent" act, they disagreed about its legal consequences.

On the one hand, the question whether or not the administrative rule is contrary to Articles 100 and 333 of the Colombian Constitution of 1991 reflects a disagreement about the legal consequences of these provisions. While for the plaintiff these constitutional provisions emphatically preclude the President from encroaching on Congress' power to regulate commerce and place restrictions on nonresident aliens' fundamental rights<sup>132</sup>, the government argues that these constitutional provisions do not limit the President's rulemaking authority to issue the necessary rules and restrictions aimed at preventing human organs trafficking<sup>133</sup>. On the other, the question whether or not the President created "*new law*" based on the "gratuitousness principle" may also appear as a *Hartian Challenge* to the executive rule's validity. In this case, the parties do not contest the parent statute's open-texture. Rather than doing so, the parties disagree about how the "gratuitousness principle" legal consequences ought to be interpreted in the case at hand. Each one of the conflicting interpretations advanced by the concerned parties conveys an underlying moral and political philosophy about the limitations that may be imposed on an economic activity to prevent human organs trafficking. Thus the parties disagree about the legal consequences that the application of these constitutional provisions may elicit in light of two different moral and political philosophies.

Likewise, *McBean* may appear as a *Hartian challenge* against the legality of the Ministry's decision in the sense that the parties question whether or not the adjudication was made in accordance with the requirements set out in the parent statute. In fact, based on two technical reports and the findings of an on-site inspection to the Project's premises, the Ministry concluded that a significant variation occurred as to the factual basis of the initial environmental clearance. As was noted earlier, a challenge of this type requires first a judgment about which is the parent act of the legislator that sets forth the extent and scope of administrative agency's adjudicatory authority. A *positivist theory* of administrative law would argue that in the case at hand the answer to that first question lies in the transition

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<sup>130</sup> L. 73/88, diciembre 20, 1988, Diario Oficial 38623, diciembre 21, 1988 [D.O.] art. 7 (Colom.).

<sup>131</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 51.

<sup>132</sup> Id. At 20.

<sup>133</sup> Id. at 22.

regime contained in Article 117 of Law 99 of 1993<sup>134</sup> that was further developed by the President in Article 38 of Decree 1753 of 1994<sup>135</sup>. That theory would then find out that both normative provisions clearly state that, according to the "transition regime," the new environmental legislation introduced by Congress in 1993 is only effective at the time of its enactment, which occurred on December 22<sup>nd</sup>, 1993<sup>136</sup>. That theory would conclude, furthermore, that the application of that transition regime does not depend on whether or not the permit was "lawfully" granted because Congress did not include such a condition.

If the parent statute and administrative regulations are clear as to the non-retroactivity of the new environmental legislation and administrative regulations, why did the parties disagree about the applicable legal framework to the case at hand? The answer is because the parties did not disagree about the textual clarity or open-texture of Article 117 of Law 99 of 1993, but rather about its legal consequences. Indeed, they disagreed about the permissible limitations that may be imposed on acquired rights and the non-retroactivity principle to secure environmental protection in light of the precautionary principle. Put it simply, the parties disagree about the undesired legal consequences that the straightforward application of the transition regime could elicit under different moral and political philosophies, which in this case springs from a clash between the non-retroactivity principle and the precautionary principle.

Therefore, on the *legal positivist* account, a theory of administrative law would claim that the application or implementation of open-textured rules would require that the administrative agency balance the competing facts, social aims, and interests in light of its own discretionary judgment by appealing to extra-legal supplements. Nevertheless, on this account, these four administrative hard cases are ungoverned by law because legal obligations stem only from valid rules<sup>137</sup>. Recall that there cannot be a legal obligation in the absence of a valid legal

<sup>134</sup> L. 99/93, *supra* note 52, at art. 117.

<sup>135</sup> D. 1753/94, agosto 3, 1994, Diario Oficial 41.427 [D.O.] art. 38 (Colom.) ("Article 38. *Transition Regime*. The projects, works or activities whose environmental permits, licenses, concessions or authorizations were granted pursuant to the norms effective before the enactment of this Decree, shall continue. However, the environmental authority may require from them, in a motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of this Decree, initiated all the required proceedings seeking the obtainment of the permits, licenses, concessions, and environmental authorizations required by the laws effective at the time, will continue their course according to them and, in the case they are granted, the project, works or activities may be developed. Nevertheless, the environmental authority may require them, in a motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of Law #99 of 1993, initiated their activities will not require an environmental permit. The projects that initiated activities previously to the enactment of this Decree and fall within the jurisdiction of the Autonomous Regional Corporations will not require an environmental permit either. However, this does not prevent such projects, works or activities from complying with the environmental laws in force, except for the environmental permit requirement").

<sup>136</sup> L. 99/93, *supra* note 52, at art. 117.

<sup>137</sup> Brian H. Bix, *Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY*, 29 (Martin P. Golding & William A. Edmundson eds. 2005); Andrei Marmor, *Exclusive Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY*, 104 (Martin P. Golding & William A. Edmundson eds. 2005); Kenneth E. Himma, *Inclusive Legal Positivism in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY*, 125 (Martin P. Golding & William A. Edmundson eds. 2005); Ronald Dworkin, "The Model of Rules I", in *TAKING RIGHTS SERIOUSLY* 17 (1978); Scott J. Shapiro, *LEGALITY*, 83 - 105 (2011).

rule, which means that when a decision maker decides a *hard case* by exercising her discretion, she is not enforcing a legal rule<sup>138</sup>.

On these grounds, these four cases suggest that legal institutions endowed with administrative power, exerting their discretion and acting as lawmakers, decided these four administrative hard cases by appealing to extra-legal supplements such as public policy or morality. Consider that, even in the absence of a clear statutory language, in *Chevron* the EPA argued that the “bubble concept” “[...] would further the statutory purpose of affording states flexibility in designing revised SIPs by leaving the states with considerable authority to define source as they believe best-advised: they might adopt the bubble concept or, if necessary for timely attainment, a more stringent standard”<sup>139</sup>. Also, consider *City of Arlington* where, in the absence of a clear congressional mandate, the FCC construed its own jurisdiction and asserted authority to interpret Section 332(c)(7) of the Communications Act based on a purposive interpretation of the Act’s goals<sup>140</sup>. Based on that implicit grant of authority, the FCC concluded that, a “[...] ‘reasonable period of time’ under 332(c)(7)(B)(ii), is presumptively (but rebuttably) 90 days to process a collocation application and 150 days to process all other applications”<sup>141</sup>. Similarly, in the Colombian *organ donation case* the President advanced a broad interpretation of the “gratuitousness principle” to defend the restrictions placed on certain activities related to human organs transplantation procedures for therapeutic or scientific purposes to prevent organ trafficking<sup>142</sup>. Finally, in *McBean*, the Colombian Minister of the Environment, acting against a clear statutory provision, repealed *ex officio* an environmental permit based on the precautionary principle to secure the McBean mangrove and its adjacent biosphere, even at the cost of previously acquired individual rights<sup>143</sup>.

Hence, one could argue that a theory of administrative law committed to the core tenets of *legal positivism* would suggest that all of these administrative hard cases share the salient feature that positive or written law was insufficient to solve the questions at issue, which entails that these cases are ungoverned by law and that administrative decision-makers exercised unbound discretion by resorting to extra-legal supplements to decide them such as policy or personal morality.

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<sup>138</sup> For the discussion about the core tenets of legal positivism and its different branches *see* Chapter One.

<sup>139</sup> *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, at 727 (1982).

<sup>140</sup> *In re Petition*, *supra* note 47, at 14001; *See also* *Brand X Internet Servs.*, *supra* note 59, at 980.

<sup>141</sup> *In re Petition*, *supra* note 47, at 14012, (“Based on our review of the record as a whole, we find 90 days to be generally a reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications”).

<sup>142</sup> D. 2493/04, *supra* note 60.

<sup>143</sup> R. 024/96, *supra* note 61.

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### *Hercules: The Administrator?*

In Chapter One I described how, based on the role of principles in deciding hard cases, RONALD DWORKIN launched a sophisticated defense of law's determinacy<sup>144</sup>. He claims that, in deciding hard cases where the applicable formal or positive rules have arguably run out, judges should not look beyond the law to act as legislators who must compensate for the shortcomings of positive rules by appealing to their personal morality<sup>145</sup>. Rather, judges should treat the present "system of public standards" as conveying and "respecting a coherent set of principles" about justice, fairness, and procedural due process, "and to that end", to construe these standards in their best moral light order to "find implicit standards between and beneath the explicit ones"<sup>146</sup>. To portray his ideas DWORKIN appeals to Hercules, an imaginary judge of "[...] superhuman intellectual power and patience who accepts law as integrity"<sup>147</sup>. On this view, DWORKIN accused *legal positivism* of being a "model of rules" under the argument that it cannot successfully account for the normative nature of principles<sup>148</sup>.

In explaining how judges decide hard cases where there is no clear rule to apply, DWORKIN argues that "[...] principles, policies, and other sorts of standards" of a normative nature different from rules that play a crucial role within the legal system<sup>149</sup>. On the one hand, DWORKIN calls a *policy* "[...] that kind of standards that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)". On the other hand, he calls *principle* a "[...] standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality"<sup>150</sup>. As an example, he explains that the "[...] standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle"<sup>151</sup>.

On this account, he then differentiates legal principles from legal rules on the basis of a logical distinction<sup>152</sup>. Although both groups of standards suggest particular decisions about a legal obligation under specific circumstances, they differ in the sense that rules are applicable in an "all-or-nothing fashion"<sup>153</sup>, whereas principles state the reasons that argue in one direction of a decision but without dictating a particular one<sup>154</sup>. It follows from this distinction that principles do not look like rules insofar as they do not set out specific duties, special

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<sup>144</sup> Dworkin, LE, at 217.

<sup>145</sup> Id. at 218.

<sup>146</sup> Id. at 217.

<sup>147</sup> Id. at 239.

<sup>148</sup> Dworkin, *supra* note 7.

<sup>149</sup> Id.

<sup>150</sup> Id. at 23.

<sup>151</sup> Id.

<sup>152</sup> Id. at 25.

<sup>153</sup> Id.

<sup>154</sup> Id. at 26.



obligations or rights<sup>155</sup>. This difference entails, furthermore, that “[...] principles have a dimension that rules do not – the dimension of weight or importance”<sup>156</sup>. Indeed when principles overlap, DWORKIN explains, one “[...] who must resolve the conflict has to take into account the relative weight of each”<sup>157</sup>.

By contrast, rules do not have this dimension because “[...] we can speak of rules as being *functionally* important or unimportant,” namely, that one rule can have a greater role than another one in regulating behavior<sup>158</sup>. Despite these differences, sometimes rules include words like “reasonable,” “negligent,” “unjust,” and “significant” that perform the function of a principle<sup>159</sup>. Indeed, the application of such rules “[...] depend to some extent on the principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle”<sup>160</sup>. Yet they do not turn the rule into a principle because the terms of the rule exclude the application of other principles and policies<sup>161</sup>. The consequence that they do have on the application of the rule is that a larger amount of judgment is required to construe the principle in light of the facts of the case at hand<sup>162</sup>.

DWORKIN acknowledges, nonetheless, that the line between arguments of policy and principle may collapse under certain circumstances, namely, “[...] by construing a principle as stating a social goal (*i.e.*, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (*i.e.*, the principle that the goal the policy embraces is a worthy one) or by embracing the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number)”<sup>163</sup>. Despite this caveat, the distinction is central to the claim that *law as integrity* requires the government to act in pursuance to the set of principles and policies that present past political acts in their best moral light. In DWORKIN’s own words, *integrity* “[...] requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some”<sup>164</sup>.

*Law as integrity* has a twofold spectrum. On the one hand, *integrity in legislation* restricts what the legislature and other lawmakers may do in expanding or changing the public standards<sup>165</sup>. DWORKIN explains that, although integrity is about principle and does not command any form of strict consistency in policy, it demands that lawmakers attempt to protect for everyone what it takes to be their moral and political rights, in such a way that public standards express a coherent scheme of justice and fairness in light of what he calls

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<sup>155</sup> Id.

<sup>156</sup> Id. at 27.

<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Id. at 28.

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id. at 23.

<sup>164</sup> Dworkin, LE, at 165.

<sup>165</sup> Id. at 221 - 222.

the *abstract egalitarian principle*<sup>166</sup>. It requires, furthermore, that “[...] government pursue some coherent conception of what treating people as equals means, but this is mainly a question of general strategies and rough statistical tests. It does not otherwise require narrow consistency within policies: it does not require that particular programs treat everyone the same way”<sup>167</sup>. In sum, on DWORKIN’s account, a legislature does not need to justify the rules it enacts based on reasons of principle, unlike judges<sup>168</sup>.

On the other hand, *integrity in adjudication* requires judges to treat the present system of public standards as conveying and “respecting a coherent set of principles” about justice, fairness, and procedural due process, “and to that end”, to construe these standards in their best moral light in order to find implicit standards between and beneath the explicit ones<sup>169</sup>. In DWORKIN’s view, that style of adjudication is respectful of the integrity ambition upon which a community of principle is based<sup>170</sup>. Law as integrity assumes, furthermore, that judges are in a very different position from legislators insofar as they must make their decisions on grounds of principle, not policy. On this account, he argues that judges “[...] must deploy arguments why the parties actually had the ‘novel’ legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past”<sup>171</sup>. But a judge should not stop there, law as integrity requires her to test her interpretation of any part of the political structures and decisions of her community by querying whether it could form part of a coherent theory justifying the network as whole<sup>172</sup>. Therefore, on this account, the *grounds of law* are not determined by convention but rather by a constructive interpretation of a community’s political structure and legal doctrine in its best moral light<sup>173</sup>.

The extrapolation of DWORKIN’s ideas to a theory of administrative law must be consistent with the distinction he introduced between arguments of principle and policy to explain how government ought to act with integrity. Thus I venture to speculate that, DWORKIN’s account, a theory of administrative law would distinguish two forms by which administrative decision-makers may construe the grounds of law in deciding theoretical disagreements about the law. Administrative decision-makers, acting as delegated rule-makers, would construe the grounds of law according to the set of principles and policies that present past political acts in their best moral light but without the constraints of a strict consistency. Conversely, administrative decision-makers, acting as adjudicators, would not exercise any legal

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<sup>166</sup> Id. at 221 – 222. (“If the legislature provides subsidies for farmers who grow wheat, for example, in order to ensure an adequate crop, or pays corn farmers not to plant because there is too much corn, it does not recognize any right of the farmers to these payments”).

<sup>167</sup> Id. at 223.

<sup>168</sup> Id. at 243. (“A legislature does not need reasons of principle to justify the rules it enacts about driving, including rules about compensation for accidents, even though these rules will create rights and duties for the future that will then be enforced by coercive threat. A legislature may justify its decision to create new rights for the future by showing how these will contribute, as a matter of sound policy, to the overall good of the community as a whole. [...] The general good may not be used to justify the death penalty for careless driving. But the legislature need not show that citizens already have a moral right to compensation for injury under particular circumstances in order to justify a statute awarding damages in those circumstances”).

<sup>169</sup> Id. at 217.

<sup>170</sup> Id. at 243.

<sup>171</sup> Id. at 244.

<sup>172</sup> Id. at 245.

<sup>173</sup> Id. at 255; Shapiro, *Legality*, at 299.

discretion or look beyond the law to decide a hard case insofar as they would rely on principles to enforce new rights or duties by construing the grounds of law pursuant to the community's political structure and legal doctrine in its best moral light. Nevertheless, this would be a rough extrapolation that would not account for the works of modern administrative governance, namely, the articulation of public policy via adjudication or the acknowledgment of rights and duties via rulemaking. A hard look into the administrative decisions rendered in the four administrative hard cases and the arguments advanced in their support show that, unlike the judiciary, the administrative power decides theoretical disagreements by construing the grounds of law based on both arguments of policy and principle regardless of the form of administrative action.

Let us consider the arguments advanced by the EPA to construe the grounds of law in support of the "bubble policy" in the *Chevron* case. On the one hand, EPA argued that the bubble policy was consistent with President RONALD REAGAN'S policy on the reexamination of regulatory burdens and procedures<sup>174</sup>. As was noted in Chapter Two, EPA construed the term "stationary source" as to allow States to treat all of the pollution emitting devices within the same industrial facility as if they fell within the same "bubble," for which one overall permit would be sufficient<sup>175</sup>. EPA explained, moreover, that its action was faithful to Congress' mandate that states "[...] play the primary role in pollution control insofar as the bubble concept allows states much greater flexibility in developing their nonattainment programs"<sup>176</sup>. In short, a Dworkinian theory of administrative law would argue that the bubble policy is based upon a deregulatory policy and federalism.

A similar approach can be made to the reasons presented by the FCC in support of its decision in *City of Arlington* to construe the grounds of law in order to assert jurisdiction over the question at stake. For instance, concerning the jurisdictional question, the FCC agreed with the CTIA's purposive interpretation that it was endowed with authority to interpret Section 332(c)(7) of the Communications Act because Congress delegated to the FCC the responsibility for administering the Communications Act<sup>177</sup> based on administrative and

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<sup>174</sup> 46 Fed. Reg. 16280, 16281 (March 12, 1981) ("The decision to reconsider the scope of nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. EPA has also reevaluated all of the arguments on all sides of these definitional issues. The Agency has concluded that the amendments to the August 7 rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals of the Clean Air Act").

<sup>175</sup> 46 Fed. Reg. 50766, *supra* note 44, at 50767.

<sup>176</sup> Merrill, *supra* note 42, at 410; 46 Fed. Reg. 50766, *supra* note 44, at 50767 ("Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D").

<sup>177</sup> Section 1 of the Act mandates the FCC to "execute and enforce the provisions of this Act" in order to, *inter alia*, regulate and promote communication "by wire and radio" on a nationwide basis. Moreover, Section 201(b) of the Act authorizes the FCC "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act". Furthermore, Section 303(r) of the Communications Act dictates that "the Commission from time to time, as public convenience, interest or necessity requires shall [...] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act [...]". Section 4(i) mandates that the Commission "may perform

judicial precedent<sup>178</sup>. On the *Dworkinian* account, one could argue that the FCC's interpretation of the grounds of law contributes to the preservation of law's integrity in the sense its decision was consistent with the FCC's own administrative precedent. Consider that FCC argued that its conclusion was consistent with its previous decision in the *Local Franchising Order*<sup>179</sup>, which was upheld by the United States Court of Appeals for the Sixth Circuit in *Alliance for Community Media v. FCC*<sup>180</sup> relying on the Supreme Court's precedent in *AT&T Corp. v. Iowa Utilities Board*<sup>181</sup>. Concerning the policy question, the FCC claimed that the evidence in the record proved that personal wireless service providers have often faced excessive and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays was making the Act's goals nugatory<sup>182</sup>.

Likewise, on a *Dworkinian* account, one could suggest that the Colombian President advanced a set of principle and policy reasons in support of the executive order's legality in the *human organ donation case*. Consider that the President claimed that the executive rule was lawful under the policy argument that it was issued aimed at the regulation and improvement of the technical standards for the procedures involving the extraction, storage, distribution, and transplantation of human organs for therapeutic or research purposes in Colombia. In this sense, the government asserted that it was its duty to organize, manage, regulate, oversee, and provide healthcare and environmental sanitation services pursuant to the principles of efficiency, universality, and solidarity contained in Article 365 of the Constitution of 1991<sup>183</sup>. Government claimed, moreover, that the executive measure to preclude healthcare organizations for-profit from providing certain activities related to the extraction, storage, and distribution of human tissues and bone marrow as a way to prevent organ trafficking was consistent with the "gratuitousness principle" set forth in Article 7 of Law 73 of 1988 and Article 1 of Law 919 of 2004. Likewise, the government defended the legality of the restrictions placed on the donation of anatomical components to non-resident aliens under Article 100 of the Constitution. However, a closer look at the Government's arguments suggests that the President articulated a policy based upon a long-standing principle of law according to which human organs are considered as *res extra commercium*,

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any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions”.

<sup>178</sup> *Brand X Internet Servs.*, *supra* note 59, at 980.

<sup>179</sup> *In re Petition*, *supra* note 47, at 14002 (“This finding is consistent with our decision in the *Local Franchising Order*, in which we held that the Commission has clear authority to interpret what it means for a local government to “unreasonably refuse to award” a franchise to a cable operator in Section 621(a)(1) of the Act”).

<sup>180</sup> 529 F.3d 763 (2008).

<sup>181</sup> *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 – 378, (1999).

<sup>182</sup> *In re Petition*, *supra* note 47, at 14005 - 14007. The FCC found that the “[...] record evidence demonstrates that unreasonable delays in the personal wireless facility siting process have obstructed of wireless services” and that such delays “[...] impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996”. It found, furthermore, “[d]elays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion. Wireless providers currently are in the process of deploying broadband networks which will enable them to compete with the services offered by wireline companies”.

<sup>183</sup> It is to be noted that this constitutional provision mandates that public authorities or private organizations shall provide in and environmental sanitation services under the statutory framework enacted by Congress for that purpose.

which means they cannot be validly trade<sup>184</sup>. In my view, this is a good practical example of how DWORKIN's principle-policy construction collapses and falls short to account for real world administrative reasoning.

In the *McBean* administrative debate, the Ministry of Environment defended its construction of the grounds of law on factual and legal grounds, for which it mainly appealed to the precautionary principle. Bear in mind that the Ministry's decision to halt the construction of Project Mount Sinai and repeal the environmental permit was based on two arguments<sup>185</sup>. On the *Dworkinian* account, one could suggest that the Ministry construed the statutory scheme to make three arguments in support of its decision to apply new legislation and administrative regulations to the case at hand. First, the Ministry argued on policy grounds that Congress declared Old Providence's McBean Lagoon as a National Park in Law 136 of 1994, which was further developed by the Ministry in Resolution 1021 of 1995 with the aforementioned legal consequences. Second, drawing on policy considerations about which would be the interpretation that best advances the Act's goals, the Ministry asserted that the transition regime set forth by Congress in Article 117 of Law 99 of 1993 and further developed by the President in Article 28 of Decree 1753 of 1994 applies only to the cases where the permits have been *lawfully* granted by the incumbent administrative authorities<sup>186</sup>. Third, the Ministry claims that, rather than "repealing" Resolution 029, it is applying the "precautionary principle" insofar as there is uncertainty as to the consequences that Project Mount Sinai may place on the McBean mangrove and the biosphere reserve<sup>187</sup>.

On these grounds, the Ministry of the Environment concluded that the case at hand falls under the new legislation and administrative regulations because the transition regime cannot be applied under the argument that Resolution 029 of 1992 was "unlawfully" granted in the sense that INDERENA's environmental clearance did not meet all the requirements set out in Decree 2811 of 1974. Nevertheless, it must be highlighted that Law 99 and Decree 1753 did not set out this requirement as a condition to the application of the "transition regime." One must bear in mind that Article 117 of the Act only mandates that, ongoing projects at the time when the Act becomes effective, must submit an environmental impact statements with the strategies on how to manage and mitigate the project's environmental impact. Put it differently, the Ministry construed the grounds of law to justify its decision to protect the environment at the expense of previously acquired individual rights.

It follows from these administrative decisions and the arguments advanced to support them that, unlike the judiciary, the administrative power decides theoretical disagreements by construing the grounds of law based on both arguments of policy and principle regardless of the form of administrative action. Furthermore, administrative decision-makers tend to give reasons and justify their decisions based on the evidence gathered on the record. However, there is no evidence in the four administrative cases that the administrative decision-makers engaged, like HERCULES, in several rounds of interpretations until they construe the grounds

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<sup>184</sup> 2 Charles P. Sherman, ROMAN LAW IN THE MODERN WORLD 139 – 141 (1917); J.A.C. Thomas, TEXTBOOK OF ROMAN LAW 281 (1976) ("The sale of a thing that was not *in commercio* [...] was void [...]").

<sup>185</sup> R. 024/96, *supra* note 61.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*



of law in their best moral light. Rather than advancing a sophisticated philosophical construction of the grounds of law like HERCULES, the four case studies suggest that administrative decision-makers tend to engage in decision-making procedures where all the interested parties –including the administrative decision-maker itself– partake by advancing different interpretations that convey underlying political and moral philosophies about how the grounds of law ought to be construed to decide the question at hand.

It must be noted, however, that *realist* and *legal process* scholars criticize DWORKIN's account of statutory interpretation by highlighting that he never asked the question “[...] why should courts be entrusted with the duty to carry out that task?”<sup>188</sup>. In this sense, they claim “[e]veryone should agree that the executive, no less than that judiciary, has a duty of ‘fit’; many of the hard cases arise when the key question is which interpretation puts the law in its ‘best constructive light’”<sup>189</sup>.

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### *A Planning Theory of Administrative Law*

Let me go back to the four administrative hard cases to portray how the planning theory of administrative law's meta-interpretation would hypothetically play out in practice. Consider that, on a positivist conception of the nature of law, SHAPIRO suggests treating theoretical disagreements about whether a “[...] fact should be label as the grounds of the law” as “clashes between different interpretive methodologies” such as textualism, purposivism, living constitutionalism, originalism, pragmatism, law as integrity, and so on<sup>190</sup>, which are methods for “reading legal texts”<sup>191</sup>. In short, he indicates that *theoretical disagreements* are “meta-interpretive disagreements” about the “proper interpretive methodology” of a particular legal system<sup>192</sup>. Before carrying out the hypothetical projection, I deem necessary to briefly define textualism and purposivism as methods for reading legal texts<sup>193</sup>. On the one hand, Professor ABBE GLUCK explains that textualism focuses on “[...] the primacy of enacted text as the key tool in statutory interpretation [that] emphasizes textual analysis,

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<sup>188</sup> Thomas J. Miles & Cass Sunstein, DO JUDGES MAKE REGULATORY POLICY? AN EMPIRICAL INVESTIGATION OF CHEVRON, 73 Chi. L. Rev. 823, 867 (2006).

<sup>189</sup> Id.

<sup>190</sup> Shapiro, *Legality*, at 306.

<sup>191</sup> Id. at 304.

<sup>192</sup> Id. at 306.

<sup>193</sup> For the general discussion on this point, see, e.g., Eskridge, *supra* note 102, at 25 – 47, 125; William N. Eskridge, Jr., THE NEW TEXTUALISM AND NORMATIVE CANONS, 113 Colum L. Rev. 531 (2013); Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Jonathan T. Molot, THE RISE AND FALL OF TEXTUALISM, 106 Colum. L. Rev. 1 (2006); John F. Manning, WHAT DIVIDES TEXTUALISTS FROM PURPOSIVISTS?, 106 Colum. L. Rev. 70 (2006); Peter L. Strauss, THE COURTS AND CONGRESS: SHOULD JUDGES DISDAIN POLITICAL HISTORY?, 98 Colum. L. Rev. 242 (1998); Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); Lisa Schultz Bressman & Abbe R. Gluck, STATUTORY INTERPRETATION FROM THE INSIDE –AN EMPIRICAL STUDY OF CONGRESSIONAL DRAFTING, DELEGATION, AND THE CANONS: PART I, 65 Stan. L. Rev. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, STATUTORY INTERPRETATION FROM THE INSIDE –AN EMPIRICAL STUDY OF CONGRESSIONAL DRAFTING, DELEGATION, AND THE CANONS: PART II, 66 Stan. L. Rev. 725 (2014).

interpretive predictability, and cabined judicial discretion”<sup>194</sup>. On the other, HART and SACKS explain that purposive interpretation proceeds in two stages<sup>195</sup>. In their view, a court should first “[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved” and then proceed to construe “[...] the words of the statute [...] so as to carry out the purpose as best it can”<sup>196</sup>.

On this assumption, have in mind that *Chevron*, like all the other administrative hard cases that I described in Chapter Two, was decided in a different way at the administrative and judicial levels. At the administrative level, relying on *Alabama Power*<sup>197</sup>, the EPA asserted broad discretion to define the term “source” to “[...] meet the purposes of the various NSR programs mandated by the [Clean Air] Act”<sup>198</sup>. EPA then turned to the policy question to justify the application of the PSD’s plantwide definition of source or “bubble” to nonattainment areas, namely, the application of a definition of “source” devised for maintaining air quality levels to a program conceived to improve air quality<sup>199</sup>. Although EPA relied heavily on *Alabama Power* to claim discretion to construe the term “source” in light of the “purpose” of the Act, it expressly rejected the Court of Appeals’ reasoning that a narrow definition of source should be used where the “purpose” of a program is to “enhance” air quality, as opposed to a broad definition of “source” that is appropriate where the “purpose” of a program is to “maintain” air quality<sup>200</sup>. In short, in this case the parties agree on purposivism as the correct interpretive methodology to construe the amended Clean Air Act but disagree about how the Act’s purpose ought to be construed for the different sections of the Act.

The question here is why did the parties disagree about the “purpose” of the amended Clean Air Act and why that purpose had different readings for different sections of the same Act? On the one hand, environmental interest groups advocated for a purposive interpretation aimed at improving air quality levels. On the other, business interest groups argued in favor

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<sup>194</sup> Abbe R. Gluck, THE STATES AS LABORATORIES OF STATUTORY INTERPRETATION: METHODOLOGICAL CONSENSUS AND THE NEW MODIFIED TEXTUALISM, 119 Yale L. J. 1750, 1762 (2010) (“Textualists advance their theory through three main types of arguments –institutional, constitutional, and structural”). See, e.g., Abbe R. Gluck, IMPERFECT STATUTES, IMPERFECT COURTS: UNDERSTANDING CONGRESS’S PLAN IN THE ERA OF UNORTHODOX LAWMAKING, 129 Harv. L. 62 (2016).

<sup>195</sup> Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS 1374 (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>196</sup> Gluck, *supra* note 194, at 1762. Professor GLUCK describes a modified version of textualism: “Modified textualism has two salient differences from the original: it ranks interpretive tools in a clear order-textual analysis, then legislative history, then default judicial presumptions -and it includes legislative history in the hierarchy. The individual components here are not new. Many jurists (though it has been assumed, not many self-proclaimed textualists) employ such a text- plus-legislative history approach. But what is new is the “tiering” concept and the order itself. The strict hierarchy emphasizes textual analysis (step one); limits the use of legislative history (only in step two, and only if textual analysis alone does not suffice); and dramatically reduces reliance on the oft- used policy presumptions, the “substantive canons” of interpretation (only in step three, and only if all else fails)”.

<sup>197</sup> *Alabama Power v. Costle*, 636 F.2d 323, 343 (1979).

<sup>198</sup> 46 Fed. Reg. 50766, *supra* note 44.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* The EPA argued: “While it is true that the court in *Alabama Power* used the different definitional structures of NSPS and PSD to distinguish ASARCO, the critical element of the court’s opinion rests on the fact that EPA may define the term “source” so as to best meet the purposes of a particular program”.

of a purposive interpretation aimed at maintaining air quality levels. Each one of the conflicting views on the purpose of the Act mirrors an underlying political and moral philosophy about how to improve air quality in the most cost-effective manner and the role of the states in the regulation of those burdens. It is noteworthy that, unlike famous hard cases such as *Riggs v. Palmer*<sup>201</sup> and *TVA v. Hill*<sup>202</sup> where parties disagreed about the proper interpretive methodology, in *Chevron* the parties agreed on the interpretive methodology but disagree about how to grasp the Act's purpose.

Consider that, in the *Palmer case*, the disagreement between Judge EARL's purposivism and Judge GRAY's textualism, and in the *TVA v. Hill*, the disagreement between Chief Justice BURGER's watered-down textualism and Justice POWELL's purposivism based on the general principles of justice<sup>203</sup>. In the *Chevron* administrative debate, the parties agreed upon purposive interpretation as the proper interpretive methodology to construe the term "stationary source" in the absence of textual statutory definition. Nevertheless, despite the agreement on the interpretive methodology, the parties disagreed about how the Act's purpose should be grasped to define "source," which reflects a disagreement about the purposes behind the Act's enactment. This is crucial insofar as the grasp on the Act's purpose defined what the law is in this case and so it is reflected in the EPA's "bubble policy" final decision<sup>204</sup>. The EPA ruled in favor of the pro-business purposive interpretation and the United States Supreme Court of Justice in a landmark decision deferred to the EPA's administrative meta-interpretation<sup>205</sup>.

By contrast to *Chevron* where the parties agreed on the same interpretive methodology but disagree how to read the goals of the Act, in *City of Arlington* the parties advanced contrasting interpretive methodologies to construe the amended Communications Act. While the CTIA and its supporters advanced a purposive interpretation of the Act's goal to sustain the petition, state and local government commenters opposed by advocating for a textual interpretation of the statute. Nevertheless, the arguments introduced by the parties to defend their views of what constitutes the secondary rule or grounds of the law that set out the FCC's rulemaking jurisdiction go beyond simple textual or purposive statutory interpretations. In other words, these arguments go far beyond the Act's penumbra zone

First, concerning the FCC's authority to construe the ambiguous statutory provisions of the Communications Act, the CTIA advanced a purposive interpretation of the Act's "public interests" goals. Therefore, CTIA asserted that those zoning authorities that do not act in a timely fashion are "frustrating" the goals of the amended Communications Act<sup>206</sup>. To support

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<sup>201</sup> *Riggs v. Palmer*, *supra* note 2.

<sup>202</sup> *Tennessee Valley Authority vs. Hill*, 437 U.S. 153, 185 (1978).

<sup>203</sup> Dworkin, LE, at 23, ("Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually intended the opposite. Powell said that the courts should accept an absurd result only if they find compelling evidence that it was intended. Burger's theory is Gray's, though in a less rigid form that gives some role to legislative intention. Powell's theory is like Earl's, though in this case it substitutes common sense for the principles of justice found elsewhere in the law").

<sup>204</sup> 46 Fed. Reg. 50766, *supra* note 44.

<sup>205</sup> *Chevron v. NRDC*, *supra* note 42.

<sup>206</sup> *In re Petition*, *supra* note 47, at 14000. The CTIA contended, under this interpretation, that the capacity to organize wireless systems depends upon the availability of sites for the construction of towers and transmitters.

this claim, CTIA argued that the Sixth Circuit's decision in *Alliance for Community Media v. FCC* rejected the argument that the FCC's implementation of a timeframe in the local franchising regime “[...] improperly intruded on decisions left by Congress to the courts”<sup>207</sup>. By contrast, relying on a textual interpretation of the Act, state and local government commenters disagreed with the CTIA’s claim that the FCC possesses authority to construe ambiguous provisions of the Communications Act arguing that the statutory text and the legislative history demonstrate congressional intent to deny the Commission such authority. Nonetheless, the arguments advanced under such a textual interpretation were not precisely textual in nature, but rather based upon broader political considerations such as federalism and separation of powers. Particularly, they made a federalism argument to contend that “[...] in expressly preserving state and local government authority over personal wireless service facility siting decisions, subject only to the specific limitations stated in Section 332(c)(7), Congress withheld preemptive authority from the FCC”<sup>208</sup>. They argued that the legislative history of Section 332(c)(7) further demonstrated this intent, as Congress indicated that “[...] any pending rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CM[R]S facilities should be terminated”<sup>209</sup>.

Regarding the policy dispute about what constitutes a “reasonable period of time” beyond which inaction on a personal wireless service facility siting application will be deemed a “failure to act” under the Communications Act, the CTIA advanced a purposive interpretation of the Act’s goals to request that the FCC to shed some light of the ambiguous language of Section 332(c)(7)(B)(v) based on data it gathered from its members<sup>210</sup>. Conversely, based on an apparent textual interpretation of the Act, state and local government commenters opposed and claimed that there was no ambiguity in the statutory terms “reasonable period of time” and “failure to act” under the argument that Congress “deliberately” employed these “general terms” to preserve state and local government administrative “flexibility”<sup>211</sup>. However, the arguments advanced under such a textual interpretation were not precisely textual in nature, but rather based upon federalism and separation of powers considerations.

First, they claimed Congress used such *general terms* because “[...] it wanted state and local

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In this sense, the petitioner argues that Section 332(c)(7) of the Communications Act “created a framework in which states and localities could make zoning decisions ‘subject to minimum federal standards -- both substantive and procedural -- as well as federal judicial review’”.

<sup>207</sup> *In re Petition, supra* note 47, at 14000 - 14001; *Alliance for Community Media v. FCC*, 529 F.3d 763, 775 (2008). The Sixth Circuit ruled that “[...] the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)”.

<sup>208</sup> *Id.* The CTIA disagreed with the state and local government commenters’ claim that Congress “left in place the complete autonomy of States and localities with respect to zoning”. The CTIA argued that “it is Congress that expressly inserted such federal concerns into the tower siting process, limiting traditional local authority, when it promulgated Section 332(c)(7)” in order to reduce delays and impediments at the state and local level. Thus, the CTIA asserted that the FCC's interpretation of Section 332(c)(7) does not contravene that section's reservation to state and local governments of authority to review personal wireless service facility siting applications to the extent not limited by Section 332(c)(7).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 13997.

<sup>211</sup> *Id.* at 13998 - 13999, Footnote 43, (“See, e.g., NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4, 15-20; City of Dublin, OH Comments at 2-3; California Cities Comments at 13-16”).

governments to process applications in the timeframes in which land use applications are typically processed”<sup>212</sup>. Second, they explained, “[...] the Act and its legislative history [...] establish that the courts, not the FCC, should determine whether such processing is reasonable based on the individual facts in each case”<sup>213</sup>. Commenters explained that some applications “[...] require greater time to consider than others, and that sufficient time is needed to compile a written record as required by Section 332(c)(7)(B)(iii) and to seek collaborative solutions with wireless providers and the surrounding communities affected by the proposed wireless service facilities”<sup>214</sup>. Here again, the real point of contention lies beyond HART’s *penumbra zone*.

In the Colombian *human organ donation case*, the parties invoked the same Constitutional and statutory language in support of their arguments in favor and against the administrative rule's legality, yet they interpreted them differently. While the plaintiff argued in favor of a textual pro-business interpretation to reassert the constitutional limits of the President's rulemaking authority seeking to strike down the restrictions imposed on healthcare organizations for profit, the defendant advocated for a purposive interpretation to explain how the rule advances the regulatory agenda and fulfills statutory goals like the prevention of human organs trafficking in light of the "gratuitousness principle". Put it simply, in this case, the parties agreed on both the parent statute's pedigree and textual clarity but disagreed about how the "gratuitousness principle" legal consequences ought to be interpreted in the case at hand. Each one of the conflicting interpretations advanced by the concerned parties reflects an underlying moral and political philosophy about the limitations that may be imposed on commerce to prevent human organs trafficking. Thus, the parties disagreed about the legal consequences that the application of these constitutional provisions may elicit in light of two different moral and political philosophies. The President embraced the purposive interpretation and placed restrictions on an economic activity to prevent human organs trafficking in light of the "gratuitousness principle"<sup>215</sup>.

In the *McBean* administrative debate, as I already explained, the parties did not disagree about the textual clarity or open-texture of the statutory language, but rather about its legal consequences. The transition regime introduced in Article 117 clearly mandates that environmental permits granted before the enactment of Law 99 of 1993 shall remain in effect for the time they were conferred and that permit holders are obliged to submit an environmental impact statement assessing the risks that their projects place on the environment and explaining their strategies how to mitigate them<sup>216</sup>. Under this statutory framework, the straightforward application of the transition regime to the case at hand would

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<sup>212</sup> Id. at 14003.

<sup>213</sup> Id. at 14004.

<sup>214</sup> Id. (“These commenters claim, furthermore, that rigid timeframes do not account for time to amend applications that are frequently incomplete when submitted by wireless providers, and may provide incentive for wireless providers to submit incomplete applications and to delay correcting them until the application is ‘deemed granted’. They argue that Congress directed applicants aggrieved by a failure to act to seek a remedy in court, and assigned to the courts the duty of determining the appropriate remedy. They claim, moreover, under the CTIA’s proposed framework, local governments would have no say over siting of facilities once an application is “deemed granted”, even where safety factors justify modification or rejection of the facility”).

<sup>215</sup> D. 2493/04, *supra* note 60.

<sup>216</sup> L. 99/93, *supra* note 52, at art. 117.



entail that the initial environmental clearance granted by INDERENA to the Great View Company back in 1992 should remain in effect with all the rights pertaining, even if the risks that the project may place on the McBean mangrove and the adjacent biosphere are *unknown*.

Let us take a closer look at the interpretive methodologies advanced by the parties to support their arguments. The Ministry of Environment proposed a purposive interpretation of the statutory framework seeking to secure environmental protection at the cost of acquired individual rights. In light of this interpretation, the Ministry read two exceptions into the application of the transition regime set forth in Article 177 of Law 99 of 1993 and further developed by the President in Article 28 of Decree 1753 of 1994<sup>217</sup>. Hence the revisited transition regime established that permits granted by the incumbent environmental authorities before the enactment of Law 99 of 1993 should remain in effect for the time they were conferred *unless* the Ministry of Environment considers that the permit has been unlawfully granted or the project places unknown risks on the environment<sup>218</sup>. The legislative history is silent on this point.

The Great View Company opposed and argued for a textualist interpretation of the statutory framework and a purposive interpretation of two principles of law aimed at preserving acquired rights over newly enacted legislation according to the non-retroactivity principle and the legitimate expectation doctrine<sup>219</sup>. On the one hand, based on a textual interpretation, the developer claimed that the transition regime introduced by Article 117 contains no exceptions as to its application and thus the environmental clearance shall remain in effect for the time it was conferred by INDERENA<sup>220</sup>. On the other, based on a purposive interpretation, the Great View Company invoked the non-retroactivity principle to argue that it is a general principle of law that legislation and administrative regulation shall not be retroactive, except for the cases where the legislature has expressly decided so<sup>221</sup>. Likewise, the developer made an argument about the legitimate expectation doctrine that stems from the *bona fide* principle set out in Article 82 of the Constitution of 1991 to claim that he validly acquired the right to develop the project when INDERENA granted clearance according to

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<sup>217</sup> D. 1753/94, agosto 3, 1994, Diario Oficial 41427 [D.O.] art. 38 (Colom.). Article 38. *Transition Regime*. The projects, works or activities whose environmental permits, licenses, concessions or authorizations were granted pursuant to the norms effective before the enactment of this Decree, shall continue. However, the environmental authority may require from them, in a motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of this Decree, initiated all the required proceedings seeking the obtainment of the permits, licenses, concessions, and environmental authorizations required by the laws effective at the time, will continue their course according to them and, in the case they are granted, the project, works or activities may be developed. Nevertheless, the environmental authority may require them, in a motivated ruling, the filing of environmental management, recovery or restoration programs. The projects, works or activities that, previously to the enactment of Law #99 of 1993, initiated their activities will not require an environmental permit. The projects that initiated activities previously to the enactment of this Decree and fall within the jurisdiction of the Autonomous Regional Corporations will not require an environmental permit either. However, this does not prevent such projects, works or activities from complying with the environmental laws in force, except for the environmental permit requirement".

<sup>218</sup> Id.

<sup>219</sup> Consejo de Estado [C.E.] [Council of State], 5000-23-24-000-1996-6978-01(4027), *supra* note 53, (Colom.); Consejo de Estado [C.E.] [Council of State], 25000-23-24-000-2002-00192-01(4027), *supra* note 53.

<sup>220</sup> Id.

<sup>221</sup> Id.

the legal framework effective back in 1992<sup>222</sup>.

In my view, this is exactly the point of the contention in the case at hand. Each one of the conflicting interpretations conveys an underlying political and moral philosophy about the permissible limitations that may be imposed on acquired rights and the non-retroactivity principle to secure environmental protection in light of the precautionary principle. In other words, the parties disagree about the undesired legal consequences that the straightforward application of the transition regime may elicit under different moral and political philosophies, which in this case springs from a clash between the non-retroactivity principle and the precautionary principle. The Ministry of Environment ruled in favor of the purposive pro-environmental interpretation and read two exceptions into the statute as to the application of the transition regime in light of the precautionary principle. Thus, based on the precautionary principle, the Ministry construed Article 177 of Law 99 in the sense that permits granted by the incumbent environmental authorities before the enactment of Law 99 shall remain in effect for the time they were conferred, *unless* the Ministry of Environment considers that the permit was unlawfully granted or the project places unknown risks on the environment<sup>223</sup>. The Higher Courts of Colombia endorsed the Ministry's decision without any further inquiry, upon which I shall return on due course.

Recall that Shapiro treats administrative agencies and executive officials as legal actors, planners, and self-regarding meta-interpreters, which is the same treatment given to legislatures and courts for the purposes of his *planning theory of law*<sup>224</sup>. SHAPIRO acknowledges the rise of the administrative state, its historical evolution, and how courts assess the administrative agency's economy of trust according to the *Chevron* framework in the United States of America<sup>225</sup>. Based on *Whig theory*, he explains in detail the remarkable transformation that the administrative state has experienced from the time when the executive power was "stripped of virtually every power and prerogative traditionally enjoyed by the

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<sup>222</sup> Id.

<sup>223</sup> R. 024/96, *supra* note 61.

<sup>224</sup> Shapiro, *Legality*, at 355 – 356, ("The four most important groups that play a role in meta-interpretation are the officials, actors, planners, and, of course, meta-interpreters. By 'officials' I refer to those who occupy offices in a particular legal system. They include judges, senators, administrative officials, ambassadors, police officers, county clerks, city comptrollers, bailiffs, and so on. By 'actors' I mean those persons who are delegated legal rights and responsibilities so that they may contribute in some way to the political goals of the system. Actors include not only officials, but ordinary citizens as well. [...] By 'planners' (or as I will sometimes say 'designers') I refer to those actors who have created, modified, or extinguished the institutions of a particular legal system, or affected the relationships between institutions. In the American system, for example, legal planners ordinarily include legislatures, courts, administrative agencies, but also constitutional conventions and the electorate itself. [...] Last, by 'meta-interpreters' I mean those persons who attempt to discover which interpretive methodology is appropriate for an actor in a given legal system to use. For example, a federal judge who attempts to ascertain what method she should use to interpret the United States Constitution is a meta-interpreter who also happens to be a planner. [...] Meta-interpretation can be either 'self-regarding' or 'other-regarding'. A self-regarding meta-interpreter attempts to determine which interpretive methodology is appropriate for her to use, for example, a Supreme Court Justice arguing that a certain method of statutory interpretation is appropriate for her to follow").

<sup>225</sup> Id. at 316 – 317.

Crown”<sup>226</sup>, to the rise of the administrative state during the New Deal<sup>227</sup>. He argues, furthermore, that nowadays judges usually show a *high relative trust* towards administrative agencies’ statutory interpretations. Relying on two landmark decisions of the United States Supreme Court in *Chevron*<sup>228</sup> and *Skidmore*<sup>229</sup>, SHAPIRO claims that “[t]he deference that is normally shown administrative agencies in statutory interpretation is justified, at least in part, by the greater experience and expertise of administrative agencies as compared to courts with respect to the underlying issues at stake. Provided that courts find an agency interpretation reasonable and based on the relevant considerations, they will inquire no further into its appropriateness and acquiesce”<sup>230</sup>.

Three descriptive findings follow from these administrative hard cases. First, legal institutions endowed with administrative power act as meta-interpreters and decide meta-interpretive disagreement about the law. Second, occasionally, administrative bodies not only act as meta-interpreters that must decide meta-interpretive disagreements between opposing parties but may also partake in the administrative proceedings as an interested party in the issue at stake. Third, under certain circumstances, legal institutions endowed with administrative power are called upon to construe their own position and responsibilities within the legal system. These findings are consistent with SHAPIRO’s theoretical proposal to label administrative agencies as *legal actors, planners, and self-regarding meta-interpreters*. In Chapter One I described how judges decide hard cases according to the *planning theory of law*. For SHAPIRO, law’s defeasibility entails that it is the duty of the courts to improve the guidance provided by law and create new law by discovering the suspension clauses that *implicitly* attach to statutes in matters of statutory interpretation<sup>231</sup>.

On SHAPIRO’s account, I venture to speculate that a *planning theory of administrative law* would suggest that, in deciding meta-interpretive disagreements about law, legal institutions endowed with administrative power must first decide the meta-interpretive disagreement by determining the proper interpretive methodology of a particular legal system. According to the four administrative hard cases that I have presented, the high relative trust that the American and Colombian courts have shown towards each system’s administrative power due to its experience and expertise suggests a significantly discretionary interpretive

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<sup>226</sup> Id. at 316 - 317 (“They sought, rather, to divest the executive of most of his power to rule society – to eliminate, in the words of Thomas Jefferson, the ‘kingly office. [...] The executive no longer had the authority to assemble or dismiss the legislature, declare war, make peace, lay lengthy embargoes, erect courts, grant charters to corporations, or coin money. The executive also lost the power to appoint members of his own administration, to elevate judges to the bench, or to dismiss judges, even for cause. [...] Of the few powers retained, the executive generally was required to share them with the councils of state. The council members were not advisors chosen by the chief executive, as were the members of the privy council of the Crown, but rather controllers and overseers of the governor chosen by the legislature, or even made up for legislators”).

<sup>227</sup> Id. at 328 (“Analogously, there has been increased trust in the federal government and its officials to wield power in a responsible manner, as evidenced by the additional grants of power to Congress in the Reconstruction amendments to protect individual rights, as well as the rise of the administrative state during the New Deal”).

<sup>228</sup> *Chevron*, supra note 42, at 865 (“Judges are not experts in the field”).

<sup>229</sup> *Skidmore v. Swift & Co.*, 232 U.S. 134 (1944) (“[T]he Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case”).

<sup>230</sup> Shapiro, *Legality*, at 372 – 373.

<sup>231</sup> Id. at 303 – 304.

methodology. Then, in light of the interpretive methodology they have chosen as adequate because it best advances the goals that they are entrusted with furthering, legal institutions endowed with administrative power would “create new law to improve the guidance provided by the law by discovering implicit suspense clauses based on their experience and expertise”<sup>232</sup>.

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### *The Boundaries of Administrative Reasoning*

The different thesis about the nature of law and adjudication that I have canvassed in this Chapter may contribute to a better understanding of the theories of administrative law or administrative decision-making insofar as they expose their core theoretical commitments at the jurisprudential. Indeed, the determination of such core commitments sheds some light on the view the theories of administrative decision-making have on law’s determinacy, the place of the administrative power in the legal process, what makes law indeterminate, what is a hard case and what are its sources, how legal institutions endowed with administrative power decide hard cases, and so on. Hence, the judgment about the existence of *administrative novelty* depends upon a theory of administrative law’s core jurisprudential tenets. Similar to what occurs with judges, for some theories of law or adjudication, in deciding a hard case, administrative decision-makers are *applying* legal norms; for others, they are *creating* new legal norms<sup>233</sup>.

The four case studies indicate that, regardless of the core jurisprudential commitments of the different theories about the nature of law and adjudication that I have presented in Chapter One, legal institutions endowed with administrative power decide hard cases based both on arguments of policy and principle by appealing to their experience and expertise regardless of the form of administrative action. The four case studies show how the concerned parties tend to introduce contrasting arguments about the planning and allocation of valuable resources into the administrative debate in the form of *interpretive methodologies* that are based upon reasons of policy and principle. Thus, administrative decision-makers do not only decide empirical disagreement about the law by ascertaining whether a particular fact falls within the scope of a legal norm in light of a particular interpretive methodology or theoretical disagreement about the law by making a judgment about whether the grounds of law have obtained in the case at hand. They also tend to make decisions about which interpretive methodology ought to be employed to tackle the question at issue, which requires a judgment about the different interpretive methodologies advanced by the parties.

For instance, in the *Chevron* administrative debate, the EPA ruled in favor of the pro-business purposive interpretation aimed at improving air quality in the most cost-effective manner<sup>234</sup> and the United States Supreme Court of Justice in a landmark decision deferred to the EPA’s administrative interpretation<sup>235</sup>. Similarly, in *City of Arlington*, the FCC ruled in favor of the

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<sup>232</sup> Id.

<sup>233</sup> Id. at 274.

<sup>234</sup> 46 Fed. Reg. 50766, *supra* note 44.

<sup>235</sup> *Chevron*, *supra* note 42, at 857.

purposive interpretation of the Act's goals to assert jurisdiction over the question at issue<sup>236</sup>. The United States Supreme Court of Justice upheld the FCC's decision in another landmark decision<sup>237</sup> that arguably expanded the *Chevron* framework<sup>238</sup>. This also occurred in the *human organs case*, where the Colombian President embraced the purposive interpretation and placed restrictions on commerce and on nonresident aliens' fundamental right to receive medical treatment in equal conditions to prevent human organs trafficking based on the gratuitousness principle<sup>239</sup>. Likewise, in the *McBean* case, the Ministry of Environment ruled in favor of the purposive pro-environmental interpretation and read two exceptions into the statute as to the application of the transition regime relying on the precautionary principle<sup>240</sup>. The Higher Courts of Colombia upheld the administrative power's decisions without any further inquiry<sup>241</sup>.

These four case studies suggest that, in administrative hard cases where there is not a settled legal norm addressing a hard question of value choice, administrative decision-makers tend to decide complex moral and political philosophy conflicts about the allocation of valuable benefits in a democratic polity in the form of theoretical disagreement or meta-interpretive disagreement about law and that these administrative decisions may elicit profound changes in the polity that can range from the acknowledgment of new rights to the way in which public policy ought to be made and implemented in the cases where courts endorse them<sup>242</sup>. Judicial imprimatur is central to administrative novelty because, as I shall argue in Chapter Five, it is the duty of the judges to police the boundaries established in the constitution and legislation. Furthermore, the case studies also indicate that, rather than advancing sophisticated philosophical arguments, administrative decision-makers tend to engage in complex and collective decision-making procedures where all the interested parties – including the administrative decision-maker itself – partake by advancing different interpretations that convey underlying political and moral philosophies about how the grounds of law ought to be construed to decide the question at stake or what is the proper meta-interpretive methodology of a particular legal system in light of which the question at stake ought to be assessed. In my view, the synergy between these variables leads to original administrative decisions that are arguably not subordinated to previously acknowledged legal rules of legislative, administrative or judicial nature, which indicates that there may be cases

<sup>236</sup> *In re Petition*, *supra* note 47, at 14001.

<sup>237</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

<sup>238</sup> For the general discussion on this point, *see, e.g.*, Thomas W. Merrill, STEP ZERO AFTER CITY OF ARLINGTON, 83 *Fordham L. Rev.* 753 (2014); Peter L. Strauss, IN SEARCH OF SKIDMORE, 83 *Fordham L. Rev.* 789 (2014).

<sup>239</sup> D. 2493/04, *supra* note 60, at art. 8.

<sup>240</sup> R. 024/96, *supra* note 61.

<sup>241</sup> For the decision about the human organs donation case: Consejo de Estado [C.E.] [Council of State], *supra* note 51; For the decisions about the McBean Lagoon case: Consejo de Estado [C.E.] [Council of State], 5000-23-24-000-1996-6978-01(4027), *supra* note 53, (Colom.); Consejo de Estado [C.E.] [Council of State], 25000-23-24-000-2002-00192-01(4027), *supra* note 53; Corte Constitucional [C.C.] [Constitutional Court], T – 695/12, *supra* note 53.

<sup>242</sup> Gerald E. Frug, WHY NEUTRALITY?, 92 *Yale L. J.* 1591 (1983). Professor FRUG suggests, "[...] every creation and interpretation of a right is itself a value choice." *See, e.g.*, Wesley Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 26 *Yale L. J.* 710 (1917); Robert Hale, FORCE AND THE STATE: A COMPARISON OF "POLITICAL" AND "ECONOMIC" COMPULSION, 35 *Colum. L. Rev.* 149 (1935). For the contrary position, *see, e.g.*, Richard B. Stewart, REGULATION IN A LIBERAL STATE: THE ROLE OF NON-COMMODITY VALUES, 92 *Yale L. J.* 1537, 1539 (1983).



where administrative decision-makers would operate with unbound discretion regardless of legal traditions, constitutional schemes, institutional arrangements, and forms of administrative action. I call this *administrative novelty*.

*Administrative novelty* is itself an interpretive concept that may elicit disagreement under different theories about the nature of law or adjudication. Put it simply, the concept of administrative novelty changes according to the different theoretical commitments at the jurisprudential level that I have outlined in Chapter One, which means that an administrative decision could be labeled as “novel” under different jurisprudential assumptions. I venture to speculate, for example, that a theory of administrative law or administrative decision-making committed to the tenets of *legal formalism* would regard the administrative power as a mere executor of legislation whose duty is to simply execute the fully expressed will of the legislature. On the assumption that law is rationally determinate, a formalistic theory of administrative law would exclude any social policy consideration from administrative decision-making and reject strong administrative discretion. On this account, the four administrative cases would be ungoverned by law and the administrative bodies are required to look beyond the law to make their decisions, namely, to appeal to extralegal considerations like public policy or personal morality.

Conversely, a theory of administrative law committed to the *realist core claim* would argue that "paper rules" may guide but cannot control administrative decision-making and that administrative decisions tend to be determined by non-legal supplements such as policy and morality in the form of "real rules." Indeed, a *realist theory of administrative law* would claim that administrative officials react primarily to the underlying facts of each case and, in order to describe how administrative decision-making works in fact, it would focus on the vast array of variables that influence it. In other words, a theory of administrative law would posit that the application or implementation of open-textured rules would require that the administrative agency balance the competing facts, social aims, and interests in light of its own discretionary judgment by appealing to extra-legal supplements of variable nature. Nevertheless, a *legal positivist theory of administrative law* would criticize this account of administrative decision-making under the argument that the four administrative hard cases are ungoverned by law because legal obligations stem only from valid rules because there cannot be a legal obligation in the absence of a valid legal rule, which means that when a decision-maker decides a *hard case* by exercising her discretion, she is not enforcing a legal rule. Hence, administrative decision-makers, exerting their discretion, and acting as lawmakers, ought to decide administrative hard cases by appealing to extra-legal supplements such as public policy or morality.

On the *Dworkinian* alternate approach, a theory of administrative would claim that law is determinate because, even in hard cases, there is always a right answer to the question at issue and that it is the duty of the administrative decision-maker to find by appealing to legal principles. However, the four administrative decisions and the arguments advanced to support them show that the administrative power decides theoretical disagreements by construing the grounds of law based on both arguments of policy and principle regardless of the form of administrative action. Rather than acting as Hercules who advances complex philosophical constructions of the grounds of law, administrative decision-makers tend to engage in administrative procedures where they give reasons and justify their decisions based

on the evidence of a distinct technical or scientific character gathered on the record. Finally, a *planning theory of administrative law* would suggest that, in deciding meta-interpretive disagreements about law, legal institutions endowed with administrative power must first determine the proper interpretive methodology of a particular legal system. Then, in light of the interpretive methodology they have chosen as adequate because it best advances the goals that they are entrusted with furthering, administrative decision-makers would create “new law to improve the guidance provided by the law” by discovering “implicit suspense clauses” based on their experience and expertise<sup>243</sup>.

As a theoretical matter, I venture to speculate that the jurisprudential theories that I have described are rooted in the assumption that judges come to their decision with built-in expertise and opinions over any question at bar. *Legal realism* would be an exception because its salient feature consists in explaining how decision-makers develop, acquire, and articulate their expertise into legal decisions according to extra-legal supplements of diverse nature. By contrast, this assumption may be either explicit or implicit concerning the other theories that I have canvassed. For instance, it is explicit in DWORKIN’s theory of legislation when he explains that Hermes is an expert and has his own opinion on every technical question that might arise.<sup>244</sup> One could argue that said assumption is implicit in HART’s theory of legislation when he argues that hard cases are ungoverned by law and should appeal to extra-legal considerations to create new law and provide a solution. Similarly, one could suggest that this assumption is implicit in the planning theory of law when SHAPIRO indicates that, in deciding hard cases, judges must create new law by discovering the implicit policy considerations or defense clauses that are implicitly attached to statutes. Nevertheless, drawing on Professor REICH’s critique<sup>245</sup>, I think that it would remain unclear how judges acquire that expertise and whether it has been publicly validated. Furthermore, it would remain unclear whether this assumption could actually entail a significant shift in the judiciary’s expertise to reject any personal morality consideration from judicial reasoning in hard cases. The next Chapter addresses these questions by exploring the relationship between administrative reasoning and the administrative power’s expertise and political accountability.

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<sup>243</sup> Shapiro, *Legality*, at 303 – 304.

<sup>244</sup> Dworkin, *LE*, at 337.

<sup>245</sup> Reich, *supra* note 93, at 1242.

## CHAPTER IV

### THE ADMINISTRATIVE POWER: UNTAMED?

“Energy in the executive is a leading character in the definition of good government”  
-ALEXANDER HAMILTON<sup>1</sup>

The four case studies and their hypothetical assessment through the lenses of different theories about the nature of law and adjudication suggest that *administrative novelty or creativity* tends to spring from the decision of *administrative hard cases* where law proved to be vague, insufficient, silent or undesired to solve the controversies at hand about the planning or allocation of resources in a democratic polity. These case studies also suggest that such controversies tend to arise from complex moral and political philosophy conflicts in the form of theoretical or meta-interpretive disagreement about the law. On this assumption, I speculated in Chapter Three that *administrative novelty* might indicate the existence of administrative hard cases where administrative decision-makers would operate with unbound discretion insofar as their decisions are arguably not subordinated to previously acknowledged legal norms of legislative, administrative or judicial nature.

Chapters Four and Five tackle the question whether *administrative novelty* or *originality* can be defended from the three objections that have been traditionally raised against *judicial novelty*. I analyze in these two Chapters the factors that may shape the legal reasoning or judgment behind the administrative power’s lawmaking, policymaking, and interpretive authority regardless of the form of administrative action. Commentators have argued that judicial decision-making ought to be as unoriginal as possible on the assumption that responsible *elected* officials –not judges or administrators– should make the law, that when a judge, by a novel interpretation, makes “new law” and applies it to the case at hand, she applies it retroactively punishing the losing party, and that when judges create “new law” they rely on their “personal morality” that may or may not “embody” a set of decisions delivered by other judges in the past<sup>2</sup>. In short, my answer is that such arguments do not hold against *administrative novelty* because, unlike the judiciary, in contemporary democracies the administrative power is a democratically accountable power of government endowed with original or delegated lawmaking power. On this assumption, administrative reasoning should be *moral* in the sense that decision-makers should be able to reason from policy or principle in the planning and allocation of valuable benefits in a polity by relying on their experience and expertise.

As the Roman *praetor* example showed us in the Preface, judging and administrating are two functions that have been traditionally assimilated on historical, legal, and practical grounds. To separate those functions analytically is a hard nut to crack in the sense that said assimilation is deeply entrenched in legal traditions, constitutional schemes, political structures, and generally in how we think of the law and legal reasoning. Nonetheless, I will undertake that task, arguing that the two powers of government perform different functions,

<sup>1</sup> THE FEDERALIST No. 70, at 423 (Alexander Hamilton).

<sup>2</sup> Ronald Dworkin, *HARD CASES*, 88 Harv. L. Rev. 1057, at 1105 (1975) [hereinafter, Dworkin, *Hard Cases*].

and hence decide theoretical or meta-interpretive disagreements about the law in a different fashion. I will particularly emphasize the administrative power's democratic accountability and expertise in the decision of questions about planning and resource allocation in a democratic polity in the form of theoretical or meta-interpretive disagreement about the law that leads to administrative hard cases. Put it differently, I shall argue that judging and administrating can be distinguished on institutional and substantive grounds when it comes to the decision of theoretical and meta-interpretive disagreements about the law that gives rise to *administrative hard cases*.

The argument proceeds in two parts. This Chapter focuses on the institutional argument to suggest that the judiciary and the administrative power are two different branches of government that perform different roles within the legal process, possess different degrees of democratic accountability, are staffed and equipped with different experience and expertise, and follow different substantial and procedural requirements in making their decisions. I suggest that for an administrative decision-maker, executing the law is a complex interpretive and lawmaking process that calls for judgments of principle and policy, for which democratic accountability is crucial.<sup>3</sup> I will describe the administrative power's democratic accountability according to the influences on the administration exerted by the President, Congress, courts, civil society, and interest groups in the United States and Colombia. In light of the democratic ideal that law should be made by elected and responsible officials, I am convinced that a government of laws requires a public power responsible to the electorate that balances competing interests to make rights and policy decisions to fulfill the community's moral and political expectations. In sum, I shall argue that two different powers that perform different roles within a democratic government that speaks the language of legality and in the legal process cannot say what the law is in the same fashion. Then, from a philosophical perspective, in Chapter Five I shall tackle the question whether *administrative novelty* can be defended from the three objections that have been traditionally raised against *judicial novelty*.

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### ***Three Objections Against Administrative Novelty or Creativity***

In Chapter One I explained that the study of hard cases had been focused on discussing how judges decide cases where the law seems to run out or the decision-maker deems it insufficient or inappropriate to decide the case at hand. In fact, I described that, depending on the core tenets of different theories about law and adjudication, for some theorists, in deciding a hard case, judges are *applying* legal norms; for others, they are *creating* legal norms.<sup>4</sup> However, legal scholars not only disagree about what counts as a hard case and how to describe what judges do in deciding hard cases. They also disagree about *judicial originality or creativity* under the arguments that adjudication should be subordinated to legislation and that it ought to be as unoriginal as possible.<sup>5</sup>

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<sup>3</sup> Cass R. Sunstein, BEYOND MARBURY: THE EXECUTIVE'S POWER TO SAY WHAT THE LAW IS, 115 Yale L. J. 2583 (2006) [hereinafter, Sunstein, Beyond Marbury].

<sup>4</sup> Scott J. Shapiro, LEGALITY, 274 (2011) [hereinafter, Shapiro, Legality].

<sup>5</sup> Dworkin, Hard Cases, at 1105.

Two political theory arguments have been advanced to support this view.<sup>6</sup> First, commentators contend that when a judge, by a novel interpretation, makes “new law” and applies it to the case at hand, she applies it retroactively; thus the losing party will be “punished” because the “new duty” was created and enforced “after the time” when the events that gave rise to the litigation occurred.<sup>7</sup> Second, commentators argue that responsible *elected* officials –not judges or administrators– should make the law.<sup>8</sup> Moreover, from a legal theory perspective, commentators argue that when judges create “new law” they rely on their personal morality that may or may not embody a set of decisions delivered by other judges in the past.<sup>9</sup>

Consider the *Spartan Steel and Alloys Ltd. v. Martin & Co Ltd.* case discussed by RONALD DWORIN to illustrate the critique against judicial novelty<sup>10</sup>. *Spartan Steel and Alloys Ltd* have a steel factory in Birmingham<sup>11</sup>. In June 1969, *Martin & Co Ltd* employees were working on a road about a quarter mile away from the steel factory. Although the contractor’s employees inquired about the location of cables, mains, and so on, they did not take reasonable care and their excavator damaged the cable that provided electricity to the steel factory. Following the incident, the Electricity Board shut down the power supply for about 15 hours until it was finally restored. *Spartan Steel* claimed that it suffered (1) physical damage, (2) lost profit on the damaged material that was being processed at the time when the accident and the power outage occurred, and (3) lost profit for the metal that could not be processed during the 15h power outage. In an opinion written by Lord DENNING, the Court of Appeal ruled that the plaintiff could recover the damages caused to the material that was being processed at the time the power supply was shut down and to the profit lost on such damaged material. Nonetheless, the Court of Appeal rejected on policy grounds the recovery of the “economic loss” for the material that could not be processed during the 15h power outage.<sup>12</sup> On this point, Lord DENNING explained that the “[...] question of recovering economic loss is one of policy. Whenever the Courts draw a line to mark out the bounds of duty, they do it as matter of policy so as to limit the responsibility of the defendant”<sup>13</sup>. In

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<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. (“[...] its decision by asking either whether a firm in the position of the plaintiff had a right to a recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested, which is a matter of policy.”)

<sup>11</sup> *Spartan Steel and Alloys Ltd. v. Martin & Co Ltd* I QB 27 (1973).

<sup>12</sup> Id.

<sup>13</sup> Id. (“Whenever the Courts set bounds to the damages recoverable - saying that they are, or are not, too remote - they do it as matter of policy so as to limit the liability of the defendants. [...] The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say “*There was no duty.*” In others I say: “*The damage was too remote.*” So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as matter of policy, economic loss should be recoverable, or not. [...] So I turn to the relationship in the present case. It is of common occurrence. The parties concerned are: the - Electricity Board who are under a statutory duty to maintain supplies of electricity in their district; the inhabitants of the district, including this factory, who are entitled by statute to a continuous supply of electricity for their use; and the contractors who dig up the road. Similar relationships occur with other statutory bodies, such as gas and water undertakings. The cable may be damaged by the negligence of the statutory undertaker, or by the negligence of the contractor, or by accident without any negligence by anyone: and the power may have to be cut off whilst the cable is



other words, common law judges may appeal to policy considerations in defining the structural aspects of the standard of care and the damages that can be recovered which may affect individual rights.

DWORKIN devoted a considerable part of his scholarship to justify *judicial novelty* in hard Common law cases, but only in the events when it is sustained upon arguments of principle. Concerning the first argument, that responsible *elected* officials –not judges or administrators– should make the law, DWORKIN explained that it was persuasive but only in the cases when we think of law as *policy*, especially because elected officials are in a better democratic position to make the necessary judgments and compromises to weigh competing interests in the search for the welfare of a community as a whole. As to the second argument, that new judge-made rules cannot be justified on improving the overall welfare of a community or the public interest at the expense of individual rights, DWORKIN also agrees that it would be wrong to sacrifice rights in the name of new policies that improve a community’s welfare as a whole.<sup>14</sup> Concerning the legal philosophy argument, DWORKIN contends that *integrity in adjudication* demands judges to treat the present system of public standards as conveying and “respecting a coherent set of principles” about justice, fairness, and due process, “and to that end”, to construe these standards in their best moral light in order to find implicit standards “between and beneath the explicit ones.”<sup>15</sup> On this account, judges are in a very different position from legislators insofar as they should make their decisions on the grounds of principle, not policy.<sup>16</sup> He argues that judges “[...] must deploy arguments why the parties actually had the ‘novel’ legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.”<sup>17</sup>

Two caveats must be made concerning judicial novelty in *statutory hard cases*. First, as it was noted in Chapter One, DWORKIN’s account of law as integrity is equally applicable to statutory interpretation but with the sharp difference that judges should reason from policy *and* principle. This means that, on the *Dworkinian* account, judges may appeal to policy considerations in deciding statutory hard cases<sup>18</sup>. It is noteworthy that Dworkin’s theory of legislation is based on the assumption that Hercules is an expert on every technical question that might come to his bench.<sup>19</sup> Nevertheless, it remains unclear how he gained that expertise and whether it has been publicly validated according to the principles and policies that flow from past political decisions. Second, another distinction must be made about judges’ democratic accountability regarding their election or appointment method. In Colombia, for example, there is a national judiciary where judges are generally appointed according to a merit-based civil service career system that is administered by the Consejo Superior de la Judicatura, which is an independent judicial body endowed with administrative power. Supreme Court and Council of State Justices are elected according to a co-option system

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repaired, or the power may be cut off owing to a short-circuit in the power house: and so forth. If the cutting off of the supply causes economic loss to the consumers, should it as matter of policy be recoverable? and against whom?”)

<sup>14</sup> Dworkin, *Hard Cases*, at 1105.

<sup>15</sup> Ronald Dworkin, *LAW’S EMPIRE* 217 (1986) [hereinafter, Dworkin, LE].

<sup>16</sup> *Id.* At 244.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 338 – 339.

<sup>19</sup> *Id.* at 337.

from a list of candidates submitted by el Consejo Superior de la Judicatura. The Senate appoints the Constitutional Court Justices from a list of three nominees sent by the Supreme Court, the Council of State, and the President.<sup>20</sup> By contrast, as Professor ABBE GLUCK points out, twenty-two states elect their judges and the remaining states employ different appointment methods in the United States.<sup>21</sup> It must be noted that state courts hear about ninety-eight percent of the statutory interpretation cases that arise in the American legal system.<sup>22</sup> Federal courts hear the remaining two percent of the cases.<sup>23</sup> Thus, one could argue that the two political philosophy arguments made against judicial novelty would not hold true in a legal system where judges are democratically elected or retained.

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### *The Administrative Power to Say What the Law Is: A Preliminary Inquiry*

Now I turn to the question whether the arguments that have been wielded against judicial novelty can be raised against *administrative novelty* or *originality*. Despite the caveats made in the past section, the three arguments raised against judicial novelty allow me to analyze in detail how administrative reasoning is shaped by the administrative power's democratic accountability and expertise. The discussion about the administrative power's lawmaking, policymaking, and interpretive authority has mobilized a legion of commentators drawn from different latitudes over many decades. They claim in unison that, unlike judges, administrators are in a better position to solve statutory ambiguities that require principle and policy judgments due to their administrative, political or democratic accountability and specialized expertise.<sup>24</sup> Yet this is just the skeleton of the argument because its formulation

<sup>20</sup> It must be noted that the President recently introduced a public procedure to select the three nominees that he submits to the Senate under the argument that this would make the selection more transparent. However, the President retained his discretionary powers to pick the three nominees without having to provide any reasons in support of his decision. *See generally* Decreto 537/15, marzo 25, 2010, (Colom.).

<sup>21</sup> Abbe R. Gluck, THE STATES AS LABORATORIES OF STATUTORY INTERPRETATION: METHODOLOGICAL CONSENSUS AND THE NEW MODIFIED TEXTUALISM, 119 Yale L. J. 1750, 1813 (2010) (“Twenty-two states elect their judges; thirteen (including D.C.) use appointment (by either the governor, the legislature, or a nominating commission); the remaining sixteen use a combination of initial appointment and retention elections. Terms range from life (which is rare) to initial terms of office as short as one year prior to a retention election. *See* BOOK OF THE STATES, *supra* note 129, at 286-87; Am. Judicature Soc’y, Judicial Selection Methods in the States, <http://www.ajs.org/selection/sel-state-select-map.asp> (last visited Feb. 8, 2010). Specifically with respect to the states studied, Connecticut's justices are appointed; Texas's are elected in partisan elections; and Oregon's, Michigan's, and Wisconsin's are elected in non-partisan elections”).

<sup>22</sup> *Id.* at 1753, 1813.

<sup>23</sup> *Id.*

<sup>24</sup> For the discussion about the nature, scope, and extent of administrative decision-making and adjudication in the United States of America, *see, e.g.*, Sunstein, *Beyond Marbury*, at 2589; Cass R. Sunstein, INTERPRETING STATUTES IN THE REGULATORY STATE, 103 Harv. L. Rev. 405 (1989); Thomas J. Miles & Cass Sunstein, DO JUDGES MAKE REGULATORY POLICY? AN EMPIRICAL INVESTIGATION OF CHEVRON, 73 Chi. L. Rev. 823 (2006); William N. Eskridge, DYNAMIC STATUTORY INTERPRETATION (1994); Jerry L. Mashaw, NORMS, PRACTICES, AND THE PARADOX OF DEFERENCE: A PRELIMINARY INQUIRY INTO AGENCY STATUTORY INTERPRETATION, 57 Admin. L. Rev. 501 (2005); Martin Shapiro, ADMINISTRATIVE DISCRETION: THE NEXT STAGE, 92 Yale L. J. 1487, 1487 (1983); Martin Shapiro, THE GIVING REASONS REQUIREMENT, 1992 U. Chi. Legal F. 179 (1992); Martin Shapiro, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); Anne Joseph O’Connell, AGENCY RULEMAKING AND POLITICAL TRANSITIONS, 105 Nw. U. L. Rev. 471 (2015); Kenneth A. Bamberger, NORMATIVE CANONS IN THE REVIEW OF ADMINISTRATIVE POLICYMAKING, 118 Yale L. J. 64

may assume different colors and contrasts in light of myriad variables such as legal traditions, constitutional schemes and interpretations, institutional arrangements, substantive and procedural administrative frameworks, forms of administrative action, shifting judicial precedents, the scope and extent of judicial review of administrative actions, political forces and events, and so on. Nevertheless, not much has been said about how different theories about the nature of law or adjudication may influence the administrative reasoning that propels the public administration's lawmaking, policymaking, and interpretive authority. This Chapter addresses this question.

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### *Judging and Administering: A Hard Nut to Crack?*

In *Courts*, Professor MARTIN SHAPIRO argues that courts and administrative agencies make decisions in a similar way because it is their duty to resolve disputes by applying general rules to particular facts.<sup>25</sup> From a historical perspective, Professor SHAPIRO explains that the British and Chinese mandarin “imperial administrators” or “prefects” are the best example of this similarity.<sup>26</sup> Both officers were there to “keep peace and collect taxes.”<sup>27</sup> In his view, more examples can be found in “feudal monarchies” like the “English Exchequer” and the person responsible for “supervising the rice tax” in Tokugawa, Japan.<sup>28</sup> Furthermore, SHAPIRO highlights the role of the “English common law judges” in dispensing “the king’s justice in the course of doing the rest of the king’s business,” the role of the courts of equity

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(2008); Kenneth A. Bamberger, PROVISIONAL PRECEDENT: PROTECTING FLEXIBILITY IN ADMINISTRATIVE POLICYMAKING, 77 N. Y. U. L. Rev. 1272 (2002); William N. Eskridge, Jr., EXPANDING CHEVRON’S DOMAIN: A COMPARATIVE INSTITUTIONAL ANALYSIS OF THE RELATIVE COMPETENCE OF COURTS AND AGENCIES TO INTERPRET STATUTES, 2013 Wis. L. Rev. 411 (2013); William N. Eskridge, Jr. & Lauren E. Baer, THE CONTINUUM OF DEFERENCE: SUPREME COURT TREATMENT OF AGENCY STATUTORY INTERPRETATIONS FROM CHEVRON TO HAMDAN, 96 Geo. L. J. 1083 (2008); Elizabeth Garrett, LEGISLATING CHEVRON, 101 Michigan L. Rev. 2637 (2003); Jack Goldsmith & John F. Manning, THE PRESIDENT’S COMPLETION POWER, 115 Yale L. J. 2280 (2006); M. Elizabeth Magill, AGENCY CHOICE OF POLICYMAKING FORM, 71 Chi. L. Rev. 1383 (2004); Richard J. Pierce, Jr., HOW AGENCIES SHOULD GIVE MEANING TO THE STATUTES THEY ADMINISTER: A RESPONSE TO MASHAW AND STRAUSS, 59 Admin. L. Rev. 197 (2007); Antonin Scalia, JUDICIAL DEFERENCE TO ADMINISTRATIVE INTERPRETATIONS OF LAW, 1989 Duke L. J. 511 (1989); Kevin M. Stack, THE PRESIDENT’S STATUTORY POWERS TO ADMINISTER THE LAWS, 106 Colum. L. Rev. 263 (2006); Kenneth W. Starr, JUDICIAL REVIEW IN THE POST-CHEVRON ERA, 3 Yale Journal on Regulation 283 (1986). For the discussion in Europe, see, e.g., Luciano Parejo Alfonso, ADMINISTRAR Y JUZGAR: DOS FUNCIONES CONSTITUCIONALES DISTINTAS Y COMPLEMENTARIAS, 97-100, 104 (1993); Juli Ponce Solé, DEBER DE BUENA ADMINISTRACIÓN Y DERECHO AL PROCEDIMIENTO ADMINISTRATIVO DEBIDO. LAS BASES CONSTITUCIONALES DEL PROCEDIMIENTO ADMINISTRATIVO Y DEL EJERCICIO DE LA DISCRECIONALIDAD, 113-116 (2001); Elisenda Malaret I García, “Los principios del procedimiento administrativo y el responsable del procedimiento”, in ADMINISTRACIÓN PÚBLICA Y PROCEDIMIENTO ADMINISTRATIVO (COMENTARIOS A LA LEY 30/1992, DE 26 DE NOVIEMBRE), 305 (J. Tornos Más ed., 1994); Winfried Brohm, “Administración y Jurisdicción Contencioso-Administrativa como mecanismos de regulación en un sistema policéntrico de producción del Derecho”, in DOCUMENTACIÓN ADMINISTRATIVA, 234 INAP 130, (L. Parejo Alfonso trad., 1993); Mariano Bacigalupo, LA DISCRECIONALIDAD ADMINISTRATIVA. ESTRUCTURA NORMATIVA, CONTROL JUDICIAL Y LÍMITES CONSTITUCIONALES DE SU ATRIBUCIÓN, 62-64 (1997). For the discussion in Colombia, see, e.g., Hugo Marín, DISCRECIONALIDAD ADMINISTRATIVA (2007).

<sup>25</sup> Martin Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981).

<sup>26</sup> Id.

<sup>27</sup> Id. at 20.

<sup>28</sup> Id. at 21.

as the chancellor's courts, and the simultaneous judicial and administrative duties carried out by the justices of peace.<sup>29</sup> He also points out an "affinity" between "judging and administration in the town magistrates" from "Imperial Japan to colonial Massachusetts and medieval France" because, in his opinion, "[...] wherever a body of local notables has been vested with authority the authority to direct municipal affairs, it will be found with authority to do local judging"<sup>30</sup>. It is noteworthy that, although these historical precedents about the affinity between judging and administrating belong to a pre-constitutional era, they show us the different faces that said assimilation has assumed over time and how it persists nowadays in modern democracies with clear separation of powers and elaborate administrative states.

In fact, another striking example of this tendency can be found in the assimilation made by the Civil Code of the Republic of Colombia between judges and administrators for matters of statutory interpretation. On a comparative note, Colombia's Civil Code is an adaptation from Chile's Civil Code, which was originally drafted by Don ANDRÉS BELLO who had a patent influence over Latin American civil codes.<sup>31</sup> Article 26 of Colombia's Civil Code mandates that "[i]n the application of the law to particular cases and in administrative cases, judges and administrative officials shall construe it via doctrine in the search for its true meaning, like private citizens employ their criteria to accommodate general provisions to their particular facts and peculiar interests. The rules set out in the following articles ought to inform the doctrinal interpretation of the law."<sup>32</sup>

Although the Colombian Congress introduced a set of specific canons of statutory interpretation in 1873, the Constitutional Court modified them via interpretation<sup>33</sup>. In this sense, according to Article 27 of the Civil Code, the legislature expressly retained the power to construe "obscure" laws by enacting statutes (statutes construing obscure rules). Nonetheless, the Constitutional Court struck down said legislative privilege and ruled that, even in the cases where the law is "obscure", the Court's precedent has "general" controlling authority over legislation<sup>34</sup>. Furthermore, the original Article 27 indicated that plain or clear statutory language ought to control over any purposive interpretation of the "spirit" of the law, except in the cases where the statutory language is vague and the interpreter is authorized to construe it in light of the "spirit of the law" or its legislative history<sup>35</sup>. The Civil Code also

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Fernando Hinestrosa, *EL CÓDIGO CIVIL DE BELLO EN COLOMBIA*, 9 R.D.P 5, (2006); Fernando Hinestrosa, *CODIFICACIÓN, DECODIFICACIÓN Y RECODIFICACIÓN*, 27 R.D.P. 3, (2014); Fernando Vélez, *DATOS PARA LA HISTORIA DEL DERECHO NACIONAL*, (1891);

<sup>32</sup> C.C. art. 26.

<sup>33</sup> Carlos Bernal Pulido, *EL PRECEDENTE EN COLOMBIA*, 21 *Revista Derecho del Estado*, 84 (2008).

<sup>34</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 4, 2006, C – 820/06, (Colom.) (Holding unconstitutional the legislature's "authoritative" interpretation power under the argument that it contravenes the supremacy clause).

<sup>35</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 10, 2016, C – 054/16, (Colom.) (Upholding this statutory provision because it does not violate the supremacy clause set forth in Art. 4 of the Colombian Constitution of 1991)

introduced canons of statutory interpretation about textualism<sup>36</sup>, the interpretation of technical jargon<sup>37</sup>, and the systematic interpretation of obscure laws<sup>38</sup>.

But let me focus on the assimilation between judges and administrators set out in Article 26 of the Colombian Civil Code for matters of statutory interpretation via “doctrine”. One must trace back the origins of Article 26 to the Chilean Code and the *Code Napoleon* of 1804 in order to understand the assimilation between judges and administrators. First, in the Chilean Code, one can find that the Chilean legislature introduced a set of canons of statutory interpretation similar to the ones in the Colombian Civil Code. In fact, Article 19 mandates that clear statutory language controls over any purposive interpretation except in the case where the statutory language is obscure. Articles 20 and 21 contain rules about construing the plain language of the legislature and technical jargon. Article 22 explains how obscure rules ought to be construed systematically or by other general rules enacted by Congress. Finally, Article 24 indicates that obscure or contradictory laws ought to be construed in light of the spirit of the law or “natural equity.” However, there is not a single trace of the assimilation between judges and administrators concerning matters of statutory interpretation.

This takes me to the *Code Napoleon*. Recall that Mr. BELLO relied heavily on the *Napoleonic Code* of 1804 in drafting the *Chilean Code*. However, the only provision related to statutory interpretation is Article 5 that emphatically prevents judges from dispensing justice via general rules (“*disposition générale et réglementaire*”)<sup>39</sup>. Commentators explain that the *Code Napoleon* contain no canons of statutory interpretation under the idea that the code itself was the outcome of pure reason aimed at the unification and systematization of the law in a written and intelligible fixed text enacted by the legislature that could be accessible to everyone<sup>40</sup>. Similar to the *Chilean Code*, the *Code Napoleon* lacks of any mention of assimilation between judges and administrators for matters of legal interpretation, which I think is consistent with the French administrative justice model that places the administrative judge within the executive branch of power<sup>41</sup>.

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<sup>36</sup> C.C. art. 28.

<sup>37</sup> C.C. art. 29.

<sup>38</sup> C.C. art. 30.

<sup>39</sup> C.C. art. 5, (France) (“Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises”).

<sup>40</sup> Henri Mazeaud, Leon Mazeaud, Jean Mazeaud & François Chabás, INTRODUCTION À L’ÉTUDE DU DROIT, 16, (12d ed. 2000); 1 Ambroise Colin & Henri Capitant, CORSO ELEMENTAL DE DERECHO CIVIL, 11, (Démofilo de Buen trans. 1922); Marcel Planiol, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 3, (7d. 1915); Jean Carbonnier, DROIT CIVIL, 86, (2004) (“Art. I : Il existe un droit universel et immuable, source de toutes les lois positives: il n’est que la raison universelle, en tant qu’elle gouverne tous les hommes”); Jean M. Portalis, DISCOURS PRÉLIMINAIRE DU PREMIER PROJET DE CODE CIVIL, 24, (1999) (“Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les Lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers”); Charles S. Lobingier, NAPOLEON AND HIS CODE, 32 Harv. L. Rev 114, 127 (1918) (discussing the importance of the Code Napoleon); Angelo P. Sereni, The Code and the Case law, in THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD, 55-56, (Bernard Schwartz ed., 1956); C. J. Friedrich, The Ideological and Philosophical Background, in THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD, 2, (Bernard Schwartz ed., 1956); Claire M. Germain, APPROACHES TO STATUTORY INTERPRETATION AND LEGISLATIVE HISTORY IN FRANCE, 13 Duke J. Comp. 195, (2003).

<sup>41</sup> See generally Jean-Laurent Rosenthal, THE FRUITS OF THE REVOLUTION: PROPERTY RIGHTS, LITIGATION, AND FRENCH AGRICULTURE 1700–1860 (1992); Robert Kagan, ADVERSARIAL LEGALISM 207 (2003).



Indeed, the French administrative justice system is another example of the assimilation between judging and administrating, which can be best exemplified by HENRION DE PANSEY's famous words "*juger l'administration c'est encore administrer*"<sup>42</sup>. Consider that, unlike the United States and Colombia's legal systems, the French administrative judge is part of the executive branch of power and, though her duties are administrative in nature, she is instituted to review administrative actions and dispense justice in the case where the administration is involved.<sup>43</sup> This institutional design is consistent with a strict application of MONTESQUIEU'S idea that the judicial and the executive branches of power must be separated to protect the fundamental liberties of the citizens<sup>44</sup>. An additional distinction must be made, however. Historically the French administration has been internally divided into two functions, namely, the "active function" and the "jurisdictional function"<sup>45</sup>. While the former refers to the executive action *per se*, the latter denotes the functions of certain administrative officials who specialize in deciding the "contentious" ("*contentieux*") challenges against administrative actions or decisions.<sup>46</sup> Some commentators explain that the French administrative jurisdiction was the outcome of the separation of powers and the internal division of the administrative function.<sup>47</sup> Thus, they claim the French administrative jurisdiction was instituted at the core of the executive branch of power to prevent the judiciary from intervening in the executive's actions.<sup>48</sup>

Based on the historical similarities between judicial and administrative rule application styles, *empirically-oriented* scholars indicate that there are significant similarities between the way in which courts and administrative agencies implement public policy to legitimate the power of a given political regime for which they appeal to the objective and unbiased

<sup>42</sup> Henrion de Pansey, DE L'AUTORITÉ JUDICIAIRE EN FRANCE (1818).

<sup>43</sup> Jean Rivero, DROIT ADMINISTRATIF 175 (13<sup>th</sup> ed., 1990); Jacques Chevallier, L'ÉLABORATION HISTORIQUE DU PRINCIPE DE LA SÉPARATION DE LA JURIDICTION ADMINISTRATIVE ET DE L'ADMINISTRATION ACTIVE (1968).

<sup>44</sup> Charles de Secondat Montesquieu, THE SPIRIT OF THE LAWS, at 5.14 (Cohler, Miller & Stone trans. and eds., 1989).

<sup>45</sup> Rivero, *supra* note 43, at 175 ("Ainsi s'ébauche, au sein de l'administration, une nouvelle *séparation entre la fonction active et la fonction juridictionnelle*, qu'il faut bien distinguer de la séparation des pouvoirs: celle-ci intéresse les rapports de l'exécutif et du judiciaire, alors que la séparation des fonctions ne concerne que la division du travail au sein de l'exécutif, certains de ses agents se spécialisant dans le jugement du contentieux"); Chevallier, *supra* note 43.

<sup>46</sup> Rivero, *supra* note 43, at 175; Chevallier, *supra* note 43; Georges Vedel, DERECHO ADMINISTRATIVO 369 (J. Rincón Jurado trans., 1980).

<sup>47</sup> Rivero, *supra* note 43, at 175; Chevallier, *supra* note 43.

<sup>48</sup> Rivero, *supra* note 43, at 173 ("La juridiction administratif est née d'un *principe*, interprété à la lumière d'une *tradition*. Le principe est celui de la *séparation des pouvoirs*, appliqué aux rapports du judiciaire et de l'exécutif. Pour sauvegarder la liberté des citoyens, la « puissance de juger » doit, selon Montesquieu, être séparée de « la puissance exécutive ». Mais comment appliquer le principe au jugement de litiges dans lesquels « la puissance exécutive » est engagée, c'est-à-dire au contentieux administratif ? Il s'agit de juger : ceci peut conduire à les confier au pouvoir judiciaire ; il s'agit de juger l'exécutif : ceci peut conduire à les lui soustraire, dans la mesure où en jugeant, il risque de s'immiscer dans l'action de l'exécutif"); Vedel, *supra* note 46, at 365 (Describing the general structure of the French administrative courts system); Prosper Weil, DERECHO ADMINISTRATIVO, at 150 (L. Rodríguez Zuñiga trans., 1986) (Explaining the historic evolution of the French administrative justice system); Jean Massot, "The Powers and Duties of the French Administrative Judge", in COMPARATIVE ADMINISTRATIVE LAW (Rose-Ackerman & Lindseth eds., 2013) (Discussing the main features of the French administrative judge compared to other legal traditions).

sounding language of the law<sup>49</sup>. Professor MARTIN SHAPIRO sees both as shaped by a triadic dispute resolution model where the third party<sup>50</sup> (either a court or an administrative agency) faces a legitimacy problem vis-à-vis the civil society parties it faces because it is not totally independent from the other powers of government insofar as, simply by virtue of its obligations to apply the laws made by political authorities, it represents the interests of the political regime viewed broadly<sup>51</sup>. On this account, SHAPIRO argues that both judges and administrators are expected to follow the procedures that have been set out beforehand by the legislature, which require them to gather evidence that supports their conclusions, to produce written records of their proceedings, to follow previous precedent, and to give reasons about their final decisions<sup>52</sup>.

Furthermore, *administrative justice* scholars explain that in administrative agencies whose rule application culture emphasizes both “strong rule-based decision-making” and, at the same time, “responsiveness to broader social consequences,” agencies’ rule application style resembles that of judges – and hence can be labeled the “judicial mode,” “legal creativity,” or “moral judgment.”<sup>53</sup> Evoking CARDOZO’s words,<sup>54</sup> Professor ROBERT KAGAN suggests that when there is a tension between the wording of existing law and desired social consequences or policy goals, administrative agencies tend to reinterpret existing law by adopting innovative constructions, and articulating principled decisions that support the desired outcome.<sup>55</sup> These sound empirical findings are fundamental insofar as they point out

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<sup>49</sup> Shapiro, *supra* note 25, at 1.

<sup>50</sup> Id. (“Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon”).

<sup>51</sup> Id. at 26 (“Thus so long as a judge acts to impose preexisting rules on the disputants, he is imposing an element of social control. Or to put the matter differently, he is importing a third set of interests, whatever interests are embodied in those rules, to be adjudicated along with the interest of the two parties. In this sense the prototype’s elements of judicial independence and judgment according to preexisting rules are always in conflict. For the preexisting rules almost invariably embody some public interests over and above and in contradistinction to the interests of the two parties. To the extent that the judge employs preexisting rules not shaped by the parties themselves, he acts not independently but as a servant of the regime, imposing its interests on the parties to the litigation”). For the contrary position: *See, e.g.*, William M. Landes & Richard A. Posner, THE INDEPENDENT JUDICIARY IN AN INTEREST-GROUP PERSPECTIVE, 18 *Journal of Law and Economics* 875, (1975).

<sup>52</sup> Shapiro, *supra* note 25, at 20. (“The congruence of administering and judging must be specially noted. Indeed, the observer who did not so firmly believe in the independence of judging might take judging for a special facet of administering. Both the judge and administrator apply general rules to particular situations on a case-by-case basis. Both tend to rely heavily on precedent, fixed decisional procedures, written records, and legalized defense of their decisions. Both are supplementary lawmakers engaged in filling in the details of more general rules. Both are front-line social controllers for more distant governing authorities. And in a startling number of instances both are the same person, and a person who draws little or no distinction between administering and judging”).

<sup>53</sup> Robert Kagan, REGULATORY JUSTICE 91 – 92, (1978); Robert Kagan, The Organisation of Administrative Justice Systems: The Role of Political Mistrust, in ADMINISTRATIVE JUSTICE IN CONTEXT, at 171, (Michael Adler ed. 2010).

<sup>54</sup> Benjamin Cardozo, THE NATURE OF JUDICIAL PROCESS, 19 – 25 (1921).

<sup>55</sup> Kagan, The Organisation of Administrative Justice Systems, *supra* note 53, at 172.

exactly where to look for the differences between judicial and administrative decision-making, namely: theoretical and meta-interpretive disagreements about the law. In fact, the meticulous evidence upon which *administrative justice* scholars rely, suggest that judges and administrators tend to tackle the question whether a proposition of law is true or false in the sense that it fulfills the grounds of the law<sup>56</sup> in the same fashion. For instance, in the adjudication of a permit or welfare benefit, both the judge and the administrative official will tend to follow the procedures introduced beforehand by the legislature, which require them to gather evidence in order to determine what happened or whether the claimant's situation falls within the factual scope of the proposition of law whose legal effects he pursues, to produce a written record of their proceedings, to follow precedent, and to give reasons for their final decisions.

Nevertheless, I venture to think that judging and administrating can be distinguished on institutional and substantive grounds when it comes to the decision of theoretical and meta-interpretive disagreements about the law that gives rise to *administrative hard cases*. On the one hand, Professor JERRY MASHAW proposes an alternate position about agency interpretation that emphasizes the institutional position that administrative agencies hold in a constitutional democracy. He asserts that, although statutory interpretation is dominated by what he calls a "judiciocentric legal literature," agency interpretation ought to be regarded as an "autonomous enterprise."<sup>57</sup> Furthermore, MASHAW suggests that administrative interpretation could be distinguished from judicial interpretation in light of the institutional position that administrative agencies hold within the American legal system and the responsibilities of modern administration according to the constitutional design that institutes administrative agencies as "faithful agents of the legislature" and "executors of the President's constitutional responsibility to take 'Care that the Laws be faithfully executed.'"<sup>58</sup> Although Mashaw is speaking about the American legal system, I shall argue that the Colombian Public Administration shares a similar constitutional design as to its institutional position and responsibilities in the Colombian legal system.

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### *The Administrative Power's Political or Democratic Accountability*

Regarding the two political philosophy challenges, that law should be made by elected officials to justify the acknowledgment and enforcement of rights, I argue that the administrative power should decide hard cases based on the role it plays within a democratic government of laws and in the path of the law. This is not a novel argument, however. It is rather the restatement of a long-standing view of the administrative state advanced by courts and commentators<sup>59</sup>, particularly by *legal realists* and *legal process scholars*.

Consider *TVA vs. Hill* where the United States Supreme Court decided a controversy about

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<sup>56</sup> Ronald Dworkin, *LAW'S EMPIRE*, 4-6 (1986).

<sup>57</sup> Mashaw, *supra* note 24, at 503, 505; Jerry L. Mashaw, *BETWEEN FACTS AND NORMS: AGENCY STATUTORY INTERPRETATION AS AN AUTONOMOUS ENTERPRISE*, 55 U. Toronto L.J. 497 (2005).

<sup>58</sup> Mashaw, *supra* note 24, at 503.

<sup>59</sup> See *supra* note 24.

whether the construction of a dam could be halted due to the possible destruction of an endangered species' habitat. In a landmark decision, the Supreme Court ruled that, while it is true that the judiciary has the power to say what the law is, "[...] it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought"<sup>60</sup>. The Supreme Court ruled in *Chevron* that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones [...]"<sup>61</sup>.

The administrative power's democratic or political accountability is rooted in light of the influences on the administration exerted by the President, Congress, courts, civil society, and interest groups. These influences vary according to changing political contexts, constitutional schemes, institutional arrangements, interest group configurations, policy agendas, and so on. Professor JERRY MASHAW posits that a dominant external, legal, and institutional environment tends to shape internal administrative activity, either in rulemaking and adjudicatory proceedings; while at the same time it sets the criteria to hold administrators accountable.<sup>62</sup> As one example of variation in external influences, Professor ANNE O'CONNELL uses meticulous evidence to show that in the United States congressional and presidential political transitions (*e.g.* from one presidential regime to another) may significantly affect agency decision-making.<sup>63</sup> Others have written about how variation in an administrative agency's legal and political external environment affects the risk of "capture" or "influence" by interest groups as a result of those groups' resources, specialized information, or special relations with administrators.<sup>64</sup>

<sup>60</sup> *Tennessee Valley Authority vs. Hill*, 437 U.S. 153, 194 (1978).

<sup>61</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>62</sup> Jerry L. Mashaw, *IMPROVING THE ENVIRONMENT OF AGENCY RULEMAKING: AN ESSAY ON MANAGEMENT, GAMES, AND ACCOUNTABILITY*, 57 *Law & Contemp. Probs.* 185, 187 (1994) ("The first assumption is that the rulemaking process in all administrative agencies is shaped by the interaction of the agency's internal and external environments. More controversially, the external environment is assumed to be dominant. The signals that an agency receives from its external, legal and institutional environment will ultimately cause the internal procedural and managerial environment of the agency to adapt in order for the agency to survive or prosper").

<sup>63</sup> O'Connell, *supra* note 24.

<sup>64</sup> Robert Kagan, *A Consequential Court: The U.S. Supreme Court in the Twentieth Century*, in *CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 199 (Kapiszewski, Silverstein & Kagan eds., 2013). Kagan explains that the American Administrative State was born from struggle and legal contestation because many federal statutes creating new agencies were constantly challenged on constitutional grounds and many of those statutes were endorsed by conservative judges. *See also, e.g.*, Sunstein, *Beyond Marbury*, at 2594 ("The foundations of *Chevron*, understood in the terms I have sketched out, are intensely pragmatic, and a challenge might be mounted on pragmatic grounds. Suppose we believe that executive agencies do not usually deploy technical expertise in a way that is properly disciplined by political accountability. Suppose we think that such agencies are often or largely controlled by well-organized private groups hoping to redistribute wealth or opportunities in their favor."); Elena Kagan, *PRESIDENTIAL*

### *The Administration and the Legislature*

Consider the relationship between administration and Congress in the United States. Commentators explain that, regardless if the congressional delegation of power is explicit or implicit,<sup>65</sup> administrative agencies are subject to congressional oversight in the form of budgetary control and of continuous consultations about their duties and their testimony before congressional appropriation committees that often have contrasting opinions on how administrators ought to carry out their responsibilities and jurisdiction.<sup>66</sup> In Colombia, Congress possesses the constitutional authority to call Ministers or High-rank administrators to congressional hearings or ask them to respond to written memoranda to consult or ask them about how they are carrying out their duties and jurisdiction. Highly sensitive political issues that are under the consideration of a given administrative body and that could eventually lead to an impeachment usually motivate congressional hearings of this sort. However, no one has been impeached since the Constitution became effective in 1991. A similar mechanism to hold administrators politically accountable for their actions (“*Moción de Observaciones*”) can be found at the local level but with the significant difference that City Councils are administrative bodies, unlike Congress<sup>67</sup>. There are other less formal methods of legislative “oversight” such as inviting Ministers or High-rank administrators to partake in congressional committee debates over specific matters. I venture to speculate that the reason behind this lack of a strong congressional oversight of administration may be that the administration’s political accountability is embedded –or diluted– in the highly legalistic administration model embraced by the Colombian administrative law tradition and endorsed by the Constitution of 1991, upon which I shall return on due course<sup>68</sup>.

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ADMINISTRATION, 114 Harv. L. Rev. 2245, 2264 - 2272 (2001); Sam Peltzman, TOWARD A MORE GENERAL THEORY OF REGULATION, 19 J.L. & Econ. 211, 214-20 (1976). For a general discussion on this point, *see, e.g.*, Paul J. Quirk, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981); Daniel Carpenter & David A. Moss (eds.), PREVENTING REGULATORY CAPTURE, SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2013).

<sup>65</sup> Elena Kagan, *supra* note 64, at 2255 – 2260.

<sup>66</sup> Mashaw, *supra* note 24, at 512; Mashaw, *supra* note 62, at 205 (“Over the past two decades Congress has included hundreds of action-forcing mandates, principally rulemaking deadlines, in federal agency legislation. The congressional tendency to demand action is in part a response to 1960s’ perceptions of a moribund and often “captured” agency regulatory process. That tendency has been sustained and consistently re-energized by Congress’s institutional competition with the Executive Office of the President as that Office, mostly through the OMB, has increased its oversight and review of the agency regulatory process. An almost continuous history of Republican presidents and Democratic Congresses has given partisan political impetus to this constitutionally sanctioned institutional competition. If ever there were an instance of the fulfillment of Madison’s expectation that “ambition [would check] ambition,” the last two decades of regulatory politics have provided that example”).

<sup>67</sup> L. 136/94, junio 2, 1994, Diario Oficial 41.377, junio 2, 1994 [D.O.] arts. 38 y 39 (Colom.). For the discussion about the nature, scope, and extent of the “*moción de observaciones*”, *see, e.g.*, Consejo de Estado [C.E.] [Council of State], First Chamber, febrero 17, 2000, C.P.: O. Navarrete Barrero, Expediente 5731 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 1998, M.P.: A. Martínez Caballero, Sentencia C – 405/98, Expediente D-1952, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 23, 1996, M.P.: A. Martínez Caballero, Sentencia T – 405/96, Expediente T-98281, (Colom.).

<sup>68</sup> For the general discussion about political oversight in Colombia, *see, e.g.*, German Lózano, CONTROL POLÍTICO EN EL ORDENAMIENTO CONSTITUCIONAL COLOMBIANO: ¿UN CONCEPTO DILUIDO EN EL CONTROL JURÍDICO O UNA IDEA QUE DEBE CONSOLIDARSE? (2010).



### *The Administration and the President*

Concerning the relationship between the administration and the President, the United States Constitution endows the President with the power to appoint the members of the Cabinet, other high-ranking administrative officials, and their top assistants or deputies with the advice and consent of Senate<sup>69</sup>. However, the President retains the power to remove executive officers at her discretion, which entails that administrators are expected to be loyal and responsive to the President's political and policy agenda<sup>70</sup>. In *Humphrey's Executor v. the United States*, the Supreme Court examined the nature, extent, and scope of the power of executive removal and ruled that the President may only remove executive officers at her discretion, as opposed to officers that exercise quasi-legislative or quasi-judicial functions that can only be removed pursuant to the causes and procedures established by Congress<sup>71</sup>. It must be noted that the President also appoints the head of the Office of Information and Regulatory Affairs – OIRA created by the Paperwork Reduction Act of 1980<sup>72</sup>, which SUNSTEIN describes as the “cockpit of the regulatory state” because it is charged with the responsibility of overseeing the quality of agency policy analysis and endorsing proposed new regulatory rules.<sup>73</sup>

One can find at least three different accounts of the administrative state's democratic accountability concerning different forms of presidential direction. According to the first interpretation, commentators argue that the President of the United States lacks any decision-making authority unless Congress expressly decides the otherwise, which makes her only an "overseer" not a "decider"<sup>74</sup>. A second string of commentators argues that the Constitution

<sup>69</sup> For the general discussion on this point, see, e.g., Cass R. Sunstein & Lawrence Lessig, THE PRESIDENT AND THE ADMINISTRATION, 94 Colum. L. Rev. 1 (1994); Russell L. Weaver, ADVICE AND CONSENT IN HISTORICAL PERSPECTIVE, 64 Duke L. J. 1717 (2015).

<sup>70</sup> Elena Kagan, *supra* note 64.

<sup>71</sup> 295 U.S. 602 (1935).

<sup>72</sup> Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–21 (2006 & Supp. V 2011)).

<sup>73</sup> Cass R. Sunstein, SIMPLER: THE FUTURE OF GOVERNMENT 3 (2013) (“The office oversees federal regulations involving clean air and water, food, safety, financial stability, national security, health care, energy, agriculture, workplace safety, sex and race discrimination, highway safety, immigration, education, crime, disability rights, and much more. As a general rule, no significant rule can be issued by any of the nation’s Cabinet departments—including the Department of Transportation, the Department of Treasury, the Department of State, and the Environmental Protection Agency— unless OIRA says so”). See also, e.g., Cass. R. Sunstein, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: MYTHS AND REALITIES, 126 Harv. L. Rev. 1838 (2013); Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, WHITE HOUSE REVIEW OF AGENCY RULEMAKING, 99 HARV. L. REV. 1075 (1986); Curtis W. Copeland, THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS IN FEDERAL RULEMAKING, 33 Fordham. Urb. L.J. 1257 (2006).

<sup>74</sup> Peter L. Strauss, OVERSEER, OR “THE DECIDER”?, THE PRESIDENT IN ADMINISTRATIVE LAW, 75 G.W. L. Rev. 696, (2007) 75 G.W. L. Rev. 696, (2007) (“Our Constitution explicitly gives us a unitary head of state, but it leaves the framework of government almost completely to congressional design. [...] Congress can, to be sure, give the President decisional authority, and it has sometimes done so. In limited contexts – foreign relations, military affairs, coordination of arguably conflicting mandates – the argument for inherent presidential decisional authority is stronger. But in the ordinary world of domestic administration responsibilities that Congress has delegated to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. Oversight, and not decision, is his

endows the President with decision-making authority over said matters based on an *originalist*<sup>75</sup> interpretation that emphasizes the Framers' intent and their original understanding about the nature, scope, and extent of the powers of government.<sup>76</sup> Finally, another group of commentators indicates that the Constitution did not vest decision-making authority on the President but that it should be presumed under the fiction that Congress intends it in light of modern administration techniques.<sup>77</sup>

On the Colombian side, the Constitution of 1991 leaves no room to question the President's constitutional decision-making authority and the executive branch's political or democratic accountability. Concerning the presidential direction of administrative bodies, Article 189 of the Constitution clearly states that the President is the Chief Executive ("*Máxima Autoridad Administrativa*") and she is endowed with the constitutional authority to appoint and remove the Ministers of the Cabinet and other high-rank administrative officials without any congressional consent or authorization<sup>78</sup>, to faithfully execute the law, to make the necessary administrative rules upon express congressional authorization though she can exert said authority without congressional authorization in certain events,<sup>79</sup> to determine the organic structure of the executive branch which encompasses the power to eliminate, restructure, and merge administrative bodies but not to create them<sup>80</sup> unless Congress explicitly vests such a power on the President,<sup>81</sup> to prepare and submit to Congress the administration's budget blueprint, and so on. In addition to this, Article 209 of the Colombian Constitution of 1991 established the guiding principles of the administrative function ("*Función Administrativa*"), which is the authority carry out by legal institutions or private individuals endowed with administrative power. On a comparatist note, it must be highlighted that "administrative function" is itself one of the most cryptic concepts in European and Latin American

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responsibility"); Stack, *supra* note 24; Cynthia R. Farina, THE CONSENT OF THE GOVERNED: AGAINST SIMPLE RULES FOR A COMPLEX WORLD, 72 Chi-Kent L. Rev. 987 (1997).

<sup>75</sup> Sunstein & Lessig, *supra* note 69, at 10 - 11. For the general discussion about *originalism*, see, e.g., Antonin Scalia, ORIGINALISM: THE LESSER EVIL, 57 U. Cin. L. Rev. 849 (1989); Frank H. Easterbrook, THE ROLE OF ORIGINAL INTENT IN STATUTORY CONSTRUCTION, 11 Harv. J.L. & Pub. Pol'y 59 (1988); Richard S. Kay, ADHERENCE TO THE ORIGINAL INTENTIONS IN CONSTITUTIONAL ADJUDICATION: THREE OBJECTIONS AND RESPONSES, 82 Nw. U. L. Rev. 226 (1988).

<sup>76</sup> Steven Calabresi & Saikrishna Prakash, THE PRESIDENT'S POWER TO EXECUTE THE LAWS, 104 Yale L. J. 541 (1994); Christopher S. Yoo, Steven G. Calabresi, and Anthony Colangelo, THE UNITARY EXECUTIVE IN THE MODERN ERA, 1945-2004, 90 Iowa L. Rev. 601 (2005).

<sup>77</sup> Elena Kagan, *supra* note 64.; Sunstein & Lessig, *supra* note 69.

<sup>78</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 189 - 1, 13.

<sup>79</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 189 - 11. A good example of this would be the administrative rule issued by the President regulating the process by which she picks the three nominees that she later submits to the Senate to fill in the vacancies in the Constitutional Court. The rule introduces a public procedure to choose the nominees. Nonetheless, the President retains her discretionary power to put together the list without giving any reason to justify her decision.

<sup>80</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 189 - 14, 15, 16, 17. The Constitutional Court has repeatedly held that the Constitution of 1991 endowed Congress with the power to create and decide the public administration's general structure, see, e.g., Corte Constitucional [C.C.] [Constitutional Court], septiembre 20, 1999, Sentencia C - 702/99, M.P.: F. Morón Díaz, Expediente D-2296 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], julio 24, 2013, Sentencia C - 473/13, M.P.: L. Guerrero Pérez, Expediente D-9445 (Colom.).

<sup>81</sup> Corte Constitucional [C.C.] [Constitutional Court], abril 20, 2004, Sentencia C - 349/04, M.P.: M. Monroy Cabra, Expediente D-4844 (Colom.). For a general discussion on this point, see, e.g., Libardo Rodríguez, LA ESTRUCTURA DEL PODER PÚBLICO EN COLOMBIA (2009).

administrative law.<sup>82</sup>

In Colombia, the legislation mandates that rule-making authority ought to be exerted by "Government," which means that the President must act jointly with a Minister of the Cabinet or High-rank administrative official under the formula President + Minister/High-ranking official = administrative rule. However, there are other administrative rules that further develop statutes or Presidential Decrees that are issued by incumbent administrative bodies according to express congressional or presidential delegations of rulemaking authority. The *McBean* case discussed in Chapter Two is a good example of this. Recall that, on the one hand, Congress endowed the President with rulemaking authority to further develop Law 99 of 1993 and, on the other, vested rulemaking authority on the Ministry of Environment to set out the territorial boundaries of the *McBean Lagoon* National Park. Also, it must be highlighted that the President's rulemaking authority is not to be confused with precise congressional delegations of legislative power. In fact, the Constitution of 1991 allows Congress to endow the President with *pro-tempore* legislative powers over specific matters, as opposed to the Colombian Constitution of 1886 that permitted broad and indefinite delegations of such power on the President.<sup>83</sup> In this event, the President acts as a *pro-tempore* deputy legislator via Legislative-Decrees that have the same legal force as congress-made legislation. Therefore, similar to what occurs in the United States, the Colombian constitutional structure of the relationship between the President and the Public Administration suggests that it is expected that administrators are loyal and responsive to the President's political and policy agenda.

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### *The Administration and the Judiciary*

The study of the relationship between the public administration and the judiciary requires an approach to the doctrines that have been advanced by the courts of the compared legal systems to review agency statutory interpretations, fact, and policy determinations. In doing so, rather than getting into the details of said judicial standards of review, my purpose is to describe how that interplay may influence the administrative reasoning behind any agency decision. In the United States, first one would face the dichotomy that courts defer to agencies' statutory interpretations but tend to take a "hard look" at their fact and policy determinations under stringent standards of review according to *State Farm*.<sup>84</sup> This section focuses on agency statutory interpretation, but I shall return upon the review of agency fact and policy determinations when I discuss administrative expertise.

Commentators explain that it was not until the 1930s when the Supreme Court began the

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<sup>82</sup> For a general discussion on this point, see, e.g., Alberto Montaña Plata, FUNDAMENTOS DE DERECHO ADMINISTRATIVO (2010); Alberto Montaña Plata, EL CONCEPTO DE SERVICIO PÚBLICO EN EL DERECHO ADMINISTRATIVO, (2005).

<sup>83</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 150 – 10.

<sup>84</sup> 463 U.S. 29, 43 (1983). Note, RATIONALIZING HARD LOOK REVIEW AFTER THE FACT, 122 Harv. L. Rev. 1909, 1909 – 1910 (2009).

tendency to endorse the executive's law-interpreting power.<sup>85</sup> But one could argue that the Supreme Court began defending the "policy-driven nature" of agency statutory interpretation even in the pre-New Deal era. Consider the *Interstate Commerce Commission v. Illinois Railroad Company* case where the Supreme Court, in an opinion written by Justice WHITE in 1910 who later that year became the Chief Justice, ruled that it was not the duty of the courts to "usurp merely administrative functions" by questioning the "wisdom" of administrative statutory interpretations.<sup>86</sup> Some commentators explain that the administration's responsibility and democratic accountability for deciding hard cases are not plenary but limited according to the nature of the question at stake.<sup>87</sup> Consider *FDA vs. Brown & Williamson Tobacco Corp.* where the Supreme Court rejected the Federal Drug Administration's decision to assert jurisdiction to regulate tobacco products<sup>88</sup>. In this case, the Supreme Court ruled "[a]s in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."<sup>89</sup> Bear in mind that this decision relies heavily on the Supreme Court's previous decision in *MCI Telecommunications Corp. v. AT & T* where it rejected the FCC's significant deregulatory initiative in the telecommunications industry.<sup>90</sup> In this decision written by Justice SCALIA, who was a staunch textualist, the Supreme Court went on dictionary shopping until it found the meaning of the word "modify" that best fit its policy considerations aimed at rejecting the possibility that administrative agencies could make significant policy changes without an express congressional authorization.<sup>91</sup>

On the account that *Chevron* deference rests upon the express or even "implicit" congressional delegations,<sup>92</sup> some commentators argue that *Chevron* deference may be

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<sup>85</sup> Sunstein, *Beyond Marbury*, at 2594; R. Shep Melnick, *COURTS AND AGENCIES IN MAKING POLICY, MAKING LAW* 89 (2004). For the historical overview of the executive law-interpreting power in the United States, see, e.g., Jerry L. Mashaw, *CREATING THE ADMINISTRATIVE CONSTITUTION. THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

<sup>86</sup> *Interstate Commerce Commission v. Illinois Railroad Company*, 215 U.S. 452, 470 (1910) ("Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question").

<sup>87</sup> Sunstein, *Beyond Marbury*, at 2594; Mashaw, *supra* note 24, at 541.

<sup>88</sup> 529 U.S. 120 (2000).

<sup>89</sup> *Id.* at 160.

<sup>90</sup> 512 U.S. 218, 231 (1994) ("Rate filings are, in fact, the essential characteristic of a rate-regulated industry. It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate filing requirements").

<sup>91</sup> For the discussion about the use of dictionaries in textual interpretation, see, e.g., Philip Rubin, *WAR OF THE WORDS: HOW COURTS CAN USE DICTIONARIES IN ACCORDANCE WITH TEXTUALIST PRINCIPLES*, 60 *Duke L. J.*, 167, (2010) ("Textualism demands adherence to an objective, original meaning of the text. Thus, it is no surprise that dictionaries are so appealing to textualists: dictionaries present an aura of objective authority, and there are dictionaries from any time period relevant for legal analysis. But fidelity to textualist principles requires a disciplined approach to using dictionaries because they are neither as objective nor as authoritative as they seem. And their misuse can lead to exactly what textualists often bemoan: the personal preferences of judges creeping into their interpretations of statutes or the Constitution").

<sup>92</sup> Cass R. Sunstein, *CHEVRON STEP ZERO*, 92 *Va. L. Rev.* 187, 231 (2006).

incompatible with “major questions” of great “economic and political significance” that require an express congressional enactment.<sup>93</sup> Commentators suggest, furthermore, that agency statutory interpretation under *Chevron* is limited to the cases where the question at issue is of a “micro-politics” nature, as opposed to “macro-politics” issues where reviewing courts seem to demand that Congress ought to make “major” law and policy changes.<sup>94</sup> Nonetheless, commentators are convinced that the distinction introduced by the Supreme Court may collapse in practice due to the difficulty of drawing a line between “major” and “interstitial” issues.<sup>95</sup> Thus in 2007, in a suit against the EPA brought by twelve state governments and major environmental advocacy organizations, the Supreme Court held, albeit by a narrow margin, that the EPA was obliged by the 1972 Clean Air Act to promulgate regulations to control the emission of greenhouse gases (which had not been regarded as a problem when the Act was passed).<sup>96</sup> Some commentators also contend that there is not a convincing argument that suggests that judges are in a better position to decide “major” questions.<sup>97</sup> Most importantly, it must be noted that reviewing courts should not defer to agency interpretations over constitutional issues.<sup>98</sup>

By contrast, the Colombian legalistic administration model is consistent with a legalistic judicial review that requires a strong judicial review of the legality of administrative decisions regardless of their nature. In fact, the Constitution of 1991 clearly mandates that the administration ought to discharge its duties and responsibilities within the boundaries established in the Constitution and legislation.<sup>99</sup> The Constitution dictates, furthermore, that it is the duty of administrative judges to review the legality of administrative actions.<sup>100</sup> I must introduce two caveats about the terminology that I will employ to describe the Colombian model of judicial review of agency action. The General Administrative Procedure Code does not contain any specific reference to “*de novo*” review or “*judicial remedy*.” First, administrative judges tend to review thoroughly the legal and factual basis for the agency decision as if it were for the first time. Second, regardless of the procedural or substantive

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<sup>93</sup> Sunstein, *Beyond Marbury*, at 2606 (“The Court seems to be saying that for decisions of great “economic and political significance,” an implicit delegation ought not to be found. And if an exception exists for major questions, then the executive's power of interpretation faces a large limitation”).

<sup>94</sup> Mashaw, *supra* note 24, at 541 (“Although they surely leave the dilemma of deference only partially resolved, the decisions in *Brown & Williamson* and *D.C. Federation* can also be read as sorting interpretive questions into different bins—micro-political intersections of politics and policy choice, where deference is owed, and macro-political intersections of interpretation and political-institutional structure, where it is not”).

<sup>95</sup> Sunstein, *Beyond Marbury*, at 2606.

<sup>96</sup> *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). In 2012, the EPA began to promulgate greenhouse gas controlling regulations. In February 2016, a 5-4 conservative majority on the United States Supreme Court blocked implementation of a 2015 EPA regulation intended to cut carbon emissions from electric power plants, pending the disposition of more than 25 lawsuits (filed by Republican state governments) challenging the legality of the regulation.

<sup>97</sup> Sunstein, *Beyond Marbury*, at 2606.

<sup>98</sup> *Id.* (“Most importantly, the executive is not permitted to construe statutes so as to raise serious constitutional doubts. This principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional. Instead it means that the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld. So long as the statute is unclear and the constitutional question serious, Congress must decide to raise that question via explicit statement.”); Mashaw, *supra* note 24, at 507 – 509.

<sup>99</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 4.

<sup>100</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 237.



nature of the standard of judicial review of agency action, administrative judges can nullify the administrative decision, grant damages when the plaintiff has suffered loss or injury due to an unlawful adjudication made by an agency, and eventually substitute their own for the administrative judgment under very specific circumstances upon which I shall return on due course.

Three aspects must be highlighted about of the relationship between the administration and administrative courts regarding political accountability. First, unlike the United States, in Colombia, there is no *practical* distinction between standards of judicial review of agency statutory interpretations and determinations of fact and policy. The General Administrative Procedure Code (Law 1437 of 2011) establishes the procedural and substantive standards of judicial review of agency action. On the one hand, similar to what occurs in certain European legal systems<sup>101</sup>, the Colombian system shifted from statutory procedural safeguards *per se* to the protection of the *administrative due process* that is recognized as a fundamental right in Article 29 of the Constitution of 1991<sup>102</sup>. The Constitutional Court has repeatedly held that any violation of the procedural safeguards that make up the administrative due process should entail the nullification of the agency decisions<sup>103</sup>. On the other, the General Administrative Procedure Code mandates that agency decisions should be nullified in the cases when they are arbitrary or capricious. I suggest there is no “practical” distinction because, though the General Administrative Procedure Code (Law 1437 of 2011) distinguishes the different legal (violation of the Constitution or legislation) and factual reasons (arbitrary and capricious) that may be invoked to petition for review of an administrative action, judges tend to review thoroughly the legal and factual basis for the agency decision. It must be noted that these standards of review are not exclusive but competitive in the sense that the plaintiff may invoke one or more in support of her claims.

Consider two cases where the Council of State dismissed the plaintiffs’ claims due to lack of standing but only after it had review thoroughly the legal and factual basis for the challenged administrative statutory interpretations and determinations of fact or policy. In the first case, a contractor challenged on legal and factual grounds the Colombian Ministry of Transportation’s determination to fix toll rates that in his opinion would likely alter the compensatory scheme of a highway concession contract. The plaintiff claimed that the administrative decision was illegal because it violated the statutory framework, as well as arbitrary and capricious because the Ministry did not assess all the factual circumstances that would directly affect the contract’s compensatory scheme.<sup>104</sup> In the second case, a mining company challenged on legal and factual grounds the Colombian Mining and Energy

<sup>101</sup> See, e.g., Susan Rose-Ackerman, Stefanie Egidy & James Fowkes, DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION 31 (2015); Eduardo Jordão & Susan Rose-Ackerman, JUDICIAL REVIEW OF EXECUTIVE POLICYMAKING IN ADVANCED DEMOCRACIES: BEYOND RIGHTS REVIEW, 66 Admin. L. Rev 1, 16 (2014).

<sup>102</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 29.

<sup>103</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 7, 1992, Sentencia T – 552/92, M.P.: F. Morón Díaz, Expediente T – 3.197 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], septiembre 13, 2010, Sentencia T – 722/10, M.P.: J. Pretelt Chaljub, Expediente T – 2.660.494 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], diciembre 12, 2012, Sentencia T – 1082/12, M.P.: J. Pretelt Chaljub, Expediente T – 3623056 (Colom.).

<sup>104</sup> Consejo de Estado [C.E.] [Council of State], Third Chamber, noviembre 30, 2006, C.P.: A. Hernández Enríquez, Expediente 13074 (Colom.).

Ministry's determination to deny a mining permit application. The plaintiff argued that the administrative adjudication was illegal because it violated the statutory framework and that its factual basis relied on an arbitrary or capricious technical report produced by the administration.<sup>105</sup>

These two cases share the salient feature that the disputes ensued over technical matters that required determinations of law, fact, and policy such as whether toll rates were consistent with a complex compensation scheme or whether a mining facility was compliant with the applicable regulation. As to the factual basis review, administrative judges tend to be somewhat limited to the claims, arguments, and evidence introduced by the concerned parties<sup>106</sup> but judges have the authority to ask for further evidence or even to call an expert witness to produce a technical report on a matter they deem necessary to decide the case at hand (“*Pruebas de Oficio*”).<sup>107</sup> Concerning the legal basis, the Council of State has insistently ruled that administrative judges must first review the constitutionality and legality of the challenged administrative decision regardless of the legal or factual nature of the plaintiff's claims. If the courts find the administrative decision unconstitutional, illegal, arbitrary or capricious, they will nullify it or declare it "void," without having the possibility of remanding it to the agency for further proceedings.<sup>108</sup> However, I shall come back to the judicial review of agency determinations of fact and policy under the arbitrary or capricious standard when I discuss administrative expertise.

Second, the General Administrative Procedure Code does not contain any provision that allows plaintiffs to challenge administrative rules or adjudications based on politics or policy arguments. Thus, a plaintiff cannot question the wisdom of a policy choice made by the administration *per se*. However, another way of framing the challenge against an administrative policy choice would be to argue that the administrative rule or adjudication violates a constitutional value, principle or goal since they carry a paramount moral and political weight that is often invoked by Congress and administrative decision-makers to justify their decisions regardless of the form of action. Articles 270 and 217 of Law 1437 of 2011 indicate that the Council of State's General Chamber may “unify” its precedent in cases that raise questions of a significant political, social or economic importance.<sup>109</sup>

This takes me to the third feature of the administration-courts relationship in Colombia. The Council of State's precedent has controlling authority over administrative decision-makers. Article 10 of Law 1437 of 2011 mandates that administrative authorities must carry out their duties, responsibilities, and jurisdiction pursuant to the Council of State's precedent.<sup>110</sup> The Constitutional Court upheld this provision and ruled that its precedent also has controlling

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<sup>105</sup> Consejo de Estado [C.E.] [Council of State], Third Chamber, octubre 31, 2007, C.P: M. Fajardo Gomez, Expediente 13503 (Colom.).

<sup>106</sup> In these two cases the Council of State explained that the plaintiffs did not provide pertinent evidence to prove that the agency decisions were arbitrary or capricious. *See, e.g.*, Consejo de Estado [C.E.] [Council of State], *supra* note 104; Consejo de Estado [C.E.] [Council of State], *supra* note 105.

<sup>107</sup> L. 1437/11, enero 18, 2011, Diario Oficial 47956, enero 18, 2011, [D.O.] art. 180.10 (Colom.).

<sup>108</sup> *Id.* at art. 189.

<sup>109</sup> *Id.* at arts. 270 – 271.

<sup>110</sup> *Id.* at art. 10.

authority over the administration.<sup>111</sup> Nevertheless, administrative authorities may “distinguish” judicial precedents on the condition that they must explain in detail the reasons why they consider their interpretation conveys a better understanding of the Constitution or legislation in comparison to the interpretations advanced by the Council of State and the Constitutional Court.<sup>112</sup> The interested parties may dispute the administration’s decision to distinguish the judicial precedent by asking the Council of State to review *de novo* such administrative interpretation.<sup>113</sup> If the Council of State deems the interpretation inconsistent with the Constitution or legislation, it will overrule the administrative decision and issue an injunction mandating the agency to comply with the judicial precedent<sup>114</sup>. It follows that Colombian administrative judges have the final word in matters of statutory interpretation and policymaking regardless of the form of action or the nature of the question at hand. Hence, Colombian administrative judges do not only dispense justice but also tend to act as administrators upon which I shall return in Chapter Five.

The constitutional and statutory design of Colombia’s administrative justice system suggests that, although administrative judges acknowledge the administrative power’s political accountability and expertise, they tend to review administrative decisions *de novo* according to legalistic standards of review. However, I want to particularly focus on the “political or governmental orders” doctrine introduced by the Council of State to describe the situations where the President exerts her rulemaking authority to address issues of a significant social, political or economic value. In a first stage, the notion of political or governmental actions was meant to explain the situations where the President’s actions as Chief of State over foreign affairs were not reviewable by the Council of State. A good example of this can be found in the case concerning the territorial dispute with Venezuela over *Los Monjes Archipelago*<sup>115</sup>.

The issue was whether the Minister of Foreign Affairs' diplomatic note asserting that Colombia had no objection to Venezuela's territorial claim over the archipelago was reviewable by administrative courts. Although the Minister’s diplomatic note resulted in the loss of Colombia’s territorial sovereignty over *Los Monjes*, the Council of State upheld it and ruled that Presidential decisions over foreign affairs acting as Chief of State were not subject to judicial review.<sup>116</sup> In a second stage, the General Administrative Procedure Code of 1984 dictated that political or governmental actions were not reviewable by administrative courts but for procedural aspects regardless if the President was acting as Chief Executive or Chief of State. However, the Colombian Supreme Court of Justice, which at the time had the authority to review the constitutional challenges against legislation, struck down this procedural restriction and ruled that the Chief Executive’s political or governmental actions

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<sup>111</sup> Corte Constitucional [C.C.] [Constitutional Court], agosto 24, 2011, M.P.: L. Vargas Silva, Sentencia C – 634/11, Expediente D – 8413 (Colom.).

<sup>112</sup> Id.; Corte Constitucional [C.C.] [Constitutional Court], julio 6, 2011, Corte Constitucional [C.C.] [Constitutional Court], julio 6, 2011, M.P.: L. Vargas Silva, Sentencia C – 539/11, Expediente D – 8351 (Colom.).

<sup>113</sup> L. 1437/11, *supra* note 107, at art. 269; Corte Constitucional [C.C.] [Constitutional Court], *supra* note 111.

<sup>114</sup> L. 1437/11, *supra* note 107, at art. 102, 269.

<sup>115</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, enero 28, 1976, C.P: A. Romero Aguirre, Expediente 1496 (Colom.).

<sup>116</sup> Id.

were also reviewable on substantive grounds<sup>117</sup>.

On this account, the Council of State posits that the Chief Executive's political or governmental orders are reviewable on both substantive and procedural grounds. Consider the case where the President declared the State of Emergency to address terrorism threats in 1996. The issue was whether the reasons that motivated this political decision were reviewable by administrative courts. The Council of State sitting *en banc* upheld the Presidential Decree in a rather cryptic decision. The Council ruled that, though presidential or governmental orders were administrative rules issued by the Chief Executive, the political reasons behind their enactment were unreviewable by administrative courts.<sup>118</sup> The Council of State reiterated this precedent in a 2010 case. The issue was whether a Decree enacted by the President calling Congress for extraordinary sessions was reviewable by administrative courts. Once again, the Council of State upheld the President's Decree and ruled that the salient feature of political or governmental orders is given by the political nature of the motives behind their enactment.<sup>119</sup>

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### *Administrative Reasoning & Expertise*

As was noted earlier, commentators suggest that administrative decision-makers ought to discharge their duties based on their experience and expertise.<sup>120</sup> We often talk about "expertise" as a distinctive knowledge in a given field that shall inform governmental decisions. Some commentators venture to label scientific advisory committees as the "fifth branch" of government due to the pivotal role of expertise in policymaking.<sup>121</sup> But what is "expertise" and why should lawyers care about it? Political philosophers and philosophers of expertise point out that,<sup>122</sup> since the time of MACHIAVELLI, political leaders have been advised to consult the wisdom of their decisions with experts.<sup>123</sup> This growing concern about the critical role of expertise in administrative decision-making is central to the works of MAX WEBER and his account of a specialized bureaucracy.<sup>124</sup>

In his book a *World of Struggle*, which focuses on how power, law, and expertise shape global political economy, Professor DAVID KENNEDY introduces an insightful framework to understand the interaction between expertise, politics, and law in policy-making.<sup>125</sup> KENNEDY distinguishes expertise from the "work" that experts carry out, which in his view

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<sup>117</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 15, 1984 (Colom.).

<sup>118</sup> Consejo de Estado [C.E.] [Council of State], General Chamber, septiembre 17, 1996, C.P: M. Méndez, Expediente CA - 001 (Colom.).

<sup>119</sup> Consejo de Estado [C.E.] [Council of State], General Chamber, febrero 16, 2010, C.P: M. Rojas Lasso, Expediente 11001-03-24-000-2009-00344-00(IJ) (Colom.).

<sup>120</sup> See *supra* note 24.

<sup>121</sup> Sheila Janasoff, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* (1990).

<sup>122</sup> See, e.g., Mark B. Brown, *SCIENCE IN DEMOCRACY: EXPERTISE, INSTITUTIONS, AND REPRESENTATION* (2009); Evan Selinger & Robert Crease, eds., *THE PHILOSOPHY OF EXPERTISE* (2006); David Kennedy, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

<sup>123</sup> Niccolo Machiavelli, *THE PRINCE AND SELECTED DISCOURSES* 80 (Daniel Donno trans., 1966).

<sup>124</sup> See generally Max Rheinstein, ed., *MAX WEBER ON LAW IN ECONOMY AND SOCIETY*, (1966).

<sup>125</sup> Kennedy, *supra* note 122, at 128.

consists in “[...] translating the known into action and knitting the exercise of power back into the fabric of fact.”<sup>126</sup> He explains that the work of experts is characterized by a high degree of disagreement insofar as they “[...] struggle with one another using tools of interpretation, articulation, and persuasion that are, when effective, at once words and authority.”<sup>127</sup> In this context, KENNEDY places “policy” right at the intersection between knowledge and politics, which in his view is “[...] an applied amalgam of both, more practical than science, more knowledgeable and reasoned than politics.”<sup>128</sup>

The Higher Courts of the United States and Colombia have explicitly acknowledged that expertise plays a major role in statutory interpretation and in making fact or policy determinations on the assumption that administrators are equipped with the necessary expertise in the form of administrative discretion to construe ambiguous statutes and make policy decisions. Although they both agree that expertise must prevail over the administrator’s personal morality, the evolution of the nature, extent, and scope of administrative discretion has been controversial and fluctuating over time according to different concepts about the nature of law or adjudication, as well as responsive to the different stages of the administrative state and shifting political circumstances.<sup>129</sup>

Since the works of FELIX FRANKFURTER and JAMES LANDIS,<sup>130</sup> American administrative law places heavy emphasis on administrative expertise and professional judgment in support of administrative decision-making authority to protect it from political pressure by Congress members and interest groups.<sup>131</sup> A further distinction must be made. The APA and case law have articulated a set of different procedural and substantive standards of judicial review of administrative action.<sup>132</sup> While the former focuses on reviewing whether the administrative decision was made pursuant to the procedural requirements or safeguards contained in the APA according to Section 706 (2)(D),<sup>133</sup> the latter is aimed at determining whether the “substance” of the administrative decision is “arbitrary or capricious” according to Section

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<sup>126</sup> *Id.* at 108.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 128.

<sup>129</sup> Martin Shapiro, *Judicial Activism*, in *THE THIRD CENTURY: AMERICA AS A POST-INDUSTRIAL SOCIETY* 110 (Seymour Lipset ed., 1979); Martin Shapiro, *APA: PAST, PRESENT, FUTURE*, 72 *Va. L. Rev.* 447, 477 (1986); Daniel B. Rodriguez, *JAFFE’S LAW: AN ESSAY ON THE INTELLECTUAL UNDERPINNINGS OF MODERN ADMINISTRATIVE LAW THEORY*, 72 *Chi Kent L. Rev.* 1159 (1997); Thomas W. Merrill, *CAPTURE THEORY AND THE COURTS: 1967 – 1983*, 72 *Chi Kent L. Rev.* 1039 (1997).

<sup>130</sup> See Chapter III for a detailed discussion about the influence of the work of FRANKFURTER and LANDIS in the formation of American administrative law.

<sup>131</sup> Felix Frankfurter, *THE PUBLIC AND ITS GOVERNMENT* 157 - 160 (1930). See also, e.g., Jerry Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance, Co.: Law, Science and Politics in the Administrative State*, in *ADMINISTRATIVE LAW STORIES* 394 (Peter L. Strauss ed., 2006); James Freedman, *Crisis and Legitimacy in the Administrative State* (1978); Steven P. Croley, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2007); Mark Tushnet, *ADMINISTRATIVE LAW IN THE 1930S: THE SUPREME COURT’S ACCOMMODATION OF PROGRESSIVE LEGAL THEORY*, 60 *Duke L. J* 1566, 1575 (2011); Daniel R. Ernst, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900 – 1940*, 26 (2014).

<sup>132</sup> Rose-Ackerman, Egidy & Fowkes, *supra* note 101, at 31; Jordão & Rose-Ackerman, *supra* note 101, at 16; Thomas W. Merrill, *The Origins of American-Style Judicial Review*, in *COMPARATIVE ADMINISTRATIVE LAW* 389 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

<sup>133</sup> 5 U.S.C. § 706 (2)(D) (“without observance of procedure required by law.”)



706 (2)(A) of the APA.<sup>134</sup> Furthermore, the standards judicial of review vary depending on the form of administrative action regarding which administrative decision-makers have discretion to choose the form of action they deem appropriate, except in the cases where statutes mandate them to follow a specific one.<sup>135</sup> Commentators suggest that the difference between said standards tends to be “blurry” in practice due to the difficulty of distinguishing pure questions of statutory interpretation from questions where law, policy, and fact are intertwined.<sup>136</sup> Some commentators even suggest the existence of a third “quasi-procedural” standard of review that demands agencies a “heightened requirement of reasoned elaboration.”<sup>137</sup>

Judicial review of agency statutory interpretation is governed by *Chevron*. Based on *Chevron*, Professor SUNSTEIN asserts that there is a strong “link between the realists’ emphasis on the policy-driven nature of interpretation and the New Deal’s enthusiasm for administrators [...]”<sup>138</sup> and their expertise, for which he considers JAMES LANDIS’ ideas about the administrative process essential. Consider *Chevron* where the Supreme Court recognized that “[j]udges are not experts in the field” concerning the technical assessment of the bubble policy. However, commentators point out that reviewing courts not always defer to agency statutory interpretations under *Chevron* insofar as they may strike them down if they lack the “power to persuade”<sup>139</sup> according to the standard of review articulated in *Skidmore*, *Mead*, and *Christiansen*, which the Supreme Court deems similar to the “arbitrary or capricious” test.<sup>140</sup>

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<sup>134</sup> 5 U.S.C. § 706 (2)(A) (“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”)

<sup>135</sup> Nat'l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion”). For the discussion about agency choice of policymaking form, see, e.g., M. Elizabeth Magill, AGENCY CHOICE OF POLICYMAKING FORM, 71 U. Chi. L. Rev. 1383 (2004).

<sup>136</sup> Kennedy, *supra* note 122, at 16; Merrill, *supra* note 132, at 389.

<sup>137</sup> Christopher F. Edley, Jr., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 220 (1990); Merrick Garland, DEREGULATION AND JUDICIAL REVIEW, 98 Harv. L. Rev. 505, 530 (1985) (“There is, however, another side to this argument. Although the hard look requirements do have a procedural tinge, they may more appropriately be referred to as ‘quasi-procedural’ because they also have a substantive aspect. At bottom, they focus not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decisionmaking record the agency must produce to survive judicial review; the method of generating the record is left to the agency itself. Their concern is not with the external process by which litigants present their arguments to the agency, but with the internal thought process by which an agency decisionmaker reaches a rational decision. Thus, these requirements can be said to flow not from the APA's procedural dictates, but from its substantive command that agency decisionmaking not be ‘arbitrary’ or ‘capricious.’”); Jordão & Rose-Ackerman, *supra* note 101, at 16.

<sup>138</sup> Sunstein, *Beyond Marbury*, at 2594.

<sup>139</sup> Christensen v. Harris County, 529 U.S. 576, 587 (2000).

<sup>140</sup> Jordão & Rose-Ackerman, *supra* note 101, at 45 (“The reasoning approximates the arbitrary and capricious standard, but applied to statutory interpretation rather than policymaking under a clear legal mandate.”). See, e.g., Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-81 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act”); Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996) (“Whether it is ‘arbitrary [or] capricious’ as an interpretation of what the statute means—or perhaps even (what *Chevron* also excludes from deference) ‘manifestly contrary to the statute’ [...]. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation may be ‘arbitrary, capricious [or] an abuse of discretion.’”).

In *Skidmore* and *Mead*, for example, the Supreme Court held that the “[p]ursuit of his duties [the administrator’s] has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution,” which entails the administration’s policies are “entitled to respect”<sup>141</sup> but only when the “validity of its reasoning”<sup>142</sup> is persuasive. Likewise, in *TVA v. Hill*, the Supreme Court ruled that judges “[...] have no expert knowledge on the subject of endangered species [...]” and that the Constitution vested the responsibility for administering statutes in the executive branch of power.<sup>143</sup> *Chevron* is itself consistent with the previous precedent. Let me put these opinions into context with previous Supreme Court decisions on agency expertise.

Back in 1894, the Supreme Court held in *Reagan v. Farmers' Loan & Trust Co.* that administrative agencies were mere instruments of legislation. Based on a *formalist* perspective, the Supreme Court ruled that a “[...] commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation”.<sup>144</sup> In 1914, amidst the *realist* assault on *legal formalism*, the Supreme Court ruled that Congress created the Interstate Commerce Commission - ICC to “bring into existence” a particular body of law and that courts shall not substitute their judgment for that of the administrative agencies because that would transform them into a fact-finding instrument.<sup>145</sup> Then, in 1918, the Supreme Court ruled that Congress had entrusted the ICC with the “judgment and discretion” to administer the statute and that its decisions “are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.”<sup>146</sup>

Similarly, *United States Navigation Co., Inc., v. Cunard S.S., Ltd, et al.* is another striking example of how courts recognize that statutory ambiguities over technical matters ought to be resolved by administrative agencies based on their discretion in order to preserve

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<sup>141</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 – 138, 140 (1944).

<sup>142</sup> *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

<sup>143</sup> *TVA v. Hill*, *supra* note 60, at 194 – 195.

<sup>144</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 394 (1894). *See also* *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348; *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 343 - 44 (1886) (“Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the state. This we held, in *Ruggles v. Illinois*, included laws in force when the charter was granted, and those which came into operation afterwards as well”).

<sup>145</sup> *U.S. v. Louisville & N. R. Co.*, 235 U.S. 314, 320-321 (1914) (“[I]t plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. [...] It cannot be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action”).

<sup>146</sup> *Manufacturers' RY. CO. et al. v. U.S. et al.*, 246 U.S. 457, 481 (1918).

“uniformity” in decision-making.<sup>147</sup> Consider also a 1937 case where the Supreme Court acknowledged that Congress instituted administrative agencies with the purpose of administering legislation based on their “informed judgment and discretion” and ruled that a court “[...] is not authorized to substitute its own for the administrative judgment.”<sup>148</sup> Finally, commentators point out that it was not until 1941 when the Supreme Court upheld in *Gray v. Powell* a debatable statutory interpretation advanced by the Department of the Interior<sup>149</sup> and ruled that it “[...] is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action.”<sup>150</sup>

By contrast, section 706 (2)(A) of the APA dictates that judges ought to set aside agency fact and policy determinations they deem “arbitrary, capricious, [or] an abuse of discretion.”<sup>151</sup> Commentators explain that the “hard look” doctrine is mainly underpinned in *Chenery I* and *Overton Park*. In the first case, the parties disputed the way in which the SEC handled a re-organization process involving a public utilities company.<sup>152</sup> The Supreme Court strengthened the “arbitrary or capricious” review of administrative policymaking by ruling that “[...] the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>153</sup> In *Citizens to Preserve Overton Park*, the point of contention stemmed from the Secretary of Transportation’s failure to provide contemporaneous reasons behind his decision about the location of an interstate highway.<sup>154</sup> The Supreme Court construed the “arbitrary or capricious” standard of review as “searching and careful” scrutiny into “[...] whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>155</sup>

The famous discussion between Chief Judge DAVID BAZELON and Judge HAROLD LEVENTHAL best exemplifies the tension that “arbitrary or capricious” review might elicit in practice concerning judicial review of highly technical questions.<sup>156</sup> In *Ethyl Corp.* the

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<sup>147</sup> *United States Navigation Co., Inc., v. Cunard S.S., Limited, et al.*, 284 U.S. 474, 481 (1932) (“Preliminary resort to the Commission [ICC] ‘is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission’”).

<sup>148</sup> *Swayne & Hoyt v. U.S.*, 300 U.S. 297, 303 – 304 (1937). “Both have set up an administrative agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders. Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment”.

<sup>149</sup> Sunstein, *Beyond Marbury*, at 2594.

<sup>150</sup> 314 U.S. 402, 412 (1941).

<sup>151</sup> 5 U.S.C.

<sup>152</sup> For a detailed reconstruction of this case and the *Chenery II* case, see, e.g., Roy A. Schotland, *A Sporting Proposition – SEC v. Chenery*, in *ADMINISTRATIVE LAW STORIES* 394 (Peter L. Strauss ed., 2006); Russell L. Weaver & Linda D. Jellum, *CHENERY II AND THE DEVELOPMENT OF FEDERAL ADMINISTRATIVE LAW*, 58 *Admin. L. Rev.* 815 (2006).

<sup>153</sup> *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

<sup>154</sup> For a detailed reconstruction of this case, see, e.g., Peter L. Strauss, *REVISITING OVERTON PARK: POLITICAL AND JUDICIAL CONTROLS OVER ADMINISTRATIVE ACTIONS AFFECTING THE COMMUNITY*, 39 *UCLA L. Rev.* 1251 (1992).

<sup>155</sup> *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>156</sup> For the general discussion about this case, see, e.g., Thomas Drechsler, *PUBLIC HEALTH ENDANGERMENT AND STANDARDS OF PROOF: ETHYL CORP. v. EPA*, 6 *B.C. Envtl. Aff. L. Rev.* 227 (1977),

controversy arose over the regulatory limits imposed by the EPA on lead additives in gasoline under Section 211(c)(1)(A) of the Clean Air Act.<sup>157</sup> In an opinion written by Judge WRIGHT, the Court of Appeals for the District of Columbia Circuit sitting *en banc* upheld the EPA's regulatory limits because it deemed them consistent with the Clean Air Act.<sup>158</sup> Yet Judges BAZELON and LEVENTHAL disagreed about the scope and extent of judicial scrutiny concerning highly technical or scientific matters. On the one hand, Chief Judge BAZELON argued in a concurring opinion that reviewing courts should refrain themselves from scrutinizing evidentiary support of highly technical decisions.<sup>159</sup> In his view, “[t]he process of making a *de novo* evaluation of the scientific evidence inevitably invites judges of opposing views to make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data.”<sup>160</sup> By contrast, Judge LEVENTHAL in a concurring opinion suggested that the collaborative interplay between Congress and courts requires judges to review highly technical decisions in order to “[...] assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”<sup>161</sup>

The Supreme Court articulated the so-called “hard look” doctrine in *State Farm*. In this case, the controversy ensued over a decision by President RONALD REAGAN’s National Highway Traffic Safety Administration – NHTSA to repeal regulations issued under the previous administration requiring the inclusion of passive restraints such as airbags or automatic seatbelts in vehicles manufactured after a certain date.<sup>162</sup> The NHTSA concluded, on the one hand, that vehicle manufacturers would prefer to comply with the regulation by installing seatbelts rather than airbags, and on the other, that the regulation would eventually fail to increase seatbelt use to the degree that would justify its implementation costs. Nonetheless, the United States Supreme Court rejected the NHTSA’s conclusions and ruled in a landmark decision that “[...] an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>163</sup>

Recently, in *FCC v. Fox Television Stations*, the Supreme Court was confronted with the issue whether agency regulatory policy shifts were subject to heightened judicial scrutiny.

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<sup>157</sup> 40 C.F.R. s 80 (1975).

<sup>158</sup> Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (1976).

<sup>159</sup> Id. at 66 (Bazelon, J., concurring). For a detailed discussion on this point, *see, e.g.*, David L. Bazelon, COPING WITH TECHNOLOGY THROUGH THE LEGAL PROCESS, 62 Cornell L. Rev. 817 (1977); David L. Bazelon, SCIENCE AND UNCERTAINTY: A JURIST VIEW, 5 Harv. Envtl. L. Rev. 209, 211 (1981) (“Courts lack the technical competence to resolve scientific controversies; they lack the popular mandate and accountability to make the critical value choices that this kind of regulation requires. The court’s role is rather to monitor the agency’s decisionmaking process-to stand outside both the expert and political debate and to assure that all the issues are thoroughly ventilated.”).

<sup>160</sup> Ethyl Corp., *supra* note 158, at 66 (Bazelon, J., concurring).

<sup>161</sup> Id. at 67 (Leventhal, J., concurring).

<sup>162</sup> For a detailed discussion of this case, *see, e.g.*, Mashaw, *supra* note 131, at 394; Peter L. Strauss, OVERSEERS OR “THE DECIDERS” – THE COURTS IN ADMINISTRATIVE LAW, 75 U. Chi. L. Rev. 815 (2008); Garland, *supra* note 137.

<sup>163</sup> *State Farm*, *supra* note 84, at 43.

The Court rejected the Second Circuit’s interpretation and held that the APA does not contain any provision that requires heightened judicial scrutiny into agency action that changes previous policy<sup>164</sup>. Furthermore, the Supreme Court ruled that “[...] *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance”<sup>165</sup>. Finally, I must flag out that the APA introduced in Section 706 (2)(E) another standard of review for on-the-record agency fact-finding, which requires that such agency determinations be struck down if “unsupported by substantial evidence.”<sup>166</sup> Nonetheless, some commentators argue the application of this standard of review shares similarities with the “arbitrary or capricious” test.<sup>167</sup>

Similar to the United States Supreme Court precedent that has been incremental towards the recognition of strong administrative expertise since the New Deal but retaining the power to review administrative procedure and substance, Colombian case law has gone through different stages where the Constitutional Court and the Council of State have advanced jarring positions that tend to echo the never-ending European doctrinal debate over administrative discretion. For now, I want to describe the evolution that Colombian case law has experienced concerning Article 44 of Law 1437 of 2011,<sup>168</sup> which mandates that discretionary judgments ought to be reasonable with the facts, merits, and purposes that the administrative decision seeks to fulfill.<sup>169</sup> In the first stage, the Constitutional Court ruled that administrative decisions that are based upon technical criteria are not subject to judicial review. The issue was whether the Constitutional Court could review in *tutela* the decision of an administrative authority to dismiss an administrative official that could not longer discharge his duties due to severe illness. The Court upheld the administrative decision and ruled that, though administrative discretionary decisions based on “highly technical criteria” are unreviewable by judges, such administrative decisions may be subject to judicial review in the cases where there is a constitutional issue at stake<sup>170</sup>.

In a similar opinion, the Constitutional Court asserted that, although administrative discretionary decisions based on “highly specialized” scientific criteria were not reviewable by judges in *tutela*, administrative judges possess the authority to determine whether such decisions are arbitrary or capricious pursuant to Article 36 of the General Administrative Procedure Code of 1984<sup>171</sup>. In a second stage, the Constitutional Court moved on to reject

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<sup>164</sup> FCC v. Fox Television Stations, Inc., 556 U.S. 502, 1810 (2009).

<sup>165</sup> Id.

<sup>166</sup> For the description of the substantial evidence test, see, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366-367 (1998); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 – 491 (1951).

<sup>167</sup> Thomas J. Miles & Cass R. Sunstein, THE REAL WORLD OF ARBITRARINESS REVIEW, 75 U. Chi. L. Rev. 761, 764 (2008); Note, *supra* note 84, at 1910; Bangor Hydro-Elec. Co. v. Fed. Energy Regulatory Comm’n, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) (“The APA’s ‘substantial evidence’ and ‘arbitrary and capricious’ standard connotes the same substantive standard of review.”).

<sup>168</sup> It must be noted that this provision repealed and replaced Art. 36 of Decreto 01 of 1984, which contained the same mandate.

<sup>169</sup> L. 1437/11, *supra* note 107, at art. 44.

<sup>170</sup> Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T – 427/92, M.P.: E. Cifuentes Muñoz, Expediente T – 936 (Colom.).

<sup>171</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 4, 1993, Sentencia T – 418/93, M.P.: A. Martínez Caballero, Expediente T – 14.813 (Colom.).



the argument that administrative decisions based on “highly specialized technical or scientific criteria” were unreviewable by courts. The issue was whether judges could review in *tutela* the reasons that led Colombia’s Child Protection Services agency to reject an adoption petition filed by a Belgian couple. The Constitutional Court struck down the administrative decision that denied the adoption under the argument that discretionary decisions cannot rely on the administrator’s personal morality, as it occurred in the case at hand, but rather on “universally accepted” technical or scientific criteria that are subject to judicial review<sup>172</sup>.

The Council of State introduced an intermediate or eclectic position about the role of experience and expertise in administrative decision-making and the standards for its judicial review<sup>173</sup>. The Council asserted that experience and expertise are essential to modern administrative governance to the extent that they serve as the basis to adjudicate individual disputes and make policy decisions<sup>174</sup>. Nevertheless, the Council of State introduced a distinction between purely “technical decisions” and “discretionary decisions based on technical or scientific data.”<sup>175</sup> For the Council, the former refers to the decisions where the administration relies on technical or scientific standards that suggest one only “lawful” correct answer to the question at issue.<sup>176</sup> Contrariwise, the latter denotes the decisions where technical or scientific data suggest more than one possible correct answer to the question at stake and the administration must choose one of them by appealing to “impartial and reasonable” criteria based on its discretion.<sup>177</sup> On these grounds, the Council of State distinguishes “technical questions” from “highly technical questions.”<sup>178</sup>

Despite this distinction, the Council of State held that administrative decisions are reviewable by administrative courts *de novo* but according to different standards of review.<sup>179</sup> On the one hand, regarding simple “technical questions,” the Council asserted that reviewing courts are not to be bound by the technical or scientific conclusions reached by the administrative authority, which entails they must review *de novo* such administrative conclusions along with all the other evidence introduced to the judicial proceedings, including but not limited to expert witnesses.<sup>180</sup> On the other, concerning “highly technical or complex questions,” the Council of State set two sub-standards of review.<sup>181</sup>

First, when reviewing courts determine that technical or scientific data suggests more than one “lawful” answer to the question at hand, they must examine whether the technical or scientific reasons provided by the administration in support of its decision are arbitrary or

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<sup>172</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 20, 1998, Sentencia T – 587/98, M.P.: E. Cifuentes Muñoz, Expediente T – 164386 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 23, 1994, Sentencia C – 071/94, M.P.: A. Martínez Caballero, Expediente D – 380 (Colom.).

<sup>173</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 105.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

capricious<sup>182</sup>. Thus, reviewing courts must strike down administrative decisions that are arbitrary or capricious. Second, when reviewing courts conclude that technical or scientific data suggests only one “lawful” answer to the question at issue, they must determine whether the administration choose that one “lawful” answer<sup>183</sup>. If the administration did not choose that "one only correct lawful solution," then reviewing courts should strike down the administrative decision and choose the only "lawful" solution by substituting their own for the administrative judgment.<sup>184</sup> Finally, the Council of State asserts that it is the duty of the plaintiff to assume the burden of proof in all of these scenarios.<sup>185</sup> Finally, it must be highlighted that Colombian courts tend to appeal to *ad-hoc* expert witnesses (*péritos*) and the technical reports (*dictamen pericial*) they are commissioned to produce during the judicial proceedings to review the administrative record and the "post-hoc rationalizations" made by the defendant. Technical witnesses may be public institutions or private individuals that do not hold any office or public appointment. They are commissioned to produce an *ad-hoc* technical report about the question at issue with the purpose of informing the reviewing court on the technical aspects of the litigation. However, reviewing courts possess discretion to follow or dismiss the conclusions of the technical report.<sup>186</sup>

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### ***The Administrative Power to Say What the Law Is in Comparative Law Perspective***

In this Chapter I have presented a handful of the variables that allowed me to describe how the administration's political or democratic accountability and expertise is structured in the United States and Colombia. This overview suggests that, although both legal systems speak the language of legality, the nature, scope, and extent of the administrative power's political accountability varies according to different constitutional schemes, institutional arrangements, political forces, and so on. I must clarify, however, that this is just an overview of how the administrative power's political accountability and expertise are managed in the compared legal systems according to the precedent of the Higher Courts. I acknowledge that there are many variables at stake that have set the backdrop against which the Higher Courts of the United States and Colombia have developed their account of democratic or political accountability, administrative expertise, discretion, and the scope of judicial review such as legal traditions, constitutional schemes, political distrust, and so on. Yet the detailed study of such variables and their empirical verification goes beyond the purposes of this dissertation.

Concerning the administrative power's democratic accountability, I want to specifically focus on the “political or governmental order” doctrine advanced by Colombian Council of State introduced to describe the situations where the Chief Executive is in a better position than the other two branches of government to decide questions of a significant social, political or economic nature. However, it must be noted that a vast array of situations ranging from

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<sup>182</sup> Id.

<sup>183</sup> Id.

<sup>184</sup> Id.

<sup>185</sup> Id.

<sup>186</sup> Consejo de Estado [C.E.] [Council of State], Third Chamber, marzo 6, 2013, C.P: E. Gil Botero, Expediente 13001-23-31-000-2001-00051-01 (Popular Action) (Colom.).

foreign affairs to domestic policy questions may fall within the scope of this doctrine due to the cryptic language employed by the Council of State, which entails that the extent of judicial review over these issues may vary accordingly. Put it differently, although the Council of State asserts that political or governmental orders are reviewable on both procedural and substantive grounds, the case law suggests that the Council is likely to defer to the President's constitutional and statutory interpretations regardless if the question at stake is about foreign affairs or domestic public policy.

From a comparative perspective, the "political or governmental order" doctrine differs from the "major question" doctrine advanced by United States Supreme Court in a fundamental aspect. While the former doctrine is aimed at reaffirming the broad presidential powers over significant foreign affairs and critical political decisions like declaring the State of Emergency, the latter is meant to reject major policy changes made by administrative agencies without a clear congressional authorization. It is noteworthy that the Colombian Council of State has not yet developed a doctrine to review "major" or "interstitial" domestic policy shifts made by the President and the public administration, which in my view is consistent, in principle, with their undisputed political authority over domestic policy affairs and the legalistic nature of judicial review.

Despite this significant distinction, both doctrines share common ground: judges have the final word to determine what constitutes a major or significant question, though they retain such authority by different means. On the account that *Chevron* deference rests upon explicit or "implicit" congressional delegations, the administration's political accountability to make significant or "major" policy decisions is limited by a Supreme Court precedent that rests upon a textualist interpretive methodology that accommodates the judges' personal policy preferences with sophisticated –or convenient– semantics. By contrast, on the assumption that the Constitution of 1991 unambiguously endowed President and the administration with political authority to execute what Congress enacts in general terms by means of policy-driven interpretations, the Colombian Council of State appeals to originalist interpretations of the Constitution, cryptic formulas, and sloppy language aimed at acknowledging the policy-driven nature of such administrative decisions but retaining the authority to review their wisdom.

Likewise, the precedent of the Higher Courts of the compared legal systems is divided concerning administrative expertise and judicial review. In the United States, for example, courts defer to agency statutory interpretations under *Chevron* but tend to take a "hard look" at agency fact and policy determinations under stringent standards of review according to *State Farm*.<sup>187</sup> I want to focus on the "arbitrary or capricious" review regarding administrative reasoning. The "hard look" doctrine plays a major role in shaping administrative reasoning insofar as it requires administrative agencies to provide detailed statutory, technical or scientific reasons of their decisions<sup>188</sup>, ponder different feasible alternatives, and make reasonable policy determinations.<sup>189</sup> Furthermore, it precludes judges

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<sup>187</sup> *State Farm*, *supra* note 84, at 43.

<sup>188</sup> Kathryn A. Watts, PROPOSING A PLACE FOR POLITICS IN ARBITRARY AND CAPRICIOUS REVIEW, 119 *Yale L. J.* 2, 5 (2009).

<sup>189</sup> For the general discussion about the "hard look" doctrine, *see, e.g.*, Shapiro, APA: PAST, PRESENT, FUTURE,

from substituting their own policy views for that of the agency with the purpose of improving “policymaking accountability” by limiting judicial scrutiny into the substance of agency decisions,<sup>190</sup> while at the same time it prevents administrative agencies from providing “post-hoc rationalizations” for challenged decisions.<sup>191</sup> However, the doctrine is not itself without controversy. Commentators accuse the “hard look” doctrine of excluding politics from arbitrary and capricious review<sup>192</sup> and for focusing only on requiring agencies “detailed, even encyclopedic explanations”<sup>193</sup> of technocratic or scientific nature for their decisions, which might lead to potential delays and “ossification.”<sup>194</sup> Others have suggested that judges do not have access to all the relevant information nor they possess the expertise to assess in detail the reasons given by administrative agencies to defend the decision under judicial scrutiny.<sup>195</sup> Concerning the doctrine’s application domains, some commentators argue that *FCC v. Fox Television* left many unresolved issues, particularly about the standards that should be employed by reviewing courts to identify agency action that changes previous policy<sup>196</sup>. Finally, some commentators have claimed that the “hard look” doctrine is “[...] so indeterminate that any judge could manipulate it to obtain her preferred outcome.”<sup>197</sup>

In short, one could restate the United States Supreme Court's long-standing precedent on administrative expertise as follows: Unlike judges that have no expertise in technical matters, administrative agencies have been vested with the democratic responsibility to bring law into existence by appealing to their prompt action, informed judgment, and discretion aimed at the preservation of uniformity and programmatic effectiveness in statutory interpretation and policy-making. Thus, a reviewing court should not substitute its own for the administrative judgment. This represents a sharp difference with the Colombian system. The Higher Courts of Colombia acknowledge that administrative discretion and expertise are fundamental to

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*supra* note 129, at 477; Colin S. Diver, POLICYMAKING PARADIGMS IN ADMINISTRATIVE LAW, 95 Harv. L. Rev. 393, 411-12 (1981); Stephen Breyer, JUDICIAL REVIEW OF QUESTIONS OF LAW AND POLICY, 38 Admin. L. Rev. 363 (1986); Jerry L. Mashaw & David L. Harfst, REGULATION AND LEGAL CULTURE: THE CASE OF MOTOR VEHICLE SAFETY, 4 Yale J. On Reg. 257 (1987); Thomas O. Sargentich, THE CRITIQUE OF ACTIVE JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES: A REEVALUATION, 49 Admin. L. Rev. 599 (1997); Sidney A. Shapiro & Richard E. Levy, HEIGHTENED SCRUTINY OF THE FOURTH BRANCH: SEPARATION OF POWERS AND THE REQUIREMENT OF ADEQUATE REASONS FOR AGENCY DECISIONS, 1987 Duke L.J. 387 (1987); Miles & Sunstein, *supra* note 167, at 772; Mathew C. Stephenson, A COSTLY SIGNALING THEORY OF “HARD LOOK” JUDICIAL REVIEW, 58 Admin. L. Rev. 753 (2006).

<sup>190</sup> Jordão & Rose-Ackerman, *supra* note 101, at 44.

<sup>191</sup> Chenery, *supra* note 153, at 95; Overton Park, *supra* note 155, at 409, 420 - 421. See, e.g., Adrian Vermeule, JUDGING UNDER UNCERTAINTY (2006); Cass R. Sunstein & Adrian Vermeule, INTERPRETATION AND INSTITUTIONS, 101 Mich. L. Rev. 885 (2003); Jerry L. Mashaw, SMALL THINGS LIKE REASONS ARE PUT IN A JAR: REASON AND LEGITIMACY IN THE ADMINISTRATIVE STATE, 70 Fordham L. Rev. 17 (2002); Note, *supra* note 84.

<sup>192</sup> Watts, *supra* note 188, at 5 (arguing that agencies should be allowed to defend their decisions on politics grounds).

<sup>193</sup> Miles & Sunstein, *supra* note 167, at 762.

<sup>194</sup> See generally Vermeule, *supra* note 191; Sunstein & Vermeule, *supra* note 191; Note, *supra* note 84; Thomas O. McGarity, THE COURTS AND THE OSSIFICATION OF RULEMAKING: A RESPONSE TO PROFESSOR SEIDENFELD, 75 Tex. L. Rev. 525, 557 (1997).

<sup>195</sup> Stephenson, *supra* note 189, at 801 – 802.

<sup>196</sup> Note, *supra* note 84; Ronald M. Levin, HARD LOOK REVIEW, POLICY CHANGE, AND FOX TELEVISION, 65 U. Miami L. Rev. 555 (2011).

<sup>197</sup> Richard J. Pierce, LEGISLATIVE REFORM OF JUDICIAL REVIEW OF AGENCY ACTIONS, 44 Duke L. J. 1110, 1120 (1995).

modern governance and policy-making. Nonetheless, based on a legalistic standard of review, Colombian courts have retained the authority to review administrative decisions *de novo* and even to substitute their own for administrative judgments regardless of the form of administrative action or the technical complexity of the question at stake.

Similar to what occurs with American Courts, Colombian judges lack any expert knowledge to review the technical aspects of challenged administrative decisions in matters of statutory interpretation or policymaking. Yet the Colombian administrative judicial review model differs significantly from the American in three fundamental aspects, which makes it an excellent example of how a watered-down version of the American "hard look" doctrine would likely work in practice. First, unlike the *Chenery* rule, Colombian administrative agencies are allowed to provide alternative reasons or "post-hoc rationalizations" in defense of the challenged statutory interpretation, fact, or policy determination. Second, unlike *Overton Park*, Colombian administrative decision-makers are not required to consider or ponder alternative reasons during the administrative proceedings regardless of the form of action. Third, contrary to the "hard look" doctrine, Colombian courts are not precluded from substituting their own for the administrative judgment. The result is that Colombian courts will likely uphold an administrative interpretation, fact or policy determination so long as they find it reasonable with the facts, merits, and purposes that the challenged decision seeks to fulfill.<sup>198</sup>

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### ***Legal Realism, Legal Process, and the American Administrative State***

From a philosophical perspective, the rise of the administrative state in the United States has been heavily influenced by legal realism and legal process theory. On this assumption, I will focus particularly on the works of Professors CASS SUNSTEIN and WILLIAM ESKRIDGE who have explicitly highlighted the relation between these two jurisprudential theories and the development of the American Administrative State. I venture to speculate, however, that the realist and legal process view of the administrative state lives at the core of every administrative law theory that places the assault of legal realism on legal formalism as its departure point. Let me take a closer look at their proposal, particularly, at the core theoretical commitments upon which their view of the executive's law-interpreting authority is based.

Relying on *Chevron*, Professor SUNSTEIN takes a *realist* approach to suggest that the interpretation of ambiguous statutes calls for judgments of policy and principle, for which democratic accountability is crucial.<sup>199</sup> In this sense, he suggests that the law-interpreting authority of the executive branch to say "what the law is" is essential to the works of modern government, which in his view can be defended on "both democratic and technocratic grounds"<sup>200</sup>. He argues that said law-interpreting authority is a "[...] natural and proper

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<sup>198</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 104.

<sup>199</sup> *See generally* Sunstein, *Beyond Marbury*.

<sup>200</sup> Sunstein, *Beyond Marbury*, at 2591-2593. For an empirical analysis of *Chevron* and its implications in agency statutory interpretation, *see, e.g.*, Miles & Sunstein, *supra* note 167, at 865, ("At first glance, the evidence seems to fortify the argument for a strong reading of *Chevron*. There is no reason to think that where statutes are ambiguous, their meaning should depend on the composition of the panel that litigants draw, or on



outgrowth of both the legal realist attack on the autonomy of legal reasoning and the most important institutional development of the twentieth century: the shift from regulation through common law courts to regulation through administrative agencies”<sup>201</sup>. SUNSTEIN asserts, furthermore, that the executive’s law-interpreting power is consistent with the “[...] institutional judgments that are embodied in the post-New Deal willingness to embrace presidential authority”<sup>202</sup>. Thus, he concludes that *Chevron* is “[...] best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle”<sup>203</sup>, which entails, in his view, that “[...] it is emphatically the province and duty of the executive branch to say what the law is”<sup>204</sup>. As it was noted in Chapter 4, such a broad power there are certain domains where the executive’s law-interpreting authority ought to be limited by express congressional stipulations, such as issues that raise “serious constitutional questions,”<sup>205</sup> and restrictions on retroactivity, and other “non-delegation canons”<sup>206</sup>.

Professor WILLIAM ESKRIDGE suggests that *Chevron* is an example of the application of *legal process theory* and dynamic statutory interpretation. He explains that *Chevron* “[...] is an important recognition that statutory interpretation often involves policy-making choices, that the best interpretation can change over time, and that agencies are usually in a better position to make choices than courts”<sup>207</sup>. In his view, *Chevron* is the acknowledgment that Congress cannot foresee nor regulate all the many variables of social behavior, particularly in highly technical fields<sup>208</sup>. Furthermore, Eskridge suggests that Congress “[...] can articulate a goal that it is pursuing; that goal is then carried out by statutory interpreters-mainly agencies, which have both the expertise and the political accountability to make the hard political choices Congress has not made”<sup>209</sup>. Nonetheless, he considers that legal process theory should not endorse any *Chevron* deference to an administrative interpretation of the law in the cases where the administrative agencies get the “statutory purpose wrong” or the question

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the ideological predilections of the sitting judges. If the resolution of statutory ambiguities turns on judgments of policy, then those judgments ought to be made by the relevant agencies, not by federal courts”).

<sup>201</sup> Cass R. Sunstein, *BEYOND MARBURY: THE EXECUTIVE’S POWER TO SAY WHAT THE LAW IS*, 115 *Yale L. J.* 2583, 2593-2595 (2006).

<sup>202</sup> Sunstein, *Beyond Marbury*, at 2593-2595.

<sup>203</sup> *Id.* at 2610.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 2609 (“This principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional. Instead it means that the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld. So long as the statute is unclear and the constitutional question serious, Congress must decide to raise that question via explicit statement”).

<sup>206</sup> *Id.* (“Consider the notion that unless Congress has spoken with clarity, the executive is not permitted to interpret a statute to apply retroactively. Here too, a nondelegation canon is at work: Only Congress may compromise the interest, long honored by Anglo-American traditions, in avoiding retroactive application of law. Or consider the idea that the executive cannot interpret statutes and treaties unfavorable to Native Americans. This idea is plainly an outgrowth of the complex history of relations between the United States and Native American tribes, which have semi-sovereign status; it is an effort to ensure that any unfavorable outcome will be a product of an explicit judgment of the national legislature. In areas ranging from broadcasting to the war on terror, the nondelegation canons operate as constraints on the interpretive discretion of the executive”).

<sup>207</sup> Eskridge, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 24, at 162.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 163.

at stake raises “serious constitutional issues”<sup>210</sup>.

SUNSTEIN relies heavily on the works of *realist* scholars like KARL LLEWELLYN, MAX RADIN, and ERNST FREUND. In fact, drawing on the works of RADIN, SUNSTEIN asserts that the interpretation of ambiguous legislation calls for judgment of principle and policy. But to understand RADIN’s concept of interpretation, one must first understand his concept of legislation. For RADIN, a “statute is neither a literary text nor a divine revelation. Its effect is therefore neither an expression laden with innumerable emotional overtones nor a permanent creation of infallible wisdom”<sup>211</sup>. In this sense RADIN suggests that a statute is “ambiguous” when it is a statement about a situation or a set of “possible events within a situation” that suggests at least two possible meanings<sup>212</sup>. RADIN introduces a distinction between “determinables” and “determinates” to explain how judges and lawyers construe ambiguous legislation<sup>213</sup>.

RADIN suggests that, though certain statutes are “generally determinable” in the sense they include a set of potentially “correct” statements based on potentially correct assumptions about the domain to be regulated that “involve a number of possible events or individualizations”, they may be made determinate by “reducing the number of possible individualizations”<sup>214</sup>. RADIN recognizes the importance of written or positive rules issued by the legislature as “instrumentalities” used by courts and administrators in discharging their own “specialized functions” by means of interpretation. It is noteworthy that in his view the legislature “[...] might also be a court and an executive, but it can never be all three things simultaneously”<sup>215</sup>. On these grounds, RADIN asserts that law is often indeterminate and that it is the duty of judges to construe ambiguous legislation in a piecemeal fashion according to the underlying facts of each particular case by appealing to their “social emotions”, an “ideal scheme of society”, and “personal predilections” so long as they do not “deliberately go beyond the limits set within the “determinables” of the statute”<sup>216</sup>.

Likewise, Professor SUNSTEIN’s theory of agency interpretation relies on KARL LLEWELLYN’S legal realist account of legal interpretation. Bear in mind LLEWELLYN’S claim that canons of statutory construction have no practical implication insofar as judges employ them to justify decisions that were really made based on their personal preferences or other considerations<sup>217</sup>. Commentators point out that, though *legal realism* admits some “causal relation” between any legal rules and judicial behavior, it denies that paper rules produce legal outcomes and claims that judges make their decisions based on “real rules”<sup>218</sup>, whose

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<sup>210</sup> Id. at 164 (“Figuring out statutory purpose and harmonizing applications of statutes with legal and constitutional principles are the traditional strengths of judges, who are statutory generalists; Chevron-mandated deference to administrators (statutory specialists) in such instances is not appropriate”).

<sup>211</sup> Max Radin, STATUTORY INTERPRETATION, 43 Harv. L. Rev. 863, 868 (1930).

<sup>212</sup> Id.

<sup>213</sup> Id.

<sup>214</sup> Id.

<sup>215</sup> Id. at 871.

<sup>216</sup> Id. at 884.

<sup>217</sup> Karl N. Llewellyn, THE THEORY OF RULES (Frederick Schauer ed., 2011) (1938); Karl N. Llewellyn, A REALISTIC JURISPRUDENCE – THE NEXT STEP, 30 Colum. L. Rev. 431, 448 (1930).

<sup>218</sup> Brian Leiter, “American Legal Realism” in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, 51 (Martin P. Golding & William A. Edmundson eds., 2005).

determination and relation to judicial opinions require empirical investigation<sup>219</sup>. As it was noted in Chapter One, KAGAN suggests that the “use of rules is not an abstract, logical operation but a social process, in which participants draw on a learned repertoire of conventions to produce shared understandings of what the rules mean and of how and when they should be applied”<sup>220</sup>. On this assumption, commentators suggest that *realists* mean that there are cases, particularly the *hard* ones that reached the stage of appellate review, where “paper rules” do not dictate “one and only one” outcome to a legal issue due to the proliferation of canons of statutory construction<sup>221</sup>.

Moreover, Professor ESKRIDGE relies on the works of the *legal process school*. Recall that the *legal process school* refers to the synthesis presented by Professors HENRY HART and ALBERT SACKS in their writings between 1938 and 1959<sup>222</sup>. Commentators suggest that the legal process school was the outcome of the synergy between organic rationalism<sup>223</sup>, the rise of the New Deal’s administrative state, and participatory democracy<sup>224</sup>. Professor EDWARD RUBIN suggests that legal process theory tries to combine, on the one hand, the realist view that law is both the creation and an instrument of the political power to convey a given policy predilection, and on the other, the formalist aspiration that legal decisions are a coherent expression within a rational legal system<sup>225</sup>. The core tenet of the legal process school is that each governmental institution holds a particular position within the legal system unrelated to any substantive policy consideration, which is often referred to as “neutral principle”<sup>226</sup>. Commentators suggest that this principle has no substantive connotations unlike the ones that legal formalists attributed to principles by placing them at the top of the legal system<sup>227</sup>.

According to HART and SACKS, law is purposive in character, which implies that legal rules are made to pursue certain ends whose attainment require the active participation of various governmental institution<sup>228</sup>. Indeed, HART and SACKS view the enactment of legislation as the beginning of the legal process, not the end<sup>229</sup>. On this assumption, legal process scholars

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<sup>219</sup> Llewellyn, A REALISTIC JURISPRUDENCE, *supra* note 217, at 444.

<sup>220</sup> Kagan, REGULATORY JUSTICE, *supra* note 53, at 89.

<sup>221</sup> Karl N. Llewellyn, REMARKS ON THE THEORY OF APPELLATE DECISION AND THE RULES OR CANONS ABOUT HOW STATUTES ARE TO BE CONSTRUED, 3 Vand. L. Rev. 395, 395–96 (1950).

<sup>222</sup> Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>223</sup> See, e.g., Harlan Fiske Stone, THE COMMON LAW IN THE UNITED STATES, 50 Harv. L. Rev. 4 (1936); James Landis, "Statutes as the Sources of Law," in HARVARD LEGAL ESSAYS 213 (1934).

<sup>224</sup> Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 24, at 141; William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in Hart & Sacks, THE LEGAL PROCESS, at lv – lxviii (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>225</sup> Edward L. Rubin, THE NEW LEGAL PROCESS, THE SYNTHESIS OF DISCOURSE, AND THE MICROANALYSIS OF INSTITUTIONS, 109 Harv. L. Rev. 1393, 1395 (1996).

<sup>226</sup> Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS, 92 (William Eskridge, Jr. & Philip P. Frickey eds., 1994); Rubin, *supra* note 225, at 1396; Herbert Weschler, TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW, 73 Harv. L. Rev. 1, 9 (1959); Lon L. Fuller, THE MORALITY OF LAW 152 (1964); Alexander Bickel, THE LEAST DANGEROUS BRANCH 1 – 34 (1962); Charles L. Black, Jr., THE PEOPLE AND THE COURT (1960); Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 24, at 144; Lon L. Fuller, THE LAW IN QUEST OF ITSELF 9 – 10 (1940).

<sup>227</sup> Rubin, *supra* note 225, at 1396.

posited that it is the duty of the lawmakers, administrators, and judges to combine their lawmaking and interpretive efforts toward adapting statutes to new circumstances and creating public policy<sup>230</sup>. Furthermore, HART and SACKS argued that dynamic interpretation should unfold aiming at the preservation of law's coherence by appealing to "a body of hard-won and deeply-embedded principles and policies" that go beyond any statutory enactment or precedent<sup>231</sup>. So, on the assumption that law is indeterminate, administrators and judges should decide cases pursuant the role and position they hold within the legal system in light of broader democratic principles and policies of politically neutral or procedural nature<sup>232</sup>.

Although Professors SUNSTEIN and ESKRIDGE rely on different core tenets at the jurisprudential level, they agree on the executive's authority to say what the law is based on both arguments of policy and principle in deciding hard cases. They indicate that the interpretation of ambiguous statutes requires judgments of policy and principle, for which democratic accountability and expertise are crucial. Hence, on the assumption that administrative agencies are both politically accountable and experts in their field, SUNSTEIN and ESKRIDGE suggest that it is the duty of the executive power to decide hard cases by construing ambiguous statutes based on arguments of policy and principle.

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### ***Legal Positivism, Hercules, and the Colombian Public Administration***

In Colombia, the jarring views on administrative expertise, its political accountability, the standards of judicial review, and judicial remedies that have been advanced by the Constitutional Court and the Council of State tend to rely heavily on the debate among European administrative law scholars. This debate mirrors, in turn, the discussion between *legal positivists* and Dworkin's alternate approach at the jurisprudential level. Except for Dworkin's influence, this is a good example of the popular saying among Colombian lawyers and scholars that *we open the umbrella in Bogota when it rains in Paris*, which can be explained by the strong influence of European continental law in the making of the Colombian legal system.

Back in 1886, German scholar EDMUND BERNATZIK argued that judges ought to be precluded from reviewing administrative decisions over technical issues to avoid a co-administration between the judiciary and the executive branch ("*Doppelverwaltung*")<sup>233</sup>. Similarly, Italian commentators PRESUTTI and CAMMEO introduced the distinction between "simple technical matters" and "complex technical matters." For them, while "simple technical matters" refer to the cases where legislation suggests "only correct answer" to the question at hand, "complex technical matters" indicate the cases where there is more than one correct answer, case in which is not possible to decide the question at issue in an "automatic" or "univocal"

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<sup>230</sup> Hart & Sacks, *supra* note 226, at 92.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*; Rubin, *supra* note 225, at 1396; Rubin, *supra* note 226, at 9; Fuller, *supra* note 226, at 152.

<sup>233</sup> Fernando Sainz Moreno, CONCEPTOS JURÍDICOS, INTERPRETACIÓN Y DISCRECIONALIDAD ADMINISTRATIVA, 231-232 (1976). Sainz Moreno considers that the remote origins of administrative discretion can be trace back to the works of German scholars, *see, e.g.*, Edmund Bernatzik, RECHTSPRECHUNG UND MATERIELLE RECHTSKRAFT 43 (1964).

fashion". They claim that the solution to "complex technical matters" calls for strong administrative discretion and that judges should be precluded from reviewing such decisions due to their lack of expertise over specialized matters<sup>234</sup>.

Another group of Spanish commentators have also advocated for a strong "technical administrative discretion" to decide complex technical questions, whose technical nature entails that judicial review must be limited to a judgment about whether the administrative decision is arbitrary or capricious in order to prevent that "administrative discretion" is transferred from the administration to the judiciary<sup>235</sup>. Spanish commentators argue, furthermore, that judges should defer to administrative interpretations over "complex" issues because, unlike judges, administrative agencies are politically accountable and experts in their field<sup>236</sup>. On this account and drawing on German scholarship, BACIGALUPO claims that administrative agencies are in a better "functional" position than judges to decide complex questions given the administration's organic structure, resources, and specialized procedures<sup>237</sup>.

By contrast, MASSIMO SEVERO GIANNINI, one of the most influential administrative law scholars in Europe and Latin America, made an argument against what he calls "technical discretion". GIANNINI argued that "technical discretion" could be distinguished from "administrative discretion" because, while the former refers only to a judgment about application of "technical rules" that suggest only "one correct answer" to the question at issue, the latter requires balancing contrasting interests and assessing the wisdom of the administrative judgment<sup>238</sup>. On this assumption, Spanish commentators suggest that "technical discretion" and "administrative discretion" are antagonistic concepts due to the

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<sup>234</sup> José Antonio Tardío Pato, CONTROL JURISDICCIONAL DE CONCURSOS DE MÉRITOS, OPOSICIONES Y EXÁMENES ACADÉMICOS, 152-153 (1986). Tardío Pato suggests that the first references about administrative discretion can be found in Italy in the works of Presutti and Cammeo, *see, e.g.*, Federico Cammeo, COMMENTARIO DELLE LEGGI SULLA GIUSTIZIA AMMINISTRATIVA, (1913).

<sup>235</sup> Miguel Sánchez Morón, DISCRECIONALIDAD ADMINISTRATIVA Y CONTROL JUDICIAL 129 – 130 (1994); Alejandro Nieto García, REDUCCIÓN JURISDICCIONAL DE LA DISCRECIONALIDAD EN MATERIA DISCIPLINARIA, 44 *Revista de Administración Pública* 156, (1964); Luis García Del Río, "El control judicial de la discrecionalidad técnica. Los procedimientos de selección del personal al servicio de las Administraciones Públicas", in DISCRECIONALIDAD ADMINISTRATIVA Y CONTROL JUDICIAL. I JORNADAS DE ESTUDIO DEL GABINETE JURÍDICO DE LA JUNTA DE ANDALUCÍA, 386-387 (HINOJOSA MARTÍNEZ, E. & GONZÁLEZ-DELEITO DOMÍNGUEZ, N. eds., 1996); Francisco José Navarro Sanchís, "Comunicación. La llamada 'discrecionalidad técnica', el principio de tutela judicial efectiva y el control jurisdiccional de los concursos de mérito, oposiciones y exámenes docentes", in EL ACTO Y EL PROCEDIMIENTO, CUADERNOS DE DERECHO JUDICIAL, 308, 311 (1993).

<sup>236</sup> Luciano Parejo Alfonso, ADMINISTRAR Y JUZGAR: DOS FUNCIONES CONSTITUCIONALES DISTINTAS Y COMPLEMENTARIAS 97 – 100, 104 (1993); Juli Ponce Solé, DEBER DE BUENA ADMINISTRACIÓN Y DERECHO AL PROCEDIMIENTO ADMINISTRATIVO DEBIDO. LAS BASES CONSTITUCIONALES DEL PROCEDIMIENTO ADMINISTRATIVO Y DEL EJERCICIO DE LA DISCRECIONALIDAD 113-116 (2001); Elisenda Malaret I García, "Los principios del procedimiento administrativo y el responsable del procedimiento", in ADMINISTRACIÓN PÚBLICA Y PROCEDIMIENTO ADMINISTRATIVO (COMENTARIOS A LA LEY 30/1992, DE 26 DE NOVIEMBRE), 305 (J. Tornos Más ed., 1994); Winfried Brohm, "Administración y Jurisdicción Contencioso-Administrativa como mecanismos de regulación en un sistema policéntrico de producción del Derecho", in DOCUMENTACIÓN ADMINISTRATIVA, 234 INAP 130, (L. Parejo Alfonso trad., 1993).

<sup>237</sup> Mariano Bacigalupo, LA DISCRECIONALIDAD ADMINISTRATIVA. ESTRUCTURA NORMATIVA, CONTROL JUDICIAL Y LÍMITES CONSTITUCIONALES DE SU ATRIBUCIÓN 62 – 64 (1997).

<sup>238</sup> Massimo Severo Giannini, *LEZIONE DI DIRITTO AMMINISTRATIVO* 110 (1950).



fact that the former denotes a “strict” factual verification on technical or scientific grounds of the “only correct answer” to the question at stake provided by the “technical rule” while the latter requires a discretionary judgment about whether a given decision is aimed at fulfilling the welfare of a community as a whole<sup>239</sup>.

Moreover, there is a third string of commentators that argue in favor of an intermediate or eclectic position about administrative expertise, discretion, and the standards of judicial review. In Italy, for example, commentators explain that there are instances where the available technical or scientific expertise cannot “totally” exclude personal considerations from administrative decision-making, which means that decisions of this sort will be driven by the administrator’s personal morality<sup>240</sup>. On this account, they propose that judges should review *de novo* administrative decision unless the circumstances of each particular case suggest that administrators are better equipped than judges on technical grounds to decide the question at stake, case in which they should defer to the administration’s interpretation<sup>241</sup>.

Likewise, some Spanish commentators indicate that the standards of judicial review of administrative actions vary according to technical statutory language and the available technical or scientific data employed by administrative agencies to construe it. First, commentators explain that in the cases where the available technical or scientific data suggests “more than one possible answer” to the question at issue, the administration must choose the solution that best advances the public interest<sup>242</sup>. Second, commentators argue that, in the cases where the available technical or scientific data is “not conclusive” and indicate “more than one plausible answer” to the question at issue, administrative agencies ought to determine which is the construction that best fits the public interest<sup>243</sup>. Commentators posit that in these two events that depend upon the conclusive nature of the available scientific or technical data, reviewing judges should limit their analysis to determine whether the administrative decision is arbitrary or capricious.

Some commentators describe a third event that might require judges not only to strike down the administrative decision but also to substitute their own for the administrative judgment. They call it “instrumental discretion” to explain the events where administrative decision-makers do not exert strong discretion in construing “technical rules” because they are bound by the “technical language or jargon” employed by the legislature. In these hard cases, administrative decision-makers ought to construe such “technical rules” by appealing to their

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<sup>239</sup> 1 José Antonio García-Trevijano Fos, TRATADO DE DERECHO ADMINISTRATIVO, 435 (1964); Luis Cosculluela Montaner, MANUAL DE DERECHO ADMINISTRATIVO 314 (6<sup>th</sup> ed., 1995); Manuel Martín González, SANIDAD PÚBLICA: CONCEPTO Y ENCUADRAMIENTO 763 - 767, 791 - 792 (1970); Manuel Martín González, EL GRADO DE DETERMINACIÓN LEGAL DE LOS CONCEPTOS JURÍDICOS, 54 *Revista de Administración Pública* 226, 227, 239 (1967); Eduardo Coca Vita, LEGALIDAD CONSTITUCIONAL, EXCLUSIÓN DE CONTROL JUDICIAL Y DISCRECIONALIDAD TÉCNICA, 2 *Revista de Administración Pública* at 1073-1077, 1080 (1983); Tomás Ramón Fernández Rodríguez, DE LA ARBITRARIEDAD DE LA ADMINISTRACIÓN 37 (3<sup>rd</sup> ed., 1999); José Luis Martínez Morales, LAS PRUEBAS DE IDONEIDAD: UN AVANCE JURISPRUDENCIAL EN EL CONTROL DE LA DISCRECIONALIDAD TÉCNICA, 47 *Revista Española de Derecho Administrativo* 413 (1985).

<sup>240</sup> Carlo Marzuoli, POTERE AMMINISTRATIVO E VALUTAZIONI TECNICHE 191 (1985).

<sup>241</sup> Id.

<sup>242</sup> Eva Desdentado Daroca, LOS PROBLEMAS DEL CONTROL JUDICIAL DE LA DISCRECIONALIDAD TÉCNICA (UN ESTUDIO CRÍTICO DE LA JURISPRUDENCIA) 62 – 64 (1997).

<sup>243</sup> Id. at 48 – 50.

discretion and expertise to determine which is the interpretation that is consistent with the technical statutory language that best advances the public interest<sup>244</sup>. Reviewing courts should not only strike down the administrative decision they deem arbitrary or capricious but also substitute their own for the administrative judgments by holding the interpretation that they consider best fits the technical language set out by the legislature, that is, the "only correct answer" to the question at stake<sup>245</sup>.

From a legal philosophy perspective, this is an interesting puzzle that in my view comes in three pieces depending on the *easy* or *hard* nature of the case at hand. The first piece is given by the concept of "technical" or "instrumental" discretion, which in my view is committed to the core tenets of *legal formalism* and the *transmission belt theory of administration* on the assumption that law is determinate because it suggests, in the vast majority of *easy cases*, only one correct answer to the question at stake and that administrative agencies must *mechanically* execute the fully expressed will of the legislature without any policy or morality consideration. However, in *administrative hard cases*, even the most *formalist* of these commentators acknowledges that law is indeterminate due to open-textured statutory language whose construction requires a strong administrative discretion that relies heavily on technical or scientific expertise. This account of administrative discretion is committed, in my opinion, to the core tenets of *legal positivism* in the sense that administrators must appeal to extra-legal supplements –such as expertise and even personal judgments– to decide administrative hard cases that arise in the penumbra zone where the law seems to run out. Recall that *legal positivism* account of law's indeterminacy entails that hard cases that arise in the penumbra zone are ungoverned by law and judges should decide them by appealing to extra-legal considerations.

On this assumption, commentators suggest that judges should refrain themselves from reviewing such administrative judgments made in hard cases due to the "highly technical nature" of the question at stake or when there is not conclusive scientific or technical data suggesting a set of plausible answers, though the *Hartian Challenge* advises that they should determine whether the administrative rule was made pursuant to the parent act. But let us suppose that these commentators accept that the *Hartian Challenge* is the appropriate standard to review administrative decisions in hard cases, case in which one must bear in mind that H.L.A. HART posited that these cases raise no fundamental question because reviewing judges should only determine whether the administrative decision was made in pursuant to the parent act enacted by the legislature. Let us further suppose that the judge strikes down the administrative decision over a highly complex issue because she deems it contrary to the parent act. Should the judge decide the administrative hard cases by substituting its own for the administrative judgment, that is, by substituting its own for the administrator's personal morality? The *Hartian Challenge* says nothing about the possibility of the judge substituting its own for the administrative judgment in the cases where she considers that the administration did not choose the only correct answer to the question at issue.

This takes me to the third piece of the puzzle: HERCULES. I will try to restate the contrasting

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<sup>244</sup> Id. at 64 – 66.

<sup>245</sup> Id. at 62 – 66.

views of administrative expertise and political accountability advanced by the European administrative law scholars in light of what I think are their core jurisprudential tenets. Generally speaking, European commentators suggest that law is determinate because, in most *easy cases*, legal rules suggest only one correct answer to the questions at stake and thus administrative decision-making ought to be discharged in an instrumental or mechanical fashion toward executing it. Nonetheless, they also recognize that there are administrative hard cases that arise from ambiguous legal norms where administrative decision-makers tend to exercise strong discretion by appealing to expertise, policy or morality to assess the wisdom of a given decision. Furthermore, commentators explain that there are hard cases where administrative judges tend to review thoroughly the administrative judgment's legal and factual basis to determine whether it is consistent with the only answer they deem correct based on arguments of principle *and* policy. In other words, commentators explain that judges tend to determine whether or not to defer to the administrative judgment only after they had exhaustively reviewed its factual and legal basis. As a phraseology matter, one could argue that such a strict judicial scrutiny into the administrative decision's factual and legal basis is to certain extent "*de novo*" because the judge reviews it as it were for the first time. Commentators even suggest that there are some hard cases that spring under certain circumstances where judges tend to substitute their own for the administrative judgment by upholding what they consider the only correct answer to the question at issue.

A good example of the transition from the *Hartian Challenge* to HERCULES' bench can be found in a recent decision rendered by the Colombian Council of State in a case concerning the medical protocols on how to conduct abortion<sup>246</sup>. In 2006, the Colombian Constitutional Court legalized abortion in three specific events and ordered Congress to enact a statute regulating the required protocols to conduct such a procedure under safe conditions<sup>247</sup>. However, Congress has not yet enacted such a statute. Despite the absence of an express statutory enactment, the Superintendence of Health issued an administrative rule mandating healthcare organization to adopt protocols on how to conduct abortion in compliance with the Constitutional Court's opinion<sup>248</sup>. The Superintendent did not issue the medical protocols about how to conduct abortion *per se*, but instead issued seven guidelines according to which healthcare organizations must draft their own protocols on how to carry out the Constitutional Court's ruling. The Superintendent's rule was later challenged by a catholic healthcare organization under the argument that the Superintendent lacked the authority or jurisdiction to issue said administrative rule. The issue was whether the Superintendent of Health was vested with the authority or jurisdiction to issue such an administrative rule in the absence of an express congressional authorization to do so.<sup>249</sup> The Council of State upheld four guidelines and struck down the other three because it deemed they lacked a previously acknowledged written basis of constitutional, international, statutory, administrative or judicial nature<sup>250</sup>.

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<sup>246</sup> Consejo de Estado [C.E.] [Council of State], First Chamber, noviembre 3, 2016, C.P.: G. Vargas Ayala, Expediente 11001 03 24 000 2013 00257 00 (Colom.).

<sup>247</sup> Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, M.P.: J. Araujo Rentería & C. Vargas Hernández, Sentencia C – 355/06, Expedientes D – 6122, 6123, and 6124 (Colom.).

<sup>248</sup> R. 003/13, abril 26, 2013, Diario Oficial 48.776, abril 29, 2013 [D.O.] [Ministerio de Salud] (Colom.).

<sup>249</sup> Consejo de Estado [C.E.] [Council of State], *supra* note 246.

<sup>250</sup> *Id.*

It is noteworthy that, though issuing guidelines according to which certain medical protocols on how to carry out a complex medical procedure ought to be drafted certainly is a technical field that requires a particular expertise, the Council of State did not consider the Superintendence's technical expertise in any way to assess the question at hand. Rather, Council of State's decision to uphold four out of the seven administrative guidelines was based upon a broad and legalistic understanding of the legal sources that could serve as a legal basis to the challenged administrative rules, which in this case encompassed legal norms of judicial nature. Put it differently, on the *Dworkinian* conception of law, in this hard case the Council of State construed the grounds of law to comprise the judicial precedent on abortion rights and it then employed it as a legal basis to uphold the validity of four out of the seven administrative guidelines that lacked any express statutory or administrative legal basis. Regrettably, the Council of State refused to take one step further to endorse the *administrative novelty or creativity* over the other three guidelines that were essential to the public policy on how to draft the medical protocols to conduct abortion procedures, which in my view left a complex regulatory gap that could eventually lead to a critical public health situation due to Congress' legislative lethargy.

Therefore, on this account, judges have the final word in the determination about which is the only correct answer to the question at issue in administrative hard cases based on both arguments of principle and policy. According to DWORKIN, in *hard cases*, there is always one correct answer that must be discovered by Hercules through a constructive interpretive process that presents past political decisions in their best moral light aiming at the preservation of law's integrity. Unlike common law cases, the preservation of law's integrity in statutory interpretation requires that the judicial decision rest upon arguments of principle and policy.

Hence, the Colombian case law that I have discussed in this Chapter suggests that it is plausible that "technically illiterate" courts review the substance of an administrative decision,<sup>251</sup> strike it down, and even substitute their own for the administrative judgment. It also suggests that Colombian courts tend to review thoroughly the legal and factual basis of administrative decisions in light of *ad-hoc* technical reports produced by expert public institutions or private individuals pursuant to civil procedure evidence rules. My hypothesis is that this variation in the intensity of judicial review of administrative actions could be explained due to what KAGAN calls "political mistrust" on the integrity, competence, relatively non-professional, and undeveloped policy-analytic capacities<sup>252</sup> of many Colombian administrative agencies. Yet my speculations are subject to empirical corroboration.

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<sup>251</sup> See generally Jordão & Rose-Ackerman, *supra* note 101 (describing the hazards of judicial review of technical matters conducted by technically illiterate judges).

<sup>252</sup> Robert Kagan, "The Organisation of Administrative Justice Systems: The Role of Political Mistrust" in ADMINISTRATIVE JUSTICE IN CONTEXT 168 (Michael Adler ed. 2010) ("If faith in expertise inclines legislators and agency leaders toward an 'expert judgment' model of case-by-case decision making, a decline in that faith should lead them—from the outset or after some negative experiences—to impose a more formal and legalistic decision system on the agency. Whether political mistrust of expert judgment results in a shift toward bureaucratic legalism or toward adversarial legalism depends on the source and particular nature of that mistrust"). See also Robert Kagan, LAS CORTES Y EL ESTADO ADMINISTRATIVO: LA EVOLUCIÓN POLÍTICA DEL LEGALISMO ADVERSARIAL EN LOS ESTADOS UNIDOS (Daniel Castaño trans., 2014).

From a jurisprudential perspective, I consider that the evolution of the administrative power and its authority to construe ambiguous legal norms based on arguments of principle and policy is consistent with different theories about the nature of law or adjudication in the compared legal systems. The case law that I have described suggests that, while the evolution of the nature, scope, and extent of the administrative power's interpretive and lawmaking powers in the United States have been heavily influenced by *legal realism* and *legal process theory*, its development in Colombia has been consistent by *legal formalism*, *legal positivism* and RONALD DWORKIN's alternate approach



## CHAPTER V

### THE LANGUAGE OF LEGALITY

“[T]he other kind [of equity] contains what is omitted in the special written law. For that which is equitable seems to be just, and equity is justice that goes beyond the written law.”

-ARISTOTLE<sup>1</sup>

The comparison between the different theories about the nature of law and adjudication that have influenced the development of the administrative power in the United States and Colombia seeks to portray how such jurisprudential views suggest diverse solutions to address the common concern on how to explain the way in which administrative decision-makers reason in deciding hard cases. Yet the different theories about law and adjudication that I have canvassed seek to address this concern by different means and core theoretical commitments that show how the administrative power may assume different faces, namely, the American Administrative State and the Colombian Public Administration. *Legal realism* and its synthesis *legal process* theory emphasize that hard cases are ungoverned by law and decision-makers respond primarily to the underlying facts of each case through dynamic interpretive practices, which have raised concerns about to preserve coherence in decision-making<sup>2</sup>. DWORKIN's approach seems to address these coherence concerns by suggesting that the decision-maker's personal considerations ought to be channeled through a complex interpretive process that requires her to construe the grounds of law in their best moral light to preserve law's integrity. The debate about how to preserve law's coherence has elicited a vigorous discussion among scholars.

It must be noted that *pragmatism* rejects DWORKIN's approach, but DWORKIN rejects *pragmatism* under the argument that it is a skeptical conception of law insofar as it rejects genuine nonstrategic legal rights<sup>3</sup>. He explains that *pragmatism* “[...] says that judges should follow whichever method of deciding cases will produce what they believe to be the best community for the future, and though some pragmatic lawyers would think this means a richer or happier or more powerful community, others would choose a community with fewer incidents of injustice, with a better cultural tradition and what is called a higher quality of life”<sup>4</sup>. DWORKIN argues, furthermore, that *pragmatism* “[...] does not take rights seriously. It rejects what other conceptions of law accept: that people can have distinctly legal rights as trumps over what would otherwise be the best future properly understood”<sup>5</sup>.

Is it possible to find common ground between these theories of law and adjudication to address that common concern? This section addresses this question by exploring the tension

<sup>1</sup> Aristotle, RHETORIC, I. 13. 1374a (J. H. Freese trans., 1934).

<sup>2</sup> Cass R. Sunstein, INTERPRETING STATUTES IN THE REGULATORY STATE, 103 Harv. L. Rev. 405 (1989); William N. Eskridge, Jr., PUBLIC VALUES IN STATUTORY INTERPRETATION, 137 U. Pa. L. Rev. 1007 (1989); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 146 – 151 (1994).

<sup>3</sup> Ronald Dworkin, LAW'S EMPIRE 160 (1986) [hereinafter, Dworkin, LE]; Ronald Dworkin, Pragmatism, Right Answers and True Banality, in PRAGMATISM IN LAW AND SOCIETY (Brint & Weaver eds., 1991).

<sup>4</sup> Dworkin, LE, at 160.

<sup>5</sup> Id.

between the different core commitments of such jurisprudential theories as applied to administrative reasoning. *Realist* and *legal process* scholars criticize DWORKIN's account of statutory interpretation by highlighting that he never asked the question "[...] why should courts be entrusted with the duty to carry out that task?"<sup>6</sup>. Commentators suggest that "[e]veryone should agree that the executive, no less than that judiciary, has a duty of 'fit'; many of the hard cases arise when the key question is which interpretation puts the law in its 'best constructive light'"<sup>7</sup>. Despite their criticism, I venture to think that *legal realist* and *legal process* scholars agree with DWORKIN's account of law as integrity in the sense that they argue that dynamic statutory interpretation should appeal to a set of "public values" in order to preserve law's responsiveness and coherence<sup>8</sup>. I think this might be the starting point towards a synthesis of these jurisprudential approaches.

In my view, such a synthesis should comprise at least, on the one hand, the *realist* claim that the construction of legal norms calls for judgments of principle and policy through a coherent dynamic interpretive process that appeals to *public values*, and on the other, DWORKIN's view that integrity the adjudication of statutory hard cases requires that decision-makers should construe the grounds of the law in their best light based on arguments of principle and policy. However, critics would argue that it is not feasible to reconcile the core tenets of legal realism, legal process, and DWORKIN's approach, particularly about law's determinacy and legal interpretation.

I think this critique would hold true only if we think about the traditional *legislature-courts* reciprocal interaction that has propelled traditional theories about law and adjudication over the past decades. But I consider that the synthesis that I propose might have a chance if we think of the legal process as a complex conversation or set of *feedback loops* where the administrative power is not only a mere executor of the law, but rather a power of government that actively partakes in the creation, interpretation, execution, and adjudication of the law. I

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<sup>6</sup> Thomas J. Miles & Cass Sunstein, DO JUDGES MAKE REGULATORY POLICY? AN EMPIRICAL INVESTIGATION OF CHEVRON, 73 Chi. L. Rev 823, 867 (2006).

<sup>7</sup> Id.

<sup>8</sup> Compare Dworkin, LE, at 217 – 218, 342 – 346 with Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS 148 (William Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Underlying every rule and standard, in other words, is at least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning. [...] Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies"); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, 135 U. Pa. L. Rev. 1480, 1553 (1987) ("Notwithstanding these problems, I concur with Dworkin's quest for coherence in the law in two important respects. First, there are certain public values—such as nondiscrimination and freedom of speech, press, and religion—which courts will protect from statutory encroachment, often through strained statutory interpretation. Second, courts will bend old statutes in response to more modern policies. In these ways, courts do lend greater coherence to statutory law; and I agree with Dworkin that this contributes to our government's overall legitimacy and worthiness"); Eskridge, Jr., PUBLIC VALUES IN STATUTORY INTERPRETATION, *supra* note 2, at 1007 – 1008 ("Public values, as I am using the term, are legal norms and principles that form fundamental underlying precepts for our polity-background norms that contribute to and result from the moral development of our political community. Public values appeal to conceptions of justice and the common good, not to the desires of just one person or group"); Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 146 – 151 (1994); Sunstein, *supra* note 2.

take this approach. On this assumption, I shall propose a philosophical account of the administrative power and appeal to Hermes, an imaginary administrator, to portray an ideal approach of the way in which I think the administrative power should partake in modern constitutional democracies and in what I call the path of the law.

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### ***Enlightenment Constitutionalism: Mapping the Origins of the Administrative Power***

My premise that law, rather than an *abstract essence* possible of being studied and apprehended *in a vacuum*, is an *existential phenomenon* that stems from the synergy among political, social, cultural, and economic factors in a given time and place. In that regard, Holmes's words are enlightening when he argues that “[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know that it has been, and what it tends to become”<sup>9</sup>. That premise can be perceived most powerfully within the domains of public law, especially when one studies the interaction between the rule of law and administrative governance (i.e., the process whereby administrative agencies and citizens take part in collective decision-making<sup>10</sup> within the constraints of law and ideas of legality). Indeed, GASTÓN JÈZE who is often been considered the architect of modern European administrative law, argues that public law is governed by the prevailing political ideas of a given time and place<sup>11</sup>. Professor ROBERT KAGAN suggests that the founding and nature of a political regime, its political structures, institutions and legal traditions are shaped by a set of political events, forces, and ideas, in sum, by political history. Kagan explains that social, political and economic changes can elicit shifts in a nation's political governance<sup>12</sup>.

While it is true that political, social, economic variables lead to diverse political, institutional and legal arrangements, those choices are also influenced by a master ideal in Western society, the rule of law, envisioned as a mechanism for protecting liberty and promoting democratic governance. I consider that a common origin can be traced back to what Professor

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<sup>9</sup> O. W. Holmes Jr., THE COMMON LAW 1 – 2, (1881) (“[...] We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into the new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to achieve desired results, depend very much upon its past”).

<sup>10</sup> Martin Shapiro, ADMINISTRATIVE LAW UNBOUNDED: REFLECTIONS ON GOVERNMENT AND GOVERNANCE, 8 Ind. J. Global Legal Stud. 2, 369 (2001) (“In today's public administration and political science literature, however, the word ‘governance’ has largely replaced the word ‘government’. This change in vocabulary announces a significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them. To be sure, governments and their administrative organizations still make collective decisions, but now everyone, or at least potentially everyone, is also seen as a participant in the collective decision-making process”).

<sup>11</sup> 1 Gastón Jèze, PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO, LA TÉCNICA JURÍDICA DEL DERECHO PÚBLICO FRANCÉS, at XL (trans. J.N. San Millán Almagro, 1948).

<sup>12</sup> Robert Kagan, ADVERSARIAL LEGALISM (2001); Robert Kagan, The Organisation of Administrative Justice Systems: The Role of Political Mistrust, in ADMINISTRATIVE JUSTICE IN CONTEXT 172 (Michael Adler ed. 2010); Robert Kagan, LAS CORTES Y EL ESTADO ADMINISTRATIVO: LA EVOLUCIÓN POLÍTICA DEL LEGALISMO ADVERSARIAL EN LOS ESTADOS UNIDOS (Daniel Castaño trans., 2014).

JEREMY WALDRON calls “*Enlightenment constitutionalism*” and which he defines as a “[...] body of thought that emerged in the 18<sup>th</sup> century, but originated in England in the later decades of the 17<sup>th</sup> century, about forms of government and the structuring of the institutions of government to promote the common good, secure liberty, restrain monarchs, uphold the rule of law, and to make the attempt to establish popular government— representative, if not direct democracy—safe and practicable for a large modern republic”<sup>13</sup>. WALDRON explains that the paramount importance of such an ideological movement is given by the fact that it “[...] transformed our political thinking out of all recognition; it left, as its legacy, not just the repudiation of monarchy and nobility in France in the 1790s but the unprecedented achievement of the framing, ratification, and lasting establishment of the Constitution of the United States”<sup>14</sup>.

Commentators argue that one of the most transcendental achievement of the *Lumières* and the *Enlightenment* was that of advancing the notion of a constitution as the supreme law of the land and the rule of law as an ideal to prevent and correct the “evils of abuse”<sup>15</sup> that arise from the exercise of political power<sup>16</sup>. *Enlightenment constitutionalism* views the Constitution as a machine devised to control, limit, and restraint the power of the state<sup>17</sup>. Because legitimate government can only rest upon the idea of separation of powers, the *Lumières* claimed that government had to be disaggregated into separate functions<sup>18</sup>. They emphasized the supremacy of the legislative power in the making of laws regulating social behavior in general terms and prescribing the consequences of such regulated conducts<sup>19</sup>. The *Lumières* also envisioned an executive power charged with the duty of executing the law by making the necessary judgments to enforce the general rules set forth by the legislature<sup>20</sup>.

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<sup>13</sup> Jeremy Waldron, Isaiah Berlin’s Neglect Of Enlightenment Constitutionalism, in *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* (2016).

<sup>14</sup> Id., (“I have in mind an array of thinkers: James Madison, Emmanuel Sieyès, Voltaire, Denis Diderot, Tom Paine, Thomas Jefferson, the Marquis de Condorcet, Alexander Hamilton, Montesquieu—above all Montesquieu—and of course Jean-Jacques Rousseau. Maybe we could extend it back as far as James Harrington writing in the 1650s or forward to Benjamin Constant in the early decades of the 19<sup>th</sup> century; the boundaries are of course blurred and there are continuities with later and earlier movements. But my arbitrary book-ends are John Locke who finished writing the second of his *Two Treatises of Government* in the 1680s and Immanuel Kant in his declining years, putting republican pen to paper in 1795 in *Perpetual Peace* and in the middle sections, the constitutional sections (§§43- 50), of the *Rechtslehre* in *The Metaphysics of Morals* published in 1797. It’s a long list and I apologize if I have left off the name of anyone’s loved ones. I make no apology for populating it with American names as well as French ones: Madison, Hamilton, Jefferson, and one could add James Wilson, Benjamin Franklin, and John Adams”).

<sup>15</sup> Joseph Raz, *THE RULE OF LAW AND ITS VIRTUE*, IN *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 214 (1979) (“The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself [...] Thus the rule of law is a negative virtue [...] the evil which is avoided is evil which could only have been caused by the law itself”).

<sup>16</sup> Ronald Cass, *THE RULE OF LAW IN AMERICA*, 1-4 (2001); Jeremy Waldron, *THE CONCEPT AND THE RULE OF LAW*, 43 Ga. L. Rev 1, 11 (2008).

<sup>17</sup> Id.

<sup>18</sup> 1 John Locke, *TWO TREATISES OF GOVERNMENT* 195, (Thomas I. ed., 1947).

<sup>19</sup> Id., at 188, 197.

<sup>20</sup> Id., at 195. (“But because the laws that are at once and in a short time made have a constant and lasting force and need a perpetual execution or an attendance thereunto; therefore, it is necessary there should be a power always in being which should see to the execution of the laws that are made and remain in force”).

Finally, they suggested that a judiciary should be instituted to adjudicate the disputes that the application of the law to particular cases may elicit<sup>21</sup>.

This does not mean, however, that there is a universal, uncontested idea of the rule of law capable of describing all the substantive and procedural requirements of every action that any given democratic polity undertakes to fulfill its political and legal mandates, which are often embodied in a constitution as the supreme law of the land. Indeed, what does persist is an endless battle to shape and implement the rule of law, as democracies seek to cabin politics and public administration according to evolving ideas of legality. I will use the core tenets of *Enlightenment constitutionalism* as a template for identifying the contours of the rule of law. By employing this method, I will then ascertain the moral and political ideas, claims, and aspirations that fueled two centuries ago the battle for legality against arbitrariness and tyranny in both sides of the Atlantic and that continue fueling many in our time.

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### *The Language of Legality and Its Values*

We often talk about the rule of law to refer to a set of principles and values that shall inform how legal institution ought to carry out their duties and responsibilities pursuant to the law. This section is not meant to conduct a thorough historical review the rule of law's inception, but it rather seeks to ascertain its philosophical underpinnings and values. The idea of a rule of law was first materialized in the French Revolution under the expression "*Règne de la Loi*" and in the American Revolution under the formula "*Government of Laws and Not of Men*"<sup>22</sup>. It must be noted, however, that the original formulation of the expressions "*Règne de la Loi*" and *Rule of Law* do not share the same semantic, historical, and legal roots and it would be imprecise to treat them as equal<sup>23</sup>.

On the one hand, the French Revolution abolished the Ancient Regime's model of "*chacun tient du Roy, le Roy ne tient de personne*" (everyone is obliged to the King, but the King is not obliged to anyone)<sup>24</sup>, according to which all public power was rooted upon the superiority of the King as God's vicar on earth and that for such a reason it ought to be venerated and obeyed by the citizenry<sup>25</sup>. The origin of these revolutionary ideas can be traced back to the

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<sup>21</sup> Id.

<sup>22</sup> David Hume, *ESSAYS, MORAL, POLITICAL, AND LITERARY* 94 (1985. Original 1742); James Harrington, *COMMONWEALTH OF OCEANA* (1992, original 1656); Joseph Raz, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212 (1979) ("The ideal of a rule of law is [...] often expressed by the phrase 'government of laws and not of men'"); Owen Fiss, *THE BUREAUCRATIZATION OF THE JUDICIARY*, 92 *Yale L.J.* 1442, 1451 (1983) ("Adherence to rule is required [...] by the maxim that insists upon a 'government of laws and not of men'"); Eduardo García de Enterría, *LA LENGUA DE LOS DERECHOS. LA FORMACIÓN DEL DERECHO PÚBLICO EUROPEO TRAS LA REVOLUCIÓN FRANCESA* 145-153 (1994).

<sup>23</sup> Bernardo Sordi, "Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe" in *COMPARATIVE ADMINISTRATIVE LAW* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011); Cass, *supra* note 16, at 1 – 4; Waldron, *supra* note 16, at 11; García de Enterría, *supra* note 22 at 129.

<sup>24</sup> Antoyne Loyrel, *INSTITUTES COUTOUMIÈRES* 36 (1846, original 1607). LOYREL explains that that the expression apparently emerged from a response delivered by KING FRANCIS I of France to a group of nobles that attempted to demand something from him.

<sup>25</sup> See Jean Domat, *LES LOIS CIVILES DANS LEUR ORDRE NATUREL* (1689).



very notion of liberty coined by *natural law*<sup>26</sup> and introduced in the Declaration of the Rights of the Man and the Citizen of 1789<sup>27</sup>. Bear in mind that Article 4 states that “Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. *These bounds may be determined only by Law*”. In other words, only the legislature as the most democratically accountable institution within a government of laws may place restrictions on natural rights for the sake of the “common good” or the “public interest”<sup>28</sup>.

The French revolutionaries were convinced that the government of men should be replaced by a government of laws for which they pushed forward the idea of the realm of law (*Règne de la Loi*) created by a legislature that should work as a “*machina legislatoria*” seeking to regulate all details of social behavior<sup>29</sup>. The *Lumières* envisioned legislation as the purest expression of a community’s public will<sup>30</sup>. Legislation was then inspired by the revolutionary ideals of abrogating, unifying, and systematizing the law in written and intelligible fixed texts enacted by the legislator that could be accessible to everyone<sup>31</sup>. The Code Napoleon of 1804 is a good example of this<sup>32</sup>. Commentators explain that administrative agencies and judges became “agents of the people” that shall faithfully execute what legislation commands or forbids<sup>33</sup>, without having the authority to *make new law*<sup>34</sup>. It must be underlined that, although the Napoleonic code was an unprecedented enterprise, the drafters of the code accepted that was incomplete and that it was the duty of the judiciary to act as an interstitial legislator to fill in the gaps<sup>35</sup>.

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<sup>26</sup> The *Enlightened* also introduced the notion of *Natural law* as a body of universal and immutable law, derived from nature and reason, which ought to inspire all positive or written law. Although the *Natural law* notion can lead to ambivalent interpretations even related with religious doctrines, I refer here to a reduced and simple ensemble of principles and axioms that shall inspire the Lawmaker in the process of laying down written or positive norms in order to meet the current trends and needs of a society in a given time and place. See, e.g., Charles S. Lobingier, *NAPOLEON AND HIS CODE*, 32 HARV. L. REV 114, 127 (1918) (discussing the importance of the Code Napoleon); Jean Carbonnier, *DROIT CIVIL*, at 86 (2004) (“Art. I : Il existe un droit universel et immuable, source de toutes les lois positives: il n’est que la raison universelle, en tant qu’elle gouverne tous les hommes”); Jean M. Portalis, *DISCOURS PRÉLIMINAIRE DU PREMIER PROJET DE CODE CIVIL*, 24, (1999) (“Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les Lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers”).

<sup>27</sup> I Ambroise Colin & Henri Capitant, *CURSO ELEMENTAL DE DERECHO CIVIL*, 11, 19, (Démofilo de Buen trans. 1922).

<sup>28</sup> García de Enterría, *supra* note 23, at 145 – 153.

<sup>29</sup> García de Enterría, *supra* note 23, at 129. See Charles de Secondat Montesquieu, *THE SPIRIT OF THE LAWS* (Cohler, Miller & Stone trans. and eds., 1989).

<sup>30</sup> I Jean-Jacques Rousseau, *Du Contrat Social, Ou Principes Du Droit Politique*, in *COLLECTION COMPLÈTE DES OEUVRE* 228 (1780-1789); Diderot, D., Alembert, J., Bombart, M. & Verlet, A, *Droit Naturel*, in *ENCYCLOPÉDIE, OU DICTIONNAIRE RAISONNÉ DES SCIENCES, DES ARTS ET DES MÉTIERS* at Section VII, 372 (Gallimard ed., 2008).

<sup>31</sup> C. J. Friedrich, *The Ideological and Philosophical Background*, in *THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD*, 3 (Bernard Schwartz ed., 1956).

<sup>32</sup> Lobingier, *supra* note 26, at 127.

<sup>33</sup> García de Enterría, *supra* note 22, at 129.

<sup>34</sup> Montesquieu, *supra* note 29, at 5.14.

<sup>35</sup> Portalis, *supra* note 26, at 19.

On the other hand, the inception of the rule of law in the United States of America occurred throughout different stages<sup>36</sup>. Commentators suggest that the conception of the rule of law in Anglo-American legal systems of the late 1800's and the early 1900's emerged from ALBERT DICEY's reconstruction of the concept<sup>37</sup>. For DICEY, the rule of law has two main features. The first feature is the "omnipotence or undisputed supremacy throughout the whole country of the central government" embodied in the King as the source of law and maintainer of order. Such royal supremacy as later passed into that sovereignty of Parliament<sup>38</sup>. In Dicey's view, "[t]he second of these features, which is closely connected with the first, is the rule or supremacy of law. [...] This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise"<sup>39</sup>.

I want to particularly focus on the rise and development of the rule of law in the United States of America after the American Revolution of 1776. The well-known expression of the rule of law understood as "a government of laws and not of men" first appeared in the works of DAVID HUME and JOHN ADAMS and it was later articulated in the Constitution of Massachusetts of 1780<sup>40</sup>. When discussing the evils of European monarchies, HUME wrote: "It may now be affirmed of civilized monarchies, what was formerly said in praise of republics alone, *that they are a government of Laws, not of Men*. They are found susceptible of order, method, and constancy, to a surprising degree. Property is there secure; industry encouraged; the arts flourish; and the prince lives secure among his subjects, like a father among his children"<sup>41</sup>. Likewise, ADAMS posited that:

[L]aw proceeds from the will of man, whether a monarch or people; and that this will must have a mover; and that this mover is interest: but the interest of the people is one thing — it is the public interest; and where the public interest governs, it is a

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<sup>36</sup> Roscoe Pound, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 20 (1957) ("The supremacy of law, a fundamental dogma of our common law, one, moreover, which we trace back to Magna Charta, is but the supremacy of right divorced at the Reformation from its theological element").

<sup>37</sup> A.V. Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 195 (10th ed., 1961). In DICEY's view, the supremacy of the rule of law was a characteristic of the English constitution that included three main conceptions. First, no man is punishable except for a breach of law established in the ordinary legal manner before the ordinary courts of the land<sup>37</sup>. In his own words, the rule of law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government"<sup>37</sup>. Second, as a "characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals. In England, the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit"<sup>37</sup>. Third, the rule of law implies that the general principles of the constitution (i.e. the rights to personal liberty and public meeting) are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts".

<sup>38</sup> *Id.* at 183.

<sup>39</sup> *Id.* at 184.

<sup>40</sup> Const. of Mass: Declaration of Rights, Art. 30 (1780). "XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men".

<sup>41</sup> See Hume, *supra* note 22.

government of laws, and not of men: the interest of a king, or of a party, is another thing — it is a private interest; and where private interest governs, it is a government of men, and not of laws. [...] What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance.<sup>42</sup>

One could argue that the rule of law, in the sense envisioned by *Enlightenment constitutionalism*, was adopted in the United States since the very enactment of the Constitution. Indeed, HAROLD LASKI indicated that "[t]he whole background of American constitutionalism is a belief in the supremacy of reason"<sup>43</sup>. The first commitment of the American Revolution and the Framers was that of establishing a government subjected to the law, politically decentralized with strong local democracies and governments, accountable to the people, devoted to the public good as opposed to personal desires, and hence devised to deter tyranny<sup>44</sup>.

Thus conceived the idea of the rule of law is threefold in character to the extent that it has a formal, a procedural, and an instrumental conception<sup>45</sup>. First, legal philosophers argue that the formal conception of the rule of law mirror the virtues of LON FULLER's inner morality of law in the sense that legal norms ought to be general, clear, public, stable, consistent, prospective, and congruent with the way in which their text is administered and implemented by government. H.L.A HART explains that these principles are often called "principles of legality"<sup>46</sup>. For FULLER, a total failure in any of those seven features "[...] does not simply result in a bad system of law; it results in something that is not properly called a legal system at all"<sup>47</sup>. Although FULLER's account of the values of legality have been considered as procedural, I agree with WALDRON that it can be best characterized as formal and structural insofar as it "accentuates the forms of governance" and the formal features that are supposed to distinguish the norms on which state action is based<sup>48</sup>.

Second, the procedural conception of the rule of law advocates in favor of the "unbiased and neutral administration" of the legal norms upon which government actions are based<sup>49</sup>. This view accounts for the manner in which legal norms must be administered by the government

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<sup>42</sup> 1 John Adams, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 129 (1787).

<sup>43</sup> Harold J. Laski, A NOTE ON M. DUGUIT, 31 Harv. L. Rev. 186, at 192 (1917).

<sup>44</sup> THE FEDERALIST No. 10, 47, 51 (Madison); Cass, *supra* note 16, at 1 – 4; Waldron, *supra* note 16, at 11.

<sup>45</sup> Waldron, *supra* note 16, at 8.

<sup>46</sup> H.L.A. Hart, THE CONCEPT OF LAW 273 – 274 (3rd ed., 2012) [hereinafter, Hart, CL] ("The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality").

<sup>47</sup> Lon Fuller, THE MORALITY OF LAW 33 – 45 (rev. ed. 1969) ("The demands for the inner morality of law, however, though they concern a relationship with persons generally, demand more than forebearances; they are, as we loosely say, affirmative in nature: make law known, make it coherent and clear, see that your decisions as an official are guided by it, etc").

<sup>48</sup> Waldron, *supra* note 16, at 7.

<sup>49</sup> *Id.* at 7.

to preserve their characteristics throughout the path of their execution and enforcement<sup>50</sup>. ALBERT DICEY is often cited as one of the main precursors of this procedural account of the rule of law given that he was equally concerned about the features of the norms and the way in which the courts of justice should administer them<sup>51</sup>. Thus, a procedural conception of the rule of law demands governmental authorities, in administering and applying legal norms to a given set of facts, to be impartial, to hear arguments, to consider the evidence, and to give reasons for their final determinations<sup>52</sup>. These requirements are often attributed to the principles of “natural justice”<sup>53</sup>. I agree with WALDRON that this account of the rule of law is intertwined with political ideas like the separation of powers and the independence of the judiciary<sup>54</sup>.

Third, an instrumental account of the rule of law can be found in SCOTT SHAPIRO’s recent contribution to the canon. Professor SHAPIRO distinguishes between the “autonomous” and “instrumental” benefits of the rule of law. In his view, the former refers to the benefits that stem only from observing the principles but without any consideration to the ends of the legal norms, whereas the latter emphasizes the benefits of enabling individuals to pursue worthy ends. Relying on the instrumental benefits, he postulates the rule of law as the “Rule of Social Planning” to the extent that it allows us to plan our lives; while at the same time it enables the law to settle serious and complex moral problems whose solution can be only achieved through its guidance, coordination, and monitoring<sup>55</sup>.

Therefore, one could argue that the philosophical foundations of the idea of a rule of law emerged from two political revolutions that led to a political conquest with profound legal consequences. According to the core tenets of *Enlightenment constitutionalism*, the rule of law is machinery devised to prevent and correct the evils of the exercise of public power, protect liberty, and promote democratic governance<sup>56</sup>. While it is true that battle for the rule of law was fought in two different political, cultural and legal arenas, I deem possible to identify common ground between the two political movements. From a philosophical perspective, I believe that the idea of a rule of law requires that all governmental functions be discharged in pursuance to the substantial, procedural, and formal rules of constitutional, statutory, administrative, and judicial nature. I call this the *language of legality*, which is the language employed by a community to subject all private and public behavior to the law, as the expression of the general will, seeking to achieve its moral and political expectations or aspirations. I would enter two caveats. First, “legality” is itself an ambiguous term that has a vast array of meanings<sup>57</sup>, ranging from the “property of being lawful” to the values of legality

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<sup>50</sup> Id.

<sup>51</sup> Dicey, supra note 37, at 193-95.

<sup>52</sup> Hart, CL, at 273-274; Waldron, supra note 16, at 8.

<sup>53</sup> Hart, CL, at 273-274.

<sup>54</sup> Waldron, supra note 16, at 8.

<sup>55</sup> Scott J. Shapiro, LEGALITY 388 – 400 (2011) [hereinafter, Shapiro, Legality].

<sup>56</sup> Waldron, supra note 16, at 8.

<sup>57</sup> Shapiro, Legality, at 404n3 (2011) (“Unfortunately, the term ‘legality’ has its own ambiguities. Sometimes, it refers to the property of being legal or lawful. Thus, we might ask about the legality of making a U-turn in the middle of the street. Other times, ‘legality’ refers to a value or set of values, in particular, those values associated with the Rule of Law. The principles of legality, for example, require that laws be clear, prospective, promulgated, etc.”).

“often ascribe to the rule of law”<sup>58</sup>. Second, when sailing on the stormy sea of studying the rise, evolution, and future of the administrative state in different political and legal systems, which are based on different legal traditions and whose history is written in different languages, one is prone to get lost in translation. Indeed, VAN CAENEGEM highlights the different meanings that the word “law” has in English, French<sup>59</sup>, and I will add, Spanish. Therefore, when I speak about the “language of legality”, I will be referring generally to the values and principles of the rule of law, understood as the aggregation of formal, procedural, instrumental methods, and substantive general principles required to prevent and correct the evils of the arbitrary exercise of public power, protect fundamental liberties, promote democratic governance, establish and preserve a government of laws as opposed to a government of men.

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### *The Path of the Law*

Generally speaking, legal systems purport to regulate the life of a community by imposing a normative order<sup>60</sup>. This means that propositions of law are intrinsically teleological and dynamic in character; namely, they impose legal obligations seeking to fulfill certain ends<sup>61</sup>. Hence it can be said that lawmakers, administrative agencies, and courts do not operate in a

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<sup>58</sup> H.L.A. Hart, *Philosophy of Law, Problems of*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 264, 273 – 274 (Paul Edwards ed., 1967) (“The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality. The principle which requires courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs matters of fact from both sides of a dispute are often referred to as rules of natural justice. These two sets of principles together define the concept of the rule of law to which most modern states pay at least lip service. [...] The value of the principles of natural justice which concern the process of adjudication are closely linked to the principles of legality”). See, e.g., Fuller, *supra* note 47, 33 – 45; Dicey, *supra* note 37, at 193-195; Waldron, *supra* note 16, at 11; Timothy A. O. Endicott, *ADMINISTRATIVE LAW* (2nd ed., 2011).

<sup>59</sup> R.C. Van Caenegem, *JUDGES, LEGISLATORS & PROFESSORS* 4 (1987) (“One consequence of this English ambiguity is that one is not even certain how to translate such a key expression as ‘the rule of law’. Personally I would be inclined to render it as *la règne du droit*, but I have found it translated as *le règne de la Loi*. This is rather amazing since, to my mind, the rule of law refers not only to enacted law but also to the legal rules of various origins on which the court protection of the individual is based. A recent French work on the role of the law in American and French democracy sometimes renders ‘the rule of law’ by *le règne de la loi* and sometimes by *la règle de droit*, underlining again the perplexity caused by the ambiguous term ‘law’”).

<sup>60</sup> See, e.g., Hart, *CL*; Shapiro, *Legality*; Timothy A. O. Endicott, *INTERPRETATION, JURISDICTION, AND THE AUTHORITY OF LAW*, *APA Newsletter* 14-19 (2007); Hans Kelsen, *GENERAL THEORY OF LAW & STATE* 35 (1949).

<sup>61</sup> Cass R. Sunstein, *ON THE EXPRESSIVE FUNCTION OF LAW*, 44 *U. Pa. L. Rev.* 5, 2021 (1996); León Duguit, *THE LAW AND THE STATE*, 31 *Harv. L. Rev.* 1, (1917); León Duguit, *LAW IN THE MODERN STATE*, (Frida & Harold Laski trans., 1919); Karl Llewellyn, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOLS*, at 9 (1965); O. W. Holmes Jr., *THE PATH OF THE LAW*, 10 *Harv. L. Rev.* 457, at 3 (1897); Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 40 (1921, 2012); Hart & Sacks, *supra* note 8, at 148 (“Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living set forth in the two opening notes. Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless”).



vacuum or without any underlying purpose; they act to shape social behavior and to articulate social policy in order to achieve the community's political and moral expectations<sup>62</sup>.

Such communitarian goals cannot be achieved instantaneously; rather, they demand that legal norms travel throughout a long pathway from the time when the lawmaker creates them to the moment they effectively come to shape social behavior<sup>63</sup>. Furthermore, legal norms do not live nor speak by themselves since they are not self-executing<sup>64</sup>. From a legal perspective, the *mise en oeuvre* of legal norms takes place in the legal process or in what I call, for purposes of this dissertation, the *path of the law*. Here, in the path of the law, legal institutions interact with each other to create, shape, interpret, modify, repeal, execute, and enforce legal norms in light of the principles of legality aiming toward fulfillment of a given community's goals<sup>65</sup>. In short, the path of the law is nothing but the channel through which legal practice unfolds. This does not mean, however, that what I call the path of the law serves as a method to test the validity or the efficacy of legal norms. This model is only meant to describe the different stages of the legal process, that is to say, the different steps that a legal norm takes from the time of its creation to the moment until it fulfills the purposes behind its enactment<sup>66</sup>.

Legal practice is then interpretive and argumentative, that is, a practice that consists essentially where participants advance various interpretations about what the law demands and defend such claims by offering reasons in their support<sup>67</sup>. In other words, legal practice is about solving competing interests and claims by construing and applying legal norms. Because of law's indeterminacy, interpretation requires some of the interpreter's own judgments on law and policy, for which accountability is crucial<sup>68</sup>. It must be noted that different interpretations of the same proposition of law made by different legal decision-makers may entail different legal consequences that (if not reconciled reasonably promptly) could undermine the stability and predictability of the rule of law<sup>69</sup>. An example of this undesired situation can be found in what administrative law scholars called the

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<sup>62</sup> Philip Nonet & Philip Selznick, *LAW AND SOCIETY IN TRANSITION, TOWARDS RESPONSIVE LAW* (1978).

<sup>63</sup> Hart & Sacks, *supra* note 61, at 150 -165.

<sup>64</sup> Jerry L. Mashaw, *CREATING THE ADMINISTRATIVE CONSTITUTION. THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 312 (2012).

<sup>65</sup> Hart & Sacks, *supra* note 61, at 180 – 183.

<sup>66</sup> Kelsen, *supra* note 60, at 35.

<sup>67</sup> Dworkin, LE; Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in *RONALD DWORKIN* (Arthur Ripstein ed., 2007).

<sup>68</sup> Max Radin, *STATUTORY INTERPRETATION*, 43 *Harv. L. Rev.* 863, 884 (1930); Ernst Freund, *INTERPRETATION OF STATUTES*, 65 *U. Pa. L. Rev.* 207, 211 (1917); Karl N. Llewellyn, *REMARKS ON THE THEORY OF APPELLATE DECISION AND THE RULES OR CANONS ABOUT HOW STATUTES ARE TO BE CONSTRUED*, 3 *Vand. L. Rev.* 395, 395-400 (1950).

<sup>69</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 97 (1816) ("A Motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable").

“balkanization” of federal law, which in their view occurs when federal statutes are construed in a different fashion by different federal judges<sup>70</sup>.

In practical terms, if one portrays what I have described as the path of the law through the lenses of the two compared legal systems’ constitutional structures, one would draw something like a straight line that goes in one direction. The legislature passes a statute<sup>71</sup> that, since it is not self-executing, must be executed *ex ante* by administrative agencies<sup>72</sup> or *ex post* by courts in the cases where litigation arises<sup>73</sup>. On the assumption that a community rests upon a political and moral consensus<sup>74</sup>, it must be noted that in this simple picture of the path of the law all lawmaking power is vested in the legislature as the most politically accountable branch of government and, for such a reason, it has the first word in the legal process. This view of the path of the law appears to be consistent with the core tenets of *Enlightenment constitutionalism*. Bear in mind that LOCKE posited that the “[...] legislative is not only the supreme power of the Commonwealth, but sacred and unalterable in the hands where the community have once placed it”<sup>75</sup>. Likewise, though he referred to the German *ius pandectarum*, WINDSCHEID postulated that legislation is whatever the legislature desires to transform into law<sup>76</sup>. When this linear view of the legal process is compared to the principles and values of legality that I have described, it is not by simple chance that each one of the three phases or stages of what I have pictured as the path of the law match with each one of the three branches of the government of laws designed by the quill of the *Lumières* to articulate and constrain government and the exercise of public power. Indeed, I consider that what I call the path of the law is nothing but the translation of the *Enlightenment constitutionalism*’s core tenets into legal terms and structures.

The path of the law is dynamic in character, for it should be the forum where all the powers of a government of laws concur to work toward the fulfillment of a community’s expectations. On this assumption, I believe that the path of the law works as a complex conversation to propose a view of a legal process that accounts for the new role of the administrative power within it and that preserves the supremacy of legality. I must clarify, however, that by communicative function I do not mean that legal norms “communicate” the “will” of the lawmakers nor that it is the duty of the interpreter to discover what they were “trying to say” when they create a legal norm<sup>77</sup>. Instead, I seek to describe how various legal institutions simultaneously partake in the legal dialogue or conversation in light of the broader values of legality.

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<sup>70</sup> Peter L. Strauss, ONE HUNDRED FIFTY CASES PER YEAR: SOME IMPLICATIONS OF THE SUPREME COURT’S LIMITED RESOURCES FOR JUDICIAL REVIEW OF AGENCY ACTION, 87 Colum. L. Rev. 1093 (1987) (describing the balkanization of federal law); Cass R. Sunstein, BEYOND MARBURY: THE EXECUTIVE’S POWER TO SAY WHAT THE LAW IS, 115 Yale L. J. 2588 (2006); Thomas G. Krattenmaker, THE TELECOMMUNICATIONS ACT OF 1996, 49 Federal Communications Law Journal 1, 4 (1996).

<sup>71</sup> U.S. Constitution, Art. I Sec. 8; Constitución Política de Colombia [C.P.], Arts. 114 and 150 (Colom.).

<sup>72</sup> U.S. Constitution, Art. II Sec. 1; Constitución Política de Colombia [C.P.], Arts. 115 and 189 (Colom.).

<sup>73</sup> U.S. Constitution, Art. III; Constitución Política de Colombia [C.P.], Arts. 116, 228, 229, 230 (Colom.).

<sup>74</sup> Donald S. Lutz, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 11-13 (1980); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 519 (2d ed. 2003).

<sup>75</sup> Locke, *supra* note 8, at 188, 197.

<sup>76</sup> 1 Bernhard Windscheid, *TRATADO DE DERECHO CIVIL ALEMÁN*, at 1 (Fernando Hinestrosa trans., 1987).

<sup>77</sup> Dworkin, *LE*, at 317.

Hence, I consider that the language of legality serves as a channel whereby physical situations, politics, and moral ideas are introduced into the legal system<sup>78</sup>. Put it differently, from a jurisprudential perspective, that the language of legality channels the transformation of expertise and politics into legal norms that carry and convey a moral and political meaning, regardless of the branch of government to which the legal institution is ascribed. Hence the language of legality is responsible for shifting an “agreement” into a contract<sup>79</sup>, namely, for transforming a moral duty into a legal obligation pursuant to the formal, procedural, and substantive requirements set out in a legal system that can vary according to the theory about the nature of law or adjudication that one embraces<sup>80</sup>. By the same token, I consider that the language of legality is responsible for transforming politics and morality into legal obligations that impose duties which legal institutions and private individuals are obliged to comply with. I call this the transformative function of the legality.

In my view, law in a democratic polity works as complex conversation whereby the community conveys, through the public authorities that it has established, a message on how to shape social behavior to achieve its political and moral aspirations. All participants in the conversation play an active role in shaping the language of legality according to their authority and place within the legal and political system. On this assumption, I believe that a pluralistic legal process works as a set of *feedback loops* where all powers of government

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<sup>78</sup> Lon Fuller, CONSIDERATION AND FORM, 41 Colum. L. Rev. 799, 800 - 801 (1941). I consider that FULLER's account of the underlying policies and functions of form allows me to illustrate this point. In his view, form serves three main functions: evidentiary, cautionary, and channeling<sup>78</sup>. Despite their theoretical distinction, the three functions are interrelated in practice. I want to focus on the “cautionary” and “channeling” functions. First, FULLER explains the cautionary function is meant to be a safeguard to prevent or deter inconsiderate actions. When applied to public law, I think this cautionary function may serve, in principle, to deter the legislature to enact a statute without fulfilling the formal requirements set forth in the Constitution. The same can be said about an administrative agency, the formal requirements may prevent them from making a rule or adjudicating a right without meeting the minimum formal aspects required by legislation to do so. The “channeling” function of the form mentioned by FULLER serves an essential purpose that goes beyond a mere seal or notarization. Indeed, he argued that the channeling function of the form signalizes the “[...] enforceable promise; it furnishes a simple and external test of enforceability” by offering a channel for the “legally effective expression of intention.” In order to illustrate the channeling function of legal formalities, FULLER makes an analogy with language. He explains that they way to communicate inner thoughts and ideas “[...] must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech.” FULLER explains, furthermore, that one who wants to engage in a legal transaction faces the same situation: one first envisions an economic or mental aim and then one must, “[...] with or without the aid of a lawyer, cast about for the legal transaction.”

<sup>79</sup> I disagree with HOHFELD's view that the shift from an agreement to contract may occur unexpectedly and that it is a matter of legal phraseology. In my view, such a shift occurs when the interested parties comply with the formal and substantive requirements established in the law. See W. Hohfeld, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 23 Yale L. J. 16, at 57, 56 (1913) (“[W]ord may mean *the agreement* of the parties; and then, with a rapid and unexpected shift, the writer or the speaker may use the term to indicate *the contractual obligation* created by law as a result of the agreement”).

<sup>80</sup> For instance, according to H.L.A. Hart's and Dworkin's accounts, one could argue that the “shift” occurs respectively when the agreement is made in pursuance to a secondary rule or grounds of law that articulate the form in which contracts ought to be made to create legal consequences for the contracting parties, that is, to impose legal obligations or to grant rights. By contrast, Holmes would argue that such a “shift” relies on the fact that the making of contract not only depends upon the mere agreement of two minds but on the agreement of two “external signs.”

intervene to make policy choices and shape the language of the law accordingly<sup>81</sup>. That provides, in turn, different gateways through which citizens can access the legal process to participate in policy decisions and the making of the law.

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### *The Rise of the Administrative Power*

Although it may appear that the idea of a rule of law and its articulation in the path of the law speaks in the language of political consensus, its practical implementation suggests otherwise. In fact, the problems that societies face in our days are much more complex than those existing in the time when *Enlightenment constitutionalism* flourished<sup>82</sup>. Nowadays social life, science, and technology develop at a vertiginous rate<sup>83</sup>. Far from having a political and moral consensus<sup>84</sup>, a community is rather pluralistic insofar as it is comprised of individuals with different interests and sentiments<sup>85</sup>. Addressing competing interests within such a complex social, technological, and political context raises several challenges to legality and its legal process<sup>86</sup>. Generally speaking, legislators often lack the necessary specialized expertise or political determination to regulate the life of a community in detail<sup>87</sup>,

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<sup>81</sup> Martin Shapiro, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); Hart & Sacks, *supra* note 61, at 150 - 165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 151 (“Legal process theory does not hold that all lawmaking must occur in the legislature but maintains that statutory interpretation should be a cooperative endeavor, in which different institutions work together to create public policy”). In addition to this account advanced by the *legal process theory*, one can find a *legal positivist* theory of dynamic interpretation. H.L.A. HART suggests the legislature may regulate social conduct by employing what he calls "variable standards", case in which the legislature faces two possible pathways: It can either pass a general variable standard identifying a class of specific actions and delegating rulemaking power on an administrative authority to adapt it according to a special set of facts and needs or pass a variable standard that leaves to individuals' discretion the task of balancing the facts and social aims involved in their implementation. Although both types of variable standards are similar, it is possible to distinguish between them relying on the moment when the determination of the standard is made and by whom. On the one hand, one can find variable standards whose determination is made *ab initio* by an administrative authority, and on the other, variable standards whose determination is made *ex post facto* by Courts in light of a given set of facts. *See, e.g.*, Hart, CL, at 130. Moreover, SCOTT SHAPIRO also introduces a theory of dynamic interpretation that takes into account the allocation and assessment of the economy trust of different legal institutions represented as planners. *See* Shapiro, Legality, at 335 - 338. For the discussion about Shapiro's meta-interpretive theory *see* Chapters One and Three.

<sup>82</sup> Kagan, The Organisation of Administrative Justice Systems, *supra* note 12. Professor KAGAN explains, that in “[...] most political democracies, governments are under constant pressure to improve the general welfare. So decade after decade, governments enact more laws, create more rights, regulate more risks, and create costly new social programs. To implement these laws and programs, they create specialized government agencies or bureaus”.

<sup>83</sup> James Landis, THE ADMINISTRATIVE PROCESS 6 (1938); Felix Frankfurter, THE PUBLIC AND ITS GOVERNMENT 7 – 10 (1930).

<sup>84</sup> Lutz, *supra* note 74, at 11-13; Pocock, *supra* note 74, at 519.

<sup>85</sup> Robert A. Dahl, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); Daniel Bell, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1960).

<sup>86</sup> *See, e.g.*, Ralph F. Fuchs, CONCEPTS AND POLICIES IN ANGLO-AMERICAN ADMINISTRATIVE LAW THEORY, 47 Yale L. J. 538, 539 (1938); Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES, 96 - 97 (1982); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, 155 (1994); Sunstein, *supra* note 2; Richard B. Stewart, THE REFORMATION OF ADMINISTRATIVE LAW, 88 Harv. L. Rev. 1667 (1975).

<sup>87</sup> Elena Kagan, PRESIDENTIAL ADMINISTRATION, 114 Harv. L. Rev. 2245, 2255 (2001) (“Sometimes Congress legislated in this way because it recognized limits to its own knowledge or capacity to respond to changing

which bolsters the truism that statutes cannot foresee nor regulate all variables of social behavior<sup>88</sup>. This undermines, in my view, the *formalist* idea of complete legislative supremacy in lawmaking<sup>89</sup>. As a practical matter<sup>90</sup>, it also entails that legal norms often are made in a general and even indeterminate fashion,<sup>91</sup> which MARTIN SHAPIRO calls “lottery statutes”<sup>92</sup> when they are enacted by the legislature. In fact, legal institutions often employ general, ambiguous, imprecise, incomplete, and, open-textured written formulas<sup>93</sup> to attend to the community’s competing interests or to address different audiences at the same time<sup>94</sup>. This legal craftsmanship leads to constitutional and statutory indeterminacies, ambiguities, and implicatures whose resolution often calls for judgments of policy and principle<sup>95</sup>. Put it differently, the way in which legal norms are made determine the difficulty in answering the

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circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and sometimes because it wished to pass on to another body politically difficult decisions”).

<sup>88</sup> See, e.g., Hart & Sacks, *supra* note 61, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 15; Joseph Story, “Codification of the Common Law”, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, 698 (William W. Story ed., 2000); Radin, *supra* note 68, at 868; Hart, CL, at 123; Portalis, *supra* note 26, at 44 (“L’office de la loi est de fixer, par de grandes vues, les maximes générales du droit: d’établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière”); André Tunc, The Grand Outlines of the Code, in THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD, 29 - 30, (Bernard Schwartz ed., 1956). Tunc cites Portalis’ words: “Laws are not pure acts of will; they are acts of wisdom, of justice, and of reason. The legislator does not so much exercise a power as fulfill a sacred trust. One ought never to forget that laws are made for men, not men for laws; that laws must be adapted to the character, to the habits, to the situation of the people for whom they are drafted; that one ought to be wary of innovations in matters of legislation, for if it is possible, in a new institution, to calculate the merits that theory may promise us, it is not possible to know all the disadvantages, which only experience will reveal; that the good ought to be kept if the better is dubious; that in correcting abuses, one must also foresee the dangers of the correction itself; that it would be absurd to indulge in absolute ideas of perfection in matters capable of a relative value only [...]”.

<sup>89</sup> For the discussion about the core tenets of *legal formalism* see Chapter One.

<sup>90</sup> In the United States, empirical studies have found that vague statutory language is more common in some substantive policy areas than others. See, e.g., David Epstein & Sharyn O’Halloran, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS, 198 – 199 (1999).

<sup>91</sup> Hart, CL, at 124 - 131 (“[...] [T]he need of certain rules which can, over great areas of conduct, safely be applied by private individual to themselves without fresh official guidance or weighing up for social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case”).

<sup>92</sup> Shapiro, *supra* note 81, at 172.

<sup>93</sup> *Towne v Eisner*, 245 U.S. 418, 425 (1918); Hart, CL, at 123, (“This imparts to all rules a fringe of vagueness or ‘open texture’, and this may affect the rule of recognition specifying the ultimate criteria used in the identification of the law as much as a particular statute”); Timothy Endicott, VAGUENESS IN THE LAW 31 – 55 (2000).

<sup>94</sup> See, e.g., Daniel A. Farber & Anne Joseph O’Connell, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (2010); Daniel A. Farber & Philip Frickey, LAW AND PUBLIC CHOICE (1991).

<sup>95</sup> Radin, *supra* note 68, at 868; Max Radin, THE THEORY OF JUDICIAL DECISION: OR HOW JUDGES THINK, 11 A.B.A. J. 357, 362 (1925); Herman Oliphant, A RETURN TO STARE DECISIS, 14 A.B.A. J. 71, 75 (1928); Felix Cohen, TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH, 35 Colum. L. Rev. 809, 843 (1935); Brian Leiter, “American Legal Realism” in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, 51 (Martin P. Golding & William A. Edmundson eds., 2005); Sunstein, *supra* note 70; Sunstein, *supra* note 2; Miles & Sunstein, *supra* note 6; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2; Jerry L. Mashaw, NORMS, PRACTICES, AND THE PARADOX OF DEFERENCE: A PRELIMINARY INQUIRY INTO AGENCY STATUTORY INTERPRETATION, 57 Admin. L. Rev. 501 (2005); Kenneth A. Bamberger, NORMATIVE CANONS IN THE REVIEW OF ADMINISTRATIVE POLICYMAKING, 118 Yale L. J. 64 (2008).



questions that fall within their scope and the amount of discretion granted to the institutions that shall interpret and enforce them<sup>96</sup>.

Another power different from the legislature and the judiciary is then required to bring the law into existence, though I think that additional power should not be limited to “executing” legislation. My view is that if the path of the law mirrors how political power is divided and shared among the different branches of government and the way in which such powers create and execute public policy through the language of legality, any change in the form and structure of government may entail a shift in the form and structure of the path of the law. It must be underlined that, based on empirical evidence, commentators suggest that the tripartite theory of the separation of powers is inadequate to deal with the problems of modern governance<sup>97</sup>. As a result, commentators argue that the administrative power emerged as a response to the practical limitations of the separations of powers<sup>98</sup>. Back in 1938, JAMES LANDIS posited that the administrative power is not only a simple extension of the executive power of government but a “different” power of government. He wrote:

[The] administrative [power] differs not only with regard to the scope of its powers; it differs most radically in regard to the responsibility it possesses for their exercise. In the grant to it of that full ambit of authority necessary for it in order to plan, promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole. [...] The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.<sup>99</sup>

I agree with LANDIS’ understanding of the administrative process on the assumption that it is the solution to the inadequacies of the tripartite separation of powers doctrine embraced by constitutional democracies without undermining the essence of theory. However, I consider that the “administrative power” is not different from the other three powers of government, but instead the outgrowth of the executive power of government which has been shaped by

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<sup>96</sup> Hart & Sacks, *supra* note 61, at 150 – 165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 143, (“According to Hart and Sacks, statutes must be understood not solely as directives addressed to the citizenry (the traditional liberal position), but also as directives addressed to government officials who are charged with developing statutory schemes over time. Courts and agencies do this through a process of reasoned elaboration from the statutory purpose”).

<sup>97</sup> Landis, *supra* note 83, at 1; Bruce Ackerman, THE NEW SEPARATION OF POWERS, 133 Harv. L. Rev. 633, (2000); Bruce Ackerman, “Good-Bye, Montesquieu”, in COMPARATIVE ADMINISTRATIVE LAW, at 128 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011); Peter L. Strauss, THE PLACE OF THE AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH, 84 Colum L. Rev. 573 (1984); Peter L. Strauss, OVERSEER OR “THE DECIDER”?, THE PRESIDENT IN ADMINISTRATIVE LAW, 75 G.W. L. Rev. 696, (2007).

<sup>98</sup> *Id.*

<sup>99</sup> Landis, *supra* note 83, at 136, 46.

the necessities of modern governance and shifting political circumstances<sup>100</sup>. In my view, rather than being a justification for the existence of a different power of government, LANDIS' unparalleled effort to differentiate the administrative power from the executive power on theoretical, procedural, and practical grounds can be best seen as a *legal realist* account of administrative reasoning, for it emerged as a reaction against the *formalist* conception of the executive power as a mere executor of legislation in the pre-New Deal era. Indeed, a comparison between the core tenets of the *formalist* transmission belt theory of administration and LANDIS' *realist* account of the administrative power suggests that they both agree on the existence of an executive power but differ about its role in the path of the law and about the nature, scope, and extent of agency action. Nonetheless, unlike the formalist transmission belt theory, LANDIS' insightful approach revealed the vast array of duties and responsibilities that the administrative power embodies in a constitutional democracy and the path of the law.

Relying on the core tenets of *Enlightenment constitutionalism*, I consider that the actions of making the law, executing the law, and adjudicating the law are three functions that should be disaggregated and separated in order to prevent any abuses of power<sup>101</sup>. It must be underlined, however, that the separation of powers doctrine is about functions, not institutions<sup>102</sup>. Although LOCKE'S and MONTESQUIEU'S accounts of the theory are slightly different as to the terminology, they remain the same in the substance of advocating in favor of the disaggregation of the functions of government and vesting them upon different legal institutions to deter tyranny and promote a democratic government<sup>103</sup>. On this assumption, I am convinced that a democratic polity that speaks the language of legality requires a power that encompasses the three traditional functions of government, namely; making the law, executing it, and adjudicating the disputes that its application to particular facts may elicit<sup>104</sup>.

On the one hand, from a *political philosophy perspective*, I think that a community that speaks the language of legality and that is committed to protecting fundamental liberties and democracy requires a power of government charged with the authority to bring the law into existence and to apply it to particular issues and situations. The values of legality demand the existence of a power that acts as a faithful agent of the law, that is, a power that ought to be

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<sup>100</sup> Martin Shapiro, *Judicial Activism*, in *THE THIRD CENTURY: AMERICA AS A POST-INDUSTRIAL SOCIETY* 110 (Seymour Lipset ed., 1979); Martin Shapiro, *APA: PAST, PRESENT, FUTURE*, 72 *Va. L. Rev.* 447, 477 (1986).

<sup>101</sup> 1 John Locke, *TWO TREATISES OF GOVERNMENT* 195 (Thomas I. ed., 1947).

<sup>102</sup> Alex Tuckness, "Locke's Political Philosophy," *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2012/entries/locke-political/>>. ("If we compare Locke's formulation of separation of powers to the later ideas of Montesquieu, we see that they are not so different as they may initially appear. Although Montesquieu gives the more well known division of legislative, executive, and judicial, as he explains what he means by these terms he reaffirms the superiority of the legislative power and describes the executive power as having to do with international affairs (Locke's federative power) and the judicial power as concerned with the domestic execution of the laws (Locke's executive power). It is more the terminology than the concepts that have changed. Locke considered arresting a person, trying a person, and punishing a person as all part of the function of executing the law rather than as a distinct function").

<sup>103</sup> *Id.*

<sup>104</sup> Landis, *supra* note 83; Felix Frankfurter, *supra* note 83; Daniel R. Ernst, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900 – 1940*, (2014); Mark Tushnet, *ADMINISTRATIVE LAW IN THE 1930S: THE SUPREME COURT'S ACCOMMODATION OF PROGRESSIVE LEGAL THEORY*, 60 *Duke L. J.* 1566 (2011).

discharged according to the constitution and legislation and whose inner and external actions are subject to judicial review. Furthermore, I see the administrative power as a natural outgrowth of the executive power insofar as it should be responsive to the guidance provided by a politically accountable Chief Executive. This is what establishes, in turn, the administrative power's political or democratic accountability. On the other, from a *legal philosophy perspective*, experience has shown that laws do not live by themselves since they are not self-executing. Nor can the legislature foresee and regulate all the variables of social behavior. Thus, an additional action from a public power is required to execute, construe, and enforce what the legislature has announced in general terms. Hence I consider that the administrative power is itself a political and legal philosophy construction that may assume different faces according to varying constitutional schemes, institutional arrangements, political structures, shifting political circumstances, and theories about the nature of law and adjudication.

Having in mind that constitutional democracies are committed to democratic accountability and specialized competence, legal institutions endowed with administrative power have then been called upon to play an active role in governance, sequential policymaking procedures, and in the legal process<sup>105</sup>. Their duty is to address competing interests in resolving easy and hard cases<sup>106</sup>. Interpretation is central to their role within their path of the law due to the need for resolving constitutional and statutory ambiguities or implicatures, as well as frequent changes in policy over time in order to adapt old normative provisions to unanticipated situations<sup>107</sup>. As was noted earlier, bringing the law into existence is not a simple task; nor does it occur instantly. It rather requires a set of actions from all the branches of government that actively partake in what I call the path of the law, which I envision as a complex conversation that unfolds as a set of *feedback loops*. In this complex conversation, I see the

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<sup>105</sup> See, e.g., Landis, *supra* note 83; Frankfurter, Landis, *supra* note 83, at 7 – 10; Henry Friendly, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962); Bernard Schwartz, AMERICAN ADMINISTRATIVE LAW, (1950); Frank J. Goodnow, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES, 3 (1905); Martin Shapiro, ADMINISTRATIVE DISCRETION: THE NEXT STAGE, 92 Yale L. J. 1487, 1487 (1983); Martin Shapiro, THE GIVING REASONS REQUIREMENT, 1992 U. Chi. Legal F. 179 (1992); Mashaw, *supra* note 64, at 8; Mashaw, *supra* note 95, at 538; Sunstein, *supra* note 70; Sunstein, *supra* note 2; Miles & Sunstein, *supra* note 6; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2; Ernst, *supra* note 104; Bamberger, *supra* note 95, at 124; Alexandre F. Vivien, ÉTUDES ADMINISTRATIVES at V (1845); León Duguit, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON (1920); León Duguit, THE LAW AND THE STATE, 31 Harv. L. Rev 1, (1917); Jean Rivero & Marcel Waline, DROIT ADMINISTRATIF (17th ed., 1998)

<sup>106</sup> Stewart, *supra* note 86, at 1683 (“Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy”). Furthermore, Professor STEWART explains that E. PENDLETON HERRING first proposed this account of the administrative process in 1936. See Edward P. Herring, PUBLIC ADMINISTRATION AND THE PUBLIC (1936). See also, e.g., Ernest Gellhorn, PUBLIC PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS, 81 Yale L. J. 359, 360 (1972); Mashaw, *supra* note 95, at 538 (“Agencies are immersed in political controversies-struggles not just between or among interest groups vying for attention and preference, but institutional competitions between the executive and the legislative branches.”); Elena Kagan, *supra* note 87, at 2356 - 2357 (“Agencies, for example, often must confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face of both scientific uncertainty and competing public interests.”); Bamberger, *supra* note 95, at 74; Tennessee Valley Authority v. Hiram Hill et al., 437 U.S. 153, 194 (1978); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

<sup>107</sup> Hart & Sacks, *supra* note 61, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 151; Mashaw, *supra* note 95; Hart, CL, at 130; Shapiro, Legality, at 335 – 338; Chevron, *supra* note 106.

administrative power as the first interpreter and executer of what the legislature has laid down in general terms<sup>108</sup>. The administrative power is, therefore, a *faithful agent of the law*<sup>109</sup>.

By *faithful agent of the law* I do not mean, however, that the administrative power is only an agent of Congress or legislation<sup>110</sup>; I mean that it is an agent of the principles and policies, either written or not, that flow from past political decisions and which define a democratic polity as such<sup>111</sup>. I consider that personal morality considerations should not be excluded from administrative reasoning. For instance, one could argue that one of the salient features of the path of the law is the existence of hard cases where the decision-maker experiences conflict between the plain letter of the law and her personal morality as applied to a particular question at stake. This is what ROBERT COVER calls the “moral-formal dilemma” in *Justice Accused*<sup>112</sup>. Similarly, BARDACH and KAGAN suggest that this occurs frequently in practice because statutes and administrative regulations tend to be “overinclusive”<sup>113</sup>. They suggest, furthermore, that such a conflict between the decision-maker’s personal morality and the plain letter of the law is an essential “prompt” for flexible interpretations or drafting principled exceptions<sup>114</sup>. I consider that administrative reasoning should be regarded as *moral* because the decision of hard cases may require administrators to look beyond previously acknowledged legal norms by appealing to expertise, morality, and politics. This is nothing but a claim for candor. However, this does not mean that the administrator’s personal desires or interests should exclusively motivate administrative reasoning because the language of legality should channel the transformation of morality and expert knowledge into valid legal rules. Put it differently, the obedience to the rule of law entails that the administrative power should act only to fulfill the political and moral aspirations of a community that lives under the values of legality, as opposed to a government of men that acts only to advance the personal morality and desires of those who govern<sup>115</sup>.

<sup>108</sup> Sunstein, *supra* note 70, at 2609; Sunstein, *supra* note 2; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 162; Thomas W. Merrill, The Story of Chevron: The Making of an Accidental Landmark, *In ADMINISTRATIVE LAW STORIES* 401 (Peter L. Strauss ed., 2006).

<sup>109</sup> Mashaw, *supra* note 95, at 505; Peter Strauss, WHEN THE JUDGE IS THE NOT THE PRIMARY OFFICIAL WITH RESPONSIBILITY TO READ: AGENCY INTERPRETATION AND THE PROBLEM OF LEGISLATIVE HISTORY, 66 *Chi. Kent L. Rev.* 321 (1990); Vivien, *supra* note 105, at V; García de Enterría, *supra* note 22 at 129.

<sup>110</sup> Jerry L. Mashaw, TEXTUALISM, CONSTITUTIONALISM, AND THE INTERPRETATION OF FEDERAL STATUTES, 32 *Wm. & Mary L. Rev.* 827, 827 - 828 (1991) (“Yet, whether commentators emphasize the potentially chaotic or self-interested nature of legislation, the internally contradictory or radically subjective nature of norms, or the necessity of tradition-based, communitarian, or pragmatic solutions to interpretive puzzles, one underlying message seems the same: attempts to link the interpretation of statutes to the commands of an identifiable legislature are doomed. If we ever believed in the naive ‘faithful agent’ model of statutory interpretation, we can no longer”).

<sup>111</sup> Ronald Dworkin, HARD CASES, 88 *Harv. L. Rev.* 6, 1057, at 1105 (1975); Dworkin, LE, at Ch. 7.

<sup>112</sup> Robert M. Cover, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 197 (1975) (describing the judge’s moral-formal dilemma about slavery and liberty).

<sup>113</sup> Eugene Bardach & Robert A. Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 66 (1982).

<sup>114</sup> *Id.* at 123. *See also* Robert Kagan, REGULATORY JUSTICE 89 – 90 (1978).

<sup>115</sup> Dworkin, *supra* note 111, at 1064. For DWORKIN, the doctrine of political responsibility states “[...] in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make. The doctrine seems innocuous in this general form; but it does, even in this form, condemn a style of political administration that might be called, following Rawls, intuitionistic. It condemns the practice of making decisions that seem right in isolation, but cannot be brought within same comprehensive theory of general principles and policies that is consistent with

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### *Administrative Novelty*

Now I turn to the question whether the arguments that have been wielded against *judicial novelty* can be raised against *administrative novelty or originality*. I want to jointly address the first two challenges, namely; on the one hand, that law should be made by elected and responsible officials, and on the other, that that new administrative rules cannot be justified on improving the overall welfare of a community or the public interest at the expense of acquired rights. My short answer is that that the administrative power should decide hard cases by attending competing interest and choosing between different courses of action on discretionary grounds<sup>116</sup> based on arguments of policy and principle due to the role it plays within the path of the law<sup>117</sup>.

The idea of a democratic government of laws instituted to serve the “public interest” is certainly one of *Enlightenment constitutionalism’s* core tenets and its origins can be traced back to the works of PLATO<sup>118</sup> and ARISTOTLE<sup>119</sup>. Recall DENIS DIDEROT’s suspicion on how particular interests may corrupt government and his confidence on the untainted nature of *la volonté générale* as the compass that shall guide a democratic government<sup>120</sup>. Likewise, JOHN ADAMS was particularly concerned about the essential role of the “public interest” in a government of laws. In his opinion, “[...] law proceeds from the will of man, whether a monarch or people; and that this will must have a mover; and that this mover is interest: but the interest of the people is one thing — it is the public interest; and where the public interest governs, it is a government of laws, and not of men: the interest of a king, or of a party, is another thing — it is a private interest; and where private interest governs, it is a government of men, and not of laws”<sup>121</sup>. On this account, I suggest that a traditional view of administrative decision-making would argue that administrative decision-makers should construe the grounds of law or decide meta-interpretive disagreements *rationaly* seeking the protection

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other decisions also thought right”. See also Dworkin, LE, at 223, 243; Sunstein, *supra* note 2; Eskridge, PUBLIC VALUES, *supra* note 2; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 146 – 151.

<sup>116</sup> See, e.g., Louis D. Schwartz, LEGAL RESTRICTION OF COMPETITION IN THE REGULATED INDUSTRIES: AN ABDICATION OF JUDICIAL RESPONSIBILITY, 67 Harv. L. Rev. 436, 472 (1954) (“[E]xpertness is not wisdom and [...] the relative ordering of values in a society – the ultimate problem of choosing between alternative courses of action – is something we do after the expert has completed his task of collecting data, describing, and, to a limited extent, predicting”).

<sup>117</sup> Stewart, *supra* note 86, at 1683; Shapiro, ADMINISTRATIVE DISCRETION, *supra* note 105, at 1487; Shapiro, THE GIVING REASONS REQUIREMENT, *supra* note 105; Shapiro, *supra* note 81.

<sup>118</sup> Plato, THE REPUBLIC at 462a – b (2003).

<sup>119</sup> Aristotle, POLITICS III at 1279a, 17 – 21 (“Constitutions which aim at the common advantage are correct and just without qualification, whereas those who aim only at the advantage of the rulers are deviant and unjust, because they involve despotic rule which is inappropriate for a community of free persons”).

<sup>120</sup> Diderot et Al, *supra* note 30, at 372 (“Les volontés particulières sont suspectes; elles peuvent être bonnes ou méchantes, mais la volonté générale est toujours bonne; elle n’a jamais trompé, elle ne trompera jamais”).

<sup>121</sup> Adams, *supra* note 42, at 129.



of the “common good”<sup>122</sup>, the “public interest”<sup>123</sup> or the “national welfare”<sup>124</sup>.

Critics would reply, nonetheless, that this is a misconception of the administrative process insofar as the “public interest” is just a “myth” to “disguise” the planning and allocation of “valuable benefits” in a community<sup>125</sup>; while at the same time it exposes the legislature’s incapability to address “hard questions of social choice”<sup>126</sup>. In *The Law of the Planned Society*, Professor CHARLES REICH raised a sharp critique against the traditional view of administrative law. He posited that administrative procedures were meant to preserve “[...] the appearance of the rule of law, making it seem that the immensely important allocation and planning process is being carried out at all times subject to fair and equitable guiding principles. It preserves the appearance of constitutional division of power”<sup>127</sup>. Moreover, the generous literature on *public choice* introduced an insightful framework to analyze the different variables that may actually influence the behavior of administrators acting as

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<sup>122</sup> Edward L. Rubin, THE NEW LEGAL PROCESS, THE SYNTHESIS OF DISCOURSE, AND THE MICROANALYSIS OF INSTITUTIONS, 109 Harv. L. Rev. 1393, 1395 (1996) (“Legal process theorists accepted the prevailing notion that government institutions act rationally to achieve their goals. The question they asked about these institutions involved their legitimacy: that is, whether their actions correspond with the common good. Presumably, the common good will be advanced by the political branches in a democratic system, at least in the absence of particularized distortions like discrimination because these institutions are controlled by the populace”). See, e.g., Hart & Sacks, *supra* note 61, at 693; Lon L. Fuller, THE FORMS AND LIMITS OF ADJUDICATION, 92 Harv. L. Rev. 353, 365 (1978).

<sup>123</sup> European scholars agreed that the “public interest” is best exemplified by the “service publique” doctrine recognized by the French *Tribunal des Conflits* in the *Arrêt Blanco*, *february 8, 1873*. On this account, French administrative law scholar GASTÓN JEZE asserts that the “service publique” is the “*piere angulaire*” of French administrative law. See 1 Gastón Jèze, PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO, LA TÉCNICA JURÍDICA DEL DERECHO PÚBLICO FRANCÉS, at XL (J.N. San Millán Almagro trans., 1948). For the discussion about the nature, scope, and extent of the “public interest” and “*service publique*” doctrines in Spain, see, e.g., Gaspar Ariño Ortiz, PRINCIPIOS DE DERECHO PÚBLICO ECONÓMICO, MODELO DE ESTADO, GESTIÓN PÚBLICA, REGULACIÓN ECONÓMICA, 481 - 483 (2008); Tomás Ramón Fernández, DEL SERVICIO PÚBLICO A LA LIBERALIZACIÓN, 150 Revista de Administración Pública (1999); 1 Sebastián Martín-Retortillo Baquer, DERECHO ADMINISTRATIVO ECONÓMICO, 39 - 41 (1988); Luciano Parejo Alfonso, EL ESTADO SOCIAL ADMINISTRATIVO: ALGUNAS REFLEXIONES SOBRE LA <<CRISIS>> DE LAS PRESTACIONES Y LOS SERVICIOS PÚBLICOS, 153 Revista de Administración Pública, 28 (2008); Javier Pérez Royo, LA DOCTRINA DEL TRIBUNAL CONSTITUCIONAL SOBRE EL ESTADO SOCIAL, 10 Revista Española de Derecho Constitucional, 161 (1984). For the discussion about the relationship between the “servicio público” doctrine and the “public interest in Colombia, see, e.g., Alberto Montaña Plata, EL CONCEPTO DE SERVICIO PÚBLICO EN EL DERECHO ADMINISTRATIVO (2005).

<sup>124</sup> European scholars have traced back the origins of the “national welfare” concept to the concept of “*daseinsvorsorge*” which was first introduced in German public law to describe the set of values that the public administration ought to fulfill in carrying out its responsibilities in the Welfare State. See, e.g., Ernst Forstthoff, TRATADO DE DERECHO ADMINISTRATIVO, 252 (trans., 1958); Ernst Forstthoff, “Concepto y Esencia del Estado Social de Derecho”, in EL ESTADO SOCIAL, 69 (trans., 1986); Martin Bullinger, EL SERVICE PUBLIC FRANCÉS Y LA DASEINSVORSORGE EN ALEMANIA, 166 Revista de Administración Pública at 33 - 34 (2005); Lorenzo Martín-Retortillo Baquer, LA CONFIGURACIÓN JURÍDICA DE LA ADMINISTRACIÓN PÚBLICA Y EL CONCEPTO DE DASEINSVORSORGE, 38 Revista de Administración Pública, 40 - 47 (1962).

<sup>125</sup> Louis L. Jaffe, THE ILLUSION OF THE IDEAL ADMINISTRATION, 88 Harv. L. Rev. 1183 (1973); Louis L. Jaffe, TWO DAYS TO SAVE THE WORLD, 24 Okla. L. Rev. 17, 17 (1971); Louis L. Jaffe, THE INDIVIDUAL RIGHT TO INITIATE ADMINISTRATIVE PROCESS, 25 Iowa L. Rev. 485, 498 (1940); Charles Reich, THE LAW OF THE PLANNED SOCIETY, 75 Yale L. J. 1227, 1235 (1966).

<sup>126</sup> Kenneth Culp Davis, DISCRETIONARY JUSTICE 48 (1969).

<sup>127</sup> Reich, *supra* note 125, at 1237.

“reelection maximizers”<sup>128</sup>. For the purpose of building predictive theories, public choice scholars assume that administrators “[...] are perfectly rational as individuals, since reelection maximizes each individual's self-interest, but the behavior of the institutions that they comprise is determined simply by the sum of their uncoordinated individual efforts”<sup>129</sup>.

I think that this critique raised against the traditional view of administrative law is sharper than it may appear at first glance insofar as it questions the rule of law and its underlying values. Put it simply, on the assumption that the public interest that ought to propel a government of laws is nothing but a “myth” to “disguise” the planning and allocation of valuable benefits made by prevalent private interests<sup>130</sup>, it follows that we are in the presence of Aristotle’s and Adams’ nightmare: a government of men. This account would hypothetically entail, furthermore, that traditional theories about administrative law have not been shaped according to sophisticated sociological or philosophical constructions of the “common good”, the “public interest”, the “*service publique*” or the “national welfare”, but instead by *ad-hoc* administrative decision-making strategies devised to channel the planning and allocation of valuable benefits by attending predominant private interests of certain well organized interest groups present in a given time<sup>131</sup>.

Commentators have proposed different ideal models that revolt around democratic participation, representation, reasoned elaboration, and equal treatment. For example, Charles Reich suggested a model that emphasizes notice and active democratic participation in the planning process, broad values and guidelines that require administrative agencies to engage in affirmative planning, and the role that equality should play in informing the planning and redistribution of valuable benefits in a community<sup>132</sup>. Similarly, Richard Stewart postulated another model where interest groups should play an essential role in the administrative process to facilitate the administrative state's task to address the interests and

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<sup>128</sup> For a general discussion on this point, *see, e.g.*, Farber & O’Connell, *supra* note 94; Daniel A. Farber & Philip Frickey, *LAW AND PUBLIC CHOICE* (1991); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A THEORY OF LEGISLATIVE DELEGATION*, 68 *Cornell L. Rev.* 1, 41 – 45 (1982); Martin Shapiro, “*DELIBERATIVE, “INDEPENDENT” TECHNOCRACY V. DEMOCRATIC POLITICS: WILL THE GLOBE ECHO THE E.U.?*”, 68 *Law and Contemporary Problems* 341, 343- 344 (2005) (“Moreover, from the perspective of currently in-vogue, rational choice acolytes, the generalist high civil servant, serving the public interest rather than the narrower interests of technological specialists or of the clients who seek to capture them, is a mere fiction. There really is no ‘public interest,’ but only the special interest of whatever actor is projecting that interest onto the public. The civil service mandarin has the disadvantage of lacking the technical knowledge to understand what she is doing, without the advantage of actually pursuing any public interest beyond cultivating her own perquisites—which are most easily defended by maintaining the status quo”).

<sup>129</sup> Rubin, *supra* note 122, at 1395.

<sup>130</sup> Reich, *supra* note 125, at 1237.

<sup>131</sup> *Id.* at 1239 (“The whole concept of “the good” as representing a compromise of interests is thus at variance with planning. Fashioning values and goals out of existing interests prevents any really long range policy making or planning from ever being done. It equates policy making with satisfying the majority or the most powerful interests although the country might benefit more from policies which favor weaker or minority interests, or interests not yet in existence. It tends to place emphasis on those interests which have a commercial or pecuniary value as against intangible interests such as scenery or recreation. [...] The economic need for a dam, which can be presently felt, is likely to carry more weight than considerations that urge that a river be left as it is. In addition, the prevailing notion of the public interest allows large private interests undue power. All too often choice becomes a compromise among powerful private interests in which more general but less immediate interests are neglected”).

<sup>132</sup> *Id.* at 1257 – 1270.

sentiments of a pluralist community<sup>133</sup>. Nevertheless, Martin Shapiro explains that there was a shift from requiring administrative decisions to reflect plural interests to "demanding that these decisions be right." In his view, this elicited a conflict about whether "right" means "technically or rationally correct" or "ethically informed prudential best guess"<sup>134</sup>.

But is it possible to reconcile the pragmatist critique raised against the traditional view of the administrative power with the tenets of *Enlightenment constitutionalism*? I think this question can be answered in the affirmative. To that end, I suggest we must start off by accepting that the insightful ideas that fueled the battle for legality over two centuries ago should be accommodated to our time, particularly regarding fundamental aspects such as political participation, democratic representation, reasoned elaboration, and public validation of expertise. I subscribe to the view that a democratic government is only legitimate when it rests upon the equal concern and respect for all its citizens under a *partnership conception of democracy*<sup>135</sup>. On this philosophical assumption, I am convinced that a legitimate democratic government that treats each citizen as equal must reject any neutral conception<sup>136</sup> about the rule of law, the administrative power, and the procedures by which it carries out its responsibilities<sup>137</sup>. Furthermore, I consider that such a conception of democracy is consistent with the activist account of the state envisioned by DAMAŠKA<sup>138</sup> and the responsive law model proposed by SELZNICK and NONET<sup>139</sup>. Hence, I venture to think that an active state committed to a partnership conception of democracy and a responsive law model should require an administrative power that brings law into existence by giving all citizens an equal voice, participation or representation in the complex administrative process of making value choices in the planning and allocation of valuable benefits in a community<sup>140</sup>.

<sup>133</sup> Stewart, *supra* note 86, at 1813.

<sup>134</sup> Shapiro, *supra* note 81, at 150.

<sup>135</sup> Ronald Dworkin, JUSTICE FOR HEDGEHOGS 384 (2011) ("The partnership conception of democracy is different: it holds that self-government means government not by the majority of people exercising authority over everyone but by the people as a whole acting as partners. This must inevitably be a partnership that divides over policy, of course, since unanimity is rare in political communities of any size. But it can be a partnership nevertheless if the members accept that in politics they must act with equal respect and concern for all the other partners. It can be a partnership [...] if each accepts a standing obligation not only to obey the community's laws but to try to make law consistent with his good-faith understanding of what every citizen's dignity requires").

<sup>136</sup> Richard B. Stewart, REGULATION IN A LIBERAL STATE: THE ROLE OF NON-COMMODITY VALUES, 92 Yale L. J. 1537, 1539 (1983).

<sup>137</sup> Jerry Mashaw, The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance, Co.: Law, Science and Politics in the Administrative State, in ADMINISTRATIVE LAW STORIES 394 (Peter L. Strauss ed., 2006) ("We seem capable of admitting that regulation is policy making and that policy is never apolitical"); Gerald E. Frug, WHY NEUTRALITY?, 92 Yale L. J. 1591 (1983) ("[...] every creation and interpretation of a right is itself a value choice"). See, e.g., Wesley Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 26 Yale L. J. 710 (1917); Robert Hale, FORCE AND THE STATE: A COMPARISON OF "POLITICAL" AND "ECONOMIC" COMPULSION, 35 Colum. L. Rev. 149 (1935); James Freedman, CRISIS AND LEGITIMACY IN THE ADMINISTRATIVE STATE (1978).

<sup>138</sup> Mirjan Damaška, THE FACES OF JUSTICE AND STATE AUTHORITY 92 (1986).

<sup>139</sup> Philippe Nonet & Philip Selznick, LAW AND SOCIETY IN TRANSITION, TOWARDS RESPONSIVE LAW 77 (1978).

<sup>140</sup> Reich, *supra* note 125, at 1236 - 1237 ("In the case of the river valley, the planners must first gather facts, but the decision about where and whether to build a dam is almost purely a value choice. No dam is necessary for any absolute sense; every dam has advantages and offsetting disadvantages, and the choice may be like a

If a pluralistic community is to be ruled by law, legality requires, on the one hand, rule-governed techniques that impose substantial and procedural safeguards for legitimizing the decisions made by all powers of government to attend to the community's competing interests by giving all citizens an equal voice, participation or representation in decision-making procedures<sup>141</sup>. On the other hand, because the necessary judgments to govern a pluralistic community are often serious and complex, legality requires the strategic, combined, articulated, and collaborative action of various legal institutions acting through the law towards achieving a particular end and preserving law's integrity<sup>142</sup>. It is noteworthy that lawmaking and policymaking no longer rest exclusively in the hands of the legislature<sup>143</sup>. A pluralistic legal process should entail, therefore, that the community could access the path of the law from different gateways or access points to preserve democratic accountability. I consider that the idea of a politically accountable administrative power is embedded in the rule of law and in the separation of powers, which places it in a better position than the judiciary to construe the grounds of law or to decide meta-interpretive disagreements by addressing competing interests based on both arguments of policy and principle.

As to the third challenge, that when judges create "new law" they rely on their personal morality, I think it does not hold true against *administrative novelty*. Commentators agree that the administrative power is better equipped than the judiciary in terms of expertise and the procedures by which administrative decision-making articulates expertise and politics into law<sup>144</sup>. This does not mean, however, that the legal conversation requires that the main decision-makers in agencies should be lawyers. As it was noted in Chapter 4, the transformation of politics and knowledge into policy is the result of the "work of experts"<sup>145</sup> within a legal institution endowed with administrative power, not the expertise itself that the main decision-maker in an agency may possess over a specific field. I must caveat that I shall refer to the "work of experts" as "agency expertise" or "expertise." On this assumption, the articulation of agency expertise in the path of the law may be influenced by different variables that range from models of political appointments for agency leadership and their top assistants or deputies to civil service systems. Despite how those variables may be combined in a particular legal system, I believe that the reasonable and coherent articulation of expertise and politics into law requires that administrative decision-makers should give detailed explanations of their decisions, ponder different feasible alternatives or courses of action to

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vote for inexpensive electricity and against fish, or a vote for free enterprise-expensive electricity and against public power-cheap electricity".

<sup>141</sup> Id. at 1247; Richard B. Stewart, Stewart, *supra* note 86, at 1805; Richard. B. Stewart, ADMINISTRATIVE LAW IN THE TWENTY-FIRST CENTURY, 78 N.Y.U. L. Rev. 437, 438 (2003); Shapiro, ADMINISTRATIVE DISCRETION, *supra* note 105, at 1487; Shapiro, THE GIVING REASONS REQUIREMENT, *supra* note 105; Shapiro, *supra* note 81, at 150; Mashaw, *supra* note 137, at 373, 394.

<sup>142</sup> Hart & Sacks, *supra* note 61, at 170 -186; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 151; Hart, CL, at 130; Shapiro, Legality, at 335 – 338.

<sup>143</sup> Hart & Sacks, *supra* note 61, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 2, at 151; Joseph Story, Codification of the Common Law, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, 698 (William W. Story ed., 2000); Radin, *supra* note 68, at 868; Hart, CL, at 123, 130; Portalis, *supra* note 26, at 44; Shapiro, Legality, at 335 - 338.

<sup>144</sup> See *supra* note 88. Steven P. Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2007).

<sup>145</sup> David Kennedy, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 108 (2016).



tackle the question at stake, and make reasonable policy determinations based on publicly validated data.<sup>146</sup>

Nevertheless, deference to the work of experts in policymaking is not itself without controversy and it has prompted an intense debate amongst philosophers, political scientists, and legal scholars about the nature, extent, and scope of expertise<sup>147</sup>. More precisely, REICH explains that deference to administrative expertise in adjudication, which might as well be applied to administrative rulemaking procedures given the dynamism of modern governance, implies that the “[...] agency comes to its decision with built-in biases and a knowledge of facts outside the record, which give the parties the uncomfortable feeling that the decision may have been prejudged”<sup>148</sup>. Moreover, public choice literature presents an alternate view about administrative delegations under the argument that legislators do not rationally rely on the administrator’s expertise, but rather seek to obtain “[...] the electoral benefits of public-oriented legislation while giving powerful interest groups the opportunity to eviscerate that legislation in a less visible setting”<sup>149</sup>.

In response to the concern on how to reconcile expertise with democratic values, political philosophers posit that “public validation” is essential to legitimize administrative reasoning on democratic grounds, which can be accomplished by the implementation of a vast array of democratic representation methods that may vary in extent and scope depending on the different institutional arrangements that a polity embraces<sup>150</sup>. In my view, the language of legality should channel the transformation of expertise into law and public policy made by administrative decision-makers, for it provides the substantive and procedural safeguards for the public validation of administrative expertise. From a procedural perspective, the path of the law channels legal practice providing a forum where participants should have the right concur to the dialogue that shapes the language of legality and make their voice heard. Unlike

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<sup>146</sup> For the general discussion about the “hard look” doctrine, *see, e.g.*, Shapiro, APA: PAST, PRESENT, FUTURE, *supra* note 100, at 477; Colin S. Diver, POLICYMAKING PARADIGMS IN ADMINISTRATIVE LAW, 95 Harv. L. Rev. 393, 411-12 (1981); Stephen Breyer, JUDICIAL REVIEW OF QUESTIONS OF LAW AND POLICY, 38 Admin. L. Rev. 363 (1986); Jerry L. Mashaw & David L. Harfst, REGULATION AND LEGAL CULTURE: THE CASE OF MOTOR VEHICLE SAFETY, 4 Yale J. On Reg. 257 (1987); Thomas O. Sargentich, THE CRITIQUE OF ACTIVE JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES: A REEVALUATION, 49 Admin. L. Rev. 599 (1997); Sidney A. Shapiro & Richard E. Levy, HEIGHTENED SCRUTINY OF THE FOURTH BRANCH: SEPARATION OF POWERS AND THE REQUIREMENT OF ADEQUATE REASONS FOR AGENCY DECISIONS, 1987 Duke L.J. 387 (1987); Miles & Sunstein, *supra* note 6, at 772; Mathew C. Stephenson, A COSTLY SIGNALING THEORY OF “HARD LOOK” JUDICIAL REVIEW, 58 Admin. L. Rev. 753 (2006).

<sup>147</sup> For a general discussion on this point, *see, e.g.*, Evan Selinger & Robert Crease, eds., THE PHILOSOPHY OF EXPERTISE (2006); Mark B. Brown, SCIENCE IN DEMOCRACY: EXPERTISE, INSTITUTIONS, AND REPRESENTATION (2009); David Kennedy, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016); Reich, *supra* note 125, at 1239; Mariano-Florentino Cuéllar, JAMES LANDIS AND THE DILEMMAS OF ADMINISTRATIVE GOVERNMENT, 83 Geo. Wash. L. Rev. 1330 (2015) (discussing the tension between specialized administrative decision-making and political pressures).

<sup>148</sup> Reich, *supra* note 125, at 1242.

<sup>149</sup> Rubin, *supra* note 122, at 1399. *See, e.g.*, Jerry L. Mashaw, *supra* note 110, at 827; Aranson, Gellhorn & Robinson, *supra* note 128, at 41 – 45.

<sup>150</sup> *See, e.g.*, Stephen Turner, What is the Problem with Experts?, in THE PHILOSOPHY OF EXPERTISE 176 – 177 (Evan Selinger & Robert Crease eds., 2006); Brown, *supra* note 147, at 201 – 203. For the general discussion on this point from an administrative law perspective, *see, e.g.*, Reich, *supra* note 125, at 1242; Stewart, *supra* note 86.



a majoritarian or statistical model of democracy, a partnership conception requires that the community should have the right to *effectively* access the legal process not only through congressional representatives but also through administrative agencies, and courts<sup>151</sup>. In doing so, I consider that the community and legal institutions should ideally engage in pluralistic or collective lawmaking within the constraints of law and ideas of legality<sup>152</sup>. From a positive perspective that relies on the description I made in Chapter Three about how administrative rulemaking and adjudicatory procedures unfold in the United States and Colombia, I consider that administrative decision-making possesses two salient features that differentiate it from judicial decision-making.

First, from an institutional design perspective, administrative decision-makers should be devised to carry out rulemaking and adjudicatory procedures based on their experience and expertise, for which they should be *ideally* staffed with experts and equipped with the means to do so. Yet the practical implementation of this ideal faces many challenges. In fact, commentators suggest that certain administrative agencies tend to be underfunded, understaffed with experts, and that administrators are incompetent or politically motivated<sup>153</sup>. Second, from a procedural perspective, while the judicial procedure is designed only to adjudicate disputes that result from particular fact-situations, administrative procedures are actually designed to empower agencies to act with the force of law by making rules, policies, and adjudicating rights within the scope of the responsibilities entrusted by the legislature. In fact, the general administrative procedure acts of the United States and Colombia are meant to produce functional interpretations of the law by combining legal reasoning with expertise. Otherwise, administrative procedure laws would be just a compilation of canons of statutory construction or dictionaries aimed at the solution of linguistic ambiguity.

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### *Hermes Awakens*

Now I must try to portray how the administrative power partakes in what I call the path of the law and for such a purpose I shall use an imaginary administrator. Call him HERMES<sup>154</sup>. Unlike Hercules<sup>155</sup>, Hermes possesses expert knowledge, skill, patience, and unlimited

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<sup>151</sup> Dworkin, *supra* note 135, at 5 (“I distinguish a majoritarian or statistical conception from what I call the partnership conception. The latter holds that in a genuinely democratic community each citizen participates as an equal partner, which means more than just that he has an equal vote. It means that he has an equal voice and an equal stake in the result”).

<sup>152</sup> Shapiro, *supra* note 10, at 369; Hart, Jr. & Sacks, *THE LEGAL PROCESS*, *supra* note 61, at 173.

<sup>153</sup> For a detailed discussion about administrative decision-making models and their practical challenges, *see, e.g.*, Robert Kagan, *supra* note 114; Kagan, *ADVERSARIAL LEGALISM*, *supra* note 12; Jerry Mashaw, *BUREAUCRATIC JUSTICE* (1983).

<sup>154</sup> Hermes the Administrator should not be confused with Judge Hermes introduced by Dworkin in *Law’s Empire*. Dworkin explains: “I now suppose a new judge, Hermes, who is almost as clever as Hercules and just as patient, who also accepts law as integrity but accepts the speakers meaning theory of legislation as well. He thinks legislation is communication, that he must apply statutes by discovering the communicative will of the legislators, what they were trying to say when they voted for the Endangered Species Act, for example”. Dworkin, *LE*, at 317.

<sup>155</sup> *Id.* at 239. DWORKIN describes Hercules as “[...] an imaginary judge of superhuman intellectual power and patience who accepts law as integrity.”

resources. He is not precisely a legal philosopher, but he knows a thing or two about administrative law.

Let me provide a hypothetical case as an example to illustrate my argument. Suppose that there is a democratic polity called Pacifica located on an island in the middle of the ocean. Pacifica is organized as a centralized state with five autonomous regions that represent five traditional tribes. Assume that it is a democratic government structured under the rule of law, a division of powers, and it is committed to the protection of fundamental rights and liberties. The national Constitution is the supreme law of the land and it is normative in nature. The Constitution includes a generous catalog of fundamental rights and liberties, as well as an organic section where it sets forth the way in which the political power is divided and shared among three branches: The Congress, the Executive, and the judiciary headed by the Supreme Court of Justice. The President and Congressmen are elected for a fixed 4-year term. The justices of the Supreme Court are appointed by the President and confirmed by Congress.

Congress is divided into two Chambers. The Upper Chamber is nationally elected. The Lower Chamber is drawn from the five regional electoral districts. To become a valid law, the Constitution prescribes that a bill has to be passed by both Chambers and then it has to be presented to the President for its promulgation. Congress has the general lawmaking power to enact the statutes that it deems necessary to guide the actions of all public authorities towards the fulfillment of the superior goals set forth in the Constitution. The Judiciary has the constitutional power to enforce the fundamental rights and liberties set out in the Constitution and it has the final word in matters of constitutional and statutory interpretation. Constitutional judicial review is both *abstract* and *particular*, that is, that any piece of legislation can be challenged in the absence of a concrete controversy and to adjudicate a dispute. Judicial review is only *a posteriori* and there is not a special standing requirement for abstract review, whereas concrete review requires an actual loss.

The President is the Chief Executive and she is endowed with the constitutional authority to faithfully execute the law. The executive branch of government is constituted by departments, executive and administrative agencies that are charged with the duty to execute the law. To that end, administrative agencies advance their agenda relying on their special scientific knowledge and expertise. Agencies can act with the force of the law to make general rules and adjudicate rights. The President appoints Cabinet members and other high-ranking administrative officials with the Upper Chamber's advice and consent. Assume that directors or plural co-directors that are appointed for a fixed term to head independent agencies endowed with quasi-legislative and quasi-judicial functions can only be removed according to the causes and procedures established by the legislature. Suppose that Pacifica's community is divided into two political parties: *traditional* and *reformer*. The former considers environment and fishing as sacred and rejects any oil drilling enterprise in the continental shelf in order to preserve the natural resources for future generations, whereas the latter advocates for a significant change in the economic system in order to get funding for new assistance programs aimed at improving the community's welfare as a whole. Both political parties have a significant representation in Pacifica's Congress insofar traditionalist have the majority in the Lower Chamber and reformers have the majority in the Upper Chamber.

Let us further suppose that as the result of recent offshore oil explorations underneath the seabed, Pacifica's Oil and Energy Agency discovered an unparalleled oil reserve large enough to change the country's fate. However, experts predict that oil drilling underneath the seabed is likely to entail an unprecedented environmental damage on Pacifica's sovereign sea, biodiversity, and marine life that could affect, in turn, the country's main economic activity: fishing. It has to be noted that fishing is not only Pacifica's main economic source but also a cultural tradition that has been transmitted from one generation to the other and is therefore considered as part Pacifica's cultural heritage. In fact, most *pacificans* identify themselves as *pescatarians*.

Assume that Congress only devised the Oil Exploration and Drilling Act of 1993 to regulate oil drilling on land. Concerning the prevention and management of environmental damages, the Act only requires applicants to file an environmental impact statement assessing the project's potential environmental risks and suggesting strategies on how to mitigate and manage such potential environmental damages. It must be noted that a handful of oil companies hold valid on-land oil drilling permits granted under the previous legislation. Also, assume that the current oil drilling legislation and administrative regulations are obsolete and cannot account for the magnitude and complexity of this new offshore oil drilling enterprise. Further suppose that Congress wants to make a statement about responsible offshore oil drilling, environmental protection, and sustainable development. Nevertheless, it failed to reach an agreement on the specific measures to execute their political decision because the members of Congress feel that it might be inconvenient for their interests and that it could jeopardize their future reelection. Congress acknowledged, moreover, that it lacks the necessary scientific knowledge and expertise to regulate the way in which oil drillings ought to be conducted and the technical measures to reduce their environmental consequences.

This is the first time that Pacifica is in political turmoil. Given the different positions of both political parties and the impossibility of passing an unambiguous statute regulating the matter without reaching a political consensus, both political parties agreed to bargain on how to regulate offshore oil-drilling activities underneath the country's seabed. After many rounds of congressional deliberation and discussion, Congress members reached a bipartisan solution: They agreed on authorizing offshore oil drilling underneath the seabed but without causing a major environmental damage that could affect Pacifica's natural resources and major fishing areas. Congress also agreed to adopt measures to reduce the economic and environmental damage on fishing activities. Congress is aware of the Supreme Court of Justice's longstanding precedent that tends to give preference to environmental protection over economic activities that might pollute air and water streams, and on the other, the precedent on fishing entitlements as an expression of Pacifica's cultural heritage. Congress also acknowledges that it must be respectful of property rights acquired by permit holders under current legislation.

Suppose that Pacifica's Congress decides to amend the Oil Exploration and Drilling Act of 1993. The amendment states: "Section 1. Offshore oil drilling can be conducted underneath the seabed, provided that it is done without placing an unreasonable burden on the environment. Section 2. All interested organizations seeking to conduct offshore oil exploration or drilling activities must obtain a permit issued by the Environmental Protection

Agency according to the standards mention in Section 1. Section 3. Nonetheless, oil exploration, drilling, and production permits granted under previous legislation shall remain in effect for the time they were conferred. Nonetheless, valid permit holders shall submit an environmental impact statement to the EPA communicating their intent to carry out offshore drilling activities and the strategies on how to prevent the environmental damage their activity may entail. Section 4. The Environmental Protection Agency may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act". Hence Congress decided to left in the hands of Pacifica's Environmental Protection Agency the regulation, interpretation, and enforcement of the new offshore oil drilling amendments, which is headed by HERMES.

As a faithful agent of the law, he must bring the Act into life by articulating administrative rules and regulations based on principle and policy considerations about how to carry out offshore oil drilling without placing an unreasonable burden on the environment. He is puzzled about how to ensure whether his policy decisions will be consistent with the policy goals articulated by the legislature. To discharge his mandate, Hermes knows that he should draft rules that address competing interests, namely, offshore oil drilling technology, low environmental impact, implementation costs, and ancestral fishing rights. Because in this case he must articulate a new offshore oil drilling policy, he deems rulemaking the most appropriate and pluralist procedure to do publicly validate his expert judgment. He then turns to Pacifica's General Administrative Procedure Code, which sets out the rules on how to carry out rulemaking and adjudicatory proceedings. The Act requires him to draft a proposed rule, for which he gathers and integrates the expertise of scientists, engineers, biologists, and petroleum in the fields of offshore oil drilling, economics, environmental risk management, maritime life protection, and so on. This is not the first time that he is required to do so. He has actually traveled this road before many times in the process of articulating, construing, and enforcing Pacifica's environmental protection policies and legislation. Shortly after, Hermes drafts a proposed rule that attends cutting-edge oil drilling technology, implementation costs, and what he considers effective environmental risk management methods. But he is not done yet.

Suppose that Hermes published the proposed rule and the data upon which he relied. He encouraged all potentially interested individuals and private firms to submit their comments on the proposed rule and scheduled a public hearing to hear what the citizenry has to say about his proposed rule. In response to Hermes' call for comments, a few oil companies, a non-profit called "Keep Oceans Clean," and one of Pacifica's tribal communities submitted their comments. Suppose that these are all organized and well-represented interest groups. Generally speaking, oil companies disagreed with Hermes' proposed rule because they consider that employing less expensive drilling technology and risk management methods can also attain the amendment's purposes. Based on their own research and data, they suggested an alternative less expensive offshore drilling technology that may reduce implementation costs and would prevent placing an unreasonable burden on the drilling zone. However, they accept that there is uncertainty about its effectiveness in managing risks because the drilling device is at an experimental stage.

The non-profit and the tribal community support Hermes' proposed rule, but not in all respects. In this sense, they think it is a comprehensive regulation that further develops what

the legislature has announced in general terms in the sense that it requires interested oil companies to employ the best available drilling technology and methods to manage environmental risk efficiently. Yet they think there is room for improvement. Based on a purposive interpretation of the Act, they argued that Hermes' proposed rule fails to introduce effective measures to protect ancestral fishing rights, particularly, they assert it fails to exclude one of Pacifica's most important marine sanctuaries and a major fishing area from the proposed drilling zone, leaving them exposed to an unreasonable burden. They claim the marine sanctuary is essential to Pacifica's marine biodiversity and thus it must be excluded from the proposed drilling zone. They also asserted fishing rights over the major fishing area and asked Hermes to exclude it from the proposed drilling zone, though they could not point out to any legal rule in support of their claim. They recognized that the exclusion of these two areas from the proposed drilling zone would entail a reduction the initial oil production estimate, but they think that oil companies would still be interested in carrying out their operations in the rest of the proposed drilling zone. In short, they argued, that the best way of preventing that offshore oil drilling places an unreasonable burden on the environment is by establishing an exclusion zone. In the alternative scenario, they argued that offshore oil drilling should be conducted by employing the best available technology – not the oil company's novel and untested method.

Hermes finds himself confronted with an *administrative hard case*. First, he must determine what are the parties disagreeing about. It may appear that the disagreement is empirical in nature insofar as the parties disagree about what "unreasonable burden" means under specific factual circumstances. On the one hand, fishers argue that drilling underneath the seabed in certain areas places an unreasonable burden on the environment, and on the other, oil companies argue that it is not an unreasonable burden because of the technology they will use. One could argue that the uncertainty about the "consequences" of offshore drilling makes the decision about what is an "unreasonable burden" a hard one but that it does not require any further philosophical considerations.

The first obstacle he faces is statutory ambiguity. What does "unreasonable burden" mean? To answer this question, Hermes takes a *formalist* approach according to which the administrative power is a mere executor of legislation whose duty consists in executing the fully expressed will of Congress. On the formalist account, Hermes embarked himself on a dictionary-shopping quest but quickly found out that "unreasonable" and "burden" have different meanings in different contexts and that none of them refer to the technical standards or parameters that must guide offshore oil drilling to manage pollution sources and reduce the risk of harming marine life. Hermes then recognizes that the case at hand might be ungoverned by law because he will need more than a dictionary and semantic skill to discharge his duties coherently.

Hermes must do what he knows best, that is, turn expertise and politics into law through the administrative process. His task is to rapidly develop expertise, for which he must do research to ascertain what other countries have decided "best practices" for reducing environmental damage from offshore oil production and determining what the specific environmental conditions and risks are in the areas near the oil discoveries. He decides to take a *realist* approach but it realizes that such an approach to the question at hand would require him to appeal to extra-legal supplements of variable nature to find a solution. He fears that his



decision might be ungoverned by law because Pacifica's legal system is rooted on the principle that legal obligations can only spring from valid legal administrative rules made pursuant to the procedural and substantive safeguards contained in legislation. He recognizes that this longstanding principle is what distinguishes law from personal morality, and by the same token, a government of men from a government laws. From a *positivist* perspective, Hermes is convinced that he should be able to point out to any settled legal rule in support of his decision. However, he is unable to find a previously acknowledged legal rule of legislative, administrative or judicial nature in support of his decision.

Hermes decides to try a different approach for which he must revisit the nature of the question at hand. Although the point of contention appeared to be empirical in nature *prima facie*, a closer look suggests the otherwise insofar as the question at hand involves a value choice about the planning and allocation of valuable resources in Pacifica. One could argue that Congress made the value choice when it voted in favor of allowing oil drilling underneath Pacifica's seabed hoping that oil would eventually bring a significant impact on the economy and welfare of the people of Pacifica. Furthermore, one could argue that Congress left an objective choice in Hermes' hands because his duty is only to make the regulations about staff experience, drilling technology, and the installation of oil platforms that interested oil companies must comply with to conduct any offshore drilling activity. While it is true that Congress authorized said activity by amending the Act, it failed to reach an unambiguous solution as to what is the most cost-benefit method to manage the risk placed on the environment by offshore oil drilling. Congress decided to leave that value choice in Hermes' hands because it requires him to make a judgment about the location of oil platforms, their desirability, and about what methods or technology will reduce environmental risks to a tolerable level. This is indeed a value choice because any misjudgment would eventually entail either that offshore drilling would not be feasible or an unprecedented environmental damage.

Therefore, assume that the parties do not dispute the linguistic ambiguity of the term "unreasonable burden" but rather its legal consequences. More precisely, the parties disagree about a value choice, namely, what is the most cost-benefit method to manage the risk placed on the environment by drilling underneath Pacifica's seabed. Suppose that Hermes considers that value choices about the planning and allocation of valuable resources in a democratic polity tend to mirror complex moral and political philosophy conflicts in the form of theoretical disagreement or meta-interpretive disagreement about the law. On the assumption that Hermes accepts *law as a integrity*, he considers that the parties disagree about whether the amended Oil Exploration and Drilling Act exhausted everything that he must take into account to make a value choice that is coherent with the principles and policies upon which Pacifica's community is rooted. *Law as integrity* requires Hermes to emulate Hercules, for which he must undertake a superhuman intellectual quest by engaging in several rounds of philosophical inquiry into past political decisions until he grasps the correct construction of Pacifica's moral and political philosophy that best justifies his administrative rule.

Such a philosophical quest implies that, like Hercules, Hermes must take into account legislative history, official public statements, and contemporaneous facts, for they embody

Pacifica's political morality and represent history in action.<sup>156</sup> Recall that DWORKIN's theory of legislation rests upon the assumption that Hercules "has his own opinions about all the issues at stake."<sup>157</sup> On this assumption, Hermes must turn to the legislative record and public statements hoping that something said by any legislator during the congressional debates may help him elucidate what Congress intended or to grasp the *spirit* of the amended Act. However, after reading carefully the entire legislative record, public statements, and the general principles laid down by Congress, Hermes could not point out to any rule or public statement about the strategies that must be devised to manage and prevent environmental damaged caused by offshore drilling. Unlike Hercules that comes to his decision with built-in technical and policy assumptions about the question at stake, Hermes is convinced that expertise should be publicly validated according to the procedural and substantive safeguards required by Pacifica's legal system to make it coherent with the community's moral and political aspirations.

Suppose that, as a result of Hermes' interpretive effort, he finds out that the legal, technical and policy arguments advanced by the parties are not necessarily committed to *law as integrity* as the only available theory of legislation to construe the amended Oil Exploration and Drilling Act of 1993. Further assume that each of one these positions is articulated in a different interpretive methodology that conveys two different moral and political philosophies about environmental protection, economic growth, acquired rights, and the non-retroactivity principle. In fact, oil industry commenters advanced a pro-business purposive interpretation aimed at conducting offshore oil drilling underneath the seabed by implementing an experimental and cost-benefit drilling method. Also, based on a textualist interpretation, they argued the statutory language is clear as to forbidding its prospective application to permits issued under previous legislation. By contrast, based on a pro-environmental purposive interpretation of the statutory language, non-profit and tribal communities considered that the only feasible way to prevent that offshore oil drilling may place an unreasonable burden on the environment is by employing the best available technology whose effectiveness has been proven by conclusive data. According to the *planning theory of law*, one could argue that the question at stake involves a *meta-interpretive disagreement* about the law that questions what is the proper interpretation methodology of Pacifica's legal system according to which the planning or allocation of resources should be made. Once Hermes has determined which interpretive methodology is adequate because it best advances the goals that he is entrusted with furthering, the *planning theory of law* suggests Hermes to create "new law to improve the guidance provided by the law" by discovering "implicit suspense clauses" based on his experience and expertise<sup>158</sup>.

Hermes is a strategist and he should assess his proposed administrative rule and the comments made by the interested parties in light of the competing interests at stake, while at the same time seeking to preserve the moral and political aspirations that flow from past political decisions. But before making any factual decision that helps him make a judgment about what is reasonable or not, he must engage in balancing conflicting values against a philosophical backdrop. The disagreement about the value choice is philosophical in nature

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<sup>156</sup> Id. at 342 – 346.

<sup>157</sup> Id. at 337.

<sup>158</sup> Shapiro, *Legality*, at 303 – 304.

because the parties convey different views about the rights that individuals have against the state and the sacrifices that a community should make to improve the general welfare arguably. As I said, Hermes is not an expert legal philosopher that engages in a complex and sophisticated philosophical debate about the moral or political foundations of every case that comes before him. He is only concerned about taking an approach that helps him find a solution that is just.

Hermes is aware, like Congress, that there is a controlling Supreme Court Precedent that tends to give preference to environmental protection over economic activities like oil drilling and mining. Concerning the comment made by the non-profit and the fishermen community about fishing rights, Hermes is also aware of the Supreme Court longstanding precedent on ancestral fishing rights. Assume that he concludes that ancestral fishing rights are an indisputable limit against the value choice made by Congress to authorize oil drilling underneath Pacifica's seabed, for they have been passed down from one generation to other and define the Pacifican community as such. On this philosophical assumption, he analyzes again the data that supports his proposed rule to explore other alternatives and he found out that it is feasible to exclude the marine sanctuary and the fishing area from the proposed drilling without compromising the project's technical and financial viability. Therefore, he decides to exclude the marine sanctuary and the fishing area from the drilling zone not only because he thinks his decision benefits the community as a whole, but also because he considers that the people of Pacifica have the inalienable right to fish there without any restriction. Hermes knows that his decision entails the interpretation of the Constitution, though he deems it consistent with the moral and political aspirations of the community. If he is wrong, let the Supreme Court overruled him. Hermes is not unchecked because his decisions are subjected to judicial review, for it is the duty of the courts to police the boundaries set out in the Constitution and legislation by saying what the law is.

Let us also suppose that, after holding a notice-and-comment procedure, Hermes, acting in his capacity as the Director of Pacifica's Environmental Protection Agency, issued Rule 001 articulating the new policy on offshore oil exploration, drilling, and production activities and introducing all the technical aspects, procedures, and strategies to reduce the environmental damage and protect ancestral fishing rights. A few years after the enactment of Rule 001', Pacifica Oil Industries filed the environmental impact statement in compliance with the EPA regulations. In this statement, the company argued that the EPA regulations should not be prospectively applied to modify a valid oil-drilling permit. Thus, the company claimed that it could conduct offshore oil drilling underneath the seabed by employing experimental technology. Assume that Super Oil holds a valid oil-drilling permit issued before Congress amended the Oil Exploration and Drilling Act of 1993. Pacifica Oil Industries recently acquired this company.

A considerable group of fishermen requested the EPA to revise Pacifica Oil's permit under the argument that it is "contrary to the spirit of the Amended Act and Rule 001". The petitioners consider themselves as active members of the most conservative wing of the traditionalist party that opposes to any offshore drilling enterprise in Pacifica, regardless of the possible benefits it might bring to the community. They advance two arguments. First, they argued that the straightforward application of Section 3 of the Amended Act to the case at hand violates Article 1 Pacifica's Constitution that states: "Fishing is an expression of

Pacifica's cultural identity. Therefore, it is an inalienable right of the community". Second, the claim the exemption contained in the aforementioned Section 3 frustrates the purposes of Rule 001 issued by the EPA. Suppose that Hermes is confronted with another administrative hard case involving adjudication. On these grounds, they requested the prospective application of the amendment Act and new administrative regulations to existing permits granted under previous legislation.

The issue is whether the new legislation and administrative regulations can be applied prospectively to permits issued under previous legislation. Conversely, one could argue that this case does not raise a hard question because Hermes already made a judgment in Rule 001 about what counts as an "unreasonable burden" and his decision in the case at hand is limited to decide whether the harm or risk of harm of conducting offshore drilling without being subjected to the new regulations is "reasonable or unreasonable" under specific circumstances. Nevertheless, Hermes considers this a hard case because he must determine whether the straightforward application of Section 3 of the amended Act may elicit undesired legal consequences under certain circumstances that may frustrate the goals behind the amendment's enactment. Indeed, it remains unclear whether the new EPA standards can prospectively qualify or limit the actions taken under the existing permits at the time when the Act became effective. In other words, the real point of disagreement is theoretical or meta-interpretive in nature insofar as the interested parties are not disagreeing about whether Hermes is acting pursuant to the substantive and procedural requirements set out in the amended Act. Rather, according to DWORKIN's approach, the parties disagree about whether Section 3 exhausted everything that Hermes must take into account to make a value choice that is coherent with the principles and policies that flow from past political decisions. The same question could be framed in the terminology suggested by SCOTT SHAPIRO: the parties disagree about what is the proper interpretive methodology of Pacifica's legal system to tackle the question of value choice.

Suppose that Hermes wants to make a significant regulatory policy shift concerning property rights acquired by permit holders under past legislation or administrative regulations, would he be allowed to do so without an express congressional authorization? Social life is dynamic and so is the language of legality. Hermes acknowledges his position in the fabric of law and politics because this is the only language he speaks. This is what prevents him from becoming an *administrative juggernaut*, a force so disruptive that could shatter down the principles and policies that define a community as such. In fact, I believe that the *administrative juggernaut* that carries out her duties according to her personal interests or with willful disregard of the procedural and substantive rules established in a particular legal system is nothing but the modern definition of a tyrant. But this is not Hermes case. As a faithful agent of the law, he would have to provide a sufficient justification to do so based on publicly validated data and why such a change is required to fulfill the community's moral and political aspirations. He is also a pragmatist in the sense that he must articulate strategic actions to attend competing interests, though he is not a maverick. Hermes is responsive to the political agenda advanced by Congress and the President, which may change over time due to new unanticipated situations.

Hermes is confronted with a hard question of value choice about the planning and allocation of valuable resources in Pacifica. The solution to the question at hand requires him to make

a judgment about securing environmental protection at the expense of acquired individual rights. Such a judgment embodies a compromise at the philosophical level about the extent to which individual rights acquired under previous legislation should be limited to improve the community's welfare as a whole arguably. To do so, Hermes faces the question whether it is enough for him to show that his administrative decision will contribute, as a matter of sound policy, to the overall good of the community. He is convinced that the language of legality requires him to do so. He then undertakes the task of explaining that his decision is a sound policy by articulating informed knowledge and law, which he does by making sure that the policy he deems the most cost-benefit, is consistent with the legal, economic, and cultural aspects of fishing rights.

Although the Act and the legislative record are silent on the matter, Hermes decides to apply the new regulations prospectively to old permits because, in his opinion, the Supreme Court would likely uphold it in light of its precedent. He takes one step further and considers the opposite interpretation. If he does not include the extension of his final rule, someone may challenge it under the argument that it fails to advance Congress' mandate to allow offshore oil drilling without placing an unreasonable burden on the environment. The Supreme Court would likely rule for the plaintiff, strike down the administrative rule, and even substitute its own for Hermes' judgment under different principle and policy considerations that might not rely on the appropriate publicly validated technical criteria. Hence, he concludes that the straightforward application of Section 3 of the amended Act may create a loophole that interested oil companies could capitalize on by acquiring or merging with another company that holds a valid permit issued under previous legislation. Thus, Hermes considers that the new oil-drilling regulations should be applied prospectively to permits issued under previous legislation and those valid permit holders must comply with the new offshore oil exploration and production policy.

Pacifica Oil challenged the validity of the administrative adjudication that requires permit holders to comply with new legislation and regulations under the argument that it is arbitrary and capricious. Assume the petitioner has standing and the case makes its way up to the Supreme Court of Pacifica. The Supreme Court dismissed the plaintiff's claims and upheld the adjudication under the argument that Hermes' conclusions are consistent with the law and based upon sound technical considerations. Furthermore, the Court decided to endorse Hermes' interpretation of the Constitution. In the Court's opinion, the adjudication was made pursuant to the procedural and substantive requirements introduced by Congress. Furthermore, the Court considered that Hermes' decision to apply new legislation and regulations prospectively is consistent with the principles and policies upon which Pacifica's legal system is rooted.



## EPILOGUE: A LITTLE BIT OF LAW ABOUT ADMINISTRATIVE LAW

*“But it is an ideal, and without ideals what is life worth? They furnish us our perspectives and open glimpses of the infinite. It often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection.”*

-Oliver W. Holmes<sup>1</sup>

In 1899, OLIVER W. HOLMES postulated scientifically informed legal reasoning as an ideal that every society should attain<sup>2</sup>. Here I argue for an eclectic model where administrative reasoning should ideally be informed by publicly validated expert knowledge that requires a moral and political compass oriented towards the fulfillment of the purposes and aspirations of a democratic polity that lives under the rule of law. In this dissertation, I have particularly focused on the “law” component of “administrative law” in an attempt to propose a synthesis of the pragmatic and rational accounts of the administrative power. I decided to take the road less traveled to argue, from a philosophical perspective, that nowadays every constitutional democracy worthy of the name speaks the language of legality. In this context, I suggest that the administrative power ought to decide hard cases regardless of the empirical, theoretical or meta-interpretive nature of the disagreement they may elicit. Unlike the judiciary, I consider that the administrative power is ideally endowed with original or delegated lawmaking authority, vested with democratic legitimacy, equipped with specialized expertise, and the procedural mechanisms to allow the active participation of the citizenry in the administrative process. These features entail that administrative decision-makers should reason from principle and policy in deciding hard cases about the planning and allocation of valuable resources in a community by construing the grounds of law or deciding meta-interpretive disagreements based on publicly validated expertise.

In Chapter One I explored the tension between law’s determinacy and its responsiveness to address unanticipated situations by emphasizing that hard cases tend to mirror complex moral and political philosophy conflicts whose solution might elicit profound changes in a polity, which can range from the acknowledgment of new rights to the way in which public policy is made and executed. On this assumption, in Chapter Two I presented four real world administrative hard cases to show that administrative decision-makers not only decide empirical disagreements that question whether a proposition of law fulfills the procedural and substantive requirements established in a particular legal system for its creation or enforcement. Instead, I described how they also decide theoretical or meta-interpretive disagreements about law that tend to spring from moral and political philosophy conflicts. The decision of hard cases by administrative decision-makers calls for an inquiry about the compromises they should make at the jurisprudential level. In Chapter Three I tackled this question by mapping the philosophical architecture of administrative reasoning, which allowed me to describe the circumstances under which *administrative novelty* tends to arise according to different theories about the nature of law or adjudication. In Chapter Four I

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<sup>1</sup> Oliver W. Holmes, LAW IN SCIENCE AND SCIENCE IN LAW, 12 Harv. L. Rev. 443, 462 - 463 (1899).

<sup>2</sup> Id.

described how the administrative power's democratic accountability and expertise are structured concerning its relationship with the other powers of government seeking to portray how such jurisprudential accounts work in practice in the United States and Colombia. Finally, in Chapter Five I argued that the existence of *administrative novelty* suggests that there may be hard cases where administrative reasoning should go beyond previously acknowledged legal rules of statutory, administrative, or judicial nature seeking to secure law's responsiveness to govern unanticipated situations.

In my view, the existence of *administrative novelty* challenges the truism embraced by traditional jurisprudence according to which the solution to the tension between law's certainty and its responsiveness is usually reserved to the interplay *legislature-courts* that regards the administrative power as a mere executor of legislation. Contrary to this traditional belief, I think that the administrative power should play an essential role in the creation, interpretation, adjudication, and enforcement of the law. This account of the administrative power implies that, in the events where the legislature's failure or omission to make a value choice concerning the creation, interpretation or implementation of a right or policy leads to an administrative hard case, administrative decision-makers should be ideally better equipped than the judiciary to construe the grounds of law or decide a meta-interpretive disagreement by making value choices to implement some values at the cost of others<sup>3</sup> in order to protect justice, equality, and liberty<sup>4</sup>. Unlike the traditional assumption that technically illiterate judges tend to come to their decisions with built-in expertise, I am convinced that the reasonable and coherent articulation of expertise and politics into law should require that administrative decision-makers give detailed explanations for their decisions, ponder different feasible alternatives or courses of action to tackle the question at stake, and make reasonable policy determinations based on publicly validated data.

Nonetheless, if the administrative power neglects or fails to do so, the judiciary should intervene to make the necessary value choices that may be required to attain the same communitarian goals. The existence of judicial oversight is central to my account of the administrative power and nothing that I have said in this dissertation should be taken as an argument against judicial review of administrative decisions regardless of the form of action. For it is the duty of the judiciary to keep the administrative power in check by policing the impassable boundaries that have been established in the constitution and legislation<sup>5</sup>. On this

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<sup>3</sup> Gerald E. Frug, WHY NEUTRALITY?, 92 Yale L. J. 1591 (1983). Professor Frug explains this has been a longstanding view among liberal thinkers. For a general discussion on this point, see, e.g., John Stuart Mill, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 22 (C. Shields ed., 1958) (1<sup>st</sup> ed. London 1848) (“[M]ost important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves”); Louis Harz, THE LIBERAL TRADITION IN AMERICA (1955) (explaining the efforts of the American government to promote certain values at the expense of others); John Dewey, LIBERALISM AND SOCIAL ACTION 15 (1963) (arguing that government should make value choices and implement social change); Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORAL AND LEGISLATION (suggesting that government should implement certain values at the expense of others).

<sup>4</sup> Ronald Dworkin, JUSTICE FOR HEDGEHOGS 5, 388 (2011) (“On that conception [partnership democracy], which I defend, democracy itself requires the protection of just those individual rights to justice and liberty that democracy is sometimes said to threaten”).

<sup>5</sup> Louis F. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 321 (1965). In Professor JAFFE's view, judicial review of administrative action represents “[...] reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.” See generally, e.g., Jean Rivero,

assumption, I think that the extent and scope of the standards of judicial review of agency action should vary according to procedural and substantive considerations, as well as the judicial remedies that may be granted. For example, a reviewing court should be less deferential in cases where the administrative decision-maker failed to comply with procedural safeguards, did not provide reasons in support of her decision or when the data that she provided in support of her decision was not publicly validated. I am convinced that it is the duty of the courts to control that administrative decision-makers follow and implement the procedural rules for public participation, as well as to review the reasons they provide in support of their decisions to be sure that they are acting on the basis of publicly validated evidence gathered by experts rather than on the basis of “back-door political influence” or any personal motivation<sup>6</sup>.

Similar to what occurs with HOLMES’ ideal model about science in law, one could make the argument that the ideal model I propose is unattainable in a particular polity when certain deviations are common or there is a lack of access to appeal by persons or groups aggrieved by administrative decisions. I think there can be at least two scenarios where one can find deviations from this ideal model, particularly where the existence of general administrative procedure acts or codes is not itself a guarantee that administrative decision-makers will effectively act by the book. The first scenario would be when there is a “mismatch” between the APA and the way in which administrative decision-makers discharge their responsibilities. Professors ANNE JOSEPH O’CONNELL and DANIEL FARBER have explored this scenario and posited the powerful claim that, in the United States, “[...] the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed”<sup>7</sup>. The second scenario would be the absence of a general administrative rulemaking procedure, like it occurs in Colombia. I think that the absence of a general administrative rulemaking procedure in Colombian legislation would entail, as a practical matter, that the debate between the administration and private individuals or firms that should take place in the administrative process on expert grounds, ends up unfolding before the bench where technically illiterate administrative judges do not only dispense justice but also act as administrators. In my opinion, from a philosophical perspective, these scenarios may give rise to serious concerns about the public validation of agency expertise and its political accountability that would potentially undermine rule of law values, while at the same time it may encourage judicial policymaking based on policy arguments.

Nowadays the tension between ideals and the challenges that their practical implementation may face is central to the battle for legality to the same extent as it was when *Enlightenment*

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DROIT ADMINISTRATIF (13<sup>th</sup> ed., 1990); Georges Vedel, DERECHO ADMINISTRATIVO, (J. Rincón Jurado trans., 1980) (Describing the general structure of the French administrative courts system); Prosper Weil, DERECHO ADMINISTRATIVO (L. Rodríguez Zuñiga trans., 1986).

<sup>6</sup> Steven P. Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2007).

<sup>7</sup> Daniel A. Farber & Anne Joseph O’Connell, *THE LOST WORLD OF ADMINISTRATIVE LAW*, 92 Tex. L. Rev. 1137, 1140 (2014).

*Constitutionalism* flourished. Tyranny<sup>8</sup> assumes different faces as times change, for it still imperils the rule of law, the separation of powers, and fundamental liberties. The ideals that a community should be governed by undisputed scientific theories or a complete legal system share the common feature that both are unattainable. No matter how meticulous a scientific data set may be or how sound a theory about the nature of law may appear, both tend to be rooted in countless assumptions such as that individuals behave rationally or that law always provides an answer to every possible case that may arise in a particular system without having to appeal to extra-legal supplements of variable nature. I venture to speculate that most of such assumptions tend to be aimed at minimizing the influence of morality in legal reasoning. Nonetheless, instead of rejecting any moral consideration from administrative reasoning, the language of legality is nothing but an ideal framework that suggests an alternate view on how I think a legal system should react to the deviations that social behavior's unpredictable nature may entail in a particular polity by channeling the coherent transformation of expert knowledge and morality into valid legal norms. In this dissertation, I have canvassed the different faces that these ideals tend to assume and the deviations they may face in practice in light of different legal traditions, constitutional frameworks, political structures, and theories about the nature of law or adjudication in an attempt to bridge the gap between jurisprudence and administrative law.

Thus, evoking OTTO MAYER's opening remarks in his famous *Administrative Law Treatise* published back in 1886<sup>9</sup>, I venture to claim that the administrative power is entitled to its "own place under the sun," that is, its own chapter in the literature of jurisprudence. I am convinced that any inquiry about the administrative power, either normative or empirical in character, should be framed within a theory about the nature of law or adjudication in order to preserve the conceptual coherence of administrative law in light of the broader consideration of what we should understand by the law. In order to undertake this enterprise, I propose that we shall start off by recognizing that the judiciary and the administrative power are actually two photographs that portray different landscapes, where the latter appears to be unknown in the eyes of legal philosophers and whose appraisal may require us to go beyond the frontiers established by traditional jurisprudence. Let this be a modest contribution towards the inquiry of how HERMES' awakening may change the pantheon of jurisprudence.

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<sup>8</sup> James Madison, The Federalist Papers No. 47, ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very *definition of tyranny*).

<sup>9</sup> I Otto Mayer, DERECHO ADMINISTRATIVO ALEMÁN 24 (Horacio D. Heredia & Ernesto Krotoschin trans., 1949).

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## APPENDIX

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