The Language of Legality: The Role of Administrative Power in Building the Digital Republic by Daniel Castaño

"Clearly, there are no risk-free technologies, not even in an Amish-style approach to life, because technologies push the limit of the feasible and this, inevitably, comes at some risk. The only technologies completely safe are those never built."

-LUCIANO FLORIDI[1]

Technology has the potential to serve a vital social purpose by addressing a wide range of issues and challenges that affect the quality of life for individuals and societies[2]. By using technology to improve healthcare, education, and communication; address environmental problems; and promote economic development, we could create a more just and equitable society[3].

Nonetheless, it is also important to recognize that technology is not a neutral tool because the way it is designed, developed, and used can have unintended consequences that can either contribute to or undermine social goals[4]. For example, if technology is only accessible or beneficial to certain groups of people, or if it is used in ways that discriminate against or exploit certain individuals or communities, it can exacerbate social and economic inequality[5]. As such, it is essential that we carefully consider the social impacts of technology and strive to use it in ethical, responsible, and inclusive ways[6].

Disruptive technologies such as artificial intelligence (AI), blockchain, quantum computing, and augmented/virtual reality (AR/VR) raise a range of critical challenges, risks, and trade-offs[7]. These include ethical concerns related to job displacement and income inequality, security risks such as hacking and data breaches, the difficulty of regulating rapidly advancing technology, data privacy concerns, and potential social and cultural impacts[8].

The current discussions surrounding the regulation of emergent technologies predominantly revolve around the need for legislative frameworks to govern their development and use. While there

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[1] Luciano Floridi, Energy, Risks, and Metatechnology, Philos. Technol. 24, (2011).
[2] Ken Goldberg & Vinod Kumar, Cognitive Diversity: AI & The Future of Work, Tata Communications, 8 (2018); Michael I. Jordan, Artificial Intelligence: The Revolution that hasn't Happened Yet, 1 Harvard Data Science Review (2019); Jaron Lanier, The Dawn of the New Everything: Encounters with Reality and Virtual Reality (2017).
[3] Pedro Domingos, The Master Algorithm: How the Quest for the Ultimate Learning Machine will Remake our World (2015).
[4] James Barrat, Our Final Invention: Artificial Intelligence and the End of the Human Era (2013); Nick Bostrom, Superintelligence: Paths, Dangers and Strategies (2014).
[5] Sonia K. Katyal, Private Accountability in the Age of Artificial Intelligence, 66 UCLA L. Rev. 54, 59 (2019).
[6] Morley, J., Elhalal, A., Garcia, F. *et al.* Ethics as a Service: A Pragmatic Operationalisation of AI Ethics. *Minds & Machines* 31 (2021).
[7] Vid. Luciano Floridi, The Fourth Revolution: How the Infosphere is reshaping humanity (2014).
[8] Luciano Floridi et Al., AI4People – An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations, Minds and Machines, 2018, 28: 689 – 707, OECD (2019), Artificial Intelligence in Society, OECD Publishing, Paris, https://doi.org/10.1787/eedfee77-en.

is no doubt that legislation is necessary, it is essential to consider how administrative agencies will construe and enforce such legislation in the future. Given the fast pace of technological advancement, administrative agencies will be required to make important decisions on how to apply the law to rapidly evolving technology.

What is the role of the administrative state in regulation emergent technologies? This paper tackles on this question. Regulation plays an important role in ensuring that digital technologies are used in a way that benefits society. It can help protect the privacy and security of individuals by setting standards for the collection, use, and storage of personal and sensitive data. It can also promote competition in the digital economy by preventing anticompetitive practices and protecting consumers by setting standards for the quality and safety of digital products and services. Additionally, regulation can promote social and ethical values by setting standards for the use of digital technologies in areas such as employment, banking, and education.

There are several challenges that the administrative state may face in enacting regulation for disruptive technologies, however. One challenge is the speed at which these technologies are developing and changing. Disruptive technologies often emerge and evolve rapidly, and it can be difficult for regulatory agencies to keep up with the pace of change. This can make it difficult for regulators to anticipate and address potential risks and challenges associated with these technologies in a timely manner.

Another challenge is the complexity of these technologies, which can make it difficult for regulators to fully understand their potential impacts and to identify appropriate regulatory approaches. This can be particularly true for technologies that involve complex systems or processes, or that involve a wide range of stakeholders and interests. A third challenge is the potential for regulatory uncertainty or inconsistency, which can arise when different regulatory agencies or jurisdictions have different approaches to regulating a particular technology. This can create confusion and uncertainty for businesses and individuals and may hinder the development and deployment of these technologies.

These challenges will likely give rise to *administrative hard cases*. 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 is no previously acknowledged legal norm that addresses the question at issue about the planning or allocation of resources in a community.

Legal institutions endowed with administrative power are often called upon to solve these controversies and their underlying moral and political philosophy conflicts by issuing rules and adjudicating disputes. Based on CARDOZO's works[9], 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

[9] Benjamin Cardozo, THE NATURE OF JUDICIAL PROCESS 19 – 25 (1921).

articulating principled decisions that support the desired outcome[10]. 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[11].

Many theories have been written in the effort to describe what judges do in hard cases[12]. For some theorists, in deciding a hard case, judges are *applying* legal norms; for others, they are *creating* legal norms[13]. 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[14].

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[15]. RONALD 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[16]. 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"[17]. 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"[18].

Is it possible to find common ground between these theories of law and adjudication to address that common concern? This paper addresses this question by exploring the tension between

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[10] Robert Kagan, The Organisation of Administrative Justice Systems: The Role of Political Mistrust, *in* ADMINISTRATIVE JUSTICE IN CONTEXT 172, (Michael Adler ed. 2010).

[11] Kagan, REGULATORY JUSTICE, at 87 (1978). ("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 rile 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).

[12] Ronald Dworkin, "Hard Cases," *in* TAKING RIGHTS SERIOUSLY (1978).

[13] Scott J. Shapiro, LEGALITY, 274 (2011) [hereinafter, Shapiro, Legality].

[14] H.L.A. Hart, THE CONCEPT OF LAW (3rd ed., 2012) [hereinafter, Hart, CL]; Shapiro, Legality, at 305.

[15] 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).

[16] 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).

[17] Dworkin, LE, at 160.

[18] Id.

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?"[19]. 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"[20]. 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[21]. 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 will 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 take this approach.

Throughout this paper I shall refer to legal institutions endowed with administrative power (*i.e.*, Cabinet departments, executive agencies, independent agencies, commissions, boards, and the

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[19] Thomas J. Miles & Cass Sunstein, DO JUDGES MAKE REGULATORY POLICY? AN EMPIRICAL INVESTIGATION OF CHEVRON, 73 Chi. L. Rev 823, 867 (2006).

[20] Id.

[21] *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 15, 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 15, at 146 – 151 (1994); Sunstein, *supra* note 15.

like) as "*administrative decision-makers*". 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. On this account, 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 the construction of a *digital republic* committed to the core tenets of *enlightenment constitutionalism*.

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"[22]. 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[23] 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[24]. Professor ROBERT 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[25].

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

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[22] 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").

[23] 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").

[24] 1 Gastón Jèze, PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO, LA TÉCNICA JURÍDICA DEL DERECHO PÚBLICO FRANCÉS, at XL (trans. J.N. San Millán Almagro, 1948).

[25] 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).

consider that a common origin can be traced back to what Professor JEREMY WALDRON calls "*Enlightenment constitutionalism*" and which he defines as a "[…] body of thought that emerged in the 18th century, but originated in England in the later decades of the 17th 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"[26]. 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"[27].

Commentators argue that one of the most transcendental achievements 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"[28] that arise from the exercise of political power[29]. *Enlightenment constitutionalism* views the Constitution as a machine devised to control, limit, and restraint the power of the state[30]. 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[31]. 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[32]. 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[33].

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[26] Jeremy Waldron, Isaiah Berlin's Neglect Of Enlightenment Constitutionalism, *in* POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS (2016).

[27] 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 19th 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*").*

[28] 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").

[29] 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).

[30] Id.

[31] 1 John Locke, TWO TREATISES OF GOVERNMENT 195, (Thomas I. ed., 1947).

[32] Id., at 188, 197.

[33] 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[34].

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.

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*"[35]. 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[36].

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)[37], 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[38]. The origin of these revolutionary ideas can be traced back to the very notion of liberty coined by *natural*

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[34] Id.

[35] 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).

[36] 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 26, at 11; García de Enterría, *supra* note 35 at 129.

[37] 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.

[38] *See* Jean Domat, LES LOIS CIVILES DANS LEUR ORDRE NATUREL (1689).

law[39] and introduced in the Declaration of the Rights of the Man and the Citizen of 1789[40]. 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"[41].

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[42]. The *Lumières* envisioned legislation as the purest expression of a community's public will[43]. 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[44]. The Code Napoleon of 1804 is a good example of this[45]. Commentators explain that administrative agencies and judges became "agents of the people" that shall faithfully execute what legislation commands or forbids[46], without having the authority to *make new* law[47]. 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[48].

On the other hand, the inception of the rule of law in the United States of America occurred throughout different stages[49]. 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

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[39] 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").

[40] 1 Ambroise Colin & Henri Capitant, CURSO ELEMENTAL DE DERECHO CIVIL, 11, 19, (Démofilo de Buen trans. 1922).

[41] García de Enterría, *supra* note 35, at 145 – 153.

[42] García de Enterría, *supra* note 35, at 129. *See* Charles de Secondat Montesquieu, THE SPIRIT OF THE LAWS (Cohler, Miller & Stone trans. and eds., 1989).

[43] 1 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).

[44] C. J. Friedrich, The Ideological and Philosophical Background, *in* THE CODE OF NAPOLEON AND THE COMMON-LAW WORLD, 3 (Bernard Schwartz ed., 1956).

[45] Lobingier, *supra* note 39, at 127.

[46] García de Enterría, *supra* note 36, at 129.

[47] Montesquieu, *supra* note 42, at 5.14.

[48] Portalis, *supra* note 39, at 19.

[49] 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 it theological element").

reconstruction of the concept[50]. 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[51]. 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"[52].

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[53]. 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"[54]. 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 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.[55]

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[50] 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[50]. 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" [50]. 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"[50]. 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".

[51] Id. at 183.

[52] Id. at 184.

[53] 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".

[54] *See* Hume, *supra* note 35.

[55] 1 John Adams, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 129 (1787).

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"[56]. 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[57].

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[58]. 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"[59]. 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"[60]. 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[61].

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[62]. This view accounts for the manner in which legal norms must be administered by the government to preserve their characteristics throughout the path of their execution and enforcement[63]. 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[64]. 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[65]. These

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[56] Harold J. Laski, A NOTE ON M. DUGUIT, 31 Harv. L. Rev. 186, at 192 (1917).
[57] THE FEDERALIST No. 10, 47, 51 (Madison); Cass, *supra* note 16, at 1 – 4; Waldron, *supra* note 16, at 11.
[58] Waldron, supra note 16, at 8.
[59] 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").
[60] 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 that 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").
[61] Waldron, supra note 26, at 7.
[62] Id. at 7.
[63] Id.
[64] Dicey, supra note 50, at 193-95.
[65] Hart, CL, at 273-274; Waldron, supra note 16, at 8.

requirements are often attributed to the principles of "natural justice"[66]. 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[67].

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[68].

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[69]. 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[70], ranging from the "property of being lawful" to the values of legality "often ascribe to the rule of law"[71]. 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

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66 Hart, CL, at 273-274.

67 Waldron, supra note 26, at 8.

68 Scott J. Shapiro, LEGALITY 388 – 400 (2011) [hereinafter, Shapiro, Legality].

69 Waldron, supra note 26, at 8.

70 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.").

71 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).

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[72], 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.

The Path of the Law

Generally speaking, legal systems purport to regulate the life of a community by imposing a normative order[73]. This means that propositions of law are intrinsically teleological and dynamic in character; namely, they impose legal obligations seeking to fulfill certain ends[74]. Hence it can be said that lawmakers, administrative agencies, and courts do not operate in a 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[75].

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[76]. Furthermore, legal norms do not live nor speak by themselves since they are not self-executing[77]. 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[78]. In short, the path of the law is nothing but the

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[72] 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'").

[73] *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).

[74] 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 21, 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".).

[75] Philip Nonet & Philip Selznick, LAW AND SOCIETY IN TRANSITION, TOWARDS RESPONSIVE LAW (1978).

[76] Hart & Sacks, *supra* note 21, at 150 -165.

[77] Jerry L. Mashaw, CREATING THE ADMINISTRATIVE CONSTITUTION. THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 312 (2012).

[78] Hart & Sacks, *supra* note 21, at 180 – 183.

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[79].

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[80]. 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[81]. 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[82]. An example of this undesired situation can be found in what administrative law scholars called the "balkanization" of federal law, which in their view occurs when federal statutes are construed in a different fashion by different federal judges[83].

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[84] that, since it is not self-executing, must be executed *ex ante* by administrative agencies[85] or *ex post* by courts in the cases where litigation arises[86]. On the assumption that a community rests upon a political and moral consensus[87], 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

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79 Kelsen, *supra* note 60, at 35.

80 Dworkin, LE; Scott J. Shapiro, The Hart-Dworkin Debate: A Short Guide for the Perplexed, *in* RONALD DWORKIN (Arthur Ripstein ed., 2007).

81 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).

82 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").

83 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).

84 U.S. Constitution, Art. I Sec. 8; Constitución Política de Colombia [C.P.], Arts. 114 and 150 (Colom.).

85 U.S Constitution, Art. II Sec. 1; Constitución Política de Colombia [C.P.], Arts. 115 and 189 (Colom.).

86 U.S. Constitution, Art. III; Constitución Política de Colombia [C.P.], Arts. 116, 228, 229, 230 (Colom.).

87 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).

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"[88]. Likewise, though he referred to the German *ius pandectarum*, WINDCHEID postulated that legislation is whatever the legislature desires to transform into law[89]. 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[90]. 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.

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[91]. 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

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[88] Locke, *supra* note 8, at 188, 197.

[89] 1 Bernhard Windscheid, TRATADO DE DERECHO CIVIL ALEMÁN, at 1 (Fernando Hinestrosa trans., 1987).

[90] Dworkin, LE, at 317.

[91] 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[91]. 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."

shifting an "agreement" into a contract[92], 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[93]. 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 intervene to make policy choices and shape the language of the law accordingly[94]. 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.

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

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92 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").

93 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."

94 Martin Shapiro, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); Hart & Sacks, *supra* note 21, at 150 - 165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, 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.

when *Enlightenment constitutionalism* flourished[95]. Nowadays social life, science, and technology develop at a vertiginous rate[96]. Far from having a political and moral consensus[97], a community is rather pluralistic insofar as it is comprised of individuals with different interests and sentiments[98]. Addressing competing interests within such a complex social, technological, and political context raises several challenges to legality and its legal process[99]. Generally speaking, legislators often lack the necessary specialized expertise or political determination to regulate the life of a community in detail[100], which bolsters the truism that statutes cannot foresee nor regulate all variables of social behavior[101]. This undermines, in my view, the *formalist* idea of complete legislative supremacy in lawmaking[102]. As a practical matter[103], it also entails that legal norms often are made in a general and even indeterminate fashion,[104] which MARTIN SHAPIRO calls "lottery statutes"[105] when they are enacted by the legislature. In fact, legal institutions often employ general, ambiguous, imprecise, incomplete, and open-textured

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95 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".

96 James Landis, THE ADMINISTRATIVE PROCESS 6 (1938); Felix Frankfurter, THE PUBLIC AND ITS GOVERNMENT 7 – 10 (1930).

97 Lutz, *supra* note 87, at 11-13; Pocock, *supra* note 87, at 519.

98 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).

99 *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).

100 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 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").

101 *See, e.g.,* Hart & Sacks, supra note 21, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, 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 81, at 868; Hart, CL, at 123; Portalis, *supra* note 39, 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 […]".

102 For the discussion about the core tenets of *legal formalism* see Frederick Schauer, FORMALISM, 97 Yale L. J. 509, 511-12 (1988)

103 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).

104 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").

105 Shapiro, *supra* note 94, at 172,

written formulas[106] to attend to the community's competing interests or to address different audiences at the same time[107]. This legal craftsmanship leads to constitutional and statutory indeterminacies, ambiguities, and implicatures whose resolution often calls for judgments of policy and principle[108]. Put it differently, the way in which legal norms are made determine the difficulty in answering the questions that fall within their scope and the amount of discretion granted to the institutions that shall interpret and enforce them[109].

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[110]. As a result, commentators argue that the administrative power emerged as a response to the practical limitations of the separations of powers[111]. 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

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[106] 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).

[107] *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).

[108] Radin, *supra* note 81, 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 19; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15; 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).

[109] Hart & Sacks, *supra* note 21, at 150 – 165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, 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").

[110] Landis, *supra* note 96, 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).

[111] Id.

> 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.[112]

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 the necessities of modern governance and shifting political circumstances[113]. 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[114]. It must be underlined, however, that the separation of powers doctrine is about functions, not institutions[115]. 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

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[112] Landis, *supra* note 96, at 136, 46.

[113] 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).

[114] 1 John Locke, TWO TREATISES OF GOVERNMENT 195 (Thomas I. ed., 1947).

[115] 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").

government[116]. 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[117].

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 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[118]. Their duty is to address competing interests in resolving easy and hard cases[119].

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[116] Id.

[117] Landis, *supra* note 96; Felix Frankfurter, *supra* note 96; 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).

[118] *See, e.g.*, Landis, *supra* note 96; Frankfurter, Landis, *supra* note 96, 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 77, at 8; Mashaw, *supra* note 108, at 538; Sunstein, *supra* note 70; Sunstein, *supra* note 15; Miles & Sunstein, *supra* note 19; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15; Ernst, *supra* note 117; Bamberger, *supra* note 108, 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)

[119] Stewart, *supra* note 99, 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 108, 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 100, 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

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[120]. 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 administrative power as the first interpreter and executer of what the legislature has laid down in general terms[121]. The administrative power is, therefore, a *faithful agent of the law*[122].

By *faithful agent of the law* I do not mean, however, that the administrative power is only an agent of Congress or legislation[123]; 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[124]. 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*[125]. Similarly, BARDACH and KAGAN suggest that this occurs frequently in practice because statutes and administrative regulations tend to be "overinclusive"[126]. 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[127]. 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

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uncertainty and competing public interests".); Bamberger, *supra* note 108, 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).

120 Hart & Sacks, supra note 21, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, at 151; Mashaw, *supra* note 108; Hart, CL, at 130; Shapiro, Legality, at 335 – 338; Chevron, *supra* note 119.

121 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).

122 Mashaw, *supra* note 108, 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.

123 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").

124 Ronald Dworkin, HARD CASES, 88 Harv. L. Rev. 6, 1057, at 1105 (1975); Dworkin, LE, at Ch. 7.

125 Robert M. Cover, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 197 (1975) (describing the judge's moral-formal dilemma about slavery and liberty).

126 Eugene Bardach & Robert A. Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 66 (1982).

127 Id. at 123. *See also* Robert Kagan, REGULATORY JUSTICE 89 – 90 (1978).

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[128].

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[129] based on arguments of policy and principle due to the role it plays within the path of the law[130].

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[131] and ARISTOTLE[132]. 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[133]. 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"[134]. On this account, I suggest that a traditional view of administrative

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[128] Dworkin, *supra* note 124, 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 other decisions also thought right". *See also* Dworkin, LE, at 223, 243; Sunstein, *supra* note 15; Eskridge, PUBLIC VALUES, *supra* note 15; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, at 146 – 151.

[129] *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").

[130] Stewart, *supra* note 99, at 1683; Shapiro, ADMINISTRATIVE DISCRETION, *supra* note 118, at 1487; Shapiro, THE GIVING REASONS REQUIREMENT, *supra* note 118; Shapiro, *supra* note 94.

[131] Plato, THE REPUBLIC at 462a – b (2003).

[132] 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").

[133] 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").

[134] Adams, *supra* note 55, at 129.

decision-making would argue that administrative decision-makers should construe the grounds of law or decide meta-interpretive disagreements *rationally* seeking the protection of the "common good"[135], the "public interest"[136] or the "national welfare"[137].

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[138]; while at the same time it exposes the legislature's incapability to address "hard questions of social choice"[139]. 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"[140]. 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 "reelection maximizers"[141]. For the purpose of building predictive theories, public choice scholars assume that

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135 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).

136 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 JÈZE asserts that the "service publique" is the "pierre 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).

137 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 Forsthoff, TRATADO DE DERECHO ADMINISTRATIVO, 252 (trans.,1958); Ernst Forsthoff, "Concepto y Esencia del Estado Cocial 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).

138 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).

139 Kenneth Culp Davis, DISCRETIONARY JUSTICE 48 (1969).

140 Reich, *supra* note 138, at 1237.

141 For a general discussion on this point, *see, e.g.,* Farber & O'Connell, *supra* note 107; Daniel A. Farber & Philip Frickey, LAW AND PUBLIC CHOICE (1991); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A THEORY OF LEGISLATIVE

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"[142].

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[143], 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[144].

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[145]. 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 sentiments of a pluralist community[146]. 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

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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".)

142 Rubin, *supra* note 135, at 1395.

143 Reich, *supra* note 138, at 1237.

144 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").

145 Id. at 1257 – 1270.

146 Stewart, *supra* note 99, at 1813.

or rationally correct" or "ethically informed prudential best guess"[147].

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*[148]. On this philosophical assumption, I am convinced that a legitimate democratic government that treats each citizen as equal must reject any neutral conception[149] about the rule of law, the administrative power, and the procedures by which it carries out its responsibilities[150]. Furthermore, I consider that such a conception of democracy is consistent with the activist account of the state envisioned by *DAMAŠKA*[151] and the responsive law model proposed by SELZNICK and NONET[152]. 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[153].

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[154]. On the other

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147 Shapiro, *supra* note 81, at 150.

148 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").

149 Richard B. Stewart, REGULATION IN A LIBERAL STATE: THE ROLE OF NON-COMMODITY VALUES, 92 Yale L. J. 1537, 1539 (1983).

150 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).

151 *Mirjan Damaška, THE FACES OF JUSTICE AND STATE AUTHORITY 92* (1986).

152 Philippe Nonet & Philip Selznick, LAW AND SOCIETY IN TRANSITION, TOWARDS RESPONSIVE LAW 77 (1978).

153 Reich, *supra* note 138, 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 vote for inexpensive electricity and against fish, or a vote for free enterprise-expensive electricity and against public power-cheap electricity".

154 Id. at 1247; Richard B. Stewart, Stewart, *supra* note 99, 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

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[155]. It is noteworthy that lawmaking and policymaking no longer rest exclusively in the hands of the legislature[156]. 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[157]. This does not mean, however, that the legal conversation requires that the main decision-makers in agencies should be lawyers. The transformation of politics and knowledge into policy is the result of the "work of experts"[158] 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 tackle the question at stake, and make reasonable policy determinations based on publicly validated data.[159]

1487; Shapiro, THE GIVING REASONS REQUIREMENT, *supra* note 105; Shapiro, *supra* note 81, at 150; Mashaw, *supra* note 137, at 373, 394.

155 Hart & Sacks, supra note 61, at 170 -186; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, at 151; Hart, CL, at 130; Shapiro, Legality, at 335 – 338.

156 Hart & Sacks, supra note 61, at 150 -165; Eskridge, DYNAMIC STATUTORY INTERPRETATION, *supra* note 15, 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.

157 *See supra* note 88. Steven P. Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2007).

158 David Kennedy, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 108 (2016).

159 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

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[160]. 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"[161]. 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"[162].

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[163]. 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 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[164]. 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[165]. I consider that administrative decision-making possesses two salient features that differentiate it from judicial decision-making.

OF "HARD LOOK" JUDICIAL REVIEW, 58 Admin. L. Rev. 753 (2006).

160 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 138, 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).

161 Reich, *supra* note 138, at 1242.

162 Rubin, *supra* note 135, at 1399. *See, e.g.*, Jerry L. Mashaw, *supra* note 110, at 827; Aranson, Gellhorn & Robinson, *supra* note 141, at 41 – 45.

163 *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 160, at 201 – 203. For the general discussion on this point from an administrative law perspective, *see, e.g.*, Reich, *supra* note 138, at 1242; Stewart, *supra* note 99.

164 Dworkin, *supra* note 148, 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").

165 Shapiro, *supra* note 36, at 369; Hart, Jr. & Sacks, THE LEGAL PROCESS, supra note 61, at 173.

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[166]. 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.

Hermes Awakens in a Digital Republic

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[167]. Unlike HERCULES[168], HERMES possesses expert knowledge, skill, patience, and unlimited 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 must 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

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[166] For a detailed discussion about administrative decision-making models and their practical challenges, *see, e.g.*, Robert Kagan, *supra* note 127; Kagan, ADVERSARIAL LEGALISM, *supra* note 25; Jerry Mashaw, BUREAUCRATIC JUSTICE (1983).

[167] 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.

[168] Id. at 239. DWORKIN describes Hercules as "[…] an imaginary judge of superhuman intellectual power and patience who accepts law as integrity."

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: *Forward Pacifica* and the *Progressive Alliance*. The former advocates for a limited government and believes that technical decisions on digital architecture and the like ought to be left in the hands of a free market as way to promote innovation. The latter considers that encryption and decentralization are both necessary to ensure privacy and human rights protection in digital ecosystems. Both political parties have a significant representation in Pacifica's Congress to the extent that *Forward Pacifica* has the majority in the Lower Chamber and the *Progressive Alliance* has the majority in the Upper Chamber.

Let us further suppose that Pacifica is a highly advanced digital society, with AI and AR/VR technologies integrated into virtually every aspect of life. One of the most transformative technologies in Pacifica is the metaverse, a virtual world powered by advanced AI algorithms and accessed by everyone through state-subsidized AR/VR devices. Assume that the metaverse has become a central hub for social interaction, entertainment, and education, and is a key part of Pacifica's economy and culture.

However, as Pacifica's reliance on the metaverse has grown exponentially, there are increasing concerns that it may turn into a "walled garden", which is a digital platform controlled by a single entity or a small group of entities designed to keep users within a limited set of experiences or offerings. In the context of a metaverse, a "walled garden" could arise if a small group of powerful players were able to control the development and operation of the metaverse, either through the ownership of key infrastructure or through the concentration of financial or technological resources.

When public policy is made without a scientific basis, it is akin to mere speculation. The use of scientific evidence in policymaking ensures that policies are grounded in empirical data and are more likely to be effective in achieving their intended goals. Without a scientific basis, policies are at risk of being arbitrary, based on personal beliefs or political agendas rather than objective evidence. As such, public policy that lacks a scientific basis may ultimately be ineffective, or worse, harmful to

the public. Therefore, policymakers ought to take a cautious and evidence-based approach to decision-making to ensure that public policy aligns with the best available scientific knowledge.

One way in which Pacifica is promoting innovation while ensuring regulatory compliance is through the implementation of regulatory sandboxes. A regulatory sandbox is a controlled environment in which businesses can test innovative products, services, or business models under the supervision of regulatory authorities. By participating in a regulatory sandbox, businesses can gain valuable insights into how their products or services might work in the market and identify any regulatory hurdles that they may encounter in the future.

As the result of a set of controlled experiments carried out within Pacifica's *regulatory sandbox*, the government is concerned about the risks and trade-offs of a "walled garden" metaverse for privacy, human agency, and cultural heritage. One potential trade-off is that it could limit the privacy and security of users. If the controlling entities were able to collect and use user data in ways that are not transparent or fair, or if they were able to monitor or track the activities of users without their knowledge or consent, it could undermine the right to privacy. Another potential trade-off is that it could limit the autonomy and agency of users. If the controlling entities were able to dictate the terms and conditions under which users can access and use the metaverse, or if they were able to control the actions and behaviors of users through the use of algorithms, AI, and other technologies, it could undermine the ability of users to make their own choices and to exercise their own agency.

Moreover, the experiments ran in the regulatory sandbox indicate the use of generative AI in immersive ecosystems raises significant concerns, particularly with regards to deepfake simulations of real people in virtual worlds, which could lead to the spread of misinformation or malicious propaganda. Also, the use of generative AI to create highly persuasive virtual marketing and advertising campaigns could manipulate consumer behavior and preferences in potentially harmful ways. The experiments also suggest the creation of highly realistic virtual environments that blur the line between reality and virtual reality could have profound effects on human psychology and well-being.

This could pave the way for a dystopian future where users would be isolated from the outside world and subject to the control and manipulation of a few powerful corporations or organizations. In response, the government of Pacifica decides to regulate AI-powered metaverses to ensure that they are safe ecosystems committed to human rights protection and open to everyone.

Also, assume that the current digital technology legislation and administrative regulations are obsolete and cannot account for the magnitude and complexity of this new AI-powered metaverse. Further suppose that Congress wants to make a statement about responsible innovation and human rights protection. Nevertheless, it failed to reach an agreement on the specific measures to execute their political decision because some congressmen 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 how metaverses should work in practice.

Political parties also disagree about the relevance of passing the Metaverse Act. *Progressive* lawmakers may argue that the metaverse represents a significant technological advancement with the potential to transform the way people live and work, and that it is important to establish regulatory frameworks early on to promote its responsible development. They may also see the metaverse as an

opportunity to address social and economic challenges through innovative solutions. In contrast, the *traditional* party views the metaverse as a speculative and unproven technology that may not warrant government intervention at this time.

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 the challenges raised by immersive ecosystems. After many rounds of congressional deliberation and discussion, Congress members reached a bipartisan solution: They agreed on mandating that any metaverse operating within the island must run on platforms built on open protocols and the best available technology to ensure it is not controlled by a single entity or group, but without placing an unreasonable burden on government surveillance and the exercise of legal remedies.

However, Pacifica's Congress struggled to reach agreement on the meaning of "best available technology" and whether the metaverse must necessarily be an immersive ecosystem. Some lawmakers argued metaverses can be created through various forms of digital media, including text-based chatrooms, forums, and other online communities, while others insisted that a true metaverse must provide a fully immersive and interactive experience, like that of a video game. In the end, Congress took a nuanced approach, recognizing that a metaverse can take many forms, and decided to pass general legislation granting authority to Pacifica's Digital Transformation and Innovation Agency to construe and enforce the Act. This agency would be responsible for interpreting the requirements of the Act and ensuring that any metaverse is operated in a transparent and democratic manner.

Suppose that Pacifica's Congress passes a new piece of legislation called "The Metaverse Act". The Act states: "Section 1. Any metaverse operating within the jurisdiction of Pacifica shall be open, transparent, safe, explicable, equitable, and resilient. It shall not be controlled by a single entity or group. Section 2. Metaverses shall be designed and operated in a manner that serves the rule of law, the public interest, and protects human rights. Section 3. Metaverses shall not use AI or other technologies to automate or control the actions and behaviors of its users, except where such automation or control is necessary for the protection of human rights and fundamental liberties, or for the promotion of public safety and security. Section 4. Metaverse service providers operating in Pacifica shall use the best available technology. Section 5. The Digital Transformation and Innovation 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 leave in the hands of Pacifica's Digital Transformation and Innovation Agency the regulation, interpretation, and enforcement of the Metaverse Act, 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 design, build, and operate open, transparent, safe, explicable, equitable, and resilient metaverses that shall not be controlled by a single entity or group. 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, human rights protection, innovation, open protocols, safety, and government surveillance. Because in this case he must articulate a new metaverse policy, he deems rulemaking the most appropriate and pluralist procedure

to 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, and lawyers in the fields of peer-to-peer networks, consensus algorithms, cryptography, immersive technologies, AI, privacy, human rights, 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 digital transformation, innovation, and privacy policies and legislation.

Shortly after, Hermes drafted a proposed rule that strikes balance between cutting-edge immersive technology, privacy enhancing technology, innovation, implementation costs, rule of law values, human rights, existing legal remedies, and what he considers effective government surveillance techniques.

The proposed rule states: "Section 1. For the purposes of the Act, a metaverse is a virtual world or universe that is open, accessible, and secured through cryptographic mechanisms, and is governed by a distributed network of users and validators rather than a single entity or group. It allows for participation and collaboration among its users and validators, enabling them to collectively shape the direction and evolution of said immersive space. Section 2. For the purposes of the Act, a 'metaverse service provider' is any individual, entity, or organization that operates, manages, or controls an immersive ecosystem within the jurisdiction of Pacifica. This includes, but is not limited to, entities that provide hosting, infrastructure, content, applications, or services to users of the digital ecosystem. Metaverse service providers may be for-profit or non-profit and may be based within or outside of Pacifica. Section 4. There shall be a regulatory sandbox to allow for the testing of new regulatory approaches, disruptive technologies, and business models in a safe and controlled environment." 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 organizations 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, immersive service providers and a non-profit called "*CypherPacifica*" submitted their comments. Suppose that these are all organized and well-represented interest groups.

Generally speaking, metaverse service providers disagreed with Hermes' proposed rule because they consider that employing distributed architecture and private blockchain networks can also attain the Act's purposes. Based on their own research and data, they suggested that, unlike public blockchain networks, private blockchain networks are the "best available technology" because they offer a higher level of privacy, security, scalability, control, and customization. Furthermore, they claim that private blockchain networks optimize compliance with existing regulation, enable the exercise of legal remedies in the event of a dispute against the metaverse service provider or other users, and facilitate government surveillance to help keep the metaverse safe from criminal or otherwise illegal activity.

By contrast, *CypherPacifica* supported Hermes' proposed rule, but not in all respects. It explained that the proposed rule is a comprehensive regulation that further develops what the

legislature has announced in general terms in the sense that it requires any digital ecosystem operating in Pacifica to run on platforms built on open standards, protocols, and decentralized technologies. However, based on a purposive interpretation of the Act, *CypherPacifica* argued that Hermes' proposed rule fails to introduce effective measures to ensure decentralized digital ecosystems, particularly, it asserts the proposed rule fails to exclude any form of control from a single entity or group over these ecosystems, thus frustrating the purposes behind the Act's enactment.

CypherPacifica argued that public blockchains are the "best available technology" because they are the only decentralized networks that are not controlled by a single entity or group, which can reduce the risk of censorship, manipulation, or concentration of power, thus enabling any digital ecosystem to operate more fairly and equitably. Additionally, it asserted that any metaverse operating in Pacifica ought to be governed by a decentralized autonomous organization (DAO) without any government participation or interference, though it could not point out to any legal rule in support of their claim. Nonetheless, *CypherPacifica* accepted that there is uncertainty about the effectiveness of DAOs in immersive ecosystem's governance insofar as they are still at an experimental stage and how it may impact the exercise of legal remedies against metaverse service providers or other users.

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 "best available technology" and "unreasonable burden" mean under specific factual circumstances. On the one hand, *CypherPacifica* argued that public blockchain networks are the best available technology to fulfill the Act's purposes, and on the other, metaverse service providers argued that private blockchain networks are the best available technology because it does not place an unreasonable burden on the exercise of legal remedies and government surveillance for the sake of human rights protection in digital environments. One could argue that the uncertainty about the "consequences" of the implementation of decentralized networks for the exercise of legal remedies makes the decision about what is the "best available technology" a hard one but that it does not require any further philosophical considerations.

The first obstacle he faces is statutory ambiguity. What does "best available technology" 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 "best", "available" and "technology" have different meanings in different contexts and that none of them refer to the technical standards or parameters that must guide how to design, build, and operate a metaverse that shall not be controlled by a single entity or group, but without placing an unreasonable burden to the exercise of legal remedies. 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 considered the "best available technology" for building and operating metaverses that are not controlled by a single entity or group. He decides to take a *realist*

approach but 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 knows 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 mandating that any metaverse operating within Pacifica's jurisdiction shall be open, transparent, safe, resilient, and not be controlled a single entity or group in the hopes that a democratic, fair, and equitable metaverse 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 privacy enhancing techniques, cryptographic protocols, consensus algorithms, peer-to-peer networks, degree of technical or economic control over the metaverse, and effective government oversight. While it is true that Congress mandated the use of the "best available technology" to ensure that the metaverse is not controlled a single entity or group, it failed to reach an unambiguous solution as to what is the best available technology to do so that does not place an unreasonable burden to the exercise of legal remedies and government surveillance.

Congress decided to leave that value choice in Hermes' hands because it requires him to make a judgment about setting the threshold to assess the degree of openness, accessibility, cryptographic security, control exercised by a single entity or group over the platform, participation, and collaboration of a distributed network of users and validators in the operation of the platform. This is indeed a value choice because any misjudgment would eventually entail either that any metaverse turns into a "walled garden" or a highly decentralized platform where users would lack an effective legal remedy to defend their rights and fundamental liberties.

Therefore, assume that the parties do not dispute the linguistic ambiguity of the term "best available technology" but rather its legal consequences. More precisely, the parties disagree about a value choice, namely, what is the most cost-benefit technology to ensure that any metaverse is not controlled by a single entity or group but without placing an unreasonable burden to the exercise of legal remedies and government surveillance. 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 integrity*, he considers that the parties disagree about whether the Metaverse 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.[169] Recall that DWORKIN's theory of legislation rests upon the assumption that Hercules "has his own opinions about all the issues at stake."[170] On this assumption, Hermes must turn to the legislative record and public statements hoping that something said by any congressmen during the congressional debates may help him elucidate what Congress intended or to grasp the *spirit* of the 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 strike balance between the degree of openness, accessibility, control exercised by a single entity or group over the metaverse, legal remedies, and government surveillance. 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 his interpretive effort, Hermes 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 Metaverse Act. Further assume that each of one these positions are articulated in a different interpretive methodology that conveys two different moral and political philosophies about privacy, human rights protection, decentralized governance models, government surveillance, and legal remedies. In fact, metaverse service provider commenters advanced a pro-business purposive interpretation aimed at using private blockchain networks to fulfill the Act's purpose.

By contrast, based on a pro-decentralized purposive interpretation of the statutory language, *CypherPacifica* considered that the only feasible way to prevent that any metaverse operating in Pacifica's jurisdiction is controlled by a single entity or group by using public blockchain networks. 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 the proper interpretation methodology of Pacifica's legal system is according to which the planning or allocation of resources ought to 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

[169] Id. at 342 – 346.
[170] Id. at 337.

the guidance provided by the law" by discovering "implicit suspense clauses" based on his experience and expertise[171].

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 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.

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. He 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 rule of law.

Finally, Hermes is aware that his decisions entail the interpretation of the law, though he deems them consistent with the moral and political aspirations of the community. If he is wrong, let the Supreme Court overrule 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.

[171] Shapiro, Legality, at 303 – 304.