

## Articles

# The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s

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I. PARLIAMENTARY SUPREMACY AS A PROBLEM IN GERMAN  
AND FRENCH CONSTITUTIONAL HISTORY

A. *Comparative Reflections on the Struggle To Reconcile Democracy and  
Delegation in the First Half of the Twentieth Century*

Over the course of the first half of the twentieth century, nation-states throughout the industrialized world underwent a dramatic institutional transformation with important legal and constitutional consequences. Even in countries with well-established bureaucratic traditions, the emergence of the welfare state entailed a significant diffusion of normative power away from elected legislatures into an often fragmented and complex executive and administrative sphere. The 1920s and 1930s, in particular, marked a breakdown of notions of separation of powers derived from the nineteenth century—the old *trias politica*. This concept, at least in theory, had made the popularly elected legislature (parliament) the principal legitimating mechanism of a state structure that also included the executive and judicial branches.

In the prevailing nineteenth-century conception, the national parliament, as the cornerstone of representative government, was to possess ultimate authority over the adoption of generally applicable legislative norms governing society.<sup>1</sup> By contrast, the primary role of the national executive and its administrative subordinates was, consistent with the prevailing political liberalism, to serve as agents of the legislature with very

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1. See, e.g., JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 68 (Carrin V. Shields ed., Bobbs-Merrill 1958) (1861) (“The meaning of representative government is that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power . . .”). Mill’s conception of representative government was emblematic of a fundamental political-cultural shift in the nineteenth century, in which, as Robert Dahl has described, “the nation or the country” became “the ‘natural’ unit of sovereign government.” ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 214 (1989). In this way, nineteenth-century democratic theory broke from “the conventional wisdom of over two thousand years,” which assumed “that self-government necessarily required a unit small enough for the whole body of citizens to assemble.” *Id.*

It should be stressed, however, that Mill’s understanding of the place of an elected assembly in the national constitutional structure differed from the republican-parliamentary orthodoxy prevalent on the Continent (particularly in France) during the same period. That orthodoxy viewed the legislature as the very embodiment of the national sovereignty, with essentially unchecked lawmaking authority as representative of the “general will.” See *infra* notes 140-147 and accompanying text. By contrast, although Mill believed that “[n]o measure [sh]ould become a law until expressly sanctioned by Parliament,” MILL, *supra*, at 79, he also asserted that “a numerous assembly is as little fitted for the direct business of legislation as for that of administration,” *id.* at 76. He thus argued that the actual *drafting* of legislative norms should be undertaken by a more limited number of experts “appointed . . . to make the laws,” while the legislature should retain only the post hoc power of approval or rejection. *Id.* at 78-80. Taking a position that presaged many of the twentieth-century developments described in this Article, Mill argued that “the proper office of a representative assembly is to watch and control the government.” *Id.* at 81; *cf. infra* text accompanying notes 260, 270.

limited normative autonomy or discretion—the so-called “transmission belt” theory of administration.<sup>2</sup> The principal function of judicial control in this scheme (whether exercised by courts or court-like *juridictions administratives* in the French tradition) was to ensure that the executive and the administration remained within the confines of the authority delegated by the legislature—the classical judicial concern with *ultra vires*.

By the 1950s, “few could deny that . . . a much more complex reality” prevailed.<sup>3</sup> First and most importantly, the vast expansion of the welfare state had transformed the legislative function of parliaments significantly. Rather than attempt to produce most norms directly in statutes, elected assemblies now more often than not simply delegated broad normative power to executive or administrative bodies “to make the rules via some form of subordinate legislation, subject to certain general statutory guidelines.”<sup>4</sup> Second, aided by a purportedly “depoliticized” and “technocratic” administrative apparatus,<sup>5</sup> executives throughout the industrialized world came to exercise extensive normative authority in their own right, whether in the production of quasi-legislative rules or in the adjudication of disputes that arose in connection with their expanding regulatory authority. Finally, in the face of this concentration of normative power in the executive, the nature of judicial oversight also evolved, with courts and court-like *juridictions administratives* now focusing to a much greater degree on the internal substantive and procedural regularity of this delegated normative power, rather than simply on whether the executive and administration were operating within the bounds of the authority conferred by the legislature in the enabling legislation.

This general description of legal-historical developments over the middle third of the last century should sound quite familiar to American lawyers. In the aftermath of World War I, and more particularly with the arrival of the New Deal, the discrepancy between the constitutional ideal of

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2. Richard Stewart has described the prevalence of this conception in the United States prior to the end of World War I. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (citing A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 431 (1917)). For an example of a concurring view from Europe, see PIERRE ROSANVALLON, *L'ETAT EN FRANCE DE 1789 À NOS JOURS* 53 (1990).

3. Peter Lindseth, *Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 139, 150 (Christian Joerges & Renaud Dehousse eds., 2002).

4. *Id.* For a theoretical discussion of the changing nature of legislation in the modern administrative state that focuses on “transitive” versus “intransitive” legislation, see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380-85 (1989).

5. See *infra* note 253 and accompanying text (describing the aim of the French constitution of 1958 as being in part to “depoliticize” policymaking); see also Remarks to Members of the White House Conference on National Economic Issues, 1962 PUB. PAPERS 420, 422 (May 21, 1962) (“The fact of the matter is that most problems, or at least many of them, that we now face are technical problems, are administrative problems. They are very sophisticated judgments which do not lend themselves to the great sort of ‘passionate movements’ which have stirred this country so often in the past.”).

separation of powers (in which Congress was to play the central role in the system of norm production) and the socio-institutional reality of executive and administrative power became a major theme in American public law. As James Landis famously argued in *The Administrative Process* in 1938, the fusion of legislative, executive, and judicial functions in administrative bodies in the United States had emerged over the prior half-century “from the inadequacy of a simple tripartite form of government to deal with modern problems.”<sup>6</sup> As a supporter of the New Deal expansion of federal regulatory power, Landis welcomed this effort “to adapt governmental technique,” but he also recognized that the emergent forms of administrative governance had to “preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government.”<sup>7</sup> A kind of legal-cultural reconciliation was thus required, Landis seemed to suggest, between the constitutional values inherited from the past and the “exigencies of governance” in the present.<sup>8</sup>

The challenge for American administrative law in the twentieth century would indeed be to develop constitutional doctrines—such as a relaxed but not wholly ineffective nondelegation principle<sup>9</sup>—as well as other legal and political mechanisms—such as those found in the Administrative Procedure Act and numerous other statutes and executive orders<sup>10</sup>—that might help to reconcile the concentration of authority in the executive and administrative spheres with the constitutional vision of balanced and separated powers. The development of American public law in the decades after 1945 suggests a compromise—a kind of “postwar constitutional settlement,” as this Article calls it. The concentration of power in the executive and administrative spheres would be tolerated as a constitutional matter, but only on the condition that, at the subconstitutional level, delegated authority would be subject to a range of political and legal controls that would act as a substitute for the formal structural protections of separation of powers.<sup>11</sup>

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6. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938).

7. *Id.*

8. *Id.* at 2.

9. Since the late 1930s, the nondelegation doctrine in the United States has largely served as a background constraint and an interpretive principle, allowing courts to read enabling legislation narrowly in order to avoid nondelegation concerns. *See, e.g.*, *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (“Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so. . . . As a technical matter, the key holdings are based not on the nondelegation doctrine but on certain ‘canons’ of construction.”).

10. *See infra* notes 194-196 and accompanying text.

11. Gary Lawson sees this as a “compromise position between Madison and Landis” that explains much of modern administrative law doctrine in the United States: “[W]e will not hold the administrative state unconstitutional, but we will build into the system some (but not quite all) of the wise checks on power that the Constitution, if applied, would automatically impose.” GARY LAWSON, *TEACHER’S MANUAL TO ACCOMPANY FEDERAL ADMINISTRATIVE LAW*, SECOND EDITION notes to pp. 175-86 (2d ed. 2001).

The existence of subconstitutional constraints allowed the courts to broadly eschew formalist notions of separation of powers,<sup>12</sup> focusing rather on “finding a way of *maintaining the connection* between each of the generalist institutions and the paradigmatic function which it alone is empowered to serve, while also retaining a grasp on government as a whole that respects our commitments to the control of law.”<sup>13</sup> As long as each of the three branches of government could exercise its paradigmatic function—legislative, executive, or judicial—American public law generally found that the structural demands of the Constitution would be satisfied, even if, formally speaking, the three governmental powers might, on a subordinate level and in particular regulatory domains, be fused in single administrative agencies to meet the demands of modern governance.

This brief excursus into American administrative and constitutional law in the twentieth century is necessarily schematic. Its aim is simply to put into relief certain elements of the corresponding French and German constitutional experiences that are the focus of this Article. On the level of legal doctrine, both France and Germany faced a challenge of constitutional reconciliation that, in its broad contours, was similar to that of the United States, even as it differed in important particulars. As compared to the United States, of course, both France and Germany began from very different institutional and doctrinal baselines—most notably, a much longer heritage of bureaucratic centralization stretching back to the absolute monarchies of France and Prussia in the seventeenth and eighteenth centuries<sup>14</sup>—as well as a cultural tradition that viewed the bureaucratic class as a sort of *pouvoir neutre* above social and political divisions in society.<sup>15</sup> Both France and Germany also built on very different constitutional histories—most recently, the horror of the National Socialist dictatorship and the capitulation, humiliation, and collaboration of the Vichy regime—that the United States had obviously not experienced. Finally, French and German constitutional cultures differed greatly from

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12. This is not to say that Supreme Court decisions have never taken a formalist tack. Since the mid-1970s the Court's approach has been, at times, both formalist, *see, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) (per curiam), and functionalist, *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-48 (1986); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 443 (1977).

13. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493 (1987) (emphasis added).

14. For an excellent comparative summary, see C.B.A. BEHRENS, SOCIETY, GOVERNMENT AND THE ENLIGHTENMENT: THE EXPERIENCES OF EIGHTEENTH-CENTURY FRANCE AND PRUSSIA (1985).

15. As James Sheehan has described, in Prussian and German history this tradition received its most famous expression in Hegel's *Philosophie des Rechts*. *See* JAMES J. SHEEHAN, GERMAN HISTORY, 1770-1866, at 430-33 (1989). Similar conceptions have, however, also influenced understandings of the bureaucratic function in France. *See, e.g.*, JACQUES CHEVALLIER, SCIENCE ADMINISTRATIVE 99-100 (2d ed. 1994).

each other—France with its revolutionary-republican tradition going back to 1789, and Germany with its *Sonderweg*, or purported “special path” to modernity, characterized by the failed “bourgeois” revolution of 1848 and the “late” political unification of the German states on a Prussian Imperial basis two decades later, with all its attendant constitutional consequences.<sup>16</sup>

As a general matter, however, French and German constitutional history in the nineteenth century could nevertheless be said to involve a similar struggle between the pretenses of an imperial-monarchical executive and the claims of an elected assembly as the supreme constitutional representative of the nation. In France, the moment of the parliament’s seeming constitutional triumph (the 1870s) would come a half-century earlier than it would in Germany (in the immediate aftermath of World War I), but, ironically, in each country that triumph came as the result of a military defeat at the hands of the other. Indeed, the ironic parallel perhaps went deeper: Despite the best efforts of Hugo Preuss and the other drafters of the Weimar Constitution to avoid the “parliamentary absolutism” of the French Third Republic<sup>17</sup> (hence, the “dual” system in which a popularly elected president would act as a counterweight to the parliament), similar conceptions of unchecked parliamentary supremacy—the cornerstone of French republicanism since the adoption of the constitutional laws of 1875—would also manifest themselves in Weimar constitutional doctrine in the 1920s.

It was this prevalent notion of unlimited parliamentary power, in particular as it related to the permissible scope of legislative delegation to the executive, that distinguished the French and German interwar constitutional experiences from the American one. On both sides of the Atlantic, similar political demands for increased state intervention into an economic system in apparent crisis drove the process of delegation. In France and Weimar Germany in the 1920s and early 1930s, however, conceptions of unlimited parliamentary authority to allocate normative power within the state left the parliament in both countries vulnerable to its own growing propensity to abandon its constitutional function as the democratic representative of the people—the role that nineteenth-century constitutional doctrine had assigned to it.<sup>18</sup> By the third and fourth decades

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16. For a succinct summary of the *Sonderweg* thesis, as well as its critique, see Thomas Childers, *The Social Language of Politics in Germany: The Sociology of Political Discourse in the Weimar Republic*, 95 AM. HIST. REV. 331, 331-35 (1990).

17. See WOLFGANG J. MOMMSEN, MAX WEBER AND GERMAN POLITICS, 1890-1920, at 351 (Michael S. Steinberg trans., Univ. of Chi. Press 1984) (1959) (citing HUGO PREUSS, STAAT RECHT UND FREIHEIT: AUS 40 JAHREN DEUTSCHER POLITIK UND GESCHICHTE 426 (1926)). According to Mommsen, Preuss was heavily influenced in this regard by the seminal study of ROBERT REDSLOB, DIE PARLAMENTARISCHE REGIERUNG IN IHRER WAHREN UND IN IHRER UNECHTEN FORM (1918).

18. The same was arguably also true in the Italian case. See *infra* note 51. Contrast the line of cases from the mid-1930s in which the U.S. Supreme Court struck down major pieces of New

of the twentieth century, the notion of parliamentary supremacy paradoxically provided the foundation, through its support for extreme delegations, for the degeneration of the parliamentary system into dictatorship. In both countries, the practice of extreme delegation in the 1920s and into the 1930s created an increasing gap between the constitutional ideal of parliamentary democracy inherited from the nineteenth century and the socio-institutional reality of executive and administrative power in the early twentieth. By 1933 and 1940 respectively, the practice of unchecked delegation in Germany and France led ultimately to the collapse of the parliamentary system into one in which all effective governmental power would, as a matter of constitutional doctrine, be fused in the person of the national leader.<sup>19</sup>

In the aftermath of World War II, the challenge for both France and the western zones of occupation in Germany (out of which the Federal Republic of Germany—West Germany—emerged in 1949)<sup>20</sup> would be to come to terms with their recent and terrible constitutional histories, establishing a system of governance that could sustain the welfare state bureaucracy while also remaining true to the ideal of parliamentary democracy and developing notions of human rights. Looking back on the rise of brutal dictatorships and the devastating experience of World War II, postwar constitution drafters in both the western zones of occupation in Germany and postliberation France recognized how unchecked delegation in the interwar period had undermined both the democratic-deliberative function of legislatures and emergent conceptions of constitutionally protected rights of individuals. In fact, augmented protections of human rights and the imposition of constitutional delegation constraints were linked in each country.<sup>21</sup> As a consequence, the drafters of both the West

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Deal legislation on the basis of the nondelegation doctrine. *See infra* note 168 and accompanying text.

19. In this regard, Germany and France followed the path already traced by Italy in the 1920s. *See infra* note 47 and accompanying text; *infra* note 51. However, Nazi Germany and Fascist Italy, together with Vichy France, arguably constituted the most extreme examples of a broader trend, in which the practice of unlimited delegation served as the legal foundation for the constitutional break with liberal parliamentarism in favor of a form of authoritarian or dictatorial government. For interesting Austrian parallels, see Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 361, 363-64 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

20. For obvious reasons, the constitutional settlement that took hold in the eastern zone of occupation (out of which the German Democratic Republic emerged) has little relevance to this discussion.

21. *See infra* notes 207-211 and accompanying text (discussing the *Wesentlichkeitstheorie*, or “theory of essentialness,” in postwar West German constitutional doctrine); *infra* notes 240-242 and accompanying text (discussing the French legislature’s obligation to fix “the essential rules” in enabling legislation that might have an impact on individual rights). The connection between delegation constraints and human rights protections should be unsurprising given the interwar and wartime experiences of each country, which created obvious incentives to strengthen both aspects



German Basic Law of 1949 and the French Constitutions of 1946 and 1958 attempted to define, in the constitutional text itself, both the fundamental rights of individuals and the core normative responsibilities that the legislative branch could not lawfully delegate to the executive or administrative sphere. Each country also eventually established a body *external* to the legislature—the Federal Constitutional Court in West Germany and the Constitutional Council in France—to enforce delegation constraints *against the legislature itself*, thereby concretely signifying the abandonment of the unchecked parliamentary supremacy that had been a cornerstone of republican orthodoxy in the interwar period.<sup>22</sup>

B. *The German and French Experiences in the Broader Context of Western European Constitutional History*

The postwar constitutional reconciliation of parliamentarism and administrative governance was not limited, of course, to those countries in Western Europe where interwar delegation had degenerated into dictatorship. In contrast to France and Germany, for example, Britain largely retained the forms of parliamentary democracy throughout the war, as well as notions of parliamentary supremacy thereafter.<sup>23</sup> Nevertheless, in the Statutory Instruments Act of 1946, Britain attempted to regularize the process of parliamentary review of delegated legislation—the so-called “laying” procedures—which required the government to submit its subordinate legislation, post hoc, to Parliament for approval or annulment, thereby attempting to preserve, even if minimally, some measure of

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of the modern democratic system after 1945. This connection is suggested, but not explicitly explored, in ANDREW MORAVCSIK, EXPLAINING THE EMERGENCE OF HUMAN RIGHTS REGIMES: LIBERAL DEMOCRACY AND POLITICAL UNCERTAINTY IN POSTWAR EUROPE 18 (Weatherhead Ctr. for Int'l Affairs, Harvard Univ., Working Paper No. 98-17, 1998) (“Politicians delegate power to human rights regimes, like domestic courts and administrative agencies, to stabilize future political behavior of domestic governments.”), <http://www.people.fas.harvard.edu/~moravcs/library/emergence.pdf>; see also *id.* at 14 (“Institutional commitments, properly designed, insulate the administration, interpretation, and enforcement of rules from future political opponents.”).

22. The Italian experience is similar. Part I of the postwar Italian Constitution sets out an extensive list of protected civil, political, and social rights, whereas Articles 134-37 also provide for the establishment of a Constitutional Court. Finally, in Articles 76-77, the postwar Italian Constitution also restricts the legislature’s delegation of power to the executive. In particular, Article 76 states: “The exercise of the legislative function may not be delegated to the government if the principles and guiding criteria have not been established and then only for a limited time and for specified ends.” COSTITUZIONE art. 76, *translated in* CAMERA DEI DEPUTATI, COSTITUZIONE DELLA REPUBBLICA ITALIANA: DEUTSCH, ENGLISH, ESPAÑOL, FRANÇAIS, ITALIANO 91 (1990).

23. For further elaboration of the British experience, see Peter Lincoln Lindseth, *The Contradictions of Supranationalism: European Integration and the Constitutional Settlement of Administrative Governance, 1920s-1980s*, at 114-41, 205-27 (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

parliamentary oversight and control of the regulatory process.<sup>24</sup> Additionally, in the Tribunals and Inquiries Act of 1958, the British Parliament attempted to better define the relationship between the judicial courts and the burgeoning system of administrative adjudication, while also providing a mechanism to elaborate a set of adjudicative procedures that were consistent with the demands of natural justice (due process) in the administrative sphere.<sup>25</sup> Both pieces of legislation, even if more limited in their reach than the West German and French developments, were indicative of the constitutionalist ethos that prevailed throughout Western Europe after World War II. This ethos combined two elements: effective protection of individual rights, on the one hand; and political and legal mechanisms to manage the broad displacement of legislative power out of the parliamentary realm, on the other.

The increasing social and political demands on the state that drove the demand for delegation in the interwar period by no means disappeared after World War II; indeed, they markedly increased with the advent of the postwar welfare state. Thus, Aneurin Bevan described the British situation in the early 1950s in terms that could have applied equally well to West Germany and France: “There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the process of democratic consultation, scrutiny and control.”<sup>26</sup> Throughout Western Europe, there was an effort to “democratize” delegation in a manner that was consistent with each country’s own particular historical experiences and constitutional traditions, but the resulting settlements still arguably shared several basic elements. The distribution of functional power within the state changed fundamentally in the postwar decades (being concentrated in the executive and administrative spheres), even if many of these changes had their roots

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24. 9 & 10 Geo. 6, c. 36; *see also* Statutory Instruments (Confirmatory Powers) Order, (1947) SI 1948/2; Statutory Instruments Regulations, (1947) SI 1948/1.

25. 6 & 7 Eliz. 2, c. 66. The Act itself did not specify a uniform code of tribunal procedure. Rather, it established a “Council on Tribunals” with broad consultative and review functions over the formation and procedures of tribunals in the administrative sphere. *Id.* § 1. The work of the Council over the subsequent decade established “a much clearer standard” of what procedures were minimally necessary for administrative fairness. BERNARD SCHWARTZ & H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 153 (1972). These procedures generally came to include a public hearing, the right to legal representation, the right to call witnesses, an adversary process, and the full disclosure of relevant documents. Importantly, the Act itself provided for extended rights of appeal to judicial courts (reflective of the fundamentally subordinate character of these tribunals on questions of law), Tribunals and Inquiries Act § 9(1), as well as a requirement that tribunals publicly provide reasons for their decisions (essential to effective judicial review), *id.* § 12.

26. Memorandum by Mr. A. Bevan, M.P., to the Select Committee on Delegated Legislation (June 22, 1953), *in* REPORT FROM THE SELECT COMMITTEE ON DELEGATED LEGISLATION, TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, THE MINUTES OF EVIDENCE AND APPENDICES 144, 144 (1953).

in the interwar period and before.<sup>27</sup> The purpose of parliamentary majorities became no longer so much to vote on legislation as such—though this function hardly ceased, particularly in matters relating to individual liberties, budgets, and taxation—but to yield a stable executive, which could then assure rational internal management of the state and the projection of national political and economic power on the international level.<sup>28</sup> Parliaments thus became less forums for legislative decisions than institutional instruments to legitimize the normative activity of the national government and its administrative apparatus.

In postwar West Germany and France, these developments were particularly pronounced. In both countries, the marginalization of parliaments as loci of effective legislative power was in part the consequence of explicit constitutional design in reaction to the perceived failings of parliamentary democracy in the interwar period. Constitutional changes were implemented in West Germany in 1949 and in France in 1958 that were aimed at reinforcing the executive's political position vis-à-vis parliamentary factionalism and thereby rendering the executive more politically secure. Although there was less of a perceived need for such changes in the United Kingdom (given the relative stability of British governments over the course of the century), the separation-of-powers effect of postwar developments in that country tended in the same direction—that is, toward the predominance of the executive over the legislative branch. The result in all three countries was to reduce still further direct parliamentary influence over the state's normative output. The aim was arguably to enable national executives to make more credible policy commitments, whether to interest groups at the national level or to international partners, free from “undue” parliamentary interference.<sup>29</sup>

In postwar France and West Germany, however, this process of constitutional settlement took on an added dimension designed to protect

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27. As an interwar British observer commented, delegation of legislative power to the executive was certainly not unknown in the nineteenth century, but it was in the early twentieth century that there was “a quickening [of this phenomenon] to meet the felt needs of the new Social State,” which was then followed by “a sudden flowering during [World War I], and after the War the full fruition.” JOHN WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* 5 (1933).

28. In many respects, the postwar constitutional settlement of executive-technocratic governance constituted the realization of key aspects of Max Weber's understanding of the nature and role of parliaments in the modern mass-democratic constitutional system (what Weber called “plebiscitarian leadership democracy”). For further discussion, see *infra* notes 268-271 and accompanying text.

29. For a theoretical discussion of the relationship between delegation and policy commitment, see MORAVCSIK, *supra* note 21, at 14-18, which in turn relies heavily on Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. (spec. issue) 213 (1990). See also GIANDOMENICO MAJONE, *TEMPORAL CONSISTENCY AND POLICY CREDIBILITY: WHY DEMOCRACIES NEED NON-MAJORITY INSTITUTIONS* (Robert Schuman Ctr., European Univ. Inst., Working Paper No. 96/57, 1996); LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* 29-31 (2000).

“the ‘core’ democratic functions of the legislature through the development of . . . constraints on the nature and scope of delegation.”<sup>30</sup> Although it is often overlooked by historians, among the more important manifestations of the constitutional crisis of parliamentary democracy in the interwar period had been the inability to define the boundary between legislative and executive norm production. Was there any “reserve” of normative power that the parliament could not transfer to the executive? The German answer in 1933, as well as that of the French in 1940, was that there was not: Not only could parliament transfer unlimited legislative power to the executive, but it could also transfer the power to make new constitutional law.

In the postwar period, by contrast, delegation constraints in each country would be grounded in the idea that there was indeed a substantive reserve of essential legislative power that parliament could not constitutionally shift to the executive. In theory, these nondelegation principles would ensure that parliament made the fundamental policy choices, subject to the publicity of traditional legislative procedures, although in practice reasonably vague delegations were often made. Excessive vagueness or indeterminacy, however, still provided judges with a basis to strike down the enabling legislation itself (which they in fact did from time to time), or at least to interpret it restrictively, consistent with the principles of nondelegation, so as to limit the executive’s normative autonomy.<sup>31</sup> Beyond legal principles of nondelegation, a number of additional mechanisms developed, such as legislative vetoes in West Germany, that—like “laying” procedures in Britain—were intended to maintain some modicum of parliamentary involvement in regulatory decisionmaking. And perhaps most importantly, courts and *juridictions administratives* assumed a broader role in the protection of individual or corporatist rights affected by administrative action, all of which were essential to the postwar constitutional settlement.

This Article is not intended to enter into debates over the continuing relevance of the nondelegation doctrine in American constitutional law.<sup>32</sup>

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30. Lindseth, *supra* note 3, at 145-46.

31. Because Britain “never abandoned parliamentary supremacy as a fundamental constitutional doctrine . . . , explicit recourse in that country to judicially-enforced constraints on delegation was out of the question.” *Id.* at 149. Nevertheless, after an initial period of quiescence, the British courts began to take an increasingly activist role in the scrutiny and control of executive and administrative power, even if they were precluded from striking down statutes on nondelegation grounds. *See infra* notes 273-275 and accompanying text.

32. The literature on the American nondelegation doctrine is obviously vast. For a particularly polemical recent exchange, compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003). It might be noted, however, that the “naïve view” of delegation advanced in Posner & Vermeule, *supra*, at 1725-26, is based on a formalist conception of “legislation” and “execution” that resembles the one that prevailed in Germany and France in the late nineteenth and early twentieth centuries, *see infra* notes 76, 141-142 and accompanying text.

Nevertheless, this Article is intended to stimulate discussion over the perhaps broader comparative-historical significance of delegation constraints in the stabilization of administrative governance of advanced welfare states in the twentieth century. In West German and French constitutional law, the emergence of limitations on the ability of parliament to delegate legislative power after 1945 did not reflect the persistence of a doctrinal relic from the eighteenth or nineteenth centuries, as American commentators have often supposed when looking exclusively at the American case.<sup>33</sup> In postwar West Germany and France, rather, the development of enforceable, yet flexible, delegation constraints marked an important constitutional *innovation*, one essential to the reconciliation of historical conceptions of parliamentary democracy with the reality of executive power in an age of modern administrative governance. The emergence of flexible delegation constraints after 1945 reflected a constitutional commitment to preserve—*despite* delegation—a mediating role for elected legislatures along with the conception of representative government that they embodied.

This Article's ultimate aim is not doctrinal, however, but rather historiographical. It seeks to add an important measure of legal nuance to the prevailing historical interpretation of political-economic stabilization in Western Europe from the 1920s to the 1950s. To the extent that the conventional historiography has paid attention to public law at all, it has generally followed the work of Charles Maier, which, in describing the rise of corporatism in the twentieth-century welfare state, has also noted the "relocation of the agencies of consensus and mediation" away from parliaments and into welfare state bureaucracies.<sup>34</sup> A closer look at the historical evolution of public law during this period, however, suggests that Maier's corporatist thesis is not fully accurate.<sup>35</sup> After 1945, the more

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33. As Cass Sunstein has described,

According to the familiar refrain, the [nondelegation] doctrine was once used to require Congress to legislate with some clarity, so as to ensure that law is made by the national legislature rather than by the executive. But the nondelegation doctrine—the refrain continues—is now merely a bit of rhetoric, as the United States Code has become littered with provisions asking one or another administrative agency to do whatever it thinks best.

Sunstein, *supra* note 9, at 315 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132-33 (1980); and DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 58-81 (1993)). The notion of the nondelegation doctrine as a vestige from the past (one that, perhaps, refuses to die) is well reflected in the title of a recent symposium. See Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999); see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002) ("The nondelegation doctrine . . . is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.").

34. CHARLES S. MAIER, *RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I*, at 515 (1975).

35. See *infra* Part IV.

traditional constitutional structures that had been inherited from the nineteenth century—not merely parliaments but also courts and court-like *juridictions administratives*—continued to play a central role in legitimizing the normative output of corporatist bargaining in the executive and administrative spheres. As this Article seeks to show, this persistent mediating function was consolidated in law only after a period of significant historical struggle, a process that required, paradoxically, the weakening of elected legislatures—through the imposition of delegation constraints—in order to ensure their place in an evolving, but still democratic, system of separation of powers. In sum, by dispensing with the older notions of parliamentary supremacy that permitted unchecked delegation, the evolution of postwar constitutional doctrine in West Germany and France helped to reinforce the democratic character of the postwar administrative state in a historically recognizable sense.

## II. DELEGATION AND THE INTERWAR CRISIS OF PARLIAMENTARY DEMOCRACY

The political turmoil of the interwar period was intimately bound up with the challenges of war and of economic and social crisis. The experience of World War I, as the British historian Alan Milward has written, required the European nation-state “to undertake feats of organization on a scale far greater than anything it had previously attempted,” while at the same time forcing the state “to call on the allegiance of its citizens to a degree which it had not previously attempted.”<sup>36</sup> The sacrifices that the state demanded of Europe’s citizens in World War I would not have been possible, he continues, “without an extension of the state’s obligations to them, nor without the changes in the political system which that implied.”<sup>37</sup> Political and economic instability in the interwar period flowed directly from the fact that “[f]ew European nation-states found themselves able . . . successfully to make the transition to a new form of governance securely founded on this larger pattern of obligations.”<sup>38</sup>

Milward does not expand, at least in legal or institutional terms, on what precisely this “new form of governance” entailed. These generalizations nevertheless provide a useful point of entry into the political and constitutional struggles of the interwar period, as well as their social and economic underpinnings, out of which a new form of governance did indeed emerge after 1945. In the immediate aftermath of World War I, the

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36. ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION-STATE* 4 (1992).

37. *Id.*

38. *Id.*

key constitutional question confronting Europe was this: What should be the role of representative institutions, notably parliaments, in a state confronted by public demands for social and economic intervention on a scale never before seen in peacetime? To many political actors and scholarly observers alike, the appropriate response to this question was reasonably clear: Fundamental changes in the constitutional distribution of powers would be necessary. Most importantly, national parliaments—whose generalist character and cumbersome deliberation had fit nicely with the more limited, liberal state of the nineteenth century—would now need to cede broad normative powers to the executive and emergent “technocratic” spheres, just as they had during the war in the interest of national defense.<sup>39</sup>

Such changes were required for European nation-states to have any chance of resolving the myriad social and economic challenges confronting them (particularly with the onset of the Depression). As the Committee on Ministers’ Powers, a special committee of the British Parliament, reported in 1932, “The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of

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39. In the German context, see Gesetz über die Ermächtigung des Bundesrats zu wirtschaftlichen Maßnahmen und über die Verlängerung der Fristen des Wechsel- und Scheckrechts im Falle kriegerischer Ereignisse, v. 4.8.1914 (RGBl. S.327), which granted the Reich government, under the supervision of the Bundesrat, the authority “to take those legislative measures which, during the war, are established as necessary to relieve economic damage.” *Id.* § 3. Four days after the German Reichstag passed this enabling act (*Ermächtigungsgesetz*), the British Parliament passed the first Defence of the Realm Act (DORA) on August 8, 1914. See 4 & 5 Geo. 5, c. 29. The DORA contained sweeping powers similar to those contained in its German counterpart, declaring in section 1 that “His Majesty in Council has power during the continuance of the present war to issue regulations . . . for securing the public safety and the defence of the realm.”

Interestingly, at the very outset of World War I, the French Parliament, unlike its German and British counterparts, largely resisted the temptation to transfer all effective legislative powers to the government, opting instead for more limited transfers for more specific purposes. See Law of Aug. 5, 1914, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, LOIS ET DÉCRETS [J.O., LOIS ET DÉCRETS], Aug. 6, 1914, p. 7128; D.P. 1914, IV, 98 (authorizing the government, while Parliament was not in session, to open up new lines of credit by a decree, subject to the requirement that the government seek subsequent parliamentary approval during the first two weeks of the next legislative session); Law of Aug. 5, 1914, J.O., LOIS ET DÉCRETS, Aug. 6, 1914, p. 7126; D.P. 1914, IV, 88 (authorizing the government to act by decree to suspend or otherwise alter private contractual obligations for the duration of the war—for example, payments owed by a soldier to a bank under a mortgage). It was not until 1918 that France adopted a law that could be characterized as a general delegation of legislative powers in connection with the war. Law of Feb. 10, 1918, J.O., LOIS ET DÉCRETS, Feb. 12, 1918, p. 1515; B.L.D. 1918, 79.

As for Austria, corresponding legislation was adopted in 1917. It authorized the government “to pass regulations necessary to re-establish and promote economic life, to avert economic harm, and to provide for the subsistence of the population under the ‘extraordinary economic circumstances’ caused by the war.” Somek, *supra* note 19, at 364 (translating § 1 Gesetz vom 24. Juli 1917 [Kriegswirtschaftliches Ermächtigungsgesetz] RGBl. 307/1917). In Italy, the first resort to “full powers” took place earlier, in May 1915, under the Salandra government. See Stefano Merlini, *Il governo costituzionale*, in STORIA DELLO STATO ITALIANO DALL’UNITÀ A OGGI 3, 30 (Raffaiele Romanelli ed., 1995).

legislation which modern public opinion requires.”<sup>40</sup> This statement could have applied equally well to the French and German parliaments of the same period.

This necessity for delegation, however, raised a subsidiary question: How was it possible to reconcile the concentration of normative power in the executive with traditional conceptions of parliamentary democracy inherited from the past? John Locke had defined the classical position two centuries earlier, in a famous passage in the *Second Treatise of Government*:

The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.<sup>41</sup>

Some interwar observers in Western Europe (on both the right and the left) viewed delegation in essentially Lockean terms, as fundamentally in conflict with the principles of parliamentary governance. In 1926, the French Socialist Léon Blum argued that the emergent practice in France of *pleins pouvoirs* and *décrets-lois* (“full powers” and “decree laws”) was “not only a violation of the Constitution, but a violation of national sovereignty, of which you [the members of parliament] are the representatives, but not the masters and which you do not have the right to delegate to others but yourselves.”<sup>42</sup> Coming from the other end of the spectrum, Lord Hewart, the Lord Chief Justice of England, published a book in 1929 provocatively entitled *The New Despotism*, which argued that delegation of legislative and adjudicative powers to the executive in the modern administrative state posed a grave threat to the “two leading features” of the British constitution, “the Sovereignty of Parliament and the Rule of Law.”<sup>43</sup>

In Britain, the Committee on Ministers’ Powers was formed in 1929 directly in response to Hewart’s critique of legislative delegation. The members of the Committee, among whom one could find such political and scholarly luminaries as Harold Laski, were drawn from all parliamentary parties in order to bolster its credibility in the face of growing parliamentary discomfort with the purported excesses of “bureaucracy.”<sup>44</sup> The

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40. COMMITTEE ON MINISTERS’ POWERS REPORT, 1932, Cmd. 4060, at 23.

41. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

42. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, CHAMBRE DES DÉPUTÉS, DÉBATS [J.O., CHAMBRE DES DÉPUTÉS, DÉBATS] (July 7, 1926), p. 2773 (statement of Leon Blum).

43. LORD HEWART OF BURY, THE NEW DESPOTISM 17 (1929).

44. For examples, see WILLIS, *supra* note 27, at 39.



Committee's general conclusion was "that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes"; it stressed pressures on parliamentary time, technicality of regulatory subject matters, need for flexibility in the face of unforeseen contingencies, and even opportunities for regulatory experimentation.<sup>45</sup> The Committee thus rejected the sweeping denunciations from the likes of Lord Hewart, finding that such criticisms, rather than destroying the case for delegation, simply demonstrated "that there are dangers in the practice; that it is liable to abuse; and that safeguards are required."<sup>46</sup> The legal and political formula for the legitimation of delegated legislative and adjudicative power in the future, the Committee suggested, would be some combination of direct legislative oversight of administrative action, ministerial responsibility, and corporatist participation in regulatory decisionmaking, as well as judicial review of executive and administrative actors exercising delegated power.

While some interwar observers believed, particularly in Britain, that a workable fusion of traditional parliamentarism and administrative governance was possible, others argued that parliamentary institutions were incapable of mastering the sociopolitical tensions of the time. The deterioration of any semblance of parliamentary or even semiparliamentary government, first in Italy between 1922 and 1925,<sup>47</sup> and then in Germany between 1930 and 1932 (followed by the Nazi seizure of power in 1933), seemed to suggest that the time of parliamentary democracy, at least as traditionally understood, had indeed passed. From this perspective, the persistent instability of the parliamentary system in France (until its definitive collapse, with German help, in 1940) simply seemed to offer further confirmation of the constitutional trend.<sup>48</sup>

Perhaps the most articulate exponent of the negative view of parliamentary capabilities was Carl Schmitt, the eminent conservative constitutional theorist under the Weimar Republic and later the "crown jurist" in the early years of the National Socialist regime. For Schmitt, the traditional precepts of separation of powers inherited from nineteenth-century European public law (at the core of which was the deliberative, elected parliament) simply could not be reconciled with the exigencies of modern governance and the interventionist demands of the "total state."<sup>49</sup>

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45. COMMITTEE ON MINISTERS' POWERS REPORT, *supra* note 40, at 51-52.

46. *Id.* at 54.

47. See ADRIAN LYTTTELTON, *THE SEIZURE OF POWER: FASCISM IN ITALY, 1919-1929* (2d ed. 1987).

48. See, e.g., 2 ANDRÉ TARDIEU, *LA REVOLUTION À REFAIRE: LA PROFESSION PARLEMENTAIRE* (1937).

49. The twentieth-century state was quintessentially the "total state," Schmitt believed, regardless of whether it was a democracy or a dictatorship. The principal characteristic of the total state in the twentieth century was, in Schmitt's eyes, the interpenetration of state and society:

Schmitt was, in some sense, a theorist of the inevitability of executive dictatorship in an age of administrative governance, even though he rationalized this state of affairs as a return to a more traditional form of European rule.

In 1938, Schmitt contributed an article (originally published in Germany in 1936) to a collection of essays in honor of France's great comparative law scholar, Edouard Lambert, using this as an opportunity to disseminate to a wider audience his writings in Germany on "the recent evolution of the problem of legislative delegations."<sup>50</sup> His basic argument was that, in the aftermath of World War I, developments not just in Germany and France but also in Britain and the United States (the four "Great Powers" on which he chose to focus) reflected a similar breakdown in the constitutional boundary between legislative and executive power, to the obvious benefit of the latter. Schmitt noted how "the majority of states" had found it increasingly necessary to "simplify" the procedures normally required for the adoption of legislative rules so as to remain "in harmony with the constant changes in the political, economic, and financial situation."<sup>51</sup> The delegation of extensive normative power to the executive was, in Schmitt's estimation, the principal instrument of this

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Heretofore ostensibly neutral domains—religion, culture, education, the economy—then cease to be neutral in the sense that they do not pertain to state and to politics. As a polemical concept against such neutralizations and depoliticizations of important domains appears the total state, which potentially embraces every domain. This results in the identity of state and society.

CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 22-23 (George Schwab trans., Rutgers Univ. Press 1976) (1932). On the irreconcilability of Schmitt's conception of the "total state" and notions of separation of powers, see *infra* text accompanying notes 51-52. See also GOPAL BALAKRISHNAN, *THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT* 150-52 (2000).

50. Carl Schmitt, *Une étude de droit constitutionnel comparé: L'évolution récente du problème des délégations législatives* (Paul Roubier & H. Mankiewicz trans.), in 2 *INTRODUCTION À L'ÉTUDE DU DROIT COMPARÉ: RECUEIL D'ÉTUDES EN L'HONNEUR D'ÉDOUARD LAMBERT* 200 (1938) [hereinafter Schmitt, *L'évolution récente du problème des délégations législatives*]. The article appeared originally in German as Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)*, in 6 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 252 (1936).

51. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 200 (internal quotation marks omitted). This statement applied equally well to the Italian case. Charles Maier has described what he calls the "corrupting *trasformismo*" of constitutional government as pursued by the Fascists in late 1922:

Socialists excepted, the Chamber remained generally compliant before Mussolini and quickly endorsed a grant of "full powers" for a year, supposedly on the informal assurance that the executive grant would be used only for trimming the bureaucracy or rationalizing tax laws. Only a few speakers complained; as one Socialist deputy pointed out, however, the system of bypassing parliament with decree legislation had been accepted since the war.

MAIER, *supra* note 34, at 344; see also Merlino, *supra* note 39, at 30 (describing the grant of "full powers" to the Salandra government in May 1915 as part of a "radical upheaval" in the "constitutional substance of the Italian form of government" which would "repeat [itself] seven years later, with the advent of fascism").

“simplification”; however, only Germany had, in his view, taken this process to its logical conclusion by completely eliminating any semblance of “separation of powers,” opting instead for a system of “governmental legislation.”<sup>52</sup>

Schmitt seemed well aware of his dependence on euphemism to soften the image of the National Socialist dictatorship in Germany. He believed that “the pejorative word dictatorship” should be avoided in the description of the German system after 1933.<sup>53</sup> Rather, that system simply vindicated the thinking of Aristotle and Thomas Aquinas about the proper locus of legislative power, demonstrating the superiority of these Aristotelean and Thomist notions “over the concepts of legislation and of constitution peculiar to separation-of-powers regimes.”<sup>54</sup> Schmitt thus suggested that this return to reputedly traditional European forms of governance was inevitable among industrialized nations.<sup>55</sup> Schmitt reasoned that there was simply “an insurmountable opposition between the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades,” which demanded not the legislature’s deliberation over general norms, but the executive’s decisive action in concrete cases.<sup>56</sup> It was this need for decisive, concrete action that had, in Schmitt’s view, required the increasingly broad delegation of legislative and adjudicative power to the executive and administrative spheres in the years since the end of World War I.

Schmitt had made his career in the 1920s criticizing the parliamentary system for its purported endless discussion and indecisiveness.<sup>57</sup> As Schmitt

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52. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 205. Of course, after 1940, France joined Germany and Italy in this camp. See DRAGOS RUSU, *LES DÉCRETS-LOIS DANS LE RÉGIME CONSTITUTIONNEL DE 1875*, at 178 (1942) (citing Schmitt with approval).

53. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 201.

54. *Id.* at 210. For a critique of this aspect of Schmitt’s reasoning, see BALAKRISHNAN, *supra* note 49, at 199-200.

55. Lindseth, *supra* note 3, at 145 (“Schmitt’s evident purpose was to justify the Nazi regime as both a more genuine expression of purportedly traditional European precepts of governance, as well as a harbinger of things to come throughout the industrialized world.”).

56. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 204. Schmitt’s assertions in 1936 regarding the inevitable decline of parliamentary democracy extended the argument he had articulated a decade before, in *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*: “Even if Bolshevism is suppressed and Fascism held at bay, the crisis of contemporary parliamentarism would not be overcome in the least,” Schmitt wrote, because that crisis “has not appeared as a result of the appearance of those two opponents; it was there before them and will persist after them.” CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 17 (Ellen Kennedy trans., MIT Press 1985) (2d ed. 1926).

57. See GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936* (2d ed. 1989); see also BALAKRISHNAN, *supra* note 49, at 68 (“[I]n Schmitt’s view, the idea that the ideal of government by discussion as the centre of an educated public sphere could be obliterated without affecting the historical viability of parliamentary government was absurd. . . . According to Schmitt, it was precisely this belief in institutionalized discursive rationality which was evaporating in

accurately noted, through the 1920s and into the 1930s, Britain, France, and Germany experimented with ever broader concentrations of legislative and adjudicative authority in the executive branch as a means of overcoming parliamentary blockages that made credible policymaking difficult if not impossible. In France and Germany especially, the emergency legislation adopted during World War I served as a kind of constitutional model, and following this model, each successive enabling act (*Ermächtigungsgesetz*, *loi d'habilitation*) would transfer to the executive, in some degree or another, the necessary powers to address the perceived crisis of the moment (inflation, currency stabilization, economic depression). In Germany, moreover, recourse to the “emergency” powers of the Reich President under Article 48 of the Weimar Constitution reinforced this process. Although this provision was originally understood as conferring authority on the President only to address civil strife,<sup>58</sup> it evolved into an excuse for the executive to exercise wide-ranging legislative powers. By the early 1930s, Article 48 in fact became the purported constitutional foundation for extraparliamentary and eventually unadulterated antiparliamentary government.<sup>59</sup>

The Weimar Constitution, with its seemingly contradictory parliamentary and presidential characteristics, was in many ways simply an extreme example of the constitutional confusion that gripped much of Europe in the interwar period. The increasing political demands for state intervention into economic and social affairs seriously disrupted received understandings of “normal” parliamentary democracy, leaving Europe groping for the “new form of governance” to which Alan Milward alluded.<sup>60</sup> All the major European states attempted to respond in a similar fashion, concentrating broad authority in the executive while also struggling to justify these shifts in the locus of effective legislative power to outside the parliamentary realm. In Germany in 1933 and later in France in 1940, however, these efforts would end in tragic failure (in some sense following Italy’s lead from the early 1920s), with delegation providing the legal mechanism, if not the political and cultural cause, for the collapse of the parliamentary system into dictatorship.

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contemporary Europe.” (citing CARL SCHMITT, *DIE GEISTESGESCHICHTLICHE LAGE DES HEUTIGEN PARLAMENTARISMUS* 7 (2d ed. 1926)).

58. The provision was viewed “merely as a carryover” of a similar one contained in the 1871 Imperial Constitution and the 1850 Prussian Constitution. PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* 67 (1997) (citing WILLIBALT APELT, *GESCHICHTE DER WEIMARER VERFASSUNG* 99-101 (1946); and HARLOW JAMES HENEMAN, *THE GROWTH OF EXECUTIVE POWER IN GERMANY: A STUDY OF THE GERMAN PRESIDENCY* 46-49 (1934)).

59. Schmitt’s role in providing the conceptual foundation for antiparliamentary presidential government in Germany in the early 1930s was decisive. See *infra* note 66 and accompanying text.

60. See *supra* text accompanying notes 36-38.

A. *Germany: "For the Relief of the Distress of the People and the Reich"*

The Weimar Republic is an appropriate place to begin our discussion, as it was here that efforts to accommodate executive power with traditional principles of parliamentary democracy arguably proved to be the most difficult while also having the most disastrous outcome. The aftermath of World War I was hardly an auspicious historical moment for Germans to attempt to create a working democracy on a national scale where only traces had previously existed. The challenge for Germany was, in fact, even greater given that the drafters of the Weimar Constitution sought to establish a novel constitutional system based on hybrid, and potentially contradictory, parliamentary and presidential elements. Moreover, the political turmoil that flowed from the highly volatile economic and social conditions in the decade and a half following the end of World War I deeply aggravated the already precarious constitutional situation. In the waning years of the Weimar Republic, this social and economic instability, along with constitutional flaws in the regime itself, would feed off each other, creating a negative political dynamic that the Nazis exploited to their full advantage, ultimately enabling them to pursue their infamous strategy of taking power through purportedly "legal" means.

According to the traditional historiography of the dissolution of the Weimar Republic, the central contradiction in the Weimar Constitution involved the relationship between the Reichstag and the popularly elected Reich President as competing pillars of democratic legitimation for the new regime. Deeply fearful of French "parliamentary absolutism,"<sup>61</sup> Hugo Preuss and his fellow drafters of the Weimar Constitution opted for a dual system in which a popularly elected president would act as a counterweight to the parliament.<sup>62</sup> Thus, under Article 54 of the Weimar Constitution, the Chancellor and the government required majority support in the Reichstag, a feature typical of traditional parliamentarism; however, under Article 53, the Reich President was empowered to appoint and dismiss the Chancellor and his cabinet at his will. In this way, the constitution made the government answerable both to the Reichstag and to the Reich President.

The Weimar Constitution, however, appeared to give the Reich President several strategic advantages in any contest between presidential and parliamentary power. First, Article 25 gave the President the power to

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61. *See supra* note 17 and accompanying text.

62. As to the constitutional role of the Reich President, Preuss was in part influenced by Max Weber's advocacy of a strong president independent of parliament, but only to a certain degree. The Preuss draft rejected Weber's position that the president should enjoy a power of command over the army (*Kommandogewalt*). *See* CALDWELL, *supra* note 58, at 67. Mommsen concurs that Weber's conception of plebiscitary democracy headed by a strong and independent president "went far beyond Hugo Preuss." MOMMSEN, *supra* note 17, at 354.

dissolve the Reichstag and call new elections, suggesting a superior democratic legitimacy in the President over that of the parliamentary majority.<sup>63</sup> Second, and perhaps more famously, Article 48 gave the President an initially overlooked<sup>64</sup> but extremely important set of emergency powers that could be invoked in situations “[w]here public security and order [were] seriously disturbed or endangered.” In these situations (all too common under the Weimar Republic as it turned out), the first paragraph of Article 48 gave the President a “reserve” legislative power that included explicit authorization to suspend certain constitutionally guaranteed individual liberties—the protection of property rights, as well as the guarantees of freedom of speech, assembly, and association. By negative implication, however, Article 48 also seemed to obligate the President to observe all remaining constitutional requirements. Additionally, the third paragraph of Article 48 further obligated the President to submit emergency decrees to the Reichstag for post hoc review and possible annulment. In this sense, on its face, Article 48 appeared to preserve an important element of parliamentary legitimation during periods of presidential emergencies, albeit after the fact.

The contradictions inherent in this hybrid parliamentary-presidential structure would manifest themselves in the final years of the Weimar Republic. After the collapse of the Great Coalition in 1930, the formation of “positive” majorities sufficient to support the establishment of traditional parliamentary cabinets became impossible. In this situation, governments formed under presidential auspices moved into the governing breach, ruling on the basis of the President’s Article 48 decree powers while also using the weapon of dissolution as means of punishing recalcitrant “negative” majorities in the parliament (that is, majorities united only in their opposition to the existing government but otherwise incapable of forming a government in the “positive” sense). These dissolutions would in fact prove disastrous for German democracy, ultimately providing the electoral opening for the Nazis to establish themselves as the predominant party in the Reichstag between 1930 and 1933, even as they used street-level violence to aggravate the political crisis still further.

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63. Article 43 authorized the removal of the president on the motion of the Reichstag but required that the resolution be carried by a two-thirds majority, a much more cumbersome procedure when compared to the unfettered discretion of the Reich President to dissolve the Reichstag under Article 25. For a comparative analysis of Articles 25 and 43, along with citations to contemporaneous legal commentary, see Christoph Gusy, *La conception de la démocratie dans la constitution de Weimar*, in WEIMAR, OU DE LA DÉMOCRATIE EN ALLEMAGNE 11, 38 (Gilbert Krebs & Gérard Schneilin eds., 1994).

64. During the debates over the constitution, the National Assembly apparently paid little attention to presidential powers under Article 48, viewing them “merely as a carryover from the 1871 Imperial Constitution and the 1850 Prussian Constitution.” CALDWELL, *supra* note 58, at 67 (citing APELT, *supra* note 58, at 99-101; and HENEMAN, *supra* note 58, at 46-49).

It is important to stress that, under the chancellorship of Heinrich Brüning from 1930 to 1932, presidential government in Germany could at least claim to possess a “semiparliamentary” character that would persist until Franz von Papen’s installation as Chancellor in 1932. By scrupulously submitting presidential decrees to the Reichstag for post hoc control as required by Article 48, the Brüning government enjoyed the “toleration,” indeed even the tacit support, of a negative parliamentary majority including the Social Democrats, which repeatedly refused to annul Brüning’s submitted decrees.<sup>65</sup> With Brüning’s fall in 1932, however, presidential government in Germany took a decidedly antiparliamentary turn. The ensuing Papen government, and more briefly that formed under Kurt von Schleicher, ruled without pretense of parliamentary support, positive or negative, post hoc or otherwise. The claimed constitutional foundation for this antiparliamentary and authoritarian rule was Carl Schmitt’s controversial theory of the president’s inherent dictatorial powers as the “protector of the constitution” under Article 48, free from the need for parliamentary support of any kind.<sup>66</sup>

The early post-1945 historiography of the disintegration of the Weimar Republic—led by Karl Dietrich Bracher’s seminal work, *Die Auflösung der Weimarer Republik*,<sup>67</sup> published in 1955—views Hindenburg’s appointment of Hitler as Chancellor in January 1933 as simply the culmination of this transformation of the Weimar regime into presidential dictatorship under Article 48. As Bracher has written, “Hitler gained ‘legitimate’ control of the Government not as the head of a parliamentary coalition, as a misleading apologia still suggests, but through this authoritarian loophole in the Weimar Constitution.”<sup>68</sup> What I would like to suggest here, however, is that this dominant historiographical interpretation of the constitutional

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65. See WILLIAM L. PATCH, JR., HEINRICH BRÜNING AND THE DISSOLUTION OF THE WEIMAR REPUBLIC 72-117 (1998).

66. See generally CARL SCHMITT, DER HÜTER DER VERFASSUNG 117-31 (1931) (arguing that Article 48 implied an unlimited authority in the president to suspend the constitution during a state of emergency, as long as he restored the constitution when the emergency ended). For a succinct summary of the political influence that Schmitt’s theory attained in conservative and nationalist circles in the late 1920s and early 1930s, see BALAKRISHNAN, *supra* note 49, at 143-48. See also JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983); PATCH, *supra* note 65, at 52.

67. KARL DIETRICH BRACHER, DIE AUFLÖSUNG DER WEIMARER REPUBLIK: EINE STUDIE ZUM PROBLEM DES MACHTVERFALLS IN DER DEMOKRATIE (1955) [hereinafter BRACHER, DIE AUFLÖSUNG DER WEIMARER REPUBLIK]; see also KARL DIETRICH BRACHER, THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF NATIONAL SOCIALISM (Jean Steinberg trans., Praeger Publishers 1970) (1969) [hereinafter BRACHER, THE GERMAN DICTATORSHIP].

68. BRACHER, THE GERMAN DICTATORSHIP, *supra* note 67, at 194; see also *id.* at 197 (“Wasn’t it a good thing—so state the files of many a high official of that time—that the irresistible revolution was carried out in so legal a fashion? It was therefore only logical to do everything in one’s power to assure this legal revolution every technical and administrative success.”).

disintegration of the Weimar Republic, in its broad emphasis on Article 48 and the devolution of the regime into presidential dictatorship in 1932 under Papen and Schleicher, arguably fails to recognize the full constitutional-historical import of the second essential element of the Nazis' successful legality strategy: the *Ermächtigungsgesetz*, or Enabling Act, of March 24, 1933.<sup>69</sup>

Although historians have recognized the critical importance of the Enabling Act in "legalizing" the Nazi exercise of full dictatorial powers (thus obviating the need for further recourse to Article 48), they have generally not examined the Act itself as a manifestation of a profound flaw in Weimar constitutional practice on par with the potential for presidential dictatorship under Article 48. Bracher, for example, recognizes that the Enabling Act was of "enormous importance" because it reassured the civil service and the courts of the "apparently unexceptional legal foundations" for the Nazi regime.<sup>70</sup> But one might fairly ask: How was it that administrative officials and the courts could regard the Reichstag's complete abdication of its constitutional functions in 1933 as "apparently unexceptional" legally? Bracher's choice of words suggests that there was a deeper flaw in Weimar constitutional practice that went beyond the potential for presidential dictatorship under Article 48.

Bracher's own *Die Auflösung der Weimarer Republik* provides a clue as to what that flaw was, even if this particular insight is overshadowed by his broader emphasis on Article 48 as the "authoritarian loophole" that ultimately destroyed German democracy. According to Bracher, the first instances of "the dismantling of parliamentary power" did not take place in "the end phase of the Weimar Republic."<sup>71</sup> Rather, "the Reichstag had never been able to occupy its position as the de facto legislative power," however much it was expected to do so "as the crystallization point of democracy" under the constitution.<sup>72</sup> Bracher alludes to a series of enabling acts of the early 1920s, suggesting that these pieces of legislation demonstrate how the parliament of the Weimar Republic saw its legislative powers dissipated "bit by bit," long before Hitler exploited the well-established mechanism of the enabling act to legalize his dictatorship.<sup>73</sup>

In order to understand the constitutional flaws in the Weimar regime that paved the way for the Nazi seizure of power, we should follow Bracher's suggested lead, which requires that we look beyond Article 48, beyond the hybrid and potentially contradictory parliamentary-presidential elements in the system, to an additional examination of the unfettered right

69. Gesetz zur Behebung der Not von Volk und Reich, v. 24.3.1933 (RGBl. I S.141).

70. BRACHER, THE GERMAN DICTATORSHIP, *supra* note 67, at 197.

71. BRACHER, DIE AUFLÖSUNG DER WEIMARER REPUBLIK, *supra* note 67, at 47.

72. *Id.*

73. *Id.*



of the Reichstag to delegate legislative power to the executive. This practice, as Bracher implies and as we shall see below, was an essential element of Weimar constitutionalism. The success of the Nazis' legality strategy depended not simply on the constitution's potentially authoritarian-dictatorial elements under Article 48, but also on the absence of effective constitutional controls over the parliament's abdication of its legislative role.<sup>74</sup> As a legal and constitutional matter at least, the enabling act was viewed as "apparently unexceptional" precisely because so many contemporaneous observers accepted, without examination or even reflection, the constitutional authority of the Reichstag to cede its most basic democratic function—the making of legislative norms—to the executive.<sup>75</sup>

This absence of critical reflection was an outgrowth of well-settled German constitutional precepts that predated the Weimar Republic. The prevailing theory of legislation in late-nineteenth-century Germany was highly formalistic, holding that only those normative acts in the form of a statute (*Gesetz*) were "legislation," whereas regulatory ordinances (*Verordnungen*) that gave substantive content to that legislation were not. Thus, although regulatory ordinances of the government established prospective rules of general application in the same manner as legislation classically conceived, they did not in fact involve a delegation of "legislative" power.<sup>76</sup> The essence of that latter power (which was constitutionally unlimited) was in providing *legal force* to normative rules, something that the executive could not autonomously provide without authorization of the legislature.

This formalist distinction between statute and regulation reflected an important element of the legal positivism that came to dominate German thinking in the nineteenth century, at the core of which was the belief in the supremacy of statutory law as the ultimate expression of the state's will. The formal emphasis on the necessity of an original legislative authorization, however, did not translate into a severe constraint on executive power, particularly after the founding of the imperial regime in

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74. For examples of historians who have undertaken this examination in a systematic fashion, see FRIEDRICH KARL FROMME, *VON DER WEIMARER VERFASSUNG ZUM BONNER GRUNDGESETZ: DIE VERFASSUNGSPOLITISCHEN FOLGERUNGEN DES PARLAMENTARISCHEN RATES AUS WEIMARER REPUBLIK UND NATIONALSOZIALISTISCHER DIKTATUR* 130-37 (2d ed. 1962); and WILHELM MÖBLE, *INHALT, ZWECK UND AUSMASS: ZUR VERFASSUNGSGESCHICHTE DER VERORDNUNGSMÄCHTIGUNG 19-27* (1990). The following discussion draws significantly from Wilhelm Möble's account.

75. There were certain isolated exceptions to the uncritical acceptance of unfettered delegation in the early years of the Weimar Republic, notably by Heinrich Triepel and Fritz Poetzsch. See *infra* notes 90-91 and accompanying text.

76. See 2 PAUL LABAND, *DAS STAATSRECHT DES DEUTSCHEN REICHES* 96 (5th ed. 1911). For a discussion of the formal distinction between legislation and regulation, see Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 206.

1871. Rather, on the critically important question of the *extent* of permissible delegations, both political practice and legal theory favored open-ended transfers of authority. Because the power of the legislature was in principle unlimited (in this respect, even in the German nineteenth-century tradition, parliament was supreme), the legislature was *entirely free* to define the substantive content of legislative rules directly in the statute itself or to authorize the executive to do so by way of regulatory ordinance.<sup>77</sup> As a practical matter, therefore, there was in fact no substantive “reserve” of normative authority—a *Vorbehalt des Gesetzes*—that parliament could not delegate. The result was an extraordinary degree of autonomous regulatory power in the executive, in keeping with the views of the conservative interests that dominated the imperial regime (and, therefore, the Reichstag) that the Crown and its bureaucracy possessed an inherent mandate to implement the social and economic policy of the nation, generally free from parliamentary interference.<sup>78</sup>

The postwar enabling acts in Weimar Germany came in several waves. The first arrived in the immediate aftermath of the war, in the face of the challenges of demobilization, the transformation to a peacetime economy, and civil strife approaching civil war.<sup>79</sup> The second came in 1923-1924 with

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77. See 2 LABAND, *supra* note 76, at 96; Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 206.

78. In Paul Laband's conception, parliamentary institutions served as “mere formal limitations to an elementary state power that remained firmly in the hands of unelected bureaucrats.” Christoph Schoenberger, *Hugo Preuss: Introduction*, in WEIMAR: A JURISPRUDENCE OF CRISIS 110, 112 (Arthur Jacobson & Bernhard Schlink eds. & Belinda Cooper trans., 2000) (citing CHRISTOPH SCHÖNBERGER, *DAS PARLAMENT IM ANSTALTSSTAAT: ZUR THEORIE PARLAMENTARISCHER REPRÄSENTATION IN DER STAATSRICHTSLEHRE DES KAISERREICHS (1871-1918)*, at 165 (1997)).

79. The most important statute adopted in this period was the “Act on a Simplified Form of Legislation for the Purposes of the Transitional Economy,” which was intended to govern the shift from a wartime to a peacetime economy. Gesetz über eine vereinfachte Form der Gesetzgebung für die Zwecke der Übergangswirtschaft, v. 17.4.1919 (RGBl. S.394). The statute constituted “the republican counterpart to the enabling act of 1914.” MÖBLE, *supra* note 74, at 19. Section 1 empowered the Reich government, in consultation with a twenty-eight-member committee of the National Assembly, “to adopt all legislative measures that are established as urgent and necessary to regulate the transition from the war economy to the peace economy.” § 1 Gesetz über eine vereinfachte Form der Gesetzgebung für die Zwecke der Übergangswirtschaft. All effective legislative power was thus transferred to the government; indeed, acting pursuant to authority conferred by this Act (twice renewed by the Reichstag after the adoption of the Weimar Constitution), the Reich government laid the foundation for much of the modern German welfare state, adopting ninety-two pieces of major legislation by way of *Verordnungen*. A comprehensive list can be found in Fritz Poetzsch, *Vom Staatsleben unter der Weimarer Verfassung (vom 1. Januar 1920 bis 31. Dezember 1924)*, 13 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 1, 207-11 (1925). See also 5 ERNST RUDOLF HUBER, *DEUTSCHE VERFASSUNGSGESCHICHTE: WELTKRIEG, REVOLUTION UND REICHSERNEUERUNG, 1914-1919*, at 1089 (1978); MÖBLE, *supra* note 74, at 20.

In February 1919, the Weimar National Assembly also adopted an “Act on the Provisional Reich Authority” to serve as a kind of interim constitution to govern German political life until the later adoption of a definitive constitution. See Gesetz über die vorläufige Reichsgewalt, v.

the Ruhr Crisis and hyperinflation.<sup>80</sup> On a number of levels, the enabling acts in this second wave are especially instructive for our purposes. The *Ermächtigungsgesetz* of October 13, 1923, for example, transferred emergency legislative power to a Great Coalition government under Gustav Stresemann. On its face, the Act was designed to free the government from the need to gain a parliamentary majority for each particular aspect of stabilization policy, and yet it also expressly provided that its powers would lapse if the government fell or the composition of the governing coalition shifted.<sup>81</sup> (Stresemann's government did indeed collapse in November 1923 with the defection of the Socialists.)<sup>82</sup> The enabling act of October 1923 was thus caught in a warp between, on the one hand, a conception of executive power wholly dependent on a legislative majority and, on the other, the emergent forms of executive autonomy in the modern administrative state.

Just as the collapse of the Great Coalition in November 1923 reflected the persistence of traditional parliamentarism over executive power, the stabilization program of the ensuing Marx government reflected the triumph of unlimited parliamentary sovereignty over nascent understandings of constitutional rights. The most notorious of the measures adopted during this period was the Marx government's "Third Emergency Tax Ordinance" of February 14, 1924, which included a ban on an upward revaluation of debts rendered nearly worthless by the hyperinflation of the

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10.2.1919 (RGBl. S.169). Apart from conferring on the National Assembly the power to draft the new constitution, this statute also gave it the authority to adopt "other urgent Reich legislation." *Id.* § 1. One of the first pieces of such legislation that the National Assembly adopted (on March 6, 1919) was the "Act on the Implementation of the Conditions of the Armistice," which empowered the Reich government to promulgate any economic and financial measures that would be needed to fulfill the armistice agreement. Gesetz zur Durchführung der Waffenstillstandsbedingungen, v. 6.3.1919 (RGBl. S.286).

80. § 1 Ermächtigungsgesetz, v. 8.12.1923 (RGBl. I S.1179) (authorizing the Marx government to take those measures it viewed as "necessary and urgent in view of the distress of the people and of the Reich"); Ermächtigungsgesetz, v. 13.10.1923 (RGBl. I S.943) (authorizing the Stresemann government to adopt legislative ordinances in derogation of rights guaranteed under the Weimar Constitution, such as Article 109's right to equality before the law and Article 153's right to property and due compensation after public expropriation); Notgesetz, v. 24.2.1923 (RGBl. I S.147) (empowering the Cuno government to take any measure it deemed necessary for the protection of German interests in the Ruhr, including measures relating to German finances and the currency).

81. § 2 Ermächtigungsgesetz, v. 13.10.1923.

82. However, the fall of the government did not occur until after thirty-six major pieces of legislation had been adopted under this statute. For a list, see Poetzsch, *supra* note 79, at 213-14. The list included the introduction of a new currency based on the gold standard (the *Rentenmark*), as well as a new bank to issue it. Verordnung über die Errichtung der Deutschen Rentenbank, v. 15.10.1923 (RGBl. I S.963). For a review of the stabilization program, as well as an evaluation of its longer-term political consequences, see Thomas Childers, *Inflation, Stabilization, and Political Realignment in Germany 1924 to 1928*, in *THE GERMAN INFLATION RECONSIDERED: A PRELIMINARY BALANCE* 409 (Gerald D. Feldman et al. eds., 1982). For a similar summary of the consequences, see GERALD D. FELDMAN, *THE GREAT DISORDER: POLITICS, ECONOMICS, AND SOCIETY IN THE GERMAN INFLATION, 1914-1924*, at 856-58 (1993).

prior year.<sup>83</sup> This ban attempted to counter the political and legal pressure that had been mounting for a fair revaluation of debts to protect the interests of small creditors and pensioners.<sup>84</sup> The Marx government proposed to revalue debts at no more than fifteen percent of their original value, an offer that directly contradicted a decision of the Reichsgericht (the Weimar Supreme Court) that holders of debt securities, rather than accept repayment in devalued marks, could sue for full revaluation in order to vindicate their constitutional property rights.<sup>85</sup> The government simply ignored this ruling, and, consistent with otherwise broadly accepted notions of plenary parliamentary competence, the court had no power to strike down an ordinance legally adopted pursuant to a statute of the Reichstag (indeed one enacted by a two-thirds majority sufficient to amend the constitution itself).

Because German legal commentators at the time broadly believed (as in the French case) that the constitution conferred on the Reichstag “an unlimited competence, a *plenitudo potestatis* for constitutional change,”<sup>86</sup> the enabling act and its subordinate ordinances issued by the government were viewed as the unassailable expression of the state’s will, beyond the legal control of any court.<sup>87</sup> This sentiment was widely shared by Weimar legal commentators of both the left and the right,<sup>88</sup> although the stabilization crisis forced some to reconsider whether the rights listed at the end of the Weimar Constitution had a positive legal force limiting the scope of parliamentary power. It was under the Weimar Republic that there emerged in German scholarly and judicial discourse a recognizably modern conception of constitutional rights as limits on state power, both legislative and executive, as well as an embryonic conception of judicial review to enforce those limitations.<sup>89</sup>

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83. § 1 Dritte Steuernotverordnung, v. 14.2.1924 (RGBl. I S.74).

84. The collapse of the currency over the course of 1923 had severely damaged the interests of pensioners, small investors, and creditors, who “helplessly watched their savings, retirement funds, government bonds, and other liquid assets evaporate [while] having seen debts repaid [to them] in worthless paper currency.” Childers, *supra* note 82, at 417.

85. Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 107, 357.

86. Richard Thoma, *Grundbegriffe und Grundsätze*, in 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 108, 154 (Gerhard Anschütz & Richard Thoma eds., 1932), translated in SCHWAB, *supra* note 57, at 70.

87. Gerhard Anschütz, a leading public law theorist under the Weimar Republic, aptly summarized the prevailing conception of parliamentary sovereignty in these circumstances when he stated, “The constitution does not stand above the legislature, but rather at its disposition.” GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11. AUGUST 1919, at 401 (4th ed. 1933), translated in CALDWELL, *supra* note 58, at 69.

88. For a summary, see DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 525-26 n.17 (2d ed. 1997). Kommers provides an extended list of citations to the commentary of Gerhard Anschütz, Walter Jellinek, Richard Thoma, Julius Hatschek, Friedreich Giese, Gustav Radbruch, Franz W. Jerusalem, and Carl Schmitt.

89. For a detailed list of works by commentators favorable to judicial review, including articles by Hans Fritz Abraham, Hans Nawiasky, Fritz Poetzsch, Eduard Hubrich, Rudolf

It was also under the Weimar Republic that a small group of constitutional theorists, most notably Heinrich Triepel and Fritz Poetzsch, began to argue that legislative ordinances issued by the government under an enabling act—*Rechtsverordnungen*—were not only subject to the political control of the Reichstag but also the judicial control of the courts. Both Triepel and Poetzsch recognized that one of the main challenges of modern governance was to define a workable distinction between legislative and executive power. These two theorists were therefore critical of both the extraordinary scope and the substantive indeterminacy of the delegations under the Weimar enabling acts.<sup>90</sup> If the constitution assigned legislative competence to the people's elected representatives, they reasoned, the Reichstag could not transfer that authority to another organ without calling into question both the constitution itself and its distribution of powers.<sup>91</sup>

These critical views of the Weimar practice of wholesale delegation were not widely shared, however. Rather, delegation was viewed as a cornerstone of republican governance in a modern administrative state. And yet, even with such delegations, the Weimar Republic was unable to achieve sufficient political stability to develop credible long-term solutions to the myriad problems confronting it. It is perhaps unsurprising, then, that the emergency powers of the Reich President under Article 48 of the Weimar Constitution assumed an increasingly important role in the production of legislative norms over the course of the 1920s, at critical junctures being used as a mechanism to overcome blockages in the

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Stammler, and Heinrich Triepel, see *id.* Of particular interest, given their positions on the delegation of legislative power, are FRITZ POETZSCH-HEFFTER, *HANDKOMMENTAR DER REICHsverFASSUNG* 310-11 (3d ed. 1928); and Heinrich Triepel, *Der Weg der Gesetzgebung nach der neuen Reichsverfassung*, 39 *ARCHIV DES ÖFFENTLICHEN RECHTS* 436, 534-35 (1920). See also RGZ 111, 320 (322) (holding in 1925 that because Article 102 of the Weimar Constitution declared that “judges are independent and subject only to law” they were not barred “from declaring a federal statute or particular provisions of such a statute void insofar as they are in conflict with other provisions of a higher rank”); Carl Joachim Friedrich, *The Issue of Judicial Review in Germany*, 43 *POL. SCI. Q.* 188 (1928); J.J. Lenoir, *Judicial Review in Germany Under the Weimar Constitution*, 14 *TUL. L. REV.* 361 (1940). For a recent historical analysis of the origins of constitutional review under Weimar, see Gertrude Lübke-Wolff, *Safeguards of Civil and Constitutional Rights—The Debate on the Role of the Reichsgericht*, in *GERMAN AND AMERICAN CONSTITUTIONAL THOUGHT: CONTEXTS, INTERACTION, AND HISTORICAL REALITIES* 353 (Hermann Wellenreuther ed., 1990).

90. See, e.g., Fritz Poetzsch, *Verfassungsmässigkeit der vereinfachten Gesetzgebung*, 40 *ARCHIV DES ÖFFENTLICHEN RECHTS* 156 (1921).

91. In the reports of Triepel and Poetzsch at the convention of German jurists (*Deutscher Juristentag*) in 1922, the central question on the agenda was whether it would “be advisable to include new rules in the Reich constitution on the boundaries between legislation [*Gesetz*] and regulatory ordinances issued by the government [*Rechtsverordnung*].” *VERHANDLUNGEN DES 32. DEUTSCHEN JURISTENTAGES*, at iii (1922); see also *id.* at 11-35 (report of Triepel); *id.* at 35-52 (report of Poetzsch). For a discussion of the contributions of Triepel and Poetzsch to the proceedings, see *MÖBLE*, *supra* note 74, at 25.

Reichstag concerning central issues of economic policy.<sup>92</sup> With the breakdown of parliamentary government in the early 1930s, Article 48 would become the principal means by which legislative norms were produced.

The historiography of the dissolution of the Weimar Republic correctly distinguishes, however, between Brüning's extraparliamentary governance under Article 48 in 1930-1932 and the more explicitly antiparliamentary, authoritarian approaches of Papen and Schleicher (under Schmitt's influence) in 1932 and 1933.<sup>93</sup> Brüning's claim "in later years that his resort to government by decree did not suspend parliamentary control but merely changed its form"<sup>94</sup> is less far-fetched than one might think. Brüning's use of parliamentary control primarily as a post hoc annulment procedure was not unlike approaches being tested elsewhere,<sup>95</sup> and perhaps more importantly, was not unlike forms of parliamentary control that would develop after 1945.<sup>96</sup> One might reproach Brüning's government for its deviation from the practices of "normal" parliamentarism,<sup>97</sup> but such a critique ignores how "normal" parliamentarism was under severe strain throughout Europe, to the point that it was difficult to discern precisely what "normal" parliamentarism was under the circumstances. The fairer judgment is that of Martin Broszat, that "the new constitutional reality [of the early 1930s] also contained opportunities for a stabilisation of republican state power . . . especially in the first year of the Brüning Cabinet."<sup>98</sup>

Germany's slippage into a kind of presidential dictatorship under Article 48 after Brüning's fall in 1932 undoubtedly helped to pave the way for the Nazi seizure of power in 1933. Hitler, too, was able to use Article 48 decree powers to his advantage, particularly after the Reichstag fire and the suspension of individual liberties (precisely as Article 48 authorized), which enabled him to eliminate opponents and outmaneuver coalition

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92. See, e.g., *Steuernotverordnung des Reichspräsidenten*, v. 7.12.1923 (RGBl. I S.1177); see also Ulrich Scheuner, *Die Anwendung des Art. 48 der Weimarer Reichsverfassung unter den Präsidenschaften von Ebert und Hindenburg*, in *STAAT, WIRTSCHAFT UND POLITIK IN DER WEIMARER REPUBLIK: FESTSCHRIFT FÜR HEINRICH BRÜNING* 249, 257-66 (Ferdinand A. Hermens & Theodor Schieder eds., 1967). A list of presidential acts by emergency decree in the early Weimar period can be found in Poetzsch, *supra* note 79, at 141-47.

93. See BRACHER, *THE GERMAN DICTATORSHIP*, *supra* note 67, at 174. See generally BRACHER, *DIE AUFLÖSUNG DER WEIMARER REPUBLIK*, *supra* note 67.

94. PATCH, *supra* note 65, at 115.

95. In France, for example, article 1 of Law of Aug. 3, 1926, J.O., LOIS ET DÉCRETS, Aug. 4, 1926, p. 8786; B.L.D. 1926, 449, conferred decree powers on the government through the end of the year to undertake administrative reforms to shore up state finances, subject to the submission of the decrees to the parliament within three months of their promulgation.

96. See *infra* note 206 and accompanying text; see also *supra* note 24 and accompanying text.

97. See, e.g., Christoph Gusy, *La dissolution de la constitution de Weimar*, in *WEIMAR, OU DE LA DÉMOCRATIE EN ALLEMAGNE*, *supra* note 63, at 274.

98. MARTIN BROSZAT, *HITLER AND THE COLLAPSE OF WEIMAR GERMANY* 93 (V.R. Berghahn trans., Berg 1987) (1984).

partners in the March elections. But it is still important to recall that, in March 1933, the decisive legal foundation for Hitler's dictatorship was not a presidential decree but an enabling act adopted by a Reichstag in which the Nazis still did not hold a majority. The name given to the March 24, 1933, statute—the “Act for the Relief of the Distress of the People and the Reich”<sup>99</sup>—intentionally used language from section 1 of the enabling law of December 8, 1923, authorizing the Marx government “to take those measures it regards as necessary and urgent in view of the distress of the people and of the Reich.”<sup>100</sup> Moreover, the March 1933 Act used essentially the same mechanism as its counterpart from October 13, 1923, authorizing the government to violate constitutionally guaranteed rights but “checking” that authority politically, rather than judicially. The March 1933 Act provided that the powers it delegated would terminate “if the present Reich government is replaced by another”—but in any event no later than April 1, 1937, when the powers under the enabling act were supposed to definitively lapse.<sup>101</sup> The Nazis then had the Reichstag adopt extensions of the enabling act in 1937 and 1939, in what appears now as a farcical effort to give Hitler's dictatorship the appearance of ongoing constitutional legality.<sup>102</sup>

One may argue, correctly I think, that what distinguished the March 1933 enabling act from its Weimar counterparts was its purpose, which was to unify all executive and legislative power *permanently* in the hands of the Chancellor-Führer, Adolf Hitler. It is undoubtedly true that there was no intention to return to anything approaching parliamentarism, despite the language contemplating the replacement of the Reich government. Nazi cynicism, however, does not entirely absolve Weimar constitutional practice, or its prevailing conception of permissible legislative delegation, of an important measure of complicity (albeit inadvertent) in setting the stage for the National Socialist dictatorship.<sup>103</sup> The Nazis' ability to exploit the legal form of delegation established since the early 1920s was simply evidence that there existed no adequate legal or constitutional controls over the substance and process of delegation in the Weimar Constitution.

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99. Gesetz zur Behebung der Not von Volk und Reich, v. 24.3.1933 (RGBl. I S.141). For a chronological collection of texts documenting the enactment of this statute, see DAS “ERMÄCHTIGUNGSGESETZ” VOM 24. MÄRZ 1933 (Rudolf Morsey ed., 1968).

100. § 1 Ermächtigungsgesetz, v. 8.12.1923 (RGBl. I S.1179).

101. Art. 5 Gesetz zur Behebung der Not von Volk und Reich.

102. See Gesetz zur Verlängerung des Gesetzes zur Behebung der Not von Volk und Reich, v. 30.1.1939 (RGBl. I S.95); Gesetz zur Verlängerung des Gesetzes zur Behebung der Not von Volk und Reich, v. 30.1.1937 (RGBl. I S.105). In 1943 the law was further extended, although this time by a decree of Hitler himself. Erlaß des Führers über die Regierungsgesetzgebung, v. 10.5.1943 (RGBl. I S.295).

103. The same might also be said of Italian parliamentarism in paving the way for the Fascist dictatorship. See MAIER, *supra* note 34, at 344 (noting how, in November 1922, the grant of full powers to Mussolini was difficult to oppose on constitutional grounds because “the system of bypassing parliament with decree legislation had been accepted since the war”); see also Merlino, *supra* note 39, at 30.

B. *France: "Questions of Pleins Pouvoirs Are Above All Questions of Confidence"*

During World War I, the French parliament, unlike its counterpart in Germany, largely resisted the temptation to transfer all effective legislative powers to the government, opting instead for more limited transfers for more specific purposes.<sup>104</sup> It was not until 1918 that France adopted a law that could be characterized as a general delegation of legislative powers in connection with the war.<sup>105</sup> Over the course of the 1920s and 1930s, however, the French legislature would experiment with ever broader forms of delegation in the face of economic and social crisis, thus bringing its experience broadly into line with that of Weimar Germany. Indeed, by 1939, in anticipation of the impending hostilities with Hitler's Germany, the French parliament transferred to the government essentially unlimited decree powers. Moreover, as in Germany in March 1933, the legal foundation for the destruction of the republican regime in France in July 1940 would take the form of an enabling act, delegating to Marshal Pétain not only emergency legislative authority but also full powers to draft and promulgate a new constitution.

The events of 1940 arguably represent a confluence of seemingly contradictory currents in the French constitutional experience. On the one hand, the consolidation of all governing power in the hands of Pétain in 1940 was a manifestation—admittedly an extreme one—of an authoritarian, "Bonapartist" strand in French constitutional history, in which the executive was understood as having a governing legitimacy and normative power of its own, independent of any representative assembly.<sup>106</sup> On the other hand, the unconstrained transfer of authority to Pétain was a perverse but nevertheless genuine expression of parliamentary supremacy—a cornerstone of the French republican tradition that had enabled successive parliaments to delegate their powers to the executive as they saw fit over the course of the 1920s and 1930s, regardless of the constitutional objections of some political and academic observers.<sup>107</sup>

To grasp the manner in which the interaction of these two crosscurrents in French constitutional history gave way to the Vichy regime, some historical background is necessary. The relationship in late-eighteenth- and nineteenth-century France between the executive's purportedly autonomous regulatory power and the legislative supremacy of parliament (as representative of the sovereign "nation") was a major point of political and legal contention. In theory, in 1789 the absolute sovereignty previously

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104. See *supra* note 39.

105. See *infra* note 129 and accompanying text.

106. See *infra* notes 111-112 and accompanying text.

107. See *infra* notes 140-151 and accompanying text.



possessed by the king devolved to the “nation,” and statutory law adopted by the nation’s assembled legislative representatives became the unique and unassailable expression of that sovereignty. The tradition of legislative supremacy found its original legal expression in Article 6 of the Declaration of the Rights of Man and Citizen of 1789: “*La loi*”—i.e., a statute adopted by the legislature—“is the expression of the general will.”<sup>108</sup>

However, the principal effect of the political turmoil of the revolutionary decade was the strengthening of the French executive at the expense of legislative power, directly contrary to the principles of 1789.<sup>109</sup> In fact, over the course of the revolutionary decade, the administrative sphere under the executive’s hierarchical control was increasingly recognized as possessing an independent, quasi-legislative power—*un pouvoir réglementaire autonome* as it was called. This was a sharp break with the constitutional principle of the supremacy of legislation over executive power, scandalizing those who clung to the original revolutionary notion of an absolute parliamentary monopoly on legislative norm production.<sup>110</sup>

The idea that there existed a normative power belonging to the executive and the administration, one exercised independently of any legislative delegation, became a basic premise of the Bonapartist regime after 1799. Although the textual foundation of such power was in theory debatable,<sup>111</sup> actual practice was in no way ambiguous. The subordination of legislative to executive power was manifest not only in the constitutional debasement of legislative assemblies as representative bodies, which lost all

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108. This notion of national sovereignty embodied in the legislature, combined with the complete subordination of the executive to the legislative will, was perhaps the most important element of the revolutionary conception of institutional order in its purest form. As the first post-revolutionary constitution of 1791 provided, “The executive power can make no law, even provisionally, but can only make proclamations in conformity with the law, in order to command or call [*rappeler*] for the law’s execution.” CONSTITUTION du 3 septembre 1791, tit. III, ch. IV, § 1, art. 6. This provision was an explicit reaction against the fusion of all legislative, executive, and judicial powers in the person of the king under the Old Regime.

109. Under the Terror, effective governing power at the summit passed from the Convention to the Committee of Public Safety in everything but name, and this latter body often found it expedient to issue orders that exceeded or modified legislation without recourse to the legislature in whose name it governed. Although a principal aim of the Thermidorian reaction and the Constitution of Year III (1795) was to put an end to the lawlessness of the Jacobin dictatorship under the Convention (a central element of which was to centralize and consolidate administrative power, ensuring its autonomy from legislative control), this process proceeded unabated in the mid-1790s. FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF (DE LA RÉVOLUTION AU DÉBUT DES ANNÉES 1970), at 58-65 (1995); cf. ISSER WOLOCH, THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER, 1789-1820S, at 43-45 (1994) (describing the cumbersome and ineffective legislative system instituted by the Constitution of Year III).

110. BURDEAU, *supra* note 109, at 60.

111. Napoleon’s Constitution of Year VIII referred, without elaboration, to so-called *règlements d’administration publique* issued by the executive, and it was unclear from the text whether such regulations could be issued independently of legislative authorization. See CONSTITUTION du 22 frimaire an VIII, arts. 52, 54.

power of initiative to the executive, but also in the practical exclusion of the legislature from the administrative sphere.<sup>112</sup> The very ethos of the regime was thus clearly rooted in the subordination of legislative to executive power, aided by an enlightened administration with the Conseil d'Etat at its summit (to serve as Napoleon's principal legislative advisor as well as the supreme legal arbiter of administrative disputes).

At this point, it is important to add that there was an unexpected side effect of the Napoleonic regime that would make itself felt over the course of the nineteenth century: the growth of a genuinely independent system of legal control over the exercise of administrative power (*la juridiction administrative*).<sup>113</sup> By establishing the Conseil d'Etat in the Constitution of Year VIII (1799), Napoleon hoped to create "a half-administrative, half-judicial body [to] regulate the exercise of that portion of arbitrary power necessarily belonging to the administration of the state."<sup>114</sup> Modeled on the Conseil du Roi under the Old Regime, the Conseil d'Etat reflected a basic premise of French public law stretching back to the seventeenth century: The legal control of administrative action is itself a form of administration—*juger l'administration, c'est encore administrer*—and thus should belong to the administration alone, generally beyond the purview of the judicial courts.<sup>115</sup>

From this perspective, the resolution of administrative disputes—*le contentieux administratif*—required a judge organically attached to the executive, well-versed in the operation of the administration, and purportedly imbued with *le sens de l'Etat*. The separate French system of administrative justice was designed as a kind of "commitment mechanism" (to use more modern terminology) to ensure that those empowered to adjudicate administrative disputes would adhere to the policy goals of the state and to the "general interest," even as they also enforced basic principles of justice on behalf of particular individuals. Such a body was

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112. According to Napoleonic practice, the executive was the sole judge of the best means to execute the laws, and in the absence of effective means of legislative supervision, the agents of executive power (prefects, ministers) could deviate significantly from the express provisions of legislation. BURDEAU, *supra* note 109, at 74-75; *see also* WOLOCH, *supra* note 109, at 46-48.

113. The process of separation of the administrative judiciary from the active administration was long and complex, and I do not pretend to cover the various stages of that history here. For the definitive work on the subject, see JACQUES CHEVALLIER, *L'ELABORATION HISTORIQUE DU PRINCIPE DE SEPARATION DE LA JURIDICTION ADMINISTRATIVE ET DE L'ADMINISTRATION ACTIVE* (1970).

114. PELET DE LA LOZÈRE, *OPINIONS DE NAPOLÉON* 191 (Paris, F. Didot 1833).

115. This premise found its first expression as positive law in the royal edict of Saint-Germain of February 1641, which prohibited the *parlements* and other sovereign courts of the Old Regime from reviewing any matter "that may concern the state, administration, and government." Edict: qui défend aux parlemens et autres cours de justice de prendre à l'avenir connaissance des affaires d'état et d'administration, et qui supprime plusieurs charges de conseillers au parlement de Paris, in 16 [FRANÇOIS ANDRÉ] ISAMBERT ET AL., *RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES, DEPUIS L'AN 420, JUSQU'À LA RÉVOLUTION DE 1789*, at 529, 533 (Paris, Belin-Leprieur 1829), *quoted in* BURDEAU, *supra* note 109, at 34.

functionally necessary, Napoleon recognized, because without some form of legal control over state action “the government will fall into scorn.”<sup>116</sup> Perhaps because of this functional necessity, the Conseil d’Etat long outlived the collapse of Napoleon’s regime in 1815; in fact, it survived every subsequent change in the form of government (monarchical, imperial, republican) even as each sought to reform the Conseil to its own liking.

One reason for the Conseil’s survival was that, even as its organic attachment to the executive remained central to its identity, the French system of administrative justice also became increasingly “judicialized” through an incremental assertion of jurisprudential independence over the course of the nineteenth century.<sup>117</sup> Under the imperial and monarchical regimes that dominated France until 1870, the Conseil d’Etat would refine the various procedural devices (*recours contentieux*) used to scrutinize the legality of executive power.<sup>118</sup> Of these devices, clearly the most historically significant was the *recours pour excès de pouvoir*, or the claim that an executive act should be annulled because it fell outside the authority granted to the administration under the controlling legislation. Much of the most significant jurisprudential progress regarding this form of action took place, in fact, under the Second Empire (1852-1870), expressly to compensate for the loss of both political liberty and parliamentary control after the suppression of the Second Republic (1848-1852). A member of the Conseil under the Second Empire, Léon Aucoc, famously characterized the system of administrative justice as a “safety valve that should always remain open,” a specific allusion to the need to reinforce the legitimacy of the Bonapartist state in the absence of genuine democratic outlets.<sup>119</sup>

The establishment of the Third Republic in the 1870s, however, forced a reassessment of the proper scope of the legal control of administrative action as exercised by the Conseil d’Etat. The restoration of representative political institutions to control executive power (notably in the adoption of the constitutional laws of 1875) arguably meant that the Conseil d’Etat’s judicial “safety valve” should no longer remain as open as it had become in the final years of the Second Empire. As the Conseil d’Etat’s most eminent member, Edouard Laferrière, explained in the second edition of his *Traité de la juridiction administrative* in 1896, after the fall of the imperial regime

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116. DE LA LOZÈRE, *supra* note 114, at 191.

117. See generally CHEVALLIER, *supra* note 113 (describing the separation of the “active administration” from the administrative judiciary—*la juridiction administrative*—over the course of the nineteenth century).

118. The best history of this process remains the multivolume work, EDOUARD LAFERRIÈRE, *TRAITÉ DE LA JURIDICTION ADMINISTRATIVE ET DES RECOURS CONTENTIEUX* (Paris, Berger-Leurault et Cie 2d ed. 1896) (1887-1888).

119. Pierre Lampué, *Le développement historique du recours pour excès de pouvoir depuis ses origines jusqu’au début du XXe siècle*, 20 *REVUE INTERNATIONALE DES SCIENCES ADMINISTRATIVES* 359, 380 (1954) (internal quotation marks omitted); see also 2 JEAN-MARIE AUBY & ROLAND DRAGO, *TRAITÉ DE CONTENTIEUX ADMINISTRATIF* 419 (1962).

the Conseil “asked itself whether the reestablishment of parliamentary control and ministerial responsibility did not remove some of the *raison d’être* from the mission that the Conseil d’Etat had pursued under the Empire, in the absence of guarantees of a political order.”<sup>120</sup>

The need to find a proper balance between legal and parliamentary controls of executive power would remain a persistent concern for the remainder of the century. What is significant, however, is how the extreme jurisprudential caution of the Conseil d’Etat in the early years of the Third Republic steadily eroded in the period leading up to the turn of the century. Perhaps the most significant historical step (both symbolically and legally) was taken in the *Cadot* decision of December 1889,<sup>121</sup> in which the Conseil declared that it had original jurisdiction to hear any administrative dispute from the moment it arose, thus dispensing with the requirement that a litigant appeal first to the competent minister (known as “the doctrine of the minister-judge”). This decision reflected the ultimate realization on the part of the members of the Conseil d’Etat that there was still a place in the republican order for independent legal control of executive power; hierarchical political control by parliament was not enough.<sup>122</sup> The result of this realization, in the two decades preceding the outbreak of World War I, was an increasingly skeptical body of case law concerning the “absolute parliamentarism” of the Radical Republic.<sup>123</sup>

This skepticism is well-reflected in the period’s jurisprudence concerning the legal control of the government’s delegated legislative authority, notably its power to issue *règlements* to fulfill a statute’s legislative goals. The Conseil’s approach presents a particular contrast with the approach of its German counterparts to the judicial control of *Rechtsverordnungen* under Weimar.<sup>124</sup> Nineteenth-century French commentators (including Laferrière) largely agreed with the German position that such delegated legislative acts enjoyed the supremacy and nonreviewability of the enabling legislation itself, thus placing them beyond the legal control of the Conseil under the *recours pour excès de pouvoir*. However, in a decision of December 6, 1907 (*Compagnie des Chemins de fer de l’Est et autres*), the Conseil held that, under the terms of article 9 of the statute of May 24, 1872, reorganizing the Conseil after the fall of the

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120. 1 LAFERRIÈRE, *supra* note 118, at 273.

121. Conseil d’Etat [C.E.], Dec. 13, 1889, *Cadot, Rec.* 1148, concl. Jagerschmidt.

122. A modern historian of French administrative law has ascribed the Conseil’s increased activism during this period to a broad dissatisfaction among its members with the intense politicization of all aspects of the state apparatus by the Radical Republicans who gained political ascendancy during the Dreyfus Affair. BURDEAU, *supra* note 109, at 257-59. The judicial decisions of the Conseil during this period were motivated “by a certain idea of the State, . . . the dignity of which [the members of the Conseil] intended to defend against the governments themselves.” *Id.* at 258.

123. *Id.* at 259.

124. *See supra* notes 86-87 and accompanying text.

Empire, the *recours pour excès de pouvoir* was available against any act of an “administrative authority,” and that the government, even if acting pursuant to a legislative delegation, constituted such an authority.<sup>125</sup> Consequently, because the competence of the Conseil d’Etat under article 9 turned not on the nature of the act but on the nature of the promulgating institution, *règlements* issued by the government were subject to legal review by the Conseil d’Etat.

Although this was a clear advance over German practice,<sup>126</sup> its legal significance should not be exaggerated. The Conseil’s holding in no way impugned the power of parliament to delegate its powers to the executive as it saw fit, meaning that the Conseil d’Etat would not pose an obstacle to the broad expansion of legislative delegation during the interwar period. Rather, the Conseil held simply that such powers, once delegated, were subject to legal control. The Conseil d’Etat did in fact have some leeway in defining the scope of the executive’s power when the Conseil interpreted the initial enabling act,<sup>127</sup> but its jurisprudence regarded the question of the permissible *extent* of legislative delegation as political and constitutional, and thus beyond its limited legal competence to consider. Indeed, the Conseil generally interpreted the scope of legislative delegations in maximalist terms, giving the government very broad freedom of action consistent with what the Conseil understood to be the intent of the legislature.<sup>128</sup> Consequently, as we shall see below, the only effective checks on delegation in France in the interwar period came from the parliament itself and from its conception of the legislature’s constitutional obligations in the republican tradition.

At the outset of World War I, for reasons of constitutional principle, the French parliament exhibited some notable reluctance to delegate its legislative authority to the government. It was not until the adoption of the Law of February 10, 1918—conferring decree powers on Clemenceau’s government—that the French parliament would concede that such sweeping powers were necessary to the prosecution of the war.<sup>129</sup> In fact, after the war, there was a somewhat futile attempt in France to return to traditional

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125. C.E., Dec. 6, 1907, *Compagnie des Chemins de fer de l’Est et autres*, Rec. 913, 919-20, concl. Tardieu.

126. See *supra* notes 86-87 and accompanying text.

127. In this regard, the conclusions of the *commissaire de gouvernement*, Jean Romieu, in C.E., May 4, 1906, *Babin*, Rec. 362, concl. Romieu, would be of particular importance in defining the Conseil’s understanding of the relative sphere of legislative and regulatory power. Romieu’s conclusions came to be understood to stand for the proposition that “certain questions are reserved to legislation,” such as those “touching on the regime of public liberties, the status [*état*] of persons, the determination of taxation, and the definition and punishment of crimes and misdemeanors.” LES GRANDS AVIS DU CONSEIL D’ETAT 66 (Yves Gaudemet et al. eds., 1997).

128. See, e.g., C.E., Nov. 3, 1933, *Gilliet*, Rec. 996, 996-97, concl. Andrieux; C.E., May 7, 1920, *Gautier*, Rec. 450, concl. Mazerat.

129. Law of Feb. 10, 1918, J.O., LOIS ET DÉCRETS, Feb. 12, 1918, p. 1515; B.L.D. 1918, 79.

parliamentary supremacy over the executive, with the lapsing of the *pleins pouvoirs* conferred upon the government under the terms of the Law of February 10, 1918. Legislative supremacy over the executive was thus seemingly restored.<sup>130</sup> However, just as normalcy would prove illusory in the economic sphere, so would it in the constitutional; in fact, over the course of the 1920s, disruptions in the two domains were intimately interrelated. As is well-known, the impact of World War I on the economic and financial position of France forced it to finance much of its war effort through debt, and what had been a net creditor nation in 1914 had become a net debtor one by 1918. Although many French people, particularly on the nationalist right, had high hopes that “Germany would pay” (hence the occupation of the Ruhr in 1923 to enforce the onerous reparation obligations in the Versailles treaty), France was forced to finance postwar reconstruction largely through additional debt and monetary expansion. Periodic payment crises and persistent inflation were the results, along with a series of enabling acts empowering the executive to address these severe problems.

In the first half of the 1920s, the new episodes of *pleins pouvoirs* and *décrets-lois* provoked considerable political controversy and debate in the French parliament. The Radical leader Edouard Herriot was particularly vocal in his opposition, decrying Raymond Poincaré’s request for decree powers in March 1924, for example, as contrary “to all the parliamentary history of our country,” and a return to “imperial methods.”<sup>131</sup> When, in July 1926, the Briand government also requested decree powers to address the currency crisis, Herriot—despite his membership in the majority—again was prominent in opposition to the bill.<sup>132</sup> Herriot’s opposition would prove, however, to have a somewhat quixotic quality. As Richard Kuisel has put it, during this time the “republic’s inefficacy was seldom more patent . . . Parliament refused to grant decree powers, and yet it could find no way to liquidate the [monetary and financial crisis] itself.”<sup>133</sup> Eventually, even Herriot would recognize that executive empowerment was necessary for France to have any chance of monetary and financial stabilization.

In a supreme irony, Herriot in fact joined the new “national union” government in August 1926, even as the new prime minister—Poincaré,

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130. The principal exception related to the transitional regime in Alsace and Lorraine. In particular, the Law of October 17, 1919, specifically article 4, provided that, in matters of urgency, the government could apply French laws by decree until such time as special legislation could be passed. Law of Oct. 17, 1919, J.O., LOIS ET DÉCRETS, Oct. 18, 1919, p. 11,522; B.L.D. 1919, 760.

131. J.O., CHAMBRE DES DÉPUTÉS, DÉBATS (Feb. 6, 1924), p. 500-01 (statement of Edouard Herriot). For an overview of the parliamentary debates, see RUSU, *supra* note 52, at 144-51.

132. J.O., CHAMBRE DES DÉPUTÉS, DÉBATS (July 16, 1926), p. 2964-65.

133. RICHARD F. KUISEL, CAPITALISM AND THE STATE IN MODERN FRANCE: RENOVATION AND ECONOMIC MANAGEMENT IN THE TWENTIETH CENTURY 73 (1981).

once again—asked for, and received, decree powers only slightly more limited than those demanded by the center-left government headed by Briand only days before (which Herriot vigorously opposed).<sup>134</sup> Herriot became the minister of education (*ministre de l'Instruction publique et Beaux-arts*) in Poincaré's new government.<sup>135</sup> After the conferral of *pleins pouvoirs* on Poincaré's government in 1926,<sup>136</sup> there would no serious opposition in the French parliament to delegation as a matter of constitutional principle.<sup>137</sup>

By the 1930s, requests for decree powers in France became little more than political questions of confidence in the government. Between 1934 and 1938, five prime ministers requested decree powers; three received them, with each successive request being for a longer duration (Edouard Daladier, in 1938, asked for them for a period of four years). In an indication of the growing acceptance of delegation over the course of the interwar period, Léon Blum himself sought decree powers for his Popular Front governments in June 1937 and April 1938. In the debate over his 1937 request, Blum conceded that constitutional practice had evolved: "Questions of *pleins pouvoirs*, in effect, are questions of constitutional law, but they are above all, as you well know, questions of confidence."<sup>138</sup> Indeed, in both 1937 and 1938, Blum's cabinets resigned following the parliament's refusal to confer decree powers.

Although some foreign observers around 1950 argued that the French parliament's repeated recourse to *pleins pouvoirs* over the course of the 1930s meant that "the Constitution of 1875 was in abeyance long before the end of the Third Republic,"<sup>139</sup> this is a fundamental misreading of the French situation in the interwar period. The better view is to be found in the work of perhaps the greatest French public law scholar of the era, Raymond Carré de Malberg, and more specifically in his 1931 classic *La loi*,

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134. RUSU, *supra* note 52, at 153-55.

135. Institut National de Recherche Pédagogique, A Chronological List of the French Ministers of Education and Their Various Designations, at <http://www.inrp.fr/she/wministres.htm> (last visited Mar. 31, 2004).

136. Law of Aug. 3, 1926, arts. 1-2, J.O., LOIS ET DÉCRETS, Aug. 4, 1926, p. 8786; B.L.D. 1926, 449.

137. Insofar as *pleins pouvoirs* are concerned, Kuisel in fact misses the import of the constitutional legacy of the franc crisis of 1924-1928. He concludes that, aside from making the French "extremely protective about any further loss in the value of their currency," the crisis "[o]therwise . . . had little permanent effect on public policy or its machinery" and that "[i]n institutional terms little had changed." KUISEL, *supra* note 133, at 75. In fact, from the perspective of *pleins pouvoirs*, the Law of August 3, 1926, constituted a turning point in the political life of the Third Republic.

138. J.O., CHAMBRE DES DÉPUTÉS, DÉBATS (June 15, 1937), p. 1979 (statement of Leon Blum).

139. MARGUERITE A. SIEGHART, GOVERNMENT BY DECREE: A COMPARATIVE STUDY OF THE HISTORY OF THE ORDINANCE IN ENGLISH AND FRENCH LAW 302 (1950).

*expression de la volonté générale*.<sup>140</sup> For Carré de Malberg, the French parliament's repeated conferral of decree powers on the executive was a logical (if problematic) extension of the constitutional principles of the Third Republic. Under the constitutional laws of 1875, Carré de Malberg asserted that there was no subject matter that was exclusively "legislative" in character that could not be delegated to the executive. Rather, he found that, not unlike the predominant German theory from before 1914,<sup>141</sup> the distinction between the legislative and executive domains was not substantive but purely formal: *La loi* was the product of the legislature, whereas *le règlement* or *le décret* was the product of the executive, and any subject matter could be constitutionally allocated to either realm, as the parliament saw fit.<sup>142</sup>

The core principle of French republican-parliamentary orthodoxy was, in Carré de Malberg's view, that the legislature possessed plenary normative power as representative of the "general will" of the nation. "When a Constitution starts from the idea that the Parliament has the power to formulate the general will by its laws," Carré de Malberg wrote, "it is manifest . . . that the Constitution can no longer contemplate assigning a defined subject matter to legislation. [This is] because the general will is indefinitely free to exercise its primacy over all the objects it intends to regulate . . ." <sup>143</sup> As representative of the general will, the parliament had the power, "at its choice and in any subject matter, either to legislate directly itself, or to charge the Executive to rule by decree to the extent determined by the enabling act."<sup>144</sup>

Just as this republican-parliamentary orthodoxy effectively erased anything but the formal distinction between legislative and regulatory power, Carré de Malberg also showed that it erased the distinction between routine legislative power and the power to alter or amend the constitution itself ("constituent power"). In theory, parliament's freedom to transfer its rulemaking authority to the executive was subject to only one restriction, "deriving from the superiority of the constitutional laws over ordinary laws."<sup>145</sup> As Carré de Malberg argued extensively, however, this distinction neither corresponded to the actual constitutional principles upon which the Third Republic was founded, nor had any practical significance in the absence of any effective external checks on parliament's legislative power.<sup>146</sup> As a representative of the general will, parliament constituted a

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140. RAYMOND CARRÉ DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE: ÉTUDE SUR LE CONCEPT DE LA LOI DANS LA CONSTITUTION DE 1875* (1931).

141. See *supra* notes 76-77 and accompanying text.

142. CARRÉ DE MALBERG, *supra* note 140, at 86.

143. *Id.*

144. *Id.* at 87.

145. *Id.*

146. See *id.* at 103-39.



sort of floating constituent assembly, and there was no body external to the legislature (like the Constitutional Council under the Fifth Republic) that had the competence to enforce any purported constitutional restrictions against it. In the end, the constitution was what the parliament declared it to be.<sup>147</sup>

Carré de Malberg's prescient observations regarding the absence of effective limits on parliament's ability to exercise (and therefore delegate) both legislative and constituent power would take on special meaning in the spring and summer of 1940: "The Parliament," he wrote in 1931, "having received *carte blanche* in this regard from the Constitution, is not limited in its [transfers of normative authority to the executive] except by considerations of political expediency . . . ."<sup>148</sup> Thus, on July 9, 1940, when the French parliament (the very same parliament that had brought the Popular Front to power in 1936) voted overwhelmingly that "the constitutional laws should be revised,"<sup>149</sup> it was acting entirely within its constitutional authority as supreme representative of the "general will." In transferring to Pétain the following day "not merely [legislative] *pleins pouvoirs* . . . but explicit authorization to draft a new constitution,"<sup>150</sup> the French parliament undoubtedly abdicated its democratic responsibilities. However, it was not simply the German occupation that, as Robert Paxton put it, forced "republican practice . . . to give way to a Bonapartist executive constitution-making."<sup>151</sup> Rather, as Carré de Malberg so ably showed, this delegation of constituent power to Pétain was an extension of the unchecked parliamentary sovereignty that was the defining feature of French republicanism after 1875. In this sense, what transpired in July 1940 was paradoxically both republican and Bonapartist, constituting the ultimate expression of confidence in Pétain and his promise of a new order, a political choice entirely within the power of the parliament of the Third Republic to make.

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147. Carré de Malberg argued that the Conseil d'Etat implicitly acknowledged this fact in its 1907 decision in *Compagnie des Chemins de fer de l'Est et autres*, C.E., Dec. 6, 1907, *Rec.* 913, concl. Tardieu. In that case, the Conseil spoke of delegations empowering the executive to exercise rulemaking power "in all the plenitude of the powers that have been conferred by the legislature on the Government." *Id.* at 920. Carré de Malberg interpreted this phrasing to mean that "the Executive can acquire, by means of an enabling law, regulatory faculties going to the full 'plenitude' of powers." CARRÉ DE MALBERG, *supra* note 140, at 88.

148. CARRÉ DE MALBERG, *supra* note 140, at 88.

149. ROBERT O. PAXTON, *VICHY FRANCE: OLD GUARD AND NEW ORDER, 1940-1944*, at 30 (1972) (internal quotation marks omitted). For official tallies of the votes, see J.O., CHAMBRE DES DÉPUTÉS, DÉBATS (July 9, 1940), p. 814; and J.O., SÉNAT, DÉBATS (July 9, 1940), p. 353.

150. PAXTON, *supra* note 149, at 30. For the legislative act, see Loi constitutionnelle, Law of July 10, 1940, J.O., LOIS ET DÉCRETS, July 11, 1940, p. 4513; B.L.D. 1940, 537.

151. PAXTON, *supra* note 149, at 31.

C. *Executive Power, Democracy, and Dictatorship*

The political developments in France in 1940 seemed to give further support to Carl Schmitt's claim in 1936 that there was "an insurmountable opposition between the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades," which had obliged the concentration of legislative power in the executive.<sup>152</sup> The disaster of the Nazi dictatorship and the experience of World War II would, however, push even Schmitt to recognize the imperative of devising a way to reconcile parliamentary democracy with the demands of modern administrative governance. Toward the end of 1944, Schmitt wrote another piece—*Die Lage der europäischen Rechtswissenschaft* [*The Plight of European Jurisprudence*] (1943/44)<sup>153</sup>—that, in certain respects, can be viewed as a companion to his earlier contribution on the subject of delegation from 1936. Schmitt traced some of the same ground he had in the earlier piece—the acceleration of legislation after 1914, the "ever new and broader" delegations of legislative power in the postwar period<sup>154</sup>—and again he stressed how all industrialized countries had experienced a similar phenomenon: "[R]egardless of whether they were belligerents or neutrals, victors or vanquished, parliamentary states or so-called dictatorships," Schmitt wrote, "the compulsion for legal regulations to accommodate the tempo of changing conditions was irresistible."<sup>155</sup>

Absent, however, from Schmitt's 1944 essay was the smug confidence his 1936 piece showed in the German solution to the problem of delegation, which is perhaps understandable in light of the disaster that Germany had brought upon millions of people in Europe and elsewhere as a result of the choices it made in 1933. Schmitt in 1944, surrounded by evidence of that German-inflicted catastrophe, now cited with approval Heinrich Triepel's efforts in the early 1920s to bring attention to the dangers of unchecked delegation.<sup>156</sup> He also noted Lord Hewart's "warning" in *The New Despotism* (although he claimed that it had been ignored, even in Britain),<sup>157</sup> and wrote of the necessity for "a sense for the logic and consistency of concepts and institutions" and "the minimum of an orderly

152. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 204.

153. Carl Schmitt, *The Plight of European Jurisprudence*, TELOS, Spring 1990, at 35 (G.L. Ulmen, trans.) [hereinafter Schmitt, *The Plight of European Jurisprudence*]. This essay originally appeared as CARL SCHMITT, *Die Lage der europäischen Rechtswissenschaft (1943/44)*, in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954: MATERIALIEN ZU EINER VERFASSUNGSLEHRE 386 (2d ed. 1973).

154. Schmitt, *The Plight of European Jurisprudence*, *supra* note 153, at 50.

155. *Id.* at 52.

156. *Id.* at 50.

157. *Id.* at 52.

procedure, due process, without which there can be no law.”<sup>158</sup> He even wrote of the need for “a recognition of the individual based on mutual respect.”<sup>159</sup>

The challenge facing Europe after 1945 was indeed to learn the lessons of the interwar period, although we would be justified in our skepticism of Schmitt’s seeming reversal in 1944 in light of the hope he had invested in the constitutional principles of the Third Reich in the 1930s. In some sense, by 1944 Schmitt had simply gone to the opposite extreme, sounding almost Hayekian in his warnings of the dangers of “the increasing motorization of the legislative machinery” and “of this dissolution of law under the avalanche of ever more legislation.”<sup>160</sup> He had not really let go of the view that delegation ultimately must lead to dictatorship, as he argued in 1936; rather, he simply no longer celebrated that process as the “triumph” of an older constitutional tradition in Europe.<sup>161</sup> As Schmitt quite rightly understood, the social and economic conditions of modern life required broader forms of legislative delegation, and this would be as true after 1945 as it was after 1918. It was precisely for this reason, however, that postwar Europe was not going to abandon delegation as a form of governance altogether, as Schmitt implicitly advocated. Instead, the challenge was to find a way to make delegation work within the context of liberal-democratic institutions, to surmount what Schmitt had claimed in 1936 was “insurmountable.”

For the future Federal Republic of Germany, elements of the solution to the interwar crisis of parliamentary democracy would be drawn from many of the sources that Schmitt so extensively criticized in 1936: from the constitutional principles governing the delegation of legislative power found in the writings of Heinrich Triepel and Fritz Poetzsch in the 1920s, and from those reflected in the decisions of the U.S. Supreme Court in the 1930s.<sup>162</sup> Triepel and Poetzsch had argued that the legislature should be constitutionally obligated to define with reasonable clarity a limited purpose (*Zweck*) for any delegated powers, thus constraining the executive’s discretion in the exercise of delegated authority.<sup>163</sup> The U.S. Supreme Court had required Congress both to define an “intelligible

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158. *Id.* at 67.

159. *Id.*

160. *Id.*

161. Schmitt, *L’évolution récente du problème des délégations législatives*, *supra* note 50, at 210.

162. Schmitt had noted the similarities between these lines of thinking in 1936, in particular between the respective views of Triepel and Poetzsch and those expressed by Justice Cardozo in his concurrence in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). See Schmitt, *L’évolution récente du problème des délégations législatives*, *supra* note 50, at 205.

163. See the reports of Triepel and Poetzsch in VERHANDLUNGEN DES 32. DEUTSCHEN JURISTENTAGES, *supra* note 91, at 11-52.

principle” or legislative “standard” to guide the executive’s discretion, and to constrain that discretion still further through the imposition of appropriate procedural mechanisms; both sets of limits would furthermore be enforceable by the courts.<sup>164</sup> For Schmitt, the notion that the courts should serve as the “guardian of the constitution” had long been anathema.<sup>165</sup> Indeed, it was inconceivable to him that the “legislator” (and here one might fairly read the executive possessing full legislative powers) could be constrained in any way except by the requirements of the “concrete situation.”<sup>166</sup>

Neither the doctrines of Triepel and Poetzsch in the 1920s nor the cases of the U.S. Supreme Court in the 1930s were irrevocably opposed to delegation. The United States, in particular, was not so attached to “the classical conception of the principle of separation of powers” as Schmitt supposed.<sup>167</sup> The cases from the mid-1930s, in which the Court struck down major pieces of New Deal legislation,<sup>168</sup> in fact have been the only instances in which congressional attempts to transfer legislative powers to the executive have been invalidated by the Court on nondelegation grounds (and these involved very broad delegations of authority in the face of the economic emergency of the Depression). Since the 1930s, the “nondelegation doctrine” in the United States has largely served as a background constraint and an interpretive principle, allowing courts to read enabling legislation narrowly in order to avoid nondelegation concerns.<sup>169</sup>

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164. See, e.g., *Schechter Poultry*, 295 U.S. at 521-42 (invalidating section 3 of the National Industrial Recovery Act (NIRA) of 1933, ch. 90, § 3, 48 Stat. 195, 196-97). Section 3 of the NIRA authorized the President to “approve a code or codes of fair competition” for particular industries as a means of addressing the economic crisis. NIRA § 3, quoted in *Schechter Poultry*, 295 U.S. at 521 n.4. The Court found that the Act contained no standard to guide the President’s legislative discretion, that it provided no procedural mechanisms to govern the President’s decisionmaking, and that it thus was an unconstitutional delegation of legislative power. See 295 U.S. at 529-42.

165. See BALAKRISHNAN, *supra* note 49, at 139-43 (discussing generally the thesis set forth in SCHMITT, *supra* note 66).

166. Schmitt, *L’évolution récente du problème des délégations législatives*, *supra* note 50, at 208-09 (internal quotation marks omitted). On the more general point of the increasingly legislative role of the executive in Schmitt’s understanding, see, for example, BALAKRISHNAN, *supra* note 49, at 150, 163, 200.

167. Schmitt, *L’évolution récente du problème des délégations législatives*, *supra* note 50, at 204. Ironically, in his discussion of the Court’s decision in *Schechter Poultry*, see *id.* at 205, Schmitt dwelt on the concurring opinion of Justice Cardozo, without realizing that only five months before, Justice Cardozo had in fact *dissented* from a similar decision of the Court striking down another provision of the NIRA, see *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414-33 (1935) (striking down section 9(c) of the Act). In that case, Justice Cardozo found that a sufficient standard did exist, *id.* at 434-36 (Cardozo, J., dissenting), a position that presaged the future, flexible application of the nondelegation doctrine.

168. Along with *Schechter Poultry* and *Panama Refining*, another key case from the era is *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), which struck down the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

169. See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (imposing a narrow construction on a statute because otherwise “the statute would make such a

After 1945, the concentration of both legislative and adjudicative powers in the executive branch would continue to be a defining characteristic of governance throughout Europe, as it would in the United States. However, there would be renewed attention to the necessity for safeguards in the executive's exercise of delegated legislative authority. In Britain, there would be revived interest in the recommendations of the Committee on Ministers' Powers, leading to changes in parliamentary controls over delegated legislation and, eventually, heightened judicial review. In France and West Germany, in reaction to their interwar and wartime experiences, the drafters of postwar constitutions would give special attention to the boundary between legislative and executive power, searching for ways to reinforce the constitutional position of the executive without sacrificing the democratic functions of the legislature or the protection of human rights.

### III. SURMOUNTING THE "INSURMOUNTABLE": THE POSTWAR CONSTITUTIONAL SETTLEMENTS IN WEST GERMANY AND FRANCE

Contrary to Carl Schmitt's claims in 1936, the demands of modern governance and "the concepts of legislation and of constitution peculiar to separation-of-powers regimes"<sup>170</sup> did not, at least over the intermediate term after 1945, prove as contradictory as he predicted. Rather, in the decades after the end of World War II, Western European public law seemed to achieve what Schmitt had asserted was impossible only ten years before. The major constitutional accomplishment in Western Europe after 1945, apart from the development of effective judicial mechanisms for the protection of individual rights, would in fact be the discovery of a workable balance between traditional parliamentarism and the broad displacement of legislative power out of the parliamentary realm and into the executive and technocratic spheres.<sup>171</sup> For West Germany and France, in particular, the discovery of this balance would require significant adjustments in the constitutional authority of parliament to delegate normative power. In effect, much of the West German and French constitutional doctrine on the question would be designed to address the flaws in the traditional

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'sweeping delegation of legislative power' that it might be unconstitutional" (quoting *Schechter Poultry*, 295 U.S. at 539).

170. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 210.

171. In fact, in the postwar era, there was a direct connection between postwar human rights regimes and the constitutionally permissible nature and scope of delegation. On the German "theory of essentialness" (*Wesentlichkeitstheorie*), see *infra* notes 207-211 and accompanying text. On the corresponding French jurisprudence, see *infra* notes 240-244 and accompanying text.

republican conceptions of parliamentary supremacy that Carré de Malberg had identified at the outset of the 1930s.<sup>172</sup>

Britain, of course, emerged from World War II with its basic prewar constitutional structure intact, the cornerstone of which was the theoretical supremacy and sovereignty of parliament. Even if the British cabinet had enjoyed extraordinarily broad powers during the war, this fact did little to delegitimize delegation per se, as it had in France and West Germany. As a postwar commentator observed, “After 1939 the readiness of all parties to concede wide regulatory powers to the state lowered the temperature” of the prewar controversy over delegation.<sup>173</sup> After the war, the practice of delegation was broadly understood as a necessary means of strengthening the state in the face of the difficult tasks of national reconstruction and renewal, just as it once had been viewed as essential to organizing the national defense.<sup>174</sup>

The postwar debates in Britain were largely unencumbered by the memory of how unchecked delegation had disintegrated into a dictatorship via the legislature’s total abdication of its powers to the executive, as in Germany and France.<sup>175</sup> The persistence of notions of unqualified parliamentary sovereignty in postwar Britain thus meant that no one could really question the right of the legislature to confer whatever powers it thought appropriate on the government (and, indeed, both Labour and Conservative governments were the beneficiaries of such delegations in the decade after the war).<sup>176</sup> In other words, there would be nothing equivalent to the provisions inserted into the postwar French or West German fundamental laws that could pose any real *constitutional* obstacle to delegation.<sup>177</sup> The postwar West German and French constitutional

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172. See *supra* notes 140-151 and accompanying text.

173. S.A. de Smith, Book Review, 69 HARV. L. REV. 396, 398 (1955).

174. The wartime Defence Regulations were issued pursuant to the Emergency Powers (Defence) Acts, 1939, 2 & 3 Geo. 6, c. 62. For the major postwar legislation extending these regulatory powers into peacetime, see Emergency Laws (Miscellaneous Provisions) Act, 1947, 11 & 12 Geo. 6, c. 10; Supplies and Services (Extended Purposes) Act, 1947, 10 & 11 Geo. 6, c. 55; Emergency Laws (Transitional Provisions) Act, 1946, 9 & 10 Geo. 6, c. 26; and Supplies and Services (Transitional Powers) Act, 1945, 9 & 10 Geo. 6, c. 10.

175. There were, of course, instances in postwar Britain when political discussion sometimes seemed to take on the polemical quality of the interwar debate provoked by Lord Hewart’s *The New Despotism*. For a taste, although in significantly more muted terms than his interwar writings, see CARLETON KEMP ALLEN, LAW AND ORDERS: AN INQUIRY INTO THE NATURE AND SCOPE OF DELEGATED LEGISLATION AND EXECUTIVE POWERS IN ENGLISH LAW 66 (2d ed. 1956). Allen argued that “[t]he whole history of the [postwar] years shows (what, indeed, has been manifest all over the post-war world) that government by decree, once made, is extremely difficult to unmake.” *Id.*; see also SIEGHART, *supra* note 139, at 113 (“It is . . . but a natural consequence of the character of collectivistic legislation that it tends to transfer the task of making decisions from a democratic Legislature to an autocratic Executive.” (citing FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM ch. 5 (1944))).

176. For a summary of such delegations, see ALLEN, *supra* note 175, at 65-91.

177. In the absence of a written constitution, the focus in Britain was legislative: first, the Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36, which attempted to rationalize the process

environments were understandably different, and it is to that history that I now turn.

A. *West Germany: "The Basic Law Reflects a Decision in Favor of Stricter Separation of Powers"*

"There is general agreement that the Basic Law first and foremost is a reactive constitution."<sup>178</sup> This was the summation given by a German professor speaking on the occasion of the fortieth anniversary of the adoption of the postwar West German constitution—the Basic Law (*Grundgesetz*)—at an assembly of scholars gathered at the German Historical Institute in Washington in 1989. The idea that the foundational document of the Federal Republic of Germany was primarily reactive in character is hardly new, of course. Indeed, the stated aim of all the party factions represented in the Parliamentary Council (*Parlamentarischer Rat*), which met in Bonn in late 1948 and early 1949 with the purpose of drafting a new basic law for the western zones of occupation, was to overcome the array of perceived constitutional flaws in the Weimar regime.<sup>179</sup> As Konrad Adenauer, the future Federal Chancellor who served as president of the Parliamentary Council, wrote in his memoirs, "We followed the general

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of parliamentary oversight—the so-called "laying" procedures, *see supra* text accompanying note 24; and second, the Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66, which attempted to regularize the system of administrative adjudication, *see supra* note 25. It should be noted that the American example exerted some reformist influence on the development of British administrative law in the 1950s, though neither to as great an extent, nor as directly, as it would in West Germany. An English law professor wrote in *The Yale Law Journal* in 1950: "American administrative law is so much more developed than the British that there is little for an American lawyer to learn from British experience—except to be on guard against a weakening of judicial control. Cannot Marshall Plan Aid include 'administrative law?'" H. Street, Book Review, 59 *YALE L.J.* 590, 593 (1950) (reviewing BERNARD SCHWARTZ, *LAW AND THE EXECUTIVE IN BRITAIN: A COMPARATIVE STUDY* (1949)).

178. Peter Graf Kielmansegg, *The Basic Law—Response to the Past or Design for the Future?*, in *FORTY YEARS OF THE GRUNDGESETZ (BASIC LAW)* 5, 6 (German Historical Inst., Occasional Paper No. 1, 1990).

179. The Parliamentary Council was preceded by a critically important meeting of constitutional experts in August 1948 at Lake Chiemsee (known as the "Herrenchiemsee Conference"), which assembled the initial draft that formed the basis of the Council's subsequent work. For the full record of the Council, see 1 *DER PARLAMENTARISCHE RAT, 1948-1949: AKTEN UND PROTOKOLLE* (1975). For a general account of the Herrenchiemsee Conference, see 2 *DER PARLAMENTARISCHE RAT, 1948-1949: DER VERFASSUNGSKONVENT AUF HERRENCHIEMSEE* (1981). *See also* CIVIL ADMIN. DIV., OFFICE OF MILITARY GOV'T FOR GERMANY (U.S.), *DOCUMENTS ON THE CREATION OF THE GERMAN FEDERAL CONSTITUTION 64-77* (1949) (reprinting the Chiemsee Proposal and the draft of the Basic Law). Also important were the constitutions of the German Länder in the western occupation zones. For an overview, see HAROLD O. LEWIS, *NEW CONSTITUTIONS IN OCCUPIED GERMANY* (1948). For a succinct summary of the relationship between the constitutions of the Länder, the Herrenchiemsee Conference, and the Basic Law, see KOMMERS, *supra* note 88, at 7-8.

principle that we must learn the lessons of the mistakes of the Weimar Republic.”<sup>180</sup>

Of course, central among those mistakes was the failure to establish an adequate legal system for the protection of individual rights. In light of the Nazi experience, the drafters of the Basic Law thus placed the substantive catalogue of *Grundrechte*—“basic rights”—at the very beginning of the document, in Articles 1 through 19, to emphasize their centrality in the postwar regime.<sup>181</sup> The Basic Law’s other major innovation was the insertion of the so-called “eternity clause” in Article 79(3). This provision set forth that the core principles enunciated in Article 1 (the inviolable “dignity of man”; the “duty of all state authority” to protect that dignity; the inalienability of human rights; and the enforceability of the basic rights as positive law against all branches of government), along with those in Article 20 (the establishment of West Germany as “a democratic and social federal state”; the emanation of all public authority from the “people” exercised through elections; the separation of powers between the executive, legislative, and judicial branches), could not be rescinded even by constitutional amendment.

As Article 79(3) made clear, the drafters of the Basic Law of 1949 recognized that there existed a fundamental constitutional connection between the democratic structure of the state and the protection of the “dignity of man” through some form of separation of powers. The purpose of Article 79(3) was to prevent a momentary political majority (following the practice of the Reichstag of the Weimar Republic) from authorizing the executive or any other body to abrogate the separation of powers or constitutionally protected rights, even if that majority was of a sufficient magnitude to amend the constitution in order to grant such power. The Basic Law thus explicitly rejected the view, prevalent under Weimar, that parliament possessed “an unlimited competence, a *plenitudo potestatis* for constitutional change,”<sup>182</sup> even one that undermined the democratic character of the state itself through the abrogation of the separation of powers.

Additionally, the Basic Law provided for the establishment of a Federal Constitutional Court (*Bundesverfassungsgericht*) to act as the ultimate judicial guarantor of constitutional rights.<sup>183</sup> The existence of the

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180. KONRAD ADENAUER, MEMOIRS 1945-53, at 122 (Beate Ruhm von Oppen trans., Henry Regnery Co. 1966) (1965). The most comprehensive legal and political analysis of the Basic Law in light of the Weimar and Third Reich experiences remains FROMME, *supra* note 74.

181. This contrasted with the placement of the catalogue of protected rights at the end of the Weimar Constitution.

182. Thoma, *supra* note 86, at 154, translated in SCHWAB, *supra* note 57, at 70.

183. GRUNDGESETZ [GG] arts. 92-93. Originally, the legal standing to seek constitutional review was limited to state and federal bodies (executive, legislative, and judicial). But the organic statute adopted in 1951, establishing the Constitutional Court, extended standing to



Constitutional Court would remove any of the doubt that had existed under Weimar as to the capacity of the judiciary to enforce the provisions of the constitution against the legislature itself, or the executive exercising delegated legislative power, or indeed even against the “people” pursuant to Article 79(3). Carlo Schmid, the leader of the Social Democratic Party (SPD) faction in the Parliamentary Council and chairman of its “Main Committee,” aptly summarized the overall effect of these provisions:

The basic rights must govern the Basic Law; they must not only be an annex at the tail end of the Basic Law, as the list of basic rights of the Weimar constitution was a mere annex to it. These basic rights should not be mere phrases, statements and guiding principles . . . but directly applicable federal law, by virtue of which every individual German, every individual inhabitant of our country, can institute proceedings before the courts.<sup>184</sup>

In short, by virtue of the supremacy of the basic rights and the establishment of the Federal Constitutional Court, classical notions of unlimited popular or parliamentary sovereignty were a dead letter in postwar West Germany.

There were, however, other aspects of the Basic Law of 1949 that also reflected the demise of these notions. The drafters of the Basic Law were deeply concerned with preventing a return to the undisciplined nature of Weimar parliamentarism as they perceived it—particularly its chronic governmental instability, which was commonly regarded as one of the principal causes of the Nazi rise to power. As the first major legal commentary on the *Grundgesetz* stated, the members of the Parliamentary Council inserted a number of provisions into the Basic Law specifically “in view of the experiences with the Reichstag under the Weimar Constitution”—provisions that were designed to ensure “that the parliament would henceforth always be aware of its responsibility.”<sup>185</sup> That “responsibility” was twofold, and in some sense contradictory. First, the drafters sought ways to inhibit the ability of the parliament to interfere with the policymaking of the chancellor and the government, thereby rendering both institutions more politically secure in the face of any potential

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individual claimants as well, as long as they had exhausted all other judicial remedies. See § 90(1)-(2) Gesetz über das Bundesverfassungsgericht, v. 12.3.1951 (BGBl. I S.243, 245). In 1969, the Basic Law was amended (adding language to Article 93(1)) to recognize individual standing in the constitutional text as well. For a succinct summary, see KOMMERS, *supra* note 88, at 14-15.

184. Excerpts from the Speech of Dr. Carlo Schmid (SPD) at the Plenary Meeting of the Parliamentary Council Held in Bonn (Sept. 8, 1948), *translated in CIVIL ADMIN. DIV., supra* note 179, at 77, 79.

185. 1 HERMANN VON MANGOLDT, *DAS BONNER GRUNDGESETZ* 225 (1953), *quoted in MÖBLE, supra* note 74, at 31.

deterioration in parliamentary support. Second, the drafters sought ways to ensure that the parliament would not abdicate all of its legislative functions to the executive branch, as it had in 1933 with obviously disastrous consequences.

The provisions of the Basic Law designed to strengthen the political position of the chancellor and the government vis-à-vis parliament and the president of the republic have long been recognized for their critical importance to the stabilization of the postwar West German regime.<sup>186</sup> Apart from reducing the president's functions to a largely ceremonial role,<sup>187</sup> the key innovation in this regard was the so-called "constructive" vote of no confidence set forth in Article 67. This provision authorized the Bundestag to remove a chancellor only upon a vote by an absolute majority to elect a successor. Article 67 thus stood in stark contrast with the authority granted under Article 54 of the Weimar Constitution to the Reichstag, which authorized "destructive" votes of no confidence against individual ministers or the government as a whole, regardless of whether there existed any positive majority to elect an alternative. The new Article 67 by no means precluded changes in executive power initiated exclusively by parliamentary means without recourse to the electorate.<sup>188</sup> Nevertheless, the existence of Article 67 served to increase greatly the prospects that the chancellor originally presented to the voters (or a person of the same party coalition) would in fact serve as the chancellor over the course of the particular parliamentary term, protected from all but the most significant shifts in political support.

In this sense, Article 67 was a clear break with traditional notions of parliamentary predominance over the executive that had guided Article 54

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186. Along with federalism questions, much of the political and historical literature on the foundation of the West German republic has focused on those provisions in the Basic Law geared to reinforcing the chancellor's power against parliamentary factionalism. For early examples in English, see JOHN F. GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY* (1958); PETER H. MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* (1963); ELMER PLISCHKE, *OFFICE OF THE U.S. HIGH COMM'R FOR GERMANY, THE WEST GERMAN FEDERAL GOVERNMENT* (1952); and Carl J. Friedrich, *Rebuilding the German Constitution, II*, 43 AM. POL. SCI. REV. 704 (1949).

187. No longer would the president be popularly elected; rather, the occupant of that office would be elected by a "Federal Assembly" (*Bundesversammlung*) composed of the members of the Bundestag and an equal number of members elected from the parliaments of the Länder. GG art. 54. Thus, the federal president would lack any autonomous democratic legitimacy of the type that had caused such confusion under the Weimar Republic. Moreover, the president would possess no emergency legislative powers, which would instead be vested in the hands of the chancellor and the government, subject to control by the upper house, the Bundesrat. *Id.* art. 81.

188. In fact, the major power shifts at the chancellor level prior to 1998—i.e., those that ended the incumbencies of Adenauer in 1963, Ludwig Erhard in 1966, and Helmut Schmidt in 1982—occurred at the instigation of the minority coalition partner, the Free Democrats (FDP), and only the demise of Schmidt involved the use of Article 67 and the election of a new chancellor of a different political color, Helmut Kohl. It was not until the SPD government under Gerhard Schröder was elected in September 1998 that an incumbency (Kohl's) was actually ended at the ballot box.

of the Weimar Constitution. By reducing the degree to which the chancellor's political security depended on parliament, the Basic Law strengthened the direct linkage between the electorate and the chancellor, which in turn reinforced the plebiscitarian quality of Bundestag elections, at least insofar as executive leadership was concerned.<sup>189</sup> Thus, although the Basic Law reestablished a representative, parliamentary system of government in the western zones of occupation, that system was above all a *Kanzlerdemokratie*—a “chancellor democracy”—one dominated by the head of government.

One could note, moreover, an important sociopolitical side effect to this “hierarchically organised ‘chancellor democracy.’”<sup>190</sup> In postwar West Germany (just as in postwar France and Britain), the executive sphere became the central point of contact between the state and the emergent system of industrial lobbies and pressure groups that increasingly were an important feature of political life in the 1950s. Volker Berghahn has suggested that this nascent interest-group pluralism at the federal level in West Germany may be seen as the political aspect of a broader socioeconomic process of “Americanization” of West German industry in the postwar period. Associated with this process was an important evolution in West German political and constitutional culture: the receding of the “widespread uneasiness concerning interest groups” that was characteristic of a “‘conservative state theory’ and its view of the state as ‘the embodiment of the “commonweal” vis-à-vis particularist interests.’”<sup>191</sup>

Professor Berghahn suggests that the increasing acceptance of industrial involvement in the West German legislative and regulatory process flowed from an “infusion” of ideas into German political and academic circles that originated with “émigrés and refugee scholars from Nazism” who were familiar with the British and American systems.<sup>192</sup> A principal exemplar, according to Berghahn, was Carl J. Friedrich, the Harvard political scientist whose 1937 work *Constitutional Government and Politics* was translated into German in 1953 as *Der Verfassungsstaat der Neuzeit*. Friedrich emphasized the extent to which “occupational groups [were] beginning to play a role in the American governmental process,” and that the key challenge was “transforming them from mere pressure

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189. As a British political scientist has noted, “Each Bundestag election since 1949 has been a ‘chancellor election’ (*Kanzlerwahl*), in that the parties have entered the election as two rival groups, each with its own chancellor candidate.” David Southern, *The Chancellor and the Constitution*, in ADENAUER TO KOHL: THE DEVELOPMENT OF THE GERMAN CHANCELLORSHIP 20, 27 (Stephen Padgett ed., 1994); see also JEAN AMPHOUX, LE CHANCELIER FÉDÉRAL DANS LE RÉGIME CONSTITUTIONNEL DE LA RÉPUBLIQUE FÉDÉRALE D’ALLEMAGNE 374-86 (1962) (stressing “[e] caractère plébiscitaire des élections en Allemagne fédérale”).

190. VOLKER R. BERGHAHN, THE AMERICANIZATION OF WEST GERMAN INDUSTRY, 1945-1973, at 188 (1986).

191. *Id.* at 203 (translating H. SCHNEIDER, DIE INTERESSENVERBÄNDE 165 (1975)).

192. *Id.* at 201.

groups . . . into groups taking an active part and a measure of responsibility in the conduct of modern administration.”<sup>193</sup>

From the perspective of the regularization of interest-group politics in the postwar era, there were certainly lessons to be learned from the American example.<sup>194</sup> It would be wrong, however, to view the American postwar example solely from the perspective of the political regularization of interest-group involvement with regulatory decisionmaking. The American postwar example also shed important light on the specifically *constitutional* regularization of delegated legislative power—that is, its reconciliation with traditional notions of representative democracy embodied in the legislature—through the development of flexible constraints on the nature and scope of legislative delegation. Even in the United States in the 1930s and 1940s, where forms of administrative governance (and, therefore, of social-interest representation) were broadly recognized as a necessity in the modern state, there was still some degree of constitutional unease with regard to uncontrolled legislative delegation. The flexible principles of nondelegation that emerged in the decisions of the U.S. Supreme Court in the 1940s, even as they tolerated very broad transfers of authority to the executive, still reflected a residual belief in the elected legislature as the ultimate embodiment of the interest of the “people” as a whole, making that branch of government the presumptive locus of rulemaking power.<sup>195</sup> Much less than exemplifying a “conservative state theory,”<sup>196</sup> one could in fact say that the development of a workable nondelegation doctrine to protect the core functions of the legislative branch as the “people’s” representative was a specifically *modern* constitutional imperative.

This is something the drafters of the Basic Law recognized, which brings us, then, to the second aspect of the “responsibility” that the Basic Law sought to impose on the future West German parliament—one that

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193. CARL JOACHIM FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS* 471 (1937).

194. In the United States, in addition to the 1946 Federal Regulation of Lobbying Act—which Berghahn cited as a harbinger for similar changes in West Germany in the late 1950s, see BERGHAHN, *supra* note 190, at 202-03—there was also the adoption of the Administrative Procedure Act (APA) in the same year, see *Administrative Procedure Act of 1946*, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.); *Federal Regulation of Lobbying Act of 1946*, Pub. L. No. 79-601, 60 Stat. 839 (repealed 1995). Among the most important features of the APA was the establishment of a system of “notice-and-comment” rulemaking, which obligated agencies to give notice to the public of proposed regulations and allow the public (in practice, well-organized interest groups with strong stakes in the final form of the regulation) to comment on the proposed rules. See 5 U.S.C. § 553.

195. See, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *Opp Cotton Mills, Inc. v. Adm’r of the Wage & Hour Div. of the Dep’t of Labor*, 312 U.S. 126 (1941). These wartime cases took a much more lenient approach to the question of delegation as compared to the leading decisions handed down during the New Deal. See *supra* notes 167-169 and accompanying text.

196. See BERGHAHN, *supra* note 190, at 203 (translating SCHNEIDER, *supra* note 191, at 165); see also *supra* text accompanying note 191.

drew directly on the American example. The Office of the Military Governor of the United States interjected American nondelegation principles into postwar West German constitutional politics via its supervision of the drafting of the Bavarian state constitution, which served as a model for the Basic Law.<sup>197</sup> Article 80(1) of the Basic Law was the result. This provision authorized the federal parliament to empower the executive to issue *Rechtsverordnungen* (regulatory ordinances with the force of law); however, in a specific effort to prohibit a return to the Weimar practice of unlimited delegation, Article 80(1) further required that the enabling legislation itself specify the “content, purpose, and scope” (*Inhalt, Zweck, und Ausmaß*) of the executive’s normative authority. Thus, the new constitutional text attempted to strike a balance: Before corporatist negotiations could play themselves out in the administrative sphere, it was necessary that there be a traditional political mobilization in parliament in order to define *legislatively* the contours of the envisioned regulatory program.

The constitutional significance of Article 80(1) usually receives little notice outside the German legal literature, having been relegated apparently to the status of “lawyers’ law.”<sup>198</sup> This lack of general scholarly attention—and particularly historical attention—is unfortunate, given that the provision was specifically directed at a major flaw in the Weimar system: the absence of adequate legal or constitutional controls over the substance and process of legislative delegation. In some sense, the provisions of Article 80(1) can be understood as an effort to fuse the positions articulated by Triepel and Poetzsch in the 1920s with the American nondelegation doctrine from the mid-1930s. For example, perhaps the most influential West German commentary on the question of delegation in the early 1950s, written by Bernhard Wolff,<sup>199</sup> a leading professor of law and member of the Federal Constitutional Court until 1956, made explicit reference both to the position articulated by Poetzsch at the German Lawyers Congress in 1921<sup>200</sup> and to the American nondelegation doctrine: According to Wolff, in order to satisfy the requirements of Article 80(1), the enabling legislation must specify “the program, the state-political, legal-political, social-

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197. For a detailed discussion, see MÖBLE, *supra* note 74, at 55.

198. See, e.g., FROMME, *supra* note 74, at 138-39; MÖBLE, *supra* note 74, at 55; VON MANGOLDT, *supra* note 185, at 430-33; WOLFGANG ZOLLER, ÜBER DIE BEDEUTUNG DES ART. 80 GG: GEWALTENTEILUNGSGRUNDSATZ UND NORMENSETZUNG DURCH DIE VERWALTUNG (1971) (providing an extensive bibliography to the leading German constitutional commentaries). In English, see David P. Currie, *Separation of Powers in the Federal Republic of Germany*, 41 AM. J. COMP. L. 201, 217-25 (1993); and Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 228-38 (1994).

199. Bernhard Wolff, *Die Ermächtigung zum Erlaß von Rechtsverordnungen nach dem Grundgesetz*, 78 ARCHIV DES ÖFFENTLICHEN RECHTS 194 (1952).

200. *Id.* at 201.

political goal [*das staatspolitische, rechtspolitische, sozialpolitische Ziel*], which in English is expressed by the difficult-to-translate terms *policy* or *standards*.<sup>201</sup> Wolff's work also reflected Triepel's influence: Wolff argued that it was the legislature's duty, in the enabling act itself, to decide the precise subject that should be regulated, to determine the boundaries within which the regulation must operate, and to define the goal of the regulation.<sup>202</sup>

The decisions of the German Federal Constitutional Court in the early and middle 1950s reflected the strong influence of Wolff's interpretation.<sup>203</sup> As the court stated in 1951, in its first application of Article 80(1) to a proposed delegation,

[T]he Basic Law in this as in other respects reflects a decision in favor of a stricter separation of powers. The Parliament may not escape its lawmaking responsibilities by transferring part of its legislative authority to the executive [Regierung] without considering and precisely determining the limits of the delegated authority. The executive, on the other hand, may not step into the shoes of Parliament on the basis of indefinite provisions authorizing the promulgation of regulations.<sup>204</sup>

Of course, by its terms, Article 80(1) in fact *authorized* delegation and, in keeping with this authorization, the court unsurprisingly tried to uphold regulatory statutes by interpreting their provisions in a manner that conformed with constitutional requirements (an approach known in German as *verfassungskonforme Auslegung*). In its nondelegation jurisprudence, the court developed a series of legal tests that, on the one hand, placed limits on the executive's regulatory discretion while, on the other, generally allowing the court to uphold the delegation in question.<sup>205</sup> The court's case law also

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201. *Id.* at 197.

202. *Id.* at 198; see also MÖBLE, *supra* note 74, at 32-33 (describing Wolff's adherence to Triepel's position articulated at the German Lawyers Congress in 1921).

203. See MÖBLE, *supra* note 74, at 34 (citing *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 5, 77; and BVerfGE 2, 307 (334)).

204. BVerfGE 1, 14 (60), *translated in* Currie, *supra* note 198, at 218-19 (second alteration in original); see also MÖBLE, *supra* note 74, at 31-32. The decision arose out of a challenge to a provision "authorizing the Minister of the Interior to adopt any regulations 'necessary for the execution' of a statute respecting the rearrangement ('Neugliederung') of Länder in what is now Baden-Württemberg." Currie, *supra* note 198, at 218. The court struck down the delegation on the ground that the authorization was so indefinite that it was impossible to foresee when and how the delegated authority would be employed.

205. See generally BVerfGE 55, 207 (225-44) (describing in detail the history and tradition that had developed since the 1950s, in which the court had endeavored to find implicit limitations on legislative delegations that, on their face, open-endedly authorized the promulgation of regulations by the executive). The tests included the so-called *Vorhersehbarkeitsformel* ("foreseeability test"), which asked whether the substance of the executive's normative power was foreseeable in the statute itself; the *Selbstentscheidungsformel* ("self-decision test"), which asked whether the legislature had fulfilled its constitutional burden of deciding the limits and goals of

suggested that the constitutionality of a delegation could turn, at least in part, on whether the enabling legislation granted the Bundestag a post hoc veto over regulations adopted pursuant to the statute. The court viewed such a power as a necessary counterbalance to the expansion of the executive's normative authority brought about by the delegation itself.<sup>206</sup>

The postwar Article 80(1) jurisprudence also recognized, however, that there was an important relationship between delegation constraints and the protection of individual rights. Under the so-called *Wesentlichkeitstheorie*, or “theory of essentialness,” the court sought to protect what it believed to be the “essential” functions of the people's elected legislative representatives in the adoption of any legislative norms that might have an impact on constitutionally guaranteed rights or some other fundamental aspect of public policy. In a series of cases beginning in the late 1950s, the court determined that the Basic Law, rather than authorize delegation to the executive to adopt norms in these domains, required that the legislature formulate the controlling rules in the enabling legislation itself.<sup>207</sup> The foundation for this heightened normative obligation in the legislature was not Article 80(1) per se, but rather the Basic Law's structural commitment to a system of separation of powers under the rule of law, in which only the Parliament possessed the necessary “democratic legitimation” to decide questions of fundamental public policy.<sup>208</sup> In the court's estimation, the

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the regulatory regime; and the *Programmformel* (“program test”), which asked whether the enabling legislation defined the regulatory program with sufficient clarity.

206. See, e.g., BVerfGE 8, 274 (319-22). For a discussion of the court's view, see Currie, *supra* note 198, at 233. Under Article 80(2) of the Basic Law, the upper house of the German Parliament, the Bundesrat, also retains a right of veto that applies where certain specified interests of the several states of the federation (*Länder*) are implicated, regardless of the terms of the enabling legislation.

207. The leading decision was BVerfGE 7, 282 (302, 304), discussed in Currie, *supra* note 198, at 219. For a recent, well-publicized example of this approach to separation-of-powers questions, see the so-called “head scarf” decision, 2 BvR 1436/02, paras. 66-68 (Sept. 24, 2003), at [http://www.bverfg.de/entscheidungen/rs20030603\\_2bvr143602.html](http://www.bverfg.de/entscheidungen/rs20030603_2bvr143602.html) (under “2003 Sept.” hyperlink, followed by “24” hyperlink, followed by “2 BvR 1436/02” hyperlink). The court there held that, in the absence of legislation, a school district lacked the authority to exclude a Muslim woman teacher from employment because she insisted on wearing a head scarf while teaching. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 113-17 (1976) (holding that a rule issued by the Civil Service Commission barring aliens from employment violated the Due Process Clause of the Fifth Amendment, even if the same provision might have passed constitutional muster if enacted by Congress and signed by the President as legislation); Sunstein, *supra* note 9, at 337 (arguing that *Mow Sun Wong* may “stand for the proposition that under the Due Process Clause, and as a matter of constitutionally required ‘procedures,’ Congress or the President, not agencies alone, are required to make decisions affecting certain constitutionally sensitive rights and interests”). Elena Kagan has argued that *Mow Sun Wong* may also support the principle that, while an agency cannot make certain constitutionally sensitive decisions by itself, Congress or the President may do so. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2370-72 (2001).

208. MÖBLE, *supra* note 74, at 35. In this regard, Möble argues that the court opted for the even more restrictive position vis-à-vis delegation that had been advocated by Fritz Poetzsch at the German Lawyers Congress in 1921. See *id.* at 34-35 & n.115.

legislature's obligation to retain its "essential" functions was rooted directly in the constitutional guarantee of democracy:

The democratic legislature may not abdicate [its] responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will b[y] weighing the various and sometimes conflicting interests.<sup>209</sup>

There was of course a measure of elasticity and indeterminacy built into the *Wesentlichkeitstheorie*—the question of what exactly was an "essential" function of Parliament was itself subject to debate and critique.<sup>210</sup> Consequently, the court was often forced to proceed pragmatically, attempting to make principled distinctions based on the facts before it and the importance of the policy question at issue.<sup>211</sup> Nevertheless, regardless of whatever else one might say about elasticity and indeterminacy, the result over time was arguably a much firmer sense of the substantive reserve of normative power that belonged to the Parliament alone—the *Vorbehalt des Gesetzes*—about which German legal commentators had theorized for a half-century before 1933 but were unable to define except in the vaguest terms.

The difference in the emergent West German constitutional doctrine of the 1950s and later was that—armed with the principles of individual rights and separation of powers found in the Basic Law—West German lawyers, judges, and politicians now possessed far superior analytical tools to define what precisely that reserve included. Moreover, after 1949 there existed an institutional means to police the reserve's boundaries—the Federal Constitutional Court—in a manner conscious both of Germany's recent and terrible political history and of the necessities of executive and administrative governance in a modern welfare state.

#### B. *France: "It Is Now Advisable To Put Law in Accord with Fact"*

In France after the Liberation—just as in the western zones of occupation in Germany in the late 1940s—there was an effort to learn from

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209. BVerfGE 33, 125 (159), translated in Currie, *supra* note 198, at 224.

210. For an overview, see Dieter C. Umbach, *Das Wesentliche an der Wesentlichkeitstheorie*, in Festschrift Hans Joachim Faller 111 (Wolfgang Zeidler et al. eds., 1984).

211. See, e.g., BVerfGE 58, 257 (268-76) (distinguishing between a school's power to decide the circumstances in which a student must repeat a class—an instance where broader delegation was permissible—and those in which the student may be expelled—a matter that was determined to be sufficiently grave to implicate the legislature's "essential" functions). For a discussion of this case and the distinction it draws, see Kischel, *supra* note 198, at 231.



the constitutional mistakes of the past and to translate those lessons into new and more stable political structures. In contrast with the process of constitutional settlement in West Germany, however, the French struggle to establish a durable political order in the postwar era was a significantly more difficult and lengthy affair, perhaps owing to the ambiguity of France's wartime experience both as a collaborationist regime and (somewhat more mythically) as a source of republican resistance. The French process arguably did not conclude until the establishment of the Fifth Republic in 1958, and in important respects it continued thereafter.<sup>212</sup> In the interim, France had to endure the fits and starts of the Fourth Republic and its effective continuation of the repudiated constitutional practices of the interwar period.<sup>213</sup>

The Constitution of October 1946,<sup>214</sup> in sharp distinction with the constitutional laws of 1875, opened with a preamble on individual rights that self-consciously evoked the changed political and legal environment that followed "the victory of the free peoples over the regimes that attempted to enslave and degrade the human person."<sup>215</sup> The constitution's preamble incorporated by reference the "Declaration of Rights of 1789" as well as certain undefined "fundamental principles recognized by the laws of the Republic," seemingly conferring on these a constitutional status as well.<sup>216</sup> Additionally, the preamble listed a series of economic and social principles (notably labor and welfare rights) that were "most vital in our time,"<sup>217</sup> indicating France's desire to become, like the new Federal Republic of Germany, not merely a "democratic" but also a "social" state.<sup>218</sup>

Unlike the catalogue of rights that opened the West German Basic Law, however, the French constitution of 1946 did not specify whether these

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212. I am referring in particular to the advent of constitutional review of legislation in the 1970s. See *infra* note 221 and accompanying text. The constitutional amendment of 1962 that established the president's direct election, the first popular election of the president in 1965, and the election of a Socialist president and legislative majority in 1981, were also relevant in this regard.

213. For a detailed contemporaneous account of the similarities in the constitutional practices of the Third and Fourth Republics, see JACQUES GEORGEL, *LA RÉVISION CONSTITUTIONNELLE: LA 4<sup>E</sup> RÉPUBLIQUE À LA RECHERCHE D'UNE POLITIQUE GOUVERNEMENTALE* 29-126 (1959). See also PHILIP WILLIAMS, *POLITICS IN POST-WAR FRANCE: PARTIES AND THE CONSTITUTION IN THE FOURTH REPUBLIC* (1954).

214. An earlier draft of April 1946 was rejected by referendum, necessitating the election of a new Constituent Assembly. When quoting the Constitution of October 1946, this Article uses the translation of the French Press and Information Service contained in appendix X to FOUND. FOR FOREIGN AFFAIRS, FOUNDATION PAMPHLET NO. 2, *A CONSTITUTION FOR THE FOURTH REPUBLIC* (1947). This pamphlet also contains a detailed account of the politics leading up to the constitution's adoption.

215. CONSTITUTION du 27 octobre 1946, pmb., translated in FOUND. FOR FOREIGN AFFAIRS, *supra* note 214, app. X at 109.

216. *Id.*, translated in FOUND. FOR FOREIGN AFFAIRS, *supra* note 214, app. X at 109.

217. *Id.*, translated in FOUND. FOR FOREIGN AFFAIRS, *supra* note 214, app. X at 109.

218. *Id.* art. 1, translated in FOUND. FOR FOREIGN AFFAIRS, *supra* note 214, app. X at 110.

preambular rights or principles had any positive legal force that limited the exercise of state power in any way; French republican tradition in fact suggested to the contrary. It was only through the jurisprudential activism of the Conseil d'Etat over the course of the 1950s, supported by influential academic writers, that certain of these rights were given legal effect in the control of executive and administrative action (but not of legislation, given the Conseil d'Etat's lack of competence in this regard).<sup>219</sup> It was not until the founding of the Fifth Republic in 1958 that France established an institution external to the parliament—the Constitutional Council—to act as a control on the constitutionality of legislation.<sup>220</sup> Moreover, it would not be until 1971 that this body would actually strike down a piece of legislation for violation of an individual right—the freedom of association—that the Council found to be precisely one of the “fundamental principles recognized by the laws of the Republic” to which the constitution of 1946 had vaguely referred.<sup>221</sup>

The political and constitutional situation in France in the late 1940s was much less well-settled. A major source of the difficulty flowed from the lack of support for the institutions of the new republic from the two major political forces in the country in the immediate postwar years, the Gaullists and the Communists. Charles de Gaulle and his followers opposed the regime primarily on constitutional grounds, as outlined in de Gaulle's famous speech at Bayeux in June 1946, which called for the establishment of a strong executive power independent of parliamentary factionalism.<sup>222</sup> By contrast, the French Communist Party (PCF) was initially favorable to the new regime, joining with France's socialist party, the *Section française de l'Internationale ouvrière* (SFIO), and its Christian-democratic party, the *Mouvement républicain populaire* (MRP), in the tripartite coalition that

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219. See C.E. Ass., July 11, 1956, *Amicale des Annamites de Paris*, Rec. 317, concl. Lasry; C.E. Ass., July 7, 1950, *Dehaene*, Rec. 426, concl. Gazier; see also Jean Rivero & Georges Vedel, *Les principes économiques et sociaux de la Constitution: Le préambule*, 31 COLLECTION DROIT SOCIAL 13, 20 (1947). For a summary of the range of academic opinion, see PHILIPPE BRAUD, *LA NOTION DE LIBERTÉ PUBLIQUE EN DROIT FRANÇAIS* 309-11 (1968).

220. The constitution of 1946 provided for a “constitutional committee” within the legislature itself, but its jurisdiction was extremely difficult to invoke. See CONSTITUTION du 27 octobre 1946, arts. 91-93, translated in FOUND. FOR FOREIGN AFFAIRS, *supra* note 214, app. X at 123. For a detailed analysis of the constitutional committee mechanism under the Fourth Republic, see JEANNE LEMASURIER, *LA CONSTITUTION DE 1946 ET LE CONTRÔLE JURIDICTIONNEL DU LÉGISLATEUR* (1954).

221. Cons. const., July 16, 1971, D. 1972, 685. The preamble to the 1958 constitution incorporated the 1946 preamble by reference, hence the application of the “fundamental principles” language. For a detailed analysis of the historical foundations of the decision of July 16, 1971, see Peter L. Lindseth, *Law, History, and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49 (1996/1997).

222. De Gaulle had in fact earlier resigned as the leader of the provisional government in significant part because he had realized that it would be impossible to impose his constitutional views concerning the need for a strong executive. See SERGE BERSTEIN & PIERRE MILZA, *HISTOIRE DE LA FRANCE AU XXE SIÈCLE* 666-67 (1995); JEAN-PIERRE RIOUX, *THE FOURTH REPUBLIC, 1944-1958*, at 61-62 (Godfrey Rogers trans., Cambridge Univ. Press 1987) (1980).

would usher in the new constitution and govern France until the first months of 1947. The PCF's rupture with the regime came with the onset of the Cold War in the spring of 1947 and the expulsion of Communist ministers from the government in May of that year. By fall 1947, under instructions from the Soviet Union, the PCF undertook its part in the domestic opposition to American "imperialism," moving into open opposition to the regime and more particularly its acceptance of Marshall aid.

This rupture with the Communists came at an inauspicious time for France, because strike pressures had been building since the end of 1945 as a consequence of inflation, which resulted in demands for higher wages. During the "tripartite" period, the PCF's support for the regime had helped to alleviate these pressures because the largest trade union, the CGT, was largely under Communist control. But by the fall of 1947, when the PCF began its opposition, it encouraged strike actions that, over the course of the next several months, became increasingly violent confrontations.<sup>223</sup>

By the end of 1947, the institutions of the Fourth Republic thus found themselves in a precarious social and political situation, beset by violent strikes and opposed politically by the Communists and the increasingly powerful Gaullist movement. The two remaining parties from the tripartite coalition, the Socialists and the MRP, lacked a clear majority in the National Assembly and thus had to look to support from the various parties of the center-right, primarily Radicals and other holdovers from the Third Republic.<sup>224</sup> The resulting "third force" coalition (so called because it sat between the Communist and Gaullist extremes) was united in its defense of the new regime but little else, able to form ad hoc governments but finding it difficult to locate common ground on difficult questions of policy. The ideological incoherence among the "third force" parties, with the Socialists sympathetic to the wage demands of the workers while other members of the majority were wedded to more orthodox economic views, rendered it inevitable that the nascent Fourth Republic would be beset by continuing governmental instability.

In order to make effective policymaking possible in the face of repeated cabinet crises, governments of the Fourth Republic asked for, and with increasing regularity received, similar kinds of broad decree powers that had been granted to the governments of the Third Republic in the 1920s and 1930s. There was an evident irony in this seeming reversion to the Third Republic technique of the *décret-loi*, given the desire expressed in the referendum of October 1945 for a clean break with the past (ninety-six percent of the electorate voted against a return to the Third Republic). The

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223. BERSTEIN & MILZA, *supra* note 222, at 683-84; RIOUX, *supra* note 222, at 127-30.

224. RIOUX, *supra* note 222, at 161-62.

irony went even deeper, however, because one of the principal lessons that the postwar Constituent Assemblies appeared to draw from the experience of the interwar period was that legislative delegation in all its forms should be unconditionally prohibited. Article 13 of the constitution of 1946 provided: “The National Assembly alone shall vote the laws [*la loi*]. It cannot delegate this right.”<sup>225</sup>

Despite the seeming clarity of the constitutional prohibition on delegation, the Constituent Assembly in fact intended the text to be flexible. The debates in committee, for example, made clear that the notion of what constitutes “legislation” should be understood “in the formal sense and not in the material sense. That is to say the boundary between what is a matter for legislation and what is a matter for a decree may vary.”<sup>226</sup> The purpose of this intentionally ambiguous prohibition against legislative delegation was, therefore, to make the new constitution amenable to something approaching the formal interpretation that came to prevail in the interwar period (hence enabling the decree-laws).<sup>227</sup> This historical development led one commentator in the late 1940s to conclude that Article 13 constituted a “purely symbolic condemnation of the politics of decree-laws” that would have “no legal consequence for the future.”<sup>228</sup>

Subsequent developments would prove this prediction, in a sense, only half right. Although Article 13 did not pose any real obstacle to the expansion of the government’s normative powers over the course of the Fourth Republic, the presence of its broad (though ambiguous) prohibition meant that such powers could never be conferred or exercised without a measure of constitutional embarrassment and defensiveness. Consequently, as a matter of public law doctrine, governments of the Fourth Republic

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225. The language of the corresponding provision of the April draft (Article 66) was nearly identical: “The National Assembly alone has the right to legislate. It cannot delegate this right to any other body or person [*à quiconque*] in whole or in part.” LES CONSTITUTIONS DE LA FRANCE 242 (3d ed. 1996). The constitution committee of the second Constituent Assembly, elected in April 1946, chose not to revisit the question of decree-laws, inserting into Article 13 nearly the same language as found in Article 66 of the April draft. See Roger Pinto, *La loi du 17 août 1948 tendant au redressement économique et financier*, 64 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 517, 539 (1948). Thus, Pinto uses the debates surrounding Article 66 of the April draft as valid history for understanding the intent of the second Constituent Assembly in adopting Article 13, see *id.*, and the present Article takes a similar approach.

226. Pinto, *supra* note 225, at 539 (quoting ASSEMBLÉE NATIONALE CONSTITUANTE ÉLUE LE 21 OCTOBRE 1945, SÉANCES DE LA COMMISSION DE LA CONSTITUTION COMPTES RENDUS ANALYTIQUES IMPRIMÉS EN EXÉCUTION DE LA RÉOLUTION VOTÉE PAR L’ASSEMBLÉE, LE 2 OCTOBRE 1946, at 571 (1946) (statement of de Tinguy) (describing the corresponding provisions in the April draft, discussed *supra* note 225)).

227. For an incisive analysis of the ambiguity in Article 13 and its consequences, see GEORGEL, *supra* note 213, at 298-99. See also René Chapus, *La loi d’habilitation du 11 juillet 1953 et la question des décrets-lois*, 69 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 954, 1000 n.60 (1953) (citing sources).

228. Pinto, *supra* note 225, at 538.

struggled to distinguish the emerging practices of the late 1940s and 1950s from the old decree-laws of the 1920s and 1930s.

The first significant efforts along these lines were made in the summer of 1948, in the midst of the persistent economic and financial crisis that had plagued France for the prior year. The law of August 17, 1948,<sup>229</sup> offered an ingenious solution to the problem of Article 13: It simply redrew the boundary between the respective realms of legislation and regulation so that the government's exercise of normative power in certain specified areas would, by definition, fall outside the legislative domain. The statute provided that a whole range of matters were "by their nature" actually of "a regulatory character" and therefore could be dealt with in the future by governmental decree, even if such decrees modified or rescinded existing statutory law.<sup>230</sup> The scope of the law was extraordinarily large, affirming the government's regulatory power over a broad range of administrative, economic, and financial domains in the burgeoning postwar welfare state.<sup>231</sup> According to a published analysis of the Conseil d'Etat in 1954, somewhere in the vicinity of 350 decrees had been issued pursuant to the authority recognized under the law of August 17, 1948.<sup>232</sup> As René Cassin, the Conseil's presiding officer (*le vice-président*),<sup>233</sup> said in his introduction to the report, the statute "discharged the Parliament of secondary tasks that would have monopolized its attention to the detriment of vital questions."<sup>234</sup> The law thus had the merit "of giving some appreciable means to the regulatory power so as better to face the enormous extension of the attributions and the interventions of the state."<sup>235</sup>

Oddly, despite this extensive achievement and political importance, Cassin nevertheless termed the statute a "modest law."<sup>236</sup> His reason

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229. Law No. 48-1268 of Aug. 17, 1948, J.O., LOIS ET DÉCRETS, Aug. 18, 1948, p. 8082; B.L.D. 1948, 734.

230. *Id.* arts. 6-7.

231. The regulatory domains included: the organization of public services, whether under state control or subsidized by the state, as well as of other public establishments; the limitation or elimination of staff positions; the organization of nationalized enterprises or other establishments of a commercial or industrial character under the control of the state; rules regarding public assistance and other forms of welfare; conditions for the issuance of loans by the Treasury; the regulation of the securities markets; the equalization of exchange rates; price controls; the regulation of energy usage; and the allocation of raw materials and industrial products. *Id.* art. 7; *see also* Law No. 48-1477 of Sept. 24, 1948, J.O., LOIS ET DÉCRETS, Sept. 25, 1948, p. 9626; B.L.D. 1948, 872 (expanding the scope of Article 7 into certain types of taxation, social insurance, family allocations, and workers' compensation schemes), *reprinted in* Pinto, *supra* note 225, at 548.

232. *See* Georges Maleville, *Les décrets pris en application des articles 6 et 7 de la loi du 17 août 1948 tendant au redressement économique et financier*, in 8 ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 54, 56-96 (1954).

233. The Prime Minister is the ex-officio president of the Conseil, but almost never presides.

234. René Cassin, *Introduction* to 8 ETUDES ET DOCUMENTS DU CONSEIL D'ETAT, *supra* note 232, at 9, 12.

235. *Id.*

236. *Id.*

apparently lay less in the volume of the norms produced (which was obviously considerable) than in the law's purportedly "technical" quality and thus its legal timidity with regard to an open confrontation with the provisions of Article 13. As Cassin recognized, by 1954 other laws had been passed "conferring special powers on certain specified governments."<sup>237</sup> These newer laws carried even greater constitutional significance precisely because they sought to effect an explicitly "legislative" delegation, despite the prohibition in Article 13.<sup>238</sup> These laws depended on an important shift in prevailing understandings of the nature of Article 13's prohibition that would strongly influence the course of legislative delegation over the subsequent five years. The key development in this regard was an advisory opinion of the Conseil d'Etat issued February 6, 1953, which attempted to define the substantive limitations on the power to delegate in matters that indisputably fell within the *legislative* domain.<sup>239</sup>

The Conseil d'Etat found that Article 13 did not in fact exclude the possibility of legislative delegation; it simply suggested two broad limitations on the practice. First, there was a limitation as to *subject matter*. Looking not to the text of Article 13 itself but rather to the Conseil d'Etat's own earlier case law on the limits of administrative power,<sup>240</sup> the advisory opinion asserted that "certain matters are reserved to legislation," in particular those relating to the rights and liberties that the preamble to the 1946 constitution now incorporated by reference.<sup>241</sup> In adopting rules in these domains, the Conseil d'Etat found that, even as the legislature may authorize the government to "complete" the general norms set out in enabling legislation, the National Assembly was constitutionally obligated to formulate "the essential rules" itself.<sup>242</sup> (The parallel to the

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237. *Id.*

238. See, for example, Law No. 53-611 of July 11, 1953, J.O., LOIS ET DÉCRETS, July 11, 1953, p. 6143; B.L.D. 1953, 511, which conferred open-ended decree powers on the government of Joseph Laniel to confront the political and economic turmoil that had gripped France in the first half of 1953. As Jean-Pierre Rioux describes it,

In the spring of 1953, for the first time since the Liberation, the number of registered unemployed approached 100,000; farmers were hit by slumping food prices; and in their hardship the retailers looked back with envy to the days of inflation and easy profits. . . . This then was the disturbing economic background against which the crisis developed.

RIOUX, *supra* note 222, at 219. On the political side of the ledger, there was "a growing disillusionment" resulting from "the succession of political crises which laid bare the extent of the system's decay," the most immediate and notorious of which was the "36-day governmental interregnum of June-July 1953, the longest of the Fourth Republic, [which] made clear the impossibility of obtaining stable majorities from the Assembly elected in 1951." *Id.* at 221.

239. For the complete text of the opinion, see *Commission de la fonction publique, Avis. no. 60.497, 6 février 1953*, in LES GRANDS AVIS DU CONSEIL D'ETAT, *supra* note 127, at 63.

240. C.E., May 4, 1906, *Babin, Rec. 362*, concl. Romieu.

241. *Commission de la fonction publique, Avis. no. 60.497, 6 février 1953*, in LES GRANDS AVIS DU CONSEIL D'ETAT, *supra* note 127, at 64.

242. *Id.*

*Wesentlichkeitstheorie* of the German Federal Constitutional Court is notable.)

Second, and perhaps more importantly, the opinion noted a limitation as to the requisite *determinacy* of any attempted delegation, a limitation that flowed from the democratic character of the constitution itself. According to the Conseil d'Etat, the constitution would not allow the National Assembly to adopt enabling legislation that, "by its generality and its imprecision," amounted to an abandonment of "the exercise of national sovereignty."<sup>243</sup> As the opinion pointed out, under Article 3 of the 1946 constitution, this power belonged to the National Assembly alone as the sole constitutional representative of the people.<sup>244</sup> (Here, too, in its emphasis on the relationship between constitutional delegation constraints and the preservation of the democratic character of the political system, the doctrine articulated by the Conseil d'Etat in 1953 was strongly reminiscent of the simultaneously emerging position of the German Federal Constitutional Court.)

The aim of the Conseil d'Etat's advisory opinion was, it could be said, to overcome a basic tension that was at the center of the postwar struggle for a durable constitutional settlement, not just in France but elsewhere as well. On the one hand, the opinion recognized, at least implicitly, the *political* necessity of delegation in the modern welfare state—parliament simply lacked the time and expertise needed to produce the vast number of norms necessary to manage the economy. As one commentator concluded at the time, "[E]nabling acts are merely the recognition *de jure* . . . of [the] legislative role of the government."<sup>245</sup> This role extended not merely to the issuance of decrees and other forms of subordinate legislation, but also to the control of the legislative agenda and the drafting of statutes. On the other hand, the opinion explicitly recognized the need for a *legal* reconciliation of this inevitable recourse to delegation with the historically grounded understandings of democratic and constitutional governance, centered around the representative legislature. In the French case, this meant reconciling the broad transfers of normative power to the executive sphere with the notion of national sovereignty (explicit in Article 3 and implicit in Article 13) that the National Assembly was said constitutionally to embody.

Over the course of the 1950s, the increasing recourse to broad delegations to the executive—now termed *lois-cadres*, or "framework laws"—created a strong impression of a growing disconnect between political practice and the constitutional text. As Paul Reynaud stated in

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243. *Id.*

244. Article 3 of the 1946 constitution specified that "[n]ational sovereignty belongs to the people," and that "they shall exercise it through their deputies in the National Assembly."

245. Chapus, *supra* note 227, at 1003.

1955, “[I]n the present circumstances—perhaps they will be more grave in the future—the prohibition addressed by Article 13 of the Constitution to the National Assembly . . . cannot be respected and in fact is not so.”<sup>246</sup> In the final days of the Fourth Republic, in May 1958, with the crisis in Algeria exploding, the circumstances did indeed become “more grave.”<sup>247</sup> Unsurprisingly, the government then in power headed by Pierre Pflimlin proposed with some obvious understatement that it was now “advisable to put law in accord with fact” and thus to revise Article 13 as part of a broader program of constitutional amendment designed to give the government “the necessary means to govern.”<sup>248</sup>

In the summer of 1958, the job of constitutional revision of course fell not to the Pflimlin but to the newly established de Gaulle government, and more particularly to its Minister of Justice, Michel Debré. The result was, among other things, the constitutional redefinition of the respective realms of legislation and regulation in Articles 34 and 37 of the Constitution of October 1958, which were intended to define a sphere of “autonomous” regulatory powers belonging to the executive, free from any specific delegation.<sup>249</sup> To participants in the process of drafting the 1958

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246. Proposition Reynaud, No. 10,412, Assemblée Nationale (Mar. 15, 1955) (calling for the revision of the constitution), *quoted in* GEORGEL, *supra* note 213, at 302. For a sense of the political fallout from the Reynaud proposal (as well as from those of others in parliament), see 1 DOCUMENTS POUR SERVIR À L’HISTOIRE DE L’ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958: DES ORIGINES DE LA LOI CONSTITUTIONNELLE DU 3 JUIN 1958 À L’AVANT-PROJET DU 29 JUILLET 1958, at 11-99 (1987) [hereinafter 1 DOCUMENTS POUR SERVIR]. The remaining volumes in the series are: 2 DOCUMENTS POUR SERVIR À L’HISTOIRE DE L’ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958: LE COMITÉ CONSULTATIF CONSTITUTIONNEL DE L’AVANT-PROJET DU 29 JUILLET 1958 AU PROJET DU 21 AOÛT 1958 (1988) [hereinafter 2 DOCUMENTS POUR SERVIR]; and 3 DOCUMENTS POUR SERVIR À L’HISTOIRE DE L’ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958: DU CONSEIL D’ÉTAT AU RÉFÉRENDUM 20 AOÛT-28 SEPTEMBRE 1958 (1991) [hereinafter 3 DOCUMENTS POUR SERVIR].

247. For the prior two years, the partisans of *l’Algérie française* (those who demanded that Algeria remain permanently French and rejected the very idea of any negotiated solution with the insurgency over a changed status of the colony) had been growing increasingly hostile to the regime. On May 13, 1958, an uprising in Algiers led to the formation of a military *comité de salut public* with the stated aim of preserving French Algeria. This event precipitated de Gaulle’s return to power. For a succinct summary of the collapse of the Fourth Republic in May 1958, see RIOUX, *supra* note 222, at 300-13.

248. Projet de loi tendant à la révision de certains articles de la Constitution, adopté par le Conseil des ministres le 22 mai 1958, *in* 1 DOCUMENTS POUR SERVIR, *supra* note 246, at 225, 226.

249. Article 34 defined the competence of the parliament to extend to, *inter alia*, “fixing the rules” relating to individual rights and liberties, state finances, and several other not insignificant domains, like criminal law, as well as to defining the “fundamental principles” of other areas like the organization of the national defense. Under Article 37, however, all else was “regulatory” and thus (in principle) beyond the parliament’s power to affect directly by legislation. In this way, the constitution of the Fifth Republic appeared designed to deprive parliament of its former prerogative of “determining *souverainement* the competence of the regulatory power,” as the advisory opinion of the Conseil d’Etat in February 1953 had put it. *Commission de la fonction publique, Avis. no. 60.497, 6 février 1953, in* LES GRANDS AVIS DU CONSEIL D’ÉTAT, *supra* note 127, at 63. Moreover, even in strictly legislative domains, the parliament could delegate its



constitution, it was this redefinition that was recognized as “an absolutely key element of the whole system,”<sup>250</sup> a “capital innovation in French law,”<sup>251</sup> indeed, even a “revolution.”<sup>252</sup> Underlying this “revolution,” however, was an important political-cultural change, rooted in a transformation in prevailing understandings of the proper realm of politics belonging to the representative legislature and that of purportedly “nonpolitical” expertise (scientific, economic, financial, or organizational) belonging to a separate, technocratic sphere under the executive’s hierarchical supervision. In some sense, “a major imperative” of the new constitution was to “depoliticize” policymaking, to borrow the phrase used by Michel Debré when, as newly installed prime minister in January 1959, he presented the first government of the Fifth Republic to the National Assembly.<sup>253</sup>

This desired “depoliticization” depended, of course, much less on an actual transformation of political questions into technical ones than on their “displacement” into the administrative realm without altering their true nature.<sup>254</sup> In this sense, the notion of technocratic “depoliticization” provided a kind of ideological cover for the new regime, even as the difficult questions of balancing competing interests, allocating scarce resources, and choosing among potentially contradictory values continued to present themselves, only now in executive and administrative rather than legislative forums. The Article 34/37 distinction, because it was inscribed directly in the constitutional text itself, was simply an extreme example of a

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authority to the government to issue legislative ordinances for a limited period. See CONSTITUTION du 4 octobre 1958, art. 38.

250. Comité consultatif constitutionnel, séance du 8 août 1958 (matin), in 2 DOCUMENTS POUR SERVIR, *supra* note 246, at 275, 281 (statement of François Valentin) (referring to the corresponding provisions—Articles 31 and 33—of the draft under consideration by the Consultative Committee). For a copy of that draft, see Avant projet de constitution des 26/29 juillet 1958, in 2 DOCUMENTS POUR SERVIR, *supra* note 246, at 21, 27-28.

251. Note du 5 août 1958 de M. Michel Debré pour le général de Gaulle, in 2 DOCUMENTS POUR SERVIR, *supra* note 246, at 685, 687 (referring to the corresponding provisions—Articles 31 and 33—of the draft under consideration by the Consultative Committee, and more particularly to the revisions proposed by the Committee to that draft). For a copy of the proposed revisions to Articles 31 and 33, see Propositions de modifications adoptées par le Comité consultatif constitutionnel, in 2 DOCUMENTS POUR SERVIR, *supra* note 246, at 563, 581-84.

252. Comité consultatif constitutionnel, séance du 8 août 1958 (matin), *supra* note 250, at 282 (statement of Vice President René Dejean). As Guy Mollet made clear in a meeting between de Gaulle and other leading members of the government on June 13, 1958 (according to an account taken from Mollet’s own files), “[I]n the end governmental stability is less important than governmental authority and [thus] it is of capital importance to deal with the problem of separating the domain of regulatory power and the domain of legislative power.” *Compte rendu de la réunion constitutionnelle du 13 juin 1958*, in 1 DOCUMENTS POUR SERVIR, *supra* note 246, at 245, 247.

253. Marcel Merle, *Inventaire des Apolitismes en France*, in LA DÉPOLITISATION: MYTHE OU RÉALITÉ? 43, 51 (Cahiers de la Fondation Nationale des Sciences Politiques, Partis et Élections, No. 120, Georges Vedel ed., 1962).

254. The term is taken from BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS (1993).

more general effort undertaken throughout the major countries of Western Europe over the course of the middle third of the twentieth century. The aim of that effort was to define in legal terms an institutional space within which the purported lessons of science and expertise (along with the needs of corporatist negotiation) could be applied in relative freedom from parliamentary and party interference.<sup>255</sup>

It is important to stress, however, that the changes effectuated by Articles 34 and 37 proved to be less innovative than the constitution's drafters foresaw. After 1958, both the Conseil d'Etat and the Constitutional Council continued to recognize that the elected legislature enjoyed the central role in the French state's system of norm production, despite the contrary implication of the new constitutional text. The jurisprudence of both bodies built on a more classical understanding of legislative authority, one that viewed the legislative domain as reaching effectively all subject matters (and not just those spelled out in Article 34).<sup>256</sup> Similarly, both bodies continued to adhere to a less-than-novel understanding of the authority of the government as limited primarily to *mise en oeuvre*, or merely legislative implementation, rather than autonomous normative power itself. Thus, according to a leading French public law expert who has looked closely at the judicial decisions, "in the near totality of the cases" the determination of whether a matter fell within the legislative or regulatory domain usually turned on "the secondary or subsidiary nature of the question involved (and not [on] the nature of the matter concerned)."<sup>257</sup>

The Conseil d'Etat reinforced this understanding of the government's regulatory powers by subjecting norms produced pursuant to Article 37 to general principles of law as enforced under the *recours pour excès de pouvoir*.<sup>258</sup>

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255. This is not to assert that the needs of corporatist negotiation in the administrative sphere and the technocratic rationale for delegation amounted to the same thing: The latter in some sense built on the Hegelian ideal of the autonomous *pouvoir neutre* above social politics, whereas the former argued the inevitability of state-society interaction, albeit in a form updated to the needs of social interest representation. Rather, it is simply to assert that both impulses drove the relative marginalization of parliaments as loci of policymaking.

256. For an overview of the case law and an articulation of the claim that the decisions reflect a more classical understanding of legislative authority, see Louis Favoreu, *Les règlements autonomes n'existent pas*, 3 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 871 (1987).

257. *Id.* at 878.

258. Lindseth, *supra* note 3, at 148. With the adoption of the constitution of 1958, some observers argued that, given the purportedly "autonomous" character of the government's regulatory power under Article 37, it was no longer possible for the *juge administratif* to claim the authority to review the government's "autonomous" regulations on the basis of the general principles of law. In 1959, however, the Conseil d'Etat held that the general principles of law were also of a constitutional character, and that they were in fact superior to "autonomous" regulatory norms produced under Article 37. Thus, the *juge administratif* could draw on the general principles of law in the legal control "of all governmental action in a *recours pour excès de pouvoir*." *Id.* at 148 n.22 (citing C.E., June 26, 1959, *Syndicat général des ingénieurs-conseils*, Rec. 394, concl. Fournier).

In this way, despite the best efforts of de Gaulle and Debré, constitutional practice under the Fifth Republic reproduced essential elements of the postwar constitutional settlement that had manifested themselves elsewhere. Norm production in the new French administrative state would not be legitimated exclusively by executive oversight alone. Rather, both the legislature and the courts (in this case administrative tribunals headed by the Conseil d'Etat) continued to play key roles in mediating the legitimacy of the new form of administrative governance.

*C. Parliamentarism, Plebiscitarian Leadership, and Administrative Governance*

In the transformation of the Western European state from the 1920s to the 1950s, the parliament was generally regarded as the great institutional loser. Legislatures were broadly recognized as lacking the time, the expertise, and the political will needed to produce the kind of coherent and stable regulatory policy that a modern capitalist economy required. Thus, as a member of the British House of Commons observed in a debate on parliamentary procedure in 1966, the legislature had “surrendered most of its effective powers to the Executive.”<sup>259</sup> This sentiment was echoed in the *travaux préparatoires* of the French constitution of 1958: “In the contemporary political context, the functions of the government necessarily include the power to enact provisions of a general scope”—i.e., legislative provisions—whereas the “true mission of the Parliament is to control governmental policy” but, implicitly, not to define the details of that policy itself.<sup>260</sup> In many respects, the more notorious features of the 1958 constitution—those relating to the president of the Republic and the government—were simply designed to support a new division of authority between a purportedly “depoliticized” executive-technocratic sphere and an excessively “politicized” legislature.

The strengthening of the position of the French president in the constitution of 1958 (a process not fully realized until the constitutional amendment of 1962 establishing the president’s direct election) was in many respects aimed at effecting a shift in democratic legitimation out of the legislative and into the executive branch in order to support the new regulatory power.<sup>261</sup> In France, however, the purpose of constitutionally

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259. 738 PARL. DEB., H.C. (5th ser.) (1966) 479 (statement of Richard Crossman, M.P.).

260. Jérôme Solal-Céligny, *Projet d'exposé des motifs de l'avant-projet de Constitution soumis au Comité consultatif constitutionnel le 29 juillet 1958*, in 1 DOCUMENTS POUR SERVIR, *supra* note 246, at 521, 524.

261. As Michel Debré argued before the Conseil d'Etat, future governments would “issue” from the president, as head of state, and then be “responsible” before the parliament. *Allocution de M. Michel Debré, garde des Sceaux, ministre de la justice* (Aug. 27, 1958), in 3 DOCUMENTS POUR SERVIR, *supra* note 246, at 255, 257.

reinforced executive power went beyond these legitimacy concerns. Speaking to the universal suffrage committee of the National Assembly on June 1, 1958, the French Socialist leader, Guy Mollet, argued that the instability of the Fourth Republic had made it practically impossible, “in the face of our partners, of our allies and our adversaries, . . . to hold to any engagements whatsoever, [or] to establish a durable policy.”<sup>262</sup> It was for this reason that Mollet defied his party and joined de Gaulle’s government as minister of state on constitutional questions, a move no doubt in part motivated by his own experience with governmental instability as prime minister in 1956 and 1957. De Gaulle’s constitutional proposals were specifically designed to respond directly and explicitly to this need for more credible policy commitments (to use modern game-theoretic language).<sup>263</sup> Thus, while the government remained responsible before the National Assembly, the conditions under which censure motions could be tabled against it were now significantly restricted.<sup>264</sup> The Prime Minister and the executive further gained a number of powers that could be used against parliament, such as control of the legislative agenda and extensive procedural rights vis-à-vis amendments to legislation that the executive did not support.<sup>265</sup>

Similar trends toward executive predominance over the legislature also manifested themselves in West Germany, where, under the strong-willed leadership of Adenauer in the 1950s and supported by several provisions of the Basic Law of 1949, there emerged the hierarchically structured “chancellor democracy.”<sup>266</sup> This German label is suggestive of a basic

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262. Procès-verbal de la commission du suffrage universel de l’Assemblée nationale, 1er juin 1958, in 1 DOCUMENTS POUR SERVIR, *supra* note 246, at 141, 155. Mollet was perhaps referring here to the greatest failure of France’s European policy in the 1950s, the European Defense Community, which the French government proposed and negotiated (with a vote of support from the Assembly) but then, due to shifts in the parliamentary majority, was unable to get ratified.

263. See ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 9 (1998) (arguing that member state decisions to delegate to the supranational level in the European Community “are best explained as efforts by governments to constrain and control one another—in game-theoretical language, by their effort to enhance the credibility of commitments”).

264. CONSTITUTION du 4 octobre 1958, arts. 49-50.

265. *Id.* arts. 44, 48.

266. From the standpoint of consolidating political power in the hands of the chancellor, of particular importance was the so-called *Richtlinienkompetenz* under Article 65 of the Basic Law, whereby the chancellor had sole authority to define “the general policy guidelines” for the government. Armed with the greater political security that flowed from the “constructive” vote-of-no-confidence provision of Article 67—and therefore also from the explicit constitutional identification of the government’s collective responsibility and policy with the person of the chancellor—Article 65 could become a powerful weapon. The standing orders of cabinet procedure further reinforced the chancellor’s central political role. For example, public statements of ministers had to be in accordance with the guidelines, and the chancellor was given extensive rights to receive information from other ministries to ensure that the guidelines were in fact being followed. Of similar effect was the establishment of certain important governmental institutions, notably the Federal Chancellor’s Office (*Bundeskanzleramt*) and the Press and Information Office

attribute of postwar governance throughout the major countries in Western Europe, in which the head of the executive not only took on the predominant role in defining the real substance of regulatory policy, but now also became, in many respects, the focus of the democratic aspirations of the people, displacing the role that traditional conceptions of parliamentary democracy had assigned to the elected legislature.<sup>267</sup>

This semi-“presidentialization” of the parliamentary system (explicit in the French case in 1958 and implicit in the British and West German cases) seemed to embody several of the characteristics of the “plebiscitarian leadership democracy” that Max Weber had called for in Germany in 1917-1918<sup>268</sup>—albeit without some of the contradictions inherent in his “heterogeneous constitutional ideas,” which would manifest themselves in the waning days of the Weimar Republic.<sup>269</sup> Parliamentary institutions, in Weber’s political thinking, had a twofold function: first, as a training ground for charismatic political leaders capable of projecting national power on the international level; and second, as an organ of control of the administrative bureaucracy.<sup>270</sup> For Weber, the very purpose of the combination of plebiscitarian leadership and parliamentary control was, to quote Wolfgang Mommsen’s authoritative gloss on Weber’s political views, to counteract “the progressive bureaucratization of all institutional

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of the federal government, as well as an array of cabinet committees, all of which helped to coordinate policy from the center. *See generally* Southern, *supra* note 189.

267. Italy stands out as the notable exception, given the much greater importance of party politics as opposed to charismatic executive leadership in the formation of governments in postwar decades. The reasons for this Italian peculiarity are too complex to consider fully in this Article.

268. *See generally* MOMMSEN, *supra* note 17, at 183-88; 3 MAX WEBER, *Parliament and Government in a Reconstructed Germany (A Contribution to the Political Critique of Officialdom and Party Politics)*, in *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 1381 (Guenther Roth & Claus Wittich eds. & Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1922).

269. MOMMSEN, *supra* note 17, at 344. One might query, however, whether such “heterogeneous ideas” have, over time, impeded the operation of the French constitution of 1958, particularly in the confusing episodes of *cohabitation* between a popularly elected president of one political coloration and a legislative majority, and therefore prime minister, of the other.

270. In Weber’s estimation, this second function was “parliament’s decisive task.” *Id.* at 170 (internal quotation marks omitted); *see also id.* at 338; WEBER, *supra* note 268, at 1417 (“Parliament’s first task is the supervision of [the heads of the bureaucracy].”). Otherwise, Weber’s aim was to construct a constitutional system that, in Wolfgang Mommsen’s words, would “permit a great leader’s plebiscitary-charismatic rule within the framework of a parliamentary system.” MOMMSEN, *supra* note 17, at 345. Carl Schmitt would later radicalize the notion of plebiscitary leadership to rationalize the transformation of the Weimar Republic into dictatorship, but his views deviated from those of Weber in two critical respects: First, Weber always insisted, unlike Schmitt, on genuine parliamentary control as a fundamental condition of plebiscitarian leadership. *See* WOLFGANG J. MOMMSEN, *Politics and Scholarship: The Two Icons in Max Weber’s Life* (Gary T. Miller trans.), in *THE POLITICAL AND SOCIAL THEORY OF MAX WEBER: COLLECTED ESSAYS* 3, 17 (1989). Second, again unlike Schmitt, Weber would refuse to place his faith in an “administrative state” in which the chief executive ruled in conjunction with an unelected and otherwise unaccountable bureaucracy. *See* MOMMSEN, *supra* note 17, at 387 (citing CARL SCHMITT, *LEGALITÄT UND LEGITIMITÄT* 17 (1932)).

forms,” while “preserving intact a dynamic order of politics and thus at the same time political freedom.”<sup>271</sup> For this reason, in addition to the concentration of greater governing authority in the executive, Max Weber would have likely welcomed several central features of the reconciliation of administrative governance and parliamentary democracy in postwar Western Europe, including judicially enforced delegation constraints, parliamentary vetoes over regulations, and the doctrine of ministerial responsibility as the foundation of the government’s hierarchical oversight of the administrative sphere. These features of postwar administrative governance reflect how the parliament and the executive in postwar Western Europe came to share responsibility for the democratic legitimation of administrative power in the modern welfare state. Together they provided the necessary degree of connectedness between the bureaucratic apparatus and the “people” as a whole so that the system could still be understood as “democratic” in some historically recognizable sense.

This form of shared political oversight by the legislature and executive (with the executive of course taking the plebiscitarian lead) was not, however, the sole means of legitimizing administrative power. Developments in postwar public law reflected the recognition that one could easily overestimate the capacity of the government and parliament to supervise and control the administrative sphere in a hierarchical sense.<sup>272</sup> In Britain, for example, despite the absence of judicially enforceable constraints on delegation, the British courts arguably came to serve a similar legitimizing function as they did in France and West Germany, although initially the British courts appeared to be reluctant to assume this role.

In the ten years after 1945, the British courts showed a remarkable degree of deference toward the exercise of normative power outside the parliamentary realm.<sup>273</sup> The judicial approach changed significantly, however, in the decade after the passage of the Tribunals and Inquiries Act of 1958, in which the courts abandoned their deferential attitude in favor of

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271. MOMMSEN, *supra* note 270, at 13.

272. Mommsen accuses Weber of precisely this mistake, although he then alludes to Weber’s “repeated proposals” to expose policymaking within the bureaucracy “to the clear light of publicity through judicial complaints.” MOMMSEN, *supra* note 17, at 170. Perhaps in this limited respect it is Mommsen who fails to appreciate the nuances of Weber’s position, which clearly recognized the complementary relationship between political oversight (both executive and legislative) and judicial control over administrative action in the modern state.

273. This led to a series of disturbing precedents regarding the limited application of principles of natural justice, *see, e.g.*, *Ali v. Jayaratne*, [1951] A.C. 66 (H.L.); *R. v. Metro. Police Comm’r ex parte Parker*, [1953] 1 W.L.R. 1150 (Q.B.), deference to the discretionary powers of the administration, *see, e.g.*, *Robinson v. Minister of Town & Country Planning (In re City of Plymouth (City Centre) Declaratory Order, 1946)*, [1947] 1 K.B. 702, and a broad reading of statutory provisions precluding judicial review, *see, e.g.*, *Woollett v. Minister of Agric. & Fisheries*, [1955] 1 Q.B. 103.

more active scrutiny of delegated normative power.<sup>274</sup> Thus, “after a decade of quiescence, the British courts began to assert their place in the post-war constitutional settlement . . . by becoming more active defenders of individual rights in the face of executive and administrative action, albeit within the confines imposed by British constitutional tradition”<sup>275</sup>—a tradition that obviously did not permit the judiciary to enforce any delegation constraints (except, perhaps, through narrow readings of enabling legislation).

The augmented judicial role throughout Western Europe was not simply a consequence of the experience of 1933-1945 and the necessity of independent protections of private autonomy and human rights against the excessive pretenses of state power. Rather, there was also a functional reason for the increase in judicial controls: Given the growing regulatory and interventionist ambitions of the welfare state, administrative agents who operated under the auspices of the executive came to enjoy, as a consequence of organizational complexity (if not also of formal legal right), a significant degree of effective independence. This “agency autonomy” undermined the capacity of hierarchical-political control by ministers or parliament—i.e., the democratically legitimate “principals” in the system—and thus created the need for an alternative kind of commitment mechanism to ensure compliance with legislative and constitutional requirements.<sup>276</sup> Judicial controls served this purpose, even as the activities of the courts were normally rationalized in terms of the protection of individual rights, consistent with the constitutionalist ethos of the postwar period.

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274. A now-famous series of major cases would reinvigorate the application of principles of natural justice, *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), impose much stricter judicial limits on ministerial discretion, *Comm’rs of Customs & Excise v. Cure & Deeley Ltd.*, [1962] 1 Q.B. 340, give a much more narrow reading to preclusive clauses, *Anisminic Ltd. v. Foreign Comp. Comm’n*, [1969] 2 A.C. 147 (H.L.), and more generally use the doctrine of *ultra vires* to review a broad range of administrative illegalities, see SCHWARTZ & WADE, *supra* note 25, at 299-300. For a detailed historical consideration of the increasing judicial activism of the early 1960s, see JOHN GRIFFITH, *JUDICIAL POLITICS SINCE 1920: A CHRONICLE* 79-109 (1993).

275. Lindseth, *supra* note 3, at 149.

276. This demand for an alternative commitment mechanism is aptly demonstrated by the reforms that ensued in Britain following the so-called “Crichel Down affair,” the details of which need not concern us here. (For a contemporaneous overview, see J.A.G. Griffith, *The Crichel Down Affair*, 18 MOD. L. REV. 557 (1955). See also ALLEN, *supra* note 175, at 343-46.) Although the affair did not itself directly involve an administrative tribunal, it did expose problems relating to administrative secrecy, organizational complexity, the lack of clear lines of authority, and the opportunities for unfairness that these factors created (all problems said to afflict the system of administrative justice as well). To quell the public outcry that flowed from the affair, the British government established a Committee on Administrative Tribunals and Enquiries (the “Franks Committee”) in November 1955 to examine the question of administrative justice, which led directly to the passage of the Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66. This statute was designed to regularize the system of administrative adjudication and prompted a significant change in judicial attitudes regarding the control of administrative action. See *supra* notes 273-275 and accompanying text.

IV. THE CONDITIONS FOR CONSTITUTIONAL STABILITY IN THE  
TWO POSTWAR ERAS: MEDIATED LEGITIMACY IN THE  
GERMAN AND FRENCH ADMINISTRATIVE STATES

The process of constitutional settlement of the administrative state from the 1920s to the 1950s, which this Article describes in the cases of France and Germany/West Germany, arguably paralleled the more general socioeconomic and sociopolitical stabilization throughout Western Europe over the same period. The American historian Charles Maier described this process in his seminal essay, *The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe*.<sup>277</sup> In that rightly famous piece, Maier asserted that “[b]oth postwar periods . . . formed part of a continuing effort at stabilization, a search that was sufficiently active and persistent (and rewarded finally with sufficient success) to comprise a major theme of twentieth-century Western European history.”<sup>278</sup>

According to Maier, the major sociopolitical achievement of this period was the incorporation of “a large enough segment of the working classes” into the political and economic order of modern capitalism.<sup>279</sup> This achievement paralleled, Maier believed, “the major sociopolitical assignment” of the nineteenth century, which was “the incorporation of the middle classes and European bourgeoisie into the political community.”<sup>280</sup> Maier’s analysis further suggested (albeit without significant elaboration) that this process of stabilization also had an important constitutional dimension: “The institutional device for [the incorporation of the middle classes and European bourgeoisie into the political order of] the nineteenth century was parliamentary representation [while] the institutional foci for the twentieth-century achievement included trade unions, ambitious state economic agencies, and bureaucratized pressure groups . . . .”<sup>281</sup>

Maier’s work has had much to say about the political economy of corporatism in the twentieth century, but he has generally avoided any systematic analysis of the legal and constitutional underpinnings of the “ambitious state economic agencies” within which much of the corporatist negotiation at the core of his analysis was supposed to be taking place.<sup>282</sup>

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277. CHARLES S. MAIER, *The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe*, in *IN SEARCH OF STABILITY: EXPLORATIONS IN HISTORICAL POLITICAL ECONOMY* 153 (1987).

278. *Id.* at 161.

279. *Id.* at 184.

280. *Id.*

281. *Id.*

282. The effect of disciplinary boundaries on the scope of historical analysis cuts both ways. A German legal and political historian, in a contribution on “parliamentary legislation as a form of democratic decision making,” recently pointed out that legal history written in the legal academy generally restricts itself to “dogmatic problems of legislation,” whereas writings by mainstream historians generally focus on “political history, without taking the legislative form as a ‘thematic



The aim of the present Article has been to show that, just as Maier may fairly speak of the major sociopolitical achievement of twentieth-century Europe as being the incorporation of the interests of labor into the economic and political order of modern capitalism, the counterpart to this achievement in constitutional culture was the reconciliation of administrative governance with the principles of parliamentary democracy developed over the course of the nineteenth century. It was only after this constitutional reconciliation—most importantly, through the abandonment of notions of unchecked parliamentary supremacy in favor of constitutional delegation constraints—that Maier’s “ambitious state economic agencies” could effectively operate in a newly stabilized and self-confident political and legal system, a process that undoubtedly reinforced the socioeconomic and sociopolitical stabilization that Maier has attempted to describe.

The argument presented here elaborates on the position that Maier originally suggested in his 1975 monograph, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade After World War I*.<sup>283</sup> That study—itsself a pillar of the historiography of early twentieth-century Western Europe—identifies parliamentary institutions as the cornerstone of the “bourgeois Europe” that Maier argues was “recast” in the 1920s and after. In this period, “[p]arliamentary decision making . . . [became] increasingly a shadow play for corporatist settlements,” a process that “did not destroy parliamentarism, but . . . did suggest an inner hemorrhaging of its former strength.”<sup>284</sup> The declining “representational capacity” of political parties in turn “forced a relocation of the agencies of consensus and mediation” to administrative agencies,<sup>285</sup> making the administrative sphere the principal forum for the new kind of corporatist politics among interest groups and executive officials that *The Two Postwar Eras* asserts would ultimately triumph after 1945.

There is a risk, however, in placing too much emphasis on corporatist negotiation as a form of governance in the twentieth century without thoroughly exploring the constitutional-cultural debates, particularly as to the proper scope of executive and administrative power, that the emergence of such governance engendered. An exclusively sociopolitical and socioeconomic analysis of the new form of governance suggests that the traditional branches of constitutional government—notably the parliament—had been largely displaced in the legitimation of the state’s regulatory output, which now depended almost entirely on corporatist deals

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hook’ [*thematischen Aufhänger*].” Christoph Möllers, *Das parlamentarische Gesetz als demokratische Entscheidungsform—Ein Beitrag zur Institutionenwahrnehmung in der Weimarer Republik*, in *DEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK* 415, 417 n.4 (Christoph Gusy ed., 2000).

283. MAIER, *supra* note 34.

284. *Id.* at 515.

285. *Id.*

negotiated in the executive and administrative spheres. However, if one extends Maier's historical analysis into the decades following World War II and then supplements it with a more specifically legal-constitutional perspective, what one finds is that the normative output of the executive and administrative spheres, even in conjunction with corporatist negotiation, never gained an independent capacity for democratic legitimation. The constitutional legitimacy of the old *trias politica* (legislative, executive, and judicial) reasserted itself, albeit in a modified form that took cognizance of the demands of governance in the welfare state. Maier himself would later effectively concede this point, acknowledging in the preface to the 1988 reprinting of *Recasting Bourgeois Europe* that, "once fascism had lost its political appeal, parliamentary representation was required for legitimacy."<sup>286</sup> Legal controls enforced via administrative litigation would serve a similar legitimizing function. By necessity, the normative output of the administrative state still needed to be channeled through political and judicial bodies that were understood to possess a constitutional legitimacy in some historically recognizable sense; negotiation among executive politicians, administrative officials, and corporatist interests was not enough.

These features of postwar administrative governance reflect how all three traditional constitutional branches—the parliament, the government, and the courts—came to share responsibility for the democratic legitimation of administrative power in postwar Western Europe. For Western Europeans struggling, as Alan Milward put it, for a "new form of governance" to meet the needs of the modern welfare state,<sup>287</sup> the legal and constitutional lesson of the 1920s to the 1950s had been twofold: first, that executive and administrative power was essential to the success of the welfare state; and second, that such power must be counterbalanced by parliamentary and judicial checks. The three traditional constitutional branches remained as separate *mechanisms of legitimation*—legislative, executive, and judicial—"even if the concentration of authority in the executive branch [from the 1920s to the 1950s] seemed to signify a 'fusion' rather than a 'separation' of powers in the traditional sense (as Schmitt claimed)."<sup>288</sup>

It was the persistence of the separation of mechanisms of legitimation that allowed the postwar state to surmount what Schmitt had asserted was "insurmountable,"<sup>289</sup> while also allowing it to claim a democratic-

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286. CHARLES S. MAIER, *RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I*, at xi (6th prtg. 1988).

287. MILWARD, *supra* note 36, at 4.

288. Lindseth, *supra* note 3, at 150.

289. Schmitt, *L'évolution récente du problème des délégations législatives*, *supra* note 50, at 204.

constitutional legitimacy in a historically recognizable sense. The branches of government that enjoyed constitutional legitimacy inherited from the past—whether democratic (i.e., executive or legislative) or judicial—became conduits through which the legitimacy of the new forms of administrative governance could be *mediated*. This sort of mediated legitimacy provided the foundation for a workable reconciliation of historical notions of republican parliamentarism (which continued to regard the elected legislature as the cornerstone of self-rule) with the executive-technocratic reality of the administrative state in the 1950s. As in the United States—albeit in a different way owing to distinctions between the presidential and parliamentary regimes—such mediated legitimation helped to maintain the connection between each of the historical institutions of legitimate constitutional government “and the paradigmatic function which it alone is empowered to serve.”<sup>290</sup> But, perhaps more importantly, it allowed Western Europeans to “retain[] a grasp” on the emergent forms of administrative governance in ways that respected their newfound “commitments to the control of law.”<sup>291</sup>

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290. Strauss, *supra* note 13, at 493.

291. *Id.*