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A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?

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Introduction

One of the most important elements in constitutional theory is the principle of separation of powers.[1] We are taught that since we—the people, or in economic analysis language, the principals—cannot all govern, or exercise the entire collective decision-making power that is needed in a society, we ought to deposit the governing power in the hands of representatives, namely, agents. One of the essential tools designed to prevent these agents from abusing this power is its division into different functions, to be exercised by different branches of government with different representation structures that can check and balance each other.[2]

The perception of a judiciary as a separate branch of government and the call for its independence are an inherent part of the current view of the doctrine of separation of powers and its rationales mentioned above, though they first emerged as a pragmatic result of the power struggles between King and Parliament in 17th-century England and as a natural process of professional specialization.[3] Only subsequently did thinkers adopt and advocate the notion of an independent judicial branch of government. Blackstone can be considered the pioneer,[4] and he was followed by the American Founding Fathers, who saw the judiciary as "the bulwarks of limited constitution against legislative encroachments."[5]

But does separation of powers really fulfill this task of, in economic terms, lowering agency costs? And if so, why do the current holders of power—the agents—go along with this separation? Does an independent judiciary really carry out the normative tasks it has been assigned? And if it does, why do we, in fact, have such an institution? This paper is intended to address a small portion of these queries, focusing on the judicial branch of government, its interrelations with the legislature, and on the question: Why do we find an independent judiciary as an almost universal phenomenon in democratic countries? I will try to answer this question by offering a positive analysis of the independence of the judiciary, based on the foundations of the Public Choice theory.[6] The paper will attempt to depart, however, from the mainstream Public Choice literature, which is often tailored to fit a particular legal-political system (usually the American), by trying to capture a phenomenon common to a vast majority of, if not all, democratic regimes.[7] One consequence of this broad

perspective is that the explanation for this phenomenon is necessarily very general and begs further analysis for proper application to each specific legal system.

This paper can be read against a background of an implicit debate within the Law and Economics/Public Choice movement with regard to the positive analysis of the doctrine of separation of powers, and by deduction also with regard to the positive analysis of the independence of the judiciary. On one side of this debate we can find, among others, Richard Epstein, Jerry Mashaw, and Jonathan Macey endorsing the traditional "demonopolization" view of separation of powers and portraying the judiciary as one mechanism that operates to balance and control the legislative and executive branch, and hence as an obstacle to rent-seeking activity and interest-group legislation.[8] On the other side, we may point to William Landes, Richard Posner, Frank Easterbrook, Robert Tollison, and Mark Crain, who hold a "revisionist" or skeptical view of separation of powers, arguing that the structure of government, including the independence of the judiciary, serves politicians and interest groups to maximize their gains from legislative contracts.[9] My view, as will be apparent from this paper, is closer to the latter approach, though it does not bear the grim normative conclusions that appear to be emerging from the revisionist view of separation of powers.

Since the *independence of the judiciary* is a vague term, the interpretation of which varies among different legal systems and different scholars, the first part of this paper will offer a tentative meaning for it, which is based on an analytical definition of the term *independence*. This will provide the basis for the description, in the second part of the paper, of a general phenomenon that is part of the notion of the independence of the judiciary: a gap between what I call the *structural* independence of the judiciary and its *substantive* independence. The third part of the paper will offer an explanation for this phenomenon. I will argue there that it is in the interest of the nucleus political decision-making unit, primarily legislators, and in the interest of the legislature and the government[10] as collective decision-making institutions, to maintain an independent judiciary to which they can delegate legislative and other public decision-making powers, because this delegation assists in maximizing their political support and chances of reelection. This section will be followed by concluding remarks.

What Is Judicial Independence?

A great deal of literature has been written on the independence of the judiciary: Is the judiciary in a particular legal system independent? What are the desirable components of this independence?, etc. Although most writers point to the desirability of judicial independence and attack measures that may curtail it, one hardly comes across any attempt to specify what exactly judicial independence is.[11] What follows is an attempt at a tentative definition, with the general term *independence* as a departure point.

The general term *independence* comprises, in my view, three necessary components: the *subject* of independence, the *object* of independence, and the *nature* of independence. The subject of independence can be either a person (or a group of persons) or an institution. Thus when we say that Virginia is independent (or has independence), we may be referring to a specific person or to the American state. The object of independence, although not always mentioned explicitly, is an essential part of the concept. When we say that someone or something is independent, even if we do not specify that it is independent from x or y, we always refer to the independence as

related to an object. The meaning of the sentence "Virginia is independent" is dependent on the context. If Virginia is a 6-year-old child, the object may be her parents, her teachers, etc. If Virginia is a government minister, the object may be the prime minister, the party, or the public. If Virginia is the state, the object may be the president, Congress, or the United States of America. The object of independence can be human (other person[s]) or not human (institution, a norm, etc.), and, in a somewhat similar way to the distinction between rights in-rem and rights in-persona, it can be a specific person(s) and/or institution(s), or the whole world.

The nature of independence can be of two kinds. It can be either the mere existence of the subject of independence, or it can be the behavior, way of conduct, or decision-making process of the subject of independence. In other words, the nature of independence can refer to what its subject *is*, or what its subject *does*. I call the former type of independence *fundamental* and the latter type *dynamic*. The nature of independence, just like its object, though not always mentioned explicitly, is an inherent component of the concept and sometimes is context dependent. The term *independence*, therefore, describes the sort of causal connections, or rather a lack of such connections, either fundamental or dynamic, between its subject and its object.

The independence of the judiciary is constructed from several layers or circles, which involve different objects (the litigants, other judges, the government, the general public) in both types of relations (dynamic and fundamental). The first two inner circles are the dynamic independence whose subject is the individual judge and whose objects are (1) the litigants and (2) the government. The latter means that a judge, when delivering a judgment, is not influenced by the desires of the government with regard to the specific case being decided. The former is considered by some scholars as a separate notion of *impartiality*.[12]

The next circle of judicial independence is the dynamic independence whose subject is the individual judge and whose objects are his or her colleagues. The rationale of this circle is different from the rationale of the inner circles. While the inner circles' rationale derives from the doctrine of separation of powers and concepts of justice, this circle's rationale comes from social choice analysis, according to which the quality of a decision can be improved by creating independence between the decisions of the various decision-makers taking part in the decision-making process.

Another circle of the independence of the judiciary is the dynamic independence whose subject is the individual judge and whose object is the general public. The rationale here is connected to concepts of justice, as in the impartiality circle, but it is also related to the jurisprudential questions: What is "the law" and how judges ought to decide hard cases. The desirable degree of independence in this circle is disputed. In some legal systems, for example, some of the states in the United States, judges are elected by (and therefore dependent upon) the general public. Hence the goal of impartiality might conflict with other ideals related to the judiciary.[13]

All the aforementioned circles of judicial independence can be contained in one larger circle: the dynamic independence of the individual judge whose object is everything except the law, or in popular language, that in their judicial decision-making judges are subordinated only to the law. But the independence of the judiciary can be portrayed by two additional circles that focus on a different subject and nature. One of them refers to the fundamental independence whose subject is the judiciary as an institution and whose objects are the other branches of government. In other words, part of the notion of the independence of the judiciary is the lack of powers of the government to abolish this institution, replace it, or make significant changes in its structure. The last circle of the independence of the judiciary is the

fundamental independence whose subject is the judicial decision and whose object is the government. It is not sufficient that the process of judicial decision-making will be free of external influences; the notion of an independent judiciary requires also that these decisions, once given, would not be altered or ignored by the government (who is responsible to enforce them). Thus, pardon or retroactive legislation can be viewed as infringement of judicial independence.[14]

This definition of judicial independence has not been fully explored. We did not discuss, for example, the dichotomous character of each of the circles, the interrelations between them, or their normative analysis (examining their desirable degree), and more. However, the phenomenon to be considered in this paper relates only to a part of the notion of judicial independence, the part associated with the doctrine of separation of powers. From now on we will be speaking of the independence of judges, or the judiciary as an institution, both dynamic and fundamental, whose object is the government, whereas the term *government* includes the other branches of government (save the judiciary), that is, the legislature and the executive. We will be looking, therefore, at the independence of the judiciary, or of the individual judges, from the government.

The Independence of the Judiciary as a "Universal" Phenomenon

The Phenomenon Defined

After these clarifications we can now move to address the question: Why do we have an independent judiciary? Many scholars will reply that this question cannot be dealt with on an abstract level of analysis, and that it should be tailored to fit the specific constitutional structures of the political and legal systems under scrutiny. Thus, an American will be likely to reply: "We have an independent judiciary because we have a written constitution, in which judicial independence is guaranteed, and hence your question should be referred to the framers of the Constitution, asking why did the framers create such an arrangement in which judges have independence." In contrast, a Briton or an Israeli will have to aim the analysis more at the existing political powers (of the present), asking why does Parliament (or, more accurately, Parliament and the government), to whom the judiciary is firmly subordinated according to the constitutional structure, maintain the judiciary as a separate, and to some degree independent, branch.

From the above description it seems that we ought to talk about at least two distinct questions, which are difficult to handle within a unified model. I would nevertheless like to argue that there is a common phenomenon that can be accommodated almost universally (at least among democratic regimes) and gives rise to interesting queries. In order to describe this phenomenon I would like to suggest another distinction—between structural independence and substantive independence. *Substantive independence,* with regard to the part of the notion of independence that I set out to deal with, can be defined as decision-making which is not dependent on the views of the other branches of government, that is, that judges do not decide individual cases according to the legislature's or government's will. *Structural independence* can be defined as the institutional arrangements that aim at enabling the existence of this substantive independence (tenure, method of appointments, etc.).

The common phenomenon to which I refer is twofold: On the one hand, there is no constitutional system in which a full structural independence has been created,

and, on the other hand, there is always a gap between the degree of structural dependency and the degree of substantive independence, in favor of the latter. The first part of this observation indicates that there is no legal system that guarantees full structural independence.[15] Its second part implies that, despite being capable of doing so, the government does not fully exercise its powers to limit the substantive independence of the judiciary. In other words, the legislature and the executive allow a certain degree of judicial independence that exceeds the structural provisions. Although politicians do hold the powers to limit judicial substantive independence, they refrain, at least partly, from using these powers. In a law and economics world, in which we assume that politicians, as other individuals, are seeking to satisfy their own interests, this phenomenon demands an explanation.

The Phenomenon Illustrated—The British Legal System

Let me demonstrate this proposition using the British legal-political system. Although all the texts that I came across assert, confidently, that in Britain there is a certain degree of separation of powers between the judiciary and the other branches of government, and that the independence of the judiciary does indeed exist,[16] this is a somewhat problematic assertion, to say the least. The judiciary is structurally dependent upon Parliament simply because there are no restrictions on the legislative powers of Parliament.[17] It is true that legislation, part of which dates back to the 1700 Act of Settlement, guarantees to some of the judges some components of what I called structural judicial independence, such as tenure, fixed salaries, etc. But since there is no written constitution and Parliament may do whatever it likes to do, these arrangements can be changed from one day to the next.[18] Furthermore, because of the unique parliamentary structure according to which the government (i.e., the executive) has almost full control of Parliament, the status of the judiciary is even more fragile. Hence the judiciary does not enjoy a structural judicial independence whose object is Parliament; its life and death are in the hands of the present Parliament.

Moreover, the judiciary is also structurally dependent upon the government—the executive—through the powers of appointment and promotion, as well as other administrative components, including pay raises and fixing the number of judges in the various courts. Here we have to distinguish between first-tier judges and second-tier judges. The second-tier judges—the Magistrates, Justices of Peace, Recorders, County Court, and some Crown Court judges—enjoy hardly any structural independence, as they are appointed by the Lord Chancellor (or by the Queen at the advice of the Lord Chancellor) and are subject to be removed by him.[19]

The first-tier judges—High Court, Court of Appeal, and House of Lords judges—are appointed by the Queen at the advice of the Lord Chancellor (in the case of High Court judges) or the Prime Minister after a consultation with the Lord Chancellor (heads of divisions in the High Court, and Court of Appeal and House of Lords judges). They have tenure during good behavior, subject only to the power of removal by the Queen on the address of both Houses of Parliament. Their salaries are determined by the Lord Chancellor with the concurrence of the Minister for the Civil Service, but cannot be reduced.[20]

But these current arrangements include an extremely weak feature from the point of view of judicial independence—the procedure for the appointment and promotion of judges. These are left, in practice, solely in the hands of the Lord Chancellor (with the possible intervention of the Prime Minister). The Lord Chancellor is a po-

litical figure; he is a member of the cabinet, appointed by the Prime Minister as any other political appointment.[21] The fact that a political figure is responsible for the appointment and promotion of judges can have a significant effect on their substantive independence; but this time, we are referring to independence or dependence whose object is the government (the executive) rather than Parliament. It would seem much easier for the government to abolish or curtail judicial independence through appointment and promotion policies than for Parliament to achieve the same goals by changing substantial and time-honored constitutional arrangements.[22]

This feature (the appointment and promotion procedures) has even more potential effect on judicial independence in light of the fact that the British judiciary is in effect a career-based judiciary. The law provides that in order to become a Supreme Court judge, that is, a judge of the High Court or the Court of Appeal, as well as a judge of the House of Lords, the candidate has to have a right of audience in relation to all proceedings in the High Court (that currently includes only barristers) for at least 10 years.[23] The tradition that has been developed in the second half of this century is that High Court judges are appointed directly from the Bar; the second-tier judges do not get promoted to the High Court. The Court of Appeal judges are High Court judges who were promoted to the Court of Appeal, and the Law Lords (the House of Lords judges) are Court of Appeal judges (or their Scottish or North Irish equivalents) who were promoted to the House of Lords. Thus, in spite of Lord Denning's view that "once a man becomes a judge, he has nothing to gain from further promotion and does not seek it,"[24] and Lord Scarman's similar view that "a judge does not come to the bench looking for further promotion, judicial office is itself the apex of legal career,"[25] the plain fact is that Court of Appeal judges are paid more than High Court judges and that Law Lords are paid more than Court of Appeal judges, not only in money but also in respect and status, and it is only natural to seek these promotions.

Against the background of this institutional structure, it is interesting to observe, on the one hand, a certain degree of substantive independence that is being exercised by English courts and has been increasing with the years.[26] The most straightforward expression of this independence is the delivery of judgments against the government in cases in which the government is a litigant. On the other hand, and despite this expression of independence, we do not find that the structural dependency tools are being exercised, either by the legislature or by the executive. The usage of the appointment and promotion procedure interested me specifically in this context, as it is the most convenient tool of structural dependency that is available to British governments. I have tried to examine, therefore, whether British governments exercise this power over the judiciary. The full findings of this research are reported elsewhere[27]; only the gist of them will be conveyed here.

According to the traditional Law and Economics/Public Choice approach to separation of powers and the positive analysis of the judiciary, and even according to the layperson's intuition, one would expect that if the judiciary is structurally dependent upon the government (as it is in the British case), the government would be twisting the arms of the judges to decide in accordance with its current interests. Thus, deciding for the government should presumably improve the chances of the deciding judge to be further promoted (in the case examined—from the Court of Appeal to the House of Lords), and vice versa.

For the examination of this hypothesis—that there is a positive correlation between deciding in favor of the government and the chances of being promoted—all the

decisions of the Civil Division of the Court of Appeal in which the central government was a litigant, between 1951 (the year in which systematic transcribing began) and 1986, were scrutinized. A total of 1565 such cases, or 4554 individual opinions, were hooked. (Usually a decision in the Court of Appeal is by three judges, though some cases are heard by only one or two judges.) It was found that around 29 percent of these decisions were given *against* the government. This percentage remained more or less similar along the years.

This figure of 29 percent represents the "disloyalty to the government" rate of the Court of Appeal as an institution. What I was interested to examine, though, was the connection between the individual judges' "disloyalty" rate and their chances of being promoted. These individual rates of the judges most significantly deviating (in both directions) from the average of 29 percent are presented in Table 1. As can be seen, variation among the judges in the percentage of decisions against the government certainly exists: In fact, this rate varies between 4.5 and 50 percent. Time does not seem to play a significant role in the distribution of judges along this scale: Judges who served during different periods, including judges currently serving, are spread throughout the table. But the more important conclusion is that "loyalty" to the government does not seem to play a crucial role in the consideration of whether to promote. The ratio of promoted/nonpromoted judges is similar in the two presented extremes of the table and approximately equals the general rate of promotion.[28]

To conclude, the English judiciary is structurally dependent upon Parliament and government, but this structural dependency is not exercised, or at least not fully exercised, by either the legislature or the executive. Parliament is refraining from legislation that can be perceived as curtailing judicial independence, and as we have just seen, even the government does not use its powers to limit judicial independence. All this should be viewed in the light of some degree of substantive independence that is being exercised by the courts. It seems that the English case epitomizes the phenomenon of the independence of the judiciary defined above, that is, the existence of a gap between the degree of structural dependency and the substantive independence expressed by the judges.

The Phenomenon Illustrated—The American Legal System

The structural independence of the American federal judiciary is more solid than its British counterpart. The foundation of the Supreme Court is based on the Constitution, which also guarantees all federal judges tenure during good behavior and immunity from salary cuts.[29] However, this structural independence is not a complete one. The structure and jurisdiction of inferior federal courts were left to the discretion of the legislature.[30] The same applies for the appellate jurisdiction of the Supreme Court. In fact, the legislature was given the powers to modify the judicial process whenever it thinks it is advisable to do so, and in any way it deems suitable.[31] In addition, the budget of the courts is in the hands of Congress,[32] and the procedure for appointment and promotion of federal judges creates a significant dependency of the judiciary upon the president—the executive—and upon the Senate—a branch of the legislature—especially with regard to District and Court of Appeals judges.[33] Even the judicial immunity from removal from office is not fully guaranteed.[34] Some scholars put forward an even more extreme proposition, according to which there are no significant differences between the structural independence of judges and of legislators.[35]

TABLE 1. The English Court of Appeal—Percentage of decisions against the government among different judges (1951–1986)*

	Decision against the government (%)		
Judge	*All Opinions*	*Leading Opinions*	*Promoted*
Browne	50.0	50.0	–
Sachs	48.6		–
Edmond Davies	45.8		+
Buckley	45.5	53.5	–
Brightman	42.9		+
R.F. Goff	39.3		–
Devlin	38.9		+
Fox	36.8	18.2	–
Dunckwerts	36.4	36.4	–
Donovan	36.1		+
Somervell	35.7	35.7	+
Glidwell	35.3		
Pearce	33.9	53.8	+
Judges from High Court	39.2		
Average	28.1	27.7	
Law Lords	14.3	25.0	
R.J. Parker	23.1	0	–
Roskill	22.2		+
Orr	21.1	37.5	–
Shaw	20.0		–
Megaw	19.8	23.9	–
O'Connor	19.6	12.5	–
Cumming Bruce	18.2	23.5	–
Watkins	17.8	10.0	–
Brandon	17.4		+
Cross	16.7		+
Tempelman	16.7		+
Lane	15.6	18.2	+
Goff	11.5		+
Neil	10.0		
Brown	4.5	0	

*Percentages are indicated for five or more decisions.

If there is nothing under the "promoted" rubric, the judge is still serving in the Court of Appeal.

The figures for High Court judges and Law Lords refer to decisions they gave while sitting in the Court of Appeal on ad-hoc basis.

Madison's and Jefferson's "Federalist," which reflects the constitutional debate of the Founding Fathers, teaches us that the structure of powers in the United States was carefully designed to create a system of checks and balances, which would not allow any abuse of powers. Thus, an independent federal judiciary was created to serve as an "excellent barrier to the encroachments and oppressions of the representative body" and as "the bulwarks of limited constitution against legislative encroach-

ments."[36] On the other hand, the framers realized that the powers of the judiciary also ought to be controlled and balanced "to avoid an arbitrary discretion in the courts."[37] Thus Congress was empowered to make exceptions to the appellate jurisdiction of the Supreme Court and to regulate, in the way Congress thinks best serves the objects of the Constitution, the exercise of the jurisdiction granted.[38]

It seems that there is a wide consensus among scholars as to the observation that Congress and president have hardly used their Article 3 powers to curtail judicial independence.[39] The same applies for other constitutionally legitimate methods of influence, such as "packing" the courts.[40] In the course of the 1930s and 1940s Congress even acted actively to remove procedural barriers that limited the courts' involvement in policy issues, and it actually delegated some of these procedural powers to the courts.[41] Congress declined, despite the growing activism of the courts in the last 30 years, to reinstate those barriers. Bearing in mind the fact that the American federal judiciary shows a significant degree of substantive independence,[42] it seems that in the United States, as in England, a gap between the structural dependency of the judiciary and its substantive independence does indeed exist.[43] The question of the substantive independence of the judiciary is, therefore, as Gary McDowell puts it, not only "one of constitutional legitimacy but [also—E.S] of political prudence."[44]

A Few Words on the Israeli Judiciary

The scope of the present paper leaves little space for exploring other legal-political systems in detail. I would nevertheless like to make a brief mention of my "home" legal system—the Israeli one.[45] The case of the Israeli judiciary is especially interesting because the Israeli political and legal system is an intriguing combination of a Westminster and a Continental-European type of parliamentary democracy, with an increasingly effective American flavoring.[46] Constitutionally, the Israeli system is similar to the British: a lack of a written constitution and a lack of real separation of powers between the legislature and the executive. This means a strong structural dependency of the judiciary upon the legislature—the Knesset—and indirectly upon the executive—the government. However, the structural independence of the Israeli judiciary from the government is firmer than in Britain. The judges are less dependent upon the government, mainly due to a more "progressive" and independence-oriented procedure for judicial appointment and promotion. This is entrusted in the hands of a committee comprising three Supreme Court judges (one of them is the President of the Court), two representatives of the Israeli Bar, two Knesset members (usually one from the Coalition and one from the Opposition), and two government ministers (one of them is the Minister of Justice). In addition to the fact that the committee represents all three branches of government plus the legal profession, it is comprised in such a way that there is a majority of 5:4 for nonpoliticians (the judges and the lawyers).[47]

This structural independence is especially interesting because, unlike the structural independence of the American judiciary, which derives mainly from rigid constitutional provisions, and unlike the independence of the English judiciary, which is, at least partly, the result of lengthy historical developments and power struggles that brought about, for example, the 1700 Act of Settlement, the structural independence of the Israeli judiciary was deliberately created by the government and the Knesset in the course of the last 40 years.[48] Moreover, in the last 35 years we are witnessing a continuing process of increase in the structural judicial independence contrived by the Knesset and the government.[49]

All this is happening alongside increasing judicial activism and a Supreme Court that is becoming "American" style, with extensive and ever-increasing involvement in the affairs of the government and of the Knesset.[50] Four of the most notable examples of this "grand style" of the Israeli Supreme Court are its willingness in certain circumstances to review legislation of the Knesset, despite the lack of a written constitution or explicit authority to do so[51]; its willingess to hear petitions from the territories occupied by Israel in 1967[52]; the relaxation, in fact almost abolishment, of the requirements of justiciability and standing[53]; and its willingness to review internal matters of the Knesset.[54] In spite of this growing activism, the Knesset and government have refrained from using their structural dependency power to curtail the judges, and with regard to the first two examples, have, in fact, allowed or even encouraged the Court to expand its powers. It seems that in Israel not only is there a gap between the degree of structural independence and substantive independence, but this gap is in a constant process of widening.[55]

Conclusions

The conclusion from our examples harks back to our initial query and the debate concerning the positive analysis of separation of powers and the independence of the judiciary. The phenomenon of the independence of the judiciary, molded by the underlying assumptions of the economic approach—rationality and self-maximizing behavior—poses a serious problem to the "traditional" view of separation of powers and the judiciary, and the observed gap between structural and substantive independence has to rule it out altogether. Taking these assumptions into account, this gap means that legislatures and governments positively prefer to maintain an independent, rather than a dependent, judiciary. Had an independent judiciary worked against the interests of the legislature and the government, this would not have been so. In other words, the executive, and especially the legislature, have the powers to limit judicial independence; they do not fully exercise these powers in spite of assertions of independence by the judges, which are at times clearly against the interests of the other branches of government. Why?

The Independence of the Judiciary and the Delegation of Law-Making Powers

The Delegation of Law-Making Powers

One can argue that the answer to the question, "why do we have an independent judiciary?", is that politicians, being aware of the normative writings about the desirability of separation of powers and the need for an independent judiciary, are working to maintain it. This might do as a civic humanist or republican explanation, but not one that is based upon a public choice-rational choice-economic analysis view of the world. In this last part of the paper I will try to provide an explanation for this phenomenon that is based on the fundamental assumptions of the latter type of approaches.

Two of the more important assumptions of the Rational Choice approach are that politicians, like the other actors in the political arena, behave rationally and that they are seeking to maximize their political support and their chances to be reelected. Based on the first assumption, and on our observation with regard to the gap be-

tween structural and substantive independence, we can conclude that we have an independent judiciary because politicians are interested in its existence. According to the second assumption, politicians are interested in having and in maintaining an independent judiciary because this situation can assist them in maximizing their political support.

On these bases the "revisionist" approach offered its explanation for the independence of the judiciary.[56] Thus, William Landes and Richard Posner argued that it is in the interests of the legislature to maintain an independent judiciary because such a judiciary works as a mechanism for extending the duration of legislation. Legislation is perceived as a commodity that is sold by the legislature and bought by interest groups. The demand for it and, consequently, its market price and profits for both parties to the deal, are dependent upon its durability. Since a long-term contract benefits the legislature, it will maintain an independent judiciary that extends the duration of legislation.

The main problem with this approach is that it is heavily contingent upon the assumption that while a dependent judiciary acts as an agent of the current legislature and therefore it impairs contracts between the enacting legislature and interest groups, an independent judiciary interprets and applies legislation in accordance with the original legislature's intentions. This pivotal underlying assumption is supported neither by Landes' and Posner's own empirical findings, or by others', nor by theoretical proof.[57] This is the prime reason for my attempt to offer an alternative route.

Maximizing political support can be achieved in certain circumstances by delegating the decision-making powers—law-making or other powers. The issue of delegation of legislative and executive powers has occupied many pages of legal writings in recent years. Almost all of this literature, however, has focused on only one type of legislative delegation. This is the case in which the legislature, through a statute, delegates law-creating and law-enforcing powers either to an existing authority in the central or local government, or to a specially created body called the *administrative agency* or *Quango*. But the notion of the delegation of law-making powers can be much broader than that of this traditional literature, both in terms of the type of delegation and the identity of the delegatee. The type of delegation, in my approach, can be classified according to its *form*—a positive (active) form, or a negative (passive) one; and according to its *timing*—ex-ante to the use of these powers by the delegatee or ex-post. The delegatees can be those habitually referred to—the executive or administrative agencies—but they can also be the courts.

In constitutional arrangements of most legal systems, the legislature has the ultimate power to create and amend the law.[58] This "monopoly" is sometimes limited by substantive constraints or by procedural ones. The American Congress, like many other legislatures, cannot enact a law that violates human rights and other basic principles determined by the Constitution. The British Parliament was in the past (at least until the 17th century) restrained from legislating in the areas of the Crown Prerogative.[59] Legislation is very often bound to a specific procedure, which might require the participation of other branches of government (such as the Presidential power to veto legislation in the United States). But, setting these constraints aside, the legislature has full autonomy to make law. Thus, whenever rule-making powers that are not constitutionally assigned to a body other than the legislature are in fact being exercised by such a body, this can be regarded as a delegation of legislative powers.

The most straightforward delegation is the *ex-ante positive* one. This is the classic case in which the legislature, by a statute, directs other bodies to create rules in a specific area, instead of creating them itself. The delegatee can be the executive, a committee of the legislature, a local authority, a public corporation, or a special administrative body; but it can also be the courts.[60] When an enacted law states that an immoral contract is not binding,[61] we can infer that the legislature did not want to specify what an immoral contract is and delegated the powers to fill this term with substance to the courts. It is clear, in this example, that the legislature was aware of the fact that a more detailed regulation of the issue is required and that the courts would carry it out.

But the delegation of legislative powers can occur also in a *negative* (or passive) form. No one would doubt, for example, the powers of the English Parliament to enact a law of contracts. But the fundamentals of this legal field are left unregulated by the legislature, in the hands of the courts. For centuries they have been creating the law in the field of contracts. Indeed, the whole of the Common Law can be seen (at least at present) as a negative delegation of powers.[62]

The implicit delegation of legislative powers can be distinguished also according to the point in time at which it is made. In 1964 the American Congress enacted the Civil Rights Act.[63] The act did not indicate explicitly the legitimacy of affirmative action plans (although it specified that it should not be interpreted as requiring the granting of preference to an individual or a group on the account of unbalanced existing representation[64]). Ten years later the Supreme Court was asked to decide about the legality of affirmative action plans and whether they violate the act's "non-discrimination in work" clause (Title VII).[65] The majority of the Court interpreted the Civil Rights Act as legitimating such programs. It is very likely that Congress (as a collective decision-making body), at the time of enacting the bill, did not have an opinion on the question of affirmative action; but nevertheless it could have responded and regulated the issue following the Court's decisions. It has not done so. In this case affirmative action can be seen as an issue that was delegated by Congress to the courts ex-post.[66] In a recent case that involved the same question, Justice Brennan, on behalf of the majority of the Court, used the silence of Congress to support his position in favor of affirmative action. He noted that Congress inaction, or failure to amend Title VII in order to repudiate the previous decisions of the Court, allows the Court to assume that these decisions were correctly made.[67]

The traditional reasons for the delegation of legislative powers are as follows: the lack of parliamentary time to regulate all there is to be regulated, especially since the emergence of the welfare state in the second half of this century and the significant increase in state intervention; the technical complexity of subject matters that can be overcome more successfully by experts; the higher degree of flexibility that is needed for detailed rules; and the need, in special cases such as times of emergency, for swift rule-making procedures.[68] These reasons cannot be sufficient if the broader definition of rule-making delegation is accepted. They cannot explain a major share of the ex-post delegation and a major share of rule-making powers delegation to the courts. The three examples mentioned above—contracts, morals, and affirmative action—are not minor or technical issues that require the skills of special experts. These are neither issues for swift regulation, nor for frequent reconsideration and change. It seems, therefore, that a fresh explanation is needed.

This delegation is, in my view, the result of two main factors: one is the individual decision of the nucleus political decision-making unit, usually the legislator, who calculates that he or she would be better off by delegating an issue instead of deciding

it themselves. The other is the outcome of the fact that legislation is a collective decision-making process that does not necessarily reflect an equilibrium-majority vote solution. Let us elaborate on these two factors.

The Nucleus Political Decision-Making Unit's Perspective

As this paper attempts to provide a general explanation—across various constitutional and political systems—for the phenomenon of the independence of the judiciary, I prefer to use the term *nucleus political decision-making unit* rather than the term *individual legislator.* This unit is in effect the individual legislator in systems, such as the American one, in which legislators are accountable to constituencies and their party affiliation plays only a secondary role. But in systems of proportional representation with a national constituency, such as the Israeli system, the party (due to a lack of accountability of the individual politician to an exclusive group of voters and a strict party discipline) can be perceived as this unit. Although the *individual legislator* terminology will continue to be used below for convenience purposes, it should be always tailored to fit the specific constitutional-political system under scrutiny.

The rentability of the delegation of rule-making powers can derive from a political cost-benefit analysis.[69] A legislator (or party) who is seeking to maximize his or her political support often faces tough dilemmas as to the desirable legislation from his or her point of view. The cases in which all potential voters of a legislator unanimously support a certain arrangement are extremely rare. Usually one will find within a potential voters' group (a local constituency or a national constituency) a subgroup that will benefit from a certain legislation and thus supports it, and another subgroup that will lose from this arrangement and will naturally oppose it. If this were all there is to it, and the legislator had the information about the number of voters who supported the arrangement and the number who opposed it, his or her calculation would have been quite straightforward.

But this is not the full picture. Support and opposition to a specific legislation can be manifested in different degrees of intensity, degrees that might or might not influence or determine whether the voters are going to give their vote and support for the incumbent legislator. The stakes of voters in a specific issue can be such that, although they have a view on the matter, the way in which the legislator votes would not have any influence on their support for the legislator. On the other extreme, there may be issues to which such importance is attached that the responsibility attributed to any individual legislator (as against, for example, the party) will be, paradoxically, lower. The political system and mechanisms affecting the connections of legislators to their parties will have a significant effect on these factors.[70] Furthermore, legislation is not a "yes or no" question. There are infinite possible arrangements of one issue, and it might be difficult to identify the optimal one from the constituency's point of view. Moreover, lobbies and interest groups, on the one hand, and the free-rider problem, on the other hand, will distort the picture as to the views on the legislation in question. These are some of the reasons that might make it worthwhile for the legislator to refrain from a decision to the merits of a particular issue and, instead, to opt for the delegation of the rule-making powers in this issue to others.[71]

The desirability of delegation, in the individual legislator's (or the party's) eyes and from the perspective of political costs, depends on a divergence between the credit shifts and the blame shifts that the delegation is likely to create.[72] If a decision of the

delegated body would have the same effects in terms of the support and opposition to the legislator, the delegation could not benefit him or her. If, on the other hand, the legislator, by delegating rule-making powers, can diminish his or her responsibility for the outcome in the eyes of those who oppose the arrangement and at the same time claim the credit (or a share of the credit higher than the share of the lost blame) from those who support it, then the delegation can increase his or her political gains.

In an environment of powerful interest groups, who exercise influence over administrative agencies and bureaucrats, this responsibility shift can play a significant role in the maximization of the legislator's political support. The credit for an arrangement can be given to the legislator who empowered the agency to adopt it (or, rather, allowed the agency to be manipulated by the interest group), while the blame for an undesirable arrangement can be self-attributed by the interest group as failing to pull the right strings at the right time. This might also be the case in our context of delegation to the courts. Since the courts are usually perceived by the general public as law enforcers and not as law creators,[73] when certain types of issues are in fact regulated by the courts, the tendency will be to give the credit to the legislature; while in the case of an undesirable decision, the tendency will be to blame the courts (especially if, in turn, legislators reveal their dissatisfaction with the decision of the court).

Under the assumption that delegation creates a credit shift as well as a blame shift, but the blame shift is greater than the credit shift, all legislators (or parties) whose constituencies are net losers from the arrangement, if it is going to be adopted in any case, will tend to prefer delegation over detailed legislation. This conclusion is important for a system of government, such as the British, in which there is individual accountability to constituencies and at the same time a strong party discipline. Legislators who might be compelled to vote for a certain arrangement, although it is against their constituencies' interest, can minimize their loss in terms of political support by delegation rather than direct legislation. To put this differently, delegation can be a compromise between those legislators whose constituencies are the big winners from the arrangement on the agenda and those legislators whose constituencies are losing from it. This eventuality can also occur in systems with no strong party discipline, since it is possible that regulating an arrangement through delegation will, in fact, due to significantly unequal credit and blame shifts, increase the legislator's political support despite the fact that his or her constituency is actually worse off. Although those legislators whose constituencies are beneficiaries of the proposed arrangement will tend to prefer detailed legislation by Parliament rather than delegation, this will not always be the case. In other words, not only net losers will prefer delegation.

The institutional framework of a specific arrangement can tell us something about the prospects of the distribution of benefits that will result from it. A widespread support among legislators for a delegation of powers regarding a certain arrangement ought to raise suspicion as to the prospects of the scope of benefits from this arrangement. Such a support usually implies big gains for few constituencies and diffused costs to the rest. This is the point at which the Public Choice view of rent-seeking activity and its implications for the outcome of legislation (as opposed to the Pluralist view of legislation) is integrated into the analysis of institutions. Whether a certain arrangement will be regulated at all (though it might not benefit the majority of the public, or even the majority of constituencies) is a question of the traditional

literature of Public Choice.[74] What is added here are some insights as to the institutional choice for the regulation. An arrangement that is not to the benefit of the majority is likely to be adopted through delegated authority and not by direct legislation.[75]

The calculations of responsibility shifts apply not only to the question of whether to delegate, but also to the question of to whom to delegate. Different delegatees (one of the other central branches of government, i.e., the executive or the judiciary, administrative agency, or a lower tier of government—a state in a federal system or local government) will create different blame and credit shifts, and these differences will crucially depend on the character of the issue to be dealt with by the legislature. Legislators will try to find, for each different sort of issue, the institution that will maximize the figure resulting from the deduction of the blame shift from the credit shift for the particular issue. Since legislators are meant to address such a variety of issues, it is in their benefit to maintain the different optional types of delegatee institutions to each of which the appropriate matters can be delegated.

The independence of the judiciary is one characteristic that differentiates it from other possible delegatee bodies. This characteristic distances the judiciary from the legislature more than most other delegatees, and this, in turn, helps to maximize the responsibility shift whenever this shift is needed. A good example is provided by certain aspects of the abortion issue in the United States, which was delegated primarily to the courts.[76] The recent decision of the Supreme Court on the issue, *Rust v. Sullivan*,[77] can illustrate this proposition. The issue at stake was a 1980 decision of the Department of Health and Human Services to prohibit abortion counseling at federally funded clinics. It was based on the 1970 Public Health Services Act, which specified that no federal funds will be used in "programs where abortion is a method of family planning" (Title X of the act). Although the original legislation, which was, ironically, designed to provide family planning services and information in order to reduce the number of unwanted pregnancies,[78] relates to abortion, its interpretation with regard to concrete questions such as abortion counseling was not clear. The Court, therefore, after ruling that the administrative decision to ban federally funded counseling is not unconstitutional, preferred deference to the agency, which was guided by the conservative line of President Reagan (but see the dissenting opinion of Justice O'Connor, based on the interpretation of the statute). Congress has not responded.

In the framework of the shifting responsibilities model, the delegation of the abortion issue to the courts creates significant blame as well as credit shifts. It is of such nature (straightforward controversy with intense preferences) that it is desirable from the point of view of American legislators to create the widest possible responsibility (blame as well as credit) slippage. This is also connected to problems of information and uncertainty, which will be discussed below. It is, however, noteworthy that, unlike legislators, presidents and presidential candidates are more explicit on the issue (including attempts to exercise influence on the policies of administrative agencies and on judicial appointments). This is possibly due to the fact that a presidential candidate's position with regard to a particular issue is likely to have less influence on the potential support of his voters than a similar single-issue position of a legislator (there are, for example, many voters who are "pro-choice" and nevertheless voted for Presidents Reagan and Bush[79]).

Even the institution of judicial review of legislation can be accommodated within the shifting responsibility explanation. The existence of judicial review means that

the judiciary shares responsibilities in the outcome of legislation. In this case, whenever a statute is invalidated by the courts, the legislator can still claim the credit for the would-be legislation, while not bearing the cost of this legislation. Thus legislators are less hesitant to legislate. Some of the differences between legislation in a system without judicial review of legislation, such as the British legal system, and legislation in a system with judicial review, such as the American one, can be attributed to this factor.[80]

Although an independent judiciary can also impose costs on the legislators by deciding against their interests (the most significant cases are invalidation of statutes in a system with judicial review of legislation), the fact is that legislators hardly ever use the potential institutional measures that enhance structural dependency. One of the incidents that came closest to using these powers in the United States happened in the course of the New Deal, but eventually even then these powers were not used. This shows that lowering these direct costs by limiting judicial substantive independence is not worthwhile in total, due to the potential loss of benefits that the legislators stand to gain from delegating their rule-making powers to independent courts.

Decision-Making under Conditions of Uncertainty

Another reason for the delegation of decision-making powers, still in the realm of the nucleus decision-making unit, is *uncertainty*. Legislation can be presented as a complex three-tier structure comprising the voter, the legislator, and the delegatee. In this structure there are two principal-agent relationships: the one between the voter and the legislator, and the other between the legislator and the delegatee. In our discussion so far we implicitly made three important assumptions. The first was that legislators know what are the consequences of their selected arrangement for the problem that this arrangement is set to solve, or more specifically, what are the chances that this arrangement will in fact result in the predicted costs and benefits. In many cases uncertainty with regard to the cost and benefits is likely to be asymmetrical, and frequently the costs can be better predicted than the prospective benefits (e.g., putting up taxes to fund a new project).

Connected to this assumption is the second assumption, which relates to the former principal-agent relationship, according to which legislators or parties know the distribution of opinions in their constituencies and, more importantly, they know the political implications of a vote for or against a specific arrangement (including the effects of interest-group, free-rider, and other Public Choice complications). The third assumption, which relates to the second principal-agent relationship, was that when delegating the powers to legislate, legislators or parties can precisely predict what will be the arrangement that will be adopted by the delegatee body or that they can instruct the delegatee what arrangement to adopt. These three assumptions cannot pass the test of reality. I will try to show that their relaxation can explain another segment of legislative delegation to the courts.

What are the consequences of relaxing the first and second assumptions, that is, making the alternative assumptions that legislators and parties do not always know what are the consequences of their selected arrangement in terms of cost and benefits for their constituencies, what are the political costs to them of being held responsible for this particular arrangement, and whether these costs outweigh the benefits? When the main problem is uncertainty about the ramifications of an arrangement, rather than its effects on the political support for the legislator, it is likely that a

legislator will prefer a delegation of such nature that will enable him or her to claim a significant share of the credit should the arrangement be successful, while avoiding some of the blame. A delegation to an administrative agency, rather than to the courts, is more likely in this case, as agencies are not totally detached from the government and can be monitored ex-ante by setting rigid procedures for their operation and placing them under judicial review, and ex-post by budgetary and other scrutiny means.[81] It is possible to delegate a wide range of powers to such an agency, while limiting its scope of discretion, and it is likely that the range of delegated powers will correspond to the degree of uncertainty with regard to the prospects of the arrangement to be enacted.[82]

A different story is the case in which the main problem is a lack of information about the political consequences of an enacted arrangement. A legislator who is totally ignorant as to this political cost-benefit analysis faces a sort of gambling problem. If the legislator is risk-averse, and this is usually the case, then he or she will be seeking to lower their risk. One can argue that in this case it is best for the legislator not to regulate at all. But of course this option can impose costs in the same manner that regulating can, because absence of legislation is a negative legislation, or in some cases a negative delegation. Thus, not doing anything is not a solution. The task of lowering this risk can be accomplished by the delegation of legislative powers. In the case of total ignorance, or full uncertainty, the legislator will look for the delegatee that attracts the largest risk shift, that is, the largest responsibility shift. This delegatee is usually the courts.[83] More generally, we can say that the legislator will seek to delegate in such a way that the risk is assigned most efficiently.[84]

We do not have to assume that legislators are ignorant of the opinions in their constituencies in order to explain a choice of rule-making powers delegation. Such delegation, connected to uncertainty, can be worthwhile in two other cases. The first is the result of situations in which, although the legislator can map the different opinions of individuals and groups in his or her constituency, there is no pure strategy equilibrium of the "public opinion," due to collective decision-making problems such as cycling. In this case the best strategy of the legislator would be a strategy of ambiguity. This, in turn, means a broad delegation of legislative powers. Second, even when the legislator has a complete knowledge of the preferences in the constituency, delegation might still be chosen by him or her as the optimal option. This may be due to the voters' attitude to risk and their preferences distribution.[85]

Let us now consider the relaxation of the third assumption, which relates to the relations between the legislator or party and the delegatee. The legislature can itself enact a certain arrangement, but if the powers to regulate are delegated it can direct, and therefore expect, only that the delegatee will regulate something in the surroundings of the required specific arrangement. In other words, legislators are facing a dilemma between taking a risk or a gamble by delegating their powers, and avoiding the risk by going for the certain solution and regulating themselves.[86]

We can apply to this situation the classic model of behavior under conditions of uncertainty or risk, in which the options, as perceived by the legislator, are X*—the legislation option—or the interval ($X^{d'}$, $X^{d''}$) that surrounds X*—the delegation option. We will then discover that the chosen option will depend on (1) the legislator's individual utility function around his or her preferred X_i^*[87]; (2) the distance between the individual preference of the legislator and the legislature's choice (i.e., the median legislator's choice)—X*—which will be in the center of the delegation interval; and (3) the final outcome probability distribution around this X*. The third-

mentioned element reflects the type of the delegatee and especially its degree of dependence or bias. Delegatee bodies may differ from one another in two features: the width of the interval ($X^{d'}$, $X^{d''}$) or the range of possible arrangements to be adopted by them under the delegation of X*; and the degree of symmetry of their probability distribution with regard to the adoption of the legislature's desirable arrangement, or in simple words, their degree of bias.[88]

The full mathematical model will not be developed here. What should be noticed, though, is that for each given issue, certain nucleus political decision-making units will prefer delegation to a court type of institution; others will prefer delegation to an administrative agency type of institution. This will partly depend on the nucleus political decision-making unit's utility function and on the distance between its preferred arrangements, X_i^*, and the median preferred arrangement, X*.[89] As with regard to the shifting responsibilities explanation, here too it will be beneficial for politicians to maintain different institutions with varying scopes of power and varying scopes of discretion to which they can delegate varying chunks of legislative authority.

Delegation of Legislative Powers as a Solution to Collective Decision-Making Problems

So far we have focused on the nucleus political decision-making unit's point of view and on its incentives to delegate legislative power instead of exercising it itself. But delegation of legislative power can also occur when there are neither uncertainties nor information problems as to the preferences of the voters, nor predicted benefits, in terms of political support for the individual legislator or party from shifting responsibilities. Even in the extreme case in which the whole constituency unanimously prefers a certain arrangement, we might still find that the legislator "votes his district" by opting for delegation of powers. This can happen due to the problems caused by aggregating the preferences of the different individual legislators as they try to reach a collective decision or, in some political systems, the aggregation of parties' preferences rather than individual legislators'. I refer, here, to the traditional Social Choice analysis of collective decision-making and especially to the "fallacy" of the simple majority rule. Delegation of legislative powers in this context can be seen as trading democracy for stability, rationality, and decisiveness.[90]

One of the striking outcomes from the theoretical investigation into the simple majority rule is that it cannot guarantee a result that is both stable *and* nonarbitrary—the paradox of the rational person and the irrational society. Stability, or a solution for cycling problems, can be achieved by agenda control, agenda restrictions, veto power, and other similar mechanisms.[91] These mechanisms, though, tend to result in the arbitrary side of the solution, as they grant a small group of legislators excessive powers over their colleagues.

A different kind of a solution to the cycling problem is the delegation of legislative powers to an independent judiciary. The function of independent courts, from this point of view, is equivalent to the other institutional solutions and procedural rules just mentioned, and at times they even have several advantages over the other mechanisms. Since legislators usually want to avoid cycling, it is in their benefit to maintain these mechanisms, including an independent judiciary.[92]

It is important to distinguish here between what I have called *delegation ex-ante* and *delegation ex-post*. I will begin with the former type. There are cases in which the wording of the legislation seems to be deliberately general and not detailed. In these

cases, the lack of a specific delegation of secondary rule-making powers to the executive or to a specially created body means that the legislature implicitly leaves the question to be decided by the courts. In these cases the courts are actually assigned a rule-making power rather than merely an enforcement power. In other words, although individual legislators or parties may have a clear position with regard to a specific question within the general arrangement under consideration, they might at times refrain from promoting it and prefer to leave the details in the hands of the courts.

This practice of delegation ex-ante can be presented as the equivalent of the social choice theoretical solution of the "restricted area limitation."[93] This kind of a choice by the legislature saves, on the one hand, the costs involved in the instability of shifting from one solution to another within the winning set (the problem of cycling) and, on the other hand, the deposit of excessive powers of influence in the hands of a committee or an agenda setter.[94] In a similar way it is possible to present judicial review of legislation as resembling the Social Choice solutions of the veto power or the approval power.[95] This scrutiny by the courts can decrease the cycling problem by the very limitation of the winning set. In legal systems with judicial review of legislation in which there is no *explicit* allocation of this power of judicial review to the judiciary (as in the American and the Israeli legal systems), one can actually go further and claim that this allocation can be seen as consented to by the legislature and hence as a delegation of legislative powers to the judiciary.[96]

If this explanation of ex-ante delegation of legislative powers to the courts as a solution for the legislature's collective decision-making problems is viable, we should expect to find a tradeoff between rule-making by the legislature and rule-making by the courts. Furthermore, we should expect to find a tradeoff between delegation to the judiciary and other procedural constraints of the legislating process. There are, indeed, some interesting findings in this direction, both in time scale within the same legal system and in a comparative perspective of different legal systems. Richard Pierce, for example, observes that in the last decades the American Congress has gone through a democratization reform in which "dictatorial" agenda control and party rule were curtailed to provide a more fair debate. But the consequence of this reform, he argues, was increasing inability to decide, which in turn triggered more delegation of powers. The only way to avoid this delegation, according to Pierce, is a return to a tight agenda control.[97]

Patrick Atiyah and Robert Summers, in their comparative study of the American and the British legal systems,[98] found that the "law" in Britian relies much more on Parliamentary legislation and far less on judicial decisions than in the legal system of the United States; thus the two sources of law can be presented as interchangeable. Some of the reasons given by the authors for the differences between the two legal systems can fit well into the model offered here. The structure of the legislature and the party system in the two countries provide part of the explanation. In Britain individual legislators are far less dependent on their constituencies than their American counterparts. They are, therefore, less exposed to the pressure of interest groups and more flexible in voting for, or supporting, one arrangement or another according to the choice of their party. Collective decision-making is, therefore, less of a problem. In the American legal system the formal process of legislation is shared among several bodies, and the significance of party affiliation in the legislating houses is far less important than in Britain. These differences can help to explain why the American legislative product is much more general and vague than

the British one. This, in turn, gives the courts a rather more important role of rule-making.

Having said this, the most recent issue that can exemplify rule-making delegation to the courts as a result of collective decision-making problems is from Britain. As these lines are being written the House of Commons is debating the Maastrricht Treaty. The government (the Conservatives), which wants Parliament to approve the treaty with an opt-out from the Social Chapter, is confronted by opposition from the left (Labour), which wants the treaty only with the Social Chapter, and from the right (the Tory rebels), which does not want the treaty at all. Since this set of preferences results in a cycle,[99] the government declared (May 5, 1993) that it will not rebuff the opposition's motion, although it will ratify the treaty with the opt-out. The consequence will be a vague piece of legislation that will require the courts to decide whether the Social Chapter is applicable in Britain and other pivotal questions concerning the Maastrricht Treaty.

Ex-Post Delegation

Let us move to the second type of delegation—the ex-post one, which evolves quite straightforwardly from the theoretical description of collective decision-making. The main idea here is that although individual legislators or parties have a complete preference order, the collective decision-making process may result in an incomplete set of preferences, that is, the legislature will not be able to decide between each and every pair of options. This, in turn, means that if another body, such as the courts, shifts the legal situation from the status-quo arrangement to a different point, the legislature may not be able to indicate whether this shift was an improvement or not, and there would be no majority for a shift back to the original status quo. Thus the legislature would refrain from intervention, and this is precisely what we called an ex-post delegation.[100]

The above explanation can apply on two distinct levels: the inter-body level, when more than one authority takes part in the legislation process, and the inner-body level described above. Again, it can help to explain differences between the products of different legal-political systems. For example, Patrick Atiyah observes that in Britain it is much easier to reverse a decision of the courts through legislation (even a retroactive one) than it is in the United States.[101] The main reason for this, using the theoretical framework offered here, is the lack of the triple-veto power in the English legislation mechanism. This, in turn, can explain why American judges assign themselves a more creative role than English judges: They know that they can afford to do more without being overturned by the legislature. It is noteworthy that, according to this explanation, the differences between American and British court decisions do not originate from the character of the judges, their political affiliation, or the method of their appointment, but from the structure of the legislature and from the process of legislating.

The theoretical illustrations of the difficulties of ex-post control by the legislature are used in the literature mainly to demonstrate the problems involved in controlling administrative agencies and to explain the shift towards ex-ante control, mainly through structural and procedural constraints, as a compensation for this inability to exercise ex-post control.[102] However, the same phenomenon can also explain the institutional choice, or why (structurally) independent courts might be preferred by the legislature to administrative agencies. The latter tend to be more biased, more influenced by interest groups, and under more efficient control of the legislature's

committees than the legislature as a whole.[103] Taking into account the difficulties of ex-post monitoring and control, the choice of courts rather than administrative agencies seems to make a great deal of political sense.

Concluding Remarks

This paper offered some thoughts on the positive analysis of the independence of the judiciary. The shortcoming of the provided analysis is, as I warned in advance, its generality. But this may also be its advantage, as it tries to capture a wide-ranging phenomenon that appears in various ways across different legal systems. Be that as it may, the application of the general framework to specific constitutional-legal systems requires further study, which will not be provided here. It may, however, be worthwhile to point out that although the two main factors—those of the nucleus political decision-making unit and the collective decision-making process—do play a role in all systems, they appear in different forms and carry different weights.

For example, the important nucleus political decision-making unit in the context of a proportional representation system with a national constituency, such as the Israeli system, is the party, rather than the individual legislator. In such a system the interesting collective level is mainly the coalition parties, rather than the legislature as a whole or various bodies that take part in the legislation process (different legislative houses or a separate executive branch). Unlike the American and, to a lesser extent, the British systems, in Israel there is no accountability of the individual politician to his or her exclusive group of voters. Because of the national-proportional representation, on the one hand, and strict party discipline, on the other hand, the party usually talks in one voice and is the prime body that is accountable to the voters. In addition, due to the political reality of coalition governments, a major share of the important public decision-making (in the form of primary and secondary legislation as well as governmental decisions) is the product of a collective decision-making process in which only the coalition parties take a significant part. Nevertheless, even in such a system, the analyses of responsibility shifts, risk shifts, and collective decision-making processes are still relevant to the explanation of the independence of the judiciary.

Another factor that was not analyzed in this work is the actual degree of substantive independence exercised by judges. This degree differs, again, as a result of each particular constitutional and institutional structure. Because of the separation of powers between the president and Congress in the United States, the courts can afford to be more daring, or more active. A lack of such separation in Britain leads to a more self-restrictive approach by the courts. The élan and daring of the Israeli judiciary seems, from a comparative perspective, exceptional when compared to the characteristics of the equivalent British institutions and even, when differences of structural independence are taken into account, to the American ones. The collective decision-making factor can shed some light on these differences. In the American system potential cycling problems in public decision-making are solved by the multiplicity of the bodies that participate in this process (bicameralism and the president), each with a different structure of representation and a power to veto decisions or restrict their domain. The judiciary is an additional body that can serve these purposes, but it is not an exclusive one. In Britain, with no coalition governments and a strong party discipline, cycling in public decision-making is not a major problem. Israel, with a political reality of coalition governments, on the one hand, and

lacking bodies additional to the Knesset that could veto decisions or restrict their domain, on the other hand, is in need of the judiciary to fulfill this task. Hence the broad delegation of powers to the judiciary, which is virtually invited to participate in the national debate and the public decision-making process. These differences in the degree of actual substantive independence exercised by the courts, however, should not be confused with the phenomenon that was explored here—a gap between structural and substantive independence. This gap exists in each of the systems we have mentioned.

The explanation for the independence of the judiciary offered in this paper goes part of the way along the Landes–Posner approach, in the sense that it views the legislature as consciously preferring to have an independent judiciary. It also shares, to some extent, Tollison's and Crain's skeptical view of the practice of the doctrine of separation of powers, in the light of its proclaimed tasks. I have argued, as Posner and Landes did, that maintaining an independent judiciary is to the benefit of the legislature. But my direction was more minimalistic; it was not based on Landes' and Posner's problematic assumption regarding the orientation of an independent judiciary as loyal to the original, rather than the current, legislature, a view that is supported neither by empirical findings nor by theoretical proof. According to my suggested description, the existence of an independent judiciary benefits the legislature regardless of its subject of loyalty, be it the original or the current legislature. I will not profess to claim that the economic analysis of the independence of the judiciary can explain each and every component in the story of the various judiciaries and their interrelations with the other branches of government, but I do think that it can provide us with a better understanding of these interrelations, and more importantly, it can provide us with a general analytical framework to pursue the investigation into the independence of the judiciary.

The normative side of the story, which includes such questions as what is the best arrangement with regard to the delegation of legislative powers and how should this arrangement affect the institutional structure of government, and especially the desirable degree of judicial independence, was not discussed in this paper. Nevertheless, I think that one normative conclusion that can be drawn from the proposed analysis is that an independent judiciary does not necessarily fulfill what it has been intended to fulfill in the context of the doctrine of separation of powers. It was meant to be "an excellent barrier to the encroachment and oppressions of the representative body."[104] It turns out to be a mechanism through which the representative body might abuse its powers and reduce its accountability. Having said this, the conclusions of the suggested analysis with regard to the implications of independent courts on the gains and losses of interest groups vis-à-vis the unorganized general public (in the context of the debate about the doctrine of separation of powers[105]) are less pessimistic than those of Landes, Posner, Crain, and Tollison. We have seen why an independent judiciary benefits the legislature, but this does not necessarily have to go along with benefitting interest groups at the expense of the unorganized public. In fact, the suggested analysis is not necessarily associated only with the capture theory of legislation, which is the basis of the "crude" Public Choice or Economic Analysis approach. It can be integrated also with the Pluralist view of legislation, and some of its components may even be accommodated with the Republican view of legislation.

The problems involved in too broad a delegation of legislative powers were raised already in the 17th century by John Locke, who wrote:

> 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 the other hands.[106]

It is interesting that the issue of the delegation of legislative power had been discussed long before the construction of the modern doctrine of separation of powers and the expression of the need for an independent judiciary. In a way, our discussion in this paper has turned the tables, using the delegation issue as an explanation for the separation of powers and the independence of the judiciary. In recent years there has not been much theoretical discussion of these two concepts or phenomena, either from the positive or the normative points of view. I hope, therefore, that the proposed lines of thought will contribute to the rediscovery of these two important notions and to their integration into a more comprehensive examination of political systems and constitutional law.

Notes

1. The doctrine of separation of powers finds its roots in the ancient world, long before the ideas of constitution and constitutional law were conceived, in the writings of Aristotle. In the modern context it was in 17th-century England that the doctrine emerged for the first time as a coherent theory of the state, against the background of power battles between King and Parliament. John Locke wrote in his *Two Treatises of Civil Government* (1690) about separation between two branches of government—the legislature and the executive. But the name most associated with the doctrine is that of Baron Montesquieu, whose mature ideas are best expressed in *The Spirit of the Laws* (1748). For a historical survey of the doctrine see Vile (1967).
2. These ideas, which were expressed by Hobbes, Locke, Montesquieu, and the American Founding Fathers, were phrased in economic analysis language more than 200 years later by, among others, Downs (1957), Buchanan and Tullock (1962), Buchanan (1975), and North (1981).
3. See Shapiro (1977) and (1981), pp. 70–125.
4. See Vile (1967), p. 102.
5. *The Federalist*, No. 78, p. 526.
6. The previous major attempt to provide a comprehensive positive model of judicial independence was made by Landes and Posner (1975).
7. However, the framework of analysis derived from the specific aspects of judicial independence that will be the focus of this paper is more suitable to the Common Law legal systems, in which there is one general system of courts dealing with private law cases as well as public law cases.
8. See, for example, Epstein (1987), pp. 167–169, and Macey (1986, 1987, 1988). This view of separation of powers is also expressed by the original Public Choice literature, in the writings of Downs (1957), Buchanan and Tullock (1962), and Buchanan (1975).
9. The pioneers of this approach were Landes and Posner (1975), who specifically concentrated on the independence of the judiciary. Their view was extended by Crain and Tollison to include the separation between the executive and the legislature (1979b), as well as the mere existence of a constitution and the mechanism by which it works (1979a).
10. The term *government* has at least two meanings: the general authority in a state, which includes the legislature, the executive, and the judiciary; and one of the branches of this general authority—the executive. Later usage of the term should be apparent from the context.

11. Some writers list the components of judicial independence without actually defining it. For one of the most elaborate enterprises see Shetreet in Shetreet and Deschenes (1985), pp. 595 ff. For other definitions see Becker (1970), p. 144, Green (1976), and Shapiro (1981).
12. See, for example, Becker (1970), pp. 140–145; but for a different view see Eckhoff (1965), pp. 11, 33 ff, Thompson (1986), p. 828. I will not take a firm stance on this disagreement, but it is worthwhile to acknowledge, on the one hand, that the sources of the concept of impartiality are different from those of the concept of independence whose object is the government. While the latter derives from the doctrine of separation of powers, the former derives from concepts of justice. On the other hand, the same components of structural independence are designed to achieve both circles.
13. About the rationales of popular accountability of judges see Thompson (1986).
14. See Shetreet in Shetreet and Deschenes (1985), pp. 595 ff.
15. The lack of full structural independence derives partly from the perception of judicial accountability. See Cappelletti in Shetreet and Deschenes (1985), pp. 550 ff. But I think that not every component of this dependency can be explained by the need for accountability.
16. See, for example, de Smith (1989), pp. 368–381; Hood Phillips and Jackson (1978), pp. 30–31, 381–387; Wade and Bradley (1985), pp. 47–59, 332–342; Marshall (1971), pp. 103–104.
17. There are possible recent qualifications connected to the EEC treaties, which, nevertheless, hardly affect directly the structural independence of the British judiciary.
18. Informal conventions might make such an event unlikely, but it is formally possible.
19. Courts Act 1971, ss. 17, 20; Justices of Peace Act 1979, ss. 5, 6. For more details see Alder (1989), pp. 267–274; Shetreet (1976), pp. 19 ff. On the structure of the English Courts see Smith and Bailey (1984), pp. 27–91.
20. The Supreme Court Act 1981, ss. 10–12; Courts Act 1971, s. 18. But see on the dissatisfaction with the arrangement concerning judges' salaries Pannick (1987), pp. 13–14.
21. In fact, the Lord Chancellor is part of all three branches of government, as, in addition to being a member of cabinet, he presides over the Supreme Court and often hears cases in the House of Lords, and he also serves as the speaker of the House of Lords in its legislative capacity. For more details on the Lord Chancellor see Morrison (1973), pp. 199–216; Atiyah in Katzman (1988), pp. 130–134.
22. Indeed, this procedure for appointments and promotions was described by Morrison (1973), p. 70, as the most significant political input into the judicial system.
23. Courts and Legal Services Act 1990, s. 71, and the Supreme Court Act 1981, s. 10.
24. Denning (1955), p. 17.
25. Scarman (1967), p. 3.
26. See Jowell (1988), pp. 409–412.
27. Salzberger (1990).
28. These tentative results were confirmed by a statistical analysis using a Cox's proportional hazards regression model. The regression distinguished between deciding against the government by overturning the decision of the lower court, deciding against the government by affirming the lower court's decision, and deciding for the government by overturning the decision of the lower court. A significant negative correlation with promotion was found with regard to the latter variable. This can be interpreted in the direction of even a more far reaching conclusion, according to which not only do British politicians refrain from using their powers to curtail judicial independence, they seem even to promote it. As indicated above, the full results are beyond the scope of this paper.
29. The Constitution of the United States, Article 3, Section 1. It ought to be noted, though, that Congress controls judicial pay raises. This may create significant dependency, especially in times of inflation. See Toma (1991).
30. Article 3, Section 1 of the Constitution. For a general survey of the federal courts see Bator et al. (1988), especially chapter 4, which deals with congressional control of the jurisdiction of the courts.
31. Article 3, Section 2[2] of the Constitution. See Choper (1980), pp. 47–55.
32. Toma (1991) views the budget as the least costly political tool to create judicial dependency.

33. Article 2, Section 2[2] of the Constitution. For studies on the influence of political appointments of judges on their judicial decision-making, see Nagel (1960); Schubert (1974); Rohde and Speath (1976), ch. 5. On the confirmation process by the Senate and judicial independence see Rader (1987).
34. According to recent rulings, judges can be indicted prior to an impeachment procedure, and some argue that they can even be removed from office without an impeachment. For a critical view of these decisions see Catz (1987), pp. 316 ff. For a general account of the independence of the American judiciary see McKay and Parkinson in Shetreet and Deschenes (1985), pp. 358 ff.
35. Tushnet et al. (1988).
36. *The Federalist*, No. 78, pp. 522, 526, respectively.
37. *The Federalist*, No. 80, p. 541.
38. Article 3, Section 2[2] of the Constitution.
39. In 1978, however, the Senate passed a bill that creates a procedure for removal, and other disciplinary measures, applying to federal judges below the Supreme Court. Kaufman (1979), pp. 682–683, views this bill as a threat to judicial independence.
40. On the sporadic attempts to use institutional measures to influence judicial independence (mainly in the mid-19th century and in the New Deal period) see Bator et al. (1988), pp. 30–45. But see Gely's and Spiller's analysis (1989) as to the real factors that brought about a change in the Supreme Court's stance towards the New Deal.
41. This included allowing class actions, declaratory judgment and more. See McDowell (1988), pp. 4–10. See also Shapiro (1988); Mashaw (1990), pp. 290–294.
42. See, for example, Neely (1981), who entitled his book, *How Courts Govern America*.
43. Atkins (1988/89) found that despite the different appointment and promotion mechanisms and despite the different background of American federal judges and English judges, surprisingly the success rate of the government in civil cases and the rate of disagreement among judges in the two systems are similar.
44. McDowell (1988), p. 130, and see Chapter 4 for the founding father's debate with regard to the roles of the judiciary.
45. A more extensive analysis of the independence of the Israeli judiciary is given in Salzberger (1992).
46. For general surveys of the Israeli democracy and legal system, see Medding (1990); Shimshoni (1982); Maoz (1988); and Arian (1985).
47. This arrangement was created in 1953 by Section 5 of the Judges Law 1953.
48. The State of Israel emerged from a British Mandatory regime, which was authoritarian, suppressive, and lacking any real form of separation of powers. For example, the legal arrangement that was inherited from the Mandatory regime with regard to appointment and dismissal of judges was that judges are to be appointed by the High Commissioner (who held both legislative and executive powers) and are subject to be dismissed by him at pleasure.
49. For example, the arrangement regarding appointment and promotion of judges mentioned above was improved (in terms of structural independence) in 1984 and its status was elevated by its inclusion in the *Basic Law: Judicature*.
50. Indeed, a leading Israeli legal scholar and the former Attorney General, Professor Itzhak Zamir, wrote recently (1988, pp. 67–68) about the Israeli judiciary: ". . . The judges, and in particular the judges of the Supreme Court, appear to be dynamic, innovative and sometimes even daring to an extent uncommon in many countries. . . ."
51. See Albert (1969); Klein (1971); Shapira (1983).
52. See Negbi (1981).
53. See Kretzmer (1990); Shetreet (1990); Zamir (1990).
54. See Kretzmer (1988).
55. A somewhat similar process is taking place in Canada. The adoption of the 1982 Constitution strengthened the powers of the judiciary at the expense of the legislature. See Strayer (1988).
56. See note 9 and the text preceding it.

57. See Landes and Posner (1975), pp. 895–901; Crain and Tollison (1979a, b); Anderson et al. (1989). For similar criticism see Macey (1988/89), p. 46.
58. This is not, however, a universal feature. In France, for example, the executive has an inherent power to issue ordinances or decrees.
59. See Wade (1980), pp. 47–50.
60. The courts, in fact, can play two distinct roles: the role of a first-tier or a direct delegatee and the role of a second-tier or an indirect delegatee. The latter role consists of scrutinizing the decisions of the first-tier delegatees (especially those of administrative agencies). In this context see Pierce (1989) discussing the question whether the courts or the president in the United States ought to serve as a secondary agent of the people, and especially pp. 1251 ff, discussing the courts' role of interpreting statutes that are meant to be enforced by administrative agencies. See also Eskridge (1989).
61. As specified, for example, in Article 30 of the Israeli *Law of Contracts: General Part* 1973.
62. Calabresi (1982) can be seen as holding a similar view. See pp. 3–7.
63. 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).
64. Ibid., Title VII, section 703(j).
65. United Steel Workers of America v. Weber, 443 US 193 (1974).
66. If we assume, alternatively, that Congress thought about affirmative action when enacting the bill, but decided to be silent on the issue, it can be regarded as a negative ex-ante delegation.
67. Johnson v. Transportation Agency, 107 S.Ct. 1492 (1987), and see the dissenting opinion of Justice Scalia. For a similar view of interpretation as an ex-post delegation see Calabresi (1982), pp. 31–44.
68. See, for example, de Smith (1989), pp. 338–340; Aranson et al. (1982/3), p. 21. For a linkage between these traditional reasons for delegation and Public Choice analysis see Fiorina in Noll (1984), pp. 184–188.
69. This is in addition to a pecuniary cost-benefit analysis of the decision-making procedure itself. Rule-making by a delegatee body may be cheaper than the use of Parliament's expensive time; thus the legislature can simply save money by delegating its rule-making powers. See Fiorina (1982), pp. 45–46.
70. See Noll in McCubbins and Sullivan (1987), pp. 474–477.
71. Comparable observations were made by Lowi (1987); Sargenthich (1987); Eskridge (1989); and Macey (1990).
72. This framework of credit and blame shifts was offered, with regard to regulatory forms, by Fiorina (1982), p. 33.
73. See Atiyah (1980).
74. Public Choice theory claims that since interest groups are well organized and their prospective benefits from the arrangement are significant, and since the costs of this arrangement will be distributed to the rest of the public at a very negligible individual cost, then although the arrangement makes the majority worse off, interest groups can manipulate the legislature to pass it without losing net political support.
75. On the connections between the interest-group view of legislation and delegated powers, see also Spiller (1990). It is, however, noteworthy that the shifting-responsibilities model is, in fact, not limited to a Public Choice view of legislation. It can fit a Pluralist view of legislation, which assumes that legislators faithfully represent the views of their constituencies. It can even be accommodated within a Republican view of legislation: by delegation legislators can diminish the risk involved in representing "civic virtues." Indeed, unpopular policies, or policies that are intended to bear fruits only in the long term and bring hardship in the short term, can be legislated by delegation. Monetary policy to combat inflation adopted through a central bank can serve as a good example. See Ferejohn and Shipan (1990), p. 9.
76. Macey (1990) asserts that the abortion issue was delegated by Congress to the states. A more accurate description is that the issue has been delegated to the states, President, and courts, with participation of Congress. But I think that if one had to single out the dominant body

that is regulating the issue of abortions, the courts would have had to be pointed at, especially after the decisions of the Supreme Court in Roe v. Wade [410 U.S. 113 (1973)], which brought abortions under a constitutional umbrella, and subsequent decisions, such as Webster v. Reproductive Health Services [109 S. Ct 3040 (1989)], which qualified this constitutional right, providing the courts with a broad leverage to decide on the issue.

77. 111 S. ct 1759 (1991).
78. See Shapiro (1990), p. 1738.
79. See Carter (1992), p. 2759.
80. See Atiyah and Summers (1987), pp. 298–335.
81. See McCubbins (1985); Arnold (1987); McCubbins et al. (1987).
82. See McCubbins and Page in McCubbins and Sullivan (1987), pp. 416–420.
83. Macey (1990), p. 285, uses a similar argument to explain why the American Congress prefers at times to delegate its powers to the states rather than to an administrative agency.
84. See also Horn and Shepsle (1989), pp. 505–507.
85. For more on delegation in conditions of uncertainty see Aranson et al. (1982/3); Horn and Shepsle (1989); Macey (1990); Shepsle (1972); Fiorina (1982).
86. As a matter of fact, even when the legislature itself regulates, we can still expect that in the course of the enforcement of the arrangement, by the executive and the courts, there will be a shift from the original arrangement. But if this is a detailed arrangement (rather than a negative delegation), this shift should be marginal.
87. For an analysis based on the assumption of a bell-shaped utility function of legislators, see Fiorina (1982). For an analysis based on the assumption of a concave legislators' utility functions, see Fiorina (1986).
88. It is noteworthy that the degree of bias of a certain delegatee may be viewed differently by different legislators. Some argue, for example, that while Conservative members of Parliament in Britain view the courts as unbiased delegatees, Labour politicians view them as biased towards conservative values. See Griffith (1985).
89. For a more detailed analysis see Fiorina (1982, 1986).
90. See Mayton (1986), p. 959.
91. On some of these mechanisms in theory and in practice see Denzaw (1985); Shepsle and Weingast (1981).
92. It is noteworthy that this proposition is in a way similar to that of Landes and Posner (1975), in the sense that it draws functional parallels between an independent judiciary and the procedural rules of legislatures. But this is also the point in which the two explanations depart from each other: The function of these mechanisms for Landes and Posner is to increase the durability of legislation, while in my description they serve a more basic and primary function—the very possibility of achieving stable legislation. One can argue that the differences are only a matter of degree and that stability is nothing more than durability, but I think that in the context of the two models these qualities are significantly different. The most important difference is that for Landes and Posner the assumption according to which an independent judiciary is loyal to the original, rather than to the current, legislature is crucial to the coherence of the model, while in my explanation this problematic assumption is not required. It does not matter how the judiciary decides (within a constrained area of possibilities). The crucial factor is that the courts do decide.
93. See Shepsle and Weingast (1981), pp. 507–511. Instead of a shift from the status quo to a new arrangement that is in the winning set, the legislature prefers to adopt a vague arrangement that includes a wider range of options. The final choice within this range is left to the courts.
94. McCubbins (1985), p. 732, using a slightly different analytical framework, shows the formal necessary conditions for specific enactment and for delegation, under the assumption that the status quo is the last motion against which all alternatives are pitted. The condition for delegation is considerably weaker than the condition for specific enactment. This can explain why delegation is so common.
95. Shepsle and Weingast (1981), pp. 507–511.

96. Compare the above description with the view of Tushnet et al. (1988) on judicial review. For a similar view of judicial review as delegation of powers in the American context, see Choper (1980), pp. 47–54; McDowell (1988), pp. 4–13.
97. Pierce (1989), pp. 1245–1251. We can draw similar conclusions from Tushnet et al.'s (1988) observations comparing institutional elements, personal characteristics, and procedure of adjudication and of legislation in the United States, and from Anderson's and Higgins' (1987) finding of a significant negative correlation between the existence and degree of substantive due process and the volume of regulating and legislating across the different states in the United States.
98. Atiyah and Summers (1987); see especially chapters 10 and 11.
99. Formal presentation of this situation will look as follows: If A—is the treaty with the SC, B—the treaty without the SC, and C—no treaty, the preferences can be described as A > B > C for the Liberal Democrats; A > C > B for Labour, B > C > A for the Conservatives, and C > A > B for the rebels. Taking into account the share of power of each group in the House of Commons, this preference order results with a cycle—A > B > C > A.
100. In the American context see McCubbins et al. (1989), pp. 436–440; Gely and Spiller (1989, 1990).
101. Atiyah in Katzman (1988), p. 137.
102. See, for example, McCubbins et al. (1987, 1989), pp. 440 ff; Weingast and Moran (1983); Arnold (1987).
103. McCubbins et al. (1987), pp. 247–248. See also Ferejohn and Shipan (1990).
104. *The Federalist*, No. 78, p. 522.
105. See notes 8 and 9 and the accompanying text.
106. John Locke, *The Second Treatise of Government*, published in 1690, Section 141.

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