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Abstract

Non-majoritarian institutions (NOMIS), such as agencies and central banks, which prototypically act on a wide discretionary basis, cannot simply defer to the legislator's command or to instrumental rationality. NOMIS operates within large zones of discretion and they deal with values and *policy ends*, not only the means. Hence, the spectre of arbitrary rule. NOMIS are challenging from the point of view of democratic legitimacy. By bringing together different research traditions, this paper identifies different ways of mending the legitimacy problems: the *evidence-based* strategy, the *legislators' command* strategy and the *participatory* strategy. These strategies all come with shortcomings. The article suggests a justificatory account of NOMIS premised on the reason-giving principle, which allow us to see them as endowed with a democratic obligation. NOMIS are specialised not only on means-ends relations but on the viability and justifiability of political ends, as well.

Keywords

Arbitrary Rule - Non-Majoritarian Institutions - Legitimacy - Participation - Public Reason

Introduction¹

‘The worst financial crisis in global history’ commenced in the USA but hit Europe and the Eurozone economies hard.² The European Central Bank (ECB) has been widely credited with saving the euro, which was on the brink of collapsing. What seems remarkable, however, is the ECB’s unrelenting insistence on recipient countries honouring their debts, rejecting any other solution (Tooze 2018: 360). The insolvent countries, not the banks, paid the price. This brings up the pertinent question of in whose interest’s central banks and *non-majoritarian institutions* (NOMIS) in general act, and whether they represent a threat to democracy.

While indispensable, the discretionary power of NOMIS raise challenges. There is a risk that NOMIS defy democratic control, that they create political disenchantment, that they represent ‘escapes’ from democracy. Some claim that such delegation undermines citizens’ trust and confidence in representative democracy and leads to an upsurge in populist parties (see e.g. Caramani 2017; Mair 2013). This is because NOMIS appear to wield increasing public authority whilst their connections to parliaments, legislatures and elected executives are unclear (Power 1997; Slaughter 2004; Vibert 2007). They are *expert bodies* with some grant of specialised authority, neither directly elected nor directly managed by elected officials (Thatcher and Sweet 2002). Such bodies operate with large zones of discretion and inevitably deal with values and *policy ends* and not only means. Sometimes NOMIS are authorised to inform, advise and even make collectively binding decisions. Due to their autonomy and knowledge base, NOMIS inevitably *wield political power*.³ Policy-makers rely on agencies’ expertise to set policies. The latter advise and help sort out the basis for statutes. Since NOMIS are involved in setting political ends and not only in means-end scheming, there is an obvious danger of arbitrary rule or *dominance*; that it is the experts and not the people or their representatives that govern. A decision is arbitrary, and a source of dominance, whenever it is taken or rejected without reference to the interests, or opinions of those affected (Pettit 1997: 53). Arbitrary rule means being at the mercy of others’ will and is the essence of injustice.⁴ The core of dominance is dependence on others’ unauthorised discretion to affect citizens’ rights and duties. Can expertise-based decisions be reconciled with lay participation and mass democracy – and, if so, how?

¹ This paper is part of the project Democracy and Expert Rule: The Quest for Reflexive Legitimacy (REFLEX), funded by the Research Council of Norway (project number 250436).

² Revised version of paper read at Workshop on *Polarization, institutional design and the future of representative democracy*, Berlin, Harnack Haus, 5-7 October 2017. Another version was read at the *REFLEX Workshop on the legitimacy of depoliticized decision-making* 16-17 November 2017, ARENA, Oslo, Norway. I am grateful for comments provided by the participants, and particularly to Jonathan Kuyper and Rainer Schmalz-Bruns.

³ It does not matter that ‘EU agencies will have purely informational roles because information is a key element in policy-making and policy controversy’ (Shapiro 1997: 276).

⁴ Arbitrary rule refers, according to James Q. Wilson (1989: 326), ‘to officials acting without legal authority or with that authority in a way that offends our sense of justice’.

NOMIS qualify decision-making by fact gathering and by validating data for policy-making. They pursue long-term interests, are supposed to apply principles and procedures ensuring accuracy and to observe the law, not merely the elected politicians. For example, the time-inconsistency problem of monetary policy may justify setting longer-term goals and leaving the execution to an independent central bank or other authorities (Kydland and Prescott 1977). In NOMIS, objective knowledge enjoys a strong, if occasionally rebuttable conjecture. Belief in objective knowledge is a condition *sine qua non* for democracies, as it is what unities heterogeneous publics. But when it comes to practical decision-making, it is difficult to rely only on objective knowledge. Some types of knowledge are embedded in contested theories (about the good society, about the economy, about justice etc.), and some types involve predictions about the effects of proposed policies on complex human systems. Objective knowledge is hard to obtain and an insufficient guidance for action. In effect, experts must draw on extra-scientific types of knowledge when dealing with practical questions; when they make decisions about what to do.

There are different proposals for mending the putative legitimacy problems of NOMIS, both those related to stricter separation of facts and values and those related to stricter political control. These proposals can be more or less well suited to alleviate the problem, but they share a deficiency in that they do not adjust for the fact that the NOMIS are involved in norm setting and policy-making and not solely in technical implementation. Is then more participation an alternative? After all, the legitimate exercise of political authority requires justification to those bound by it.

This paper assesses ways to mend the legitimacy problems of NOMIS. In order to clarify the multifaceted nature of the problem and the dilemmas involved, it distinguishes between three ideal typical approaches to the problem of depoliticised decision-making. They amount to strategies for repairing legitimacy deficits reflecting the authority relations of legitimate government. Political decisions should be defensible on scientific, legal and popular accounts. This paper examines whether legitimacy can be restored by establishing purely scientifically based independent bodies – *the evidence-based strategy*; by establishing proper delegation rules – *the legislator-command strategy*; or by including lay people – *the participatory strategy*. These strategies all highlight important normative concerns that need to be addressed. They make clear that unelected bodies are endowed with a democratic obligation. However, all are deficient with regard to providing solutions. They are mistaken about the nature of unelected bodies and do not adjust for the fact that they are power wielding entities.

In Part I, I start by briefly discussing the predicaments that the NOMIS' mode of administration and the risk agenda pose for democratic self-rule. In Part II, I set out three strategies for handling legitimacy deficits and address their shortcomings. Lastly, I hint at a justificatory account premised on public reason.

Part I – Legitimacy deficits of epistocratic orders

The rise of *the administrative state* populated with NOMIS raises questions as to their implications for democratic legitimacy and accountability.

Statutory regulation

The *administrative state* based on the seclusion of regulatory power became a distinctive ingredient of modern government that emerged during the twentieth century, first in the United States and later in Europe (Lindseth 2010; Tucker 2018). It all started with central banks in the 1920's as part of the economic reconstitution after World War I. The idea was, according to the League of Nations, that central banking 'should be free from political pressure, and should be conducted solely on lines of prudent finance' (Tucker 2018: 12). However, the 1920 stock market crash and the Great Depression stripped central banks of power, and they did not regain pre-eminence until the 1990's when the International Monetary Fund and the World Bank recommended independent central banks to the emerging-market economies. The effect was deregulation, liberalisation and privatisation – the 'neoliberal turn'. It meant however not the end of big government, rather the establishment of a burdensome regulatory regime, that is: statutory regulation by independent agencies (see Majone 1996).

In the European context, the central bank is an important institution. The first step towards creating the European Central Bank (ECB) was the decision, taken in 1988, to build an Economic and Monetary Union: free capital movements within Europe, a common monetary authority and a single monetary policy across the euro area countries. The ECB was established with the primary objective to maintain price stability within the Eurozone. Once the Bank was established in 1998, its Governing Council fixed its monetary policy to an inflationary target: Price stability is defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. Central banks are generally independent from direct political control; the ECB is even more so. Why do the ECB and not the parliament set the inflationary target, why is the target set to two per cent and why is inflation only measured with reference to consumer prices? (Menéndez 2020). The ECB is a special case of depoliticised governing in a multi-state setting that is often accused of epistocratic dominance and expansion of competence (see e.g. Tooze 2018; Weisbrot 2015). A pertinent question, as posed by Joana Mendes and Ingo Venzke (2018: 76), is: 'Should the European Central Bank take decisions on outright monetary transactions, given that such decisions can have a far-reaching impact on matters of economic policy?' Moreover, in Europe, there is a massive development of the regulator capacity, with newly fortified powers to oversee and control diverse public affairs.

Agencies have proliferated both at the national and the European level as a consequence of an increase in the EU's competences but not in budgets. Agencies are not confined to economic and financial issues. Since the Single European Act in 1986, the EU has become very active in the area of risk regulation. Health and safety regulation of products within the European Single Market is a high-priority issue. Initially the EU Commission was not allowed to delegate legislative power to other bodies, according

to the *Meroni doctrine*. However, this would be improbable in view of the growing complexity of EU competencies and regulatory tasks.⁵ The first EU agencies were established in 1975, and the number exploded after 2000, amounting now to 44.

Decentralised agencies have become an established part of the way that the EU operates. They perform regulatory, monitoring, and coordination tasks within different policy fields. It can be distinguished between agencies dealing with production and dissemination of information, and those with advisory, assistant and administrative decision-making functions (Chiti 2009: 1395). They all contribute to the implementation of important Union policies, thus allowing the institutions, in particular the Commission, to concentrate on core policy-making tasks. Agencies support the decision-making process by pooling the technical or specialist expertise available at European and national level and thereby helping to enhance the cooperation between Member States and the EU in important policy areas. On the other hand, their independence and discretionary policy-making power give rise to accountability problems. Even though agencies are 'partners' to Directorate Generals (DG) (the Commission), the independence of staff and experts are recurrent themes in the research on agencies. Often, the constituent regulations do not make it clear 'from which actors exactly agencies' employees, boards and/or committees are intended to be independent: only from politicians or also from national ministries and agencies and/or perhaps also from industry and organized interests?' (Busuioc and Groenleer 2014: 181; see Everson, Monda and Vos 2014; Mendes and Venzke 2018). Miroslava Scholten notes that '[a]t this moment determining who holds EU agencies to account and how becomes a rather challenging exercise when 35 agencies are held to account in more than 30 different accountability regimes' (Scholten 2014a: 305).

Another recurrent theme is the question of what powers and what type of discretion can be given to agencies. In the controversy over the applicability of the *Meroni doctrine* (Chamon 2014), the CJEU in the 1981 *Romano case*, reiterated that the Council could not delegate the power to adopt acts 'having the force of law' to agencies (Guiseppe Romano v. Institut national d'assurance maladie-invalidité 1981). The Court prohibited the delegation of such powers to an agency. The Treaty foresaw the delegation of legally binding powers to the Commission only.

A new doctrine

In the vast literature on agencies and agencification, there is increasingly the question of whether they are empowered to make legally binding decisions; whether they have been assigned policy-making discretionary powers. Scholten (2014b) and Scholten and Van Rijsbergen (2014) argue for the latter, since the discretion assigned to them at times is of a normative, political nature (see also Moloney 2019: 103ff). The competence to take legally binding measures of general application powers were in 2010 assigned to the three new EU financial agencies (the European Banking Authority (EBA), the

⁵ See the ruling in the European Court of Justice, the *Meroni doctrine*, which arose from cases C-9/56 and C-10/56, and relates to the extent to which EU institutions may delegate their tasks to regulatory agencies.

European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA)). The authors argue that:

[T]he *ESMA-short selling* case (Case 270/12), which was decided explicitly in relation to an EU agency and within the realities of the new treaties [...] shows that [...] the Court did formulate a new delegation doctrine in relation to EU agencies: EU agencies can be the recipients of executive discretionary powers if this discretion is limited.

(Scholten and van Rijsbergen 2014: 390)

Over a longer period of time, quasi-legislative powers have been conferred to the agencies. It is argued that the *Meroni-Romano doctrine* does not fit with practical realities. A series of treaty reforms that have taken place since 1958 have demonstrated the necessity to update the doctrine. Notwithstanding the necessity to revise the doctrine to fit with practical realities, the delegation of legislative powers is not allowed, at least according to Locke's famous doctrine:

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

(Locke [1690]1963, §141)

As the *ESMA-short selling ruling* attests to, a new doctrine is in place. It states that *EU agencies can be assigned powers to take legally binding decisions of general application*. EU agencies have thus been given policy-making, discretionary powers, exactly the type of powers that the Court prohibited. This is a delegation situation that is not limited to the ESMA case but applies to EU agencies in general to a lesser or larger degree. Nor is it just a European phenomenon. In the US, there has been a heated debate over the issues of legislative powers given to agencies, in particular the Environmental Protection Agency (EPA), a federal executive agency. The Clean Air Act directed the EPA to regulate emissions from power plants if the agency found the regulation 'appropriate and necessary' (Mashaw 2018: 118). The EPA is empowered, on the basis of Section 109(b)(1) of the Clean Air Act, to promulgate and revise air quality standards from time to time, more specifically 'to establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air' (cited from Scholten and van Rijsbergen 2014: 397). This attests to the EPA's normative power, viz., power to affect citizens' choice situation, their rights and duties.

When a legislator assigns to agencies competences that it does not possess itself, there is a problem of accountability and a question of the delegation model itself.

[T]he tasks that the EU legislator has been giving to EU agencies are not the tasks that it has had itself. EU agencies have been usually assigned tasks that have been previously exercised by national authorities, the Commission or the Council. [...] Conferral of powers seems, therefore, to describe better the

process of giving powers to EU agencies by the EU legislator.

(Scholten and van Rijsbergen 2014: 402)

The principle of conferral is a fundamental principle of EU Law. According to the principle of conferral, the EU is a union of member states, and all its competences are voluntarily conferred on it by its member states.⁶ But when competences, which the EU itself is not in possession of, are delegated, there is a problem. Neither legal nor electoral control mechanisms are fit to handle this problem, because parliaments cannot hold discretionary executive power to account, and courts cannot review rule compliance when the agencies are allowed to establish the rules themselves. In contrast to the strict delegation model, the conferral of powers requires new regulation.

The conferral of powers [...] raises the questions of what powers (and how much discretion) can be conferred upon an entity, when and how the conferral takes place (within what procedural and substantive limits) and who holds the recipients of the conferred powers to account and how. This is especially the case when a constitution or a treaty is silent on these matters. In contrast to delegation, the conferral of powers requires a legal framework to be in place in order to realize the conferral.

(Scholten and van Rijsbergen 2014: 402)

This debate on the power of NOMIS is not merely a concern for constitutional lawyers.

Contestation and protest

Unelected bodies are under attack due to contestation and politicisation (Hooghe and Marks 2015). Often, they are accused of being un-democratic, of making biased decisions, of not being neutral and pursuing their own professional interests or those of the privileged elites. There is a problem of *trust* and there are legitimacy deficits. It is, the story goes, 'faceless bureaucrats' – experts and professionals – with a dubious political mandate that make decisions with harsh consequences, about the interest rates and public finance, about security and terrorist precautions, about product, health and food safety standards. The critique is often focused on depoliticised bodies, which are seen to overtax the democratic procedure, hence spurring populist opposition and Euro-scepticism (Crouch 2011; Kuyper 2016; Mair 2013; Michelsen and Walter 2013).

The widespread outsourcing of government functions to unelected bodies entail advantages with regard to gathering and presenting information, analysing evidence and linking decision-making to the current state of knowledge. Yet, it also privileges those who possess certain forms of expertise and the executive branch of government.

⁶ According to the Bundesverfassungsgericht (BVerfG): 'As long as, and in so far as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle' (see GCC 89, 155).

When experts are kept on a longer leash, the room for *discretion and manoeuvre* is high. According to critics, the focus on efficiency and outputs entails a shift from norm-based politics to pragmatic problem solving – a shift that diverts attention from the power bases of non-majoritarian institutions (Bartl 2015; White 2015). Depoliticised bodies, including courts, are the beneficiaries of this shift.

The rise of ‘depoliticized decision-making’ has in part been justified as a response to the time inconsistency problem of politics where short-term benefits trump long-term benefits due to electoral cycles. The conventional justification of the NOMIS is that expert judgments are needed to ensure rational decision-making; to choose the right means to realise political ends. From time to time, monetary, financial, security and military policy need to be isolated from partisan politics in order to enable considered judgments. It is in everybody’s interest that complexity is handled intelligently. Expert competence and administrative advice are needed to enable collective goal attainment and problem solving, to ensure consistency, long-sightedness and rationality in policy-making. No government can make viable decisions without knowledge of facts, causal connections and interconnections as well as knowledge of risk estimates and the possible negative effects of measures. There is, however, the danger that the serving administrative-scientific machinery becomes the real master. The complexity of public policies in advanced democracies ‘threatens to cut the policy elites loose from effective control by the demos’, effectively creating a ‘quasi-guardianship’ (Dahl 1989: 335).

The new risk agenda

NOMIS deal with tricky issues and wicked problems to which there is no single correct answer. Regulatory problems in the EU prompted new regulatory competences and the establishment of independent bodies on a whole range of fields, as we have seen. Compound monetary and financial policies with consequences for public revenues, taxes and citizens’ income are handed over to central banks. Agencies deal with delicate security and military policies with deep ethical and moral implications. Even though these independent bodies are not set up to make value judgments, this is in practice inescapable. Some bodies in areas such as health and safety, embryology and genetics are required by their mandates to base their advice on ethical norms (Vibert 2007: 45).

Developments within the scientific community itself, such as the continued specialisation and differentiation of science into different sub-disciplines, have made scientific consensus, even on the purely factual aspects of an issue, all the more fragile, and in important areas quite unlikely. Due to a growing awareness of epistemological uncertainties, scientific risk assessment is now seen as burdened with insecurity and ambiguity.⁷ It is hard, if not impossible, for scientists to establish ‘reliable and consensually accepted measurements for certain risks, which could act as clear guidance for decision-making’ (Krapohl 2008: 35). This is clearly demonstrated in the questions of GMOs, monetary policy, immigration, security and economic crisis management. Disagreement prevails among experts and scientific conclusions are

⁷ See Brown (2009); Fischer (2009); Hacking (1999); Jasanoff (1995); Latour and Woolgar (1986); Weingart (1999).

often politically charged.⁸ The claim is that 'science is not made scientifically'; that values and facts are inextricably entangled. For Foucault (1980: 131) and his followers, power and knowledge are intertwined. 'No reality without representation!' claims Bruno Latour (cited in Brown 2009: 140, 163).

However, if science is politicised, if it is seen as a kind of politics, how can we know that epistemic agents are right? If facts and values are interwoven, if there are no scientifically true answers, on what basis can decision-makers be held to account? If *expertise* is fraught with uncertainties and is socially constructed, as the constructivists hold, then what prevents the power holders from constructing it however they like (see Brown 2009: 202)? Ambiguity on this point has led to the allegation that the Science Technology Studies (STS) is responsible for the emergence of post-truth politics:

By revealing the continuities between science and politics, science studies opened up the cognitive terrain to those concerned to enhance the impact of democratic politics on science but, in so doing, it opened that terrain for all forms of politics, including populism and that of the radical right wing.

(Collins, Evans and Weinel 2017: 581)

The predicament is that epistemological conflicts create a situation where science loses its functional authority. When experts face experts, they often no longer serve to disencumber political discourse, but instead constitute *a strategic resource* that can be utilised by political decision makers and interest groups. But without trust in objective knowledge it becomes impossible to justify shared programs of political action. A post-truth democracy, which would have to seek agreement on a non-cognitive basis, would no longer be democratic (cp. Habermas 2005: 150).

Many have protested against the technical way of understanding risks and demanded broader involvement and lay participation. Experience- and practice based knowledge are called for as well. Because judging whether a certain level of risk is acceptable or not, cannot be determined scientifically, risk assessments cannot be left to epistemic agents alone. The 'deconstruction of science' and reactions to the *scientisation* of risk questions demonstrate their intricate nature. Risk assessments involve values, judgments and perceptions. In many areas, it becomes more difficult to leave questions regarding technological risks solely to the problem-solving capacity of expertise. When the division between science and politics becomes more obscure, a broader set of premises for decision-making is called for. The fact that, in a constitutional state, such risk assessment has never been delegated in its entirety to expert bodies is further evidence of the value-leadenness of the issues.

⁸ One expert is however a layman in relation to another expert.

Part II – Legitimacy repairing strategies

Democratic legitimacy would seem to require that political authority is involved in NOMIS in some way. Hence the problem of reconciling the epistemic and the participatory dimension of democracy.

Squaring the circle on NOMIS

NOMIS represent a challenge to democracy because they recognise some forms of knowledge as expertise and exclude alternative, competing forms, and because they operate within large zones of discretion. The assumption is that NOMIS ensure more consistent, far-sighted decision-making as well as more justifiable results (Majone 2005; Pettit 2004). But it is not clear how this type of reasoning can be reconciled with non-arbitrary decision-making, and thus how and when NOMIS can be legitimate, viz., acceptable for affected parties. Can NOMIS be justified on democratic terms or are they simply a more refined mode of epistocratic governance?

The tension between expertise and participation is mirrored in the organising principles of modern democracies as they are premised on separation of powers, knowledge-based administration, judicial review and independent central banks. There are procedures for including not only the citizens but also the experts. Both are needed to ensure rational and non-arbitrary decision-making. Accountability entails the obligation of decision-makers to provide justification in order to ensure that discretionary power is used in a reasoned and legitimate manner. Accordingly, decisions need to be perceived as rational and reasonable. The presumption is that decisions that affect peoples' interests and values must be based on shared and commonly assessable and objective knowledge if they are to be acceptable. At the same time, the democratic principle requires the participation of affected parties. How to square the circle between the epistemic and the participatory dimension of democracy?

Standard theories of agency decision-making in jurisprudence and political science offer no justification for agencies' role in policy-setting, the assignment of broad policymaking discretion to administrative agencies (Seidenfeld 1992: 1515). Different research traditions have contributed to the field and have suggested different cures. In order to get a grasp of the principled problems involved, I will address the basic assumptions that can be identified in the mainstream research traditions. I identify three principally different ways – three strategies -- for repairing the legitimacy problems, that is to ensure non-arbitrary decision-making. The strategies are derived from the authority relations of legitimate government in constitutional democracies, according to which decisions should be in line not only with the popular will, but also with verifiable knowledge and legal norms.

The following three ideal typical strategies stand out: the *evidence-based* strategy, the *legislators' command* strategy and the *participatory* strategy. They highlight principally different solutions to the legitimacy problem of depoliticised decision-making; hence help us to discern the dilemmas and concerns involved.

The evidence-based strategy

This strategy holds that establishing bodies on a purely scientific basis will enhance the legitimacy of the relationship between expert advice and politics. Rigorously established evidence informs policy decisions. Building on the idea of a strict separation between facts and values, this strategy aims at developing and clarifying the scientific basis for political action by removing manipulated, anecdotal or cherry-picked knowledge. 'Evidence-based' can mean many things, but essentially involves a system for rigid control of the quality of knowledge. Alternatives are established and ranked on the basis of the rational assessment of their consequential merits. In a political context, the idea is 'to move away from policy based on "dogma" to *sound evidence of what works*' (Boswell 2009: 3). NOMIS are instrumental entities organised outside of and independent of government. Through a clearly delimited, documented and justified knowledge base, independent knowledge-providers will be able to provide decision-makers with precise, objective knowledge to use as they wish. This strategy is premised on the epistocratic argument that *wise men* can reason rationally and there is no need to gather a group of those who will be affected by the decision.⁹ It envisions the restoring of value neutrality based on instrumental agency.

Max Weber ([1920]1978) is the founding father of the theory of bureaucracy and *agency instrumentalism*: the citizens by their representatives set the basic aims through legislation that the agencies are to implement in a value-neutral manner. Administrative bodies are transmissions belts, so to say. Weber counterpoised the role of the expert to that of the politician. Politicians employ value-neutral knowledge provided by experts, viz., knowledge as to which means are most suitable for reaching a specific political value, end or goal; for ranking alternatives and for assessing consequences and possible by-products of choices. Politicians attend to ends and values - to 'ought-questions' - experts to facts - to 'is-questions'. Experts should be 'on tap, not on top'. In line with this, Thomas Christiano (2012: 42) claims that 'citizens rule over the society by choosing the aims for society and experts, along with the rest of the system, are charged with the tasks of implementing these aims with the help of their specialized knowledge'.¹⁰

By distinguishing between evidence-based and value-based judgements, NOMIS in the evidence-based strategy seek to clarify the empirical and normative premises for political decision-making and to insulate issues for independent action. The independence of NOMIS stems from the fact that they operate outside hierarchy and are not directly accountable to politicians or voters. They act on the basis of strict professional norms such as 'expertise, professional discretion, policy consistency, fairness or independence of judgment' (Majone 2005: 37). Majone, who advocates for delegating policy-making power to non-majoritarian institutions - not to directly

⁹ See Plato (2003); Estlund (2008: 7, 22, 30-1, 40, 277-8) for the 'epistocratic' position.

¹⁰ See also Christiano (1996: 195ff, 239).

elected or accountable agencies – acknowledges the ensuing questions of accountability and legitimacy, but maintains that these could be solved by sectioning off particular policy areas in line with the *pareto optimum* criteria.

Sectioning off particular issues as pragmatic, efficiency issues presupposes the ability to separate facts and values. Facts are seldom incontestable, however. They are infused with values and cognitive frames and remain open to interpretation and reinterpretation.¹¹ In political controversies, truth claims are often interwoven with moral and counterfactual claims (Tetlock 2005: 4). For example, when experts advise politicians on whether to vaccinate against pandemics, this has less to do with the actual facts than with the perception of responsibility and socially defined standards of health. ‘Controversy studies’ have problematised the knowledge claims of experts (Timmermans 1999), shown that the public construction of science is wrong (Collins and Pinch 1993), that the law’s construction of science is arbitrary and misguided (Jasanoff 1995).¹²

Due to the contingent nature of facts, evidence is hardly ever unequivocal or unambiguous (see Williams 2002: 125). More often than not, facts and values are hard to separate. The production, selection and transmission of knowledge are hardly neutral and rely on *extra-scientific support factors*. Evidenced based methods do not improve our ability to predict which policy will be effective and which will lead to bad results (Cartwright and Hardie 2012). And lastly, who determines the content of extra-scientific input in decision making? This model does not ensure non-arbitrariness. In fact, the Weberian transmission-belt model of administration does not fit the world of delegation of regulatory competences. Agencies enjoy qualitative higher degrees of autonomy compared to that of bureaucracies. Also because disagreement prevails among experts, democratic legitimacy would seem to require that political authority is involved in some way.

The legislators’ command strategy

To restore trust, one may call upon the democratic chain of legitimation and establish bodies more firmly subjected to democratic control. The *legislators’ command strategy* holds that politicians – or the democratic constitution – lay down the rules and procedures for unelected bodies so that the *principals* can firmly supervise and control the *agents*. The principal-agent model of representation presumes that the legislature delegates competence to NOMIS, which may in principle be revoked. Such delegation can come with a powerful set of controls imposed by political bodies, to ensure that NOMIS remain within the remit of the mandate. As a response to the deficiencies of the traditional rule-of-law model with regard to control of these new bodies poised between law and politics, a new discipline, *constitutional economics*, has been developed (Buchanan 1990; see McKenzie 1984).

¹¹ The influence of heuristics, of cognitive dissonance and framing is well known (Kahneman 1997; Tversky and Kahneman 1974).

¹² See also Turner (2001).

The tools available to politicians are institutional design (incentives), fixed rules and contracts, oversight and control mechanism. The legislature both authorises the actions of NOMIS and confines and delimits their range of operations through the provisions set out in the basic rules – the constitution – as well as through a set of institutions that permit each of the principals to exercise veto power. Constitutional rules amount to *collective auto-paternalism* when designed to advert dangers arising from our own (predictable) judgmental failures due to akratic (licentious) behaviour (Elster 1979: 65-67, 77-85, 88-103; Holmes 1988: 195ff). Pre-commitments are either aimed at restraining future passions, protecting future self-interest, preventing *hyperbolic discounting* of the future or preventing future changes of preference.

Fixed rules help to discipline the representatives as well as pre-commit politicians to certain policies. It is hard to commit others unless one-self is committed. Self-binding solves the credibility problem. Some see the whole rationale for delegation to NOMIS in the ‘need for credible commitment, so that government sticks to the people’s purposes rather than departing from them for short-term gain, electoral popularity, or sectional interest’ (Tucker 2018: 12).

However, would this strategy solve the legitimacy problem? Credibility also has to do with being responsive to voters’ present demands not only their long-term interests. Would people accept this kind of paternalistic ‘auto-paternalism’? Why should long term be identified with the public interest, and, what is more, who knows what the people’s long-term interests might be? Neither do we (or anybody) have infinite knowledge about future social and objective circumstances nor are we fully transparent to ourselves.

Constitutional rules raise the problem of what should be constitutionalised and what should be left to political discretion as well as the problem of *formalism*. Despite constitutional principles that define what can be left to political discretion, it is hard to foresee the need for regulation or to establish all the rules that may be required to deal with an evolving set of problems. Lacunae and gaps will appear, requiring new regulation (cp. Crozier 1963).

In general, accountability through legislatures’ control is difficult because rational decision-making requires decisional autonomy and flexibility, especially when ends are ambiguous and statutes and legal prescriptions are vague and open for interpretation. Control through delegation is increasingly difficult due to the *de facto* autonomy and the large discretion zones of decision-making bodies necessary to facilitate rational decision-making. NOMIS require the free assessment of information and reasons, beyond what can be foreseen by the principal. Sometimes, agents must amend ends and divert from guidelines in order to reach a rational solution or a common position in case of conflict. What is more: ‘The reasonableness of means and ends are not separate issues, and the understanding of ends is discovered in the process of developing and applying means’ (Mashaw 2018: 121). *Preference and agency drift* as a result of the discretionary power of decision-making bodies are well known, as is the danger that experts are co-opted by think tanks and parties (Caramani 2017:

60). Karen Alter (2009) asks the pertinent questions: When does delegation turn into abdication? When are the 'principals' captured?

Holding the 'agents' accountable by matching their performance towards given rules will not do, since the more successful 'agents' are in solving problems, the more the rules will change (Sabel and Zeitlin 2010). Conceiving political representation as a principal-agent relationship neglects how far decision-makers actively shape opinions and decisions. Accountability processes in themselves are sense-making, which may create new norms and cognitions (Olsen 2017). They open up for new forms of arbitrariness. Internationalisation/globalisation compounds the problem, as there is an asymmetry between what the individual delegates are authorised to and what is needed to make needed decisions and prudent compromises. In the transnational context, there are several principals and several accountability lines, (also because of the many hands of modern public administration (cp. Thompson 1980)). The legislature often lacks competence or capacity to supervise and control.

The mere speed of developments makes governance through legislative measures alone obsolete. The response has been to develop broader 'frame-legislation' in which the more fine-grained regulative measures are delegated to more permanent surveying entities inside or outside the administrative apparatus. Through this, a higher degree of flexible regulatory measures and alertness to new developments can be achieved than with strict legal regulation. However, this raises the stakes for democratic authorisation and accountability. How could the decision-makers ever be under democratic control when the formal lines of authorisation and control are not in tact?

The participatory strategy

Plato famously argued that the knowers, the wisest, should rule because of their knowledge of *the good*. But even though experts can save the planet, win battles, protect refugees and solve the euro crisis, epistocracy is wrong.¹³ It fails not only because scientific knowledge is fallible and often contested; experts err and may be mistaken about facts as well as norms. It is wrong also because it entails a danger of dominance; the use of power that does not track the interests or opinions of the citizens. In a democracy, nobody has privileged access to what is good or just. Epistocracy is not the answer because in order to find out what is equally good for all, it is required that everyone has their say. Participation is needed to avoid dominance and the *pitfall of false impartiality*: Judges may defy neutrality, and existing laws may be biased or wrongly institutionalised.

The third strategy holds that the participation of lay citizens is necessary for dealing with legitimacy problems because expertise involve values, which depoliticised bodies cannot handle adequately on their own. Where science cannot supply correct or complete answers, there is need for bringing in the people. Including lay persons serves to encourage civic or community involvement and provides a link to the citizenry (Barber 1984). Participation furnishes the value-based judgments of expert

¹³ Even the strongest case in favour of epistocracy fails (Viehoff 2016; cp. Lippert-Rasmussen 2012).

bodies with democratic authorisation (Anderson 2011). It is the method to counter technocratic governance and epistocratic dominance (Zürn 2018: 77ff). According to Science and technology studies, 'the technical is political, the political should be democratic and the democratic should be participatory' (Moore 2010: 793). Moreover, following John Dewey (1927), many proponents of deliberative democracy focus on the co-constitution of issues and politics and see enlarged cooperation as a response to problematic situations.¹⁴ Participation and deliberation are requirements for *experimental inquiry* – for pragmatic problem-solving within most fields of action in modern societies. The EU has sought to enhance legitimacy by extended participation and active involvement of civil society (European Commission 2001; Official Journal of the European Union 2012, Art. 11). *Partnership arrangements* entail a commitment to additional consultations with civil-society actors such as NGOs, interest groups and 'social partners' but have left civil society split between professionalism and citizen contiguity (Kohler-Koch and Quittkat 2011: 167ff). In the EU, the Open Method of Coordination involving wide consultation, as well as the co-decision procedure, where the assent of both the Council and the European Parliament is required, reflect this strategy. Moreover, agencies themselves are not established solely when there is a need for an independent assessment based on specific expertise but also when the execution of legislation requires discretionary power and the participation of civil society is deemed necessary. Statutes often allow for broad participation, but the extent and model of participation is politically controlled (see Majone 2005: 87; McCubbins, Noll and Weingast 1987; Scholten 2014a: 302)

Participation is an important means for defining but also for contesting the collective will of society (Pettit 2001). However, such a strategy runs the risk of oversimplifying problems, of bias and of lending artificial and false justification. Biased hearing prevents rational policies and civic engagement risk been absorbed into technocratic policymaking (Brown 2009; Fukuyama 2014). There are (wicked) problems that lend themselves neither to precise scientific assessment, nor to easy solution by lay participation. It is because problems are ill formed in the first place – they do not have an unambiguous right answer – that citizens and politicians call upon expertise. Moreover, who do lay people stand, speak or act for; who do they represent, themselves, the people or a section of the people? Participation may either prove itself to be *illegitimate* because participants are asymmetrically privileged over non-participants, or *superfluous* as democratic legitimacy would require 'the quality of macro-deliberation in the broad public sphere' (Lafont 2015: 20).

Participation does not in and of itself ensure sound and legitimate decisions, although it is the basic democratic norm. Also with lay participation, decisions may be based on the wrong questions, falsely grounded interests and biased perceptions and deliberations. Problems of tacit knowledge, of groupthink, of ideology, of mass-movement manipulation, 'activism' and extremism prevail in informal settings. Further, participation is not an end in itself. It is there to ensure that power is wielded in a legitimate manner. As we cannot know the will of the people before the hearing the citizens, there can be no democracy without democratic procedures. Participation

¹⁴ See the works of Bohman (2007); Cohen and Sabel (1997); Dryzek (2006). For critique, see Eriksen (2011).

by itself do not warrant non-arbitrariness. It would be participation by invitation and involve only a section of the people - a group, a set of stakeholders.

The upshot is thus that all three strategies come with serious shortcomings. They do not prevent dominance and cannot provide justification for the role of agencies in policy-making. Neither the transmissions belt model of instrumental agency, in which agencies merely carries out statutory laws in a neutral manner, nor the standard model of constitutional economics based on principle agent theory, nor the model of participatory governance provide a full and justificatory account of the open ended grants of discretion that characterise depoliticised decision-making. Can the public reason approach provide a viable answer to the problems of agency legitimacy?

The force of public reason

In constitutional democracies, a set of norms and procedures aim at ensuring correct reasoning, which grounds the presumption of reasonable outcomes. In principle, procedural constraints make NOMIS' resolves non-arbitrary. That is, NOMIS' expert reasoning operates within procedures that mandate the undertaking, select topics and questions, limit the access of premises for solutions and assess validity/feasibility of proposals and connect deliberation to authoritative decision-making. Different institutions such as hearings; constitutional and ethical reviews; complaint and appeal procedures; professional communities constrain the deliberations. They exclude special interests and party politics from the reason-giving process. They aim at securing effective standards for qualified public approval. These procedures as well as prescriptions about impartiality, professionalism, integrity, responsibility, explanation and justification make up NOMIS legitimacy basis, and thus an autonomous basis for decision-making and for telling truth to power.

This is the basis for the presumption that the legitimacy of NOMIS depends on reasoning about the means and ends of policy in such a way that justifiable, mutually acceptable resolutions are made. Reason-based claims making can reconcile the twin goals of participation and rationality as reason-giving is itself a procedure that both tracks and generates reasons. Hence, the proposition that policy controversies can be resolved when each side tries to create consistent representations of facts and schemes of values in a deliberative process. In such process, when the arguing rules are adhered to, one side become indefensible. Fault may be either due to poor epistemic quality of representations or to poverty of value schemes (Kitcher 2011: 36ff).

In the justificatory account of NOMIS premised on the publicity standard, value-based political ends are not seen as dictates but as premises in a reason-giving process aiming at a cogent answer. NOMIS and expert deliberation are vital for enhancing the quality of policy-making by increasing the reservoir of reasons and the testing of premises for decision-making, while not constituting or legitimating power in itself. NOMIS are neither merely neutral instruments for implementing statutory law, nor are their reasoning about ends limited to the specification of statutory law. Rather, they are epistemic bodies specialised in decision-making and policy advice on the basis of statutes and within the constraints of the law, which contains rules for conduct as well

as a set of rights for officeholders, including freedom of expression and the right to speak 'truth to power'. The point is not merely that there is 'an ethical or professional commitment to truth-seeking according to the best standards of the expert community' and that they thus 'can speak truth to power' (Schudson 2006: 500).¹⁵ Rather there is an obligation stemming from political rights and the norms of administrative law to report to 'the people' about what is at stake in different policy proposals; about the risks, uncertainties, fallacies and dangers involved. Because citizens have the right to justifications for officials' decisions, actions and judgments, decision-makers are obligated to provide them.

Consequently, in order to be legitimate, NOMIS must improve the reasoning about policy ends in a publicly acceptable manner. When the factual basis has been established correctly and NOMIS have made a decision that can be explained in terms of the statute's goal and procedural criteria for hearing, inclusion and reasoning giving; when affected parties are given reasons for the decisions affecting their rights and duties, and they are accepted with mutually acceptable argument in an open and transparent process, there is a basis for presuming their legitimacy. In such a process of public deliberation, based on inclusion and equal opportunity, there is the give and take of reasons conducive to a critical evaluation of alternatives; to a rationally motivated yes or no to policy proposals; to ongoing reflection and learning.

Conclusion

The established strategies raise pertinent concerns and dilemmas of depoliticised decision-making, and they identify dimensions that are critical for NOMIS legitimacy. When we cannot expect scientifically true answers, participation and representation is needed. But, when representative bodies are structurally incapable of controlling NOMIS and increased participation does not yield better or approximately correct answers, we need an alternative approach to establish the legitimacy conditions of unelected expert bodies.

The institutionalisation of NOMIS goes to the core of modern democracies, premised on separation of powers, knowledge-based administration, judicial review and independent central banks. In order to establish the legitimacy basis of depoliticised decision-making and to give a justificatory account of NOMIS, there is need for a new approach. The point of departure in this endeavour is that NOMIS serve to cash in upon the epistemic claim of modern democracies; that they are there to produce cogent or good results. However, to understand their democratic role, one must see NOMIS not solely as agents obeying and specifying political directives but rather as representatives making claims and reasoning on the basis of politically given premises. This new approach is based on *the giving reason principle*, which also is entrenched in modern administrative law, as reasons for administrative decisions are required.

¹⁵ On this point, see also Douglas 2009; Wildavsky 1979.

References

- Alter, K. (2009) *The European Court's Political Power: Selected Essays*, Oxford: Oxford University Press.
- Anderson, E. (2011) 'Democracy, Public Policy, and Lay Assessments of Scientific Testimony', *Episteme*, 8(2): 144-164.
- Barber, B. (1984) *Strong Democracy: Participatory Politics for a New Age*, Los Angeles, CA: University of California Press.
- Bartl, M. (2015) 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal*, 21(5): 572-598.
- Bohman, J. (2007) *Democracy Across Borders: From Dêmos to Dêmoi*. Cambridge: MIT Press.
- Boswell, Christina (2009) *The Political Uses of Expert Knowledge*, Cambridge, MA: Cambridge University Press.
- Brown, M.B. (2009) *Science in Democracy: Expertise, Institutions, and Representation*. Cambridge: MIT Press.
- Buchanan, J.M. (1990) 'The Domain of Constitutional Economics', *Constitutional Political Economy*, 1(1): 1-18.
- Busuioc, M. and Groenleer, M. (2014) 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M. Everson, C. Monda and E. Vos *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwen Law.
- Caramani, D. (2017) 'Will vs. Reason: The Populist and Technocratic Forms of Representation and Their Critique to Party Government', *American Political Science Review*, 111(1): 54-67.
- Cartwright, N. and Hardie, J. (2012) *Evidence-Based Policy: A Practical Guide to Doing It Better*, Oxford: Oxford University Press.
- Chamon, M. (2014) 'The Empowerment of Agencies under the Meroni Doctrine and Art. 114 TFEU: Comment on United Kingdom v. Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism', *European Law Review* 39(3): 380-403.
- Chiti, E. (2009) 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46(5): 1395-1442.
- Christiano, T. (1996) *The Rule of the Many*, Boulder, CO: Westview Press.

- Christiano, T. (2012) 'Rational Deliberation among Experts and Citizens', in J. Parkinson and J. Mansbridge (eds) *Deliberative Systems*, Cambridge: Cambridge University Press.
- Cohen, J. and Sabel C. (1997) 'Directly-Deliberative Polyarchy', *European Law Journal*, 3(4): 313–342.
- Collins, H. and Pinch T. (1993) *The Golem of Science*, Cambridge: Cambridge University Press.
- Collins, H., Evans, R. and Weinel, M. (2017) 'STS as Science or Politics?', *Social Studies of Science*, 47(4): 580–586.
- Crouch, C. (2011) *The Strange Non-Death of Neoliberalism*, London: Polity Press.
- Crozier, M. (1963) *The Bureaucratic Phenomenon*, New Brunswick: Transaction Publishers.
- Dahl, R.A. (1989) *Democracy and Its Critics*, New Haven, CT: Yale University Press.
- Dewey, J. (1927) *The Public and its Problems*, New York, NY: Holt Publishers.
- Douglas, H.E. (2009) *Science, Policy, and the Value-Free Ideal*. Pittsburg, PA: University of Pittsburg Press.
- Dryzek, J. (2006) *Deliberative Global Politics*. London: Polity Press.
- Elster, J. (1979) *Ulysses and the Sirens*, Cambridge: Cambridge University Press.
- Estlund, D.M. (2008) *Democratic Authority: A Philosophical Framework*, Princeton, NJ: Princeton University Press.
- European Commission (2001) *European Governance: A White Paper*, COM (2001) 428, 25 July.
- Eriksen, E.O. (2011) 'Governance between Expertise and Democracy: The Case of European Security', *Journal of European Public Policy*, 18(8): 1169–1189.
- Everson, M., Monda, C. and Vos, E. (eds) (2014) *EU Agencies in between Institutions and Member States*, Alphen aan den Rijn: Wolters Kluwer.
- Federal Constitutional Court's Judgment (GCC) (30 June 2009), 2 BvE 2/08 vom 30.6.2009, para 211, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.
- Fischer, F. (2009) *Democracy and Expertise*, Oxford: Oxford University Press.
- Foucault, M. (ed.) (1980) *Power/Knowledge*, New York, NY: Pantheon.
- Fukuyama, F. (2014) *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy*, New York, NY: Farrar, Straus and Giroux.

- Guiseppe Romano v. Institut national d'assurance maladie-invalidité* [1981]Case 98-80(ECR) 1241. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0098>.
- Habermas, J. (2005) 'Religion in der Öffentlichkeit: Kognitive Voraussetzungen für den "Öffentlichen Vernunftgebrauch" Religiöser und Säkularer Bürger', in J. Habermas (ed.) *Zwischen Naturalismus und Religion: Philosophische Aufsätze*, Frankfurt am Main: Suhrkamp.
- Hacking, I. (1999) *The Social Construction of What?* Cambridge, MA: Harvard University Press.
- Holmes, S. (1988) 'Pre-commitments and the Paradox of Democracy', in J. Elster and R. Slagstad (eds) *Constitutionalism and Democracy*, Cambridge: Cambridge University Press.
- Hooghe, L. and Marks, G. (2015) 'Delegation and Pooling in International Organizations', *Review of International Organizations*, 10(3): 305–328.
- Jasanoff, S. (1995) 'Procedural Choices in Regulatory Science', *Technology in Society*, 17(3): 279–293.
- Kahneman, D. (1997) 'New Challenges to the Rationality Assumption', *Legal Theory* 3(2): 105–124.
- Kitcher, P. (2011) *Science in a Democratic Society*, New York, NY: Prometheus Books.
- Kohler-Koch, B. and Quittkat C. (2011) *Die Entzauberung Partizipativer Demokratie*, Frankfurt am Main: Campus.
- Krapohl, S. (2008) *Risk Regulation in the Single Market: The Governance of Pharmaceuticals and Foodstuffs in the European Union*, Basingstoke: Palgrave Macmillan.
- Kydland, F.E. and Prescott, E.C. (1977) 'Rules Rather Than Discretion: The Inconsistency of Optimal Plans', *Journal of Political Economy* 85(3): 473–491.
- Kuyper, J.W. (2016) 'Systemic Representation: Democracy, Deliberation, and Non-Electoral Representatives', *American Political Science Review* 110(2): 308–324.
- Lafont, C. (2015) 'Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-Publics Shape Public Policy?', *The Journal of Political Philosophy*, 23(1): 40–63.
- Latour, B. and Woolgar, S. (1986) *Laboratory Life: The Construction of Scientific Facts*, Princeton, NJ: Princeton University Press.
- Lindseth, P.L. (2010) *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford: Oxford University Press.

- Lippert-Rasmussen, K. (2012) 'Estlund on Epistocracy: A Critique', *Res Publica*, 18(3): 241–258.
- Locke, J. ([1690]1963) *Second Treatise of Civil Government*, P. Laslett ed., Cambridge: Cambridge University Press.
- Mair, P. (2013) *Ruling the Void: The Hollowing of Western Democracy*, London: Verso Books.
- Majone, G. (1996) *Regulating Europe*, New York, NY: Routledge.
- Majone, G. (2005) *Dilemmas of European Integration*, Oxford: Oxford University Press.
- Mashaw, J.L. (2018) *Reasoned Administration and Democratic Legitimacy*, Cambridge: Cambridge University Press.
- McCubbins, M.D., Noll, R.G. and Weingast, B.R. (1987) 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics, & Organisation*, 3(2): 243–277.
- McKenzie, R.B. (ed.) (1984) *Constitutional Economics: Containing the Economic Powers of Government*, Lexington, MA: Lexington Books.
- Mendes, J. and Venzke, I. (eds) (2018) *Allocating Authority: Who Should Do What in European and International Law?*, Oxford: Hart Publishing.
- Menéndez, A. (2020) 'Austerity through the Rule of Numbers: Dominance through the Combination of a Legal and an Economic Discourse', paper presented at EU3D Workshop, 23 January 2020, mimeo.
- Michelsen, D. and Walter, F. (2013) *Unpolitische Demokratie. Zur Krise der Repräsentation*, Frankfurt am Main: Suhrkamp
- Moloney, N. (2019) 'The European Supervisory Authorities and Discretion: Can Functional and Constitutional Circles be Squared?', in J. Mendes (ed.) *EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press.
- Moore, A. (2010) 'Beyond Participation: Opening Up Political Theory in STS', *Social Studies of Science*, 40(5): 793–799.
- Official Journal of the European Union (2012) 'The Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)' 2012/C 326. Available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT>, retrieved 4 June 2019.
- Olsen, J.P. (2017) *Democratic Accountability, Political Order and Change*, Oxford: Oxford University Press.

- Pettit, P. (1997) *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press.
- Pettit, P. (2001) *A Theory of Freedom*, Cambridge: Polity Press.
- Pettit, P. (2004) 'Depoliticizing Democracy', *Ratio Juris*, 17(1): 52–65.
- Plato (2003) *Plato's Parmenides*, translation, introduction and commentary by Samuel Scolnicov, Berkley, CA: University of California Press.
- Power, M. (1997) *The Audit Society*, Oxford: Oxford University Press.
- Sabel, C.F. and Zeitlin, J. (2010) *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford: Oxford University Press.
- Scholten, M. (2014a) *The Political Accountability of EU Agencies: Learning from the US Experience*, Maastricht: Datawyse / Universitaire Pers Maastricht.
- Scholten, M. (2014b) *The Political Accountability of EU and US Independent Regulatory Agencies*, Leiden: Brill.
- Schudson, M. (2006) 'The Trouble with Experts – and Why Democracies Need Them', *Theory and Society*, 35(5/6): 491–506.
- Scholten, M. and van Rijsbergen, M. (2014) 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants', *Legal Issues of Economic Integration*, 41(4): 389–406.
- Seidenfeld, M. (1992) 'A Civic Republican Justification for the Bureaucratic State', *Harvard Law Review*, 105(7): 1511–1576.
- Shapiro, M. (1997) 'The Problems of Independent Agencies in the United States and the European Union', *Journal of European Public Policy*, 4(2): 276–291.
- Slaughter, A-M. (2004) *A New World Order*, Princeton, NJ: Princeton University Press.
- Tetlock, P.E. (2005) *Expert Political Judgment*, Princeton, NJ: Princeton University Press.
- Thatcher, M. and Sweet, A.S. (2002) 'The Politics of Delegation: Non-Majoritarian Institutions in Europe', *West European Politics*, 25(1): 1–22.
- Thompson, D.F. (1980) 'Moral Responsibility of Public Officials: The Problem of Many Hands', *American Political Science Association*, 74(4): 905–916.
- Timmermans, S. (1999) *Sudden Death and the Myth of CPR*, Philadelphia, PA: Temple University Press.
- Tooze, A. (2018) *Crashed: How a Decade of Financial Crises Changed the World*, London: Allen Lane.

- Tucker P. (2018) *Unelected Power, the Quest for Legitimacy in Central Banking and the Regulatory State*, Princeton, NJ: Princeton University Press.
- Turner, S. (2001) 'What is the Problem with Experts?', *Social Studies of Science*, 31(1): 123–149.
- Tversky, A. and Kahneman, D. (1974) 'Judgment under Uncertainty: Heuristics and Biases', *Science*, 185(4157): 1124-1131.
- Vibert, F. (2007) *The Rise of the Unelected*, Cambridge: Cambridge University Press.
- Viehoff, D. (2016) 'Authority and Expertise', *Journal of Political Philosophy*, 24(4): 406–426.
- Venzke, I. and Mendes, J. (2018) 'The Idea of Relative Authority in European and International Law', *International Journal of Constitutional Law*, 16(1): 75–100.
- Weber, M. ([1920]1978) *Economy and Society*, Los Angeles, CA: University of California Press.
- Weingart, P. (1999) 'Scientific Expertise and Political Accountability: Paradoxes of Science in Politics', *Science and Public Policy*, 26(3): 151–161.
- Weisbrot, M. (2015) *Failed: What the 'Experts' Got Wrong About the Global Economy*, Oxford: Oxford University Press.
- White, J. (2015) 'Emergency Europe', *Political Studies*, 63(2): 300–318.
- Williams, B. (2002) *Truth and Truthfulness: An Essay in Genealogy*, Princeton, NJ: Princeton University Press.
- Wilson, J.Q. (1989) *Bureaucracy: What Government Agencies Do and Why They Do It*, New York, NY: Basic Books.
- Wildavsky, A.B. (1979) *Speaking the Truth to Power: The Art and Craft of Policy Analysis*, Boston, MA: Little, Brown & Co.
- Zürn, M. (2018) *A Theory of Global Governance*, Oxford: Oxford University Press.

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