

**BETWEEN DOMINANCE AND SUBSERVIENCE: A COMPARATIVE STUDY
OF EXECUTIVE POWER IN IRELAND, THE UNITED KINGDOM AND
THE UNITED STATES**

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SUMMARY

This thesis undertakes a comparative constitutional analysis of the position of the political executive in Ireland, United Kingdom, and the United States. I address three central questions. First, why has the executive become the most powerful and predominant branch of each state? Second, what does its predominant status tell us about the conceptual nature of the political executive in these, and similar, constitutional systems? Third, is the predominant status of the political executive a normatively positive or negative feature of these political systems? These questions are important by virtue of the fact the political executive is the centre of public power in the contemporary state, despite the fact historical and formal legal accounts of executive power are modest - a pale reflection of the executive's current predominant status.

Methodologically, my study takes the form of a comparison of three qualitative case-studies. I build my arguments based on inductive observations taken from a small sample of contextual and detailed case studies. A small number of highly detailed cases studies allows for a more rigorous qualitative analysis of how constitutional power is actually allocated and exercised in practice. This, in turn, allows for the building of robust narratives providing a solid explanatory foundation for both the why of executive predominance and the executive's conceptual nature.

I argue the root of executive predominance lies in each political system's attempt to increase the ability of the state to use public power to meet the political expectations, fears, and hopes of the polity, and to promote the common good. Pressures placed on the state to meet complex social and political challenges has pressed each system to evolve its constitutional order. This evolution came in the form of a diffusion of power to the executive, based on its superior institutional capacity to use it, far outstripping other political actors. It was the executive that was bestowed, above any other branch, the daunting role of steering the polity through the complexities and dangers of contemporary government.

After tracing the common forces and trends which underpin the status of the executive, I offer a conceptual account of the nature of the executive branch in each system. I argue historical conceptions of the executive as faithful executioner of the law created by representative assemblies offer an unsatisfactory account of the contemporary executive, as do accounts of the executive as kind of elected dictatorship unbound by law. Instead, I make

the case each system has a political executive with a similar - and pronounced - conceptual tension between legal subservience on the one hand and political dominance on the other. By tying these dualities together, I offer a more analytically and descriptively accurate and helpful understanding of its conceptual nature. I suggest each system can be conceptually understood as having a '*Constrained Primacy Model of Executive Power*', one where the executive is highly predominant in the formation and execution of domestic and foreign policy; vested with very capacious administrative, regulatory, and security powers; but genuinely constrained within the bounds of legality.

Finally, I conclude with a qualified defence of the constrained primacy model of executive power. I argue adequately responding to the challenges of contemporary government can require embrace of strong executive authority, and that an enfeebled executive can leave the polity less able to use public power to secure conditions like domestic order and social justice – and a host of other goals which are closely linked to the common good. But my defence is qualified in the sense I argue a predominant executive must be accompanied by a constitutional and political culture broadly dedicated to aiming its capacity toward the common good. This is because a powerful executive is inevitably a double-edged sword. It is potentially a more efficient tool for evil purposes, as it faces less veto-points in having its bad preferences changed into public policy. As such, a combination of such a potent institution with the erosion of a political culture orientated toward the common good could easily produce toxic effects. Offering a *via media* between these concerns, I conclude it is normatively defensible to argue that, in political systems where the right conditions hold, it is not the mere existence of a powerful executive that should be our primary concern, but who wields this authority, where its power is directed, and why.

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Ad maiorem Dei gloriam

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INTRODUCTION

This thesis undertakes a comparative analysis of the position of the political executive in Ireland, United Kingdom, and the United States. By ‘political executive’, I refer to:

- (i) In an Irish context, the Taoiseach and members of government whose positions are established by Article 28 of the Irish constitution.¹
- (ii) Regarding the UK, I refer to the Prime Minister and members of Her Majesty’s Government.²
- (iii) In respect of the United States, I refer to the Office of President established under Article II of the United States Constitution, core White House staff, as well as the senior political appointees who serve with the administrative bodies that implement the laws adopted by Congress under the President’s direction.³

This thesis addresses three central questions. First, why has the executive become the most powerful and predominant branch of each state? Second, what does its predominant status teach us about the conceptual nature of the political executive in these, and similar, contemporary constitutional systems? Third, is the predominant status of the political executive a positive normative feature of these democracies, or a dangerous one?

These questions are important by virtue of the fact the political executive is the focus of public power in the contemporary state, despite the fact historically and legally the executive’s power are a pale reflection of its current predominant status.⁴ From historically modest baselines, the executive has evolved to become the chief director of policy both

¹ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018) 52-55.

² Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 43.

³ Cary Coglianese and Christopher S. Yoo, ‘The Bounds of Executive Discretion in the Regulatory State’, (2016) 164 *University of Pennsylvania Law Review* 1588, 1591. *See also* Lisa Schultz Bressman and Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, (2006) 105 *Michigan Law Review* 47, 49; Elena Kagan, *Presidential Administration* (2001) 114 *Harvard Law Review* 2245, 2338.

⁴ Power is of course a contested concept, but in this context, I adopt a workable definition common to political and legal theory which understand power to consist of the ability to ‘control the outcomes of contested decision making processes and secure...preferred policies’ or ‘the ability to effect substantive policy outcomes by influencing what the government will or will not do’. Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (2016) 130 *Harvard Law Review* 1, 33. *See also* Max Weber, *Economy and Society* (Gunther Roth & Claus Wittich eds., University of California Press, 1978) 53. Weber argued that power means one ‘actor within a social relationship will be in a position to carry out his own will despite resistance.’ *See also* Robert Dahl, ‘The Concept of Power’ (1957) 2 *Behavioral Science* 201-215. Dahl similarly argued that ‘A has power over B to the extent he can get B to do something that B would not otherwise do’.

domestically and over foreign affairs. While each constitutional system has long promoted the centrality of the legislature, the executive in each system has never been an emasculated one; this would be an implausible account unsupported by the historical record. That said, behind the executive's current position is a story of considerable transformation vis a vis the *extent* of its capacity and predominance.

The political executive is now the focus of political expectation and hope; citizens look primarily to their Prime Minister and President for political leadership and solutions to complex social and economic problems, not to representative legislative assemblies. From promoting sound economic management, useful foreign relations, or national security, and over countless other policy issues, the executive is the predominant actor. It is the branch which drafts most primary legislation enacted by the legislative branch, as well as exercising copious administrative and regulatory authority through delegated statutory power. The political executive also stands at the apex of a vast bureaucracy capable of projecting public power across every conceivable aspect of social and economic life.

What caused this transformation? Are there common social and political trends which can provide insight and explanation into this commonality of executive predominance? What does this predominance tell us about the nature of the contemporary executive in these, and similar, constitutional systems? Is this kind of authority normatively problematic or justified? These are the primary questions this thesis explores.

I. METHODOLOGY

My analysis is largely positive and comparative. It is positive in its attempt to provide a persuasive descriptive account of the multi-faceted nature of the contemporary executive, and the preeminent role it plays in each constitutional order over domestic and foreign politics. My account traces key forces which have substantially transformed the nature and scope of executive authority in each system from a similarly modest baseline, the kinds of trends which spurred and incentivised the inflation of executive authority. My outline of executive predominance spans examination of the bounds of its own legal powers, its interaction and relationship with the other branches of state, and the wider political surround acting within and around the branches.⁵ This account is neither solely doctrinal in analysis,

⁵ Constitutional scholars in the United States have used this term to refer to the 'broad array of actors acting within and around the three branches identified in the Constitution...including political parties, activists, congressional committee staffers, state and local government officials, civil servants, foreign agents, and members of the general public (including

nor purely anchored on insights offered by political theory, but attempts to span disciplinary boundaries between constitutional law and theory and political science, to theorize more systemically about the place and power of the executive branch. The how and why of executive predominance in each system cannot be understood accurately without a robust account of both.

While exploring these developments in individual systems, my positive descriptive work will encompass a mixture of historical, doctrinal, and institutional approaches. It is historical to the extent that I offer an account of how the nature of the executive branch, its role and responsibility, has evolved through the lifetime of each political community. It is doctrinal in the sense that I encompass analysis of the formal constitutional powers of each branch of government outlined in constitutional and statutory text, constitutional structure, and elaborated in judicial opinions. These approaches help to illustrate the ‘base line’ of executive power, the outer legal limits of executive authority, and to detail how the judicial branch understands the limits of executive action. My analysis is institutional in that I am chiefly concerned with the institution of the political executive, not the personalities of individual incumbents which have occupied it. I examine how and why the institution of the political executive has been shaped by social and political trends which have led to its predominance.

Comparative analysis is also central to this thesis. I hope to present a nuanced comparative picture, exploring and explaining the common trends facilitating executive predominance and what their similarities tell us about the conceptual nature of the contemporary executive, in these, and similar systems.⁶ I draw on a rich body of literature on the place of the executive branch in three stable constitutional systems, drawing on the experience of the United States, the United Kingdom, and Ireland.⁷ Methodologically my comparative work can be considered a ‘Small-N study’,⁸ which means I build my arguments based on inductive observations taken from a small-sample of contextual and detailed case studies. A small number of highly detailed cases studies allows for a more rigorous qualitative analysis of how

special-interest groups and lobbyists.’ Aziz Huq and Jon D. Michaels, ‘The Cycles of Separation-of-Powers Jurisprudence’ (2016) 126 *Yale Law Journal* 346, 381.

⁶ Concepts provide the ‘mental architecture by which we understand the world and are ubiquitous in social science as well law. Conceptualization involves the process of formulating a mental construct at a particular level of abstraction’. Tom Ginsburg and Nicholas Stephanopoulos, ‘The Concepts of Law’ (2017) 84 *University of Chicago Law Review* 147, 150.

⁷ Cary Coglianese and Christopher S. Yoo, ‘The Bounds of Executive Discretion in the Regulatory State’ (2016) 164 *University of Pennsylvania Law Review* 1588, 1591.

⁸ Ran Hirschl, ‘Comparative Matters: Response to Interlocutors’ (2016) 96 *Boston University Law Review* 1393, 1421; Christoph Möllers and Hannah Birkenkötter, ‘Towards a new conceptualism in comparative constitutional law, or reviving the German tradition of the *Lehrbuch*’ 12 *International Journal of Constitutional Law* (2014) 603, 623; Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ 53 *American Journal of Comparative Law* (2005) 125-155.

constitutional power is actually allocated and exercised in practice. This, in turn, allows for the building of robust narratives providing a solid explanatory foundation for both the *why* of executive predominance and the executive's conceptual nature.

My comparative study aims to offer both a plausible explanatory argument for executive predominance and to contribute to concept formation through multiple thick descriptions of the political executive in each system.⁹ In respect of my explanatory argument, I aim to develop a thick inductive argument that the common experience of executive predominance is closely linked to similar social and political trends which are at root, concerned with matching public power with political expectation.¹⁰ To explain how different countries, after introducing key variables (rise of political parties, the administrative state, diffusion of emergency powers and foreign affairs dominance) experienced similar trends (a marked increase in executive predominance). Put simply, that a plausible causal reason for executive predominance is the attempt by each political system to better pair the state's ability to project public power with political expectation. My comparative study also engages in 'concept formation' by arguing that the picture of the political executive which emerges in each system from this study shows strong conceptual similarities. These inductive arguments about the why of executive predominance, and its conceptual nature, are validated by intimate knowledge of the detail, nuance, and history of the development of the executive branch in each system.¹¹

To select my comparators, I have had regard to several factors. The first is their common historical influences in respect of the nature and scope of executive power. The constitutional and political history of both Ireland and the United States is entwined with its historical relationship to the UK. Both systems can be considered different constitutional spin-offs with different degrees of departure from their colonial heritage - a mixture of retention and repudiation of core parts of British constitutionalism. The US system, for example, adopted a very different formal constitutional structure, including a separately elected president, a federal system, a bill of rights, and the adoption of popular sovereignty as the underlying foundation of the Constitution. But, at the same time, how the founders

⁹ Ran Hirschl, 'Comparative Matters: Response to Interlocutors' (2016) 96 *1393*, 1421; Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125-155.

¹⁰ Margit Cohn 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 *Canadian Journal of Law & Jurisprudence* 321-350.

¹¹ Ran Hirschl, 'Comparative Matters: Response to Interlocutors' (2016) 96 *Boston University Law Review* 1393, 1421; Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125-155.

of the 1789 Constitution understood executive power drew heavily on English constitutional history. Ireland similarly rejected parliamentary sovereignty in favour of popular sovereignty and a bill of fundamental rights backed by strong-form judicial review. Again, however, like the United States the Irish Constitution's understanding of executive power, and its adoption of responsible government, drew heavily on its colonial heritage. This shared historical backdrop serves to render the comparison stable, as do the similarly high levels of political and social stability in each country.

The differences of each system – including variables like different electoral systems, different bicameral structures, the form of its separation of powers, the written-ness or otherwise of its constitutional rules - all underscore, from an explanatory perspective, the main trends driving executive predominance. My selection of comparators shows how political communities with a shared historical conception of executive power, but an understanding embedded within different institutional settings, experienced similar marked increases in the power of the executive after the emergence of key trends, trends which appear to flatten their formal structural differences to a large degree.

The jurisdictions selected are thus similar enough to render the comparison stable, but sufficiently different to make their comparison useful for illuminating the different forces and trends explaining the why of executive predominance and its conceptual nature. This attempt to balance a sufficient level of similarity and difference in my case-studies also explains why other potential comparators were excluded. Using comparators who are too similar in their system of government would shed less light on whether executive predominance is common across a different variety constitutional system. New Zealand is too similar to the United Kingdom in its system of parliamentary supremacy, while Canada and Australia are very similar to Ireland's mixture of a Westminster-style executive combined with written entrenched constitutional provisions. This level of similarity in case-studies would not be as useful for highlighting the forces and trends explaining the why of executive predominance, and its conceptual nature, than using a mixture of systems with both similar and different characteristics.

Another, more fundamental, reason for excluding these other case-studies is that a larger study would invariably fail to provide the same level of detail needed to make coherent inferences and critiques. A large number of case-studies would necessarily be more

superficial in their analysis of how constitutional power is allocated in practice and why. A comparative study with a large number of case-studies would not show, at a sufficiently thick level of descriptive detail, how and why power has flowed to the executive. There would be too many differences and too many variables to account for when offering such an account.

II. OUTLINE OF THESIS

The executives in the United Kingdom, Ireland, and the United States differ in many respects. For example, in terms of how they are appointed and removed from office. However, they also share several commonalities. Notably, they are delimited in their outer bounds by similar politico-legal principles with a long, contested, and shared historical inheritance.¹² One cannot hope to understand power allocations amongst institutions such as the executive, even formal accounts, without grasping the historical context generating these foundational principles emerged. Consequently, part one of my thesis focuses on offering a historical account of how once contested principles now associated with executive power came into the ascendancy. I document how the conceptual core of executive power in constitutional thought, at least from the 18th century onward, was the legal duty and power to ensure the ‘implementation of instructions and authority that came from’ the legislative authority. The executive branch on this conception is ‘guided by law, ‘fetter’d by system,’ and ‘manacled both by man and measures.’¹³ Under this understanding, the core responsibility of the executive is identified with faithfully executing laws enacted by the legislature. In a system where this dictionary definition of the executive prevailed, the legislature would be the ‘centre of gravity of the governmental system’ and the executive the actor who carries out its will and instruction as expressed through statutes into effective execution.¹⁴ This understanding of executive power connotes an element of executive subservience to the legislature.¹⁵ The executive is an office which acts as a faithful representative of a stronger institution more powerful and important than it.¹⁶

¹² Peter Cane, *Controlling Administrative Power* (Cambridge University Press, 2016) 13.

¹³ Julian Mortenson, ‘The Executive Power Clause’ (2019) 167 *University of Pennsylvania Law Review* 1, 93.

¹⁴ Peter Cane, ‘Executive Primacy, Populism and Public Law’ (2019) 28 *Washington International Law Journal* 527, 548; Julian Mortenson, ‘Executive Power Clause’ (2019) 167 *University of Pennsylvania Law Review* 1, 24.

¹⁵ Robert J. Spitzer, ‘Is the Constitutional Presidency Obsolete?’ in Charles Dunn (ed), *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 58.

¹⁶ Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993) 7.

Some type of principal-agent relationship is assumed, where the agent (executive) faithfully follows the principal's (legislature) edict. For the framers of the US Constitution, for example, executive power was 'intrinsically an empty vessel, awaiting instructions from an exercise of the legislative power that would give it something to execute.'¹⁷ It was 'subsequent, subordinate, and dependent on instructions from a prior exercise of its legislative counterpart.'¹⁸ A characteristic of this view of executive power is that it operates indirectly, in the name of another,¹⁹ so that the hand that wields the sword of state power is thus theoretically directed by the legislative body, not by executive will.²⁰ This is the modest conception of executive power Madison had in mind when he contrasted, with some worry, the 'weight of the legislative authority' against the 'weakness of the executive' and considered the former as posing the greatest risk to political stability and good government.²¹

The other side of the coin of this traditional conception is, of course, an exclusive grant of law-making power to the legislative branch and hostility at the idea of the executive dispensing, or suspending the laws.²² The constitutional traditions of Ireland, United Kingdom, and United States all share core understandings of the boundaries of executive power linked to this conception: through subordination of the executive to the rule of legislation, the executive's duty to faithfully execute the law even if it disagrees with it, and prohibitions on unilateral executive suspension or abrogation of law.²³ These principles set what can be considered the historical base-line of executive power. This modest formal place of the executive in each system contrasts with legislative pre-eminence. In the constitutional tradition of the UK, Parliament has long been supreme, while in the United States and Ireland, the legislative branch is *primus inter partes*.²⁴

The formal legal principles governing the outer bounds of executive power in these systems retain importance and share deeply embedded historical roots. But they are only one aspect of the multifaceted nature of the contemporary executive. The formal legal boundaries of executive power tend to emphasise both the importance of controlling executive authority

¹⁷ Julian Davis Mortenson, 'The Executive Power Clause' (n 13).

¹⁸ Julian Davis Mortenson, 'The Executive Power Clause' (n 13) 66.

¹⁹ Hugh Liebert, *Executive Power in Theory and Practice* (Palgrave MacMillan, 2012) 114.

²⁰ *Ibid* 100.

²¹ James Madison, 'The Federalist Paper No. 51.' in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

²² Samuel Issacharoff, 'Democracy's Deficits' (2019) 85 *University of Chicago Law Review* 485, 498.

²³ See *R v Miller* [2017] UKSC 5; *Duggan v An Taoiseach* [1989] ILRM 720; *NHV v Minister for Justice & Equality* [2017] IESC 35; 343 *Youngstown Sheet & Tube Co. v Sawyer* U.S. 579 (1952).

²⁴ Charles Black, 'The Working Balance of the American Political Departments' (1974) 1 *Hastings Constitutional Law Quarterly* 13, 15; Samuel Issacharoff, 'Democracy's Deficits' (n 22) 498.

and its duty as a faithful *law-executor*. These principles appear characteristic of a ‘precautionary constitutionalism’, oriented toward ‘warding off the worst case’.²⁵ The historical backdrop from which these principles emerged suggest this worst case was arbitrary state power wielded by the executive, making it unsurprising ‘extralegal...and unauthorized acts’ are considered deeply troubling and illegitimate in each system.²⁶

But such accounts alone do not offer an accurate or persuasive conceptual account of the executive in these systems, whose role is characterised by predominance over the political process and policy formation, both domestic and foreign. They provide the legal base line of executive power, and much more is required to complete the picture of how and why the executive branch has become such a prominent political actor in these systems. Thus, I offer a comparative and conceptual account attempting to theorize more systemically about the substantive - rather than solely formal or doctrinal - scope of executive power in these legal orders. I aim to do this through engagement with a rich comparative literature concerning the broader range of socio-political factors used to account for the prominent position of the contemporary executive. I consider the forces and trends influencing why - although nominally a relatively constrained institution - the executive is preeminent and the institutional heart of exercises of public power.

Accordingly, the bulk of this thesis gives an account of the factors helping make the political executive the predominant constitutional actor in each system. As noted at the outset of this thesis, power is a contested concept but I adopt a definition common to political and constitutional theory, which understand power to consist of the ability to control the outcomes of contested decision making processes and secure preferred policies and the ability to effect substantive policy outcomes by influencing what the State will or will not do.

Part two traces the developments which transformed the executive from a modest law-executor into the branch in the driving seat of law and policymaking in each system. This part includes a critical examination of the role of organised political parties and the rise of the administrative state.

²⁵ Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, 2014).

²⁶ Judith Shklar, ‘The Liberalism of Fear’ in Nancy L. Rosenblum (ed.) *Liberalism and Moral Life* (Harvard University Press, 1989) 30.

Chapter two argues the development of political parties and mass democracy profoundly influenced and altered the logic of separation of powers norms and practical functioning of government. That is, norms premised on the Madisonian notion different branches of government can be personified as actors with interests and wills of their own, whose members would be locked in a struggle to aggrandize or safeguard their own institutional power²⁷ - that members of the legislative branch would guard their institutional power from encroachment from the executive and so on. This conception was undermined as political parties, in both presidential and parliamentary systems, grew to become a central extraconstitutional mechanism driving the institutional behaviour of government branches and practical functioning of government. Parties facilitate greater levels of cohesion between the legislature and executive in pursuit of a similar political vision. This collaboration undermines the notion each branch had a distinct institutional interest which would naturally result in friction which other branches attempting to aggrandize their own potentially conflicting interest. This cohesion became particularly strong in Westminster parliamentary systems, leading to a large degree of fusion between the branches and allowing the nominally weak executive to effectively leverage dominance over Parliament in terms of agenda setting and policy formulation. Indeed, such fusion became one of the most defining features of parliamentary systems. In presidential systems, the impact of disciplined organized political parties on the executive branch is more complex and nuanced, but in the U.S. it bears strong familial resemblance to parliamentary systems during periods of unified government, when the presidency and majority of Congress are drawn from the same party. The fusion of legislative and executive power through the political party apparatus has facilitated the latter's role as the chief policymaker and legislative actor.

Chapter three argues that increases in state activity in social and economic life spurred movement toward new forms of governance designed to meet fresh challenges posed by its unprecedented levels of involvement. These changes sprang from the perceived inadequacy of traditional law-making through primary legislation or common law adjudication as a means of reconciling state power to political expectation. This led to the creation of the administrative state and expansion in the law-making activity of the executive branch. The administrative state was created and nurtured from the capacious shell of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order. Another trend chapter three explores is the tendency toward centralization of the

²⁷ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (2006) 119 Harvard Law Review 1,3.

capacity of the administrative apparatus in the political executive, ensuring it now sits at the apex of an apparatus with potent capacity and regulatory reach.

Part three offers two substantive case-studies that robustly highlight the extent of executive predominance over important aspects of political life, looking at foreign affairs and emergency powers. These studies, combined with part two's general study of the rise of the executive as chief policymaker and lawmaker, provide a robust picture of how and why the executive is politically predominant. That said, these substantive case-studies are by no means intended to be an exhaustive account of the policy areas the executive reigns politically predominant. For example, in addition to these examples could be added executive predominance over the use of armed force or its ability to shape the jurisprudence of the judicial branch through strategic appointments based on ideological alignment. The constraints of space, and the need to be able to offer a sufficiently contextual, detailed, and nuanced study of executive predominance in action, both weigh against including additional examples, but they are certainly fruitful case-studies for further research.

Chapter four notes how questions of domestic political concern and importance are frequently shaped by, and interdependent on, decisions and developments taken outside national politics. This came with two broad constitutional changes: first, a *vertical* delegation of power to the international political plane; and second, a concurrent *horizontal* delegation of authority to the executive branch, which accrued greater influence and agenda-setting power over issues of international concern. The arc of constitutional politics in each system has bent toward increased executive power over foreign affairs, and relegation of the legislature to a subsidiary, frequently reactive role. Its greater control over the formation and execution of foreign policy has given it more de facto influence in the domestic plane.

Chapter five argues that copious power has flowed to the executive in the name of counteracting emergencies, but each constitutional order has largely tried to subsume this authority under constitutional or statutory authorisation. The executive has very rarely claimed authority to act *contra legem* or directly contrary to Constitution or statute. As each system has embraced elements of the liberal constitutional tradition which fears perhaps above all, arbitrary state power, it is not surprising 'extralegal...and unauthorized acts' are considered deeply troubling, even if done to preserve public safety or welfare.²⁸ Each system

²⁸ Judith Shklar, 'The Liberalism of Fear' (n 26) 30.

instead tries to reconcile granting the executive immense discretionary power but subsuming it within the thin binds of constitutional and statutory norms.²⁹ This highlights the two divergent faces of executive power which emerge throughout this thesis: politically predominant and beyond tight control by legal rules articulated by legislatures and courts, but still subservient to law in some residual and important sense.³⁰ This tense duality between weakness and strength underscores not only the dominant political power of the executive, but the enduring importance of perceptions of legality to political legitimacy in these systems.

Part four looks at legal constraints imposed on the executive via the judiciary and internal legal advisors working within the executive branch. This part argues that legal checks on the executive not only provide a source of constraint but can, in fact, act as a source of empowerment. Courts and executive lawyers act as a source of empowerment because they help provide the executive with both capacious legal space in which to pursue its policies, as well as offering a source of legalistic legitimation which bolsters their political legitimacy.

Chapter six argues the growth and consolidation of the administrative state was aided by judicial articulation of relaxed legal rules and standards to govern administrative power. The legislature and judiciary both broadly worked in tandem, over sustained periods of time to affirm, delegate, and legitimate increased executive authority.³¹ As the power of the executive waxed, these organs in turn have frequently self-limited their own law-making and law-checking authority. These branches have not abnegated their legislative and judicial authority, but they frequently offer only modest to moderate counterbalance on the executive's expanded power, which facilitates its predominance over the projection of public power. The judicial branch could attempt to tightly constrain the executive's authority, by aggressively reviewing their exercise for compliance with legal principles. Courts in each system are certainly not supine institutions as, for example, the apex courts in each system have effectively asserted they have the ultimate authority and duty to interpret the meaning of both statutes and constitutional principles for the other branches.³² Each system also has a Supreme Court which effectively regards itself as 'guardian of the Constitution'. But although they have a robust conception of their own authority, courts invariably do not use their ample powers to intensely constrain and obstruct the political executive. This chapter

²⁹ Jack Goldsmith, 'The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation' in Clement Fatovic and Benjamin A. Kleinerman (eds.), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford University Press, 2013).

³⁰ Margit Cohn, 'Tension and Legality' (n 10).

³¹ See Adrian Vermuele, *Laws Abnegation: From Laws Empire to the Administrative State* (Harvard University Press, 2016).

³² See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boland v An Taoiseach* [1974] I.R. 338; R (*Miller*) v *Prime Minister* [2019] UKSC 41.

suggests they do not do so for several reasons, including concerns over democratic legitimacy, pragmatic appreciation of the limits of judicial competence in light of the complex problems the political executive grapples with, and perhaps implicit recognition the awesome responsibility of governing ultimately rest heavily on the executive's shoulders, and courts should not seek to make the task of achieving substantive policy goals more difficult than it already is.

Chapter seven argues that although an ostensible internal constraint, executive branch lawyers in fact play a Janus-faced role in respect of executive power in each system. I trace how executive lawyers can both constrain and empower the executive branch. While sometimes offering a genuine constraint on the scope of executive action, there are plausible grounds to suggest on balance they often tend more toward the latter, giving critical legalistic credibility to executive policy choices. The processes and substantive norms governing their work is of importance to the allocation of public power in constitutional democracies, by helping legitimate how the contemporary executive chooses to deploy its expansive authority. They are a source of empowerment because their work: the personnel who undertake it, and the extent to which it is disclosed for scrutiny, can all be structured in a manner most conducive to providing legalistic legitimacy to the executive's policy goals. Despite differences in each system - on balance – the work of executive lawyers has been structured in a way that makes it a useful mechanism helping to legitimise controversial political choices made by the executive.

Part five ties the arguments and observations of the previous chapters together and seeks to do three things. First, it offers an argument concerning why the executive branch is predominant, by tying together the various trends explored throughout the thesis. Second, it asks what the executive's current status can tell us about its conceptual nature. Third, it offers a qualified normative defence of political systems where the executive is predominant.

Chapter eight argues that taken together, these trends help make the political executive the directive and energetic branch of government. That is, the branch responsible for articulating policy solutions to every conceivable political vicissitude, for leading the state and guiding it through the difficulties besetting political communities. Executives must do whatever they can, accrue whatever power they must, to deal with the never-ending problem of political contingency. Or as Machiavelli memorably put it, they must grapple with the reality 'things

arise and accidents come about that the heavens have not altogether wished to be provided against'.³³ The contemporary executive's functions are necessarily open-ended³⁴ and its responsibility has become - and this is as about as precise as one can be - to get things done, to identify problems, and find solutions. The executive is thus proactive, the other branches reactive and deliberative,³⁵ making the essential executive question: 'what is to be done?'³⁶ In determining the ends to which public power will be directed to deal with these 'things and accidents' of political contingency, and the ends the polity will pursue, the political executive has assumed primary responsibility for maintaining the common good and public welfare.³⁷

I argue at the root of these trends – the why of executive predominance – is an attempt to better pair public power with political expectation.³⁸ By this I mean a political community's ability to project and use public power to effectively implement decisions meeting the political expectations of citizens, both material and abstract.³⁹ Expectations and needs which invariably exist in a thicket of complex and difficult real-world conditions:⁴⁰ from securing domestic order, building useful foreign relations, promoting economic prosperity, providing demanding goods like education, health care, infrastructure, securing social justice, and protecting national security from domestic and foreign threats.⁴¹ Conditions which are ultimately linked to securing the common good - the state of affairs in which 'each individual within a political community and the political community as a whole is flourishing.'⁴²

³³ Niccolò Machiavelli, *Discourses on Livy* (Harvey Mansfield and Nathan Tarcov (eds), University of Chicago Press, 1998) 197.

³⁴ Timothy Endicott, 'The Stubborn Stain Theory of Executive Power: From Magna Carta to *Miller*', *Policy Exchange: Judicial Power Project* (Policy Exchange, 2017).

³⁵ Steven Calabresi, 'Some Normative Arguments for the Unitary Executive' 48 *Arkansas Law Review* (1995) 23, 39.

³⁶ *Ibid.*

³⁷ Thomas Poole, 'The Executive in Public Law' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press, 9th edition, 2019) 188-208.

³⁸ As Cane puts it, executive primacy is partly a result of 'citizen's demands and expectations that the state will step in to deal with social problems that can be tackled only by coordinated action at the social level'. Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 *Washington International Law Journal* 527, 561.

³⁹ This is not to say that, as Tocqueville did, that state capacity has expanded as an attempt to slake man's desire or expectation for *material* improvement. I also include the polity's ability to project public power to grapple with citizens abstract feelings and general anxiety and unease about the political direction the community is heading, what values it is directed by and what political vision guides it. See Leo Strauss and Joseph Cropsey (eds.), *History of Political Philosophy* (3rd edn, University of Chicago Press, 1987) 769.

⁴⁰ Michael Mann, 'The autonomous power of the state: its origins, mechanisms and results' (1984) 25 *European Journal of Sociology* 185, 189.

⁴¹ Daryl J. Levinson, 'Foreword: Looking for Power in Public Law' (n 4) 46; Daryl J. Levinson, 'Incapacitating the State' (2014) 56 *William & Mary Law Review* 181, 195; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000) 5.

⁴² George Duke, 'Sovereignty and the Common Good' (2019) 17 *International Journal of Constitutional Law* 66, 75; Gregoire Webber & Paul Yowell, 'Introduction: Securing Human Rights through Legislation' in (eds.) Gregoire Webber, Paul Yowell, Richard Ekins, Maris Kopcke, Bradley W. Miller & Francisco J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2019) 3; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 64; John Finnis, *Natural Law and Natural Rights* (2nd edn. Oxford University Press, 2011) 154-155.

This evolution was profound, and critically not achieved through executive effort alone. Rather, executive predominance was heavily aided by other constitutional actors. The legislature and judiciary broadly worked in tandem, over sustained periods of time, to affirm, delegate, and legitimate increased executive authority.⁴³ As the power of the executive waxed, these organs in turn have frequently self-limited their own law-making and checking authority. These branches have not abnegated their legislative and judicial authority, but they have frequently offered only modest counterbalance to the executive's expanded power. For example, the legislature could, formally speaking, strip the executive branch of much of its capacity for action, through its common power over law-making and the public purse.⁴⁴ The political executive depends for its sustenance after all, on the continuing flow of funds and statutory authorizations from the legislature.⁴⁵ This self-limitation over their own formal powers facilitate executive predominance over projections of public power.

Executive predominance thus cannot be considered a result of unilateral empire-building.⁴⁶ It is better understood as the form of constitutional government evolved and maintained in these systems – through sustained collaboration of their institutions – to better respond to social and political problems facing the contemporary state. The current predominance of the executive represents an evolution of the traditional separation of powers framework adopted by each system - where the legislature held theoretical primacy and the executive a modest role - to an executive-led one structurally better suited to tackle problems faced by the contemporary polity.⁴⁷ This does not mean the power invested in the executive has fulfilled, or ever can fulfil, the promise of meeting the diverse political expectations and needs of its citizens in a given political system.⁴⁸ The demands and expectations placed on the political executive may well always outstrip its capacity and powers, and its ability to secure the common good. The finiteness of resources may obstruct this goal, or the political will to direct state capacity to the common good may curdle.⁴⁹ But this does not undermine the proposition we have witnessed the long-term rise of executive predominance, or that

⁴³ This argument has been made in the U.S. context by Professor Vermeule. See Adrian Vermeule, *Law's Abnegation* (n 31). I argue a similar picture is evident in Ireland and the United Kingdom.

⁴⁴ Charles Black, 'The Working Balance of the American Political Departments' (n 24) 15.

⁴⁵ Hugh Hecla, 'The Once and Future Presidency: Prophecy versus Prediction' in (ed.) Charles Dunn, *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 21.

⁴⁶ Daryl Levinson, 'Empire-Building in Government in Constitutional Law' 118 *Harvard Law Review* (2005) 915.

⁴⁷ Adrian Vermeule, *Law's Abnegation* (n 43).

⁴⁸ Striving to meet the kinds of demands and expectations which help constitute the common good may remain a 'regulative ideal' which is very hard to instantiate in practice. Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (n 42) 64.

⁴⁹ *ibid* 64.

attempts to match state capacity with political expectation were, and remain, at the heart of its emergence and consolidation.

Considering the importance of the executive, there has been a notable lack of comparative constitutional study exploring it, and the reasons for its common predominance. Still less has there been any comparative accounts which attempt to build a conceptual account of the political executive in contemporary constitutional systems.⁵⁰ Studies of the executive instead tend to be system specific.⁵¹ To this end, my comparative study of why the executive transformed and became politically predominant has three main contributions to constitutional study of the executive branch. First, through its insight into the type of social and political forces and pressures which can inflate the executive's authority, an explanatory account which will be of use to scholars with both positive and negative dispositions toward robust executive authority. Second, it also underscores how grasping the mechanics of executive predominance is critical to accurately capturing how constitutional power is allocated and exercised by institutional actors in these systems. Finally, it is useful for informing current political or normative debate on the predominance of executive power, because a solid descriptive grasp of the *why* of executive predominance is critical to informing these evaluations.

This chapter also asks what executive predominance tells us about the conceptual nature and place of the contemporary executive in these, and similar, kinds of constitutional systems. On the one hand stand the common and enduring historical inheritance of each system - legal principles emphasizing restraining executive power under law. On the other, the developments I trace empower the political executive immensely. A persuasive account of the position of the contemporary executive in these systems, I propose, must fully acknowledge and grapple with this conceptual tension. It must be a conceptual model of executive power which ties together its conflicting trade-offs between principle, pragmatism, law, custom, and practice.⁵² Any conception of the executive branch in these systems, and similar ones, must unite them. This multifaceted model of executive power I dub the

⁵⁰ For a notable exception See Paul Craig and Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006).

⁵¹ Margit Cohn 'Tension and Legality' (n 10).

⁵² Thomas Poole, 'The Executive in Public Law' (in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press, 9th edition, 2019) 188-208.

‘*Constrained Primacy Model of Executive Power*.’⁵³ The constrained primacy model of executive power is a type of political executive which is:

- (i) highly predominant in the formation and execution of domestic and foreign policy;
- (ii) vested with very capacious administrative, regulatory, and security powers;
- (iii) committed to the practice of acting within the bounds of legality. Accepting of statutory & constitutional limitations and democratic constraints where imposed by law;⁵⁴
- (iv) distinct from a conception of the executive as a faithful executor of legislative will, acting as a secondary actor to a predominant legislature;
- (v) also distinct from a conception of executive power which is autocratic and lacking genuine commitment to legality and/or accepting of constitutional limits and democratic control imposed by law;
- (vi) *prima facie* capable of encompassing the political executive in liberal and illiberal constitutional democracies, both of which have grown in power over time.⁵⁵

This way of understanding the executive branch provides a descriptively accurate account of its current status in constitutional systems like Ireland, the United Kingdom and United

⁵³ This model enjoys commonalities with recent accounts offered by several public law scholars. It bears most similarity to Professor Margit Cohn’s internal tension model, which she argues means that the ‘the executive, entrusted with the role of management of the polity under law, operates as both an “executor” of law, under its commitment to the rule of law and subject to the political ideal of separation of powers, and as an “executive,” or CEO, entrusted with steering the state in sickness and in health.’ Margit Cohn ‘Tension and Legality’ (n 10) 345. It is also compatible with Chang-Yi Huang’s description of executive primacy as ‘the leading and dominant role of the executive branch, especially the chief executives, either presidents or prime ministers, to control political agenda on policy issues’ Chang-Yi Huang, ‘Unenumerated Power and the Rise of Executive Primacy’ (2019) 28 Washington International Law Journal 395, 400.

⁵⁴ At a minimum, this typically requires the executive is required to periodically seek the endorsement of the people through free and fair elections regulated by law. Gerrymandering, corruption, vote rigging, voter suppression, or deliberate undermining of political competition contrary to constitution or statute by advantaging the ruling party are all likely to compromise democratic control. See Tarunabh Khaitan, ‘Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism’ (2019) 17 International Journal of Constitutional Law 342, 349.

⁵⁵ Mark Graber, ‘What’s in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy’ in Mark Graber and Sanford Levinson, *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 682-683.

States. It is more accurate than accounts of the executive as absolutist, authoritarian, or unbound from law on the one hand, or historically grounded liberal constitutionalist accounts of a genuinely subordinate, modest, faithful executioner of law on the other. The constrained primacy model instead captures the full complexity and extent of the executive's current role and status in these constitutional democracies. The former account masks the central position of the executive in the constitution, while the latter gives inadequate weight to how perceived commitment to legality and constitutional limits remain critical to political legitimacy and morality.⁵⁶

This conceptual model adds several contributions to comparative constitutional study of the executive branch. First, it provides a conceptual account of the executive branch which is more accurate and not distorted, built with detailed case-studies of contemporary constitutional practice in three constitutional democracies as its foundations.⁵⁷ Second, it provides a sound basis for critical evaluation of the place of the executive branch in these constitutional systems. Third, it provides a useful analytical tool for comparative constitutional theory, facilitating the comparing and contrasting of different conceptual accounts of executive authority and their merits and drawbacks. Finally, it bolsters recent scholarship justifying study of the executive branch from a theoretical perspective.

Chapter nine concludes this thesis with a qualified defence of the constrained primacy model of executive power. I do this primarily because adequately responding to the myriad of difficult challenges of contemporary government often require embrace of strong executive power. My defence is qualified in the sense I argue a predominant executive must be accompanied by a constitutional⁵⁸ and political⁵⁹ culture broadly dedicated to aiming its capacity toward the common good. This is because a powerful executive is inevitably a double-edged sword. It is potentially a more efficient tool for evil purposes, as it faces less veto-points in having its bad preferences changed into public policy. As such, the combination of such a potent institution with the erosion of a political culture orientated

⁵⁶ Thomas Poole, 'The Executive in Public Law' (n 52).

⁵⁷ Concepts provide the 'mental architecture by which we understand the world and are ubiquitous in social science as well law. Conceptualization involves the process of formulating a mental construct at a particular level of abstraction'. Tom Ginsburg & Nicholas Stephanopoulos, 'The Concepts of Law' (2017) 84 University of Chicago Law Review 147, 150.

⁵⁸ By constitutional culture I refer broadly to the social beliefs and values held by both officials and citizens relevant to interpreting the substance of the Constitution. *See* Reva Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA' (2006) 94 California Law Review 1323 1325; Robert Post, 'Foreword: Fashioning the Legal Constitution: Culture, Courts and Law' (2003) 117 Harvard Law Review 4, 8.

⁵⁹ By political culture I refer to the attitudes, beliefs and values which inform and govern political behaviour.

toward common good could produce truly toxic effects.⁶⁰ But an enfeebled executive can leave the polity less able to use public power to secure domestic order and social justice – and a host of other goals which are indispensable to the common good. Excessive weakness of executive power may, in fact, have a perverse tendency to mutate into excessive strength in the form of fomenting authoritarian temptation to sweep aside constraints seen as impeding the common good.⁶¹ Offering a *via media* between these concerns, I conclude it is normatively defensible to argue that, in political systems where the right conditions hold, it is not the mere existence of a powerful executive that should be our primary concern, but who wields this authority, where its power is directed, and why.

In some respects, my position is anathema to core tenets of liberal constitutionalism, which is deeply suspicious of increased executive power and prizes the primacy of the legislative branch and liberty in the form of individual autonomy and freedom from state interference.⁶² But I argue there can be good reasons for constitutional actors to loosen ties to the liberal aspect of their constitutional traditions, at least in so far as it is hostile to state power and gives centre stage to individual negative liberty and legislative primacy.⁶³ In the end, the best argument for tempering hostility to robust executive power is recognising that without adequate state capacity, a constitutional order may be hapless in tackling social-political problems harmful to a healthy political community.

Even if my qualified defence is found unpersuasive, I argue these normative considerations should at least encourage scholars to avoid considering a powerful or predominant executive *per se* contrary to good government. To take care when broaching the ‘assumption that limitation of the executive (as of the state more generally) is good, and the more restrictions that exist the better’.⁶⁴ Instead, I hope it provides arguments which encourage constitutional designers and scholars to approach the question of executive authority with full and sharper consideration of the complex and tough moral and political trade-offs involved in setting the boundaries of its powers. There is no monistic, one-size-fits all approach to structuring executive power. Anxiety and tension about the right balance between empowerment and constraint has always been, and probably always will be, a core feature of debating executive

⁶⁰ Adrian Vermeule, *Instrumentalism* (2007) 120 Harvard Law Review 2113, 2120.

⁶¹ Adrian Vermuele, *The Constitution of Risk* (n 25)13.

⁶² Patrick Deenen *Why Liberalism Failed* (Yale University Press, 2018); Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) 3-5.

⁶³ Adrian Vermuele, *The Constitution of Risk* (n 25)12-14.

⁶⁴ Paul F. Scott, ‘The “Publius Paradox” and the United Kingdom: Comments on Adrian Vermeule’s 2018 Chorley Lecture, “The Publius Paradox” (2019) 82(1) *Modern Law Review* (2019) 1-16’ (2019) *Modern Law Review Forum* 1, 5.

power in constitutional systems. But concern over abuses of power should not *excessively* cloud judgment about the potential value of, and good reasons that can exist for, a robust executive.

PART ONE: HISTORY AND THEORY OF EXECUTIVE POWER

CHAPTER I – THE MODEST EXECUTIVE? HISTORICAL & THEORETICAL CONCEPTIONS OF EXECUTIVE POWER

INTRODUCTION

Defining executive power has proven problematic for public law everywhere.¹ When it comes to detailing the authority of the executive branch, constitutional documents are frequently filled with notable gaps and silences. While the executive might be the most scrutinized institution in a polity, it often occupies comparatively little space in constitutional texts. This reluctance to define precisely what executive power entails is a shared phenomenon in Ireland, the United Kingdom and the United States. Article 28 of the Irish Constitution provides sparsely that ‘the executive power of the state shall, subject to the provisions of this Constitution, be exercised by or on authority of the government’. It also specifies in Article 29 that ‘executive power’ over foreign affairs resides in the government. However, neither Article 28 nor Article 29 enumerate or define what executive power means or entails.² Article II of the United States Constitution is similarly vague, providing that ‘the executive Power’ shall be vested in a President of the United States, and has been the subject of endless scholarly debate.³ The United Kingdom’s understanding of what executive power entails is even more ambiguous, and given the unwritten nature of its constitution it is very difficult to ascertain precisely how much power is at the executive’s disposal.⁴ British public lawyers regularly debate the scope of executive power and its relationship and overlap with statutory authority and notoriously ambiguous concept of prerogative.⁵

One reason for this common conceptual uncertainty stems from the fact that understandings of executive authority – what its role and responsibilities are - are drawn from a complex and untidy assortment of sources. A mesh of political theory, historical understanding, judicial precedent and ad-hoc institutional developments.⁶ Executive power across many

¹ Paul Craig and Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 4, 16.

² Basil Chubb has argued that it is not possible to ‘convey accurately the functions and responsibilities of governments in the legal phraseology of constitutions and statutes’ and that ‘Article 28 of Bunreacht na h’Eireann can at best be described as an inadequate expression of the functions of the role of the government.’ See Basil Chubb, *A Sourcebook of Irish Government* (Irish Institute of Public Administration, 1983) 57.

³ Julian Mortenson, ‘The Executive Power Clause’ (Forthcoming, 2020) 167 *University of Pennsylvania Law Review* 1-93.

⁴ Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford University Press, 2007) 44.

⁵ *Ibid.*

⁶ Jenny Martinez, ‘Inherent Executive Power: A Comparative Perspective’ (2006) 115 *Yale Law Journal* 2480, 2486.

jurisdictions is associated with several functions: law-execution, taking primary responsibility for setting legislative priorities, conducting foreign policy, and directing a potent bureaucratic and security apparatus.⁷ *Why* and *how* did the executive become associated with such a disparate list of functions? Some of these functions appear to imply an element of subordination to another institution - the duty to execute laws passed by a lawmaker. Others conversely imply the existence of a certain political authority and dynamism – such as proposing policy priorities or conducting foreign affairs. Considered altogether, these diverse functions appear to paint an executive that is simultaneously nominally constrained, but in substance quite powerful.

When contrasted against conceptions of legislative and judicial responsibility, there is a shared unwillingness in constitutional text to articulate precisely what the executive's function is. But despite this common *prima facie* ambiguity over the precise role of the executive, a detailed examination of historical, political, and judicial understandings of the concept in each system highlight that executive power in these systems has been conceptually understood in very similar ways.

Part I of this chapter gives an account of how once contested political and legal principles associated with executive power came to ascendancy in English (and United Kingdom) constitutionalism. While these principles are not clear-cut, they allow us to identify one of the core conceptual features of executive power in each system: legal power and duty to ensure the 'implementation of instructions and authority that came from' the legislature. The executive branch on this conception is 'guided by law, 'fetter'd by system,' and 'manacled both by man and measures.'⁸ Under this understanding, the core responsibility of the executive is faithfully executing laws enacted by the legislature. Parts II and III consider the deep embeddedness of these principles in constitutional culture and judicial doctrine in the United States and Ireland respectively, systems with close historical proximity to the United Kingdom. I trace how in each system the formal legal powers of the executive have close links with this historical context.

⁷ Paul Craig and Adam Tomkins (eds), *The Executive and Public Law* (n 1) 16; Paul Craig, 'European governance: Executive and administrative powers under the new constitutional settlement' (2005) 3 *International Journal of Constitutional Law* 407, 410.

⁸ Julian Mortenson, 'The Executive Power Clause' (n 3) 93.

Part IV concludes this chapter by noting that while these kinds of principles are deeply embedded in each system, they alone cannot provide an accurate or persuasive picture of the workings of the executive in the contemporary state. Although they are important for understanding the nominal weakness of the political executive, they do not capture the full conceptual complexity of contemporary executive authority, which I will argue in subsequent chapters is characterized by a tension between this nominal weakness and its substantive political strength, which is the result of several converging social and political trends I explore.

I. EXECUTIVE POWER IN ENGLAND & UNITED KINGDOM

The power of the political executive in the United Kingdom, Ireland and the United States is delimited by similar legal principles, with a contested history in political thought. The roots of these principles originated and developed coherency slowly during various political conflicts in the English and UK constitutional order. The emergence of the concept of the separation of powers, and the distinct but related concepts of checks and balances, were all bound up in political struggles in existing regimes. These struggles were waged between political actors with conflicting ideas about the appropriate way to channel and structure government power and violent political conflict was central to cementing the broad principles intelligible to the Anglo-American common law world, the embedded small-c constitutional principles central to our understanding of the boundaries and scope of executive power and its relationship to legislative power.⁹

The principles which emerged as dominant from these political conflicts emphasized the subordinate nature of the executive and its role as executor of the directives of another institution, which reflected the emerging centrality and strength of parliamentary institutions. At its most basic, these principles encompassed the notion the legislature enacts law which the executive is bound to faithfully execute, with the latter enjoying no power to unilaterally make or suspend law. The executive existed as the embodiment of state force, but was subordinate as its role was to execute the decisions of the legislature and courts, applying statutes and enforcing judgments.¹⁰ These principles constitute a thin but foundational aspect

⁹ For accounts of the importance of these kinds of principles to guiding interpretation of constitutional text and structure see David Pozen, 'Self-Help and the Separation of Powers' (2014) 124 Yale Law Journal 1, 33; Richard Primus, 'Unbundling Constitutionality' (2013) 80 University of Chicago Law Review 1079, 1082.

¹⁰ Julian Mortenson, 'The Executive Power Clause' (n 3); N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 65; Martin Flaherty, 'The Most Dangerous Branch' (1996) 105 Yale Law Journal 1725, 1794.

of the constitutional orders I consider, offering something akin to basic ground rules for the political executive.

The influence of English (and later United Kingdom) constitutionalism has had a considerable bearing on accounts of executive power in cognate common law jurisdictions. Both in terms of political practice and their embeddedness in legal doctrine. Many concepts and principles that emerged from this system, for example that the executive is subordinate to law and an executor of the dictates of a law-making body, are certainly not axiomatic when one considers the plethora of institutional arrangements which can be used to channel political power.¹¹ The emergence and embeddedness of these principles derived as much from conflict and controversial power struggles as abstract political theorising, and it is to provide an account of these struggles, and the principles which drove and emerged from them, that next this section turns.

Executive power in the English/UK constitutional tradition

For many centuries, the heart of public power in England was the Crown, who largely exercised all the powers of the state,¹² representing the ‘life, the head, and the authority of all things that be done in the realm of England’.¹³ However, this vast reservoir of powers – a melange that we would consider spanning executive, legislative, and judicial authority - was subject to certain limitations.¹⁴ While monarchs and their intellectual defenders claimed that the duties a King swore to undertake at their coronation¹⁵ made him accountable only to God, a long-standing strand of English political thought considered the monarch subservient to law, both customary and statute based. That he owed a duty to the people to govern in accordance with law and non-arbitrarily.¹⁶ Early English legal and political writings reflected an understanding that the Crown’s power, while very considerable, was not absolutist in character.¹⁷ In other words, the self-understanding of actors in the English political order was that the state did not subscribe to the concept that anything decided by the prince had the force of law.¹⁸ This is said to be why early English jurists regarded themselves well-placed

¹¹ For example, dictatorships of both a Marxist or Fascist stripe, which may be based on principle of Marxist-Leninist party-state fusion or *Führer* principle.

¹² *R v Miller* [2017] UKSC 5, para 41.

¹³ Harold Berman, ‘Origins of Historical Jurisprudence: Coke, Selden, Hale’ (1994) 103 *Yale Law Journal* 1651, 1660.

¹⁴ See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Press, 1947).

¹⁵ Andrew Kent, Ethan J. Leib and Jed Shugerman, ‘Faithful Execution and Article II’ (2019) 132 *Harvard Law Review* 2111, 2141-2146.

¹⁶ *Ibid.*

¹⁷ Colin R. Monroe, *Studies in Constitutional Law* (2nd edn, Oxford University Press, 2005) 260.

¹⁸ John Crook, *Law and Life in Rome* (Cornell University Press, 1967) 20.

to write pejoratively in relation to continental systems they thought tended to arbitrary rule.¹⁹ Political elites long coalesced around what we might consider certain political ground rules, including that consent of the aristocrats and people's representatives of the Houses of Parliament was required for passing statutes changing the law of the land, that taxation without parliamentary consent was impermissible, and that members of Parliament had certain rights and privileges to inquire into and speak about abuses of the Crown's administration.²⁰ These restrictions were established and defended by rhetorical appeal to customary norms of the realm.

Documents like Magna Carta reflected this political understanding. While its status as a guarantor of individual rights has been extensively mythologised, less attention has been paid to its important political influence on later questions of how to channel public power institutionally.²¹ The constitutional importance of documents like Magna Carta is two-fold, first, in its illustration of the claim of political elites to legitimacy in aiming to constrain the King to adhere to his duties, and second, in its nature as a detailed list of things that the King could not do lawfully.²² The view the monarch's power was not absolute but limited by both law and custom, and partly conditional on the consent of a group of leading citizens, was well entrenched by the end of the fourteenth century.²³ Although its mythological status as a proto-bill of rights and use as a rhetorical tool by political actors obscures its real purpose and impact, the foregoing principles did broadly come to underpin expectations around appropriate exercises of political authority by the Crown.²⁴ Therefore, while all public power was more or less vested in the Crown, it was checked and mixed with other elite political actors like the House of Commons and Lords in line with customary norms.²⁵ Even Tudor and Stuart monarchs with absolutist tendencies never explicitly expressed an intent to act contrary to well-established laws or custom. Instead, as they attempted to expand their legal and political authority, monarchs would - perhaps out of political calculation - publicly profess deep respect for English law, and repeatedly affirmed loyalty to legal traditions and

¹⁹ Philip Hamburger, *Is Administrative Law Unlawful?* (Columbia University Press, 2014) 34.

²⁰ Adam Tomkins, *Public Law* (Oxford University Press, 2003) 41.

²¹ Nathan Chapman and Michael McConnell, 'Due Process as Separation of Powers' (2011) 121 *Yale Law Journal* 1672, 1683.

²² Timothy Endicott, 'The Stubborn Stain Theory of Executive Power: From Magna Carta to *Miller*', *Policy Exchange Judicial Power Project* (Policy Exchange, 2017).

²³ Peter Cane, *Controlling Administrative Power* (Cambridge University Press, 2016) 147.

²⁴ Adam Tomkins, *Public Law* (n 20) 41.

²⁵ As Cane notes, documents like Magna Carta embodied the principle that the monarchy was not above the law, and institutional developments from 1272 onward established that the Monarch ruled only with the consent of the aristocracy and the representatives of the people assembled in Parliament. Peter Cane, *Controlling Administrative Power* (n 23) 28-29.

precedents inherited from previous monarchs.²⁶ In addition, although judges were appointed by the King and acted in his name alone, they were nevertheless bound by their own ‘oaths to determine the rights of the subject not according to the king’s will but according to the law’.²⁷ Recognition certain acts of the Crown, such as creating new laws, had to be exercised through accepted institutional forms, marked a milestone in the emergence of public law.²⁸

Despite professions of faith in the binding quality of statutory law and custom, conflict over the scope of the power vested in the Crown vis-à-vis Parliament would erupt with great ferocity in the mid-17th century, helping spark a vicious Civil War and the Revolution of 1688.²⁹ Although the economic and socio-political causes of this period of upheaval are complex; heated debate over constitutional issues such as the extent of the Monarch’s law-making power and unilateral authority to raise taxation were factors in stoking conflict between a ‘radicalized Parliament and intransigent King.’³⁰ Up until this point, Parliament’s main purpose had been to assist the Crown in governing – it was not yet the locus of public power in the English constitutional order. Until the revolutionary upheaval of the 17th century, Parliament could not yet be regarded as a constitutional counter-balancing institution to the Crown.³¹

The most influential judicial opinion on executive power in 17th century English constitutionalism is the *Case of Proclamations*.³² The case concerned the legality of two proclamations made by James I purporting to have binding force of law, in the same manner as a statute enacted by the King with parliamentary consent. Around this time, the political convention appeared to be that the King had prerogative power to issue proclamations announcing the state of the law and how he intended to enforce it. However, Stuart monarchs attempted to go further, and claimed the English constitution allowed them to add legal obligations beyond those required by statutes.³³ In other words, they enjoyed a

²⁶ Harold Berman, ‘Origins of Historical Jurisprudence’ (n 26) 1673. For example, Johann Sommerville notes that although the Stuart monarch James I was a committed absolutist, he still famously reassured parliament that he would never attempt to use ‘the absolute power of a king’ to alter the existing form of government in England.’ Although James I maintained as a matter of political theory and morality he was more than entitled to do so, he suggested that all good kings should be ‘glad to bound themselves within the limits of their laws; and they that persuade them the contrary, are vipers, and pests, both against them and the Commonwealth.’ Johann P. Sommerville, *King James VI and I: Political Writings*, (Cambridge University Press, 1994) Xxv-xxvi.

²⁷ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (n 14) 52.

²⁸ Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 246.

²⁹ Ibid 63; Joseph R Strayer, *On the Medieval Origins of the Modern State* (Princeton University Press, 1970) 102.

³⁰ Robert J. Reinstein, ‘The Limits of Executive Power’ (2009) 59 *American University Law Review* 259, 275.

³¹ Martin Loughlin, *Foundations of Public Law* (n 28) 252.

³² (1611) 12 Co Rep 74, 76 (77 ER 1352).

³³ Robert J. Reinstein, ‘The Limits of Executive Power’ (n 30) 272.

residual law-making power parallel to their ability to legislate as King-in-Parliament.³⁴ This is perhaps not surprising given James's I affinity with contemporary absolutist theory. Influenced by writers like Jean Bodin,³⁵ the scholarly monarch had written his own political tracts justifying absolutism on moral, political, and explicitly religious grounds.³⁶

In any event, in the *Case of Proclamations*, James I requested an advisory opinion from the Privy Council on his power to issue and enforce such proclamations. Responding to the request, Chief Justice Coke advised that the King did not enjoy legislative authority to create new offences in his own right. Instead, he asserted that under the English constitution the King could not unilaterally change any part of the common or statutory law, nor create new offences by way of proclamation. To add insult to injury, Coke provocatively added that the King enjoyed no prerogative but that which the law of the land allows him.³⁷ Although the Crown took a dim view of the opinion and essentially side-stepped the ruling,³⁸ it remains fundamental to Anglo-British constitutionalism. The opinion articulated concepts foreshadowing the separation of powers and judicial independence.³⁹ Craig suggests the case is significant for three main reasons. First, it clearly established the Crown's prerogative powers were bound, and not unlimited, and did not encompass a legislative power. Second, it established that it was for the courts, and not the will of the Crown, to determine where the boundaries to the latter's legal powers lay. Third, the principal beneficiary of the court's judgment was Parliament, as the Crown could not make new laws or unilaterally suspend existing ones by fiat, but only by its consent.⁴⁰

It is important to note Coke was not arguing the Crown could not create new laws. Rather, he was asserting that under the English constitution the King's primary duty was to execute and uphold the law. To make new laws, or replace existing ones, he could do so only in coordination with Parliament. Authority resided not in the personal power of the King, but

³⁴ John Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1, 47.

³⁵ Johann Sommerville writes that 'In his youth, James' library had already included the *Six livres de la republique* of the French Absolutist Jean Bodin. Though the two diverged sharply on a number of points- including many religious questions- their political theories plainly belong to the same family'. Johann P. Sommerville, *King James VI and I: Political Writings* (n 26) xxviii.

³⁶ *Ibid.*

³⁷ Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005) 71.

³⁸ Robert J. Reinstein, 'The Limits of Executive Power' (n 30) 272. Reinstein notes that while in the '*Case of Proclamations*, Chief Justice Coke, on behalf of the common-law justices, declared this form of proclamation illegal' the Crown simply side-stepped the common-law courts who refused to enforce royal proclamations and instead 'brought prosecutions in the Courts of Star Chamber and High Commission, a practice that became especially draconian in suppressing dissenters when Charles I ruled without Parliament from 1629 until 1640'.

³⁹ Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2014) 46-47.

⁴⁰ Paul Craig, 'Prerogative, Precedent and Power' in Christopher Forsyth and Ian Hare (eds) *The Golden Metwand and Crooked Cord* (Oxford, Clarendon Press, 1998) 68-70.

in the institutional power of the King – in – Council in Parliament.⁴¹ Readers might recognize in the opinion, immanent strands of a form of separation of powers between the legislative and executive branches, where only a duly constituted legislature can make law that imposes binding rules of conduct; which the executive faithfully enforces.⁴² However, it bears repeating that although now deeply embedded in jurisdictions like the United Kingdom, United States and Ireland, they are not axiomatic or obvious. Indeed, they were incredibly controversial for their time, bound up in flesh and blood struggles and shaped by fights over political power as much as by abstract normative considerations.⁴³ It was not simply a matter of an overreaching executive attempting to bring a well-established constitutional order to heel, but a complex and controversial struggle over *what the constitutional order required* vis-à-vis the allocation of public power among the Crown and Parliament.⁴⁴

Indeed, many judges of the time were more than willing to uphold a broad conception of the powers of the Crown against perceived encroachment by Parliament.⁴⁵ On several occasions the judiciary gave imprimatur to sweeping claims of executive power. The *Five Knights*⁴⁶ case offer an illustrative example. The case concerned a refusal of several nobles to provide a loan to King Charles I after Parliament would not raise the desired revenue through an appropriation statute. The knight's refusal was met with prompt imprisonment at the behest of the king. When the courts granted writs of habeus corpus and inquired into the legal basis for imprisonment, they were bluntly informed the five plaintiffs were being not being detained by any statutory basis, but by the King's command.⁴⁷ In contrast to the *Case of Crown Proclamations*, judges adopted a markedly accommodating approach to expansive claims of monarchical authority, and held that the fact the warrant was issued on the authority of the Crown was itself sufficient to reject a habeus corpus petition. A majority of the Court found it was sworn to maintain all prerogatives of the king and that if the cause of imprisonment had no firm legal basis it was to be presumed it was related to sensitive matters of state, which fell to the king alone to determine.⁴⁸ In contrast, the reaction of

⁴¹ Martin Loughlin, *Foundations of Public Law* (n 28) 254.

⁴² Nathan Chapman and Michael McConnell, 'Due Process as Separation of Powers' (n 21).

⁴³ Not all political theorists have been overly concerned with highly concentrated political power. Thomas Hobbes famously pointed to the risks of social disorder stemming from an excessive weakness of government – a war of all against all - to justify robust political authority. For Hobbes, fear of the evils and pain accompanying social anarchy was a compelling reason against separating the sovereign power of the state into distinct bodies or qualifying it with legal constraints. Leo Strauss and Joseph Cropsey (eds), *History of Political Philosophy* (University of Chicago Press, 3rd edition, 1987) 409.

⁴⁴ Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press, 2015); Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 39) 50-51.

⁴⁵ *ibid* 46-47.

⁴⁶ (1627) s St Tr 1.

⁴⁷ Adam Tomkins, *Our Republican Constitution* (n 37) 77.

⁴⁸ *ibid* 78.

Parliament to this executive action was fierce and unequivocal. They asserted that the monarch had no right to discretionary non-statutory imprisonment in any circumstances.⁴⁹ Shortly afterward, the House of Commons produced the Petition of Rights, which dealt with parliamentary concerns such as discretionary imprisonment, as well as similar instances of perceived executive abuse like forced loans, billeting, and arbitrary invocation of martial law. The petition also concluded that no-one ought to be compelled to contribute to any tax without parliamentary consent.⁵⁰ This hostile reaction demonstrates the extent to which the Commons thought the judges in the *Five Knights* case had clearly lost sight of the fundamentals of English law, which left the ability to change legal duties and obligations to Parliament.⁵¹

The case of *R. v. Hampden*⁵² again demonstrated strong parliamentary determination to uphold what they considered to be fundamental legal principles against executive overreach, facilitated by a compliant court. In *Hampden*, the Court considered the legality of a writ issued under the King's prerogative power which required inland ports to provide ships fully equipped for naval service. Although it was generally accepted the King enjoyed power to raise ships by taxing maritime traders, the extension of the prerogative to inland ports was a novelty, as the levy was usually based on the kind of lucrative trade which the owners of inland ports did not partake. The extension of taxation to these ports was also controversial because it was during peace time, and not possible to pretend the writs were being issued to meet a war-time emergency. Those challenging non-statutory taxation did not dispute the King had discretionary executive powers, but that in exercising them he had to do so lawfully and in line with existing legal customs.⁵³ This proposition was rejected in striking terms by the Court, who held that not only did the King enjoy unilateral power to act in the circumstances, but that some of his prerogative powers were dedicated to the welfare of the state and beyond the reach of parliamentary regulation.⁵⁴ A majority found:

acts of parliament which take away his royal power in the defence of the kingdom are void; they are void acts of parliament to bind the king not to command the

⁴⁹ *ibid* 79.

⁵⁰ *ibid*.

⁵¹ *ibid*.

⁵² (1637) 3 St. Tr. 825.

⁵³ Adam Tomkins, *Our Republican Constitution* (n 37) 85.

⁵⁴ Thomas Poole, *Reason of State: Law, Prerogative and Empire* (n 54).

subjects, their persons and goods, and I say their money too; for no acts of Parliament make any difference.⁵⁵

When Parliament reconvened, they took a strikingly divergent view, enacting a statute attempting to void the judgment and impeach several judges on the bench which rendered it.⁵⁶ Conflict over the appropriate division of power between Crown and Parliament would rage intermittently for another several decades. Several basic foundations of modern English – and UK - constitutionalism were not determined by legalistic means, much less by the courts. They were settled by the aftermath of a bloody Civil War, the execution of Charles I, the interregnum and Protectorate, restoration of the Monarchy, Glorious Revolution,⁵⁷ passage of the Bill of Rights Act of 1689 and Act of Settlement 1701. These political conflicts forced settlement of the location of legislative power and constituted the terms and conditions according to which the monarchy's reign would be governed.⁵⁸ This included prohibitions on changing, dispensing, or suspending with the law, or raising taxes or armed forces, without parliamentary consent.⁵⁹ The Coronation Oath Act 1689 instead required future monarchs to 'in all times to come' to swear to 'govern the people of this kingdom...according to the statutes in parliament agreed on, and the laws and customs of the same', which underscored the primacy of parliamentary statutes as sources of law.⁶⁰

The principles articulated in *Crown Proclamations* were clearly echoed in this settlement and the Bill of Rights Act 1689, which undoubtedly remain important precedents underpinning Anglo-American and Commonwealth constitutionalism.⁶¹ Whatever its limited impact on the political situation at the time, *Case of Proclamations* remains an enduring influence as a lynchpin of the UK constitutional order. The English Revolution of 1640 to 1689 and its immediate aftermath essentially established the legal supremacy of Parliament over the Crown.⁶² Only the *Crown-in-Parliament* could create new statutes,⁶³ and its political authority

⁵⁵ Adam Tomkins, *Our Republican Constitution* (n 37) 85.

⁵⁶ *ibid.*

⁵⁷ So-called because no blood was spilled on English soil during the upheaval. The phrase, of course, belies the extent of bloodshed in Ireland during battles fought in Derry, the Boyne, and particularly at Aughrim.

⁵⁸ Adam Tomkins, *Our Republican Constitution* (n 37) 103.

⁵⁹ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 159.

⁶⁰ *ibid.*

⁶¹ James Grant, 'Prerogative, Parliament and Creative Constitutional Adjudication: Reflections on Miller' (2017) 28 *King's Law Journal* 35, 40.

⁶² Martin Loughlin, *Foundations of Public Law* (n 28) 381; Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 *International Journal of Constitutional Law* 146-155, 147.

⁶³ Colin R. Monroe, *Studies in Constitutional Law* (n 17) 271. Of course, it is important to remember that this development is 'not to be confused with democracy: only some two or three percent of the adult population were eligible to vote. It was in effect, the rule of an aristocracy made up principally of some eight or ten thousand landed gentry, who replaced the

became regarded as legally and constitutionally absolute.⁶⁴ For example, while 18th century commentators argued Parliament was duty bound to exercise its legal power for the common good, none would suggest its authority was subject to judicially enforceable limits.⁶⁵

The constitutional settlement also produced several other principles of importance for shaping future legal and political understandings of the boundaries of executive power, even in systems where parliament was not sovereign. Including: subordination of the executive to the rule of legislation, and the executive's duty to faithfully execute the law even if it disagrees with it. Another important principle emerging from this era of conflict was cessation of the practice of unilateral executive suspension or abrogation of law,⁶⁶ a practice particularly obnoxious to contemporary observer's hostile to expansive conceptions of royal power.⁶⁷ These principles ensured the conceptual gist of executive power in constitutional thought, at least from the 18th century onward, was the legal duty to ensure the 'implementation of instructions and authority that came from elsewhere.' The executive branch on this conception is 'guided by law, 'fetter'd by system,' and 'manacled both by man and measures.'⁶⁸ In a system where this dictionary definition of executive prevailed, the legislature would be the 'centre of gravity of the governmental system' and the executive would be the one who carries out its will and instruction as expressed through statutes into effective execution.⁶⁹ This understanding of executive power connotes an element of executive subservience to the legislature in its law-making role.⁷⁰ The executive is an office, says Mansfield, which is a mere representative of stronger forces more powerful and important than it.⁷¹

These principles were given more contemporary approval in landmark decisions of the House of Lords in *De Keyser v Royal Hotel*⁷² and Supreme Court in *R v Miller*.⁷³ The Law Lords

approximately 120 titled nobility as the most important segment of the ruling class.' Harold J. Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and future' (2000) 60 Louisiana Law Review 739, 747.

⁶⁴ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed MacMillan, 1915) 37-38; William Blackstone, *Commentaries on the Laws of England* (Reprinted by University of Chicago Press, 2002).

⁶⁵ Jeffrey Goldsworthy, *The Sovereignty of Parliament* (n 59) 173.

⁶⁶ Robert J. Reinstein, 'The Limits of Executive Power' (n 30) 279; Gordon S. Wood, 'The Origins of Vested Rights in the Early Republic' (1999) 85 Virginia Law Review 1421, 1425.

⁶⁷ Philip Hamburger, *Is Administrative Law Unlawful?* (n 19) 69.

⁶⁸ Julian Mortenson, 'The Executive Power Clause' (n 3) 93.

⁶⁹ Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 Washington International Law Journal 527, 548; Julian Mortenson, 'Executive Power Clause' (n 3) 24.

⁷⁰ Robert J. Spitzer, 'Is the Constitutional Presidency Obsolete?' in Charles Dunn (ed), *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 58.

⁷¹ Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993) 7.

⁷² [1920] AC 508.

⁷³ *R v Miller* [2017] UKSC 5. The majority held at para. 45 that 'The Crown's administrative powers are now exercised by the executive, by ministers who are answerable to the UK Parliament. However, consistently with the principles established

held in the former that it was a fundamental principle of the UK legal order that a statute could occupy and displace a prerogative power previously vested in the executive. In the context of ruling on the executive's power to appropriate property during war and emergency situations, the House of Lords reaffirmed the executive's subservience to law:

The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.⁷⁴

In the recent *Miller* judgment, the UK Supreme Court similarly considered that the executive power of government must 'consistently with the principles established in the 17th century' be exercised in a manner compatible with legislation and the common law. Otherwise, the executive would be changing or infringing the law which they cannot do unilaterally.⁷⁵

That is not to say the monarch was shorn of all its original substantial power apart from law-execution following the Glorious Revolution. His ability to legislate was curtailed, but many traditional prerogative powers remained, and eventually become exercisable by convention through the Prime Minister and Cabinet in the name of the Crown. The unwritten nature of those powers makes it notoriously difficult to define precisely what they ever were, or currently encompass.⁷⁶ An influential definition given by A.V. Dicey described the prerogative power as:

the remaining portion of the Crown's original authority, and it is therefore ... the name for the residue of discretionary power left at any moment in the hands of the

in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do.' Lord Carnwath in dissent similarly observed at para 244 that at the 'heart of the case is the classic statement of principle by Lord Oliver in the *Tim Council* case (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418): '... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament'.

⁷⁴ Ibid.

⁷⁵ Ibid para. 45.

⁷⁶ Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (n 4) 44.

Crown, whether such power be in fact exercised by the King himself or by his Ministers.⁷⁷

The UK Supreme Court in *R (Miller)*⁷⁸ echoed this Diceyan conception.⁷⁹ The Court added that over time these powers were progressively reduced as ‘Parliamentary democracy and the rule of law developed’.⁸⁰ As a formal legal matter, ministers remain the King's servants. In theory, the Crown could veto legislation and direct her ministers as to executive policy. However, the revolutionary settlement, rise of the cabinet system, and the growth of constitutional conventions all helped spur the transfer of substantive constitutional authority to the Prime Minister and his Cabinet. As a matter of constitutional convention then, the exercise of these prerogative powers is purely on the advice and consent of Her Majesty’s ministers. Their use against the wishes of the Prime Minister and Cabinet became vanishingly rare and, in contemporary politics, borderline unthinkable. The most important prerogative powers in existence include: the making and ratification of treaties; conduct of diplomacy; recognition of states; deployment of the armed forces; use of the armed forces within the United Kingdom to maintain the peace; the Prime Minister’s ability to appoint and remove Ministers; recommend dissolutions; peerages and honours; and the appointment of judges; organisation of the civil service; grant and revocation of passports; grant of pardons and the Attorney-General’s power to stop prosecutions.⁸¹

Post-revolutionary settlement, the constitutional limitations on these executive and prerogative powers became both *substantive* and *institutional*. Substantively, the Crown (and now her Ministers) is constrained as it can deprive subjects of their lawful rights only through customary law or an act of Parliament, and not by unilateral executive decree.⁸² Institutionally, the Crown is limited insofar as she can alter legal obligations only in coordination with institutions whose power is not entirely under her control, such as Parliament and its authority to make law. Stripped of personal legislative power, the monarch was largely relegated in the legislative sphere to his role of chief executor of the law.⁸³ This

⁷⁷ Ibid.

⁷⁸ [2017] UKSC 5.

⁷⁹ [2017] UKSC 5, para. 47.

⁸⁰ [2017] UKSC 5, para. 41.

⁸¹ Clement Fatovic, ‘Blurring the Lines: The Continuities between Executive Power and Prerogative’ (2013) 73 *Maryland Law Review* 15, 36; The Ministry of Justice of the United Kingdom, *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (2007) 24–25, 32.

⁸² Nathan Chapman and Michael McConnell, ‘Due Process as Separation of Powers’ (n 21) 1686.

⁸³ Philip Hamburger, *Is Administrative Law Unlawful?* (Columbia University Press, 2014) 69

made it harder for the executive to secure its political preferences through legislative and financial provision than it had been before this period.⁸⁴

As a result, before the emergence of organized political parties and cabinet government - which I consider in the next chapter - these principles helped ensure an element of institutional competition between the executive and Parliament. This competition lasted into the nineteenth century, before the emergence of a range of socio-political trends helped cement a highly concentrated system of governmental power, with the executive at the helm.⁸⁵ However, even in this highly concentrated form of government, these outer bounds of executive power remain firm. For example, it is axiomatic that a Prime Minister or Ministers cannot make policy decisions and claim they have the coercive force of law absent Parliamentary approval via primary or secondary legislation.⁸⁶ Despite their eminently controversial origins, such principles are now so deeply entrenched in the British constitutional order, that occasions on which the executive has seriously challenged them are few and far between.⁸⁷

Executive power in Commonwealth constitutionalism

These principles are also embedded in similar forms in cognate jurisdictions whose shared historical inheritance has had a significant impact on the development of their contemporary government structures.⁸⁸ Courts in Australia, Canada, and New Zealand have all firmly rejected the contention the executive may alter or impose legal burdens or obligations on citizens without parliamentary consent, or act to override or suspend the laws. In doing so, they often rhetorically invoke the centrality of these principles to the constitutional order, and sometimes refer to their longstanding legal heritage.⁸⁹

In *Ngan v R*⁹⁰ for example, the New Zealand Supreme Court found that the governments' executive powers were subject to statutory and common law constraints. In other words,

⁸⁴ Peter Cane, *Controlling Administrative Power* (n 23) 36.

⁸⁵ *ibid* 42.

⁸⁶ Maxwell Cameron, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers* (Oxford University Press, 2013) 176; Terence Daintith and Alan Page, *The Executive in the Constitution* (Oxford University Press, 1999) 34.

⁸⁷ Campbell McLachlan, 'The Foreign Affairs Treaty Prerogative and the Law of the Land', *U.K. Constitutional Law Blog* (14th November, 2016). See for example the dicta of Lord Hoffmann in *Higgs v Minister of National Security* [2000] 2 AC 228, 241: 'The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th century.'

⁸⁸ Peter Cane, *Controlling Administrative Power* (n 23) 13.

⁸⁹ See Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 7-12.

⁹⁰ [2007] NZSC 105.

without appropriate statutory authorization executive authority alone could not permit government officials to act in conflict with the rights and liberties of citizens.⁹¹ The Court trenchantly held that the executive's residual freedom to act in a non-statutory capacity could not justify a breach of vested common law rights. It considered that wherever residual non-statutory executive power conflicts with a statutory or common law rule it must give way to that rule.⁹² Simply put, a public authority must point to some specific statutory rule sanctioned by Parliament before authorising any action that affects a person's rights.⁹³ The New Zealand Supreme Court decision of *Fitzgerald v Muldoon*⁹⁴ is another prominent example of the judiciary upholding these basic principles. The case arose shortly after the appointment of Robert Muldoon MP as Prime Minister. Days after being sworn in, Muldoon issued a press statement purporting to give effect to his party's election policy of abolishing a statutory superannuation scheme established by his predecessor and to refund all contributions made under it. The Prime Minister said that the relevant statutory scheme would be suspended from that same day and that retrospective legislation would eventually be introduced. The unilateral decision to effectively abrogate and suspend the statutory scheme was challenged in the Supreme Court, who declared the Prime Minister's actions unlawful. The Court held that the action was a breach of the 1688 Bill of Rights, which asserted that 'the pretended power of suspending of laws or the execution of laws by regal authority without consent of parliament is illegal.'⁹⁵ Chief Justice Wells asserted that it is was a graphic illustration of the depth of New Zealand's legal heritage that a principle established three centuries ago to 'extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country'.⁹⁶ Similarly, the High Court of Australia referred to the foregoing as settled constitutional principles⁹⁷, and held that as a matter of Australian law executive powers are subject to parliamentary control. Parliament may determine the limits of executive power, the agencies who may exercise executive power and the manner of its exercise.⁹⁸ Australian courts have also consistently held that the executive,

⁹¹ [2007] NZSC 105, at para 96.

⁹² [2007] NZSC 105.

⁹³ Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, 2004) 287.

⁹⁴ [1976] 2 NZLR 615.

⁹⁵ Bill of Rights Act, 1688.

⁹⁶ [1976] 2 NZLR 615, at para 623.

⁹⁷ *Port of Portland Pty Ltd v Victoria* [2010] HCA 44, at para 13. The Court observed that 'From the grundnorm represented by the constitutional settlement by the Convention Parliament there was to be no turning back in England, or thereafter in the United Kingdom. In Australia, the absence of a power of executive dispensation of statute law, what Dixon CJ called a 'general constitutional principle', became an aspect of the rule of law and, as Wild CJ put it with respect to New Zealand, is 'a graphic illustration of the depth of our legal heritage'.

⁹⁸ Suri Ratnapala and Johnathan Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd edn, Oxford University Press, 2012) 45

absent statutory authority, cannot unilaterally impose legal burdens and obligations on rights. In *Ruddock v. Valardis*⁹⁹ Black C.J. remarked that unilateral executive power in the Australian constitutional order could not sustain coercive state activities such the detention or extradition of fugitives, arrests and detention, arbitrary denial of mail and telephone services; or compulsion to attend to give evidence or to produce documents in an inquiry. It was a fundamental principle of the Australian Constitutional order that these kinds of burdens required legislative sanction.¹⁰⁰ The Australian courts have also rejected the existence of an executive suspension power.¹⁰¹ Speaking in respect of Canada, Sossin similarly writes that there is no recognised executive power to legislate or administer justice, and that executive action could not impede individual liberty without the specific limitation being enshrined in a statute.¹⁰² Indeed, the Canadian Supreme Court would appear to have expressly ruled out that possibility, making it clear that there was no principle in Canada that the Crown may legislate by proclamation or order in council to bind citizens where it acts without the support of a statute of the Legislature.¹⁰³

While just a small snap-shot of the comparative jurisprudence in this area, this overview captures in a stylized way the embeddedness of the foregoing principles in these legal systems.¹⁰⁴ The question of *how* and *why* these principles were adopted or retained by legal and political actors in these jurisdictions undoubtedly involves a complex tangle of historical and sociological considerations distinct to each system; although it is perhaps fair to say that their proximity and familiarity with the British legal order had a great deal to do with it.¹⁰⁵ In any event, these principles appear to constitute part of their indigenous constitutional orders, offering a basic legal frame of ground rules for executive power.¹⁰⁶ Such principles are also clearly discernible in the United States and Ireland, despite significant differences in the formal structure of executive-legislative relations.

⁹⁹ [2001] FCA 1329.

¹⁰⁰ [2001] FCA 1329.

¹⁰¹ *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247.

¹⁰² Lorne Sossin, 'The Ambivalence of Executive Power in Canada' in Paul Craig and Adam Tomkins (eds.), *Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2005) 56.

¹⁰³ *Reference re Anti-Inflation Act* [1976] 2 SCR 373, 433.

¹⁰⁴ Margit Cohn observes that 'adherence to the rule of law, the primacy of individual liberty, and the establishment of some form of separation of powers have migrated from the ancestor democracies, England and the US...among many nations...Those countries also share, on a same general level, social and political realities that directly impact on the extent of executive powers. The separation of powers ideal infers subjection of the executive branch to statute, but the delineation of the powers of central government rests on an ingrained tension between the need to grant power to the government and the dangers of abuse of the granted power'. Margit Cohn, 'Non-Statutory Powers in Three Regimes: Assessing Global Constitutionalism in a Structural-Institutional Context' (2015) 64 *International and Comparative Law Quarterly* 65-102, 100.

¹⁰⁵ Whether this familiarity was a cause of admiration or suspicion or a mixture of both.

¹⁰⁶ It is important to note that I am not arguing in a whiggish vein that this influence was a virtue of British imperialism, I am merely commenting on its apparent existence and impact.

II. EXECUTIVE POWER IN THE UNITED STATES

To simplify a complicated and nuanced debate, it can be said conflict over how to frame executive power and the executive branch during the Philadelphia convention divided delegates into two main camps.¹⁰⁷ On one side, proponents of a strong independent executive took inspiration from the former position of the Crown in the English constitutional order. This distinctly anti-whiggish view regarded the gradual erosion of the real-life powers of the Crown as a blow to the soundness of the English constitution.¹⁰⁸ For these delegates, the erosion of the independent executive power of the Crown caused undesirable, even dangerous, constitutional imbalance. On this view, undermining the authority of the Crown provided too much power to Parliament, leaving it subject to minimal institutional check and more vulnerable to corruption by factional interests.¹⁰⁹ Prominent proponents of this view included influential federalists like Alexander Hamilton and James Wilson, who advocated for a life-tenured unitary executive with an absolute veto and powers very like the prerogatives formerly wielded by the Crown. For Hamilton and Wilson, the American revolution was not waged against abuses of executive power so much as legislative tyranny by a distant Westminster Parliament.¹¹⁰ To prevent similar legislative tyranny unfolding in the new world, a strong and independent executive check on Congress and factional politics was considered essential.¹¹¹ Hamilton famously argued that good government required ‘energy in the executive’ for the purposes of ensuring effective execution of the law, maintenance of domestic political stability, and protecting the community from foreign attack.¹¹² Conversely, others firmly advocated for a pluralist executive directly answerable to a legislative assembly. This model of the executive branch - crafted with the image of the British Cabinet system in mind - would do little more than carry legislative will into effect, and would be summoned and dismissed by Parliament.¹¹³ On this view, the elected legislature was the sole body capable of representing the sovereign

¹⁰⁷ For excellent overviews of these debates See Eric Nelson, *The Royalist Revolution* (Harvard University Press, 2014) 195-197; Edward Corwin, *The President: Office and Powers 1787-1957* (University of London Press, 1966) 10-16; Clinton Rossiter, *The American Presidency* (Harvest, 1960) 74-81.

¹⁰⁸ Ibid.

¹⁰⁹ Eric A. Posner & Adrian Vermeule, ‘Tyrannophobia’ in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012) 317-346.

¹¹⁰ Eric Nelson, *The Royalist Revolution* (n 107) 195-197. See also Sanford Levinson, ‘The Publian Presidency in the Twenty-First Century’ in Claire Finkelstein and Michael Skerker (eds.), *Sovereignty and the New Executive Authority* (Oxford University Press, 2018) 134-135.

¹¹¹ Martin Loughlin, *Foundations of Public Law* (n 28) 389.

¹¹² Ibid.

¹¹³ Ibid.

people's will, and it was similarly repugnant to republican ideals to replace a hereditary monarchy with what was, in their eyes, an elected one.¹¹⁴

In the end, disputes over the powers of the presidency ended in a compromise of sorts between these royalist and whiggish perspectives.¹¹⁵ Proponents of a strong executive who sought to preserve its independence, unity, and to vest it with some former royal prerogatives got many, but not all, of their demands.¹¹⁶ Under the presidency constituted under Article II, the president would not be directly elected nor appointed by Congress. Instead, he would be selected through the hybrid mechanism of the electoral college, which channelled a national constituency and popular voting through a quota of electors apportioned to, and chosen by, each state. The president was also made a unitary actor – vested with ‘The executive power’ of government, with authority over law execution and the officers and heads of government Departments created by Congress to assist him. While the President was given the duty and power to ‘take Care’ that the Laws passed by Congress be faithfully executed, he was not made directly accountable to Congress, as an executive in a parliamentary system would be; but he was capable of being impeached by Congress for high crimes and misdemeanours.¹¹⁷ He was not provided an absolute veto over bills and resolutions passed by both Houses of Congress, but a qualified veto capable of being overridden by a two-thirds congressional majority.¹¹⁸

Some former powers associated with the British executive were vested in the federal government, - but divided across Congress and the President. The President was made Commander-in-Chief of the armed forces, but his power over war and national security did not extend to those prerogatives formally (but by then not practically) vested in the Crown. Thus, the power to declare war and to raise and regulate armed forces would lie with Congress.¹¹⁹ The President was also provided with several other traditional prerogative powers: including the power to appoint judges, ambassadors, Officers of the United States, and to make Treaties - but only with the advice and consent of the Senate.¹²⁰ The President was also given authority to recommend measures to Congress he judged necessary and expedient and to receive ambassadors from foreign nations. However, Congress's authority

¹¹⁴ Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Knopf, 1996) 256.

¹¹⁵ Eric Nelson, *The Royalist Revolution* (n 107) 203.

¹¹⁶ Andrew Kent, Ethan J. Leib and Jed Shugerman, ‘Faithful Execution and Article II’ (n 15) 2123.

¹¹⁷ Article 2, Section 4.

¹¹⁸ Article 1, Section 7.

¹¹⁹ Article 1, Section 8.

¹²⁰ Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) 388-390.

over law-making and its authority to create and fund the infrastructure of executive government provided it with significant formal authority over the presidency.¹²¹ Compared with the broad powers of Congress, the President's stated constitutional powers were relatively feeble.¹²²

It has been argued the extensive and rich debates around the time of the drafting and ratification of the United States constitution are instructive for the proposition the difficulties encountered by the founders in crafting the presidency was due as much to sheer *ambiguity* over the meaning of executive power, as much as ambivalence over its exercise.¹²³ Attempting to derive a single definition of 'executive power' was never going to a simple, or even feasible exercise given the fact that:

[M]ultiple layers of historical experience shaped...thinking on the subject: the great disputes of Stuart England, which resonated still in eighteenth-century America; alarms over the rise of "ministerial corruption" under Hanoverian kings; and lessons learned from the efforts of the early state constitutions to cabin executive power within strict republican limits.¹²⁴

Flaherty writes that the founders freely tossed about terms such as 'legislative power', 'executive power', 'judicial power', but rarely did anyone define what these terms meant with precision.¹²⁵ Flaherty suggests the historical record makes it is implausible silence on these matters meant that there existed a deep-seated consensus on the precise meaning of these terms to the extent that no one thought elaboration was necessary. Rather, Flaherty ventures that given the fierce debates over the precise form the presidency should take it is more likely that these general terms signalled basic agreement on their broad contours, while masking profound disputes and uncertainties as to their precise scope.¹²⁶

¹²¹ Peter Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 *Columbia Law Review* 573, 603.

¹²² Jerry Mashaw, 'Recovering American Administrative Law: Federalism Foundations, 1787-1801' (2006) 115 *Yale Law Journal* 1256, 1271; Charles Black, 'The Working Balance of the American Political Departments' (1974) 1 *Hastings Constitutional Law Quarterly* 13, 20.

¹²³ Clement Fatovic, 'Blurring the Lines: The Continuities between Executive Power and Prerogative' (n 81) 38.

¹²⁴ Jack N. Ravoche, *Original Meanings* (n 114) 245.

¹²⁵ Martin Flaherty, 'The Most Dangerous Branch' (n 10) 1807.

¹²⁶ Clement Fatovic, 'Blurring the Lines: The Continuities between Executive Power and Prerogative' (n 81) 39; Lawrence Lessig and Cass R. Sunstein, 'The President and the Administration' (1994) 94 *Columbia Law Review* 1, 41.

Despite deep contestability over the precise nature and scope of executive power, there *were* basic foundational principles underpinning the outer bounds of the concept which echo those of its colonial progenitor.¹²⁷ For example, in the United States constitutional order the President is not expressly vested with either legislative power or authority to suspend or dispense with law.¹²⁸ Although the President has a qualified veto power under Article I, should a bill be enacted into law, Article II places an obligation on the president to ‘take Care’ that the duly enacted law is then faithfully executed.¹²⁹ There is broad and deep disagreement over the exact scope of presidential power, and whether it fluctuates during periods of national security emergencies or war.¹³⁰ But even the most parsimonious view of executive power agrees the President has authority – and duty - to carry out congressional commands directed to him and his agents.¹³¹ This has been conversely held to mean that he may not make law, act contrary to law, nor forbid execution of law by directing that a constitutional statute not be enforced.¹³² To the extent the phrase ‘executive Power’ conveyed any widely understood independent meaning to the framers, it encompassed a power and duty to faithfully execute the laws passed by Congress:¹³³

[I]he first key constitutional principle relevant to assessing executive claims of enforcement discretion is legislative supremacy. Under our constitutional scheme, Congress's role is to enact laws. The President's role, in turn, is to execute those laws; he cannot make up the law on his own. This scheme affords the President no general authority to nullify laws he does not like by failing to implement them.¹³⁴

¹²⁷ See Julian Mortenson, ‘The Executive Power Clause’ (n 3).

¹²⁸ Reinstein notes how ‘The English Bill of Rights became a template for American constitution drafting. Virtually every secular provision in that statute was incorporated into the U.S. Constitution. The prohibition on the suspending and dispensing powers was encoded in Article II’s requirement that the President must “take Care that the Laws be *faithfully* executed’. Robert J. Reinstein, ‘The Limits of Executive Power’ (n 30) 281.

¹²⁹ Delahunty and Yoo suggest that ‘Versed in England’s constitutional history, the Framers surely understood that the Constitution’s grant of the executive power did not include dispensation, and that to charge the President with the “faithful execution” of the laws underscored that fact. England’s constitutional moment in 1689 was to become, nearly a century later, very much our own.’ Robert J. Delahunty and John C. Yoo, ‘Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause’ (2013) 91 *Texas Law Review* 781, 808.

¹³⁰ It is no exaggeration to say that countless thousands of pages have been written debating the precise volume of authority vested in the Office of President.

¹³¹ Andrew Kent, Ethan J. Leib & Jed Shugerman, ‘Faithful Execution and Article II’ (n 15); Jack Goldsmith and John F. Manning, ‘The President’s Completion Power’ (2006) 115 *Yale Law Journal* (2006) 2280, 2305.

¹³² *ibid*, 2182; Kate Andrias, ‘The President’s Enforcement Power’ (2013) 88 *New York University Law Review* 1031, 1113; Akhil Reed Amar, *America’s Constitution: A Biography* (n 120) 365-366; Steven G. Calabresi and Saikrish Prakash, ‘The President’s Power to Execute the Laws’ (1994) 104 *Yale Law Journal* 541, 603.

¹³³ Andrew Kent, Ethan J. Leib & Jed Shugerman, ‘Faithful Execution and Article II’ (n 15) 2182; Curtis Bradley and Martin Flaherty, ‘Executive Power Essentialism and Foreign Affairs’ (2004) 102 *Michigan Law Review* 545, 688.

¹³⁴ Zachary S. Price, ‘Enforcement Discretion and Executive Duty’ (2014) 67 *Vanderbilt Law Review* 671, 689.

As already explored, these sorts of principles were entrenched in the English/British legal order from the era of the revolutionary settlement. In the English and American colonial legal tradition, the concept of faithful execution was linked to a duty owed by the executive to the intent and meaning of a law. To execute something in the eighteenth century meant to ‘carry or put into effect or force, to enforce, to administer.’¹³⁵ These principles, which carry overtones of executive subordination, clearly undergird the ‘take Care clause’ and its relationship with the executive power vested in the President.¹³⁶

These principles also find expression in judicial doctrine. As far back as the mid 1800’s, the United States Supreme Court has steadfastly held that the President does not enjoy any authority akin to a law-making or suspension power.¹³⁷ In *Little v Barreme*¹³⁸ for example, the Supreme Court considered an action arising out of the seizure of a Danish fishing ship by US naval personnel against the back drop of hostilities with France. Congress had authorised the President to detain and seize suspected US ships sailing *to* a French port, but in this instance executive officials had seized a suspected vessel sailing *from* a French port. Although the relevant executive officials had been acting in accordance with presidential instructions, the instructions themselves were thus contrary to a congressional statute. Chief Justice Marshall held that as Congress had prescribed the manner naval seizures were to be conducted, the President could not unilaterally change the ‘nature of the transaction, or legalize an act which without those instructions would have been a plain trespass’.¹³⁹ In a case from the same era, *Kendall v United States*¹⁴⁰, the Supreme Court strongly rejected the argument the executive enjoyed a suspension power. *Kendall* concerned a federal law directing the Postmaster General to provide back-pay to a group of mail carrier contractors in an amount determined by the Solicitor of the Treasury. The Postmaster General, at the direction of the President, refused to award the back-pay determined. The Court held this action to be unlawful, emphasizing that ‘[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.’¹⁴¹ The Court added that to recognise such an authority would be vesting in the President a dispensing power, which they held had:

¹³⁵ Andrew Kent, Ethan J. Leib & Jed Shugerman, ‘Faithful Execution and Article II’ (n 15) 2133.

¹³⁶ *ibid* 2182.

¹³⁷ Henry P. Monaghan, ‘The Protective Power of the Presidency’ (1993) 93 *Columbia Law Review* 1-10, 24.

¹³⁸ 6 U.S. (2 Cranch) 170 (1804) 177-178.

¹³⁹ *ibid* 179.

¹⁴⁰ 37 U.S. (12 Pet.) 524, 613 (1838).

¹⁴¹ *ibid*.

no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress.¹⁴²

As already noted, English monarchs historically claimed not only an absolute veto power, but also power to suspend the operation of existing statutes, grant dispensations prospectively excusing individuals from compliance, or even create legal obligations unilaterally.¹⁴³ While they may have been divided on many aspects of executive power, the Founders simply had no interest in creating a presidency with this monarchical equivalent of an ability to dispense or suspend congressional statutes, or act as a law-maker in their own right.¹⁴⁴

The canonical case of *Youngstown Sheet & Tube Co. v Sawyer*¹⁴⁵ provides a more contemporary expression of these basic foundational principles in action. In *Youngstown*, the Supreme Court nullified the President's attempt to temporarily seize and nationalize the nation's steel mills due to a threat of strike action during the Korean War. The President determined the strike posed a severe threat to national security and US military operations in Korea. The crux of the dispute hinged on the fact that no Act of Congress authorized the seizure, and several statutes appear to implicitly foreclose the president's action.¹⁴⁶ The question then became whether the president enjoyed inherent executive power to do so. In the absence of statutory authority for the action, the Court rejected the argument the executive enjoyed such constitutional power to carry out the seizure. The Court held that recognising such an authority would be akin to legitimizing a free-standing presidential law-making authority.¹⁴⁷ Writing for a majority, Black J. proceeded on a formalist and textual reading of the Constitution hostile to unilateral executive action, holding that '[i]n the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker'.¹⁴⁸ In the absence of statutory authorisation, Black J. considered the seizure of the steel mills represented a unilateral executive action that was,

¹⁴² *ibid.*

¹⁴³ Zachary S. Price, 'Enforcement Discretion and Executive Duty' (n 134) 690.

¹⁴⁴ Victoria Nourse, 'Reclaiming the Constitutional Text from Originalism: The Case of Executive Power' (2018) 106 *California Law Review* 1, 37.

¹⁴⁵ 343 U.S. 579 (1952).

¹⁴⁶ Nathan Chapman and Michael McConnell, 'Due Process as Separation of Powers' (n 21) 1782.

¹⁴⁷ Henry P. Monaghan, 'The Protective Power of the Presidency' (n 137).

¹⁴⁸ 343 U.S. 579 (1952), 587.

for all intents and purposes, a legislative measure without any basis in constitutional text or structure.

Justice Jackson's concurring opinion outlined an influential tripartite framework for assessing the legality of executive action.¹⁴⁹ This framework, while deeply flexible and capable of great fluidity in its application, at its core strongly rejected the notion the president could act in a way which effectively dispensed or suspended a statute.¹⁵⁰ Justice Jackson noted that presidential power will fluctuate depending on its conjunction or disjunction with congressional power. He outlined three broad categories of how Congress and Presidential power might interact. First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum - for it includes all the authority he possesses in his own right plus all that Congress can vest by statute. In these circumstances, presidential action would be supported by the strongest of presumptions of constitutionality. Second, when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent constitutional powers. Justice Jackson added there was a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain; and that congressional inertia, indifference, or quiescence may sometimes enable, if not invite, unilateral presidential measures. Third, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. Then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter.¹⁵¹ For Justice Jackson, it was when conduct falls into the third category of this spectrum that Presidential power is at its nadir.¹⁵² In *Youngstown*, a majority of the Court considered that the president was acting contrary to statute, putting it into the third category of Justice Jackson's framework. Given that, apart from his recommendation and veto, the president had no legislative power, his action was deemed unlawful due to its conflict with statute and Due Process clause of the Fifth amendment. The Court found the executive action in question originated in the individual will of the President and represented an exercise of coercive authority without a lawful basis.¹⁵³

¹⁴⁹ *ibid.*

¹⁵⁰ For an overview of the ambiguities in Jackson J's framework see Laurence H. Tribe, 'Transcending the *Youngstown* Triptych: Multidimensional Reappraisal of Separation of Powers Doctrine' (2016) 126 *Yale Law Journal Forum* 86.

¹⁵¹ 343 U.S. 579 (1952), 587, 635-38.

¹⁵² *ibid.*

¹⁵³ *ibid* 655.

Simply put then, it is a core principle of the US constitutional order ratified through history, practice, and judicial doctrine, that the President's duty is to abide by, and faithfully enforce, the laws enacted by Congress: to respect legislative primacy and not act *contra legem*.¹⁵⁴ The faithful execution clause thus underscores that '[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts.'¹⁵⁵ There is heated debate over whether the President can decline to enforce laws he deems *unconstitutional*.¹⁵⁶ There is also heated debate about the constitutional boundaries between permissible presidential enforcement discretion and exercises of impermissible suspension power.¹⁵⁷ However, these are debates on the margins of executive power, and what is not in dispute is that the President may not create law or unilaterally amend, disregard, or repeal a duly enacted constitutional statute.¹⁵⁸ The Constitution limits the president's functions in the lawmaking process to recommending laws he thinks wise, and vetoing those he thinks unwise.¹⁵⁹ Consequently, '[O]utright claims of "executive Power" to disregard statutes are now seldom advanced before...senior judges'¹⁶⁰ and are generally viewed with considerable hostility.¹⁶¹ From a modern perspective, the principle of legislative supremacy (subject to constitutional constraints) reflected in Article II may appear straightforward and intuitive,

¹⁵⁴ Jack Goldsmith and John F. Manning, 'The President's Completion Power' (2006) 115 2280, 2309; Jack Goldsmith and John F. Manning, 'The Protean Take Care Clause' (2016) 167 University Pennsylvania Law Review 1835, 1848. Harold Koh has similarly written that 'by its own terms, the Take Care Clause speaks in the language of a presidential duty, not a license. The President's duty is to faithfully execute the laws that Congress enacts in a manner consistent with congressional intent', Harold Hongju Koh, 'Setting the World Right' (2006) 115 Yale Law Journal 2350, 2369.

¹⁵⁵ Andrew Kent, Ethan J. Leib and Jed Shugerman, 'Faithful Execution and Article II' (n 15) 2187.

¹⁵⁶ For an overview of this debate see Saikrishna Prakash, 'The Executive's Duty to Disregard Unconstitutional Laws' (2008) 96 Georgetown Law Journal 1615.

¹⁵⁷ Andrew Kent, Ethan J. Leib and Jed Shugerman, 'Faithful Execution and Article II' (n 15) 2185.

¹⁵⁸ Ibid. In *Clinton v. City of New York*, 524 U.S. 417, 488 (1998) the Supreme Court held there is 'no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.' See also Martin Flaherty, 'The Most Dangerous Branch' (n 125) 1794.

¹⁵⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁶⁰ Henry P. Monaghan, 'The Protective Power of the Presidency' (n 137) 29. Monaghan adds at 31 that 'Whether or not any president can live with it, the literary theory of "The executive Power" recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency. The Steel Seizure Court endorsed this proposition, and decisions too numerous to cite fully assume it'.

¹⁶¹ Consider, for example, the backlash against the claims of executive power made by executive branch legal figures during the early years of the Bush presidency. Perhaps the most forthright assertion of executive power was exemplified by a series of now infamous legal memoranda produced by the Officer of Legal Counsel defending an extremely broad understanding of executive authority. These opinions, drafted shortly after the 9/11 terrorist atrocities, contended that the constitution vested the President with 'unenumerated executive power encompassing matters related to national security' and that said powers 'may not be limited by Congress or the courts'. In relation to national security and foreign affairs issues the memo argued that the President exercised 'independent and plenary authority' and Congress could not by statute place on limitation on determinations 'as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response. These decisions...are for the President alone to make'. See Memorandum from John C. Yoo, Deputy Assistant Attorney General, to Timothy Flanagan, Deputy Counsel to the President (September 25th, 2001) 5-16. These memos were later withdrawn and subject to 'blistering critique' from broad segments of the legal community. See Bruce Ackerman, 'Lost Inside the Beltway: A Reply to Professor Morrison' (2011) 124 Harvard Law Review Forum 13, 25.

but this intuitiveness in fact implicates a history of intense political struggle in England and the United States over executive power¹⁶² and its appropriate limits.¹⁶³

III. EXECUIVE POWER IN IRELAND

Executive power in Ireland has - to paraphrase Bagehot - a dignified and efficient aspect, in the form of the president¹⁶⁴ and government respectively.¹⁶⁵ Although some of the president's powers are consequential, most are ceremonial and exercisable only with the advice and consent of the government. The president's most significant substantive powers involve his absolute discretion to refer a bill to the Supreme Court under Article 26, and his absolute discretion to refuse a dissolution of the Dáil when requested by a Taoiseach who has lost the confidence of the Dáil. The president can also act as a moral constraint on the government through her speeches or writings.¹⁶⁶ However, real public power is vested in the political executive: the government. The head of the government is the Taoiseach, who is nominated by the lower house of the Oireachtas, the Dáil, following a general election. The Taoiseach then nominates other ministers to the government with the approval of the Dáil.¹⁶⁷ The Taoiseach can dismiss any member of the government at his discretion – for reasons sufficient to him.¹⁶⁸ The members of the government are answerable to the Dáil and not the Seanad.¹⁶⁹ Article 28.4.1 of the 1937 constitution provides that this responsibility shall be collectively exercised.¹⁷⁰ A Taoiseach who has retained the confidence of the Dáil can advise the president to dissolve the Dáil and precipitate a fresh election.¹⁷¹ As a Taoiseach (and by extension his government colleagues) who lost the confidence of the Dáil must resign, it can theoretically make or break the government at any stage.

¹⁶² Zachary S. Price, 'Enforcement Discretion and Executive Duty' (n 134) 690.

¹⁶³ Jack N. Rakove, *Original Meanings* (n 114) 20.

¹⁶⁴ In terms of protocol, Article 12 of the 1937 constitution indicates that the President takes 'precedence over all other persons in the State'. Furthermore, the constitution also states that the President is not 'answerable to either House of the Oireachtas or to any Court for the exercise and performance of the powers and functions of his office'.

¹⁶⁵ Walter Bagehot, *The English Constitution* (Cambridge University Press, 2001).

¹⁶⁶ Oran Doyle, *The Irish Constitution: A Contextual Analysis* (Bloomsbury, 2018) 80.

¹⁶⁷ Article 13.1.1 provides that: the President shall, on the nomination of Dáil Éireann, appoint the Taoiseach, that is, the head of the Government or Prime Minister. Article 13.1.2 provides that: the President shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other members of the Government.

¹⁶⁸ Article 28.9.4 provides that: the Taoiseach may at any time, for reasons which to him seem sufficient, request a member of the Government to resign; should the member concerned fail to comply with the request, his appointment shall be terminated by the President if the Taoiseach so advises.

¹⁶⁹ Article 28. 4.1 the Government shall be responsible to Dáil Éireann.

¹⁷⁰ Article 28.4.2 provides that: the Government shall meet and act as a collective authority, and shall be collectively responsible for the departments of state administered by the members of the Government.

¹⁷¹ Article 13.2.1 provides that: Dáil Éireann shall be summoned and dissolved by the President on the advice of the Taoiseach.

Compared with the Oireachtas, the government's powers appear modest. The Constitution vests the Oireachtas with considerable formal power. It has the 'sole and exclusive power of making laws for the State'¹⁷²; the Government is explicitly responsible to it and is made or broken by its approval¹⁷³; only the Oireachtas can declare war or a state of emergency,¹⁷⁴ raise taxes, or incorporate a treaty into national law.¹⁷⁵ In contrast, discussion of the government's constitutional authority is sparse. Article 28.2 states that 'the executive power of the State is to be exercised by or on the authority of the Government'.¹⁷⁶ However, what is less clear is what this power substantively entails.¹⁷⁷ Perhaps the most prominent difficulty in defining whether something constitutes an executive power is that very few are textually enumerated in the Constitution. Several enumerated powers vested in the government were like those resting with the Crown and President in Anglo-American constitutionalism. Including authority over conducting foreign affairs,¹⁷⁸ the appointment of senior officials like judges¹⁷⁹ and power to defend the state in cases of actual invasion.¹⁸⁰ However, apart from these few enumerated powers, the Constitution's treatment of executive power, like the United States and United Kingdom, is distinctly fuzzy.¹⁸¹

Compounding this lack of guidance is that judicial doctrine dealing with the boundaries separating power between the executive and the legislature is scarce, a fact recognised by some members of the Superior Courts. In *Conway v Ireland*¹⁸² the Supreme Court noted that while this division forms an important part of Irish constitutional architecture, the separation of powers between the Government and the Oireachtas has been less explored in Irish constitutional thought than the separation of powers between the courts and political branches. Writing extra-judicially, another member of the Supreme Court, Justice Donal O'Donnell J, pointed out that this stems from the simple fact that the pattern of executive control being exercised predominantly *through* legislation reflects the reality that the executive branch typically dominates Parliament through the political party apparatus.¹⁸³ The executive,

¹⁷² Art. 15.2.10.

¹⁷³ Art. 28.4.10.

¹⁷⁴ Article 28.3.3.

¹⁷⁵ Andrew Butler and Rory O'Connell, 'A Critical Analysis of Ireland's Constitutional Review Group Report' (1998) 33 *Irish Jurist* 237, 248.

¹⁷⁶ James Casey, *Constitutional Law in Ireland* (2nd edn, Sweet & Maxwell, 1992) 127.

¹⁷⁷ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 166) 100.

¹⁷⁸ Article 29.4.1.

¹⁷⁹ Article 35.

¹⁸⁰ Article 28.3.2.

¹⁸¹ Margit Cohn, 'Non-Statutory Executive Powers' (n 104) 69.

¹⁸² [2017] IESC 13, para. 2.2.

¹⁸³ Donal O'Donnell, 'Some Reflections on the Independence of the Judiciary in Ireland in 21st Century Europe' (2016) *Trinity College Law Review* 1, 10. A phenomenon which will be explored in Chapter II

which has typically enjoyed a parliamentary majority,¹⁸⁴ can reliably equip itself by statute with any new powers it may consider necessary. It is primarily from statute that the executive derives the legal powers it wields. This high degree of executive-legislative unity means there are few cases discussing the bounds of the executive's own constitutional authority, as it will typically govern through primary and secondary legislation.¹⁸⁵ The Irish judiciary have not expressly outlined a doctrinal framework for determining whether a power or function constitutes an executive power encompassed by Article 28. To the extent they have adopted a framework for understanding executive power, it is closely bound up in its historical relationship to the UK its constitutional principles demarcating executive power.¹⁸⁶ For example, the special role articulated in judicial doctrine for the executive over control of immigration matters.¹⁸⁷

Close reading of the few judicial authorities in this area suggests that the kinds of principles discussed in this chapter, in the context of the United Kingdom and United States, also appear deeply embedded and grafted onto the bare bones of Irish constitutional text and structure. In the case of executive-legislative relations, many questions concerning the interaction between these branches are under-determinate and appear incapable of settlement through appeals to text or structure alone. Article 28 provides that 'the executive power of the state shall, subject to the provisions of this constitution, be exercised by or on the authority of the Government.' Article 15.2.1 provides that 'the sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the state.' However, the constitution mentions nothing about how these provisions should interact, and where the bounds of executive power lie. For example, whether the executive can suspend a duly enacted law if it considers it a highly dubious policy. Nor does the constitution speak to the related question of whether, and how, the executive can continue to exercise its powers if it clashes with an area of policy regulated by statute. However, Irish courts at all levels appear to consider it almost axiomatic the executive power of the state cannot be exercised in a manner which would give government the power to make, override, disapply, or suspend law.

¹⁸⁴ James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall, Dublin, 2000) 231.

¹⁸⁵ Conor Casey, 'Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40 *Dublin University Law Journal* 1, 2-4.

¹⁸⁶ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 166) 34.

¹⁸⁷ Conor Casey, 'Under-Explored Corners' (n 185)

In *Duggan v An Taoiseach*¹⁸⁸ for example, the High Court held that a government direction to civil servants to suspend a taxation policy mandated by provisions of the Farm Tax Act 1985 was unlawful. In describing the appropriate role of the executive in the constitutional order, Hamilton P. adopted the terminology of the Article II ‘Take Care’ clause of the United States Constitution. He observed that it was incumbent on the executive to ‘take care that the laws be faithfully executed’ and that this duty effectively precluded a suspension power. Similarly, in several more recent decisions of the High Court and Court of Appeal, Justice Gerard Hogan, one of the most distinguished constitutional lawyers of his generation, echoed this position. In *MacDonncha v Minister for Education*¹⁸⁹ the Court held that statutory positions held by the applicants pursuant to legislation already enacted by the Oireachtas could not be dismantled, nor the statutory entitlements of those officer-holders compromised by executive action or by directions given on behalf of the executive. Hogan J observed that it is the constitutionally vested power of the Oireachtas alone to both make and unmake law and that the government enjoys no right to suspend or to disapply the law, for if such a power were to be allowed, it would be tantamount to saying that the Government could in effect secure a repeal of the law without the necessity of legislation.¹⁹⁰ In *Farrell v Governor of Portlaoise Prison*¹⁹¹ Hogan J considered a challenge to a refusal to grant remission to a prisoner. Hogan J said that there was ‘no doubt at all but that the power to remit a sentence is entirely an executive function’ but that the fact Article 13.6¹⁹² envisages that the power can be conferred by law on other authorities also tacitly implies that the exercise of this power can be regulated by law.¹⁹³ Hogan J went on to note that as statutory provisions had been made pursuant to Article 13.6, the executive power to remit was accordingly not a free-standing one, such as would obtain if there were no provisions dealing with remission in the Prison Rules.¹⁹⁴ Consequently, Hogan J held that that in any challenge to the exercise of that power, the issue becomes whether the power has been exercised in a manner compatible with that particular statute.

¹⁸⁸ [1989] ILRM 720.

¹⁸⁹ [2013] IEHC 226.

¹⁹⁰ [2013] IEHC 226, para 23.

¹⁹¹ [2014] IEHC 392.

¹⁹² Article 13.6 of the Constitution states: ‘The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.’

¹⁹³ [2014] IEHC 392, para 16.

¹⁹⁴ [2014] IEHC 392, para 16.

Hogan J made the same kinds of observation in *NHV v Minister for Justice and Equality*.¹⁹⁵ This case concerned *inter alia* a constitutional challenge to provisions of the Refugee Act 1996, which constituted an indefinite statutory ban on access to the labour market for international protection applicants. Hogan J began by acknowledging an inherent power vested in the executive to admit non-nationals into the State on conditions which might include the right to enter the labour market.¹⁹⁶ However, Hogan J observed that this area of policy had been regulated by the Oireachtas through the provisions of the Refugee Act 1996. Hogan J asserted that the executive could not rely on inherent executive power to grant the applicant a permission to enter the labour market in a manner contrary to statute. Where the Oireachtas has legislated on a particular topic in a manner which precludes exercise of any ministerial discretion in relation to that issue, the executive power cannot be exercised in a manner which would override that legislative prohibition.¹⁹⁷ The Court considered that if the executive were permitted to do so, it would effectively replace its traditional role as faithful executor of the law with that of law-maker.¹⁹⁸ For Hogan J., it is an axiomatic principle of Irish constitutionalism that the government cannot by executive action seek to affect a repeal or quasi-repeal of legislation enacted by the Oireachtas, since this would be directly contrary to Article 15.2.1 of the Constitution.¹⁹⁹

The Supreme Court in *NHV* echoed Hogan J's theoretical approach to the relationship between inherent executive power and the Oireachtas' law-making authority. Writing for a unanimous court, O'Donnell J noted that such power could not be operated to unilaterally effect the repeal or amendment of legislation.²⁰⁰ O'Donnell J observed that it was a longstanding aspect of English constitutional law, dating to the historic decision in *Crown Proclamations*, that the royal prerogative did not extend to the repealing or overriding of legislation.²⁰¹ O'Donnell J went on to assert, without much elaboration, that the same must be capable of being said, *a fortiori*, of the executive power in a constitution which recognises

¹⁹⁵ [2016] IECA 86. It should be noted that although Hogan J was in dissent in this case, the majority of the Court expressly adopted his reasoning on the inability of the executive to unilaterally suspend the intention of a statute. Finally Geoghean J held, at para 6, that 'I have had the opportunity of reading in draft the judgment of Hogan J ... I am in agreement with his conclusions and reasons therefor on all issues, other than his conclusion that the appellant has a right to work or earn a livelihood protected by Article 40.3 and his consequential conclusion that s. 9(4)(b) of the 1996 Act is repugnant to the Constitution.'

¹⁹⁶ [2016] IECA 86, para 24.

¹⁹⁷ [2016] IECA 86, para 24.

¹⁹⁸ Hogan J reached a similar conclusion in *Copymore v Minister for Public Works* [2013] IEHC 230, where he held that while a Minister can exercise the executive power of the State in Article 28.2 of the Constitution in order to give general directions to the public sector by means of circular, a circular may not alter or vary the general law nor compromise rights or entitlements deriving from European Union law.

¹⁹⁹ *McK v The Minister for Justice and Equality*, [2018] IECA 110, at para 27.

²⁰⁰ *NHV v Minister for Justice & Equality* [2017] IESC 35, para 11.

²⁰¹ *NHV v Minister for Justice & Equality* [2017] IESC 35, para 11.

the separation of powers.²⁰² In other words, it is a core principle of the Irish constitutional order that the concept of ‘*the executive power of the state*’ is- as in the other jurisdictions considered- one that precludes a suspension or de facto law-making power. The extent to which the court appeared to consider this interpretation manifestly obvious, and not in need of elaboration, is testament to its deep embeddedness.

The courts approach to Article 15 and 28 therefore involves an inescapable element of *constitutional construction*²⁰³, where constitutional meaning and practices are developed in the interstices of the constitutional text, when discoverable meaning from text has run out.²⁰⁴ Because of this under-determinacy, the courts construction has involved the adoption a thicker, richer, political theory to generate ‘substantive maxims of action’ to guide inter-branch interaction.²⁰⁵ In this case, the political theory which the courts have woven into the interaction of these under-determinate provisions, how they have stitched them together, seem anchored on the kinds of historically rooted principles discussed above. That is, that the executive is the faithful executor of the law and executive power cannot be used in a manner that amounts to amending, overriding, or suspending legislation.

Judicial construction of the provisions dealing with the boundaries of executive-legislative relations offer a window into an integral part of Ireland’s small c-constitution: a snap-shot of its web of embedded principles which are not housed in text per se, but crucially important to the Constitution’s operation in practice and the functioning of government.²⁰⁶ The boundaries between the provisions allocating legislative power and executive power can thus be considered something akin to a ‘relatively small, carefully landscaped promontory’ behind which ‘lies a vast hinterland of unwritten conventions, custom, precedents and modes of behaviour derived from history and experience’.²⁰⁷ This judicial construction might appear straightforward and intuitive but again, however, as in the United Kingdom and United States, this belies the extent to which the emergence of the principles undergirding this construction were characterized by deep struggle and political contest.

²⁰² *NHV v Minister for Justice & Equality* [2017] IESC 35, para 11.

²⁰³ Sunstein and Lessig have argued in relation to textual interpretation: ‘The text is not self-interpreting, and the presuppositions with which we begin will color our reading of the words, possibly more than they illuminate the world the words were meant to construct.’ See Lawrence Lessig and Cass R. Sunstein, ‘The President and the Administration’ (n 126) 41.

²⁰⁴ David Pozen, ‘Self-Help and the Separation of Powers’ (2014) 124 *Yale Law Journal* 1, 33; Richard Primus, ‘Unbundling Constitutionality’ (2013) 80 *University of Chicago Law Review* 1079, 1082.

²⁰⁵ Nick Barber, ‘Prelude to the Separation of Powers’ (2001) 60 *Cambridge Law Journal* 59-88.

²⁰⁶ David Pozen, ‘Self-Help and the Separation of Powers’ (n 204) 33.

²⁰⁷ I am paraphrasing Keane’s CJ colorful description of the constitutional powers inherent in the Houses of the Oireachtas in his dissenting judgment in *Maguire v Ardagh* [2002] IESC 21.

Irish constitutionalism is similarly hostile to the notion the executive can unilaterally alter or impose legally binding burdens and obligations on individuals – the core hall-mark of legislation in the Anglo-American tradition.²⁰⁸ It is not always necessary for the government to rely on statutory authority to exercise executive authority in the domestic arena.²⁰⁹ However, the courts have consistently held – and government invariably proceeds on the basis – that statutory authorisation is required before the executive imposes any legal obligation or burden on citizens.²¹⁰ In *Gama v Minister for Trade and Employment*²¹¹ Finlay Geoghegan J which discussed the limitations of how executive power may be exercised:

in certain circumstances the constitutional grant of executive power may enable the Government to act without statutory authority in domestic affairs. It seems clear however, that it could not without statutory warrant, take action imposing obligations or burdens on any citizen.²¹²

Similarly, in *Prendergast v Minister for Justice* the High Court made several interesting *obiter* comments outlining several specific legal burdens he considered would be beyond the permissible limits of non-statutory executive power in the domestic sphere:

Actions of government which have ... the result of imposing a tax; or of increasing police powers, or similar powers by departmental officials, whereby people may be arrested or dwellings searched or compelled to undergo interrogation ... are ... outside the realm of any constitutional construction of powers that are capable of being exercised by the government.²¹³

²⁰⁸ See Conor Casey, 'Under-Explored Corners' (n 185).

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ [2005] IEHC 210.

²¹² James Casey goes on to venture that the absence of judicial authority on this point 'doubtless reflects consistent legal advice to the Governments that statutory authority is essential for such actions'. See *Constitutional Law in Ireland* (n 184) 235.

²¹³ [2008] IEHC 257, at para 58 Charleton J observed that executive power has been used by the government to decide *inter alia* on the 'disbursement of funds in aid of developing countries; and, in large measure prior to specific enabling legislation, has directed the civil service, the army and the police force of the State. Now ... there may be acts providing for those bodies to obey lawful orders, but these are relatively recent. To organise the civil service and the army and the Gardaí, the Government through its ministers needs to hire people and to dispense with their services. *All of this affects people's rights and liabilities, sometimes in far-reaching ways*' (my emphasis). However, in an interesting departure from other case law, Charleton J appeared to disagree with the proposition that executive power could not impose burdens or obligations in the absence of legislation, although he did not elaborate on this disagreement, or on what kinds of burdens and obligations the executive could impose without legislation.'

Hogan J in *Bederev* explicitly linked this principle both to the Constitution's description of Ireland as a democratic state and to the normative ideal of the rule of law. Hogan J asserted that the executive power of the government in Article 28 does not extend in *itself* to taking steps which would have the effect of criminalizing certain conduct or actions.²¹⁴ Hogan J anchored this conclusion on the basis that Article 5 makes clear that the state is a democracy based on the rule of law, and it followed from that decisions imposing legal burdens like criminalising behaviour and proscribing penalties must in principle be either legislative in nature or, if taken by the executive, have the appropriate legislative foundation.²¹⁵ Academic authority, although scarce on this question, broadly agrees with these observations.²¹⁶

There is also evidence suggesting the drafters of the Irish Constitution had similar conceptions of executive power and its limits in mind when drafting the Constitution. That they did not intend to depart from the deeply entrenched Anglo-American principle that there ought to be demarcation between those vested with power of making laws, and those entrusted with their faithful fulfilment and execution.

This is not to say that they wished to create an emasculated executive. There is no doubt that while de Valera was a democrat, and someone sufficiently committed to the notion of fundamental rights that he would entrench them in a bill of rights,²¹⁷ he undoubtedly 'believed in strong government'.²¹⁸ Unlike the drafting process of the 1922 Constitution, there was no real discussion of crafting mechanisms (such as the 'extern ministers' proposal) which might be used to 'counteract or stem the problem of executive dominance' of Parliament.²¹⁹ Moreover, the drafting history suggests that some members of the drafting committee were indeed advocates of robust executive authority. Stephen Roche from the

²¹⁴ [2008] IEHC 257, para 27.

²¹⁵ [2008] IEHC 257, para 27.

²¹⁶ Hogan and Whyte, for example, consider that it is not necessary for the government to rely on statutory authority to exercise its executive power in the domestic arena. They observe that governments have often done so to create extra-statutory schemes providing benefits for citizens. However, the authors suggest conversely that legislation is required before the executive may impose any obligation or burden on citizens. Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution*, (4th edition, Butterworth, Dublin, 2003) 429.

²¹⁷ That the rights provisions in the Constitution were considered fundamental is not only evident from constitutional text, but from the drafting and ratification history of the document. At the beginning of the ratification debates on the draft constitution Éamon de Valera outlined his vision for the Constitution in a radio broadcast: 'A Constitution ought to do more than define the character of the legislative, executive and judicial regime, and if it be based on the democratic principle, it ought to do more, for example, than prescribe how the representative institutions are to function ... Every citizen should see in the basic public law of his country the sure safeguard of his individual rights as a human being – God-given rights which even the civil power must not invade. The protection of those rights means more in the long run to the integrity and continuance of organized society than the organization of the institutions by which it is ruled'. Gerard Hogan, *Origins of the Irish Constitution, 1928–1941* (Royal Irish Academy 2012) 535.

²¹⁸ Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015) 96.

²¹⁹ *ibid.*

Department of Justice²²⁰ was a particularly vociferous critic of constraining executive and legislative power through judicial review, and expressed ‘serious concerns about the potential for judicial activism which the new Constitution would afford’.²²¹ As a member of the 1934 constitution review committee, Roche asserted that what the country wanted ‘at present and probably will continue to want for many years is a strong Executive’ that would not be ‘delayed, hampered and humiliated at every step by long arguments in the courts’.²²² At a later stage in the drafting process, in a lengthy memorandum prepared on the draft constitution in March 1937, Roche expressed considerable hostility to ‘the whole idea of tying up the Dáil and the Government with all sorts of restrictions and putting the Supreme Court like a watch-dog over them for fear they may run wild and do all sorts of things indefensible things’.²²³ Roche also suggested that the rights provisions of the Constitution:

went into too much detail ... the ... shorter and more general the Constitution is the less likely it is that the maintenance of law and order will likely be impeded by limitations on the power of the Dáil and by conflicts between the judiciary and the executive.²²⁴

However, such views were not unanimous. For example, Michael McDunphy, an Assistant Secretary in de Valera’s department, commented on his copy of the 1934 Roche memo that a ‘strong executive’ could be a ‘real danger’ as opposed to a blessing for the fledgling constitutional order.²²⁵ Roches’ observations must also be read in light of evidence suggesting that the drafters were keenly aware of the possibility of executive law-making, and quite content that the vesting of sole and exclusive law making power in the Oireachtas encompassed a robust demarcation between law-making and their execution. A memorandum prepared by George Gavan Duffy²²⁶ on the second revised draft of the Constitution for the Attorney General’s Office, dated 11 April 1937, queried whether the fact the Oireachtas was to have ‘sole and exclusive’ law-making authority ensured that the lawful status of statutory orders and bye-laws were in doubt. Gavan Duffy proceeded to suggest a saving clause to expressly permit the ‘delegation of legislative power by the

²²⁰ Stephen Roche, Secretary of the Department of Justice (1934–49).

²²¹ Gerard Hogan, *Origins of the Irish Constitution* (n 217) 332.

²²² *ibid.*

²²³ *ibid.* 473.

²²⁴ *ibid.* 334.

²²⁵ *ibid.* 35.

²²⁶ Barrister, Member of the Irish Treaty Delegation, Judge and later President of the High Court.

Oireachtas for the purpose of carrying laws into effect'.²²⁷ In response to this memorandum Philip O'Donoghue²²⁸ prepared a minute for the Attorney General²²⁹ which made interesting comments regarding the intent and purpose of Article 15. O'Donoghue argued that the addition of a saving clause to the Article would take away from the sole and exclusive law-making power of the Oireachtas and 'lend support to the view that Ministers and Departments can also legislate in respect of certain matters'.²³⁰ O'Donoghue stated that this 'would be mischievous' and that 'very little consideration will indicate the abuses which would grow up if the legislature contended itself with enacting loose and indefinite principles, adding that the Minister could give effect to such principles by rules and regulations'.²³¹ He then proceeded to argue that Article 15 required that principles of legislation must be definitely enacted in the statute, and that while rules and orders may prioritise matters such as 'form, time and manner' of carrying into effect the objects of the statute, a rule that sought to 'depart from the scope of the statute, *impose new obligations or confer new rights* ... could be properly set aside by the Courts'.²³² The Attorney General subsequently thoroughly agreed with the opinion of O'Donoghue.²³³

It is apparent then, that the framers of the Constitution were attuned and concerned at the prospect of unilateral executive law-making and were satisfied that the terms of Article 15 and 28 did not provide any avenue for the government to exercise such a power. Although they wished to create a strong executive, it appears that like judicial constructions considered above, they envisaged the government would have to achieve its desired policy ends through the legislative process. By holding the confidence of the legislature and passing legislation granting it the necessary authority. Like its common-law cousins, the precise content of 'executive power' in the Irish constitutional order is considered ambiguous. However, as with the United Kingdom and United States, the outer bounds of executive power - particularly its subordination to law and duty to faithfully execute the law - share commonalities. Similarly, each jurisdiction also displays deep suspicion at the notion of a unilateral law-making or suspension powers.

IV. EXECUTIVE AS A FORMALLY CONSTRAINED ACTOR?

²²⁷ Gerard Hogan, *Origins of the Irish Constitution* (n 217) 459.

²²⁸ 1896–1987, Barrister, Legal Assistant to the Attorney General, later Judge on the European Court of Human Rights.

²²⁹ 1866–1947, Patrick Lynch, Barrister, Attorney General 1936–1940.

²³⁰ Gerard Hogan, *Origins of the Irish Constitution* (n 217) 480.

²³¹ *ibid.*

²³² Gerard Hogan, *Origins of the Irish Constitution* (n 217) 480

²³³ *ibid.*

This chapter outlines how the conceptual core of executive power in constitutional thought from the 18th century onward, was the legal power to ensure the ‘implementation of instructions and authority that came from’ the legislative authority. The executive branch on this conception is ‘guided by law, ‘fetter’d by system,’ and ‘manacled both by man and measures.’²³⁴ Under this understanding, the core responsibility of the executive is faithfully executing laws enacted by the legislature. In a system where this dictionary definition of executive prevailed, the legislature would be the ‘centre of gravity of the governmental system’ and the executive would be the one who carries out its will and instruction into effective execution.²³⁵ This connotes an element of executive subservience to the legislature.²³⁶ Some type of principal-agent relationship is assumed, where the agent (executive) faithfully follows the principal’s (legislature) directive.

For the framers of the US Constitution, for example, the concept of executive power was ‘intrinsically an empty vessel, awaiting instructions from an exercise of the legislative power that would give it something to execute.’²³⁷ It was ‘subsequent, subordinate, and dependent on instructions from a prior exercise of its legislative counterpart.’²³⁸ A characteristic of this account of executive power is that it operates indirectly, in the name of another.²³⁹ In these polities, the hand that wields the sword of state power is thus theoretically directed by the legislative body, not by executive will.²⁴⁰ This is the modest conception of executive power Madison had in mind when he contrasted the ‘weight of the legislative authority’ against the ‘weakness of the executive’ and considered the former as posing the greatest risk to political stability and good government.²⁴¹

The flip side of this traditional conception is, of course, an exclusive grant of law-making power to the legislative branch and hostility at the idea of unilateral executive law-making, dispensing, or suspending powers.²⁴² The constitutional traditions of Ireland, United Kingdom, and United States all share core understandings of the boundaries of executive power linked to this conception: through subordination of the executive to the rule of legislation, the executive’ duty to faithfully execute the law even if it disagrees with it, and

²³⁴ Julian Mortenson, ‘The Executive Power Clause’ (n 3) 93.

²³⁵ Peter Cane, ‘Executive Primacy’ (n 69) 548; Julian Mortenson, ‘Executive Power Clause’ (n 3) 24.

²³⁶ Robert J. Spitzer, ‘Is the Constitutional Presidency Obsolete?’ (n 70) 58.

²³⁷ Julian Davis Mortenson, ‘The Executive Power Clause’ (n 3) 62.

²³⁸ Julian Davis Mortenson, ‘The Executive Power Clause’ (n 3) 66.

²³⁹ Hugh Liebert, *Executive Power in Theory and Practice* (Palgrave MacMillan, 2012) 114.

²⁴⁰ *ibid.* 100.

²⁴¹ James Madison, ‘The Federalist Paper No. 51’ (n 21).

²⁴² Samuel Issacharoff, ‘Democracy’s Deficits’ (2019) 85 *University of Chicago Law Review* 485, 498.

prohibitions on unilateral executive suspension or abrogation of law.²⁴³ The modest formal place of the executive in each system contrasts with legislative pre-eminence. In the constitutional tradition of the UK, Parliament has long been supreme, while in the United States and Ireland, the legislative branch is *primus inter partes*.²⁴⁴

The very embeddedness of these kind of principles, mean they cannot be removed from analysis of the contemporary executive and its presentation as subservient to law and faithful agent of a more powerful institution.²⁴⁵ Doctrinal frameworks might overstate the degree to which legal principles can constrain and shape the power of institutional actors. However, forgetting the ongoing significance of these principles would underestimate the extent to which they play a complementary role to political or social forces in limiting the bounds of what kind of executive authority will be considered legal and legitimate.²⁴⁶ Claims for unrestrained exercises of executive power in these systems, power unbound or unconstrained by legality, are regarded with deep suspicion in each constitutional order.²⁴⁷ Political actors are instead consistently at pains to insist each and every executive action must have a statutory or constitutional legal basis, even where the claimed legal basis is deeply strained and convoluted on any reasonable interpretation.²⁴⁸

This says a lot about the nature of executive power in the contemporary state. Its power has waxed immensely as, I will argue, a response to align state power to the political expectations and fears of the polity, to the extent that legal norms frequently provide a thin constraint on its activity. In the following chapters, I demonstrate that the cumulative interaction of constitutional text, statutes, regulations and judicial opinions can confer so much authority and discretion on the executive that the practical differences between ‘Lockean prerogative and action taken in accordance with these laws’ can sometimes be difficult to draw.²⁴⁹ That being said, perceived legal and constitutional constraint still remain important to the normative preferences of political actors and to their credibility and legitimacy in each political community, an importance which demonstrates that political morality in these

²⁴³ See *R v Miller* [2017] UKSC 5; *NHV v Minister for Justice & Equality* [2017] IESC 35; 343 *Youngstown Sheet & Tube Co. v Sawyer* U.S. 579 (1952).

²⁴⁴ Samuel Issacharoff, ‘Democracy’s Deficits’ (n 242) 498; Charles Black, ‘The Working Balance of the American Political Departments’ (n 122) 15.

²⁴⁵ Margit Cohn ‘Tension and Legality’ Towards a Theory of the Executive Branch’ (2016) 29 *Canadian Journal of Law & Jurisprudence* 321-350, 334.

²⁴⁶ Aziz Huq, ‘Binding the Executive (by Law or by Politics)’ (2012) 79 *University of Chicago Law Review* 777, 783.

²⁴⁷ Maxwell A. Cameron, *Strong Constitutions* (n 86) 39.

²⁴⁸ Jack Goldsmith, ‘The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation’ in Clement Fatovic and Benjamin A. Kleinerman (eds.), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford University Press, 2013).

²⁴⁹ Clement Fatovic, ‘Blurring the Lines’ (n 81) 22.

systems remains deeply tied to perceived legality. Even if its substantive ability to closely bind executive action can be tenuous, calls for the executive to act without any legal authorization, or beyond the acknowledged scope of its constitutional powers, are vanishingly rare even if the resulting acts would be for the public good.²⁵⁰

Contemporary constitutional democracies like Ireland, the United Kingdom and United States thus try to reconcile granting the executive immense discretionary power but subsume it within the binds of legal and constitutional norms. This highlights the two faces of the political executive which are in constant tension: political predominance beyond tight control by legal rules articulated by legislatures and courts, but a subservience to law in a residual and important symbolical sense.²⁵¹

The principles considered in this chapter often offer totemic constraint, because the executive might relatively easily be able to get around these kinds of limitations. Through, for example, using mechanisms like political parties to gain broad delegations of administrative and regulatory power from the legislature. But even seeking to overcome these limiting norms in this fashion means they do so by first elaborately honouring them, by bowing to the legislature's formal predominance and not circumventing it,²⁵² underscoring their enduring significance to constitutional culture and political legitimacy.²⁵³ The stark fact remains such norms cannot be dispensed with outright in these systems without severely risking political legitimacy,²⁵⁴ as the spectre of an executive dispensing with statutes or trying to rule by executive decree is anathema to the constitutional culture of each system. As each system has embraced elements of the liberal constitutional tradition which fears, perhaps above all, arbitrary state power, it is not surprising 'extralegal...and unauthorized acts' are considered troubling and politically illegitimate. Even if done to preserve public safety or welfare.²⁵⁵ The sole *raison d'être* of the constitutional order in each system is not the

²⁵⁰ Nomi Claire Lazar, 'Prerogative Power in Rome' in (eds.) Clement Fatovic & Benjamin Kleinerman *Extra-Legal Power and Legitimacy* (Oxford University Press, 2013) 27.

²⁵¹ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' 29 *Canadian Journal of Law & Jurisprudence* (2016) 321.

²⁵² Stanley Fish, 'The Law Wishes to Have a Formal Existence', in Stanley Fish, *There's No Such Thing as Free Speech: and It's a good thing too* (Oxford University Press, 1993) 163.

²⁵³ Jenny S. Martinez, 'Horizontal Structuring' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 556.

²⁵⁴ For example, Professor Monaghan's observation that the argument the executive can dispense with or act contrary to statute is considered so beyond the pale it is rarely if ever advanced in the U.S. system are equally applicable to Ireland and the U.K. See Henry P. Monaghan, 'The Protective Power of the Presidency' (n 137) 29.

²⁵⁵ Judith Shklar, 'The Liberalism of Fear' in Nancy L. Rosenblum (ed.) *Liberalism and Moral Life* (Harvard University Press, 1989) 30.

precautionary limitation of state power,²⁵⁶ but this remains an important facet of each order, which has staying power even in the face of a precipitous institutional growth in executive capacity.²⁵⁷ This tense duality between formal weakness and practical strength, underscores not only the dominant political power of the executive in these constitutional systems, but the enduring importance of perceptions of legality to political legitimacy and constitutional culture.

Considered alone, these historical and legal principles clearly cannot provide an accurate or comprehensive situating of the contemporary executive branch – they are primarily concerned with the idea that the executive is a faithful agent which law does and should constrain.²⁵⁸ However, the contemporary executive does so much more than diligently execute the laws of the legislature and judgments of the courts. The fact is that none of the polities I consider have expressed anywhere near full commitment to the classic liberal-constitutional conception of executive as faithful law-executing overseer, and have not done so for a very long time.²⁵⁹ The very outer-bounds of executive authority may be set by this responsibility, but this occupies only a fraction of its contemporary role and status. Thus, although these principles highlight an enduring facet of the contemporary executive, they provide - so to speak - just one way of looking at the cathedral.

²⁵⁶ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009) 7.

²⁵⁷ *ibid* 8.

²⁵⁸ Eric A. Posner and Adrian Vermuele, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010) 3.

²⁵⁹ Margit Cohn ‘Tension and Legality’ (n 251) 334.

PART TWO: RISE OF EXECUTIVE POLICYMAKING

CHAPTER II- THE TIES THAT BIND: POLITICAL PARTIES AND THE RISE OF EXECUTIVE POLICY-MAKING

INTRODUCTION

Chapter I considered the emergence, and contemporary embeddedness of the legal principles governing the nature and scope of executive power in Ireland, the United Kingdom, and United States. I concluded this chapter by noting that these principles and doctrine, while of enduring significance, cannot alone provide an accurate or comprehensive situating of the place or status of the contemporary executive branch. The executive's formal legal powers are modest, and it is nominally an agent answerable to more powerful principal that can direct it through law. However, in practice in each system it exercises formidable political and legal authority. Bearing this common dichotomy in mind, the subsequent chapters of this thesis move to flesh out the picture of how the executive became predominant constitutional actors in these systems.

Part two of this thesis traces the developments which placed the executive into the driving seat of law and policymaking. This chapter begins that examination by considering the crucial role played by extraconstitutional organizations central to the practical exercise of political power: the political party. One cannot hope to understand the nature of the executive branch in these constitutional orders without understanding the factors that drove the rise of organized political parties, and the impact this had on separation of powers norms and the practical functioning of government. This chapter argues the contours of contemporary conceptions of the executive branch in the United Kingdom, Ireland and the United States were influenced by struggles that drove the expansion of the democratic franchise and the development of organized political parties. The development of political parties alerted the logic of separation of powers norms traditionally premised on the notion that branches of government are personified as political actors with interests and wills of their own, locked in a struggle to aggrandize their own power.¹ Of course, political parties divide enormously in their ideological and sectarian orientation, but broadly speaking all are organizations which 'aspire to the control of public power, an aspiration that goes beyond a desire to merely

¹ Daryl J. Levinson, and Richard H. Pildes, 'Separation of Parties, Not Powers' (2006) 119 Harvard Law Review 1, 3.

influence the policies of the state; these institutions wish to determine these policies'.² Political parties, in both presidential and parliamentary systems became a central mechanism driving the institutional behavior of the branches, facilitating greater levels of cohesion between the legislature and executive in the pursuit of a similar political vision.³ This collaboration undermined the notion each branch had a distinct institutional interest which would naturally result in friction which other branches attempting to aggrandize their own potentially conflicting interest. This cohesion became particularly strong in Westminster parliamentary systems, leading to a large degree of fusion between the branches, allowing the nominally weak executive to effectively leverage dominance over Parliament in practice in terms of policy and law formulation. In presidential systems, the impact of disciplined organized political parties on the executive branch is more complex but bears familial resemblance during periods of unified government when the presidency and majority of Congress are drawn from the same party. The following sections outline the impact of these trends in each system. Part I considers the impact of political parties in the United Kingdom and how this helped spur the executives rise as chief policymaker, part II considers these developments in the United States, and part III considers the same trends in Ireland.

I. THE EFFICIENT SECRET: POLITICAL PARTIES IN THE UNITED KINGDOM CONSTITUTIONAL ORDER

The broad legal parameters of executive power in Great Britain were forged amid civil war, the interregnum, restoration of the monarchy and the Revolution of 1688–89. While these upheavals formally left executive power with the monarch, it imposed conditions upon its exercise. The Crown was shorn of legislative power and the ability to suspend or dispense with statutes. Moreover, the Crown's remaining executive powers were capable of being diminished by Parliament.⁴ Without the power to unilaterally legislate or appropriate funds, the king was required to ensure his ministers were supported by Parliament – as it now retained the exclusive law-making power and privilege of approving and funding the policies of the government conducted on the monarch's behalf.⁵ On foot of these shifts, the traditional key separation of power between Crown and Parliament gradually became partially reconstituted by separation between the King's government in Parliament and its non-ministerial members. Although this separation involved elements of overlapping office

² N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 167.

³ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1).

⁴ Colin R. Munro, *Studies in Constitutional Law* (Oxford University Press, 2nd Edition, 2005) 257.

⁵ Anthony W. Bradley and Cesare Pinelli, 'Parliamentarism' in Michel Rosenfeld and Andras Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 650, 651.

holding, the separation was still institutional in nature. This is because the executive was indirectly elected by a House of Commons consisting of relatively independent members, who were not subject to tight party discipline. This made it capable of debating and acting collectively on policy issues in a manner that could differ from the executive's goals.⁶ Because of this independence, and institutional separation, the possibility of losing parliamentary support over policy issues was a real one. Consequently, executive dependence on—and political accountability to—Parliament reflected the practice and not merely theory of parliamentary governance.⁷ This embodied an ideal-typical understanding of the role of Parliament central in classic liberal constitutional theory. On this understanding, or at least in a stylized version of it, the electorate elect a representative Parliament, whose role is to appoint a government, make laws and deliberate on policy; which said government then faithfully executes while remaining accountable to Parliament for its actions.⁸

As the institutional power of the Crown waned, Parliament's waxed, and by the early eighteenth century, the latter had come to occupy a position of unprecedented importance in British political life. Its new significance in the eighteenth century is underscored by the unprecedented explosion in legislative productivity during this period. In the two centuries between 1485 and 1688, Parliament passed 2,700 measures. By contrast, between 1688 and 1801 - a period little over half as long, 13,600 measures were passed.⁹ For some commentators, Parliament's power - or more accurately the House of Commons - far outstripped that of other actors. In Hume's account, the share of constitutional power allotted to the House of Commons was:

so great, that it absolutely commands all the other parts of government. The king's legislative power is plainly no proper check to it. For though the king has a negative in framing laws; yet this, in fact, is esteemed of so little moment, that whatever is voted by the two houses, is always sure to pass into a law, and the royal assent is little better than a form.¹⁰

⁶ Stephen Gardbaum, 'Political Parties, Voting Systems, and the Separation of Powers' 65 *The American Journal of Comparative Law* (2017) 229, 237.

⁷ *ibid* 238.

⁸ Michael Gallagher, 'The Oireachtas: President and Parliament' in John Coakley and Michael Gallagher (eds.), *Politics in the Republic of Ireland*, (Routledge, 2009) 201.

⁹ Julian Hoppit, 'Patterns of Parliamentary Legislation, 1660-1800' (1996) 39 *Historical Journal* 109-131.

¹⁰ David Hume, 'Of the Independency of Parliament', in Knud Haakonssen (ed.), *Political Essays* (Cambridge University Press, 1994) 25.

The age of moderate institutional competition between Parliament and the executive was not to last, and was eclipsed when the emergence of several socio-political trends cemented a highly concentrated system of government with the Prime Minister at the helm.¹¹ One development was emergence of the convention that ministers of the Crown would be chosen by the Prime Minister, who in turn had to retain the confidence of the House of Commons to maintain office.¹² Prior to this development, the authority of cabinet members derived from the will of the Crown. Thus, the continuation of a government depended on monarchical will, rather than on a ministry's ability to command parliamentary support. Prior to this shift, the Crown could therefore appoint ministers who did not enjoy the confidence of the House of Commons or dismiss those who did.¹³ It was in the nineteenth-century that the Crown effectively lost power to choose or veto a prime minister when a political party commanded a majority in the Commons.¹⁴ In effect, a convention developed where the Crown had to accept the appointment of the leader of the party which commanded a majority in the lower House.¹⁵ The reason was straightforward enough. After the revolutionary settlement, if the Crown required new laws passed or monies appropriated it required parliamentary approval. But successive Parliaments became unwilling to do so at the behest of royal servants it did not trust. In order to see his policies enacted and money supplied, the Crown had to appoint ministers who could command the confidence of the House.¹⁶

The Prime Minister and his cabinet thus eventually became constitutionally *responsible* to the Commons. Which meant that if confidence was withdrawn by the Commons then the Prime Minister and his ministers had to either resign or advise the Crown to dissolve Parliament and allow a general election to be held. This advice the Crown had a constitutional conventional obligation to accede to.¹⁷ This development *formally* empowered Parliament, given that it could make or break a government at any time, by withdrawing confidence in

¹¹ Josh Chafetz, *Congress' Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017) 90-91; Peter Cane, *Controlling Administrative Power* (Cambridge University Press, 2016) 42.

¹² Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 264.

¹³ *ibid.*

¹⁴ Gillian Peele, *Governing the UK* (3rd edn, Blackwell Publishers, 1995) 92. Peele notes that in the eighteenth century the 'authority of the cabinet was still derived from the sovereign and the continuation of a government was dependent on the sovereign's good will rather than on the ministry being able to command parliamentary support... Only in the nineteenth century did the Crown lose the power to choose who should become prime minister and to veto ministers to whom the monarch objected.'

¹⁵ Robert Blake, 'Constitutional Monarchy', in David Butler and Vernon Bogdanor (eds.), *The Law, Politics, and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press, 1999) 23.

¹⁶ Josh Chafetz, *Congress' Constitution* (n 11) 90-91; Adam Przeworski, Tamar Asadurian, and Anjali Thomas Bohlken 'The Origins of Parliamentary Responsibility' in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012) 106-107.

¹⁷ Christopher Foster, 'Cabinet Government in the Twentieth Century' (2004) 67 *Modern Law Review* 753, 754.

the Crown's cabinet.¹⁸ It also further weakened the unilateral constitutional authority of the Crown, which at this point had long since given up important prerogative powers, such as authority to issue legally binding proclamations or to veto legislation approved by Parliament.¹⁹ As noted in Chapter I, following the Bill of Rights Act of 1689 and Act of Settlement 1701, the Monarch's lost any ability to raise public revenue or impose taxes unilaterally and without parliamentary consent.²⁰ This constitutional development gave Parliament a predominant constitutional role over the nation's finances, given that money required to fund domestic and foreign policy could not be appropriated or spent without their consent.

And yet, when combined with the emergence of disciplined and organized political parties, this change ironically weakened Parliament's institutional power *in practice*. This was because the political incentives for using its institutional powers, and bringing down a government staffed by their party colleagues and leaders, severely diminished.²¹ Another important consequence was that, because Parliament could now appoint and dismiss the executive, controlling a majority in Parliament offered a disciplined political party the tantalizing prospect of potentially harnessing the reins of both legislative *and* executive power - affording it plenary authority to implement its policy agenda.²²

Emergence of Mass Democracy

The crucial shift towards executive-led government approximating a more contemporary picture was heavily affected by evolution of the party system. Parties set out to capture and harness newly enfranchised voters²³ created by significant electoral reform in the mid-1800's and the rapid expansion of the franchise.²⁴ The Reform Act of 1832 increased the number of those entitled to vote by approximately 49 per cent. The Second Reform Act in 1867 afforded nearly one-third of men obtained the right to vote, doubling the size of the electorate.²⁵ In 1884 suffrage was extended further to give the county population the same

¹⁸ Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005).

¹⁹ Tom Hickey, 'Republicanism, the Distribution of Power and the Westminster Model of Government: Lessons from 20th Century Irish Constitutionalism' (2012) 4 *Ius Publicum Network Review* 1-37.

²⁰ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 159.

²¹ *Ibid.*

²² David Fontana, 'Government in Opposition' (2009) 119 *Yale Law Journal* 548, 558.

²³ Stephen Gardbaum, 'Political Parties, Voting Systems, and the Separation of Powers' (n 6) 238.

²⁴ Blake writes how the 'slow decline in the influence of a parliament that could make and unmake governments began with the beginnings of mass democracy triggered by the Reform Acts of 1867 and 1885. The supremacy of Parliament gradually gave way to that of organized political parties'. Robert Blake, 'Constitutional Monarchy' (n 15) 22.

²⁵ Martin Loughlin, *Foundations of Public Law* (n 12) 266.

suffrage basis as the urban boroughs.²⁶ As the electorate expanded in successive waves, parliamentarians increasingly turned to the task of organizing popular support for themselves and their platforms among the newly enfranchised voters.²⁷ Political parties were born of the necessity to woo and organize a mass electorate, to develop unity of political direction and maintain the strict discipline needed to gain and maintain political advantage and to implement policies.²⁸

The emergence of organized party politics changed almost everything about how the parliamentary system operated, and how political power was pursued, maintained, and wielded. These developments helped shift the allocation of power between Parliament and executive, through subjection of legislators to rigid party discipline through patronage and the whip system. Members would be sanctioned if they deviated from the party line or opposed government initiatives, imperiling hopes of reelection assistance or political promotion to ministerial office. The executive in turn, strove to maintain the loyalty of its non-ministerial deputies in order present a united front against rival party-political platforms, who performed the role of potential governments-in-waiting. Because of these developments, there could be no extended or severe opposition between the executive and legislature without provoking political crisis, resolvable only through formation of a new government or general election.²⁹

To paraphrase Bagehot, the political party became the buckle binding the executive and Parliament in a belt, leading to the near complete fusion of executive and legislative power in the cabinet.³⁰ Political-party affiliation also became crucial for the voting purposes of the average elector, as voters began to cast votes for politicians they wished to see form a government and lead the country.³¹ MP's from the party receiving the most ballots would invariably select their leader to become the Prime Minister. Making it eminently sensible for voters, in turn, to cast a ballot for a political party and the leader of that party, if they wished to see a particular programme realized.³² People became less likely to vote for an individual as such, instead, they had more incentive to vote for a party representative standing on a

²⁶ Moshe Maor, *Parties & Party Systems: Comparative Approaches & The British Experience* (Routledge, 1994) 80.

²⁷ *ibid* 81.

²⁸ Max Weber, *Essays in Sociology* in Mortimer J. Adler (ed.), 58 *Great Books of the Western World* (2nd edn. Encyclopaedia Britannica 1990) 93.

²⁹ John C. Reitz, 'Political Economy and Separation of Powers' (2006) 15 *Transnational Law & Contemporary Problems* 579, 595.

³⁰ See Walter Bagehot, *The English Constitution* (Cambridge University Press, 2001).

³¹ Stephen Gardbaum, 'Political Parties, Voting Systems, and the Separation of Powers' (n 6).

³² David Fontana, 'Government in Opposition' (n 22) 558.

manifesto commitment which they pledged to deliver should their party acquire a majority and form a government. As Loughlin puts it, the party system became the link between the electorate, Parliament, and the government - with parliamentary elections becoming the method of determining which party would rule and control both the executive and legislative arms of state.³³

Another reason voters became more party-oriented was the relative loss of policy initiative by the average backbencher. In the 18th and early 19th century, backbench MPs took a prominent part in the initiation and debate of legislation. However, by the mid 19th century the individual member of Parliament was a relatively unimportant cog in a larger legislative machine.³⁴ Elections earlier in the century frequently turned on a candidate's ability to affect general policy or leverage distributive benefits to their constituents. As this ability eroded, increased attention was placed on parties as a more effective mechanism of securing policy preferences. Voters responded to these developments by using their votes to determine what did matter to policy implementation: party control of the executive.³⁵ Voting for a candidate based on its leadership and party platform facilitated voters greater ability to determine the broad policy direction of the state.³⁶ As Cox puts it, it is not hard to see why voters began to become more party orientated in circumstances where:

MPs have little or no influence over the policy process independent of their party leaders; they generally have no electoral organization of their own with which to woo voters, and have little control over campaign finances; and they can deliver little in the way of particularized benefits to their constituents.³⁷

This shift in focus from candidate to party-orientated voting was also hastened, in part, by the fact voters were exposed for the first time to a cheap, mass, and partisan press who would endorse parties and their leadership.³⁸ Voters increasingly selected on their assessment of the potential effectiveness of the party leadership if they were to gain executive office.³⁹ When voters began to base their decisions more on what the parties did - and who their

³³ Martin Loughlin, *Foundations of Public Law* (n 12) 266.

³⁴ *ibid.*

³⁵ See Gary Cox, *The Efficient Secret: The Cabinet and the development of political parties in Victorian England* (Cambridge University Press, 2005).

³⁶ N.W. Barber, *The Principles of Constitutionalism* (n 2) 174.

³⁷ *ibid.*

³⁸ Gary Cox 'The development of party-voting in England: 1832-1918' (1984) 9 *Historical Social Research* 2, 13.

³⁹ N.W. Barber, *The Principles of Constitutionalism* (n 2) 172.

leaders were - it compounded control of the party leadership over individual MPs. Its control over patronage and electoral support, loomed larger in the voting decisions of MPs, as pressure from local constituency's decreased.⁴⁰ As a candidate's re-election and political advancement grew to depend on party support, pressure on an individual candidate to toe the party line on policy issues invariably hardened.⁴¹

Shifting Role of Legislature

These developments ensured the primary task of ordinary legislators morphed from serving as moderately independent lawmakers and institutional check on the executive, to loyally shoring up a voting majority to facilitate passage of political party programmes. A backbencher's policy role became to support their party leaders in government office and facilitate the safe passage of executive proposals.⁴² These shifts also had a sizeable impact on the allocation of constitutional power over state finances. Although Parliament enjoyed formal constitutional primacy⁴³ over the appropriation and expenditure of public monies, party discipline ensured that, just like with other policy areas, the executive grew to exercise high levels of initiative and functional control over public spending and taxation.⁴⁴ The close fusion between the cabinet and Parliament through the political party apparatus helped ensure that Parliament rarely attempted to assert initiative over financial matters, or exercise a parallel policymaking position to the executive. Instead, the Department of Treasury became charged with presenting the executive's annual estimates of expenditure and tax to Parliament for its statutory authorisation and scrutiny.⁴⁵ The close relationship between the two branches, via the political party apparatus, severely undermined incentive for Parliament to attempt to control 'government financial decisions by substituting different ones of its

⁴⁰ Gary Cox 'The development of party-voting in England: 1832-1918' (n 38) 16-17. In a major study of voting patterns in the 19th Century Cox argues that 'an analysis of over a thousand election contests held between 1818 and 1918...demonstrates that English voting behavior changed markedly during the course of the nineteenth century. In particular, it shows that the frequency with which English voters in double-member districts split their votes between the major parties declined considerably and permanently in the period 1857- 68. Whereas nearly a quarter of all electors in double-member districts split their votes in 1847, and nearly a fifth in 1857, by 1868 only 5.5% did so, and the figure never exceeded 5 % thereafter. Voting for the party rather than for the man appears to be the dominant feature of English electoral behavior from 1868 onwards.' Gary Cox, *The Efficient Secret* (n 35) 135-136.

⁴¹ N.W. Barber, *The Principles of Constitutionalism* (n 2) 172.

⁴² Stephen Gardbaum, 'Political Parties, Voting Systems, and the Separation of Powers' (n 6) 238.

⁴³ Terence Dainith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, Control* (Oxford University Press, 1999) 104.

⁴⁴ See William Bateman, *Parliamentary Control of Public Money* (Unpublished PhD Dissertation, University of Cambridge, 2018); William Bateman *Public Finance and Parliamentary Constitutionalism* (Forthcoming, Cambridge University Press, UK, 2020).

⁴⁵ Terence Dainith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, Control* (n 43) 105.

own'.⁴⁶ The executive's functional dominance over financial initiative was effectively codified in Standing Order 48 of the House of Commons, which requires that the House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue unless recommended from the Crown.⁴⁷ While Parliament's role over public finances remains important, it is one which is firmly reactive and centred around critique, debate, and scrutiny and not policymaking.⁴⁸

The development of political parties thus alerted the logic of separation of powers norms premised on the notion each branch had a distinct institutional interest, which would inevitably result in friction with each branch attempting to pursue their own potentially conflicting interests. Political parties acted as a crucial extraconstitutional supplement shaping the institutional behavior of constitutional actors and functioning of government. Creating incentive for, and facilitating, greater levels of cohesion between non-ministerial members of the legislature and cabinet in the pursuit of a similar political agenda.⁴⁹ As Bagehot famously put it, the efficient secret of the English Constitution became its close union - or near complete fusion - of the executive and legislative power.⁵⁰

Offering a more biting assessment of how these trends affected parliamentarianism, Carl Schmitt argued that they sapped it of its core intellectual rationale conceived in liberal thought. That is, as a forum of open and transparent discussion where, through a process of dialogue and confrontation of differences and opinions, the discernible political will of a polity would emerge and be robustly represented.⁵¹ Schmitt argued that the advent of mass democracy and disciplined and factional political parties designed to harness the enfranchised masses, ensured real political decisions would be made in meetings between faction leaders and extra-parliamentary party committees. In turn, these dealings would be heavily influenced by powerful interest groups who funded or supported the parties.⁵² In other words, far from open parliamentary or public debate and scrutiny. Schmitt argued

⁴⁶ Ibid, 106.

⁴⁷ <https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html>.

⁴⁸ Terence Dainith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, Control* (n 43) 104-106.

⁴⁹ As Craig puts it, 'the legitimacy of the House of Commons was strengthened by the extension of the suffrage. Somewhat paradoxically, this strengthened the Executive. The need to appeal to the expanded electorate was a powerful reason for the Executive to bring within its purview a broader range of tasks than hitherto'. Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th edition, 2016) 56.

⁵⁰ Walter Bagehot, *The English Constitution* (n 30).

⁵¹ Carlo Galli, 'Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning' (2000) 21 *Cardozo Law Review* 1597-1618; Carl Schmitt, *The Crisis of Parliamentarianism* (Translation by Ellen Kennedy, 2nd edn MIT Press, 1988) 34.

⁵² Clement Fatovic and Benjamin Kleinerman, 'Introduction: Extra-Legal Measures and the Problem of Legitimacy' in Clement Fatovic and Benjamin Kleinerman (eds.), *Extra-Legal Power and Legitimacy* (Oxford University Press, 2013) 9.

these changes meant political responsibility would be severely diluted, and that the parliamentary system offered a poor façade concealing the dominance of parties and their factional backers.⁵³

Regardless of whether one agrees with Schmitt's diagnosis, there is no doubt that on foot of these trends an apparent contradiction developed at the heart of the constitutional order; a contradiction which had a radical impact on the distribution of public power between Parliament and the executive.⁵⁴ Namely, the control and accountability of the executive relied upon a Parliament where a majority of members began to regard its principal political function as maintaining it in power.⁵⁵ In other words, as Parliament became stronger in terms of formal constitutional power, it became less inclined to use that power and weaker in terms of de facto power.⁵⁶ Conversely, these developments empowered the executive to exercise considerable influence, often political dominance, over Parliament despite the increased legal supremacy of Parliament in the British constitution.⁵⁷ The essential core of British government became centred on a Prime Minister leading a Cabinet which in turn dominated a party majority in the House of Commons.⁵⁸ The winning party from a general election ensured that their chosen Prime Minister and Cabinet would control the entire machinery of legislation and administration, while losing parties went into opposition.⁵⁹

Executive dominance over Parliament was also assisted by the removal of the House of Lord's outright veto⁶⁰ over primary legislation, via the Parliament Acts of 1911 and 1949. Replacement of this power with a modest ability to temporarily delay non-financial legislation for a year⁶¹, combined with executive authority to appoint members to the upper house, signalled an important constitutional development: an assertion of the primacy of the Commons in legislative matters.⁶² The executive's level of dominance over the Commons through the party system helped cement executive control over Parliament as a whole - an institution which had for a time after the Glorious Revolution maintained a modest element

⁵³ Carl Schmitt, *The Crisis of Parliamentarianism* (n 51) 78.

⁵⁴ Ibid 78.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Peter Cane, *Controlling Administrative Power* (n 11)105; Karl Lowenstein, 'The Balance between Legislative and Executive Power: A Study in Comparative Constitutional Law' (1938) 5 University of Chicago Law Review 566, 575.

⁵⁸ Ludger Helms, *Presidents, Prime Ministers and Chancellors* (Palgrave MacMillan, 2005) 175.

⁵⁹ Josh Chafetz, *Congress' Constitution* (n 11) 90-91; Bernard Crick, *The Reform of Parliament* (London, 1970) 16.

⁶⁰ Rhodri Walters, 'The House of Lords' in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003) 192.

⁶¹ John C. Reitz, 'Political Economy and Separation of Powers' (n 29) 596.

⁶² Peter Cane, *Controlling Administrative Power* (n 11) 43.

of functional separation.⁶³ These factors played an important role in helping usher in a period of high concentration of power in the first half of the twentieth century in the hands of the executive.⁶⁴ The developments also sound a thematic leitmotif that will recur throughout this thesis: namely the centrality of morphing socio-political context to the *effective* exercise of power amongst political institutions, notwithstanding *formal* institutional allocation or design.

Constitutional developments and diffusion of power

So far, I have traced the importance of political parties to the historical emergence and consolidation of executive predominance in the United Kingdom. However, it is important not to caricature the *degree* to which party politics have led to institutional fusion and executive predominance. Institutional factors and reforms can, and have, undoubtedly helped cultivate the kind of competition that political parties seek to break down.

For example, several reforms to UK political practice since the mid-twentieth have increased the institutional power of the modern UK Parliament to influence executive policy direction. To consider Parliament as a ‘rubber-stamp’ would be to severely caricature its ability to influence executive policy-making.⁶⁵ For example, it has developed a well-resourced and robust committee system capable of engaging in pre-legislative scrutiny, lobbying for amendments to government bills with moderate success, and post-legislative scrutiny.⁶⁶ Committees like the Joint Human Rights Committee in particular have been singled out for its robust cross-party lobbying and scrutiny work on foot of the Human Rights Act 1998.⁶⁷ Parliamentary Committees also play an important role in scrutinising the work of government departments and administrative bodies which constitute the administrative state.⁶⁸ Reforms to the House of Lords also transformed it from a largely symbolic aristocratic institution dominated by hereditary peers, to a busy upper chamber staffed with life peers appointed by the Prime Minister. These appointments are often based on a peer’s

⁶³ *ibid* 105.

⁶⁴ *Ibid*.

⁶⁵ Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017).

⁶⁶ See Philip Norton, ‘Speaking for Parliament’ (2017) 70 *Parliamentary Affairs* 191-206; Meg Russell, Daniel Gover and Kristina Wollter, ‘Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt’ (2016) 69 *Parliamentary Affairs* 286-308.

⁶⁷ Professor Kavanagh observes that due to its membership composition and access to independent legal advice the committee tends to function with a ‘relatively high degree of cross-party consensus and cooperation’ and has a reputation ‘for being more independent than most Commons committees’. See Aileen Kavanagh, ‘Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’ in Hunt, Hooper and Yowell (eds.), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 118.

⁶⁸ *ibid*.

political experience or in recognition of intellectual or professional distinction in a particular field. The upper chamber has proven dedicated to robust legislative scrutiny and far more willing to inflict inconvenient defeats on government measures it strongly opposes than the Commons.⁶⁹ While defeats on executive proposals are infrequent in the Commons, they are a regular occurrence in the Lords.⁷⁰ However, there is a convention the House of Lords will not deploy its temporary veto to block legislation introduced as part of an election manifesto.⁷¹

Additionally, the Fixed-Term Parliament Act of 2011 (**FTPA**) has put into abeyance the discretionary prerogative power of the Prime Minister to recommend dissolution of Parliament before the expiration of the maximum 5-year parliamentary term provided for in the Parliament Act 1911.⁷² This prerogative power has been frequently described as a useful tool of executive governance, allowing the Prime Minister to time the calling of a general election to maximize their chances of electoral success and put their political opponents on the back-foot.⁷³ The FTPA now provides that Parliament will dissolve every five-years, save for two statutory exceptions which can trigger a general election.⁷⁴ The first mechanism is where two-thirds of the House of Commons pass a government motion approving an early general election. The second statutory mechanism which can trigger a general election is where the House of Commons passes a motion that ‘This House has no confidence in Her Majesty’s Government’ and the government does not regain confidence within 14 days.⁷⁵ During this 14-day period an alternative government can be formed if there is a candidate for Prime Minister able to command a majority. The purported intent of the FTPA was to curb this executive authority and reduce the likelihood a general election would be called opportunistically; and to provide more authority to Parliament over whether it should finish its statutory term. The FTPA has been subject to intense academic and political criticism in some quarters for ossifying what should have remained a quintessential political question.⁷⁶ The impact of the Act on executive power, whether it aids or hinders, is hard to discern.

⁶⁹ *ibid.*

⁷⁰ Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (n 65) 16-17.

⁷¹ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Bloomsbury, 2016) 138.

⁷² Robert Craig, ‘Restoring Confidence: Replacing the Fixed-term Parliaments Act 2011’ (2018) *Modern Law Review* 480, 481.

⁷³ Andrew Blick, ‘Constitutional Implications of the Fixed-Term Parliaments Act 2011’ (2016) 69 *Parliamentary Affairs* 19, 20; Raymond Youngs and Nicklaus Thomas-Symonds, ‘The Problem of the ‘Lame Duck’ Government: A Critique of the Fixed-term Parliaments Act’ (2013) 66 *Parliamentary Affairs* 540-556; R. Blackburn, *The Electoral System in Britain* (London: Macmillan, 1995) 63.

⁷⁴ Robert Craig, ‘Restoring Confidence’ (n 72) 483.

⁷⁵ *Ibid.*

⁷⁶ *ibid.*

On the one hand, the Act may embolden dissident or recalcitrant backbenchers to vote against their colleagues in government, even on important issues, knowing that a defeat over a particular bill will not necessarily trigger an election and potential fall of the government and loss of their seat.⁷⁷ It also, *de jure*, denies the executive the ostensible political advantage of unilaterally dissolving Parliament and calling a snap general election to bolster its majority and mandate. On the other hand, the requirement a general election can only be triggered through formal statutory mechanisms, may mean a government which has lost important votes on core policy questions can linger on, despite not enjoying the confidence of the House in any substantial sense. There is debate whether the statutory mechanisms in the Act which trigger a general election are the only effective way that a government could lose the confidence of the House.⁷⁸ Most commentators argue against this position, and suggest the FTFA only provides a statutory framework to govern the calling of a general elections, and that the constitutional convention the government must resign if it fails to retain confidence remains, no matter how this is expressed.⁷⁹ The Cabinet Manual, which effectively sets out the executive's interpretation of constitutional conventions, deals explicitly with the FTFA and confidence motions and makes clear that motions outside of the Act can still be considered as confidence motions. The manual states that, while the decisions of the House which were previously regarded as expressing confidence can no longer 'enable or require the Prime Minister to hold a general election', the Prime Minister 'is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence'.⁸⁰ Thus, in constitutional principle a government which is not subject to a statutory vote of no confidence should still resign if it is clear it does not, *de facto*, enjoy the confidence of the Commons.

The endurance of the minority governments of Prime Minister May and Johnson despite strings of crushing defeats – on the government's core policy of exiting the European Union - is testament to how the Act may help steady an otherwise weak administration that has effectively lost confidence, refuses to resign, but cannot be replaced by an alternative

⁷⁷ Philip Norton, 'Speaking for Parliament' (n 66)195; Philip Norton, 'The Fixed-term Parliaments Act and Votes of Confidence' (2016) 69 *Parliamentary Affairs* 3, 4, 15.

⁷⁸ House of Commons Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution Interim Report The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011* (10 December, 2018) para 44.

⁷⁹ Mark Elliot, 'Confidence motions and the Fixed-term Parliaments Act 2011' *Public Law for Everyone Blog* (December 11, 2018).

⁸⁰ Cabinet office, *The Cabinet Manual*, (October 2011) para 2.19.

government. In other words, a government may not resign until it has lost a statutory vote of no confidence required to trigger a general election. Another fundamental critique is that the Act largely fails in its core objective – removing the unilateral authority of the Prime Minister to call a general election and putting it in Parliament’s hand.⁸¹ The operation of the FTPA thus far suggests it is extremely difficult to envisage circumstances when an opposition party could ‘realistically decide, in effect, to maintain the government in power’ for the simple reality that the political ‘optics would be...to say the least, less than ideal.’⁸² Commentators backing this view point to Theresa’s May call for a general election in early 2017, which passed by an overwhelming majority despite the fact the main opposition party was lagging considerably in the polls.⁸³ Many political actors and commentators have openly called for repeal of the FTPA, and it remains to be seen whether it will become an important piece of the architecture of UK constitutional politics in the coming years.

Devolution to regional parliamentary assemblies and their executives in Scotland, Wales and Northern Ireland from 1998 onward represents one of the most importance development in UK constitutionalism, affecting and divided law-making power previously concentrated in the Westminster executive and Parliament.⁸⁴ Devolution involves granting large degrees of law-making competence between UK authorities and devolved institutions. There is a strong political convention UK authorities should not legislate for matters within the competence of developed regions absent consent, which has diluted the power of the UK executive over these regions, particularly if they are governed by opposition political parties.⁸⁵ Legally speaking, however, any conflict between devolved law-making authorities and U.K. institutions is resolved in favour of the latter. Although not without controversy, the Supreme Court in *Miller* made clear, the requirement for consent is a political convention and not a judicially enforceable legal rule – a distinction which does not entirely erode the strong political salience of the convention, but perhaps undercuts its efficacy in times of political salience to the U.K. executive.⁸⁶

⁸¹ Robert Craig, ‘Restoring Confidence’ (n 72).

⁸² *Ibid.*

⁸³ 522 voted in favour, 17 voted against.

⁸⁴ Peter Cane, *Controlling Administrative Power* (n 11) 47.

⁸⁵ *Ibid.*

⁸⁶ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 paras 142-146. For academic commentary see Aileen McHarg, ‘Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention’, in Elliot, Williams and Young (eds.), *The UK Constitution After Miller* (Bloomsbury, 2018); Conor Crummey and Eugenio Velasco Ibarra, ‘Statutory Conventions: Conceptual Confusion or Sound Constitutional Development’ (2018) *Public Law* 613-631.

It is also important to note the influence of political parties on executive predominance is not a one way-ratchet. Until relatively recently, the United Kingdom's 'First Past the Post' electoral system helped stabilise a two-party system which tended to generate single-party governments. However, given that the fusion of legislature and executive through the party apparatus is a key source of executive predominance, it is no surprise party politics can also act to dilute, or deflect executive predominance during periods of coalition or minority government. Both have become a feature of British politics in recent times. Coalition governments will face several challenges an executive commanding a majority may not; including debates over allocating cabinet positions to coalition partners, agreeing a programme for government which might dilute ideological preferences, an onus to consult regularly with coalition partners and manage *intra* and *inter* party squabbles.⁸⁷ Even if these hurdles are cleared, coalitions often tend to become more fragile as the term of the government progresses.⁸⁸ As parties find fewer matters on which they can make gainful compromise, the cohesion of government may waver and ideological divergence become more pronounced. The chief executive leading a coalition government may well be faced with the possibility of finding themselves pursuing policies they would reject if they commanded a majority.⁸⁹ Given these factors, a Coalition government typically will not provide an executive the legislative efficiency enjoyed by one in charge of a majority.⁹⁰

Minority governments similarly demonstrate that how party politics affects executive power in parliamentary systems is a two-way ratchet. It can empower or disempower depending on the existence or otherwise of a majority. Where a government enjoys a plurality, but not a majority of parliamentary seats, a moderate measure of institutional competition can emerge between the executive and Parliament. In this way, they can resemble divided governments in presidential systems where different parties control the presidency and legislature.⁹¹ An executive in a minority government will generally be less capable of passing its full legislative and policy agenda, and Parliament may command a greater institutional role over policy formulation. An executive commanding a minority government is much more likely to see its legislative proposals amended or rejected by Parliament than a majority government.

⁸⁷ Richard Albert, 'Fusion of Presidentialism and Parliamentarianism' (2009) 57 *American Journal of Comparative Law* 531, 569.

⁸⁸ *Ibid* 569.

⁸⁹ *Ibid* 570. See also Timothy M. Hennessy and Jeanne Martin, *Exchange Theory and Parliamentary Instability*, in Allan Kornberg (ed.), *Legislatures in Comparative Perspective* (David McKay Publications, 1973) 182, 196.

⁹⁰ Richard Albert, 'Fusion of Presidentialism and Parliamentarianism' (n 87) 573.

⁹¹ *ibid* 565.

Indeed, the executive is more susceptible to collapse, given that it could be subject to a vote of no confidence at any moment.⁹²

The turbulent political landscape following the decision of the UK to withdraw from the European Union provides a vivid example of how electoral and party-political dynamics shape allocation of constitutional power. Following Prime Minister Theresa May's failure to maintain a majority in a 2016 general election, executive–parliamentary relations witnessed an unprecedented level of friction. Prime Minister May's attempts to steer the government's negotiated agreement with the EU through Parliament endured several large defeats in quick succession – including the largest government defeat in nearly a century.⁹³ The executive was also found in contempt of Parliament for refusing to disclose legal advice it had received on its draft withdrawal agreement.⁹⁴ Her successor Prime Minister Johnson initially faced a similar string of defeats. These defeats were squarely a result of the executive's inability to rely on a loyal parliamentary majority underpinned by party discipline; as the Prime Minister faced severe inter-party splintering combined with an unsurprising inability to command support from members of hostile opposition political parties. Prime Minister Johnson's crushing victory over his opponents in the December 2019 general election utterly transformed his political fortunes, catapulting him from a place of serious weakness heading a minority government, to a position of significant dominance.⁹⁵ The ongoing Brexit saga has thus provided a relatively unparalleled example of how party politics does not always serve to bolster executive power, but is a two-way ratchet. It has generally empowered the executive but can lead to intense gridlock between executive and Parliament during periods of inter-party friction and minority government.

II. FROM PRESIDER TO DECIDER: RISE OF PRESIDENTIAL POLICYMAKING

A Constitution against faction

The drafters of the United States Constitution harboured suspicion towards political factionalism. They associated party politics with corruption, unprincipled wheeling and dealing, and the gerrymandering of power toward narrow self-interest, all contrary to public

⁹² *ibid* 566.

⁹³ See Heather Stewart, 'May suffers heaviest parliamentary defeat of a British PM in the democratic era', *The Guardian* (15th January 2019); BBC News, 'Brexit: Theresa May's deal is voted down in historic Commons defeat' *BBC News* (15th January 2019).

⁹⁴ See <https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>.

⁹⁵ BBC News, *Election results 2019: Boris Johnson returns to power with big majority* (13th December 2019).

good.⁹⁶ Political factions were associated with dangers such as class legislation, partisan protection of powerful economic interest groups, and painful memories of political and sectarian animus.⁹⁷ In order for the enterprise of government to be successfully directed toward promotion of the public interest and prevention of tyranny, it had to be designed to reduce or eliminate the corrosive impact of factionalism on policy-making.⁹⁸ In Madisonian theory, providing for institutional separation and checks and balances between the executive and legislative branches was a critical way to counteract such factional tendencies.⁹⁹ This was based on the assumption each branch would act with a will of its own and attempt to aggrandize and safeguard its own sphere of power. It was hoped this would lead to ambition counteracting ambition amongst the branches.¹⁰⁰ Institutional separation and checks and balances were supposed to harness political competition into a system of government articulated through legal forms that would ‘effectively organize, check, balance, and diffuse power’ between the branches; making it very difficult for partisan factions to leverage control over all the levers of government, and use state power to act adversely to the public good.¹⁰¹ Thus, the framers provided for an executive independent of the legislature, and an explicit prohibition on members of the legislature holding executive office and vice-versa.¹⁰² They also staggered electoral terms to ensure that it would be more difficult for one faction to control the legislative and executive branch. The electorate choose a candidate for the House of Representatives every two years, for the presidency every four and for the Senate every six years.¹⁰³

Separation was not intended to - or could ever be - water-tight. For example, the President was given a role in the legislative process via his veto power, and the legislature authority over the traditional executive function of appointing senior state officials through their

⁹⁶ See Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press, 2010) 6; Defined by James Madison as ‘the permanent and aggregate interests of the community.’ ‘The Federalist No. 10.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

⁹⁷ Steven Calabresi, ‘Political Parties as Mediating Institutions’ (1994) 61 *University of Chicago Law Review* 1479, 1496.

⁹⁸ Peter Cane, *Controlling Administrative Power* (n 11) 105.

⁹⁹ As Dahl writes, while Madison was not ‘indifferent to the necessary social conditions for his non-tyrannical republic’, it is not unfair to suggest his ‘primary concern was with prescribed constitutional controls rather than with the operating social controls, with constitutional checks and balances rather than social checks and balances’. Robert Dahl, *A Preface to Democratic Theory*, (University of Chicago Press, 1956) 82.

¹⁰⁰ James Madison, ‘The Federalist No 51.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

¹⁰¹ Daryl J. Levinson and Richard H. Pildes, ‘Separation of Parties, Not Powers’ (n 1) 2; Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991) 172.

¹⁰² Article 1, Section 6, Clause 2 of the United States Constitution provides: No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

¹⁰³ See Article 1 & 2 of the United States Constitution.

requirement to give advice and consent to presidential nominations.¹⁰⁴ Despite these mutual checks, in Madisonian theory the branches of government are personified as actors with *distinct institutional interests*. They would have:

interests and wills of their own, entirely disconnected from the interests and wills of the officials who populate them...Acting on these interests, the branches purportedly are locked in perpetual struggle to aggrandize their own power and encroach upon their rivals.¹⁰⁵

The crucial omission from this theoretical conception, of course, is the fact that it misjudged how partisan political competition would structure real-world politics and dominate political discourse.¹⁰⁶ From the earliest days of the American Republic, partisan politics and the emergence of organized political parties, would undermine this Madisonian picture; of rivalrous *branches* with institutional wills of their own competing for power. The hope was that party government would be made impossible by the constitution, as it would involve bringing together, through informal extraconstitutional arrangements, that which the founders were keen to prevent through formal legal means.¹⁰⁷ Instead, these informal measures would have a success that may have dismayed the founders.¹⁰⁸

Emergence of political parties and presidential policymaking

The emergence of political parties soon guaranteed the creation of incentives that rendered the officials of each branch often indifferent to the powers of the branches per se, but keenly interested in how the public power each branch had could be directed toward the policy goals of their political party.¹⁰⁹ The growth of the party system also ensured the presidency did not remain a disinterested presider and patrician guardian of the constitution, but a figure deeply enmeshed in partisan politics. Indeed, presidents became leaders of their political factions and spokespersons for their party programmes and values. The most influential Presidents, including figures like Andrew Jackson, Abraham Lincoln, and Woodrow Wilson, and Franklin Delano Roosevelt were all able to leverage political dominance and pursue far-reaching policies precisely due to the combined weight of their formal constitutional power

¹⁰⁴ Steven Calabresi, 'Political Parties as Mediating Institutions' (n 97) 1497.

¹⁰⁵ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1) 3.

¹⁰⁶ Ibid 3.

¹⁰⁷ Steven Calabresi, 'Political Parties as Mediating Institutions' (n 97) 1497; Bruce Ackerman, *We the People* (n 101) 172.

¹⁰⁸ Robert Dahl, 'Myth of the Presidential Mandate' (1990) 105 *Political Science Quarterly* 357-372.

¹⁰⁹ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1) 12; Bruce Ackerman, *We the People* (n 101) 282.

and extraconstitutional role as party leader of a national political party.¹¹⁰ In his now canonical concurrence in *Youngstown Sheet & Tube Co. v Sawyer*¹¹¹ Jackson J. touched on this reality, and the fact the full measurement of presidential power was not confined to enumerated authority contained in the Constitution. These powers were heavily supplemented and sustained through the wider political surround.¹¹² He observed that:

[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.¹¹³

The President's now well-established role as a leader of a political party¹¹⁴ means the White House frequently takes a highly interventionist role at the front-end of the legislative process. Although the attendees of the Constitutional Convention considered the legislative branch the dangerous centre of power in more need of restraint, it was the presidency that, in time, proved to be the dynamic centre of political initiative.¹¹⁵ Following the example of transformative presidency's such as Jackson, Wilson, and Roosevelt, presidents would claim to be the only true representative of a national majority in the whole constitutional system.¹¹⁶ The emergence of president as a national political figurehead and party leader, armed with claims to a wide democratic mandate, came hand in hand with his emergence as a prolific policy-maker and initiator of legislation.¹¹⁷ A particularly concrete manifestation of the president's emergence as 'chief legislator' came with passage of the Budget and Accounting Act 1921, which placed on the President's shoulders the hugely consequential responsibility

¹¹⁰ Bruce Ackerman, *We the People* (n 101) 105-106.

¹¹¹ 343 U.S. 579 (1952).

¹¹² Michael A. Fitts, 'The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership' (1996) 144 *University of Pennsylvania Law Review* 827, 841-843.

¹¹³ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1) 45.

¹¹⁴ Thomas Cronin, Michael Genovese, and Meena Bose, *Paradoxes of the American Presidency* (Oxford University Press, 2017) 230.

¹¹⁵ Robert Dahl, *A Preface to Democratic Theory* (n 115) 141.

¹¹⁶ Robert Dahl, 'Myth of the Presidential Mandate' (n 108) 360.

¹¹⁷ Per Ackerman: 'There is little wonder, then, that the ultimate victor in the November election is tempted to understand his mandate in personalistic terms: the People selected *him* as President, and his political party has served merely as a vehicle for the projection of his own personality and ideals. The personal character of the President's mandate is also expressed in his relationship to the cabinet and his legislative programme. No cabinet secretary ever imagines himself operating on the same plane of legitimacy as his boss: after all, the President was elected by the People, and he was not'. Bruce Ackerman, 'The New Separation of Powers' (2000) 133 *Harvard Law Review* 634, 659.

of presenting an annual consolidated budget to Congress.¹¹⁸ American political culture now takes it for granted that the presidency is a representative institution whose incumbent will invariably claim popular mandates to spearhead sweeping policy changes in the name of ‘the people’.¹¹⁹ Presidents are regarded by their party loyalists as embodying the ‘virtues of the country’ as they become vessels into which are ‘projected the hopes of the nation’.¹²⁰ For their political opponents, they are a lightning rod for political criticism.¹²¹

A practical effect of how party politics impacts the separation of powers is that during periods of unified government, the president not only wields statutory powers that a politically friendly Congress enacts and delegates, but frequently drafts legislation for it to pass in the first place. In a manner akin to the executive in a parliamentary style system.¹²² Despite the conventional understanding of Congress as the primary maker of legislation, the executive branch will often draft entire pieces of legislation and transmit it to its loyalists in Congress to enact.¹²³ The executive is thus more free during these periods to pursue its legislative programme because party loyalty makes it less likely that the legislature will check or frustrate its actions as during divided government.¹²⁴

Scholars have also noted that whether government is unified or divided along party-lines impacts the extent to which Congress is likely to delegate statutory power.¹²⁵ Congress is more likely to delegate larger amounts of discretionary authority to the executive during periods of unified government.¹²⁶ These statutory delegations of authority are also likely to come with fewer constraints during these periods.¹²⁷ That is, when party loyalties might outweigh more abstract consideration of the balance of institutional power amongst the branches *qua* branches.¹²⁸

¹¹⁸ John Dearborn, ‘The “Proper Organs” for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921’ (2019) 31 *Journal of Policy History* 1-41; Daphna Renan, ‘Presidential Norms and Article II’ (2018) 113 *Harvard Law Review* 2187, 2234

¹¹⁹ Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press, 2010) 6; Dennis M. Simon, ‘Public Expectations of the President,’ in George C. Edwards III and William G. Howell (eds.), *The Oxford Handbook of the American Presidency* (New York: Oxford University Press, 2009), 135-160, 139; Robert Dahl, ‘Myth of the Presidential Mandate’ (n 108) 355.

¹²⁰ Jack Balkin and Sanford Levinson, ‘Constitutional Dictatorship’ (2010) 94 *Minnesota Law Review* 1789, 1855.

¹²¹ See Steven G. Calabresi and James Lindgren, ‘The President: Lightning Rod or King’ (2006) 115 *Yale Law Journal* 2611.

¹²² Daphna Renan, ‘Presidential Norms and Article II’ (n 118) 2234; Abbe Gluck, Anne Joseph O’Connell, and Rosa Po, ‘Unorthodox Lawmaking, Unorthodox Rulemaking’ (2015) 115 *Columbia Law Review* 1789, 1820.

¹²³ Ganesh Sitaraman, ‘The Origins of Legislation’ (2015) 91 *Notre Dame Law Review* 79, 104.

¹²⁴ Richard Albert, ‘Fusion of Presidentialism and Parliamentarianism’ (n 87) 573.

¹²⁵ Daryl J. Levinson and Richard H. Pildes, ‘Separation of Parties, Not Powers’ (n 1) 45.

¹²⁶ David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge University Press, 2000) 99, 121-162.

¹²⁷ *Ibid.*

¹²⁸ Posner and Vermuele conclude that when the ‘same party controls both the executive branch and Congress, real monitoring of executive discretion rarely occurs, at any rate far less than in an ideal Madisonian system....When Congress

Congressional oversight of the Presidency is also closely tied to party identity.¹²⁹ When the same political party occupies the Presidency and a congressional majority, oversight tends to be more lax.¹³⁰ The executive is generally subject to more intense scrutiny during divided government.¹³¹ Due to party discipline and polarisation, it is unlikely members of the president's party will seek to regularly forge bipartisan legislative consensus to tackle the president's programme.¹³² While bipartisan objection to presidential action can and does occur, party politics undermines political incentive to do so.¹³³

Unsurprisingly, Congress tends to delegate less statutory authority to the executive during periods of divided government.¹³⁴ Moreover, it more stringently cabins discretion given to executive agencies during these periods by binding them with more statutory restrictions,¹³⁵ generating a simulacrum of Madisonian rivalry and inter-branch competition.¹³⁶ During periods of divided government Congress is also more likely to delegate greater authority to administrative agencies and commissions with greater statutory independence, and at a further remove from direct executive control.¹³⁷

American political parties have not, for enduring structural reasons, ensured the same degree of fusion between the executive and legislature seen in parliamentary systems. One major structural barrier to executive-legislative fusion is the very different electoral incentives faced by the President and individual members of Congress. The president is electorally accountable to the nation, and must typically try to build and please a working national majority, creating different political incentives which impact his policy programs and priorities than the average member of Congress.¹³⁸ The average congresswoman concerned with maximizing their chances of re-election may, in contrast, be disproportionately interested in matters and issues impacting their constituency and support base.¹³⁹ These

is a co-partisan of the president, oversight is minimal; when parties differ across branches, oversight is more vigorous.' Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, (Oxford University Press, 2010) 28.

¹²⁹ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Palgrave, 2014) 96-97.

¹³⁰ Neal Devins, 'Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives' (2009) 45 *Willamette Law Review* 395, 409.

¹³¹ *Ibid* 67.

¹³² Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (n 129) 96-97.

¹³³ Neal Devins, 'Presidential Unilateralism and Political Polarization' (n 130) 409.

¹³⁴ Richard Albert, 'Fusion of Presidentialism and Parliamentarianism' (n 87) 575.

¹³⁵ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1) 30.

¹³⁶ *Ibid* 91.

¹³⁷ *Ibid* 46; Kevin M. Stack, 'The President's Statutory Power to Administer the Laws' (2006) 106 *Columbia Law Review* 263, 290.

¹³⁸ Steven Calabresi, 'Political Parties as Mediating Institutions' (n 97) 1509.

¹³⁹ *Ibid*.

divergent incentives have been linked to why the policy interests of the executive and legislature may conflict in presidential systems even during periods of united government.¹⁴⁰ Thus, even in periods of unified government the president has significantly less control over congressional legislative activity than Prime Ministers in Ireland or the United Kingdom typically enjoy over Parliament.¹⁴¹

As contemporary examples, the experience of the Obama and Trump administrations highlight how, even during periods of unified government, the executive branch may face difficulties steering their desired policy agendas through the legislative process; difficulties that a Prime Minister might not similarly face.¹⁴² Both Presidents, even during periods of hyper-unity, have had to settle for a sub-optimal version of prized policy initiatives to get the measure endorsed by a Congress. For example, while President Obama enjoyed a Democratic majority in Congress during his first two years of office, he still had to compromise considerably to pass his flagship healthcare reform legislation- the Affordable Care Act. While government may have been unified, the president nonetheless had to make significant omissions from the type of healthcare reform package he had previously campaigned on in order to see his prized policy enacted into law.¹⁴³ Similarly, several of President Trump's well-ventilated campaign promises - including a significant infrastructural overhaul of border security, repeal of the Affordable Care Act, and sizeable budget cuts for the Environmental Protection Agency - have not been acted on by the legislature, even when the Republican party occupied both the presidency and both Houses of Congress.¹⁴⁴

Both are examples highlighting that US presidents invariably lack the potential legislative muscle of the executive in a Westminster-style system, even during periods of unity. This caveat noted, the importance of political parties to the practical operation of checks and balances and executive power would have nonetheless alarmed the framers,¹⁴⁵ who famously regarded a legislative branch rife with factionalism as posing the greatest danger to liberty and good government.¹⁴⁶

¹⁴⁰ Ibid.

¹⁴¹ Peter Cane, *Controlling Administrative Power* (n 11) 107.

¹⁴² Josh Chaefetz, *Congress's Constitution* (n 11) 28-35.

¹⁴³ Jerry Mashaw and David Berke, 'Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience' (2018) 35 *Yale Journal on Regulation* 1, 91.

¹⁴⁴ Ibid 92.

¹⁴⁵ Peter Cane, *Controlling Administrative Power* (n 11) 107.

¹⁴⁶ In the Federalist papers Madison famously wrote that it was the 'legislative department' that 'is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex'. James Madison, 'Federalist Papers No.48' in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

III. THE POWER OF THE WHIP HAND: POLITICAL PARTIES IN IRELAND

While the influence of political parties on how the separation of powers would operate in practice may have surprised the drafters of the United States constitution, the same cannot be said of their Irish counterparts two centuries later. By the time the 1937 constitution was adopted, the centrality of political parties to executive-legislative relations in parliamentary systems was well-documented and understood. The provisions of *Bunreacht na h'Eireann* in many respects codified core conventions of the Westminster style cabinet government. This was one phenomenon the drafters of the earlier the 1922 Free State Constitution had initially, but ultimately unsuccessfully, hoped to dilute in its intensity. Thus, while the Irish constitution does not mention political parties or discuss how they would interact with the provisions on the executive and legislature, it was well understood by its drafters that organized and disciplined political parties would be part and parcel of executive – legislative relations.¹⁴⁷ As with the influence of political conflicts in the British constitutional order over debates concerning the nature and scope of the basic contours of executive power, the ongoing legacy of how party-politics and cabinet government affected the logic of separation of powers norms cannot be understated.¹⁴⁸

1922 Free State Constitution as an anti-party experiment

Following the Irish War of Independence and signing of the Anglo-Irish Treaty¹⁴⁹ the drafters of the 1922 Free State constitution attempted to craft a form of government which would be resistant to executive dominance over Parliament via party politics. In other words, a form of government distant from that prevalent in Westminster at the time. This was partly motivated by strong antipathy toward partisan party politics amongst the drafters.¹⁵⁰

It is very clear the drafters simply did not anticipate, or desire, the *degree* to which partisan party politics would eventually dominate the political process of the fledgling state. They

¹⁴⁷ Basil Chubb, *The Government and Politics of Ireland* (Longman, 1992).

¹⁴⁸ Harment Bulsara and Bill Kissane, 'Arend Lijphart and the Transformation of Irish Democracy' (2009) 32 *Western European Politics* 172; Basil Chubb, *Cabinet Government in Ireland* (Institute of Public Administration, 1974) 1.

¹⁴⁹ For the full text of the treaty, see: <https://www.difp.ie/docs/1921/Anglo-Irish-Treaty/214.htm>.

¹⁵⁰ See Laura Cahillane, 'Anti-Party Politics in the Irish Free State Constitution' (2012) 35 *Dublin University Law Journal* 34; Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (University College Dublin Press, 2011).

expected to have small groups in the Dáil grouping together to represent different interest groups, vocations and constituents, and to robustly control executive action. However, the best laid plans of men often go awry, and a host of circumstances pushed Irish political culture and constitutional practice toward highly organized, partisan blocs, and centralized executive power. In the following paragraphs, I briefly trace the attempts of the drafters to counteract this eventuality and their eventual failure. Having done so, I then trace how the drafters of the 1937 constitution had little qualms in fostering a much more party-based system.

The structure of the executive adopted by the Irish Free State self-consciously differentiated itself from the British system. For instance, although the Executive Council could request a dissolution of the Dáil, this authority could only be exercised collectively; the President of the Executive Council lacked the unilateral authority of the UK Prime Minister. Moreover, unlike the Prime Minister, the President of the Executive Council could not unilaterally dismiss a minister as the Executive Council stood or fell as a collective. The Constitution also provided that the Oireachtas could not be dissolved on the advice of the Executive Council which has ceased to retain the support of a majority of Dáil Éireann.¹⁵¹

Perhaps the most ambitious innovation designed to ameliorate the kind of executive dominance seen in Westminster, came in the form of the external minister proposal.¹⁵² Under the Free State Constitution, the structure of the Executive consisted of two-tiers. The first tier, the Executive Council, were to be made up of ministers who were appointed by virtue of their membership to Dáil Éireann. Article 54 provided for the collective responsibility of the members of the Executive Council. The second tier of ministers were to be known as External ministers who were to be appointed by Dáil Éireann on the recommendation of an impartially representative Committee of the Dáil. Collective responsibility did not extend to these External ministers as they were not members of the Executive Council. External ministers were individually responsible to the Dáil for the administration of their Department. The Executive Council was to play no direct role in the selection or appointment of the External ministers and the matter was ostensibly reserved to the relevant representative Dáil committee. Unlike the Executive Council, the External minister's term

¹⁵¹ Article 53 of the Irish Free State Constitution. There is debate amongst British constitutional actors and scholars whether a request for a dissolution of parliament by the Prime Minister can be refused by the Crown where the former lacks a majority in the commons and where a stable alternative government could be formed, and where a general election may not be in the national interest. Robert Blake, 'Constitutional Monarchy' (n 15) 28-29.

¹⁵² Leo Kohn, *The Constitution of the Irish Free State* (Allen & Unwin, 1932).

of office was for the life of Dáil and not the Executive Council. External ministers were to be truly independent, and there was no requirement that they should support every aspect of government policy. The Executive Council consisted of not more than seven nor less than five Ministers.¹⁵³ Article 55 provided that the total number of Ministers, including the Ministers of the Executive Council, would not exceed twelve. This meant that up to five Extern Ministers could be appointed.

The essential novelty of the scheme lay not so much in the ‘admission of non-parliamentarians to ministerial office as in the mode of their nomination by a parliamentary committee independent of the head of Government and in the fixity of their tenure of office’.¹⁵⁴ The justification for moving away from the traditional cabinet system was that it would make it possible to select ministers outside of the national Parliament. They were to be appointed solely on an assessment of competence, merit, or technocratic expertise, and not because of partisan affiliations.¹⁵⁵ The extern ministers were to be above party and to act only in the interests of the state and common good.¹⁵⁶

This innovation fundamentally failed in its objective for several reasons. For a start, the initial extern minister provisions submitted by the drafters to the Constituent Assembly was significantly amended before its adoption. Simply put, the appointment of extern ministers went from being a mandatory obligation of the Dáil to a permissive discretion. Allied to this development was the fact PR voting did not prevent the emergence of a dominant party which effectively controlled the Dáil Committees who recommended and approved extern ministers. Although PR did allow several smaller parties to take seats in the Dáil, the refusal of the second largest party to recognise the legitimacy of the new constitution, or take their seats, allowed the largest party to leverage significant predominance over the Committee system.¹⁵⁷ The first executive elected under the Constitution included three External ministers¹⁵⁸ who were all members of the ruling party, and no real attempt was made to include non-party affiliated ministers. Another blow to the scheme came in 1925, when the

¹⁵³ Article 52 provides: Those Ministers who form the Executive Council shall all be members of Dáil Éireann and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance.

¹⁵⁴ Leo Kohn, *The Constitution of the Irish Free State* (n 154) 255.

¹⁵⁵ The concept of the External minister was introduced to the Constitution drafting committee by James Douglas and based on a similar system under the Swiss Constitution. Article 96 of the Swiss Constitution provided that all seven members of the Swiss Federal Council were to be elected by the Swiss parliament and were not members of the parliament.

¹⁵⁶ Laura Cahillane, ‘An Insight into the Irish Free State Constitution’ (2014) 54 *American Journal of Legal History* 30.

¹⁵⁷ Laura Cahillane, ‘Anti-Party Politics in the Irish Free State Constitution’ (n 150) 34, 41-44.

¹⁵⁸ *Ibid.*

Dáil's 'Amendments to the Constitution Committee' recommended enabling the President of the Executive Council to decide on whether External ministers should be appointed to cabinet by a Dáil Committee. After a brief debate, the Constitution (Amendment No. 5) Act 1927 was passed which increased the size of the Executive Council to 12. As the limit on the total number of ministers, Executive Council or not, was also 12, the President effectively had discretion whether to include any External ministers at all.

The swift politicization, and eventual emasculation, of the external minister proposal went hand in hand with the shedding of other measures designed to diminish executive and party-dominated government. Although the drafters of the 1922 constitution had a common desire to constrain executive dominance over Parliament through the party system, exogenous circumstances placed heavy pressure on this early idealism. The Free State faced existential threats on several fronts: from political dissidents from within, the colossal task of building a state from the ruins of civil war, and ensuring a bloated military remained firmly under civilian control.¹⁵⁹

The birth pangs of the new state provided political actors little incentive to dilute executive power. Indeed, to achieve their objectives, parties increasingly felt they had to maintain strict discipline, and equip the executive with whatever authority it felt necessary to secure political stability. The most far reaching example being the insertion of the draconian Article 2A into the constitution.¹⁶⁰ The swift jettisoning of the external minister proposal and the emergence of disciplined partisan parties solidified executive predominance over Parliament and offer vivid testament to this shift in attitude to executive control and party politics. As Irish political elites moved swiftly to discard these innovations in favour of a more centralized cabinet structure under the President of the Executive Council, the central plank of the new state evolved around strong executive government reminiscent of a traditional Westminster

¹⁵⁹ Martin Maguire, *The Civil Service and the Revolution in Ireland, 1912-1938* (Manchester University Press, 2008) 158-159. According to Kevin O'Higgins' vivid account the fledgling state was 'simply eight young men in the City Hall standing amid the ruins of one administration, with the foundations of another not yet laid, and with wild men screaming through the keyhole'. Terence de Vere White, *Kevin O'Higgins* (Tralee, 1966) 83-84.

¹⁶⁰ Article 2A provided for the establishment of a standing military tribunal from whose judgments there was no appeal, whose members were appointed and removable at the behest of the executive, and who were empowered to impose the death penalty in respect of a vast list of offences, even if the penalty exceeded those provided under ordinary law. The tribunal could even try an "offence" that was not an offence at the time of its commission, if it was certified in writing that the offence was done with the object of impairing the machinery of government. In a case of conflict between Article 2A and any other provision of the constitution, the former was said to prevail. The powers vested in the executive under Article 2A led one Judge to suggest that they might become, 'as was said of the Star Chamber, a potent and odious auxiliary of a tyrannous administration' *The State (O'Duffy) v Bennett* [1935] IR 70. This is exactly what they became: thousands were detained without trial and dozens were to meet their death at the hands of firing squads, all without the benefit of the most meagre semblance of due process. Gerard Hogan, *The Origins of the Irish Constitution* (Royal Irish Academy, 2012) 3-5.

model.¹⁶¹ This, of course, was ironically the very same type of executive-parliamentary relations the drafters of the Free State constitution sought to distinguish the newly independent Irish State from.

By the time Fianna Fáil finally entered parliamentary politics and took power in 1932, party lines were firmly cemented, and strong executive control a lynchpin of Irish government. The dismantling and undermining of the Free State Constitution soon followed. By May 1935, the President of the Executive Council, Éamon de Valera informed the Dáil of his intention to prepare a new Constitution.¹⁶² By this stage, the external minister proposal and popular referendum petition had been consigned to the dust-bin of history, and the executive vested with effectively unfettered political power.¹⁶³ The executive council was, for all intents and purposes, an elected dictatorship.¹⁶⁴

The 1937 Constitution and solidification of party politics

The 1937 constitution unambiguously rejected several core elements of British constitutionalism.¹⁶⁵ Article 6 emphatically emphasised popular sovereignty instead of parliamentary, providing that ‘all powers of Government, legislative, executive and judicial, derive, under God, from the people’. The Constitution also codified a diverse set of civil, political, and socio-economic constitutional rights, making them enforceable via judicial review. Like its 1922 forebear, the 1937 Constitution rejected First-Past-the-Post electoral system in favour of Proportional Representation by Single Transferrable Vote. The Constitution additionally required a popular referendum for every constitutional amendment.¹⁶⁶ Finally, the constitution provided for an elected – but largely ceremonial – Head of State. Some of these institutional variables undoubtedly chime with Lijphart’s ‘consensus’ institutional model of parliamentary government.¹⁶⁷ This ideal type of government entails more dispersal of power than the ideal-type Westminster system; which is characterized by a few dominant parties, cabinet dominance over Parliament, concentration of power and imbalanced bicameralism. The consensus ideal type, in contrast, is characterized by multi-party Parliaments, greater institutional separation between

¹⁶¹ Harment Bulsara and Bill Kissane, ‘Arend Lijphart and the Transformation of Irish Democracy’ (n 148).

¹⁶² Gerard Hogan, *The Origins of the Irish Constitution* (n 160).

¹⁶³ Brian Farrell, ‘From First Dail through Irish Free State’, in (ed.) Brian Farrell, *De Valera’s Constitution and Ours* (Gill and MacMillan, 1988) 30.

¹⁶⁴ Oran Doyle, *The Irish Constitution: A Contextual Analysis* (Bloomsbury, 2018) 16.

¹⁶⁵ Oran Doyle, ‘Constitutional Change in Ireland’ (2017) 40 *Dublin University Law Journal* 3.

¹⁶⁶ Article 46 of the Irish Constitution. See *McKenna v An Taoiseach* (no. 2) [1995] 2 IR 10, 43.

¹⁶⁷ See generally Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Manchester University Press, 2012) 40-41; Arend Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 1999).

executive and legislature, and greater checks and balances on the concentration of power in any one institution, through mechanisms like judicial review and popular referendums. The Irish constitutional order clearly embraces features of both ideal types. But, while many of the most important features of Irish constitutionalism reflect characteristics from the consensus model, on balance the principal features of executive-parliamentary relations align quite closely with Lijphart's model of Westminster-style government.¹⁶⁸

Unlike the drafters of the 1922 constitution, De Valera's constitutional plans had little eagerness to diminish executive authority.¹⁶⁹ Quite the contrary, as De Valera was undoubtedly an apostle of strong party discipline and concentrated executive power.¹⁷⁰ When De Valera led Finna Fail to power in 1932, he found the broadly Westminster-style system he inherited an adequate instrument for his political purposes. It was well suited to facilitating a strong prime minister leading a loyal majority party that looked to him for initiative and direction.¹⁷¹ The familiarity and comfortability of political elites with this, combined with a shedding of early Free State idealism, helped ensure the core design and operation of Dáil-Government relations in the 1937 constitution heavily-aped the British model of government. That is, a model in which political parties dominate the political process by simultaneously controlling the executive and the lower house of Parliament, a house with greater formal and substantive power than the upper house.

While the 1937 Constitution's provision of judicial review, popular referendum, and entrenched constitutional rights eventually led to a significant change to the context in which the Irish executive operates, central components rooted in British constitutionalism have proven very enduring. The key British constitutional legacy which *was* consistently maintained in Irish constitutionalism, effectively its structural spine, was retention of an executive which enjoys a highly concentrated form of power.¹⁷² The norms structuring the relationship between the executive with the legislature heavily mirror its colonial predecessor.¹⁷³ The structural core of Irish government remains centred on a Taoiseach appointed by the Dáil leading a Cabinet which in turn governed for as long as it commanded the confidence of the House, usually manifested through domination of a majority or

¹⁶⁸ Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (n 167) 49.

¹⁶⁹ Tom Hickey, 'Republicanism, the Distribution of Power and the Westminster Model of Government' (n 19).

¹⁷⁰ Basil Chubb, 'Government and Dail: Constitutional Myth and Political Practice' in (ed.) Brian Farrell, *De Valera's Constitution and Ours* (Gill and MacMillan, 1988) 94.

¹⁷¹ Basil Chubb, *The Constitution and Constitutional Change in Ireland* (Institute of Public Administration, 1978) 32.

¹⁷² Oran Doyle, *The Irish Constitution: A Contextual Analysis* (n 164) 19.

¹⁷³ Harment Bulsara and Bill Kissane, 'Arend Lijphart and the Transformation of Irish Democracy' (n 148) 176.

plurality in the Dáil.¹⁷⁴ The party (or coalition parties) which won a general election ensured that the Taoiseach and his Cabinet would control the entire machinery administration and law-making, with losing parties going into opposition.¹⁷⁵

The 1937 executive also approximated elements of its Westminster cousin to a greater degree than the Free State executive in several respects.¹⁷⁶ Whereas the President of the Executive Council was effectively a chairman of the cabinet, the Taoiseach was without question its *chief*, and given power to request removal of any minister at any time.¹⁷⁷ Additionally, the power of dissolving the Dáil was bestowed on the Taoiseach, and not the cabinet as a collective as in the 1922 constitution. A power which can be used unilaterally and must be accepted by the president.¹⁷⁸ Should the Taoiseach at any stage resign, the other members of government had to resign as well.¹⁷⁹ The 1937 constitution also provided a possibility, although at the president's absolute discretion, that a government who lost the confidence of the Dáil could still be granted a dissolution. The formal structural alterations to executive office contained in the constitution, when combined with the lived reality of party politics, combined to create fusion between the government and Parliament through the party apparatus.

As in the United Kingdom, this fusion through the political party apparatus expanded the de facto power of the executive. This is even as it retains legally subordinate status as an agent answerable to a parliamentary principal. The formal authority and power of the Oireachtas over the executive is hard to understate. For a start, the Oireachtas can direct the Government through use of its exclusive law-making power. Moreover, the Taoiseach must retain the confidence and support of the Dáil to maintain power, otherwise he and all other members of government must resign.¹⁸⁰ The Irish Constitution also expressly provides that the executive shall be 'answerable' or 'responsible' to Dáil Éireann.¹⁸¹ This accountability is underscored through two conventions. First, through individual ministerial responsibility to the *Dáil* for the Departments they lead. As a corporation sole, a departmental minister is,

¹⁷⁴ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 164) 46-52.

¹⁷⁵ Bernard Crick, *The Reform of Parliament* (n 59) 16.

¹⁷⁶ Brian Farrell, *Chairman or Chief? The role of Taoiseach in Irish Government* (Gill and McMillan, 1971) 5.

¹⁷⁷ Article 28.9.4 provides that: 'The Taoiseach may at any time, for reasons which to him seem sufficient, request a member of the Government to resign; should the member concerned fail to comply with the request, his appointment shall be terminated by the President if the Taoiseach so advises.'

¹⁷⁸ Article 13.2.

¹⁷⁹ Article 28.9.11.

¹⁸⁰ Article 28.4.10 provides that the Taoiseach and Government must resign upon ceasing to retain the support of a majority.

¹⁸¹ The former being the literal Irish translation.

legally speaking, responsible to the Dáil for all actions taken by her department. Second, through the collective responsibility of government for decisions taken at cabinet, which ensures that the executive cannot diffuse responsibility and blame for policies facing criticism but must collectively stand or fall over them. The buck stops with the executive as a collective.¹⁸² However, in the Irish constitutional order formal constitutional principle and political reality collide in stark ways.

In reality, it is a truism of Irish politics that the executive has a dominant role over national policy direction and law-making, subject to modest checking or policy input from the average backbencher; a reality long recognized by political actors in Ireland.¹⁸³ It was candidly acknowledged by De Valera himself during debates on the 1937 constitution. Although the constitution provided the sole and exclusive power of making laws lay with the Oireachtas and that the government was answerable to the *Dáil*, De Valera stated in unequivocal terms that:

The government will have the greatest power in the State. The government will be answerable to the Dail from day to day. But if it were not for the majority of the Dail the government would not be ruling at all, and since the Dail is elected by the people, and the government by the representatives of the people, it is right in my opinion that this group should have this power. If anyone wants to discover where the power of the State is located, he will find it in the government...the government cannot conduct its business without this power.¹⁸⁴

This statement, delivered by an important political actor at the apex of public power, reveals much about the practical operation of institutions in the Irish constitutional order. The text and structure of the Irish constitution, and the historical principles underpinning them, may paint an ideal-type liberal constitutionalist picture of a subservient executive faithful to its parliamentary principal.¹⁸⁵ A more accurate depiction of the Irish political process, outlined in the words of De Valera, is one that captures the reality the executive has become the dominant actor in the formulation of policy and legislation. Parliament instead acts in a

¹⁸² Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (n 168) 12; Eoin Daly, 'Residual Conventions of the Irish Constitution: the Incongruous Example of Collective Responsibility' (2010) *Public Law* 703.

¹⁸³ Lia O'Hegarty, 'The Constitutional Parameters of the Work of the Houses of the Oireachtas' in Manning and MacCarthaigh (ed.), *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration, 2010) 103.

¹⁸⁴ Dail Debates 67/35; 11 May 1937; Brian Farrell, *Chairman or Chief?: the role of Taoiseach in Irish Government*, (Gill and McMillan, 1971) 33; Basil Chubb, 'Government and Dail: Constitutional Myth and Political Practice' (n 170) 96.

¹⁸⁵ John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (6th edn, Routledge, 2017) 243.

reactive capacity to give imprimatur and legitimacy to its proposals, a role repositioning cemented by political party co-ordination.¹⁸⁶

This marked discrepancy between the formal and substantive constitutional power of Parliament is not reflected in constitutional text.¹⁸⁷ For example, given their importance, *Bunreacht na h'Eireann* is strikingly silent to the key role played by political parties in the allocation of constitutional power between the legislature and executive.¹⁸⁸ It is clearly misleading to deduce knowledge of the workings of Parliament from the text of the Constitution, as the realities of parliamentary power are such that the executive largely controls the Houses of the Oireachtas through the disciplined coordination of whipped political parties, rather than the other way around as the Constitution might lead one to believe.¹⁸⁹ The centrality of organized political parties to Irish political life, the socio-political reality in which constitutional text and doctrine is embedded, help provide the executive with the means of political predominance over Parliament, putting it into the driving seat of law and policy formulation.¹⁹⁰ The strength of the party whip-system ensures the legislature in Ireland cannot, generally speaking, be regarded as having a voice independent of the executive. Strong party discipline makes executive-legislative fusion the defining element in the Irish governmental system, and it is vanishingly rare to see a sitting Government sanctioned by Dáil votes of no confidence, or the Dáil enact a law over the objection of the Government.¹⁹¹ The formal power of the Dáil over the Government is heavily conditioned by the:

¹⁸⁶ Muris MacCarthaigh, 'The Role of the Houses of the Oireachtas: Theory and Practice', in Manning and MacCarthaigh (eds.), *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration, 2010) 48; Muris MacCarthaigh, *Government in Modern Ireland* (Institute of Public Administration, 2008) 39.

¹⁸⁷ Stephen Gardbaum, 'Political Parties, Voting Systems, and the Separation of Powers' (n 6) 229-264.

¹⁸⁸ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 164) 47; John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (n 185) 244; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009) 40.

¹⁸⁹ Muris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (n 167) 12; Lia O'Hegarty, 'The Constitutional Parameters of the Work of the Houses of the Oireachtas' (n 183) 103.

¹⁹⁰ Basil Chubb, *The Government and Politics of Ireland* (n 147) 194.

¹⁹¹ Gerard Hogan and David Gwynn Morgan, *Administrative Law* (4th edn, Roundhall, 2012) 53. Gwynn Morgan has written elsewhere that 'The executive power of the State is exercised by the Government. In form, the Government is elected and may be removed and replaced by the Dáil, that is, the lower House of the Oireachtas, or Parliament. However, the reality is a strong party system, which means that the direction of a Dáil deputy's vote is determined not by the merits of the case or the cogency of Dáil debate, but by the dictate of the party in whose colours the deputy won election.' See also Eoin Daly, 'Residual Conventions of the Irish Constitution: the Incongruous Example of Collective Responsibility' (n 182) 725; David Gwynn Morgan, 'The Separation of Powers in Ireland' (1988) 7 *St Louis University Public Law Review* 257.

‘basic fact of political life, which is that a Government can almost always command the support of a majority of deputies, because deputies are elected principally on the basis of which party they have pledged themselves to support in the Dail’.¹⁹²

In many respects then, the legislature and executive can be regarded as twin engines driven by the same motor of the political party apparatus. The discipline of political parties ensures in many respects that Ireland’s form of separation of powers is ‘fundamentally bipartite’. Involving the Oireachtas /government on the one hand, and courts on the other.¹⁹³ The executive typically exercises close control over the legislative process, and can usually rely on its loyal majority or plurality to determine the priority in which a bill will be considered, how long will be spent debating the bill, and when to advance it to the next stage.¹⁹⁴ For example, Irish governments frequently rely on their party majorities to ‘guillotine’ debate on a bill or motion when convenient, a drastic parliamentary procedure which allows members to ‘determine that the time for debate has elapsed’ and that all further stages be resolved in single vote.¹⁹⁵ This procedure is not reserved to trivial issues, but has even been deployed to abruptly end parliamentary debate in respect of bills involving potentially serious economic, social, and political ramifications.¹⁹⁶

The executive’s de facto power over the Dáil is also not offset by institutional competition from the upper chamber of the Oireachtas. For a start, formal powers allocated to the upper house of the Oireachtas - the Seanad - are modest.¹⁹⁷ The Seanad has also not escaped the influence of party politics. Election to the Seanad takes place via indirect voting through an electorate largely made up of members of city and county councils, current deputies of the lower house, and outgoing Senators. This voting is overwhelming based on the party affiliation of the electors. This, combined with the Taoiseach’s power to appoint 11 of 60 senators, ensures the Seanad is invariably subservient to the current executive, posing no real institutional barrier to its policy agenda.¹⁹⁸

¹⁹² Gerard Hogan & David Gwynn Morgan, *Administrative Law* (n 191) 53.

¹⁹³ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 164) 46.

¹⁹⁴ *Ibid* 84-85.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid*.

¹⁹⁷ David Kenny, ‘The failed referendum to abolish the Ireland’s Senate: defending bicameralism is a small and relatively homogenous country’ in Richard Albert, Antonia Braggia, and Cristina Fasone (eds.), *Constitutional Reform of National Legislatures: Bicameralism under Pressure* (Edward Elgar, 2019) 163.

¹⁹⁸ Chubb offers the following biting assessment of the position of the Seanad in the constitutional order: ‘the prestige of Seanad Eireann was, and remains, low. To most, it seems like a leisurely body that is merely another selection of party politicians chosen in an unnecessarily complicated and not particularly democratic manner. Were it to disappear, it would not be missed’. Basil Chubb, ‘Government and Dail: Constitutional Myth and Political Practice’ (n 170) 94. Chubb was perhaps half-right. While the Irish people rejected an attempt to make the Seanad disappear in a 2013 referendum,

Due to the executive's usual ability to command a reliable Dáil and Seanad majority through the party system, it has been suggested that after a draft bill is approved by cabinet, it will tend to pass through both Houses and become law in more or less the same form,¹⁹⁹ and largely unaltered by the Oireachtas. This is premised on the dual assumption that back-bench deputies of the executive party will not vote against their own party colleagues in government, while opposition amendments are likely to be rejected or significantly altered.²⁰⁰ There is a great deal of enduring truth to this assertion and its underlying assumptions, and it is not for nothing the Dáil has been subject to sustained academic and political critique on the basis of its perceived excessively subordinate position vis a vis the executive.²⁰¹

Examples of executive predominance over policymaking

Three recent examples provide stark insight into how the political executive, and especially the Department of Taoiseach, are undoubtedly the central actors co-ordinating and driving the most consequential national policies the State will pursue.²⁰² First, the executive's core role in facilitating and implementing Social Partnership policies largely with minimal parliamentary input. Second, its role in co-ordinating the state's response to serious fiscal crisis post-2008, which again was almost entirely executive led. Third, the executive's reliance on the financial provisions of the Constitution to stymie private members bills during a period of extended minority government.

From the late 1980's to mid 2000's, Social Partnership became a flagship policy pursued by successive governments. It involved corporatist-style economic and social collaboration between government and powerful interest groups such as trade unions, business representatives, farmers, and organisers from the voluntary sector - in an attempt to tackle economic stagnation, high taxes, and high national debt.²⁰³ The Department of Taoiseach became the central forum through which government departments and these various groups

widespread dissatisfaction and demand for reform remain. For a scathing account of the Seanad's utility *See* Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 164) 66-68. Doyle describes the institution as a helpful 'creche, convalescent home and retirement community for professional politicians, who have not managed to be elected to the real seat of power, the Dáil.'

¹⁹⁹ Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press, 2015) 105.

²⁰⁰ Muiris Mac Carthaigh, *Accountability in Irish Parliamentary Politics* (n 167) 11.

²⁰¹ *See* John O'Dowd, 'Parliamentary Scrutiny of Bills' in Muiris MacCarthaigh and Maurice Manning (eds.), *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration, 2009).

²⁰² Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' in O'Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration, 2012) 42-43.

²⁰³ Maura Adshead, 'The Exercise and Impact of Social Partnership' in O'Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration, 2012) 174-175.

negotiated the terms of these wide-ranging agreements. Agreements which carried very significant social and economic implications for the state.²⁰⁴ The Department also played a critical role in delivery of the objectives eventually agreed in these partnership agreements.²⁰⁵ These entailed enormous coordinating efforts to implement given they implicated tax, employment, health, education, social welfare policies - spanning the whole spectrum of governmental departments and administrative bodies.²⁰⁶ The executive's political authority and dominance through the party-system became crucial to ensuring partnership agreement objectives were included in government legislative programmes and eventually the Oireachtas.²⁰⁷ These developments, much with minimal Oireachtas input, highlight the coordinating authority of the political executive and Taoiseach over crucially important national economic and social initiatives.

While the onset of the economic crisis might have crushed social partnership, it did not diminish the capacity of the political executive's ability to co-ordinate and implement its social or economic vision through the administrative apparatus. With the implosion of Finna Fail in the 2011 general election, the vacuum left by the hobbled Cowen government's demise was swiftly filled by a strong executive ready to implement stringent cuts to public spending and increases in taxation; policies pursued without consulting or negotiating with previous social partners.²⁰⁸ The Fine Gael/Labour government commanded the largest parliamentary majority in the history of the state. This fact, combined with the scale of the social and economic challenge faced by the state, pushed the executive to maintain centralisation over policymaking and activity of the administrative state. Part of this response involved creation of a 'War Cabinet', comprised of the Taoiseach, Tánaiste, Minister for Finance, Minister for Public Expenditure, their main advisors and some senior officials – around 13 individuals.²⁰⁹ Dubbed the Economic Management Council (**'EMC'**), this body met weekly to discuss key economic issues, and strategic management of the economic crisis.²¹⁰ Officially, the group was a Cabinet sub-committee which only made recommendations to the full Cabinet. However, the ECM attracted criticism from some quarters on the basis it was supplanting, rather than informing, policy decisions made by Cabinet. Critics alleged that in reality the ECM would make substantive decisions which

²⁰⁴ Ibid 124-125.

²⁰⁵ Ibid 180-181.

²⁰⁶ Ibid 126-127.

²⁰⁷ Ibid 185.

²⁰⁸ Ibid 189.

²⁰⁹ Fintan O'Toole, 'How gang of four runs the country' *Irish Times* (December 16, 2014).

²¹⁰ Fintan O'Toole, 'How gang of four runs the country' *Irish Times* (December 16, 2014).

Cabinet would subsequently sign-off on without any real prospect of challenge or debate. Some went as far as labelling the EMC an unconstitutional infringement of the principle Government shall meet and act as a collective authority responsible to the Dáil.²¹¹ Members of the EMC defended the body as an essential means for coordinating executive action across multiple departments and administrative bodies and making sensitive economic decisions during a time of serious financial and political uncertainty.²¹² These decisions included how to manage the national debt, implement considerable cuts to public sector spending, increases in taxation, and the abolition and merger of administrative bodies. Whatever the validity of these critiques, it is clear this small body exercised very considerable - even unparalleled - political authority over the executive and administrative bodies under its direction.²¹³ The level of cohesion between the executive and Parliament through the party system meant that during the time it operated, the EMC was undoubtedly the most powerful arm of state. It provided a stark example of the centralization of public power and policy-making both toward and within the executive branch in Ireland, a centralization which would be impossible without organized disciplined political parties and backbenchers willing to shore up the policy proposals of their executive party colleagues and leaders.

Executive dominance over policymaking is particularly acute in the realm of financial affairs. Formally speaking, the text and structure of the Constitution envisage a prominent role for both the Government and Dáil in managing the state's finances, which the Supreme Court has described as a 'double lock' on public expenditure as it requires the Dáil and executive to co-ordinate.²¹⁴ Thus, the executive is given responsibility, in Article 28.4.4, with preparing for each financial year Estimates of State Receipts and Expenditure. In turn, Article 17 gives the Dáil oversight of the Government's estimates and authority over their approval, clearly envisaging that it would play a robust scrutiny function. In an effective codification of the Westminster Parliament's Standing Order 48, Article 17.2 also provides that only the executive may introduce a bill of financial significance:

'Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the

²¹¹ Fintan O'Toole, 'How gang of four runs the country' *Irish Times* (December 16, 2014).

²¹² Eamon Gilmore, 'Reflecting on the Progressive Agenda' (12th Annual John Hume Lecture, McGill Summer School, 2012).

²¹³ Brigid Laffan, 'A glimpse inside workings of State's 'war cabinet' *Irish Times* (August 28, 2013).

²¹⁴ *Collins v Minister for Finance* [2016] IESC 73 at para 62.

appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.’

The bones of this provision, which outlines what is referred to colloquially as the ‘Money Message’ procedure, has been fleshed out by Standing Orders and extrajudicial constitutional interpretation.²¹⁵ Order 179 of the Dáil Standing Orders provides that a bill which involves the appropriation of revenue or other public moneys, other than incidental expenses, can only be initiated by the executive. Where expenditure is incidental - when the bill incurs expenditure from pursuing another end - then the Order provides it may be introduced and may pass second stage, but cannot proceed to committee stage without authorisation in the form of a Money Message from the government.²¹⁶ These Standing Orders appear, at first glance, to preserve the executive’s constitutionally assigned function of initiating bills of financial significance for the Dáil to consider, while still allowing non-executive parliamentarians to introduce policies where the primary purpose is not related to taxation or expenditure. During periods of majority or coalition government, interpretation of these provisions sparked little controversy, as party discipline militated against attempts by non-executive members of the Oireachtas to cultivate parallel policymaking space.

However, during the tenure of the 2016-2020 Fine Gael minority government, these provisions were leaned on aggressively by the executive to stymie Private Members Bills (‘PMBs’). The number of PMBs introduced during this time dramatically increased²¹⁷ and dozens passed Second Stage debate. After passing Second Stage, most of these PMBs were stalled at Committee stage awaiting money messages²¹⁸ and only minority of these bills were ruled either not to require money messages or were granted money messages by the government.²¹⁹

²¹⁵ David Kenny and Eoin Daly, ‘Opinion on the Constitutional Limits of the “Money Message” Procedure under Article 17.2 of the Constitution of Ireland’ May 2019 available at https://www.academia.edu/40448056/Opinion_on_the_Constitutional_Limits_of_the_Money_Message_Procedure_under_Article_17.2_of_the_Constitution_of_Ireland.

²¹⁶ The Library and Research Service of the Oireachtas offers the following, unofficial definition: ‘Such incidental expenses may include the research, consultation and development of a new policy, its implementation, monitoring, a subsequent review process and possible enforcement costs.’ Catherine Lynch and Darren Lawlor, ‘Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny’ *Oireachtas Library and Research Service Note* (June 14th 2018) at 6-7.

²¹⁷ Catharine Lynch and Darren Lawlor, ‘Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny (updated Note)’ *Oireachtas Library and Research Service Note* (30th May 2019) 3-4.

²¹⁸ *Ibid* 17.

²¹⁹ *ibid* 18.

However, for a majority of bills the Money Message procedure was deployed by the executive to ground their progress to a halt, with the executive largely refusing to issue a Message or to offer reasons for their decisions. The few refusals which did offer a reasoned basis cited excessive cost as the reason for not granting a Money Message.²²⁰ On these occasions, the executive argued the proposals effectively interfered with its constitutional prerogative of introducing bills with significant financial consequences. But it eventually became clear that the executive was, in fact, interpreting Article 17.2 in a highly expansive manner, which effectively transformed the provision into a de facto veto over PMB's. In December 2019, commenting on the controversy around the Money Message, Taoiseach Leo Varadkar made it clear that the government felt entitled to refuse for several reasons, only one of which related to money, with two relating to legality and one to simple preference of its own legislation:

‘Essentially, there are four grounds. First, if it requires money that has not been voted for by the Oireachtas... The second ground relates to whether a Bill is unconstitutional... The third ground relates to whether the legislation is contrary to European law or international treaties... The fourth ground relates to circumstances where the Government is introducing legislation that supersedes a Private Members’ Bill... It is common for the Government to... put forward legislation which is better, and which does much the same thing.’²²¹

The text and structure of the Constitution envisage executive-legislative co-ordination over financial policy, reserving the right of initiative over significant financial policies to the executive, and robust space for critique and scrutiny to the Dáil. However, the Constitution certainly does not envisage the entire sweep of the Oireachtas’ law-making function being conditional on executive consent or initiative. The executive’s ability to maintain a tight grip over the legislative process through aggressive and strained reliance on hitherto obscure provisions of the Constitution, even during an extended period of minority government, is thus a clear reflection of just how deeply embedded Ireland’s culture of executive dominance has become. That the executive was able to stymie non-executive policymaking in this manner, without much political blowback, highlights how it is an entrenched aspect of Ireland’s constitutional culture that political actors, elected and unelected, believe that the

²²⁰ Department of Housing, Planning & Local Government, ‘Reasoned response to the request for a money message in relation to the Local Government (Town Councils Commission) Bill 2017’.

²²¹ Dáil deb 4 December 2019 vol 990 no 5.

normal and proper operation of constitutional politics sees the executive enjoying a monopoly in the legislative and policymaking sphere. On this view, there is a constitutional expectation that the executive not only *is*, but *ought* to be the dominant actor, and the Oireachtas appropriately acts only in a reactive capacity to give scrutiny, imprimatur, and the force of law to executive proposals. This dominance, which is central to the effective allocation of constitutional power in Ireland, was undoubtedly cemented through many decades of intense party-discipline and executive-legislative fusion.

Increase in Oireachtas institutional capacity

All that said, as with the UK Parliament, the institutional capacity of the Oireachtas should not be caricatured.²²² For a start, political parties act as a variable on executive power that can empower or constrain, depending on whether a government commands a majority or acts with a coalition or minority. Both coalition and minority government have become frequent fixtures of Irish political life.²²³ Both scenarios make it more difficult for the executive to leverage predominance over Parliament. Thus, an executive leading a coalition government may well be faced with the possibility of finding themselves pursuing policies they would reject if they commanded a majority,²²⁴ ensuring they lack the legislative efficiency enjoyed by the fusion guaranteed by a majority party government.²²⁵ Minority governments can similarly act to disempower the executive, as where a government enjoys a plurality but not a majority of parliamentary seats, a moderate measure of inter-branch competition can emerge. In this way, minority government in Ireland can resemble divided governments in presidential systems where different parties control the presidency and legislature.²²⁶ An executive in a minority government will generally be less able to pass its full legislative and policy agenda, and Parliament may command a greater institutional role over policy formulation.²²⁷ Irish minority governments are much more likely to see its policy proposals defeated or modified by Parliament than a majority government. Minority governments are also clearly more susceptible to collapse and votes of no confidence.²²⁸ Even if not at immediate threat of a no confidence vote, for example, where a minority government is

²²² O'Malley suggests that 'government control of parliament is easily and frequently exaggerated. While we rarely see overt divisions between the two, executives are sensible to remain aware that they govern with the support of parliament...their power may not be easily observable, but this does not make it any less real'. Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' (n 202) 37.

²²³ Richard S. Conley and Marija A. Bekafigo, 'No Irish Need Apply? Veto Players and Legislative Productivity in the Republic of Ireland, 1949-2000' (2010) 43 *Comparative Political Studies* 91, 93.

²²⁴ Richard Albert, 'Fusion of Presidentialism and Parliamentarianism' (n 87) 570.

²²⁵ *Ibid.*

²²⁶ *Ibid.* 565.

²²⁷ *ibid.* 565.

²²⁸ *ibid.* 566.

maintained by a memorandum of understanding with another opposition party - as the Irish executive was from since 2016-2020 - its legislative efficacy is undoubtedly lessened.²²⁹ Indeed, it is fair to say the current experience of minority government has moved the constitutional order toward something approximating the tripartite separation of powers outlined in Arts 6, 15 and 28.²³⁰ As Doyle puts it, for the first time in the history of the State the executive may be forced to introduce and faithfully execute legislation with which it might profoundly disagree.²³¹ Even with the executive's aggressive use of the Money Message procedure, recounted above, this undoubtedly represents a significant shift in the constitutional balance of power between the executive and Parliament – a relatively major change in how the Constitution operates.²³² The fact this change was not due to a statutory or constitutional amendment, but party politics and electoral shifts, highlights the crucial importance to political parties to the effective allocation of constitutional power, and practical functioning of government. Even strong majority governments are sensitive to what is acceptable to Parliament, both to its own backbenchers and the opposition. Few executives would attempt to press through proposals that Parliament would be sufficiently opposed to,²³³ and although this power may not be 'easily observable' it does 'does not make it any less real'.²³⁴

Aside from party political variables, relatively recent political developments are an additional caveat which must accompany statements emphasizing the fusion of the executive and parliament, at least to the extent it implies the Oireachtas has no input during or prior to the legislative process.²³⁵ One reason for this caveat stems from the fact that since 2011, successive governments have pioneered several initiatives which have bolstered the institutional power of Parliament. The introduction of a secret ballot to elect the Ceann

²²⁹ cf Richard S. Conley and Marija A. Bekafigo, 'No Irish Need Apply? Veto Players and Legislative Productivity in the Republic of Ireland, 1949-2000' (n 223) 91-118. However, it should be noted the time frame for this study is 1949-2000 and thus misses several years from the beginning of the State and the last 19 years of government.

²³⁰ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 164) 97.

²³¹ *ibid* 62.

²³² Stephen Coutts, 'Constitutional mutation in the Shadow of the EuroCrisis: the case of the Oireachtas' (2018) 60 *Irish Jurist* 67, 71.

²³³ Michael Gallagher, 'The Oireachtas: President and Parliament', in John Coakley and Michael Gallagher (eds.), *Politics in the Republic of Ireland*, (n 185) 177.

²³⁴ Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' (n 202) 37.

²³⁵ A recent article authored by several Irish political scientists assessing the impact of pre-legislative scrutiny and several other recent political reforms has suggested that: 'The reforms made in the thirty-first and thirty-second Dáil Éireann represent the most substantial changes to the operation of the Dáil since it was formed. These changes shift Ireland substantially on the scale of government control of the parliament... In particular, the election of the Ceann Comhairle by secret ballot, the creation of the Business Committee, pre-legislative scrutiny and the allocation of committee chairs on the basis of proportionality can strengthen the parliament.' Catherine Lynch, Eoin O'Malley, Theresa Reidy, David M. Farrell, Jane Suiter, 'Dáil reforms since 2011: Pathway to power for the 'puny' parliament?' (2017) 65 *Administration* 37–57, 55.

Comhairle²³⁶, creation of a standing Business Committee to allocate Parliamentary time on a more proportionate basis between government and opposition parties²³⁷, and the introduction of the *D'Hondt* system to allocate chairmanship and membership of committees are all significant to Parliament's institutional power. The latter two measures dilute the ability of the government to dominate parliamentary time, underscoring the independence of committees, and counteracting the ability of government to exercise tight control over their policy and scrutiny work.²³⁸

Allied to this has been introduction of pre-legislative scrutiny to the Oireachtas.²³⁹ This process involves Parliament, through its committees, scrutinising draft legislation of government departments and reporting its concerns, views, and recommendations before a more final version of a bill has been drafted and formally introduced to the houses.²⁴⁰ If initiated, PLS can involve public hearings involving the calling of department officials to explain the heads of bill; the invitation of written and oral submissions from a range of advocates, interest groups, and stakeholders relevant to the bill; and a committee report providing judgment and recommendations based on issues arising during the scrutiny of the bill. The introduction of PLS has provided Parliament with the institutional means to exercise greater contestatory power over policy choices and the form of their implementation during the legislative process. This innovation has undoubted implications for the allocation of power between the executive and Parliament, and is a potentially solid means of strengthening the capacity of Parliament to robustly scrutinize government proposals, through giving it greater opportunity to influence policy-making through public analysis, critique, and feedback on draft legislation.²⁴¹ Through these innovations parliamentary committees now enjoy greater contestatory power in respect of policy formulation, through their authority to scrutinize draft bills and report its recommendations

²³⁶ Speaker of the Dail.

²³⁷ An amendment to Dail Standing Orders in 2016 allowed for the establishment of a business committee responsible for the scheduling and timetabling of Dail business. The Business Committee is cross-party and it operates on the basis of consensus, although ultimately its decisions may be put to a vote in the chamber in the event of disagreement. This committee settled on a division of the available Dail time between Government and Opposition on a 60/40 basis. Previously this government would invariably use its majority to allocate itself the lion's share of parliamentary time.

²³⁸ Catherine Lynch, 'The effect of parliamentary reforms (2011–16) on the Oireachtas committee system' (2017) 65 *Administration* (2017) 59–87.

²³⁹ Catherine Lynch and Shane Martin, 'Can parliaments be strengthened? A case study of pre-legislative scrutiny' (2019) *Irish Political Studies* 1–20.

²⁴⁰ Oireachtas Library & Research Service, *Research Note: 'Pre-legislative scrutiny (PLS) by parliament'*, See http://data.oireachtas.ie/ie/oireachtas/libraryResearch/2014/2014-12-18_spotlight-pre-legislative-scrutiny-by-parliament_en.pdf.

²⁴¹ Catherine Lynch and Shane Martin, 'Can parliaments be strengthened?' (n 239); Catherine Lynch, Eoin O'Malley, Theresa Reidy, David M.Farrell, Jane Suiter, 'Dail reforms since 2011: Pathway to power for the 'puny' parliament?' (n 235).

to government before a final version of the bill is formally introduced to Parliament.²⁴² These institutional innovations are no doubt amongst the most far-ranging in the history of the state.²⁴³

CONCLUSION

The development of mass democracy and political parties altered the logic of separation of powers norms premised on the notion that branches of government can be personified as actors with interests and wills of their own; and locked in struggle to safeguard their own institutional power.²⁴⁴ The institutional make-up of Parliament, how it is elected, conducts its internal business and is resourced, all undoubtedly have a substantial impact on their functioning and output.²⁴⁵ Factors which will of course differ in each system. However, it is also clear political parties, in both presidential and parliamentary systems, have grown to become a central extraconstitutional mechanism driving the institutional behavior of governmental actors. In particular, they facilitate greater levels of cohesion between the legislature and executive in the pursuit of a similar political vision and place the executive in the seat of policy-making.²⁴⁶ This cohesion became particularly strong in Westminster parliamentary systems, leading to a large degree of fusion between the branches and allowing the nominally weak executive to effectively leverage dominance over Parliament in terms of agenda setting and policy formulation. In presidential systems, the impact of disciplined organized political parties on the executive branch is more complex and nuanced but can bear familial resemblance during periods of unified government when the presidency and majority of Congress are drawn from the same party.

The effect of the close fusion between the legislature and executive secured through the political party apparatus should not be overstated. For a start, the legal principles demarcating their respective institutional authority are not wholly redundant. Even while a Westminster-style parliamentary system like the United Kingdom and Ireland may fuse

²⁴² An independent report prepared for the Oireachtas Library & Research Service on the impact of PLS concluded that there is 'clear evidence...that the introduction of PLS has had a positive impact on the law-making process and, more generally, the role of the Oireachtas as the central organ of representative democracy in Ireland.' Shane Martin, 'The impact of pre-legislative scrutiny on legislative and policy outcomes' *Oireachtas Library & Research Service* (December, 2017).

²⁴³ Catherine Lynch, Eoin O'Malley, Theresa Reidy, David M. Farrell, Jane Suiter, 'Dáil reforms since 2011: Pathway to power for the 'puny' parliament?' (n 235) 55; Government's Response to the Constitutional Convention's Report on Dáil Reform, https://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government%E2%80%99s_Response_to_the_Constitutional_Convention%E2%80%99s_Report_on_Dail_Reform.html.

²⁴⁴ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (n 1) 3.

²⁴⁵ Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (n 167) 40-41.

²⁴⁶ *Ibid.*

executive and legislative personnel, it retains a separation of executive and legislative functions since the executive must retain the confidence of the legislature, which must in turn approve the executive's plan for governing.²⁴⁷ Put simply, the executive does not enjoy, and would never claim to, enjoy unilateral law-making power. For all its weaknesses, the legislature remains the preeminent public institution for legitimating political power.²⁴⁸ Even if its influence over policy and law-making is frequently more rhetorical than real, this totemic quality itself underscores an important aspect of constitutionalism in these systems. As noted in Chapter I, while a legal actor like the executive can relatively easily get around these kinds of norms by, for example, using mechanisms like political parties to gain broad delegations of administrative and regulatory power from the legislature. But even seeking to overcome these limiting norms in this fashion means they do so by first elaborately honouring them, by bowing to the legislature's formal predominance and not circumventing it.²⁴⁹ The extent to which these basic principles are so rarely challenged underscores this importance. Second, the impact of political parties on separation of powers norms in parliamentary systems is a two-way ratchet – able to empower or disempower an executive depending on whether it commands a majority, governs through coalition, or acts as a minority government; or in the case of the United States, whether there is unified or divided government. Third, it is possible to cultivate the distinct institutional power of the legislature, whether through promoting a greater role over agenda-setting and policy formulation, developing strong committee systems, and ensuring Parliaments are properly resourced.

These caveats noted; political parties have undoubtedly become a crucial extraconstitutional development which help account for the increased political predominance of the executive in each system. Far from being a modest and faithful agent of a predominant legislature, the contemporary executive is the chief policymaker of the State; enjoying the main say over the direction of public power. The growth of disciplined political parties, alongside the executive's increasingly prominent role in the shaping of legislation designed to regulate economic and social life, led to growing expectation that it could be looked to for resolution of a broader and wider range of political problems than before. The cumulative impact of these shifts cemented the executive's role as principal political leader in steering and

²⁴⁷ The text of the Constitution places this express duty on *Dáil Éireann*, through Article 28.4.1, which states that the 'Government shall be responsible to Dáil Éireann'. See Richard Albert, 'Presidential Values in Parliamentary Democracies' (2010) 8 *International Journal of Constitutional Law* (2010) 207–236.

²⁴⁸ Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (n 167) 11.

²⁴⁹ Stanley Fish, 'The Law Wishes to Have a Formal Existence', in Stanley Fish, *There's No Such Thing as Free Speech: and It's a good thing too* (Oxford University Press, 1993) 163; Jenny S. Martinez, 'Horizontal Structuring' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 556.

managing the polity. This shift to predominance was copper-fastened and exacerbated by a further development in each system – the rise of the administrative state.

CHAPTER III: EXECUTIVE ENABLED: THE IMPACT OF THE ADMINISTRATIVE STATE ON EXECUTIVE POWER

INTRODUCTION

This chapter argues the capacity and power of the contemporary executive, its ability to achieve political objectives using public power, is closely linked to socio-political changes driving the rise of the administrative state. By ‘administrative state’ I rely on Metzger’s comprehensive and useful definition, which she posits encompasses the:

core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads... and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration.¹

In each system, increased state activity in social and political life spurred a move toward new forms of governance, designed to better meet challenges posed by its unprecedented levels of involvement. The challenges which spurred the administrative state apparatus exposed the inadequacy of traditional law-making, whether through primary legislation or common law adjudication,² as a means of reconciling political expectation and state capacity. This inadequacy helped spur creation of a potent administrative apparatus and an expansion in the law-making activity of the executive branch; facilitated by legislative willingness to delegate vast statutory authority to the political executive and administrative bodies under its direction.³ This was in turn aided by judicial articulation of relaxed legal rules and standards to govern administrative power, which will be explored in detail in chapter six. The executive-led administrative state was ultimately created and nurtured from the structure of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order.⁴

¹ Gillian E. Metzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (2016) 131 Harvard Law Review 1,8.

² Adrian Vermeule, *Law and the Limits of Reason* (Oxford University Press, 2008) 109; Lon L. Fuller, ‘The Form and Limits of Adjudication’ (1978) 92 Harvard Law Review 353-409.

³ Patrick Dunleavy and R.A.W Rhodes, ‘Core Executive Studies in Britain’ (1990) 68 Public Administration 3-28.

⁴ See Adrian Vermeule, *Laws Abnegation: From Law’s Empire to the Administrative State* (Harvard University, 2016); Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 435.

This chapter also traces the centralization of political power over the administrative branch apparatus *toward* and *within* the core political executive.⁵ In the context of the United Kingdom and Ireland, this is characterized by concentration of power in the hands of the Prime Minister, senior cabinet members, and their advisory apparatus and staff. In the United States, this involves presidential efforts to leverage greater centralised control and direction over hundreds of administrative bodies wielding power delegated by Congress.⁶ What the president cannot command through engagement with the legislative process, he has increasingly leveraged in his own right through his authority over a formidable federal bureaucracy.⁷

It is beyond the scope of this chapter to enter debate on the political legitimacy of the administrative state, or proper scope of state intervention in social and economic life. These questions are beset by ideological and political dispute, which shape and are shaped by cultural, constitutional, and political context.⁸ My focus is to give a robust explanatory account of why the administrative state evolved the way it did, and how its development led to an increase in the power of the executive. As noted in the introduction to this thesis, I use a workable definition of power common to political and legal theory. One which understands it to consist of the ability to control the outcomes of contested decision-making processes and secure preferred policies or the ability to effect substantive policy outcomes by influencing what the State will or will not do.⁹ To the extent I discuss questions of legitimacy, it is in the context of recounting that each system has developed its own competing and pluralist rationales for the constitutional and political legitimacy of the administrative state. Including arguments from its political accountability to the executive & legislature and the capacity of technocratic expertise to implement good political outcomes useful for securing the common good.¹⁰ The basis for the legitimacy of this increased

⁵ B. Guy Peters, R.A.W Rhodes and Vincent Wright, 'Staffing the Summit – the Administration of the Core Executive: Convergent Trends and National Specificities' in B. Guy Peters, R.A.W Rhodes and Vincent Wright (eds.), *Administering the Summit: Administration of the Core Executive in Developed Countries* (Palgrave, 2000) 21.

⁶ Elena Kagan, 'Presidential Administration' (2000) 114 *Harvard Law Review* 2253-2383.

⁷ Jessica Bulman-Pozen, 'Administrative States: Beyond Presidential Administration' (2019) 98 *Texas Law Review* 266, 272; Harold H. Bruff, 'Presidential Management of Agency Rulemaking' (1989) 57 *George Washington Law Review* 533, 547–49; Christopher C. DeMuth and Douglas H. Ginsburg, 'White House Review of Agency Rulemaking' (1986) 99 *Harvard Law Review* 1075, 1080–82.

⁸ A. Ogus, 'Comparing regulatory systems: Institution, processes and legal forms in industrialised countries' in Paul Cook, Colin Kirkpatrick, Martin Minogue and David Parker (eds.), *Leading Issues in Competition, Regulation and Development* (Edward Elgar, 2005) 146-164.

⁹ Daryl J. Levinson, 'Foreword: Looking for Power in Public Law' (2016) 130 *Harvard Law Review* 1, 33.

¹⁰ See Adrian Vermeule, 'Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State' (2017) 130 *Harvard Law Review* 2463, 2464; Jon D. Michaels, 'An Enduring, Evolving Separation of Powers' (2015) 115 *Columbia Law Review* 515, 553; Daniel Halberstam, 'The Promise Comparative Administrative Law: A Constitutional Perspective on Independent

authority is hotly dispute in academic, legal and political discourse in the United States, but arouses comparatively less concern in Ireland and the United Kingdom.¹¹

Part I of this chapter gives an account of the rise of the administrative state common across each constitutional system, and the broad forces spurring this trend. I primarily focus on the incentives driving the creation of the administrative state apparatus, and expansion of the law-making power of the executive department. Part II considers the mechanisms by which the political executive has tried to centralize control over the administrative state apparatus.

I. RISE OF THE ADMINISTRATIVE STATE

United Kingdom

Administrative bodies exercising statutory power delegated by Parliament are a long-standing feature of English and U.K. public law. As early as the 16th Century, Parliament granted extensive statutory powers to local Justices of the Peace and Commissioners for regulatory purposes like crime control, poor relief, flood protection, and sewer management.¹² Despite the long-standing nature of this apparatus, it did not greatly expand the capacity of the executive or its political predominance over Parliament. Even by the early 19th Century, the executive remained a modestly powerful actor, active mostly in the fields of foreign affairs and maintenance of public order, but not yet the central driving force of domestic policy or director of a potent bureaucracy.¹³

Erosion of institutional political competition between Parliament and the executive from the late 19th century onward, through the party-system, helped the latter leverage control over the legislative process. The growth of disciplined political parties, alongside the Cabinet and Prime Minister's increasingly prominent role in the shaping of legislation designed to regulate economic and social life, led to growing expectation that *the executive* could be looked to for resolution of a broader and wider range of political problems than before. The cumulative

Agencies' in Susan Rose- Ackerman & Peter Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, 2010); Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 41-46; Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983).

¹¹ Adrian Vermeule, 'Bureaucracy and Distrust' (n 10) 2464; Gillian E. Mertzger, 'The Supreme Court 2016 Term Foreword: 1930's Redux: The Administrative State Under Siege' (n 1).

¹² See Paul Craig, 'English Foundations of US Administrative Law: Four Central Errors' (Oxford Legal Studies Research Paper No. 3/2017); Paul Craig, 'The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight' (Oxford Legal Studies Research Paper No.44/2016).

¹³ Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th edition, 2016) 55.

impact of these shifts cemented the executive's role as principal political leader in steering and managing the polity.¹⁴

These changes were eventually accompanied by the rise of the administrative state, which grew out of enormous socio-political shifts in the late 19th and early 20th centuries, a period which saw dramatic upheavals in the form of an industrial revolution, mass expansion of the franchise, and cataclysmic global events like the Great Depression and First and Second World Wars. This same period witnessed very significant momentum for increased state involvement in social and economic life.¹⁵ Including growing expectation for a more activist government role in addressing issues such as education, health, poverty, inequality, and worker safety – and more generally improving material living standards through sound economic management, regulation, and redistribution.¹⁶ Broadly speaking, we can say this period saw an ideological shift from a constitutional system characterized by 'liberal individualism' to acceptance of a broader role for welfarist state intervention.¹⁷ The ideological underpinnings of increased state action were diverse, traceable variously to fears of market abuse, genuine welfarist concern for relieving poverty and destitution, political desire to harness a newly enfranchised electorate, and desire by political actors to defuse or undermine more radical left-wing political movements.¹⁸

This shift eventually culminated in the emergence and growth of a powerful bureaucracy¹⁹ and welfare state²⁰ constituted by dozens of ministerial departments, and hundreds of administrative bodies operating at various degrees of operational distance from the political executive.²¹ Operating outside core ministerial departments, administrative bodies specially dedicated to advise on, regulate, and supervise a given social and economic policy area, became the business end of executive management of the complex challenges facing contemporary government.²² Collectively, the bodies making up the administrative state are

¹⁴ *ibid* 56.

¹⁵ Thomas Poole, *Reasons of State: Law, Prerogative and Empire* (Cambridge University Press, 2015) 214.

¹⁶ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 42.

¹⁷ Thomas Poole, *Reason of State* (n 15) 213; Harold Laski, *The Foundations of Sovereignty* (Brace & Co, 1921) 33-34.

¹⁸ Harold Laski, *The State in the Social Order* (Fabian Publishing, 1922) 4.

¹⁹ Peter Cane, *Controlling Administrative Power* (n 16) 276.

²⁰ For a useful overview of these developments *see* Paul Craig, *Administrative Law* (n 13) 47-55.

²¹ Matthew Flinders, Katharine Domett and Katherine Tonkiss, 'Bonfires and Barbecues: Coalition Governance and the Politics of Quango Reform' (2014) 28 *Contemporary British History* 56-80. For a recent overview of these bodies *see* Cabinet Office, *Public Bodies: 2018-2019* (Cabinet Office, 2019).

²² Katharine Domett, Muiris Maccarthaigh, and Niamh Hardiman, 'Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis' (2016) 29 *Governance: An International Journal of Policy, Administration, and Institutions* 535, 538.

staffed by thousands of personnel and vested with regulatory authority to control and supervise vast areas economic and social activity, which routinely affect the lives of citizens.

In order to meet the growing challenges and expectations on the state, delegation of broad statutory power from Parliament to the executive and administrative state apparatus became an increasing staple of the constitutional order.²³ Attempting to regulate polycentric and intricate problems through the parliamentary process of primary law-making became viewed as impractical and cumbersome.²⁴ Delegated statutory power in the UK takes two primary forms: authority to issue secondary regulations and the vesting of administrative power. The former consists in the laying down of rules under secondary legislation to govern future conduct, based on often little more than vague normative direction from a primary statute enacted by Parliament.²⁵ The latter consists of the authority of making administrative decisions legally binding on the individuals they are directed to.²⁶ Extensive use of both powers by the executive and administrative bodies is testament to their movement to ‘assume managerial responsibilities’ in areas where the ‘complexity and variability of factors’ of the issues they face are too great to tackle with general principles or rules, but require use of open-ended standards and capacious statutory discretion.²⁷

The rapid growth of the administrative apparatus and delegated legislation can be easily illustrated. For example, in the early 19th century, only a modest fraction of parliamentary statutes contained a delegation of broad regulatory authority. However, by the end of the 19th Century this pattern had shifted,²⁸ and by the 20th century around half of a given year's enacted statutes entrusted the executive or subordinate administrative bodies wide administrative and regulatory power to flesh out the bones of a broad policy or normative goal pursued by a primary enactment.²⁹

²³ Craig writes how ‘Few have doubted the continuing need for delegated legislation: 3,292 statutory instruments were made in 2013 and 3,492 such instruments were made in 2014. The exigencies of the modern state have increasingly led to statutes containing delegated power.’ Paul Craig, *Administrative Law* (n 13) 435.

²⁴ N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 69.

²⁵ Edward L. Rubin, ‘Law and Legislation in the Administrative State’ (1989) 89 *Columbia Law Review* 369, 374.

²⁶ Ralph F. Fuchs, ‘Concepts and Policies in Anglo-American Administrative Law Theory’ (1938) 47 *Yale Law Journal* 538, 545.

²⁷ Robert Baldwin, *Rules and Government* (Oxford University Press, 1995) 28; Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Oxford University Press, 1976).

²⁸ J. Beatson, ‘Legislative Control of Administrative Rulemaking: Lessons from the British Experience’ (1979) 12 *Cornell International Law Journal* 199.

²⁹ Cecil T. Carr, *Delegated Legislation* (Cambridge University Press, 1921).

The broad administrative and regulatory authority cut against the traditional ‘transmission belt’ understanding of the legislative process, where the executive merely executes or sketches the less important minute details of a legislative directive.³⁰ Instead, because open-ended statutes typically do not narrowly dictate a normative outcome the executive must faithfully implement, the priorities of executive political actors and their officials often ‘hold sway’.³¹ Executive exercise of regulatory power is best seen, not only as narrow faithful execution, but effectively a broader ‘legislative process of adjusting’ competing claims, interests, and values within broad statutory parameters set by Parliament.³² While the executive does not have free rein, as it must act within statutory constraints, it often drafts these same constraints and does so in a capacious manner.³³ Through such mechanisms, a vast array and depth of decision-making power has been conferred on executive and administrative bodies.

These kind of developments led to serious political disquiet in quarters, with some commentators regarding increased state involvement in economic and social life as anathema to core constitutional principles such as parliamentary supremacy and the rule of law.³⁴ But such disquiet did little to dissuade mainstream political actors that increased state involvement, and the mechanisms of its involvement, were a necessary and practical response to the difficulties of modern government.³⁵ In 1932, the Government established a Committee of Inquiry to consider the legitimacy of bestowing extensive delegated regulatory power on ministers and administrative bodies. The practice was robustly defended in the Committee’s conclusions for several reasons. These included a requirement for greater flexibility in completing and sketching out regulatory details in light of changing circumstances than the legislature can supply; need to free the legislature from concern over the minutiae of legislative detail due to the enormous burden on parliamentary time it would involve; desirability for technocratic expert influence over issues of detail in complicated policy areas; and the necessity to act quickly in event of emergencies where it might be impracticable to summon Parliament.³⁶ The report encapsulated a ‘sea-change’ in political thinking toward the use of administrative rule-making as a policy tool.³⁷ Although still subject

³⁰ See Richard B. Stewart, ‘The Reformation of American Administrative Law’ (1975) 88 Harvard Law Review 1667-1813.

³¹ Robert Baldwin, *Rules and Government* (n 27) 34-35.

³² Ibid.

³³ Thomas Poole, ‘The Spirit of Legislation’ (2019) 9 Philosophy and Public Issues 37, 50.

³⁴ AV Dicey, *Lectures of the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan, 1905) xxxix.

³⁵ H W R Wade, *Administrative Law* (Clarendon Press, 1971) 1.

³⁶ Ralph F. Fuchs, ‘Concepts and Policies in Anglo-American Administrative Law Theory’ (n 26) 545.

³⁷ Peter Cane, *Controlling Administrative Power* (n 16) 279.

to critique for the degree and extent that delegated administrative and regulatory powers are used to regulate policy,³⁸ they remain a ‘universal practice’³⁹ broadly accepted across the political spectrum as a useful, even necessary, tool. A tool required in light of demands placed on the state by the sheer scale and complexity of its activity in socio-economic affairs.⁴⁰

These developments – emergence of a powerful administrative apparatus to implement the executive’s agenda, and the delegation of statutory power from Parliament – span ideological divides. In other words, they remain relatively constant in the face of division over the appropriate form of state involvement in social and economic life – whether it takes a positive, or aggressively deregulatory, role. Executives, whether staffed by neoliberal ideologues or social democratic stalwarts, have pursued their policy goals in respect of social and economic life through a strong administrative state apparatus armed with capacious discretion.⁴¹

Ireland

A good starting point for tracing the development of the administrative state in post-independence Ireland is the Ministers and Secretaries Act 1924. This Act sought to provide a core structure for the new Free State’s administrative system, one characterized by strong executive and parliamentary control.⁴² The Act provides and remains the primary coordinating and controlling mechanism for the administrative state apparatus. The objective of the first post-independence Free State government was to replace the disaggregated system of boards and offices making up the system of British administration, with a uniform system through which the executive and legislative power of the state was exercised directly vis-à-vis a few core executive departments, so that the Dáil in turn could exercise robust overall policy control and direction.⁴³ While undoubtedly reflective of democratic ideals, the desire for control also stemmed from lingering resentment of the political classes toward the civil service, some of whom served in the pre-independence British administration.⁴⁴ Under the Act, each Department and its powers and functions are

³⁸ Gabriele Ganz, ‘Delegated Legislation: A Necessary Evil or Constitutional Outrage?’ In Peter Leyland & Terry Woods (eds.) *Administrative Law Facing the Future* (Blackstone Press Limited, 1997) 60-82; Lord Hewart, *The New Despotism* (Ernest Benn, 1929).

³⁹ Eric Barendt, ‘Separation of Powers and Constitutional Government’ (1995) *Public Law* 599, 604.

⁴⁰ Paul Craig, *Administrative Law* (n 13) 435.

⁴¹ Martin Loughlin, ‘In Search of the Constitution’ *LSE Law, Society and Economy Working Papers 19/2019* (2019); Matthew Flinders, Katharine Dommert & Katherine Tonkiss, ‘Bonfires and Barbecues: Coalition Governance and the Politics of Quango Reform’ (n 21) 62.

⁴² Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (4th Edition, Roundhall, 2010) 27.

⁴³ *Ibid* 88.

⁴⁴ Martin Maguire, *The Irish Civil Service and the Revolution in Ireland, 1912-1938* (Manchester University Press, 2008) 175-176.

assigned to and administered by the Minister of that Department.⁴⁵ Nuance has been added to this position following the Public Service Management Act 1997, which provided that the most senior civil servant in a Department, the Secretary-General, carries responsibility for the administration and execution of policies determined by its Minister.

While the 1924 Act aspired to centralise control over policy-making and execution in a small number of government departments; the Irish administrative state apparatus grew steadily from the late 1920's, and rapidly since the 1990's.⁴⁶ Intense centralisation was no sooner achieved than it began to break down, with the emergence of new administrative bodies designed to co-ordinate and implement the policy objectives of the political branches.⁴⁷ The first half-century of the Irish State saw a consistent pattern of growth of government Departments and statutory and non-statutory administrative bodies. The number of statutory bodies doubled from 50 to 112 between 1921 and 1958. Part of this growth reflects a strong state role over economic activity from the earliest days of independence, including over areas such as electricity generation, food processing, and provision of credit through state owned banks. In addition, emergence of an Irish welfare state was reflected in the creation of several Departments and administrative bodies dealing with citizens health and social security in the 1940's.⁴⁸ The latter half of the century and dawn of the new millennium saw the administrative state grow ever larger.⁴⁹ Between 1990-2008, an average of 1.6 administrative bodies were being created per month. Prior to the economic crisis of 2008, the number of public bodies - including government Departments and administrative bodies – stood around 400.⁵⁰ The economic crisis ushered in a period of administrative body contraction, as a rapid decline in public finances led the executive to abolish, merge, or reconsolidate dozens of them.⁵¹ However, as of 2020, after a period of economic recovery, the number of administrative bodies still remains in the hundreds.⁵² As in the U.K., these

⁴⁵ S.1 of the 1924 Act.

⁴⁶ Muiris MacCarthaigh, 'Politics, Policy Preferences and the Evolution of Irish Bureaucracy' A Framework for Analysis' (2012) 27 *Irish Political Studies* 23, 35-36.

⁴⁷ T.J. Barrington, *The Irish Administrative System* (Institute of Public Administration, 1980) 25-27.

⁴⁸ Muiris MacCarthaigh, 'Politics, Policy Preferences and the Evolution of Irish Bureaucracy' (n 46) 29; Niamh Hardiman and Muiris MacCarthaigh, 'Organising for Growth: Irish State Administration' (2010) 41 *Economic and Social Review* 367, 372.

⁴⁹ Koen Verhoest, Paul G. Roness, Bram Verschuere, Kristin Rubecksen, and Muiris MacCarthaigh, *Autonomy and Control of State Agencies: Comparing States and Agencies* (Palgrave Macmillan, 2010) 86-87.

⁵⁰ The precise number is contested. Various sources pitch the number between 350-600. Niamh Hardiman and Colin Scott, 'Governance as Polity: An Institutional Approach to the Evolution of State Functions in Ireland' (2010) 88 *Public Administration* 170, 173.

⁵¹ Katharine Dommett, Muiris MacCarthaigh, and Niamh Hardiman, 'Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis' (n 22) 543.

⁵² *Ibid.*

bodies are staffed by thousands of personnel⁵³ and vested with regulatory authority to control and supervise vast areas economic and social activity⁵⁴ routinely affecting the lives citizens in the State.⁵⁵

An enormous range of decision-making power is conferred on these bodies, and the power they wield is a pervasive facet of Irish society, as they often perform functions central to the individual and collective welfare of citizens.⁵⁶ This statutory power takes two primary forms – authority to issue secondary legislation and administrative power. The former consists in the laying down of general rules under secondary regulations promulgated to govern future conduct based on often vague normative direction from a primary statute enacted by the Oireachtas.⁵⁷ Legislation passed by the Oireachtas often only specifies a broad policy goal to be achieved, but leaves a considerable level of discretion to the executive or administrative body when it comes to achieving it.⁵⁸ The vagueness of these statutory directives often give the executive a more or less ‘free hand’ to shape public policy in the area addressed by the statute.⁵⁹ Use of secondary regulation by the executive has steadily increased, and by now far outstrips the primary law-making activity of the Oireachtas.⁶⁰ For example, the average annual number of Statutory Instruments promulgated in the 1960’s stood around 284, but in the period between 2010-2016 had risen to 650. In the same 2010-2016 period the average amount of primary legislation passed was 45.⁶¹ The other legal power vested in the executive and administrative body consists in the making of administrative decisions binding on the individuals they are directed to.⁶² These kinds of state power are typically more immediately relevant to the lives of most individuals than matters of high constitutional politics. The legal entitlements of both citizens are more likely to be determined by administrators wielding discretionary statutory power than a judgment by an Article 34 judge, or through primary legislation passed by the Oireachtas.⁶³ For example, decisions on whether to grant or

⁵³ Gerard Hogan and David Gwynn Morgan, *Administrative Law* (n 42) 94. As of 2012 the number of individuals employed by a public-sector body stood at around 294,000, including 36,000 civil servants. Although this figure includes personnel of the Oireachtas and Judiciary, by far the largest number of staff are employed by a body charged with assisting the formulation and implementation of executive policies.

⁵⁴ *Meadows v Ireland* [2010] IESC 3, para 38.

⁵⁵ *Ibid.*

⁵⁶ Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018); Paula Clancy, ‘Beholden to No-One: Public Bodies, Patronage and Probity’ (2009) 98 *Studies: An Irish Quarterly Review* 19.

⁵⁷ Edward L. Rubin, ‘Law and Legislation in the Administrative State’ (n 25) 374.

⁵⁸ *Ibid.*

⁵⁹ John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (6th edn. Routledge, 2017) 258.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (n 56); Ralph F. Fuchs, ‘Concepts and Policies in Anglo-American Administrative Law Theory’ (n 26) 545.

⁶³ Eoin Carolan, ‘Democratic Accountability and the Non-Delegation Doctrine’ (2011) 33 *Dublin University Law Journal* 220, 252.

withhold social welfare benefits, grant or refuse permission to be in the state, give planning permission, grant a license to serve alcohol, adjudication over disputes between landlords and tenants, or employers and employees, all turn on important administrative power vested in an administrative body or a Minister. These are typical of the kinds of administrative powers exercised on a day-to-day basis by officials, but with significant impact on citizen's lives. Only a fraction of these decisions will ever face judicial scrutiny.

There is no evidence to suggest this sustained increase in the administrative state apparatus came about as a conscious political plan to increase executive capacity,⁶⁴ but has been attributed to several diverse forces. Including increasing complexity in the national policy-making environment,⁶⁵ a means to better embed powerful social and interest groups in policy formulation, a consequence of European Union legislative requirements,⁶⁶ and a result of reforms advocating delegation of ostensibly technocratic tasks from direct political control to moderately independent administrative bodies.⁶⁷ But while the development of the Irish administrative state may reflect a multitude of competing ideological goals and value commitments, some forces remain relatively constant when viewed at a high-level of abstraction.⁶⁸ For example, allied to – indeed subsuming – the trends above are long-standing pressures like greater political expectation and demand from citizens for state involvement in social and economic life.⁶⁹ The responsibilities of the national government have burgeoned over the life of the state, and there exists widespread political consensus that government-led initiative is the natural solution to combatting economic and social-ills.⁷⁰

Most legal academic and judicial commentary on the rise of the administrative state apparatus have explained its development in terms of *pragmatism* and *necessity*. A real-world awareness of the limitations of the legislative process in the administrative state when attempting to

⁶⁴ Clancy argues in a critical vein that 'public bodies have been developed in an *ad hoc* manner, without a coherent rationale underlying their establishment. This has resulted, at best, in a fragmented public service and, at worst, high levels of duplication and 'dumping' of responsibilities from central government to public bodies, and between public bodies'. Paula Clancy, 'Beholden to No-One: Public Bodies, Patronage and Probity' (n 56) 19. See also Niamh Hardiman and Muiris MacCarthaigh, 'Organising for Growth' Irish State Administration' (n 48) 379.

⁶⁵ Eoin O'Malley and Muiris MacCarthaigh, 'Introduction: The Context for Governing Ireland' in O'Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration, 2012) 5.

⁶⁶ For example, the creation of the Commissioner for Communication Regulation, Commissioner for Energy Regulation and Commissioner for Aviation Regulation were all done on foot of EU Directives. Niamh Hardiman and Muiris MacCarthaigh, 'Organising for Growth' (n 48) 386.

⁶⁷ Ibid 379. Muiris MacCarthaigh, *National non-commercial State Agencies in Ireland* (Institute of Public Administration, 2010) 11.

⁶⁸ Ibid 382.

⁶⁹ Gerard Hogan, David Gwynn-Morgan, and Paul Daly, *Administrative Law in Ireland* (5th edn, Roundhall, 2019) 17.

⁷⁰ Niamh Hardiman, 'Introduction: Profiling Irish Governance' in Niamh Hardiman (ed.), *Irish Governance in Crisis* (Manchester University Press, 2012) 4-5.

grapple with social and political difficulties.⁷¹ Some regard creation of the administrative apparatus, and delegation of law-making power to the executive, as a pragmatic requirement critical to navigating the complexities of government. By providing greater flexibility and speed when addressing policy issues than a multi-member and generalist legislature can supply,⁷² or helping increase government responsiveness to the electorate across a range of difficult policy areas, by allowing the executive to formulate and implement responses through specialised and dedicated Departments and administrative bodies staffed by officials with technocratic expertise.⁷³ In addition, delegation is said to represent a useful means to signal political credibility on a particular issue by removing its treatment from immediate control by the politically partisan Oireachtas to a more arms-length expert or technocratic body.⁷⁴

Unlike in the United States, an interesting feature of the growth of the Irish administrative state apparatus has been the relative absence of political controversy about its legitimacy.⁷⁵ Vesting the political executive or administrative bodies with formidable powers is generally seen as part and parcel of public administration, and has not invoked the same anxieties amongst political actors with respect to democratic concerns. Most critique stems from output legitimacy, based on public perception of government outcomes.⁷⁶ Criticism of the administrative state usually turns on whether the work of a given body is characterised by regulatory capture or is cost-effective in meeting its statutory function. Perhaps the most frequently ventilated critique is that the current constellation of administrative bodies is too expensive - and unnecessarily so - and that particular administrative bodies should be abolished or merged. The legitimacy of the administrative state apparatus itself, and its prominent role over policy formulation, is generally not an issue of high political salience. Whether it suffers from a deficit of democratic direction by Parliament, or represents a breach of the separation of powers, is not an issue which carries much political traction.⁷⁷

⁷¹ Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (n 63) 227; John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (n 59) 185.

⁷² Alan Greene, 'Questioning executive supremacy in an economic state of emergency' (2015) 35 *Legal Studies* 594, 603. Greene notes that Parliaments have themselves facilitated a decline in their ability to direct policy, by 'delegating broad regulatory powers to administrative organs entrusted, due to their expertise, to unpack in greater specificity and complexity the norms that ought to be applied in their specific sphere of competence.'

⁷³ Eoin O'Malley and Muiris MacCarthaigh, 'Introduction: The Context for Governing Ireland' (n 65) 5-9.

⁷⁴ Koen Verhoest, Paul G. Roness, Bram Verschuere, Kristin Rubecksen, and Muiris MacCarthaigh, *Autonomy and Control of State Agencies* (n 49) 86-87; Matthew Flinders and Martin Smith, *Quangos, Accountability and Reform: The Politics of Quasi-Government* (St. Martin's Press, 1999) 20-21.

⁷⁵ For an overview of the debate in an American context, see Philip Wallach, *The Administrative State's Legitimacy Crisis* (Brookings Institute, Centre for Effective Public Management, April 2016).

⁷⁶ Fiona Danson and Darren O'Donovan, *Law and Public Administration in Ireland* (Clarus Press, 2015) 17.

⁷⁷ Gay Mitchell, *By Dail Account: Auditing of Government, Past, Present and Future* (Institute of Public Administration, 2010) 146; Muiris MacCarthaigh, *National non-commercial State Agencies in Ireland* (n 67) 7.

United States

Compared to the small cadre of executive officials staffing the first administrations of the US presidency, the contemporary federal bureaucracy is a behemoth.⁷⁸ Whereas the staff of the first administrations numbered in the hundreds across a dozen or so executive Departments, the federal government today employs over 2 million civilian personnel across over one-hundred Departments and administrative bodies.⁷⁹ Both are creatures of statutes passed by Congress pursuant to their Article 1 authority⁸⁰ ‘granted authority by a constitutional principal to exercise governmental functions in the name of the US’.⁸¹ The plethora of Departments and administrative bodies which constitute the modern administrative state ensure that not only is government visibly larger in terms of personnel, or in the scope of its jurisdiction, but also vastly more capable of executing decisions along a range of policy areas.⁸² As in Ireland and the U.K., the development arch of the U.S. administrative apparatus was not a consequence of deliberate, rational design, but moved in spasmodic fits in response to social and political imperatives.⁸³ However, as in Ireland and the United Kingdom, viewed at a high enough level of abstraction, it is reasonable to suggest its growth can be linked to a desire to improve the state’s ability to project power to tackle complex problems facing the polity.

The Constitution of 1787 provided for a federal government with a legislature, Supreme Court, and two executive officers – the President and Vice-President – but little else in the way of governmental institutions.⁸⁴ Indeed, the Constitution says little about bureaucracy at all.⁸⁵ Omission of any discussion of public administration, the small size of the executive branch and its modest powers, all reflect the fact that even prominent proponents of strong government like Hamilton could not have anticipated the size and capacity of the contemporary state. A state in which virtually no social or economic activity would remain untouched by administrative action.⁸⁶

⁷⁸ Andrew Coan and Nicholas Bullard, ‘Judicial Capacity and Executive Power’ 2016) 102 *Vanderbilt Law Review* 766-830.

⁷⁹ Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (n 9) 50.

⁸⁰ See E. Garrett West, ‘Congressional Power Over Office Creation’ (2018) 128 *Yale Law Journal* 166-229.

⁸¹ Jerry Mashaw, Richard A. Merrill, and Peter M. Shane, *Administrative Law: The American Public Law System, Cases and Materials* (3rd edn, West Publishing, 1992) 12.

⁸² *Ibid.*

⁸³ Peter H. Schuck, *Foundations of Administrative Law: Interdisciplinary Readers in Law* (Oxford University Press, 1994) 31.

⁸⁴ Jerry Mashaw, Richard A. Merrill, Peter M. Shane, *Administrative Law* (n 81) 12.

⁸⁵ John C. Reitz, ‘Deference to the Administration in Judicial Review’ (2018) 66 *American Journal of Comparative Law* 269, 270.

⁸⁶ In *City of Arlington v FCC*, 569 US 290 (2013), 313 Chief Justice John Roberts stated that: ‘The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities’.

Despite this, growth of the administrative state apparatus began in earnest post-enactment of the Constitution.⁸⁷ The first years of the American republic saw successive presidencies and Congress' collaborate to create administrative bodies to expand state capacity and its ability to implement policy.⁸⁸ Moreover, from Washington's presidency onward, Congress has enacted statutes authorizing open-ended and broad powers to the president and other executive departments.⁸⁹ While the president's formal constitutional powers are relatively modest compared to Congress's broad authority, the latter began to vest considerable statutory power in the former, or an administrative body under the president's ultimate supervision and direction as chief executive. The presidency thus began to accrue discretion over important questions of public policy from the early years of the Republic, including war powers, foreign affairs, and budgetary decisions.⁹⁰

While the U.S. administrative state thus has a long provenance, it was President Franklin Delano Roosevelt's 'New Deal' political programme which proved the major watershed in executive-legislative relations in respect of the United States' growing bureaucracy.⁹¹ Some have described the era as a 'constitutional moment' precipitating a fundamental change to preexisting constitutional structure, akin to a substantial amendment via Article V.⁹² This period saw Congress delegate enormous statutory authority to the presidency to engage in regulatory and redistributive activity, usually with little more than a vague mandate to do so in the public interest, or to promote such and such economic or social benefit.⁹³ These delegations considerably ratcheted the regulatory and policy-making power of the president, particularly given the absence of any explicit positive presidential powers over policy or law-making.⁹⁴

⁸⁷ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law and Regulatory Policy* (Wolters Kluwer, 6th edn 2006); Jerry L. Mashaw, 'Recovering American Administrative Law: Federalism Foundations, 1787-1801' (2006) 115 *Yale Law Journal* 1256, 1266.

⁸⁸ *Ibid.*

⁸⁹ Jerry L. Mashaw, 'Recovering American Administrative Law: Federalism Foundations, 1787-1801' (n 87) 1268; Adrian Vermeule and Eric Posner, 'Interring the Non-Delegation Doctrine' (2002) 69 *University of Chicago Law Review* 1721, 1735.

⁹⁰ Elena Kagan, 'Presidential Administration' (n 6) 2255.

⁹¹ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law* (n 87) 18.

⁹² Peter Cane, *Controlling Administrative Power* (n 16) 78-80; Gary Lawson, 'The Rise and Rise of the Administrative State' (1994) 107 *Harvard Law Review* 1231, 1232; Bruce Ackerman, *We the People Volume One: Foundations* (Harvard University Press, 1991); Cass R. Sunstein, 'Constitutionalism after the New Deal' (1987) 101 *Harvard Law Review* 421, 447-448.

⁹³ Peter Cane, *Controlling Administrative Power* (n 16) 89; Theodore Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Cornell University Press, 1985) 46-47.

⁹⁴ *Ibid.* 79.

This period also witnessed Congress and the Presidency collaborate to create dozens of new administrative bodies to respond to the country's economic difficulties, including perceived market failure, poverty, income inequality, and workers' rights.⁹⁵ These bodies, some of whom were structured to be 'independent' from direct day-to-day political direction of the President or Congress, were also vested with substantial regulatory power.⁹⁶ Others were given adjudicatory power to decide issues or enforce regulations against individuals or corporations on a case-by-case basis. Many administrative bodies exercised these powers with only thin statutory guidance from Congress, largely on the basis that the expert and technocratic skill of administrative personnel warranted wide scope for discretionary policy judgment, given the complexity of the subject matter government regulates. Administrative bodies were charged by Congress to use their expertise, political independence, and potent regulatory tools to tackle policy problems pro-actively, avoiding the generalist limitations of Congress and the reactive incremental nature of common law regulation.⁹⁷ Prominent intellectual proponents of these developments defended the creation of bodies with this authority as a necessary response to a defunct approach to the separation of powers and checks and balances. They argued the traditional, formalist, tripartite theory was ineffectual in the face of demands government assume responsibility for large-scale regulation and involvement in social and economic life. They thus defended the growth of the administrative state as a pragmatic response to the perceived inadequacy of traditional judicial and legislative processes to manage or grapple with such issues.⁹⁸

The growth of presidential power and the administrative state apparatus of which he stood at the apex, initially faced stiff opposition from the Supreme Court, which invalidated several measures of the New Deal as inconsistent with the separation of powers.⁹⁹ This defensive posture was soon beaten back by a change of judicial personnel, and FDR's unprecedented threat to 'pack' the Court if it continued to threaten his political agenda.¹⁰⁰ This judicial climb-down over the scope of federal power and the legality of copious statutory delegated power, bolstered the legal legitimacy of the administrative state, although its political legitimacy would continue to raise controversy. Again, it is worth reiterating that the purported

⁹⁵ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law* (n 87) 18.

⁹⁶ Peter Cane, *Controlling Administrative Power* (n 16) 89.

⁹⁷ Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 212-214; Mark Tushnet, 'Administrative Law in the 1930's: The Supreme Court's Accommodation of Progressive Legal Theory' (2011) 60 *Duke Law Journal* 1565, 1566-1567

⁹⁸ James Landis, *The Administrative Process* (Yale University Press, 1938).

⁹⁹ Jeff King, *Judging Social Rights* (n 97) 212-214; Mark Tushnet, 'Administrative Law in the 1930's' (n 97) 1566-1567.

¹⁰⁰ Bruce Ackerman, *We the People* (n 92).

rationale for these developments did not necessarily mean that these administrative bodies succeeded in their regulatory mission – this question was, and remains, contentious as a descriptive and prescriptive matter.¹⁰¹

The passage of the Administrative Procedures Act 1946 ('**APA**') represented a landmark legislative acceptance of the legal legitimacy of the administrative state apparatus, and a compromise with those severely critical of its usual decision-making processes.¹⁰² The APA recognised a distinction between statutory authority vesting adjudicatory powers and power to promulgate general regulations.¹⁰³ The APA subjects both types of administrative action¹⁰⁴ to a common-set of minimum procedural and substantive standards, including popular participation in the rule-making process. The APA also ensures that those subject to administrative action have recourse to judicial review,¹⁰⁵ which is available where bodies exceeded their statutory authority or exercise it in a manner which was 'arbitrary, capricious, an abuse of discretion'.

A second spate of administrative state growth came in the 1960's and 1970's, as the federal government began to take a more aggressive role in responding to public demand for state action to combat issues like racism, sex discrimination, consumer and worker safety, civil and consumer rights and environmental protection.¹⁰⁶ During the 1980's, political and judicial opposition to the scope and form of administrative state intervention in social and economic life helped spur a spate of deregulatory initiatives in economic life,¹⁰⁷ renewed emphasis from the judicial branch on the federalist limits of national government power, and a greater focus on critically analyzing the perceived negative costs of regulatory action.¹⁰⁸ However, these developments did little to dent the capacity or size of the administrative state, but instead marked the beginning of a bi-partisan trend toward increased centralized presidential political control and oversight over its apparatus.¹⁰⁹ Disputes over the

¹⁰¹ Jeff King, *Judging Social Rights* (n 97) 212-214.

¹⁰² Robert Rabin, 'Federal Regulation in Historical Perspective' (1986) 38 *Stanford Law Review* 1189, 1265-1266.

¹⁰³ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law* (n 87) 21.

¹⁰⁴ It excludes the Presidency.

¹⁰⁵ However, particular statutes may provide for their own procedural standards.

¹⁰⁶ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law* (n 87) 5.

¹⁰⁷ Jerry Mashaw, Richard A. Merrill, Peter M. Shane, *Administrative Law* (n 81) 7.

¹⁰⁸ *Ibid.*

¹⁰⁹ See Nicholas F. Jacobs, Desmond King, and Sidney M. Milkis, 'Building a Conservative State: Partisan Polarization and the Redeployment of Administrative Power' (2019) 17 *Perspective on Politics* 453-469; Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 *Washington International Law Journal* 527, 561; Stephen Skowronek, 'The Conservative Insurgency and Presidential Power: A Development Perspective on the Unitary Executive' (2009) 122 *Harvard Law Review* 2071-2103; Edward Corwin, *The President: Office and Powers 1787-1957* (University of London Press,

administrative state today are better seen as arguments as to what ends its potent capacity should be directed, rather than genuine disagreement over whether it should be deconstructed entirely.

Capacious congressional delegation to the executive and administrative bodies remains a staple of the constitutional order, which continues to leave them considerable policy and normative discretion. Contemporary executive-legislative relations are therefore deeply inconsistent with the classical ‘transmission belt’ conception of administrative law, a conception where the executive branch or administrative body merely faithfully executes the directive of a legislative principal.¹¹⁰ Instead, to paraphrase one commentator, legislation passed by Congress is merely the skeleton of the administrative state, and discretion vested in the executive its flesh and musculature.¹¹¹ The executive-led administrative state now exercises power over ‘almost every important facet of contemporary life’ on a daily basis,¹¹² shifting the polity from one ‘governed primarily by congressional statutes to one governed largely by regulatory law created by administrative agencies within the executive branch.’¹¹³ Supreme Court Justice and administrative law scholar Stephen Breyer recently documented the sheer breadth of the administrative state’s work when he pointed out that:

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides.¹¹⁴

Public law scholars in the US have attributed the development and endurance of capacious delegation to several factors. Wide-spread delegation has been linked to congressional

1966) 294. These articles chart both conservative and progressive efforts to embiggen the presidency due to increased political expectation for government involvement in matters of general welfare and public concern, albeit for different conceptions of political good.

¹¹⁰ Ackerman notes that the United States legal order has ‘long ago moved beyond an understanding of bureaucratic regulation based on the “transmission belt” theory of democratic legitimacy, under which bureaucratic “experts” merely specify legislative norms found in the statute. Regulators *make* law’. Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 634, 693.

¹¹¹ Peter H. Schuck, *Foundations of Administrative Law* (n 83) 31.

¹¹² Cary Coglianese and Christopher S. Yoo, ‘The Bounds of Executive Discretion in the Regulatory State’ (2016) 164 *University of Pennsylvania Law Review* 1587, 1589.

¹¹³ Lisa Manheim and Kathryn A. Watts, ‘Reviewing Presidential Orders’ (2019) 86 *University of Chicago Law Review* 1743, 1750.

¹¹⁴ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 520 (2010) per Breyer J. (Dissenting).

recognition of its limited ability or structural capacity to respond to changing circumstances in complicated policy environments, or reach agreement on the minutiae of policy specifics, given limited time and diverse political interests amongst the multi-member body.¹¹⁵ Conversely, delegation to the core political executive and administrative bodies is regarded as an efficacious means of reaching substantive goals by availing of technocratic expertise and the institutional advantages of dispatch and speed they enjoy.

While there are deep and intense political debates about the appropriate scope of federal regulatory activities, the New-Deal legacy of broad delegated statutory power to the President and administrative bodies attracts broad judicial and political commitment.¹¹⁶ To paraphrase one prominent intellectual critic of this settlement, the ‘essential features of the modern administrative state’ have been taken as ‘unchallengeable postulates by virtually all players in the legal and political worlds’.¹¹⁷ As in Ireland and the UK, broad delegation of administrative and legislative authority to the executive and administrative bodies is a deeply settled part of the US constitutional landscape¹¹⁸ – disputed only by an elite fraction of the legal and political establishment.¹¹⁹

The growth of the administrative state apparatus and capacity of the US federal government has had profound implications for the allocation of constitutional power amongst traditional tripartite institutions. Not only is the federal government visibly larger in the scope of its jurisdiction, but vastly more capable of executing decisions along a plethora of policy areas. As the apparatus has grown in capacity and power, the question of who controls it has understandably become more political contentious and pressing.

Some Comparative Similarities

In each system I consider, the growth of the administrative state was spurred by increased state activity in social and political life, which led to new forms of governance designed to meet fresh challenges posed by unprecedented levels of involvement. These changes

¹¹⁵ Bruce Ackerman, ‘The New Separation of Powers’ (n 110) 693; Developments in the Law, ‘Presidential Authority’ (2012) 125 Harvard Law Review 2057, 2139- 2140.

¹¹⁶ Robert Rabin, ‘Federal Regulation in Historical Perspective’ (n 102) 1246.

¹¹⁷ Gary Lawson, ‘The Rise and Rise of the Administrative State’ (n 92) 1232.

¹¹⁸ Bruce Ackerman, ‘The New Separation of Powers’ (n 110) 693-694; Bruce Ackerman, *We the People* (n 92) 66.

¹¹⁹ Several current justices of the Supreme Court have expressed reservations at the Court’s current application of the delegation doctrine, including Alito J., Gorsuch J., Kavanaugh J., Roberts CJ., Thomas J. For an academic overview of hostility to the administrative state in the U.S. See Gillian E. Metzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (n 1); Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2015); Adrian Vermuele and Cass Sunstein, ‘The New Coke: On the Plural Aims of Administrative Law’ (2015) *The Supreme Court Review* 41.

exposed the bare inadequacy of traditional law-making through primary legislation, or adapting policy through common law adjudication,¹²⁰ as means of reconciling political expectation and state capacity. This spurred creation of a potent administrative state and expansion in the law-making activity of the executive branch. The executive-led administrative state in each system was created and nurtured from the shell of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order.¹²¹

Increased state intervention spurs increased capacity

Exploration of each system highlights several overlapping explanations for the rise of the administrative state, but accounts converge on the importance of rapid changes in national policy-making environments and shifts in perceptions over the appropriate role for the state in social and economic life. These immense changes acted to spur and facilitate increases in state capacity to meet the growing weight of expectation from their polity.¹²² The emergence of the administrative state thus cannot be disentangled from a broader trend of the state taking a more interventionist and responsive role in the everyday lives of citizens.¹²³ Some argue movement toward executive-led governance was *inevitable* given the sheer rapidity of socio-political change – and the institutional incapacity of legislatures and courts to supply necessary policy adjustments.¹²⁴

As government activity became ubiquitous in social and economic life, traditional forms of governance eventually came under pressure to meet its new responsibilities - many concerning fundamental material and welfare needs of citizens.¹²⁵ Matching state capacity to political expectation through primary legislation, or incremental change in common law doctrine, became regarded as deeply impractical to meet this end. This perceived reality would become a major and recurring theme of Anglo-American public law; encapsulated in James Landis' influential argument that the growth of the administrative state apparatus

¹²⁰ Lon L. Fuller, 'The Form and Limits of Adjudication' (n 2) 353-409.

¹²¹ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Palgrave, 2014) 95-96; Martin Loughlin, *Foundations of Public Law* (n 4) 435.

¹²² Gerard Hogan and David Gwynn Morgan, *Administrative Law* (n 42) 2.

¹²³ K. Sabeel Rahman, 'Reconstructing the Administrative State in an era of Economic and Democratic Crisis' (2018) 131 *Harvard Law Review* 1671, 1675; Jon D. Michaels, 'An Enduring, Evolving Separation of Powers' (n 10) 526.

¹²⁴ Eric A. Posner and Adrian Vermuele, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) 16; Susan Rose-Ackerman, 'Regulation and Public Law in Comparative Perspective' (2010) 60 *University of Toronto Law Journal* 519, 525.

¹²⁵ Martin Loughlin, *Foundations of Public Law* (n 4) 435; Ralph F. Fuchs, 'Concepts and Policies in Anglo-American Administrative Law Theory' (n 26) 543-545.

owed its emergence – at root - to the inadequacy of a ‘simple tripartite form of government to deal with modern problems’.¹²⁶

Pressures placed on traditional tripartite institutional structures spurred diffusion of authority to the executive, and proliferation of administrative bodies designed to help meet the social and political goals of political branches.¹²⁷ Accompanying these bodies came new tools¹²⁸ intended to bolster the state’s ability to effectively use public power to implement complex political decisions in difficult real-world conditions:¹²⁹ from securing domestic order, raising revenue, promoting economic development, providing education, health care and welfare.¹³⁰ Both the executive, and administrative bodies under its direction, became equipped with potent regulatory tools to help discharge their newly minted policy functions.¹³¹

One of the most ubiquitous tools in each system became delegated statutory power, where legislatures increasingly granted broad regulatory power to the executive and administrative bodies to set rules of binding conduct – frequently subject only to basic and vague statutory direction.¹³² The vague nature of delegation common in the administrative state invariably invites the exercise of substantive policy discretion by senior figures in the political executive, and civil servants, and technocratic bureaucrats under their direction.¹³³ Rather than attempting to articulate norms directly in primary legislation, legislatures increasingly began to delegate broad normative authority to the executive and administrative state bodies.

These developments operated on an assumption the state’s responsibilities demanded an extensively specialized and permanent regulatory apparatus to effectively control, enforce,

¹²⁶ James M. Landis *The Administrative Process* (n 98) 1.

¹²⁷ Martin Loughlin, *Foundations of Public Law* (n 4) 447. It is clear this phenomenon is not isolated to Anglo-American countries. See Jacint Jordana and Xavier Fernandez-i-Marín, ‘Agency proliferation and the globalization of the regulatory state: Introducing a data set on the institutional features of regulatory agencies’ (2018) 12 *Regulation & Governance* 524, 525.

¹²⁸ Ralph F. Fuchs, ‘Concepts and Policies in Anglo-American Administrative Law Theory’ (n 26) 543.

¹²⁹ Michael Mann, ‘The autonomous power of the state: its origins, mechanisms and results’ (1984) 25 *European Journal of Sociology* 185, 189.

¹³⁰ Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (n 9) 46.

¹³¹ Gillian E. Mertzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (n 1) 8.

¹³² Peter Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920’s-1950’s’ (2004) 113 *Yale Law Journal* 1341-1412, 1344; Eoin Carolan, ‘Separation of Powers and Administrative Government’ in Eoin Carolan and Oran Doyle (eds.), *The Irish Constitution: Governance and Values* (Roundhall, 2008) 217; Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (n 124) 524.

¹³³ Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (n 124) 524; Jerry Mashaw, ‘Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability’ (2005) 1 *Revista Direito GV Especial* 153, 155.

and supervise regulated activity, and bend it toward political ends it sought achieve.¹³⁴ The administrative state apparatus became the essential mechanism for pursuing the coordination function of government, and managing the trade-offs inherent in regulating complex social and economic activity.¹³⁵

It was the means by which the state forged new forms of ‘civic capacity’ empowering it to contest private and market power, and stamp its own socio-political vision onto private life.¹³⁶ Policy formation and execution through administrative bodies definitively displaced common law courts and primary legislation as the core means of regulation. To paraphrase Weber, bureaucracy and the administrative state became the core means of governmental power for addressing social and economic problems.¹³⁷ As it became a potent vehicle through which political actors could advance their political agenda and project public power¹³⁸ in increasingly complex and fast-moving policy environments - vast power accrued in the administrative apparatus.¹³⁹

Power flows to political executive

There are several common explanations offered in each system for why power flowed to the political executive through these developments. The most prominent are its advantages over other actors in terms of institutional structure and its access to resources like technocratic expertise.¹⁴⁰

The political executive is said to have superior structural capacity to grapple with the radical changes occasioned by the complexity and volume of contemporary governance.¹⁴¹ That its relatively hierarchical, and unitary nature, make the executive better able to both adapt and formulate policy preferences, and then act on them with flexibility and dispatch. This can

¹³⁴ Colin Scott, ‘Regulating Constitutions’, in Parker, Scott, Lacey and Braithwaite (eds.), *Regulating Law* (Oxford University Press, 2004) 229; Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1; James Landis, *The Administrative Process* (n 98) 23.

¹³⁵ Adrian Vermeule, ‘Local and Global Knowledge in the Administrative State’ in David Dyzenhaus and Thomas Poole (eds.), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press, 2015) 295-327.

¹³⁶ K. Sabeel Rahman, ‘Reconstructing the Administrative State’ (n 123) 1684.

¹³⁷ Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (n 124) 524; Daniel Halberstam, ‘The Promise Comparative Administrative Law: A Constitutional Perspective on Independent Agencies’ in Susan Rose-Ackerman & Peter Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, 2010) 18; Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, 2005) 36; Max Weber, *Economy and Society* (Guenther Roth and Claus Wittch (eds.), University of California, 1978) 1400.

¹³⁸ Jerry Mashaw, ‘Recovering American Administrative Law’ (n 87) 1263.

¹³⁹ Adrian Vermuele, *Laws Abnegation* (n 4) 59; Edward L. Rubin, ‘Law and Legislation in the Administrative State’ (n 25) 409.

¹⁴⁰ George Krause, ‘Legislative Delegation of Authority to Bureaucratic Agencies’ in Robert Durant (ed.), *The Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 524-534.

¹⁴¹ Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (n 124) 524.

make it significantly easier for it to take initiative over complex policy questions than a procedurally cumbersome, time-constrained, generalist legislatures. While the executive is better able to act flexibly, the legislature's mode of action is characterized by elaborate process.¹⁴² The executive thus suffers much less from collective-action problems because it has greater capacity for deciding expeditiously what to do - and then do it.¹⁴³ Seen in this light, the growth of the administrative state and delegation of regulatory power to the executive, stems partly from pragmatic legislative recognition doing so represents a more efficacious, and expedient, means of improving the responsiveness of government to complex policy questions, and desires of the electorate.¹⁴⁴ While the legislature can certainly provide broad normative guiding principles, they have neither the time or appropriate structure to legislate rapidly nor speak to the minutiae of complicated policy issues.¹⁴⁵

The political executive's structural advantages are complemented by its access to the technocratic expertise of a broad and diverse range of personnel, from political appointees to full-time civil servants dedicated to assisting the executive implement statutory objectives. This access helps to facilitate both policy specialization and the ability to marry the executive's values with technocratic expertise.¹⁴⁶ It also provides it a superior ability to acquire knowledge necessary to approach complex political problems. While the executive branch's capacity to obtain information is not perfect, most of the time it knows a great deal more about policy issues than other branches.¹⁴⁷ When it does not know something, it is also in a better position to find out, given that it has access to a large stock of civil servants, professionals and specialists which help it implement law & policy.¹⁴⁸ Moreover, the executive-led administrative state does not rely solely on abstract technocratic knowledge provided by its civil servants and advisors,¹⁴⁹ but frequently builds mechanisms into its policy formulation process that help generate and aggregate industry-specific local knowledge. For example, through consultations with stakeholders, public interest groups, and representatives from regulated organizations - all of which can help improve epistemic

¹⁴² Johnathan Macey, 'Executive Branch Usurpation of Power: Corporations and Capital Markets' (2006) 115 Yale Law Journal 2416, 2421.

¹⁴³ David Lewis and Terry Moe, 'The Presidency and the Bureaucracy: The Levers of Presidential Control' in Michael Nelson (ed.), *The Presidency and the Political System* (CQ Press, 2014) 374-405.

¹⁴⁴ Jerry Mashaw, *Greed, Chaos and Governance* (Yale University Press, 1997) 152-155; Jerry Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1 Journal of Law, Economics and Organisation 81, 95.

¹⁴⁵ Bruce Ackerman, 'The New Separation of Powers' (n 110) 693.

¹⁴⁶ See Cass R. Sunstein, 'The Most Knowledgeable Branch' (2016) 164 University of Pennsylvania Law Review 1606-1648; A. Ogus, 'Comparing regulatory systems' (n 8) 146-164.

¹⁴⁷ Brandice Canes-Wrone, *Who Leads Whom? Presidents, Policy, and the Public* (University of Chicago Press, 2006) 32; William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton University Press, 2003) 14-15.

¹⁴⁸ Cass R. Sunstein, 'The Most Knowledgeable Branch' (n 146) 1613.

¹⁴⁹ Adrian Vermeule, 'Local and Global Knowledge in the Administrative State' (n 135) 295-327.

accuracy and government responsiveness.¹⁵⁰ In marked contrast, within the legislative branch a lack of comparable resources combined with time pressures and electoral incentives, often lead to dependence on heuristics, headlines, and talking points to inform policy initiatives, which in turn ensures serious informational deficits on policy issues relative to the executive.¹⁵¹ The argument that power is delegated to the executive and administrative bodies in order to help the legislature execute expert driven, epistemically accurate policies, is a core and recurring feature of comparative scholarship.¹⁵²

Legislative incentives to delegate

Because of these institutional and functional advantages, the growth of the administrative state apparatus has tended to channel power to the executive branch and administrative bodies under its direction. This is not to say that the delegation of authority has been wrested from the legislature, or grudgingly given. Indeed, it has been pointed out delegation of extensive regulatory authority to the executive and administrative bodies has been *embraced* by the legislative branch for the reasons touched upon already. One explanation is that delegation stems from pragmatic legislative recognition it represents a more efficacious and expedient means of improving the responsiveness of government to the desires of the electorate.¹⁵³ Mashaw suggests that the combination of an electorate with heterogenous preferences and the complexity of modern policy environments, combine to spur legislators to give the executive and administrative bodies vague mandates with wide discretion to maximize their political responsiveness.¹⁵⁴ This is linked to the reality most parliamentarians are generalists, and not intimately familiar with much of the complex social and economic subject-matter they seek to regulate. While they can provide broad normative guiding principles, they have neither the ‘time nor the expertise’ to legislate for policy minutiae or epistemically complex or uncertain issues.¹⁵⁵ Legislative delegation to administrative bodies has also been linked to legislative desire to signal credible political commitment to a particular line of policy, by insulating decisions from immediate opportunistic political shifts by the political branches.¹⁵⁶ Another common – and critical - rationale offered is that wide-

¹⁵⁰ Ibid.

¹⁵¹ Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (n 124) 525.

¹⁵² Mark Pollack, ‘Leaning from the Americanists (Again): Theory and Method in the Study of Delegation’ (2002) 25 *Western European Politics* 200, 208-209.

¹⁵³ Jerry Mashaw, ‘Prodelegation: Why Administrators Should Make Political Decisions’ (n 144) 95.

¹⁵⁴ Jerry Mashaw, ‘Judicial Review of Administrative Action’ (n 133) 155.

¹⁵⁵ Bruce Ackerman, ‘The New Separation of Powers’ (n 110) 693.

¹⁵⁶ Mark Pollack, ‘Leaning from the Americanists (Again): Theory and Method in the Study of Delegation’ (n 152) 209.

delegation to the executive or administrative body permits the legislature to off-load difficult policy determinations, but still be seen as taking action in respect of a difficult issue.¹⁵⁷

Overall, expansion of executive power due to the rise of the administrative state is a theme strongly embedded in comparative public law and political science literature, making it one which spans regime differences between these three systems.¹⁵⁸ My account of the emergence of the administrative state in Ireland, U.K. and U.S. demonstrates how the traditional tripartite separation of powers provide only a skeletal framework for governance; complete with many gaps and silences. While the level and type of regulation through this executive-led apparatus can vary - its basic character retain commonalities in each system, characterized by the extensive vesting of vast administrative and regulatory power in the executive and bodies under its direction.¹⁵⁹

The fostering of the administrative state in these systems thus cannot be considered the work of one branch, but rather the culmination of successive interactions between them all over an extended period of time. It was the accumulated institutional operation of separated powers, checks and balances, and judicial decision-making on questions of constitutional and statutory law that together gave birth to the institutions of the administrative state, and nurtured them to maturity.¹⁶⁰ In each system, successive governments, whether majority or coalition, and largely regardless of political ideology, have sought and been granted broad administrative and regulatory authority from successive legislatures who have always retained the power - at least formally speaking - to amend, cabin, or rescind their exercise but have not had the inclination to do so. Executive-led administrative government is the form of government ultimately fostered by these systems, and their constitutional institutions, to solve difficult collective social and political problems facing the state.¹⁶¹

¹⁵⁷ Daryl J. Levinson, 'The Supreme Court 2015 Term Foreword: Looking For Power in Public Law' (n 9) 71; Johnathan Westrup, 'Regulatory Governance' in Niamh Hardiman (ed.), *Irish Governance in Crisis* (Manchester University Press, 2012) 67-68.

¹⁵⁸ Martin Loughlin, *Foundations of Public Law* (125) 391.

¹⁵⁹ Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (n 137) 19.

¹⁶⁰ Adrian Vermuele, *Laws Abnegation* (n 4).

¹⁶¹ Edward Rubin, *Beyond Camelot* (n 137) 53.

II. CENTRALIZATION OF POLITICAL CONTROL OVER ADMINISTRATIVE STATE

The growth in the power and size of the administrative state has gone hand in hand with the core political executive exercising greater centralized control over its potent apparatus.¹⁶² Authority over the administrative state has tended *toward* and *within* the political executive.¹⁶³ In each system, executive predominance over the administration has become an important means by which it can bolster its capacity for policy co-ordination and direction. This part highlights how it is the political executive which maintains the balance of control over the administrative state apparatus, far outstripping other actors.¹⁶⁴

a. Appointment & Removal Powers

United Kingdom

The political executive enjoys extensive power over the appointment and removal of leading personnel to both the core civil service and administrative bodies. Appointment to the highest ranks of the civil service which staff core executive departments are determined by senior Ministers and Prime Minister, subject to civil service advice.¹⁶⁵ A civil service panel will propose a suitable candidate, but any choice can be vetoed by the executive.¹⁶⁶ Appointments to administrative bodies outside the core executive also remain largely the prerogative of the executive, again subject to advice from senior civil servants from an advisory panel. Following reforms in 2016, the executive has an even greater input over these appointments as it now enjoys control over the composition of an advisory panel and the criteria used to evaluate an appointment.¹⁶⁷ This is the case even with public appointments to important posts whose ‘credibility depends on their being (and being seen as) independent from direct ministerial control.’¹⁶⁸ In the last decade, parliamentary committees have accrued an element of influence in the appointment process through pre-appointment scrutiny.¹⁶⁹ In a minority of cases this includes a veto power¹⁷⁰ but in the majority of instances only involves

¹⁶² B. Guy Peters and Ludger Helms, ‘Executive Leadership in Comparative Perspective: Politicians, Bureaucrats and Public Governance’, (ed.) Ludger Helms, *Comparative Political Leadership* (Palgrave, 2012) 36.

¹⁶³ *ibid* 21.

¹⁶⁴ Richard M. Pious, *The American Presidency* (Basic Books, 1979) 333.

¹⁶⁵ See Akash Paun, Josh Harris, Ian Magee, *Permanent secretary appointments and the role of ministers* (Institute for Government, 2013).

¹⁶⁶ *Ibid*.

¹⁶⁷ See Cabinet Office, *Governance Code on Public Appointments* (UK Cabinet Office, 2016).

¹⁶⁸ Akash Paun, Josh Harris, Ian Magee, *Permanent secretary appointments and the role of ministers* (n 165) 28.

¹⁶⁹ Robert JD Hazell, ‘Improving Parliamentary Scrutiny of Public Appointments’ (2019) 72 *Parliamentary Affairs* 223-244; Felicity Matthews and Matthew Flinders, ‘The watchdogs of ‘Washminster’ – parliamentary scrutiny of executive patronage in the UK’ (2015) 53 *Commonwealth & Comparative Politics* 153, 163.

¹⁷⁰ It has gained a formal veto over the appointment of the top staff in the Office for Budgetary Responsibility; an effective veto over the appointment of the Information Commissioner; and parliamentary involvement through a Select Committee

being able to question a proposed appointment, and offer a recommendation to the relevant Minister. These developments have improved its capacity to control appointments from a very low baseline. However, the executive has been adamant that the role of Parliament should generally remain advisory, and strongly rejected proposals to give it a generic veto authority over appointments.¹⁷¹ Through their predominant control over appointments and removals the executive has a powerful means of embedding ideologically sympathetic ‘players throughout the state infrastructure’¹⁷² who are less likely to impede their political aims.

Ireland

The Government has maintained a highly asymmetric level of authority over appointments and removals to leadership positions of administrative bodies.¹⁷³ Entry-level and lower-level civil servants are appointed by the Public Appointment Service, an apolitical specialist recruitment body.¹⁷⁴ But senior appointments to both core executive departments, and to administrative bodies outside the political executive, remain the prerogative of the Government, subject to advice and input from senior civil servants and the Public Appointment Service respectively.¹⁷⁵ In contrast, the Oireachtas as an institution typically has limited authority over appointment and removal to administrative bodies.

Statutes creating these bodies typically provide a highly dominant role for a member of the political executive, and only a small handful require leadership appointments to accommodate even a modest advisory role for the Oireachtas or pre-appointment scrutiny. In 2008, the Government of the day strongly rejected an opposition bill which would vest Oireachtas Committees co-ordinate authority to scrutinise and confirm executive appointments of Chairpersons to administrative bodies. Part of its rationale for rejecting the bill was its strong view that appointments to administrative bodies was a core executive

chair sitting on the appointment panel for the chair of the UK Statistics Authority, and the Parliamentary Ombudsman. See Robert JD Hazell, ‘Improving Parliamentary Scrutiny of Public Appointments’ (n 169) 227.

¹⁷¹ Felicity Matthews & Matthew Flinders, ‘The watchdogs of ‘Washminster’ – parliamentary scrutiny of executive patronage in the UK’ (n 169) 163.

¹⁷² Ibid 153.

¹⁷³ Paula Clancy and Nat O’Connor, *Public Appointments: Options for Reform* (FASC Papers, 2011) 10.

¹⁷⁴ The Public Appointments Service (PAS), established under statute in 2004, provides an independent shared service in recruitment, assessment and selection to organisations across the Civil and Public Services. On 30 September 2014, the Government decided that the PAS should also be given responsibility for putting in place an open, accessible, rigorous and transparent system to support Ministers in making appointments to State Boards.

¹⁷⁵ Richard Boyle and Muiris MacCarthaigh, *Fit for Purpose? Challenges for Irish Public Administration and Priorities for Public Service Reform* (Institute of Public Administration, 2011) 47.

prerogative, one that should not be usurped by the Oireachtas.¹⁷⁶ In this respect, the Irish legislature has the least influential role in each system in respect of appointments. Its dominant power over appointments and removals therefore allows a governing executive, ‘regardless of ideological hue’, wide scope to ‘shape public boards in its own (political) image.’¹⁷⁷

United States

One of the most important means the President has to assert control of administrative capacity is his ability to appoint and remove leadership personnel from administrative bodies.¹⁷⁸ Long standing constitutional political practice and judicial precedent confirm that *all* administrative bodies which are responsible for law administration must be subject to *some* degree of presidential oversight.¹⁷⁹ The Appointments Clause¹⁸⁰ of Article II of the US Constitution provides one important means of ensuring this. The clause gives the President authority to appoint, with the consent of the Senate, all ‘officers of the United States’ staffing the upper ranks of the federal bureaucracy.¹⁸¹ The Appointments Clause also permits the President or Heads of Executive Departments to unilaterally appoint inferior officers. An incumbent President has, in theory, as many as 6,000 senior appointments to make across executive departments and administrative bodies, with around 1,500 requiring Senate approval.¹⁸² The term Officer of the United States is not defined, but has been understood to mean someone who exercises significant governmental power in the name of the US government, an inferior officer, in turn, is someone who exercises power on behalf of the US government but is subordinate to an Officer.

The Supreme Court have also interpreted this Article II power to include an extensive presidential authority to remove executive officers. Although the Constitution is largely silent to the removal of officials, the Supreme Court regards the power as an indispensable aid to

¹⁷⁶ Muiris MacCarthaigh, ‘Parliamentary Scrutiny of Departments and Agencies’ in Muiris MacCarthaigh & Maurice Manning (eds.), *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration, 2010) 372.

¹⁷⁷ Paula Clancy & Nat O’Connor, *Public Appointments* (n 173) 12.

¹⁷⁸ James Q. Wilson, *Bureaucracy* (Basic Books, 2nd ed, 2000) 260-261.

¹⁷⁹ *Free Enterprise Fund v Public Company Accounting Oversight Board* 561 U.S. 477 (2010).

¹⁸⁰ Article II provides: He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

¹⁸¹ Article II Section 2, United States Constitution.

¹⁸² Bert A. Rockman, ‘Administering the Summit in the United States’ in (eds.) B. Guys Peters, R.A.W. Rhodes and Vincent Wright, *Administering the Summit: Administration of the Core Executive in Developed Countries* (Palgrave Macmillan, 2000) 251-252.

control subordinates assisting him in executing the laws.¹⁸³ The Court reasoned that restricting the President's removal authority could impede his ability to direct and supervise executive action and therefore undermine his duty to take care the laws are faithfully executed. However, the courts have recognised limits to this removal power. For a start, it has held Congress can limit removal power over inferior offices - low to middle ranking civil servants – by requiring good cause. In addition, the Supreme Court has recognised that Congress can impose restrictions on the President's ability to remove senior officers in so-called 'Independent' administrative bodies outside core executive departments like those constituting the President's cabinet.¹⁸⁴ The President thus has a lot of power to remove executive officers, especially if they are core departments like Defence or Treasury, but presidential removal of the heads of bodies designed by Congress to act more independently from presidential control, like the Federal Reserve or Environmental Protection Agency, may be restricted for good cause.

The scope of the President's legal power to remove officials has sparked intense academic, judicial, and political debate.¹⁸⁵ Some commentators argue the Supreme Court's position is erroneous, on the basis that Article II vests exclusive power in the President to remove high-level officers wielding statutory power – whether in 'Independent' or core executive departments - and that Congressional restrictions are unconstitutional.¹⁸⁶ Others argue the founders expected Congress to enjoy extensive authority to structure the executive branch, including through its ability to create administrative bodies whose heads do not serve at the President's pleasure, but insulated from at-will removal.¹⁸⁷ The Court's case-law is difficult to reconcile, and has been described as 'vague in the extreme', but appears to draw on both of these positions.¹⁸⁸ Based on the courts current precedents, the President does enjoy extensive authority to remove the officials of bodies discharging core executive functions. But Congress can limit removal over many other administrative bodies, unless they are of such an onerous nature so as to impede the President in discharging his constitutional duties.¹⁸⁹ Aside from legal powers, political conventions play an important role in addition

¹⁸³ *Myers v. United States*, 272 U.S. 52 (1926).

¹⁸⁴ *Humphrey's Executor v U.S.* 295 U.S. 602 (1935).

¹⁸⁵ Seth Barrett Tillman, 'The Puzzle of Hamilton's *Federalist* No.77' (2010) 33 *Harvard Journal of Law & Public Policy* 149-167.

¹⁸⁶ Steven Calabresi and Saikrishna Prakash, 'The President's Power to Execute the Laws' (1994) 104 *Yale Law Journal* 541.

¹⁸⁷ David M. Drisen, 'Toward a Duty-Based Theory of Executive Power' (2009) 78 *Fordham Law Review* 71, 102; Lawrence Lessig and Cass Sunstein, 'The President and the Administration' (199) 94 *Columbia Law Review* 1.

¹⁸⁸ Adrian Vermeule, 'Conventions of Agency Independence' (2013) 113 *Columbia Law Review* 1163, 1173.

¹⁸⁹ *Morrison v Olson* 487 U.S. 654 (1988).

to formal removal authority when it comes to assessing administrative body independence from direct presidential control.¹⁹⁰

Notwithstanding debate over the scope of this removal power, judicial precedent and political practice provide ample room for the President to appoint personnel to administrative bodies who share his ideological viewpoint, or to remove officials who frustrate his policy objectives. Together, these powers make officials subject to his appointment and removal one of the ‘principal gateways’ through which he influences the policy direction of the administrative state.¹⁹¹ Appointees can generally be expected to loyally implement the chief executive’s political objectives within often vague statutory bounds set by Congress. This is why, for example, the bureaucracy will implement the same statutes very differently depending on the Presidential incumbent, because statutes passed are often capacious and provide ample room for executive interpretation. A President can expect a subordinate will follow his favored interpretation partly as, if he does not, he can be removed. Thus, while the President exercises less centralized control over the bureaucracy than in a Westminster system, it is accepted appointees can generally be expected to loyally implement the chief executive’s political objectives within often vague statutory bounds set by Congress.¹⁹²

This is not to say Congress has no means of leveraging control over the administrative state apparatus. Indeed, there is a real sense in which administrative bodies serve two competing principals – the Presidency *and* Congress.¹⁹³ The framers of the US Constitution anticipated Congress would be the most powerful (and dangerous) branch of government, the ‘policy-and-law making centre-piece of the Constitutional system’.¹⁹⁴ Congress retains the primary power to create and organize executive offices and administrative bodies, which means that, legally speaking, Congress could shrink the executive branch and administrative bodies to the presidency, vice-presidency and a handful of clerical staff.¹⁹⁵ Congress is the constitutional institution which gives birth to administrative bodies, provides their

¹⁹⁰ Adrian Vermeule, ‘Conventions of Agency Independence’ (n 188).

¹⁹¹ The president’s ability to remove will be affected by whether the head of an executive department or administrative body can be fired at will, or only for cause. Jon D. Michaels, ‘An Enduring, Evolving Separation of Powers’ (n 10) 528; Developments in the Law, ‘Presidential Authority’ (n 115) 2139; Peter L. Strauss, ‘Overseer, or “The Decider”?’- The President in Administrative Law’ 75 *George Washington Law Review* (2007) 715-738.

¹⁹² Jon D. Michaels, ‘An Enduring, Evolving Separation of Powers’ (n 10) 556.

¹⁹³ Peter Cane, *Controlling Administrative Power* (n 16) 92; John C. Reitz, ‘Deference to the Administration in Judicial Review’ (2018) 66 *American Journal of Comparative Law* 269, 270.

¹⁹⁴ *ibid* 94.

¹⁹⁵ Charles Black, ‘The Working Balance of the American Political Departments’ (1974) 1 *Hastings Constitutional Law Quarterly* 13, 15.

substantive and procedural structure,¹⁹⁶ nurtures them by having a role in providing funding and resources,¹⁹⁷ and exercises oversight hearings and conducts investigations into its activities.

Congress – via the Senate - also has a role in approving or rejecting the Presidents appointments to leadership positions in executive departments and administrative bodies.¹⁹⁸ During times of intense polarization, the Senate’s ability to obstruct and stone-wall the appointment of officers to executive departments and administrative bodies can frustrate Presidential priorities.¹⁹⁹ Congress can also place restrictions on the President’s removal powers over lower-ranking civil servants and higher-ranking personnel of administrative bodies outside core executive departments. All of these powers are significant, and ensure that the Presidency does not enjoy the same level of control and direction over the administrative apparatus as its counterpart in Ireland and the United Kingdom.

That said, as a matter of political reality, the very same incentives driving Congress to delegate expansive authority to the Presidency and administrative bodies, weigh against them seeking to dissemble their capacity to exercise a more assertive role over the policy-direction of these bodies. Moreover, the sheer complexity, diversity and scale of the administrative state apparatus means congressional oversight is often only sporadic. When it is brought to bear, it is typically focused on controversial politically charged issues which attract public attention.²⁰⁰ Consequently, it is the presidency which maintains the *balance* of control over the administrative bureaucracy – greatly expanding his de facto institutional power.²⁰¹

b. Greater Centralization of Control over Administrative Action

United Kingdom

At the apex of the United Kingdom administrative state firmament of Departments and administrative bodies stands the political executive – the Prime Minister, Cabinet, and organizations like the Cabinet Office. These actors co-ordinate executive policy and act as

¹⁹⁶ Jon D. Michaels, ‘An Enduring, Evolving Separation of Powers’ (n 10) 532- 533.

¹⁹⁷ Kate Stith, ‘Congress’ Power of the Purse’ (1988) 97 Yale Law Journal 1343, 1350-1351.

¹⁹⁸ Jon D. Michaels, ‘An Enduring, Evolving Separation of Powers’ (n 10) 532- 533.

¹⁹⁹ Developments in the Law, ‘Presidential Authority’ (n 115) 2145.

²⁰⁰ Peter Cane, *Controlling Administrative Power* (n 16) 177.

²⁰¹ Martin S. Flaherty, ‘The Most Dangerous Branch’ (1996) 105 Yale Law Journal 1725, 1728; Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (n 9) 51.

final arbiters of conflict between different parts of government.²⁰² Given its role as chief-executor of the law and political dominance of Parliament, the executive exercises very extensive political and legal authority over the structuring and operation of this administrative apparatus.²⁰³ These developments compounded the reality evident from the rise of organized political parties and government anchored on ministerial responsibility to the House of Commons. Namely, that the purpose of parliamentary majorities was no longer to formulate or deliberate on legislation or policy as such, but to yield a stable executive that would do so.²⁰⁴ The executive, in turn, would strive to manage the complexities and intricacies of domestic policy of the contemporary state, and competently project national political and economic power in its foreign relations.²⁰⁵ Parliament shifted from being a forum for legislative deliberation and substantive policy-making, to an institution which legitimized and provided statutory underpinning for the increased activity of the political executive and an expanded administrative apparatus;²⁰⁶ a substantively law-declaring and delegating body as opposed to law-making body. If the move to government led and steered by the political executive gave it political predominance over the parliamentary law-making process, then the emergence of the administrative state helped make the executive a prolific lawmaker in *substance*.

For a start, a great deal of the activity of the administrative state is encompassed within traditional executive Departments, which remain the core policy-making units of the state.²⁰⁷ These departments are staffed by thousands of civil servants and headed by a senior figure of the political executive, a cabinet Minister who typically wields broad administrative and regulatory power granted by Parliament. Moving beyond core departments, the executive also invariably enjoys several means through which it can control and direct the policy of administrative bodies created by Parliament, which are not intended to be under immediate day-to-day departmental control of a Minister.²⁰⁸

Although administrative bodies are typically creatures of statute, it is the executive which really ‘buckles together the bureaucracy on the one side, and Parliament on the other, in a

²⁰² Martin J. Smith, *The Core Executive in Britain* (MacMillan Press, 1999) 1; R.A.W. Rhodes, ‘From Prime Ministerial Power to Core Executive’ in R.A.W. Rhodes and Patrick Dunleavy (eds.), *Prime Minister, Cabinet and Core Executive* (St Martin’s Press, 1995) 12.

²⁰³ Peter Cane, *Controlling Administrative Power* (n 16) 43.

²⁰⁴ Peter Lindseth, ‘The Paradox of Parliamentary Supremacy’ (n 132) 1344.

²⁰⁵ *ibid* 1351.

²⁰⁶ Peter Cane, *Controlling Administrative Power* (n 16) 480.

²⁰⁷ R.A.W. Rhodes, ‘From Prime Ministerial Power to Core Executive’ (n 202) 41.

²⁰⁸ Matthew Flinders, *Delegated Governance and the British State* (Oxford University Press, 2008) 142-145.

belt of public power'.²⁰⁹ The executive usually retains, whether through statutory authority or through prerogative power, ability to issue directions to these kinds of administrative bodies. This provides leverage for shaping their policy decisions - even in the case of bodies operating with moderate to high levels of day-to-day independence.²¹⁰ A Minister's views may also be communicated to the management of an administrative body through officials of his or her department. Given the core political executive's usual command over a legally supreme Parliament, the statutory independence of regulatory bodies can be considered an exercise in 'self-denial', given that formal barriers to limiting or restructuring their independence are weak.²¹¹ The independence of 'independent' administrative bodies from the executive thus exists on a spectrum, one that is largely determined by de facto political constraints.²¹²

The structural difference between presidential and parliamentary systems ensures that securing effective control over the administrative state apparatus is easier for the executive in the latter. For example, the executive typically ensures statutes allow it to exercise close control over laying down of general rules under secondary rulemaking.²¹³ Where legislation passed by Parliament leaves a discretion to an administrative body to make secondary regulations, it inevitably requires that body receive ministerial consent before promulgation. Moreover, the executive, through the Prime Minister, also has prerogative and statutory powers in respect of the civil service which allow her wide authority to structure or dismantle government departments. The Government's usual command of a parliamentary majority and the parliamentary agenda, additionally ensure it can also enjoy near plenary authority to create, direct, or restructure administrative bodies charged with implementing its policies in a manner they deem fit.²¹⁴

The Public Bodies Act 2011 enacted by the 2010-2015 Coalition Government is an instructive example of this capacity in action. The Act was designed to assist the government's broader aim of reducing public spending by provided Ministers broad

²⁰⁹ Peter Cane, *Controlling Administrative Power* (n 16).

²¹⁰ Matthew Flinders, *Delegated Governance and the British State* (n 208) 142-145.

²¹¹ Peter Cane, *Controlling Administrative Power* (n 16).

²¹² Cass Sunstein, 'Paradoxes of the Regulatory State' (1990) 57 *University of Chicago Law Review* 407, 426.

²¹³ Peter Cane, *Controlling Administrative Power* (n 16).

²¹⁴ Nuno Garoupa and Jud Matthews, 'Strategic Delegation, Discretion, and Deference: Explaining the Comparative of the Administrative Review' (2014) 62 *American Journal of Comparative Law* 1,10; Susan Rose-Ackerman, 'Regulation and Public Law in Comparative Perspective' (2010) 60 *University of Toronto Law Journal* 519, 529; George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25 *British Journal of Political Science* 289.

statutory power to abolish, merge, or restructure administrative bodies by executive order.²¹⁵ Unlike in the U.S., where the bureaucracy acts under the direction of two competing principals – Congress and the President – in the U.K. it has effectively one hierarchical master due to executive-legislative fusion.²¹⁶ Administrative bodies who become overtly obstructive to an incumbent executive’s political programme may therefore be more easily subject to political retribution in the form of dismantling, or restructuring, of their policy functions, in a manner which may not be possible in the U.S. Public servants operating under a parliamentary system like the U.K. thus have very powerful incentives to adapt to the political imperatives of an incumbent political executive.²¹⁷

Notwithstanding these legal powers, the increased size and fragmentation of the administrative state, combined with its very wide remit, undoubtedly place pressure on the political executive’s ability to co-ordinate government action.²¹⁸ For a start, in some ways the political executive has always been ‘more plural than unitary,’²¹⁹ in the sense that Ministerial departments remain the locus for policy-making in the U.K. and have traditionally been quite autonomous, an autonomy underpinned by the convention of individual ministerial responsibility to Parliament.²²⁰ Fragmentation caused by this kind of policy making is compounded by the fact in most central government departments there is a split between policy formation, which is undertaken within Departments, and delivery and implementation of policy, which is often delivered by executive agencies.²²¹ While under the legal umbrella of a parent Department, they can functionally be quite independent in discharging their role. In addition, outside core government departments and executive agencies under their umbrella, is also a proliferation of non-Departmental administrative bodies carrying out a range of roles: from advising the political executive or carrying out regulatory functions. In short, there are a complex and diverse array of administrative bodies attempting to marry a degree of autonomy in discharging their functions, with being sufficiently attentive to the policy goals of the elected political executive.

²¹⁵ Public Bodies Act 2011.

²¹⁶ Felicity Matthews and Matthew Flinders, ‘The watchdogs of ‘Washminster’ (n 169) 158; James Q. Wilson, *Bureaucracy* (n 178) 257-258.

²¹⁷ Bruce Ackerman, ‘The New Separation of Powers’ (n 110) 702.

²¹⁸ Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (n 40) 62.

²¹⁹ Terence Dainith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, Control* (Oxford University Press, 1999) 30.

²²⁰ *Ibid.*

²²¹ Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (8th edn. Sweet & Maxwell, 2018) 114-115.

Attempts to balance the autonomy of this diverse array of administrative bodies, while counter-acting excessive fragmentation, has been coloured by cultivation of greater political control over the administrative state *within* the core political executive. That is, enhancing the institutional ability of senior executive officials to co-ordinate and direct the work of executive departments and administrative bodies, and make sure they act consistently with their policy and ideological goals.²²² Traditionally, the Cabinet was regarded as the apex institution for coordinating government policy, and acting as the ultimate arbiter of the executive's strategic direction by issuing decisions binding on individual departments and bodies under their direction.²²³ However, growth in the complexity and scope of governmental activity and increase in Ministerial workloads has been linked to the decline of Cabinet as the premier political forum where policy issues would be debated and agreed prior to an executive decision.²²⁴ While its constitutional role as a body which formally ratifies government decisions remains important, power within the political executive to determine and co-ordinate executive policy has increasingly moved toward other institutional mechanisms.²²⁵

One prominent actor who has been increasingly looked toward to exercise control and direction over state activity from the centre is the Prime Minister. There is scholarly debate over the relative authority of the Prime Minister vis-à-vis other actors in the political executive. This is often expressed in terms of whether there has been a 'presidentialization' of U.K. executive politics.²²⁶ But it is broadly agreed the Prime Minister can draw on an array of authority, power, and resources they enjoy at the centre of networks and relationships which traverse the executive branch.²²⁷ For example, in recent decades the Prime Minister has been able to rely on institutional mechanisms like the Cabinet Office and Prime Minister's Office to help co-ordinate cross-departmental policy making, and scrutinize the work of administrative bodies. Both institutions have grown in influence, resources, and size in recent decades.

The Cabinet Office helps provide logistical support to Cabinet sub-Committees - bodies which emerged as a pragmatic response to the decline of full Cabinet meetings as the central

²²² Terence Dainith and Alan Page, *The Executive in the Constitution* (n 219) 7-8.

²²³ Ibid 51-57.

²²⁴ Peter Dorey, *Policymaking in Britain* (Sage, 2014) 117.

²²⁵ Terence Dainith and Alan Page, *The Executive in the Constitution* (n 219) 51-57.

²²⁶ See Michael Foley, *The Rise of the British Presidency* (Manchester University Press, 1993).

²²⁷ R. Heffernan, 'Prime Ministerial Predominance? Core Executive Politics in the UK' (2003) 5 *British Journal of Politics and International Relations* 605-620; R.A.W. Rhodes and Patrick Dunleavy, 'Core Executive Studies in Britain' (n 3) 3-28.

tool for macro executive policymaking. These sub-Committees are created and composed at the behest of the Prime Minister, and exist to agree and develop inter-departmental executive policy before formal approval by the full Cabinet.²²⁸ The Cabinet Office is now also used as a synoptic mechanism to scrutinize the firmament of administrative bodies outside core government departments - executive agencies, non-departmental public bodies, and non-ministerial departments.²²⁹ These bodies are subject to a rigorous triennial review by the political executive for whether their function is still needed; is still being delivered effectively by the organisation; and still contributes to the goals of the core sponsor department and to the executive as a whole.²³⁰ The review process aims to provide a robust challenge to, and assurance on the continuing need for, individual organizations – both their functions and form. Where it is agreed that an organisation should be retained, the review also scrutinizes their capacity for delivering more effectively and efficiently.²³¹ The Cabinet Office help agree both the terms of reference for these reviews and sign off on their final findings, which can form the basis of the political executive’s policy toward the body in question: whether it wishes to alter or keep its current form and function.²³²

The Prime Minister’s Office, and the Policy Unit embedded within, help facilitate Prime Ministerial capacity to adopt and promote policies and political strategy from the centre, outward toward Departments and administrative bodies.²³³ Prime Ministers have a view of government not accessible by other Ministers, a position operating in tandem with her other sources of authority and power: including formal constitutional power over the appointment and removal of Ministers, and informal powers of patronage and status which come from her status as party-leader and head of government.²³⁴ The institutional resources provided by the Cabinet and Prime Minister’s Office, combined with these other resources, cumulatively give her greater power relative to others to take initiative, *both* to define the executive’s strategic direction and act as its chief coordinator.²³⁵ Of course, the ability of the Prime Minister to control and direct other executive actors and administrative bodies from

²²⁸ Peter Dorey, *Policymaking in Britain* (n 224) 168-169.

²²⁹ Cabinet Office, *Tailored Reviews: Guidance on Reviews of Public Bodies* (2017).

²³⁰ Katherine Dommett, Muiris MacCarthaigh, Niamh Hardiman, ‘Reforming the Westminster Model of Agency Governance: Britain and Ireland after the Crisis’ (n 51) 535–552.

²³¹ Cabinet Office, *Tailored Reviews* (n 229) para. 2.

²³² *Ibid.*

²³³ Terence Dainith and Alan Page, *The Executive in the Constitution* (n 219) 54-55.

²³⁴ R.A.W. Rhodes, ‘From Prime Ministerial Power to Core’ (n 202) 78-79.

²³⁵ Terence Dainith and Alan Page, *The Executive in the Constitution* (n 219).

²³⁵ Peter Dorey, *Policymaking in Britain* (n 224) 117.

the centre is also contingent on other contextual factors, like their current political capital in the eyes of party, Parliament, and the public.²³⁶

Ireland

At the apex of the Irish administrative state is the government, the group of ministers headed by the Taoiseach vested the ‘executive power’ of the State.²³⁷ The members of Government are collectively the key link in the administrative apparatus,²³⁸ helping to bridge the electorate, the Dáil, and administrative bodies wielding administrative and delegated regulatory power.²³⁹ Colloquially known as ‘the cabinet’, this small group of politicians – constitutionally fixed at 15 - exercise strong political direction over core executive branch departments and their civil service. Article 28.12 refers to Ministers as being ‘in charge of’ Departments of State and Article 28.4.2 provides that the Government shall be collectively responsible for the Departments ‘administered’ by the members of the Government. Government Departments are therefore core bodies assisting in the formulation and administration of the executive’s political goals.

As in the United Kingdom, outside of these core government departments are administrative bodies which operate on a spectrum of direction and oversight from the executive. Administrative bodies can be statutory bodies created by the Oireachtas, or executive agencies created through an exercise of executive power designed to work within the umbrella of a parent Department, but operate day to day at arms-length.²⁴⁰ Administrative bodies come in a variety of forms, and fulfil a variety of functions; from discharging and formulating policy in specialist or technical areas, to commercial or regulatory functions assigned to them by Government or the Oireachtas.²⁴¹

Despite the diversity of their functions, administrative bodies tend to have several factors in common. For a start, the political executive’s day-to-day control over the activity of many administrative bodies is typically more attenuated than over central government departments.²⁴² For example, some administrative bodies are deliberately designed to be

²³⁶ R.A.W. Rhodes, ‘From Prime Ministerial Power to Core Executive’ (n 202).

²³⁷ Muiris MacCarthaigh, ‘Politics, Policy Preferences and the Evolution of Irish Bureaucracy’ (n 46) 23.

²³⁸ T.J. Barrington, *The Irish Administrative System* (n 47) 199; Fiona Donson and Darren O’Donovan, *Law and Public Administration in Ireland* (n 76) 61.

²³⁹ Katharine Dommett, Muiris MacCarthaigh, Niamh Hardiman, ‘Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis’ (n 51) 537.

²⁴⁰ Muiris MacCarthaigh, *Government in Modern Ireland* (Institute of Public Administration, 2008) 87.

²⁴¹ Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (n 42) 130.

²⁴² Muiris MacCarthaigh, *Government in Modern Ireland* (n 240) 86.

largely immune from political control, in the sense that overt government direction over its activity is deliberately limited and viewed with suspicion.²⁴³ Senior civil servants of these latter kinds of administrative bodies, like Central Banks or Ombudsmen, cannot be characterized as passive agents of the executive, as they can exercise significant influence over the policy formulation of their organizations.²⁴⁴

That said, to consider the bulk of the constellation of administrative bodies as comprising some sort of 'Fourth Branch' of state, fails to give due regard to the level of control and direction retained by the political executive. Even functionally highly autonomous administrative bodies, such as An Bord Pleanála, the Central Bank and the Irish Human Rights and Equality Commission, are subject to a measure of executive direction and control - through appointments, removals, and budgetary allocation powers.²⁴⁵ It is also important to note independent regulatory bodies have been deliberately structured this way by the core political executive, as a potential means of achieving political credibility or avoiding negative assertions of politicising activity which is seen (whether rightly or wrongly) in Irish society, as a matter of political morality, better suited to technocratic 'apolitical' control.²⁴⁶

Thus, in a similar fashion to the United Kingdom, the Government's command of executive power - as well as its regular control of the legislative process - give it ability to create, structure, restructure administrative bodies in a way it best deems fit. Virtually every statute creating and empowering an administrative body makes provision for the executive to issue statutory policy directions and guidelines the body must have regard to or follow,²⁴⁷ mechanisms allowing it to retain considerable control over their policy work. Moreover, as in the United Kingdom the executive typically exercises tight control over the laying down of general rules under secondary regulations.²⁴⁸ Where legislation passed by the Oireachtas leaves a discretion to an administrative body to make secondary regulations, it inevitably requires the body to receive ministerial consent before promulgation. Thus, most administrative bodies are best regarded as semi-detached organs of the executive as their functional independence is a matter of degree.²⁴⁹ These factors are what make the growth of

²⁴³ Niamh Hardiman and Colin Scott, 'Governance as Polity' (n 50) 173.

²⁴⁴ John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (n 59) 261.

²⁴⁵ In respect of the Central Bank see C.H. Murray, 'The Independence of Central Banks: An Irish Perspective' in C.H. Murray (ed.), *The Civil Service Observed* (Institute of Public Administration, 1990) 1-15.

²⁴⁶ Niamh Hardiman, 'Introduction: Profiling Irish Governance' (n 70) 12; Johnathan Westrup, 'Regulatory Governance' in Niamh Hardiman (ed.), *Irish Governance in Crisis* (n 157) 67-68.

²⁴⁷ Muiris MacCarthaigh 'Parliamentary Scrutiny of Departments and Agencies' (n 176) 366.

²⁴⁸ Edward L. Rubin, 'Law and Legislation in the Administrative State' (n 25) 374.

²⁴⁹ Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018) 108.

the administrative state apparatus an important variable empowering *executive* predominance – facilitating its ability to discharge political goals in complex policy environments, by availing of factors such as the specialist and technocratic expertise of such bodies. Its control over public administration is one of its core means, along with its predominance over the legislative process, for governing the state.²⁵⁰

While power over the Irish administrative state is undoubtedly concentrated within the government, at a more granular level the question of where the *precise* balance of power lies within the executive - between Ministers and the Taoiseach – is difficult to answer. It is subject to political variables like whether the government is a majority, minority, or coalition, and the personality of the incumbent Taoiseach.²⁵¹ Suffice it to say that two propositions appear plausible. First, Cabinet Ministers and the Taoiseach are all powerful actors at the top of the administrative state hierarchy. Second, recent decades have seen the Department of the Taoiseach in particular emerge as the central coordinating body of Irish government.²⁵² Taoisigh have increasingly drawn on both their formal powers as head of government, and informal political resources such as party loyalty and personality, to facilitate a greater coordinating role over executive branch policy.²⁵³ Such powers have helped the Taoiseach's Department formulate and implement policies which span several departments and across a range of administrative bodies. Three important trends illustrating this include use of cabinet sub-committees, the centrality of the Taoiseach's Department to the development of Social-Partnership, and Regulatory Impact Assessments ('**RIA**').

Use of the first has proliferated as a response to difficulties posed by the fact communication in Irish government departments tend to be vertical. From officials within the department to the minister they are accountable to, as opposed to lateral across departments. This poses obvious difficulties for the formation of policies which cut across several departments and administrative bodies.²⁵⁴ The formation of cabinet sub-committees, whose membership and remit are determined by the Taoiseach, has been used to manage, formulate, and eventually shepherd cross-departmental policies through to a full government decision.²⁵⁵ These cabinet

²⁵⁰ Ibid.

²⁵¹ John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (n 59) 265.

²⁵² Niamh Hardiman, Aidan Regan and Mary Shayne, 'The Core Executive: the Department of the Taoiseach and the Challenge of Policy Coordination', in O'Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance*, (Institute of Public Administration, 2012) 120-121.

²⁵³ *ibid* 116.

²⁵⁴ *ibid* 120-121.

²⁵⁵ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 249).

committees are attended by Ministers, and chaired by senior officials from the Department of Taoiseach, who serve to mobilise resources and help co-ordinate.²⁵⁶ These cabinet committees do not make decisions, but usually provide a recommendation to government and the Taoiseach through a formal memorandum. The significance of these Taoiseach constituted committees is that they provide a ‘networked, coordinating role’ for his department²⁵⁷ and can help delivery of complex cross-department policy objectives important to him. These developments help provide the Taoiseach’s Department a unique vantage point over the ‘politics of policy-making and the implementation of policy through the administrative system’.²⁵⁸

Social Partnership, a flagship policy pursued by successive governments from the late 1980’s to mid 2000’s, offers an excellent example of the Taoiseach’s ability to direct the administrative state from the centre. Social Partnership involved a succession of corporatist-style economic and social collaborative agreements between the executive and powerful interest groups such as trade unions, business representatives, farmers, and organisers from the voluntary sector. In an attempt to tackle economic stagnation, high taxes, high national debt, poverty, and low-pay, in a manner amenable to all parties.²⁵⁹ The Department of Taoiseach became *the* central forum through which the executive and these various groups negotiated the terms of these wide-ranging agreements, which carried very significant social and economic implications for the state.²⁶⁰

The Department also played a critical role in delivery of the objectives agreed in these partnership agreements.²⁶¹ These required enormous coordinating efforts to implement, given they implicated tax, employment, health, education, social welfare policies - spanning a spectrum of governmental departments and administrative bodies to give effect to an agreement.²⁶² For example, the political executive would inevitably direct a plethora of departments and bodies in the administrative state apparatus to take a broad range of actions: from raising the minimum wage, engaging in anti-poverty action, tackling long-term unemployment, and promoting targeted foreign investment. The executive’s political

²⁵⁶ Niamh Hardiman, Aidan Regan and Mary Shayne, ‘The Core Executive: the Department of the Taoiseach and the Challenge of Policy Coordination’ (n 252) 116.

²⁵⁷ Ibid.

²⁵⁸ *ibid* 113.

²⁵⁹ Maura Adshead, ‘The Exercise and Impact of Social Partnership’ in O’Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance*, (Institute of Public Administration, 2012) 174-175.

²⁶⁰ (n 252) 124-125.

²⁶¹ (n 259) 180-181.

²⁶² *ibid* 126-127.

authority and dominance through the party-system were also used to ensure partnership agreement objectives like tax cuts and public sector pay increases were included in its legislative programmes and eventually introduced to the Oireachtas.²⁶³ While Social Partnership imploded with Ireland's great recession, these developments, much with minimal Oireachtas input, highlight the potential coordinating capacity of the political executive and Taoiseach over the administrative state apparatus.

The Taoiseach's Department also co-ordinates policy formulation through the administrative state by spearheading use of RIA across government departments and administrative bodies.²⁶⁴ RIA requires that before a proposal for primary legislation or significant secondary legislation is promulgated, it must be assessed for whether it will meet its desired policy objectives, as well as possible side-effects and costs of pursuing it in the manner proposed.²⁶⁵ Currently, a RIA must assess the impact of a proposal across several policy dimensions: Northern Ireland relations, employment, gender equality, the environment, persons at risk of social exclusion, people with disabilities, industry costs, national economic competitiveness, exchequer costs,²⁶⁶ and impact on rural communities.²⁶⁶ These objectives can be tailored and changed depending on the incumbents political commitments, offering the Taoiseach a useful co-ordinating mechanism through which it can better ensure issues of political sensitivity and importance to him are factored into policymaking, across the entire span of the executive branch.²⁶⁷

Again, it bears repeating the executive bears the *balance* and not a *monopoly* on control and direction over the administrative state apparatus. While a very close relationship generally exists between the executive and the Oireachtas, the latter still retains a distinct institutional responsibility to oversee and hold to account the work of government Departments and administrative bodies under their direction. As many administrative bodies are creatures of statute, there is a very real sense that they are agents of the Oireachtas, and a potent means of effecting the broad normative goals articulated in legislation. Thus, a core constitutional responsibility of the Oireachtas as a principal is to scrutinise how its agents discharge its

²⁶³ (n 259) 185.

²⁶⁴ Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (n 249) 107.

²⁶⁵ Department of An Taoiseach, *Cabinet Handbook* (2006) 29-30; Department of An Taoiseach, *Revised RIA Guidelines: How to Conduct a Regulatory Impact Analysis* (June, 2009) 3.

²⁶⁶ *Ibid.*

²⁶⁷ Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (n 249) 108.

assigned functions.²⁶⁸ However, this is an area where formal constitutional principle and political reality collide in a particularly striking way. As the Oireachtas has historically been a relatively weak Parliament in terms of its independent institutional power vis-à-vis the executive, its record of robustly scrutinising the diverse activities of the administrative state apparatus is frequently described as sporadic.²⁶⁹ The increased capacity of Oireachtas Committees, through increased funding and research support has undoubtedly bolstered its ability to engage with the bureaucracy; through hold hearings with Ministers who are constitutionally answerable to the lower House, or through leadership of administrative bodies wielding statutory power or spending public monies, and issuing reports and recommendations on their activities.²⁷⁰ Increased resources and Committee authority has been linked to partisan co-operation and building of expertise and specialisation.²⁷¹ Claims that parliamentary scrutiny of the work of the administrative state apparatus is virtually non-existent would thus be to caricature the role of the Oireachtas.²⁷²

United States

The question of who controls the bureaucratic apparatus of the U.S. is deeply contested on descriptive and normative grounds. For some commentators, direction of a growing federal bureaucracy is one major area of presidential activity where his 'powers are simply not equal to his responsibilities'.²⁷³ Indeed, U.S. Presidents themselves have complained of their inability to execute policy through the administrative apparatus.²⁷⁴ Other commentators have argued that, on balance, the bureaucracy generally works to competently effect the President's programs.²⁷⁵ Some commentators go even further, and argue that presidential ability to leverage control of the bureaucracy has gone too far, and presents a distinct risk of excessive politicization and lawlessness, as administrative bodies might stretch their statutory mandates to meet the President's political objectives.²⁷⁶ Commentators thus diverge heavily on the *degree* to which he may control the administrative apparatus.

²⁶⁸ Peter Finnegan and Muiris MacCarthaigh, 'A Century of Irish Parliamentary Government' (2018) 66 *Administration* 49, 50; Muiris MacCarthaigh, 'Parliamentary Scrutiny of Departments and Agencies' (n 176) 375.

²⁶⁹ Muiris MacCarthaigh, 'Governance and accountability: the limits of new institutional remedies' in Niamh Hardiman (ed.), *Irish Governance in Crisis* (Manchester University Press, 2012) 23.

²⁷⁰ See the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013; Richard Boyle and Muiris MacCarthaigh, *Fit for Purpose?* (n 175) 47.

²⁷¹ Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Manchester University Press, 2012) 154.

²⁷² Muiris MacCarthaigh, 'Parliamentary Scrutiny of Departments and Agencies' (n 176) 375.

²⁷³ Clinton Rossiter, *The American Presidency* (Harvest, 1960) 19.

²⁷⁴ James Q. Wilson, *Bureaucracy* (n 178) 257.

²⁷⁵ *Ibid* 275.

²⁷⁶ Bruce Ackerman *Decline and Fall of the American Republic* (Harvard University Press, 2010) 37.

But as the chief executor of the law, few deny President's undoubtedly stand at its apex and enjoy several formal and informal legal and political mechanisms to direct and influence its work.²⁷⁷ This is especially the case over core cabinet departments, but more attenuated in respect of so-called independent administrative bodies like the Federal Reserve or Central Intelligence Agency.²⁷⁸ U.S. presidents of all political stripes have attempted to co-ordinate regulatory activity, and leverage more centralized control over administrative bodies wielding delegated power, to obtain significant policy aims outside the legislative process.²⁷⁹ This control intensified considerably following creation of the Executive Office of the President and several Executive Orders, which made the regulatory activity of the administrative state 'more and more an extension of the President's own policy and political agenda'.²⁸⁰

The real watershed moment for presidential control over the administrative state came during the New-Deal era. The 1936 Brownlow Committee convened by President Roosevelt recommended substantially improving the capacity of the President to control and direct the administrative state.²⁸¹ To better ensure its technocratic work was directed toward the public interest as understood by the democratically elected President, matching managerial efficiency with political responsiveness.²⁸² Reforms stemming from the report included passage of the Reorganization Act 1939, which expanded the size of the White House staff, and provision of specialized personnel to help the White House formulate policy and scrutinize the work of subordinate administrative actors. Dozens of specialized sub-agencies are now housed within the Executive Office, including the Office of Management and Budget (**OMB**) and Office of Information and Regulatory Affairs (**OIRA**). Executive Order No.12498 requires administrative bodies to submit an annual report to both sub-agencies, detailing their regulatory goals for the year and providing information on any upcoming significant regulatory activity.²⁸³ By acting as synoptic mechanisms to scrutinize the most important activity of administrative bodies,²⁸⁴ they increase presidential influence as

²⁷⁷ Jon D. Michaels, 'An Enduring, Evolving Separation of Powers' (n 10) 528.

²⁷⁸ Bert A. Rockman, 'Administering the Summit in the United States' (n 182) 249.

²⁷⁹ Peter L. Strauss, 'Overseer, or "the Decider"?' *The President in Administrative Law* (n 191) 718; James Q. Wilson, *Bureaucracy* (n 178) 257.

²⁸⁰ Elena Kagan, 'Presidential Administration' (n 6).

²⁸¹ David Rosenbloom, 'Re-evaluating Executive-Centred Administrative Theory' in Robert F. Durant (ed.), *The Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 106-107.

²⁸² Jerry Mashaw, 'Bureaucracy, Democracy and Judicial Review' in Robert F. Durant (ed.), *The Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 570.

²⁸³ Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Journal of Public Policy* 139, 151.

²⁸⁴ Adrian Vermeule, 'Local and Global Knowledge in the Administrative State' (n 135) 295-327.

proposed agendas and regulatory activity are subject to centralized review by his core staff before promulgation.²⁸⁵

Presidents also use Executive Orders to guide and infuse the work of administrative bodies with the moral and political goals of the incumbent president.²⁸⁶ For example, Executive Order No.12291 issued by President Reagan determined that cost-benefit analysis would be applied to all major rules and regulations proposed by administrative bodies in an attempt to spearhead the administration's deregulatory agenda.²⁸⁷ This Executive Order has been retained, amended, and expanded by successive Presidents, allowing the White House to subject the work of administrative bodies to a version of cost-benefit analysis defined by the incumbent's political philosophy. For example, President Barack Obama added a requirement proposed regulations be consistent with non-quantitative criteria such as equity, human dignity, and distributive impact.²⁸⁸ In contrast, Republican Presidents have used these mechanisms for aggressive deregulatory purposes.²⁸⁹ Most recently, President Trump has issued an supplementary executive order requiring administrative bodies to repeal two regulations for every newly proposed regulation in addition to carrying out cost-benefit analysis.²⁹⁰

Whether the President has constitutional power to direct a delegate of statutory power to exercise their authority in a particular manner has deeply divided commentators. Some contend that the Constitution requires the President have this authority given he is the sole actor vested with 'the executive power' of the state.²⁹¹ On this view, when Congress assigns a matter for decision to an executive official in the executive branch or administrative body, as a matter of constitutional law the President has the right to step into the decision makers shoes and decide.²⁹² Others contend that Congress can prevent the President exercising directive power over subordinates exercising statutory power if they use express language, but that there should be a statutory presumption he has such power.²⁹³ Finally, there are

²⁸⁵ Susan Webb Yackee, 'The Politics of Rulemaking in the United States' (2019) 22 Annual Review of Political Science 37, 41-42; Robert Durant and William Resh, "'Presidentializing" the Bureaucracy' in Robert F. Durant (ed.), *The Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 555.

²⁸⁶ *ibid* 41-42.

²⁸⁷ This does not apply to bodies OIRA deems independent regulatory agencies.

²⁸⁸ Executive Order 13563.

²⁸⁹ Elena Kagan, 'Presidential Administration' (n 6) 2349.

²⁹⁰ Executive Order 13771. See Susan Webb Yackee, 'The Politics of Rulemaking in the United States' (n 285) 50.

²⁹¹ For an argument that the Constitution does confer decisional authority See Christopher Yoo and Steven Calabresi, 'The Unitary Executive in the Modern Era, 1945-2004' (2005) 90 Iowa Law Review 601, 730; Steven Calabresi and Saikrishna Prakash, 'The President's Power to Execute the Laws' (n 186) 549-550.

²⁹² Peter L. Strauss, 'Overseer, or "the Decider"?' *The President in Administrative Law* (n 191) 703.

²⁹³ Elena Kagan, 'Presidential Administration' (n 6) 2372- 2385.

those who argue that unless the President is directly authorised by statute to direct the statutory power of subordinates then he is an overseer only, and can only control his executive underlings through his appointment and removal authority and informal political authority.²⁹⁴

The scope of this authority has not been adjudicated by the Supreme Court, however, in practice, Presidents have frequently been at pains to convey the impression they are personally responsible for domestic policy conducted through the administrative state apparatus. This is particularly true for core executive departments headed by cabinet members.²⁹⁵ Kagan's influential account of presidential control over the administrative state, outlined how Presidents have increasingly claimed authority to direct, or prompt, subordinates wielding statutory power to exercise discretion in a specified way consistent with the former's goals.²⁹⁶ Even if a President disclaims legal authority to direct an administrative body to act a certain way, the reality is that if an agency head fails to comply with a non-legally-binding order, she risks political blowback and removal by the President. The cumulative impact of these initiatives has, in the words of one commentator, turned the Executive Office of Presidency into a 'regulatory clearing house' and improved its ability to monitor, direct, and respond to the work of the administrative apparatus.²⁹⁷ When faced with a gridlocked or hostile Congress, Presidents have increasingly turned to the bureaucracy to achieve domestic policy goals, attempting to influence 'what they would (or would not) spend time on and what they would (or would not) generate as regulatory product'.²⁹⁸

In addition to his Article II constitutional power, the President is also a pervasive wielder of extensive and wide statutory authority in his own right. These combined constitutional and statutory powers give the President access to a range of mechanisms to harness the 'capabilities and powers' of a bureaucracy with wide regulatory reach.²⁹⁹ These developments have been controversial. Some argue greater centralized presidential direction over the administrative state apparatus brings several normative benefits, including greater

²⁹⁴ Kevin M. Stack, 'The President's Statutory Power to Administer the Laws' (2006) 106 *Columbia Law Review* 263; Peter Strauss, 'Presidential Rulemaking' (1997) 72 *Chicago-Kent Law Review* 965.

²⁹⁵ Peter L. Strauss, 'Overseer, or "the Decider"? The President in Administrative Law' (n 191) 702.

²⁹⁶ Elena Kagan, 'Presidential Administration' (n 6) 2248; David Rosenbloom, 'Re-evaluating Executive-Centred Administrative Theory' (n 281) 112-113.

²⁹⁷ (n 283).

²⁹⁸ Peter L. Strauss, 'Overseer, or "the Decider"? The President in Administrative Law' (n 191) 702.

²⁹⁹ Kate Andrias, 'The President's Enforcement Power' (2013) 88 *New York University Law Review* 1031, 1110; William P. Marshall, 'Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters' 88 *Boston University Law Review*, (2008) 505, 514.

democratic accountability and legitimation of its activity. This is linked to the President's national constituency and democratic mandate, as he is directly answerable to the entire electorate.³⁰⁰ In addition, it has been suggested Presidential direction promotes efficient policy-coordination and more balanced regulatory decisions than would be made by isolated administrative bodies pursuing their own agenda myopically.³⁰¹ In contrast, some argue greater presidential direction risks overriding the independence of administrative bodies and their dedication to addressing complex socio-economic problems from a non-partisan, expert driven approach - the initial *raison d'être* for the creation of these bodies by Congress.³⁰² This could not only undermine congressional policy choices, but if done systemically could undercut its institutional power in favour of the President.³⁰³ Other scholars suggest these developments risk administrative body 'lawlessness', by encouraging them to aggressively pursue ideological goals on the President's behalf which may stretch their statutory mandate or political neutrality.³⁰⁴

CONCLUSION

In each system I consider, increased state activity in social and political life spurred a move toward new forms of state power, designed to meet fresh challenges posed by previously unprecedented levels of involvement. Challenges which exposed the inadequacy of traditional law-making through primary legislation, or common law adjudication,³⁰⁵ as a means of reconciling the state's ability to use public power with political expectation. This inadequacy helped spur creation of the administrative state apparatus and expansion of the law-making activity of the executive branch. Both facilitated by legislative willingness to delegate and vest such authority in the core political executive and administrative bodies under its direction.³⁰⁶ This was in turn aided by judicial articulation of relaxed legal rules and standards to govern administrative power,³⁰⁷ which I explore in chapter six. The executive-led administrative state was thus created and nurtured from the broad outline of the

³⁰⁰ Elena Kagan, 'Presidential Administration' (n 6) 2331-2346.

³⁰¹ Christopher DeMuth and Douglas Ginsburg, 'The Benefits of White House Review', in Peter H. Schuck (ed.), *Foundations of Administrative Law: Interdisciplinary Readers in Law* (Oxford University Press, 1994) 245.

³⁰² See Bruce Ackerman, 'The New Separation of Powers' (n 110) 633; Peter L. Strauss, 'Overseer, or "the Decider"?' The President in Administrative Law' (n 191) 709-710.

³⁰³ Alan Morrison, 'OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation' in Peter H. Schuck (ed.), *Foundations of Administrative Law: Interdisciplinary Readers in Law* (Oxford University Press, 1994) 243.

³⁰⁴ Elena Kagan, 'Presidential Administration' (n 6) 2246; Bruce Ackerman *Decline and Fall of the American Republic* (n 276) 37.

³⁰⁵ Adrian Vermeule, *Law and the Limits of Reason* (n 2) 109; Lon L. Fuller, 'The Form and Limits of Adjudication' (n 2).

³⁰⁶ Patrick Dunleavy and R.A.W Rhodes, 'Core Executive Studies in Britain' (n 3).

³⁰⁷ Elena Kagan, 'Presidential Administration' (n 6) 2269.

traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order left by the capacious traditional tripartite framework.³⁰⁸

This chapter also traced the centralization of political power over the administrative branch apparatus *within* the political executive.³⁰⁹ In the context of the United Kingdom and Ireland, this is characterized by increased concentration of power over the administrative state in the hands of the Prime Minister and senior cabinet members. In the United States, this involves presidential efforts to leverage greater centralised control and direction over hundreds of administrative bodies wielding power granted by Congress.³¹⁰ What the President cannot command through engagement with the legislative process, he has increasingly leveraged in his own right through his authority over a formidable federal bureaucracy.³¹¹ In all systems, greater centralization has also better allowed the infusion of the technocratic work of the administrative state with the moral and political vision of the political executive.

A common and prominent theme for why power and control flowed to the political executive through these developments is its superior institutional capacity. Its capacity to grapple with radical changes occasioned by the complexity and volume of contemporary governance. Compared to the legislative and judicial branches, the political executive can count on comparative advantages like its nimble and unified structure and access to technocratic expertise and resources. These allow it to adapt and formulate policy at the pace and level of specialization demanded across a diverse range of political areas, in a manner the legislature and judiciary simply cannot.³¹²

A common explanatory argument underpinning these shifts is that they appear to be an attempt to improve the state's ability to project and use public power to effectively implement political decisions meeting the wants, needs, and demands of citizens. Expectations which invariably exist in a thicket of complex and difficult real-world conditions: from promoting economic prosperity, securing social justice, to providing demanding goods like education, health care, decent infrastructure, welfare.³¹³ All these

³⁰⁸ See Adrian Vermuele, *Laws Abnegation* (n 4) 1; Martin Loughlin, *Foundations of Public Law* (n 4) 435.

³⁰⁹ B. Guy Peters, R.A.W Rhodes and Vincent Wright, 'Staffing the Summit – the Administration of the Core Executive: Convergent Trends and National Specificities' (n 5) 21.

³¹⁰ Elena Kagan, 'Presidential Administration' (n 6).

³¹¹ See (n 7).

³¹² Cass R. Sunstein, 'The Most Knowledgeable Branch' (n 146).

³¹³ As Cane puts it, executive primacy is partly a result of 'citizen's demands and expectations that the state will step in to deal with social problems that can be tackled only by coordinated action at the social level'. Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 *Washington International Law Journal* 527, 561; Daryl J. Levinson, 'Foreword:

demands - both material and abstract³¹⁴ are primarily addressed to the political executive, focus of political hope, who is expected to use its administrative and regulatory power to provide 'direction, forceful energy and initiating drive on behalf of society's welfare and the nation's interest'.³¹⁵

Citizens and political elites disagree vociferously on their understanding of what prosperity, sound economic management, and social justice look like. They also clearly disagree on the best means for pursuing these goals. Some favour neoliberalism, some social democracy, some libertarianism. In other words, different forms of state involvement in social and economic life – whether it takes a positive, or aggressively deregulatory, role.³¹⁶ Citizens and political actors in these polities are largely not content with a nightwatchman state, with an executive branch that only protects against a 'warre' of 'every man, against every man'.³¹⁷ Instead, it is a non-partisan fact that it is 'difficult to think of a single area of governance' that the contemporary executive in these systems can safely ignore. Few would, or should, believe that political disputes are inevitably 'susceptible to correct solutions that can be (approximately) arrived at by expert deliberation'³¹⁸ by well-meaning civil-servants or technocrats in the executive branch.³¹⁹ But even if they have very different views on how to promote the common good or, can in the end, do little to resolve difficult policy issues,³²⁰ in *attempting* to do so political actors in each system inevitably rely on the capacity of a potent administrative state apparatus.

Having sketched the rise of executive predominance over policy and law-making in part two, part three of this thesis offers two substantive case-studies which highlight the extent of executive predominance over important aspects of political life, focusing at foreign affairs and emergency powers. Chapter four notes how questions of domestic political concern and importance are frequently shaped by, and interdependent on, decisions and developments

Looking for Power in Public Law' (n 9) 46; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000) 5; Michael Mann, 'The autonomous power of the state: its origins, mechanisms and results' (n 129) 189.

³¹⁴ I do not argue, as Tocqueville did, that state capacity has expanded as an attempt to slake man's desire or expectation for *material* improvement. I think expansion in state capacity to project public power includes bolstering the polity's ability to grapple with issues linked to citizens abstract feelings and general anxiety and unease about the political direction the community is heading, what values it is directed by and what political vision guides it. See Leo Strauss & Joseph Cropsey (eds.), *History of Political Philosophy* (University of Chicago Press, 3rd edition, 1987) 769.

³¹⁵ Michael Foley, *The Rise of the British Presidency* (n 226) 164.

³¹⁶ See discussion at (n 109)

³¹⁷ Thomas Hobbes, *Leviathan* in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 21* (1990).

³¹⁸ Philip Wallach, *The Administrative State's Legitimacy Crisis* (n 75) 9.

³¹⁹ Ian Shapiro, *Politics Against Domination* (Harvard University Press, 2016) 75.

³²⁰ Daryl Levinson, 'Empire-Building in Government in Constitutional Law' (2005) 118 *Harvard Law Review* 915, 957; William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (n 147) 180.

taken outside national politics. This came with two broad constitutional changes. First, a *vertical* delegation of power to the international political plane, and second, a concurrent *horizontal* delegation of authority to the executive branch, which accrued greater influence and agenda-setting power over issues of international concern. The arch of constitutional politics in each system has bent toward increased executive power over foreign affairs, and relegation of the legislature to a subsidiary, frequently reactive role. Its greater control over the formation and execution of foreign policy has given it more de facto influence in the domestic plane.

Chapter five argues that copious power has flowed to the executive in the name of counteracting emergencies, but each constitutional order has largely tried to subsume this authority under constitutional or statutory authorisation. This chapter highlights the two divergent faces of executive power which emerge throughout this thesis: politically predominant and beyond tight control by legal rules articulated by legislatures and courts, but still subservient to law in some residual and important sense. This tense duality between weakness and strength underscores not only the dominant political power of the executive, but the enduring importance of perceptions of legality to political legitimacy in these systems.

PART THREE: EXECUTIVE PREDOMINANCE IN ACTION

CHAPTER IV - OUR MAN IN HAVANA: FOREIGN AFFAIRS AND EXECUTIVE POWER

INTRODUCTION

The 20th and 21st centuries brought enormous change to nation states. Rapid advances in technology, transport, growth of international markets and transnational business activity, the globalization of trade, the desire to create a rules-based international order, and to abolish wars of aggression, all encouraged, or forced, nation states to co-operate and co-ordinate in politically unprecedented fashions.¹ Questions of domestic political concern and importance became frequently shaped by, and interdependent on, developments and decisions taken outside national borders. This came with two broad changes for many constitutional systems. First, a *vertical* delegation of power to the international plane, and second, a concurrent *horizontal* delegation of authority to the executive branch, which accrued greater influence and agenda-setting power over issues of international concern. This chapter provides an account of this development, and how the executive's position as the most important organ speaking for the state on the international plane has acted as an important component of its overall constitutional predominance.

Part I outlines the formal division of constitutional power over foreign affairs in each system as articulated in text, structure, and doctrine. It traces how constitutional principles in each system appear to envisage a measure of co-operation in the area of foreign affairs. Part II provides an outline of the literature documenting the growth of international and transnational governance. I outline how this growth ensured many areas of domestic policy are now heavily shaped in the realm of foreign affairs. The growth of the importance of international and transnational governance has concurrently increased the salience of control over the levers of foreign policy. Part III provides an account of the factors impacting why the distribution of foreign affairs power in national constitutional orders has shifted to the executive. It considers the influence of political party loyalty, informational and expertise asymmetry, structural advantages, and political incentive. The cumulative impact of these factors has tilted the balance in favour of executive predominance.

¹ Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 Michigan Journal of International Law 1041, 1047.

As with developments in other chapters, I argue at the heart of this development is an attempt to reconcile state ability to project public power with political expectation for goods like prosperity, security, welfare, and useful foreign relations. Achieving these goods in an increasingly interconnected world spurred a vertical delegation of normative power to the international plane; and a horizontal shift to the executive based on perceptions it was best placed - due to its institutional advantages in structure, information, expertise - to navigate between the domestic and international plane.

I. CONSTITUTIONAL ALLOCATION OF FOREIGN AFFAIRS POWER

Formal constitutional principles of each system, whether based on text or convention, recognize a sizeable role for the executive in this area. Indeed, compared to the formal domestic authority allocated to the executive, the baseline for executive control over foreign affairs is arguably higher. That said, in each system the formal powers of the legislature over foreign affairs are also substantial, and open the door for a separation of powers in this field characterized by dynamic and rough equilibrium over the direction of foreign policy. This has not been the case in practice, however, as external developments gradually acted to tilt the balance in the executive's favour.

The approach of each system to the reception of international law into the domestic sphere – whether it is dualist (like Ireland and the United Kingdom) or monist (like the United States) has had - perhaps surprisingly - little impact in staving off executive dominance. Theoretically speaking, the requirement for an executive in a dualist system like Ireland and the United Kingdom to gain parliamentary approval for an international agreement to gain the force of law, would seem to provide a more robust role for the legislature than in a monist system like the United States, where international agreements can be directly enforced when concluded by the executive. However, the following sections highlight that, in practice, the Oireachtas and Westminster Parliament have not exercised their formal constitutional authority with any more discernible muscularity than their monist congressional counterpart.

United Kingdom

Political theorists have long associated authority over foreign affairs with executive power. This association was partly descriptive and part normative. Descriptively, it was a positive fact that matters touching on the conduct of foreign policy were long considered paradigm ‘kingly powers’ and the preserve of the Crown.² Prescriptively, scholars offered several rationales for why this was right and proper.

For John Locke, the legislative power was ‘the supreme power of the common-wealth’ and the executive the ‘Supream Executor of the Law’ and a ‘dutiful and subordinate’ executor of legislative dictates. That said, Locke ascribed several notable powers to the executive branch, including what he dubbed the ‘federative powers’. These latter powers include authority over ‘war and peace, leagues and alliances, and all the transactions with all persons and communities’ outside the state.³ Locke’s rationale was that these latter powers were, unlike power orientated toward execution of the laws, ‘much less capable to be directed to antecedent, standing, positive Laws’ and so Locke argued ‘must be left to the Prudence and Wisdom’ of the executive, whose perpetual nature and ability to act decisively and with dispatch, made it more suitable body for these activities than an unwieldy deliberative body.⁴ Though the federative and executive powers were distinct for Locke, he added that they were almost ‘always united’ in reality and were ‘hardly to be separated, and placed...in the hands of distinct Persons’ as both required the ‘force of society’ and an element of flexibility and discretion a legislative assembly did not possess.⁵

Baron de Montesquieu’s influential account of the Separation of Powers in *Spirit of the Laws* similarly associated executive power with the conduct of foreign affairs. Executive power over the ‘law of nations’, said Montesquieu, included the making of peace or war, conducting diplomacy, and protecting against foreign aggression.⁶ In his favourable discussion of the English Constitution, Montesquieu argued this power ought to be exercised by the monarch, due to its ability to act with ‘despatch’, which a legislature could not do.⁷ William Blackstone also recorded that the Crown exercised ‘total control over foreign policy and war’ in the UK constitutional order.⁸ Blackstone also asserted that ‘with regard to foreign concerns, the king

² Rosara Joseph, *The War Prerogative: History, Reform and Constitutional Design* (Oxford University Press, 2013) 16.

³ Saikrishna Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (Yale University Press, 2015) 112.

⁴ Jack N. Ravoche, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A. Knopf, 1996) 247

⁵ John Locke, *Second Treatise on Government* in (ed.) Mortimer J. Adler (ed.), *Great Books of the Western World*, (2nd Edition, 1990) 165.

⁶ Baron de Montesquieu, ‘The Spirit of the Laws Book XI’ Mortimer J. Adler (ed.), *Great Books of the Western World* (2nd edition, 1990) 69.

⁷ Ibid.

⁸ Rosara Joseph, *The War Prerogative* (n 2) 37.

is the delegate or representative of his people' because it would be impossible that the 'individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves.'⁹ In other words, a similar structural argument to that employed by Locke and Montesquieu.

These theoretical accounts mapped onto UK constitutional orthodoxy. As documented in Chapter I, the constitutional settlement emerging after 1688 saw the Crown lose its unilateral law-making and suspending powers. However, other prerogative powers like authority to conduct the foreign affairs of the UK remained untouched. Normative justifications for executive foreign affairs predominance attracted several rationales from political actors. As already noted, some justificatory trends overlap, while others have shifted against the backdrop of broader political change. In the seventeenth century, justifications for executive power over war and foreign policy emphasised divine right, and the structural unsuitability of Parliament exercising this prerogative. These justifications were replaced in the eighteenth and nineteenth centuries by arguments more firmly based on the constitutional arguments of institutional expertise and representative government.¹⁰

Since the 19th century the Crown's prerogative powers over foreign affairs have been exercised in practice through the Prime Minister and their Cabinet. They encompass all aspects of diplomatic relations, and the negotiation, ratification and termination of treaties.¹¹ As the UK has a dualist approach to international law, the government exercises this prerogative power over foreign affairs at the international level and can enter diplomatic relations and ratify treaties/international instruments without parliamentary approval.¹² Under a conventional practice which emerged in the 1920's, known as the Ponsonby Rule, all treaties requiring ratification must be presented before both Houses of Parliament for at least 21 days before the actual ratification takes place, thereby enabling any member of either House to call attention to the proposed treaty action and stimulate public debate. Aside from this convention, the common law imposes no obligation to inform or involve Parliament in concluding international agreements.

⁹ William Blackstone, *Commentaries on the Laws of England* (Oxford University Press, 2016) 245.

¹⁰ Rosara Joseph, *The War Prerogative* (n 2) 36-41.

¹¹ *Ibid* 19-20.

¹² Robert Stewart, 'Treaty-Making Procedure in the United Kingdom' (1938) 32 *American Political Science Review* 655, 659. However, this prerogative power is checked by provisions of the Constitutional Reform and Governance Act 2010 which allow parliament to veto government ratification of treaties.

However, Parliament's status as ultimate law-making authority¹³ formally gives it broad powers over foreign affairs. A treaty or international agreement negotiated by the executive has no domestic legal effect over rights and duties unless and until the treaty obligations are 'incorporated' by the enactment of domestic legislation. When international agreements are incorporated by statute they cannot then be unilaterally frustrated by the executive.¹⁴ Funding for international commitments, as with any other policy, also requires parliamentary appropriation.¹⁵ Moreover, the executive's formal subordinate status ensures that if Parliament were to direct it through statute, the executive would have to faithfully obey.¹⁶

Ireland

In contrast to other constitutional systems with a common legal heritage such as Australia and Canada, the Irish constitution provides for a determinate textual allocation of foreign affairs power in the executive. The emphatic vesting of the foreign affairs power in the government was likely done purposefully, as an uncompromising reassertion of the freedom of the Irish State from Westminster.¹⁷ Article 28 states generally that 'the executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government' and Article 29 specifically that 'the executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government'.

For its part, the Irish Superior Courts have long interpreted these vesting clauses as guaranteeing broad authority for the executive over foreign affairs. Indeed, courts have maintained the executive 'is the sole organ of the State in the field of international affairs.'¹⁸ In *Doherty v Referendum Commission*, Hogan J. observed that as far as 'the general treaty making power is concerned...the executive retains control of all aspects of this function'.¹⁹

¹³ Joanna Harrington, 'Scrutiny and approval: the role for Westminster-style parliaments in treaty-making' (2006) 55 *International & Comparative Law Quarterly* 121, 122.

¹⁴ *R v Miller* [2017] UKSC 5.

¹⁵ Joanna Harrington, 'Scrutiny and approval: the role for Westminster-style parliaments in treaty-making' (n 13) 125.

¹⁶ *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, [1920] UKHL 1.

¹⁷ In *Pringle v Ireland* [2012] IESC 47. O'Donnell J. writes at para 18 that: 'The historical context makes this clear. Not only did the new State face an internal challenge from groups seeking to deny it legitimacy and assert their own title to govern, but perhaps even more significantly, the legal status of a dominion (which was how Ireland was viewed by the United Kingdom) was such that the Imperial Parliament still claimed, at least in theory, the right to legislate for Ireland (a claim contained in s.4 of the Irish Free State Constitution Act 1922); the army and navy of the United Kingdom still occupied the Treaty Ports, and the entitlement of the Privy Council to hear appeals from the Irish Supreme Court had only recently been removed in Ireland. This, then, was a very real context in which the exclusive power of the organs of Government was being asserted in the Constitution alongside the assertion in Article 29 of Ireland's entitlement to take its place among nations and conduct international relations with them.'

¹⁸ *Crotty v. An Taoiseach* [1987] I.R. 713, Walsh J., 777; See also *Pringle v Ireland* [2012] IESC 47.

¹⁹ Hogan J. stated that these were that: 'First, the approval of Dáil Éireann is required where the international agreement (other than agreements of a technical or administrative character) involves a charge on public funds (Article 29.5.1). Second,

This position was reiterated in *Pringle* by O'Donnell J., who considered that the Government's executive power over foreign affairs encompassed the conduct of diplomatic relations, discussion with other states, negotiating and executing treaties and conventions, and entering arrangements or understandings with other countries.²⁰ Generally, none of these actions require legislative authority and thus, even in a situation where the Oireachtas had stipulated that a treaty should be part of the law of the State, the 'decision as to whether the treaty should be ultimately ratified so as to bind the State as a matter of international law' would remain squarely with the executive.²¹

While the executive is given considerable authority, the Oireachtas too is vested with several powers which confer upon it an important supervisory role in international relations, powers which place limits on the Government's freedom of action. First, Article 29.5.1^o provides that 'every international agreement to which the State becomes a party shall be laid before Dáil Éireann'. Second, Article 29.5.2 provides that the 'State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann'. In line with the role of the legislative organ in the apportionment of public funds, this provision gives an important power to the Dáil in supervising treaty-making. For the Government to give the State's consent to be bound by such an agreement, the Dáil must have approved its terms.

United States

The Constitution's allocation of what can be dubbed foreign affairs powers is divided along two axes: the vertical separation of powers (allocating power to the national government or to the states or prohibiting it to one or both) and the horizontal separation of powers (allocating power to one of the three branches of the national government—legislative, judicial, or executive). Along each plane the Constitution assigns Congress and the President sizeable formal powers.²²

Article 29.6 reflects the classic dualist theory of international law in that it provides that no international agreement will be part of the domestic law of the State unless the Oireachtas so provides by law.'

²⁰ *Pringle v Ireland* [2012] IESC 47.

²¹ *Doherty v Referendum Commission* [2012] IEHC 211.

²² Debate over the precise allocation of constitutional power between the executive and legislature, both as a descriptive and normative matter, has long divided commentators. For an argument for presidential primacy see Saikrishna B. Prakash and Michael D. Ramsey, 'The Executive Power over Foreign Affairs' (2001) 111 *Yale Law Journal* 231-355; H. Jefferson Powell, 'The President's Authority over Foreign Affairs: An Executive Branch Perspective' (1999) 67 *527-576*. For contrary arguments see Julian Davis Mortenson, 'Article II Vests Executive Power, Not the Royal Prerogative' (2019) 119 *Columbia Law Review* 1169-1272; Curtis A. Bradley and Martin Flaherty, 'Executive Power Essentialism and Foreign Affairs' (2004) 102 *Michigan Law Review* 545-687.

On the vertical plane, the Constitution assigns to Congress the power ‘to regulate commerce with foreign nations, and among the several states’²³ and makes clear that the Constitution, all valid laws, and ‘all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land,’ binding upon every judge in every state ‘anything in the Constitution or the laws of any State to the contrary notwithstanding’.²⁴ Congress is also vested with the power to define and punish offenses against the laws of nations. Express vesting of these foreign affairs powers in the national government was partly a response to the marked failure of the Articles of Confederation to provide for a dynamic and unified foreign policy.²⁵

On the horizontal plane, the Constitution also assigns several significant powers to Congress. Congress was vested the power to regulate interstate and international commerce; to declare war and raise and support an army. One of the most ‘significant sources of congressional authority over foreign relations stems from its control over appropriations and spending’ and the fact the Constitution prohibits the appropriation of funds for the armed forces for a period of longer than two years. Additionally, the Framers understood the Senate, in particular, would play an important role in foreign relations. Their approval was required for the appointment of ambassadors and their advice and consent for ratification of international treaties. Collectively, these provisions give Congress potentially ‘enormous discretion...and thus power over US foreign relations.’²⁶

In respect of the executive, the framers of the United States Constitution attempted to provide the presidency with the flexibility and energy to meet unpredictable challenges with speed, decisiveness, and secrecy.²⁷ So, they were not overly prescriptive and rigid in enumerating the precise scope of the President’s power. On the other hand, they did not want to succumb to the danger of a ‘dangerously indeterminate’ grant of powers.²⁸ The Constitution thus grants the President several notable powers but leaves their precise bounds unenumerated. Generally, the President is vested with all ‘the executive power’ of the United States. Specifically, the President holds power over appointing ambassadors, receiving

²³ Article I, Section 8.

²⁴ Article VI.

²⁵ Akhil Amar, *America’s Constitution: A Biography* (Penguin Random House, 2005) 67; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Knopf, 1996) 26-28.

²⁶ Curtis Bradley and Jack Goldsmith, *Foreign Relations Law: Cases and Materials* (6th edn. Aspen, 2017) 148.

²⁷ Alexander Hamilton, ‘Federalist Paper No.70.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

²⁸ Akhil Amar, *America’s Constitution: A Biography* (n 25) 381-382.

ambassadors and public ministers, and final discretion concerning ratification of treaties.²⁹ These powers have several limitations. The President cannot make a treaty the supreme law of the land absent the advice and consent of the senate. Moreover, Congress retains power to frustrate or abrogate a treaty through statute, or to refuse to incorporate a treaty into domestic law or appropriate the funds for the successful execution of treaty obligations.³⁰

The constitution therefore formally divides and checks the power to formulate and execute foreign policy between Congress and the President. There is no obvious sense in which the Framers intended the President to be the ‘principal and independent’ author of foreign policy.³¹ Rather, as Silverstein observes, much like a ‘well-balanced game of tug-of-war’ the American constitutional system was predicated on the assumption that the many contending ‘factions and institutions would create a rough and dynamic equilibrium.’³²

II. FACTORS DRIVING EXECUTIVE PREDOMINANCE

A. Rise of International & Transnational Governance

The principles associated with the 1648 Westphalian settlement have enjoyed a large half-life in political thought. The settlement embedded in political thinking an enduringly influential conception of nation-state sovereignty, one encompassing absolute internal authority over conduct that occurs within their own territories.³³ It also assumes such sovereignty would be compromised if external political actors affected the operation of domestic law and policy.³⁴

Developments in the 20th and 21st century ensured classic visions of the Westphalian arrangement were put under strain.³⁵ State power now exists in an era where international and transnational governance and rules – articulated through international and supranational institutions - clearly affect domestic policy. States, of course, continue to exercise substantial

²⁹ *Zivotofsky ex rel. Zivotofsky v. Kerry* 576 U.S. 1059 (2015). This is because ‘even if the Senate were to vote to approve the treaty, a President who has turned against it (or who never was for it, the treaty having been submitted to the Senate by a prior administration) might simply refuse to file the papers necessary to give that consent effect—and do so entirely legally’. Oona A. Hathaway, ‘Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States’ (2008) 117 *Yale Law Journal* 1236, 1323-24

³⁰ *Medellin v. Texas*, 552 U.S. 491 (2008).

³¹ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (n 25) 267.

³² Gordon Silverstein, ‘U.S. War and Emergency Powers: The Virtues of Constitutional ambiguity’ (2011) 7 *Annual Review of Law and Social Science* 237, 241; Edward Corwin, *The President: Office and Powers* (NYU Press, 1948) 171.

³³ Julian G. Ku and John Yoo, ‘Globalization and Sovereignty’ (2013) 31 *Berkeley Journal of International Law* 210, 227.

³⁴ Anne Marie-Slaughter, ‘Sovereignty and Power in a Networked World Order’ (2004) 40 *Stanford Journal of International Law* 283, 284.

³⁵ *Ibid.*

control over their citizens and spatial territory; and state power has remained adaptable and enduring amidst the rise of internationalism and supranationalism.³⁶ In other words, states have certainly not abandoned their claim to be the center of the legal universe,³⁷ vividly demonstrated by the perceptible resurgence of nationalist & anti-globalist sentiment across many countries in recent years.³⁸ Yet at the same time, the traditional Westphalian arrangement demonstrably no longer has a firm grounding in political reality.³⁹

An increase in activities whose effects transcend national boundaries sits at the core of greater state interdependence and connectedness, and many economic, political, and social issues have effects and implications beyond the borders of one country or geographical region, no longer bound by territorial boundaries imposed by states.⁴⁰ It is far beyond the scope of this thesis to discern the normative impetus behind these developments in one system, let alone three, and it is not important for the purposes of my objectives.⁴¹ What is important is that, regardless of the immensely complex normative driving forces – from nationalistic self-interest, empire building, or Kantian idealism - the last several decades have seen a rise in international governance and co-operation across a diverse range of policy issues previously confined within national borders.

Interconnectedness accelerated following World War II, where a range of concerns – diplomatic, security-based, and economic – encouraged or forced states to engage in unprecedented levels of political and regulatory cooperation.⁴² State interconnectedness and interdependence further accelerated in recent years with the onset of Globalization. A notoriously contested concept⁴³, it can be generally understood to refer to the intensification

³⁶ Ran Hirschl and Ayelet Shachar, 'Spatial Statism' (2019) 17 *International Journal of Constitutional Law* 387- 438.

³⁷ See Barbo Fassbender, 'The State's Unabandoned Claim to Be the Center of the Legal Universe' (2018) 16 *International Journal of Constitutional Law* 1207.

³⁸ Contrary to what many globalists and post-nationalists may have predicted or wished, separatist and anti-globalization impulses remain robust in many diverse political communities. The 2016 Brexit referendum, robust endurance of populist-nationalist groups in other EU member states, and election of President Donald Trump on a platform of 'America First' are good recent examples.

³⁹ George Duke, 'Sovereignty and the common good' (2019) 17 *International Journal of Constitutional Law* 66, 66-67; Anne Marie-Slaughter, 'Sovereignty and Power in a Networked World Order' (n 34) 284.

⁴⁰ Janet McLean 'Government to State: Globalization, Regulation, and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173, 179.

⁴¹ Kenny has noted that 'Law in a globalized world will...be the result of a great many messy, pragmatic compromises made in response to changes in a very complex system, and made without any regard to grand theories or schemes.' David Kenny, 'Book Review: Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014)' (2015) 63 *American Journal of Comparative Law* 1053, 1059.

⁴² Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Harvard University Press, 1995) 26.

⁴³ As Yoo notes, 'Few terms are more ubiquitous in public affairs than "globalization." Countless journal articles and publications analyze globalization in sociology, political science, international relations, and cultural studies.' Julia G. Ku and John Yoo, 'Globalization and Sovereignty' (n 33) 211.

of global interconnectedness, where capital, people, and commodities move across ‘distance and physical boundaries with increasing speed and frequency.’⁴⁴ All of which have been aided by the rise of the modern technologies like the telephone, plane travel, email, and the internet, that make international communication and movement easier. Even loosely defined, the concept captures some important aspects of contemporary life: the world is growing more connected in the socio-economic sphere, and older forms of state demarcation, such as the territorial boundaries of sovereign states, have diminished in importance for many political issues.⁴⁵

On the economic front, intensified exchanges in the rate and movement of capital and trade have tied the economic fortunes of states closer together. Domestic economies are now often more subordinate to the ebb and flow of international market power, than to internal state regulation. In the face of relatively open trade, rapid information-technological advance, and considerable financial deregulation, sovereign states are now more vulnerable to economic shocks emanating from other states. Many economic problems are thus regarded by states as too complicated or sensitive to be effectively resolved by individual national governments but demand increased co-ordination and co-operation.⁴⁶

Beyond the financial sphere, states have recognized many other socio-economic problems can only be successfully tackled on an international and transnational level. Arms control, global health crises, natural disasters, extradition, environmental hazards, climate change, migration, data protection, protecting labour & consumer standards, investment, grappling with the tax consequences of globalized trade, and criminal law problems concerning terrorism, money laundering, and drug trafficking, are just a snapshot of the diverse kind of multifaceted issues which cross national boundaries and spur the rise of international and transnational governance.⁴⁷

Because these challenges cannot feasibly be resolved unilaterally at a national level, states have proceeded on the basis they can only be tackled by international or transnational means. This can encompass regulating the activities concerned through international or

⁴⁴ Philip Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 552.

⁴⁵ Julia G. Ku and John Yoo, ‘Globalization and Sovereignty’ (n 33) 212.

⁴⁶ Philip Berman, ‘From International Law to Law and Globalization’ (n 44) 502.

⁴⁷ Mario Mendez, ‘Constitutional review of treaties: Lessons for comparative constitutional design and practice’ (2017) 15 *International Journal of Constitutional Law* 84, 86-87.

transnational agreements.⁴⁸ International co-operation comes in many guises but can be helpfully coupled under two broad camps. First, formal international co-operation based around an international organization and, second, more informal co-operation in looser transnational forums.

Co-operation through International Agreements

In the former, control over tackling international issues is explicitly shared among representatives of two or more nations based on formally negotiated multilateral treaties. These are often coupled to international organizations designed to structure inter-state relations⁴⁹ and implement, interpret, and apply the agreed rules; to resolve disputes and perhaps make further rules. Such treaties have created a plethora of international organizations, as states have delegated decisions to international bodies to help achieve goals that would be much more difficult, if not impossible, for even the most powerful to achieve on their own.⁵⁰ This co-operation is intended to allow states to project their values, coordinate their activity, and to overcome collective-action dilemmas constraining individual state action.⁵¹ Prominent examples include the Council of Europe, United Nations, the World Bank, North Atlantic Treaty Organization, European Union, the International Monetary Fund, International Atomic Energy Agency, the World Trade Organization, and World Health Organization. While some extant international organizations like the Universal Postal Union pre-date the 20th Century, it was post-World War II that they truly proliferated, grew in size and capacity beyond anything existing in the past, performed functions which they never performed in the past, and operated on a truly global scale.⁵² These bodies grew in significance to the domestic political sphere of nation states as they became delegated and tasked with coordinating, revising, monitoring and implementing the content of an increasingly thick array of international agreements. Agreements which began reaching into policy areas previously reserved to political institutions of the nation state.⁵³ The European Union is particularly notable for producing binding supranational law in a wide swathe of areas, including agriculture, competition policy, energy, human rights, monetary policy,

⁴⁸ David Williams, 'Globalization and Governance: The Prospects for Democracy' (2003) 10 *Indiana Journal of Global Legal Studies* 157, 165.

⁴⁹ Kal Raustial, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law* 1, 1-3.

⁵⁰ Oona Hathaway, 'International Delegation and State Sovereignty' (2007) 71 *Law and Contemporary Problems* 115, 117.

⁵¹ Curtis A. Bradley and Judith G. Kelley, 'The Concept of International Delegation' (2007) 71 *Law and Contemporary Problems* 1, 6.

⁵² See Samuel Huntington, 'Transnational Organizations in World Politics' (1973) 25 *World Politics* 333-368.

⁵³ Hannah Woolaver, 'From joining to leaving: domestic law's role in the international legal validity of treaty withdrawal' (2019) 30 *European Journal of International Law* 73, 74; Curtis A. Bradley and Judith G. Kelley, 'The Concept of International Delegation' (n 51) 28.

public health, security, and trade. Indeed, very few areas of member state domestic policy remain untouched by EU law.⁵⁴

International organizations wield power delegated from individual nations. Yet, they often cannot be considered as acting in a principal-agent fashion. These international bodies often enjoy a significant degree of autonomy, in that no particular state is guaranteed a decisive vote or formal veto over their policy choices.⁵⁵ Rather, such organizations are typically subject to *indirect* political controls, exercised by member states through internal bargaining, negotiations, and agenda setting. Control over any final policy decisions can thus be diffused through several actors – from national executives to officials who owe their loyalty to the membership of the international body as a whole, rather than to any one particular state.⁵⁶

Informal co-operation through transnational governance

Prominent international organizations like the European Union, UN and WTO do not tell the full story of state interconnectedness. International co-operation is complemented by more informal transnational networks of national government officials.⁵⁷ These networks – prominent examples of which include the G20, G7, OECD, OSCE, and Basel Committee – are typically composed of figures from the political executive: like heads of state, finance ministers, or senior officials of regulatory bodies like central banks, policing agencies, and environmental protection bodies. Transnational governmental organizations often have no formal legal basis for their work – say, a treaty – but represent a more informal mechanism of state co-operation. They provide a forum for domestic governmental actors to connect, liaise, and form policy solutions to cross-border problems, which can be adapted into the domestic political sphere. These networks allow national executive officials to co-operate based on loosely-structured peer-to-peer ties developed through frequent interaction rather than formal negotiation.⁵⁸ Transgovernmental networks that tie together international and national public authorities have become important vehicles through which governments can enhance their access to information, learn from each other, and develop responses to cross-

⁵⁴ Eric C. Ip, 'Globalization and the future of the law of the sovereign state' (2010) 8 *International Journal of Constitutional Law* 636, 646.

⁵⁵ Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 *Columbia Law Review* 628, 632.

⁵⁶ *ibid.*

⁵⁷ Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (n 1) 1041, 1052.

⁵⁸ Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (n 49) 5.

border policy issues.⁵⁹ Their work can lead to standardization of laws, policies, and regulations in areas to address common concerns, in areas ranging from financial regulation to environmental protection.⁶⁰ Domestic regulatory rules altered to coordinate with foreign nations or standards agreed to in transnational political commitments can have significant social and economic effect.⁶¹

B. Rise of Executive Power

As international institutions and transnational networks emerged to exercise more influence over the direction and shape of important domestic policies of their participant members, the question of who controlled the levers of the foreign affairs powers of state became more pressing. National institutions are not isolated from, but embedded in, a changing and growing system of international governance, and changes in this international sphere can impact national constitutional settlements in turn. In this context, the rise of international governance has tilted ostensibly co-operative settlements into one where the executive plays a highly dominant role and the legislature a frequently subordinate one. To be sure, the legislative branch remains an important political constraint on the acceptable scope of executive action. But their ability to direct foreign affairs is comparatively weak, and their real role is reactive, involving critique and scrutiny rather than initiative and direction. There are several explanations for this drift.

Political party loyalty

As Chapter II recounted, the development of political parties, in both presidential and parliamentary systems, is a central extraconstitutional mechanism driving the institutional behavior of governmental branches. This pertains to foreign policy as much as domestic. Political parties facilitate greater levels of cohesion between the legislature and executive in the pursuit of a similar political vision.⁶² This collaboration undermined the notion each branch had a distinct institutional interest, which would naturally result in friction which other branches attempting to pursue their own potentially conflicting interest.⁶³ The political party system ameliorates the incentive for intense institutional competition between a

⁵⁹ *ibid* 14.

⁶⁰ Anne Marie-Slaughter, 'Sovereignty and Power in a Networked World Order' (n 34) 291.

⁶¹ Curtis Bradley and Jack L. Goldsmith, 'Presidential Control Over International Law' (2018) 131 *Harvard Law Review* 1201, 1256.

⁶² *Ibid*.

⁶³ Oona Hathway, 'Presidential Power over International Law-Making: Restoring the Balance' (2009) 119 *Yale Law Journal* 140, 216.

legislature and executive drawn from the same political party. In cases of party unity, legislators can have a relatively clear understanding of the policies their fellow party members in government are likely to pursue, and often adopt the position they do not need detailed oversight.

Informational Asymmetry & Structure

Constitutional and legal thought frequently asserts⁶⁴ that core aspects of foreign policy - diplomacy, recognizing and building useful relations with other nations - demand institutional traits like secrecy, unity of organization, purpose and vision, and an ability to act expeditiously to changing circumstances. These are the same traits the executive has long been associated with⁶⁵ and the same which have strengthened the executive's foreign policy predominance as the activity of international and transnational organizations have become more prominent for domestic politics.

For example, states frequently rely on informal or secretive negotiations with other states and officials when navigating international and transnational organizations.⁶⁶ As policymaking in international and transnational relations often involves bargaining and exchanges of sensitive information, it is common for executives to suggest negotiations must be treated confidentially until they are concluded, and that the involvement of other governments impose restraints on the level of acceptable disclosure of their content or state of progress.⁶⁷ Indeed, excessive disclosure of sensitive information, or the active participation of the legislature during negotiations, is frequently presented as posing a risk of distorting or weaken negotiating positions, or hurting the perceived national interest.⁶⁸ Executives are therefore frequently afforded privileged access to information on the substance of negotiations and on the strategic environment surrounding them.⁶⁹ The legislature's comparative lack of information means executive action at the international level is often only subject to domestic legislative scrutiny after negotiations have resulted in a

⁶⁴ Halvard Leira, 'The Emergence of Foreign Policy' (2019) 63 *International Studies Quarterly* 187–198.

⁶⁵ Adrian Vermeule and Eric Posner, *Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) 174.

⁶⁶ Aaron Wildavsky, 'The Two Presidencies' (1966) 4 *Trans-Action* 162, 165.

⁶⁷ Karl Kaiser, 'Transnational Relations as a Threat to the Democratic Process' (1971) 25 *International Organization* 706, 716.

⁶⁸ This is a contestable proposition of course and demonstrably not always the case. It has been argued legislative involvement can bestow critical credibility on executive actors. International actors may be more likely to believe a state will adhere to treaty commitments if the executive and legislature present a united front. See Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-level Games' (1988) 42 *International Organization* 427.

⁶⁹ Curtis Bradley, 'The Irrepressible Functionalism of US Foreign Relations Law' in Curtis A. Bradley (ed.), *Foreign Relations Law* (Edward Elgar Publishing, 2019).

formal policy proposal, the parameters of which have been largely hammered out by political executives and international officials.

Other institutional advantages the executive enjoy: access to information, expertise, and its unified hierarchical structure, also provide it superior capacity to initiate governmental action than its co-branches.⁷⁰ National executives oversee a diplomatic bureaucracy operating around the world, which can provide a tremendous amount of information related to the views, plans, and actions of foreign governments and international organizations, a flow of information the legislative branch is not equally privy.⁷¹ Additionally, the political executive has access to the persistent expertise of bureaucracies⁷² - complete with staff, and epistemic expertise - which assist it in deploying this information to formulate positions on the complex issues characteristic of international and transnational policy.⁷³ Intense asymmetry in expertise and information can also make it hard for legislatures to competently assess and pass judgment on the foreign policy choices of the executive, let alone take direct it in the first instance.

Its relatively hierarchical and unitary structure also make it significantly easier for the executive to take initiative over complex policy questions than the legislature, and to alter course if needed. In contrast, it is more difficult for procedurally cumbersome, time-constrained, generalist, and less resource rich legislatures to do so. Preference formation in the executive branch is highly streamlined due to its small and hierarchical nature, at least compared to a more cumbersome deliberative chamber divided along factional lines.⁷⁴

For both Mansfield and Hamilton, the executive's institutional capacity for energetic action is a key reason it tends toward expansion in its influence and power.⁷⁵ Through both unilateral assertion and through the co-operation and sanction of other institutional actors.

⁷⁰ Ganesh Sitaraman and Ingrid Wuerth, 'The Normalisation of Foreign Relations Law' (2015) 128 *Harvard Law Review* 1897, 1936.

⁷¹ Eric Paul Svensen, 'Structure-Induced Deference or Equal and Coordinate Actor: Congressional Influence on American Foreign Policy' (2019) 47 *American Politics Research* 88, 95.

⁷² Curtis Bradley, 'The Irrepressible Functionalism of US Foreign Relations Law' (n 69).

⁷³ Cass R. Sunstein, 'The Most Knowledgeable Branch' (2016) 164 *University of Pennsylvania Law Review* 1606; Rebecca Moosavian, 'Judges and high prerogative: the enduring influence of expertise and legal purity' (2012) *Public Law* 724, 743; Ganesh Sitaraman and Ingrid Wuerth, 'The Normalisation of Foreign Relations Law' (n 70) 1936.

⁷⁴ Ian Shapiro, *Politics Against Domination* (Harvard University Press, 2016) 69; David Lewis and Terry Moe, 'The Presidency and the Bureaucracy: The Levers of Presidential Control' in Michael Nelson (ed.), *The Presidency and the Political System* (CQ Press, 2014) 374-405; Gavin Barrett, *The Oireachtas and the European Union: The Evolving Role of the National Parliament in European Affairs* (Manchester University Press, 2011) 9; Johnathan Macey, 'Executive Branch Usurpation of Power: Corporations and Capital Markets' (2006) *Yale Law Journal* 115 2416, 2425.

⁷⁵ Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Free Press, 1989) 210; Alexander Hamilton, 'Federalist Paper No.70.' in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

Partly because of its structure, more than any other branch, the preserve of the modern executive is to *do*.⁷⁶ Of course, executives often seek ex-ante legislative approval and engagement when making and pursuing foreign policy choices. As Putnam notes, doing so can increase the credibility of executive negotiators and have a positive impact on the eventual implementation of international pacts.⁷⁷ But this is often a matter of executive grace, not legislative right.

Nature of decision-making process in foreign affairs

Central to greater executive predominance has been the copious delegation of political power out of the national legislative realm, and into an ‘increasingly complex and variegated’ international and transnational one.⁷⁸ Ceding competences to international organization and transnational networks dove-tails with executive control of diplomacy and negotiation. Together these factors enable executives to work collectively to achieve political goals in ways that can bypass national legislative institutions.⁷⁹ Aside from difficulties posed for legislatures by secrecy and information asymmetries, modes of international and transnational decision-making can also stymie attempts at ex-ante policy direction by the legislature. This is because most decision-making forums are directed through intergovernmental co-operation, and legislators are largely dependent on the executive in matters of international concern for initiative and translating domestic policy concerns into the international plane.⁸⁰ The European Union provides a good example of executive dominance via intergovernmentalism.⁸¹ The EU is led by the European Council - ‘the alpha and omega of executive power in the EU’ - and Council of Ministers. Alongside the EU Commission, national executives are the most-important actors in decision-making, steering the overall direction of the Union.⁸² National executives are involved both at the level of policy formation via ministers and prime ministers in the Council, and the European Council, and also at the lower levels of institutions (working parties, committees) where civil servants operate in largely invisible but important supporting roles.⁸³ After a proposal has been formed, legislative power to enact it is shared between the European Commission,

⁷⁶ Paul Craig and Adam Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 4.

⁷⁷ See Robert D. Putnam, ‘Diplomacy and Domestic Politics’ (n 68).

⁷⁸ Peter Lindseth, ‘Democratic Legitimacy and the Administrative Character Supranationalism’ (n 55) 632.

⁷⁹ Grainne de Burca, ‘Is EU Supranational Governance a Challenge to Liberal Constitutionalism?’ (2018) 85 *University of Chicago Law Review* 337, 361.

⁸⁰ Robert D. Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-level Games’ (n 68) 427.

⁸¹ John O’Brennan and Tapio Raunio, *National Parliaments Within the Enlarged European Union: From Victims of Integration to Competitive Actors?* (Palgrave, 2007) 5.

⁸² *Ibid.*

⁸³ Deirdre Curtin, ‘Challenging Executive Dominance in European Democracy’ (2014) 77 *Modern Law Review* 1, 5.

national executive bodies in the Council, and the European Parliament. National Parliaments are, as is frequently critiqued, excluded from this process.⁸⁴

A legislature can call to account its own national executive for its policy decisions, and even attempt to direct it through its law-making power, but it clearly cannot do the same for other state and international actors. National executives, therefore, partially elude responsibility to the legislature to achieve policy decisions the latter might prefer through the involvement of other political actors. Shared responsibility for reaching acceptable policy outcomes on often complex and divisive issues, may sometimes require repeat rounds of bargaining, compromise, and wide-ranging negotiation between national governments. Legislators have less control over the final shape of laws and policies than they ordinarily do over domestic issues, because it is necessary to gain the assent not only of all the relevant domestic actors, but another country's representative.

This reality makes it less plausible for any single national legislature – which is likely to have less information and expertise than executive actors anyway - to attempt to specify a pre-defined policy objective for its executive to achieve.⁸⁵ If international and transnational decision making rules limit the discretion of national governments, the supervisory functions of national Parliaments ‘become less important both to the parliamentary bodies themselves and to the public they serve’⁸⁶ ex-ante. Similarly, use of majority or qualified voting in international or transnational organizations ensure national executives can be outvoted, which also reduces incentive⁸⁷ for national legislatures to pressure governments to enter into detailed commitments to a particular course of action before entering negotiations or taking decisions.⁸⁸ Legislatures are instead usually involved as ratifying authorities and can typically exercise only retrospective and contestatory control but little directive role in the process.

Role perception and incentive

Effective oversight or influence over the direction foreign affairs requires a legislature collectively, or at least some parliamentarians individually, to have keen interest in engaging

⁸⁴ Adrian Vermuele and Eric Posner, *Executive Unbound* (n 65).

⁸⁵ Karl Kaiser, ‘Transnational Relations as a Threat to the Democratic Process’ (n 67) 713.

⁸⁶ Tom Ginsburg and Eric A. Posner, ‘Subconstitutionalism’ (2010) 62 *Stanford Law Review* 1583, 1613.

⁸⁷ *Ibid.*

⁸⁸ Andrea Hamann and Helene Ruiz Fabri, ‘Transnational networks and constitutionalism’ (2008) 6 *International Journal of Constitutional Law* 481, 490.

with policy and governmental performance and the will to influence it.⁸⁹ In each system, a barrier to achieving this goal has been a tendency amongst many legislators to regard the *formation* and *direction* of foreign affairs policy as simply beyond their purview, and the domain of the executive. This position is partly because of the executive's perceived mandate. As in the domestic context, the political executive is uniquely visible in the political imagination, and regarded as accountable to the entire polity, as opposed to a given constituency.⁹⁰ Even in parliamentary systems of Ireland and the UK, voters will frequently vote for the political party whose leader they wish to see form a government as much as for an individual legislator member of that party.⁹¹ The executive on this view has better claim to be representative of the national interest in foreign affairs than a more diffused legislature.⁹²

The legislative branch in each system has, as an institution, broadly complied with or acquiesced in the emergence of executive predominance in this arena. This is also attributed to a self-understanding that the executive is better institutionally equipped to direct foreign affairs.⁹³ Also relevant is the oft-cited claim that matters in the international and transnational realm are frequently not politically salient enough for most parliamentarians to dedicate the time and effort required to cultivate the information and expertise required to influence policy.⁹⁴

III. THE STATUS QUO OF EXECUTIVE PREDOMINANCE

Because of these factors, in the realm of foreign affairs the executive has been bestowed the burden of generating responses to external challenges and assuring the projection of national

⁸⁹ Shane Martin, 'Is All Politics Local? The Role-orientation of Irish Parliamentarians towards Foreign Policy' (2013) 28 *Irish Political Studies* 114-129.

⁹⁰ Terry Moe and Scott A. Wilson, 'Presidents and the Politics of Structure' (1994) 57 *Law and Contemporary Problems* 1, 11.

⁹¹ Shane Martin, 'Is All Politics Local? The Role-orientation of Irish Parliamentarians towards Foreign Policy' (n 89).

⁹² Jerry L. Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1 *Journal of Law, Economics & Organization* 81, 95-96.

⁹³ Harold Koh, 'Why the President (Almost) Always Win in Foreign Affairs: Lessons of the Iran-Conta Affair' (1988) 97 *Yale Law Journal* 1255, 1291.

⁹⁴ Shane Martin, 'Is All Politics Local? The Role-orientation of Irish Parliamentarians towards Foreign Policy' (n 89); John O'Brennan and Tapio Raunio, *National Parliaments Within the Enlarged European Union: From Victims of Integration to Competitive Actors?* (n 81) 278; Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford University Press, 1997) 213-224.

political and economic power on the international plane.⁹⁵ The executive, above any actor, enjoys a special role in mediating domestic and international political pressures.⁹⁶

United Kingdom

Direction and formation of foreign policy in the U.K. is the preserve of the political executive:⁹⁷ the Prime Minister, Cabinet, and organizations like the Cabinet Office. These actors co-ordinate executive policy and act as final arbiters of conflict between different parts of government.⁹⁸ More specifically, contemporary foreign policy decisions are dominated by the Prime Minister's Office, the Foreign & Commonwealth Office and its relevant ministers, and a permanent civil service bureaucracy.⁹⁹ Debate about whether the Prime Minister's Office has become increasingly presidential and dominating vis-à-vis his cabinet has produced a literature that 'is both vast and inconclusive'.¹⁰⁰ But the broad scholarly consensus appears to be that while the cabinet is now a body that registers important decisions taken elsewhere,¹⁰¹ whether by a powerful Prime Minister or influential sub-committee, the relative balance of authority between apex executive actors inevitably 'shifts over time and between policy areas'.¹⁰²

This debate aside, the political executive undoubtedly remains the primary institutional actor in the state's external relations, formulating UK foreign policy, representing the state at international and transnational forums, negotiating international agreements on its behalf, and deciding whether to engage or disengage from international organizations.¹⁰³ It acts as the key 'translator device' between the international and the domestic: projecting the ostensible preferences of the UK into international & transnational fora and then acting as the conduit for the reception of laws, regulations, and policies into the domestic realm.¹⁰⁴

⁹⁵ Peter Lindseth, 'Democratic Legitimacy and the Administrative Character Supranationalism' (n 55) 632.

⁹⁶ Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-level Games' (n 77) 427.

⁹⁷ *R v Miller* [2017] UKSC 5, at para 54.

⁹⁸ Martin J. Smith, *The Core Executive in Britain* (Macmillan Press, 1999) 1; R.A.W. Rhodes, 'From Prime Ministerial Power to Core Executive' in R.A.W. Rhodes and Patrick Dunleavy (eds.), *Prime Minister, Cabinet and Core Executive* (Macmillan, 1995) 12.

⁹⁹ Paul Williams, 'Who's Making UK Foreign Policy' (2004) 80 *International Affairs* 911, 915.

¹⁰⁰ *ibid* 917.

¹⁰¹ *ibid* 918.

¹⁰² R.A.W. Rhodes, 'From prime ministerial power to core executive' (n 98) 25.

¹⁰³ See Paul Craig, 'Engagement and Disengagement with International Institutions: The UK Perspective' in Curtis Bradley (ed.), *Comparative Foreign Relations Law* (Oxford University Press, 2019).

¹⁰⁴ Leonard F.M. Besselink, 'Shifts in Governance: National Parliaments and Their Governments' Involvement in European Union Decision-Making' in Gavid Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenges for the Oireachtas and Other Member State Legislatures* (Clarus Press, 2008) 31.

Executive control over the conduct of the United Kingdom's foreign affairs ranks high among the most significant of the powers vested in the cabinet.¹⁰⁵

The policies the executive pursues will, of course, be influenced by the executive's sense of parliamentary and public opinion.¹⁰⁶ But the design of international and transnational organizations means policymaking by executive actors is more isolated from national parliamentary scrutiny and control than that faced by cabinet ministers or bureaucrats in the domestic policy-making sphere.¹⁰⁷ Compounding this lack of robust parliamentary direction or control is an absence of a process or structure allowing it to influence or scrutinize the executive when it is in the midst of formulating policy in the international sphere.

Certainly, the EU focused 'scrutiny reserve' system adopted by Parliament gives it some mechanism for trying to influence executive policy positions. The system means that the executive cannot, generally speaking, agree to significant proposals at the Council level without first receiving the views of the relevant committees of the Commons and Lords.¹⁰⁸ But this system does not allow Parliament to bind the executive to specific positions ex-ante, making it a modest tool for controlling decisions at EU level.¹⁰⁹ It is also obviously of no relevance to non-EU international policy issues, which lack a similar reserve system. Parliament thus lacks, for example, any general right to a debate or vote on the position the executive ought to take on a given issue prior to or during negotiations, or to demarcate the bounds of its mandate.¹¹⁰ Nor does it have a right to be consulted or updated on the status of negotiations. There is also a notable absence of parliamentary committees devoted to scrutinising non-EU treaties or examining developments in international law generally, which perhaps compounds its lack of expertise and interest.¹¹¹

For both European and international issues, parliamentary input is heavily weighted toward post-hoc accountability rather than ex-ante constraint or influence.¹¹² Active parliamentary

¹⁰⁵ *R v Miller* [2017] UKSC 5, at para 54.

¹⁰⁶ Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017) 267-269.

¹⁰⁷ John O'Brennan and Tapio Raunio, *National Parliaments Within the Enlarged European Union: From Victims of Integration to Competitive Actors?* (n 81).

¹⁰⁸ Ariella Huff and Julie Smith, 'Westminster and the European Union: Ever-Increasing Scepticism?' in Olivier Rozenberg & Claudia Heffler (eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave, 2015) 319.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ See Jill Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reform' (2011) 60 *International & Comparative Law Quarterly* 225-245.

¹¹² Ariella Huff and Julie Smith, 'Westminster and the European Union: Ever-Increasing Scepticism?' (n 108) 319.

involvement in the ‘what’ and ‘why’ of international negotiations is therefore virtually non-existent.¹¹³ In other words, it has ‘no seat at the table’ during the substantive formation of international commitments. Its role remains largely reactive. However, even its reactive role can be limited, as once the executive has agreed upon the terms of an international policy or treaty, there is no effective means for Parliament to introduce a reservation or to bring about a change in terms.¹¹⁴ It largely has to take the proposal or reject it entirely.¹¹⁵ In respect of international treaty commitments, the Constitutional Reform and Governance Act 2010 does provide a treaty cannot be ratified if the House of Commons resolves it should not be, but Parliament need not give express consent before a treaty can be ratified, it only enjoys a veto. Thus far, it has never been employed.¹¹⁶ Parliament’s main scrutiny function comes when deliberating on whether to incorporate international obligations already agreed upon by the executive.¹¹⁷

The UK’s tangled relationship with one supranational institution in particular - the European Union - has had a marked impact on executive power. Membership of the E.U. had implications for the balance of power between Government and Parliament. The transformation of the United Kingdom from nation state to member state of the European Union inflated the law and policy-making authority of the executive as it enjoyed the standing and capacity to act within the institutional machinery of the E.U. This included both the way in which European law and policy decisions are made and in the terms of the way in which these choices are transposed into the domestic legal order.¹¹⁸ In respect of policy formulation, national executives stand foremost in the process of member state involvement.¹¹⁹ The Council of the European Union and the European Council are European institutions which are national in composition, represented respectively by ministerial representatives and the heads of government of member states. In these institutions, which are crucial to the overall policy and political direction of Union, decision making is primarily the business of the executive branch and civil servants of member states

¹¹³ Mark Elliott and Stephen Tierney, ‘The House of Lords Constitution Committee Reports on Parliamentary Scrutiny of Treaties’, *U.K. Const. L. Blog* (3rd May 2019).

¹¹⁴ Lord Templeman, ‘Treaty Making and the British Parliament’ (1991) 67 *Chicago-Kent Law Review* 459, 461.

¹¹⁵ Mario Mendez, ‘Constitutional review of treaties: Lessons for comparative constitutional design and practice’ (n 47) 98-99.

¹¹⁶ Bharat Malkani, ‘Human rights treaties in the English legal system’ (2011) *Public Law* 554.

¹¹⁷ House of Lords Report, ‘Parliamentary Scrutiny of Treaties’ (20th Report of Session, 2017-19) para. 15.

¹¹⁸ Paul Craig and Adam Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 8.

¹¹⁹ Leonard F.M. Besselink, ‘Shifts in Governance: National Parliaments and Their Governments’ Involvement in European Union Decision-Making’ (n 104) 31.

and not their national Parliaments.¹²⁰ In respect of implementing European Union laws and policies at the national level, executive power has been enhanced by widespread use of delegated law-making, seen as a necessity in coping with the range and technicality of EU regulation.¹²¹ That said, scrutiny of proposed E.U. legislation is, at least compared other aspects of international law, subject to robust oversight from select committees, and the opportunity for debate in both Houses.¹²²

The United Kingdom's decision to initiate Article 50 and exit the European Union has raised fresh questions about the balance of constitutional power between government and Parliament over foreign relations. One consequence was the extraordinary and unprecedented attempt of the 2015-2019 Parliament to steer the aims and output of negotiations between the UK executive & EU institutions. The European Union (Withdrawal) Act 2018 required parliamentary debate and approval of the outcome of negotiations between the United Kingdom Government and the European Union before ratification. It was in those circumstances that the House of Commons eventually came three times to reject the Withdrawal Agreement concluded between the Theresa May Government and the European Union. High levels of political party division and absence of a strong government majority combined to create a striking situation where the executive was too weak to press through its preferred policies, but where there was no alternative government available to pursue a different policy. Instead of withdrawing confidence from the government, parliamentarians opposed to the executive's approach tried, through securing control of the parliamentary timetable, passing resolutions and enacting statutes, to take unprecedented steps to direct the foreign policy of the UK. They pressured the executive to rule out a 'no-deal' exit¹²³ and directed the Prime Minister to pursue particular negotiation objectives, such as seeking an extension of the Article 50 period before the UK exits the EU.

This series of events was unprecedented and proven immensely controversial.¹²⁴ For the purposes of this chapter, it powerfully underscores that the constitutional status quo pre-

¹²⁰ Olivier Rozenberg and Claudia Hefftlar (eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave, 2015) 16; John O'Brennan and Tapio Raunio, *National Parliaments Within the Enlarged European Union: From Victims of Integration to Competitive Actors?* (n 81) 3.

¹²¹ Leonard F.M. Besselink, 'Shifts in Governance: National Parliaments and Their Governments' Involvement in European Union Decision-Making' (n 104) 35.

¹²² See Ariella Huff and Julie Smith, 'Westminster and the European Union: Ever-Increasing Scepticism?' (n 108) 319.

¹²³ European Union (Withdrawal) (No.6) Act 2019.

¹²⁴ Several high-profile public law scholars have clashed intensely on the propriety of parliament taken a more institutionally assertive role over foreign affairs contrary to the executive's position. See Stephen Laws and Richard Ekins, *Endangering Constitutional Government: The Risks of the House of Commons Taking Control* (Policy Exchange: Judicial Power Project, 2019).

Brexit has largely been one of executive predominance and a converse absence of parliamentary inclination to lead, or exercise a substantial role over, the negotiation and formation of international legal commitments. It remains to be seen whether the constitutional fall-out from political conflict over the British withdrawal will see Parliament carve out a permanent institutional space for itself to direct and influence foreign policy in the UK's post-EU future. But given Prime Minister Johnson's crushing victory in the 2019 General Election, it is hard to imagine the executive being directed in a similar manner in the conduct of its foreign policy objectives in the near future.

Ireland

The Government is the primary actor in the state's external relations, formulating Irish foreign policy, representing the state, and negotiating and concluding international agreements on its behalf.¹²⁵ International and EU policy-making is directed and overseen by a combination of the departments of 'Foreign Affairs, Finance and An Taoiseach, assisted by a highly effective civil service'¹²⁶ and the work of permanent secretariats based in key locations like Brussels and Strasbourg. The political executive acts as the 'key nodal point and bridge' between the national and the international political sphere. Members of government and senior civil service officials act as translators of transnational policies, norms and practices into the domestic arena and interpreters of domestic preferences back into the transnational arena.¹²⁷

This is particularly important in the European sphere, which lies at the heart of Irish foreign policy. In Ireland, it is the executive who, above any other domestic actor, can strive to shape the policy direction of the European Council and Commission. The ability of a national executive to direct the ebb and flow of European wide policy direction, through the European Council and Council of the European Union, no doubt corresponds in large degree to the size and economic power of a given member state. No-one could doubt for a moment the German Chancellor and French President generally wield more influence than the Irish Taoiseach. But in terms of relative scale, the Taoiseach and his senior ministers have the greatest input into the direction of European Union policy-direction amongst

¹²⁵ See David Fennelly, *International Law in the Irish Legal System* (Thomas Reuters, Roundhall, 2014).

¹²⁶ See John O' Brennan, 'Government and Parliament' in Kennedy, Doyle, Tonra, Dorr (eds.), *Irish Foreign Policy* (Gill & MacMillan, 2012).

¹²⁷ Bridgid Laffan and Jane O'Mahony, 'Managing Europe From an Irish Perspective: Critical Junctures and the Increasing Formalization of the Core Executive in Ireland' (2007) 85 *Public Administration* 167, 167-168.

domestic constitutional actors.¹²⁸ This influence augments the political predominance of the executive, given the broad and deep impact EU political decisions have on policy formation and execution at a domestic level.

In contrast, there has traditionally been little room for the Oireachtas to assert itself, whether in the early stages of policy initiation or the later stages of implementation at EU level.¹²⁹ Recent reforms have provided greater, and earlier, Oireachtas access to information from the executive about the formation of EU policy at the Council level. But its ability to use this to robustly shape executive policy ex-ante is hampered by, *inter alia*, a lack of a scrutiny reserve system (as in the UK) or a mandate system (as in Denmark).¹³⁰

Ireland's most consequential foreign policy decisions, such as pursuing greater European integration through enthusiastic membership of the Council of Europe & European Community¹³¹, dedication to UN peace-keeping but rejection of NATO membership, and negotiating the Good-Friday Peace Agreement, were all directed and fashioned by figures in the political executive aided by the civil service bureaucracy. In more recent years during the financial crisis, the profoundly consequential Memorandum of Understanding agreed between the Irish Government and its institutional lenders, the so-called Troika (the European Central Bank, the International Monetary Fund and the European Commission), was wholly executive led and enjoyed minimal parliamentary input as to its terms.¹³²

The Constitution confers important supervisory powers to the Oireachtas in respect of the Government's treaty-making. Indeed, the Constitution's provisions *could* provide the basis for a quite vigorous scrutiny of the Government's conduct of international relations. The Oireachtas could arguably specify the executive fulfil, or at least have regard to, a particular mandate when conducting foreign policy or adopt a specific position. But in practice the role of the Oireachtas has been quite passive. Like its UK counterpart, the Oireachtas lacks any right to a debate or vote on the position the executive ought to take on a given issue prior to or during negotiations, nor does it have a right to be consulted or updated on the status

¹²⁸ John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (6th edition, Routledge, 2017) 353.

¹²⁹ John O' Brennan, 'Government and Parliament' (n 126).

¹³⁰ Gavin Barrett, 'Long Train Running: The Slowly Developed (and Slowly Developing) Role of Ireland's Oireachtas in EU Affairs' in Olivier Rozenberg and Claudia Heffler (eds.) *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave, 2015) 290-311.

¹³¹ See Elizabeth Keane, 'Coming out of the Cave': The First Inter-party Government, the Council of Europe and NATO' (2004) 15 *Irish Studies in International Affairs* 167-190; Ben Tonra, 'The Europeanisation of Irish Foreign Affairs' 10 *Irish Studies in International Affairs* (1999) 149, 153.

¹³² Stephen Coutts, 'The Oireachtas and the Eurocrisis: Empowerment Through Crisis' 60 *Irish Jurist* (2016) 67,71-72.

of negotiations.¹³³ It would also be wholly exceptional for Oireachtas committees to issue instructions to executive ministers related to their European or international portfolio, or to demand detailed explanations from those ministers on their success or failure in fulfilling such mandates. By the time the Dáil is called upon to scrutinize executive performance at the international level, approve the terms of an agreement involving a charge upon public funds, or to enact legislation implementing an international agreement, the terms of the negotiation will have already been agreed upon by the executive and other relevant parties.¹³⁴ So, even where the Dáil's approval must be sought in accordance with Article 29.5.2, there is little the Dáil can do by way of directly influencing its terms, for the structural reasons outlined above. Parliamentary supervision of EU or international policy is almost always a *post hoc* affair in which ministers report to the Dáil only after major decisions have been taken.¹³⁵ Overall, Oireachtas *attempts* at exerting influence have been rare and overall 'evidence of *actual* parliamentary influence on Governmental positions appears...to be practically nil.'¹³⁶ Information asymmetry, party politics, role perception, and political incentives all hamper its ability to tilt the status quo to give it a greater influence in the substantive formation of policy.¹³⁷

Enormously consequential political events like Brexit provide a glimpse into how legislators *could* possibly take a more assertive approach to foreign affairs policy. Some parliamentary committees have taken an abnormally active approach in responding to Brexit and its potential economic, social, and political effects on the island. Yet, even here the usual limitations which tend to hamper parliamentary involvement in foreign policy are evident. Problems of information asymmetry linger, as *ex-ante* executive briefings to Oireachtas Committees on the substance of negotiations at the European Council level remain sporadic. There is also a distinct lack of interest amongst parliamentarians to fight for a more active role to affirmatively influence, or orientate, executive policy toward these negotiations. The Oireachtas' role has been largely limited to informing itself and the public on the complex issues Brexit has raised, engaging in relationship building, monitoring the EU-UK

¹³³ Gavin Barrett, 'Long Train Running: The Slowly Developed (and Slowly Developing) Role of Ireland's Oireachtas in EU Affairs' in Olivier Rozenberg and Claudia Heffler (eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave, 2015) 304.

¹³⁴ Mario Mendez, 'Constitutional review of treaties: Lessons for comparative constitutional design and practice' (n 47) 98-99.

¹³⁵ Ben Tonra, 'The Europeanisation of Irish Foreign Affairs' (n 131) 149.

¹³⁶ Gavin Barrett, 'Irish Parliament and Brexit' in Thomas Christiansen and Diane Fromage (eds.), *Brexit and Democracy: The Role of Parliaments in the UK and the European Union* (Palgrave, 2019) 179-205.

¹³⁷ *Ibid.*

negotiation process from the information they can piece together, and considering Irish Brexit-preparedness in the case of negative economic fall-out.¹³⁸

The most significant limitation on the executive's ability to form substantive international commitment has come from the judicial branch. In the landmark judgment in *Crotty v. An Taoiseach* the Supreme Court held it had implied constitutional authority to review executive action taken in 'clear disregard' of constitutional commitments.¹³⁹ In a strikingly interventionist judgment, the Supreme Court held it would be unconstitutional for the executive to enter substantive international commitments which would 'fetter' its own power to conduct foreign affairs. This judgment cast a long shadow over international affairs, creating a strong trend of government-initiated referendums to approve significant international agreements, especially EU treaty change.¹⁴⁰ This ensured the executive's ability to unilaterally effect substantial political change decision via its foreign affairs power was constrained.¹⁴¹ This constraint has been weakened by *Pringle v Ireland*,¹⁴² which saw the Supreme Court significantly retreat from a more exuberant reading of the *dicta* in *Crotty*.¹⁴³ The Supreme Court's more deferential approach in *Pringle* has thus loosened legal restraints on the executive's authority to entering binding international commitments, helping bolster its predominance over this area.

United States

Executive dominance is the 'most distinctive and important aspect' of contemporary U.S. foreign relations law.¹⁴⁴ Notwithstanding the textual bifurcation of foreign affairs powers between the President and Congress, in practice it is the former who has long 'exercised enormous...power...indeed...the dominant role' over the conduct of US foreign relations.¹⁴⁵ Although the powers explicitly vested in the office appear moderate, the 'structure of' the federal government, the facts of national life, the realities and exigencies of

¹³⁸ *Ibid.*

¹³⁹ *Crotty v An Taoiseach* [1974] IR 338. Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018) 35.

¹⁴⁰ David Fennelly, 'Crotty's Long Shadow: the European Union, the United Nations and the Changing Framework of Ireland's International Relations' in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012) 405-411.

¹⁴¹ Oran Doyle, 'Constitutional Change in Ireland: Political History and Balance of Power' (2017) 40 *Dublin University Law Journal* (2017) 6.

¹⁴² [2012] IESC 47.

¹⁴³ Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 139) 35.

¹⁴⁴ Ganesh Sitaraman and Ingrid Wuerth, 'The Normalisation of Foreign Relations Law' (n 70) 1930.

¹⁴⁵ Eric Paul Svensen, 'Structure-Induced Deference or Equal and Coordinate Actor: Congressional Influence on American Foreign Policy' (n 71) 89; Jack Goldsmith and Curtis Bradley, *Foreign Relations Law: Cases and Material* (n 26) 157; Edward Corwin, *The President: Office and Powers* (n 32) 185.

international relations . . . and the practices of diplomacy, have afforded Presidents unique temptations and unique opportunities to acquire unique and ever larger powers'.¹⁴⁶

The President's explicit Article II powers, which are facially modest, have long been construed to imply important additional powers. Presidents are now understood to be the principal organ of communication for United States diplomacy.¹⁴⁷ This role is implied from their powers over making treaties and sending and receiving of diplomats and solidified by long-standing historical practice, beginning with President Washington.¹⁴⁸ The President is now the sole actor tasked with representing the United States on the international stage – building relationships, communicating with foreign nations, conducting diplomacy, and negotiating agreements.¹⁴⁹

The growing importance of international and transnational policy, when combined with the President's role as primary representative of the US, has indirectly increased his authority over domestic policy. The US, which was at the time of its creation a small and uninfluential entity in world politics, grew to become its dominant economic, military, and political power. These developments generated significant demand on the country to embed itself in a web of international agreements and to play a leading role in international institutions – including as one of the five countries with a veto power on the UN Security Council.¹⁵⁰ As the sole organ representing the US on the world stage, the President projects his understanding of the preferences and priorities of the United States in these fora. In doing so, it engages in a wide range of consequential actions, including: making statements about U.S. positions relating to international issues, voting on resolutions that concern the content of pre-existing international obligations or to create new obligations, approving modifications to treaty obligations, and articulating the position of the United States in international adjudication.¹⁵¹ With this authority, the President enjoys the greatest capacity amongst domestic actors to influence the policy input and output of these organizations, which now have significant ramifications for domestic politics. In Arthur Schlesinger Jr's. influential account of the growth of presidential power, the so-called '*Imperial Presidency*' was largely a creation of its

¹⁴⁶ Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn., Oxford University Press, 1996) 31.

¹⁴⁷ Edward Corwin, *The President: Office and Powers* (n 32) 171.

¹⁴⁸ Saikrishna Prakash, *Imperial From the Beginning* (n 3) 120.

¹⁴⁹ Oona Hathway, 'Presidential Power over International Law-Making: Restoring the Balance' (n 63) 140, 206. In *United States v. Curtiss-Wright Export Corp* 299 U.S. 304 (1936) the Supreme Court maintained that 'the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.'

¹⁵⁰ See Arthur Schlesinger, *The Imperial Presidency* (Houghton Mifflin Company, 1973).

¹⁵¹ Curtis Bradley and Jack L. Goldsmith, 'Presidential Control Over International Law' (n 61)1241.

dominance over foreign policy. A by-product, he suggested, of the enormous institutional responsibility accrued and bestowed on the presidency to manage the inevitable complexity and dangers embedded in the foreign affairs of the world's premier superpower.¹⁵² In contrast, nonexecutive conduct of foreign affairs, diplomatic communication between Congress and a foreign executive branch, has long been extremely rare.¹⁵³

In addition to its own constitutional powers becoming more pertinent in this environment, presidential empowerment was cemented by statutory delegation. As Presidents sought ever-growing discretion and flexibility to negotiate international commitments on a wide range of policy issues, Congress obliged by delegating broad statutory authority across successive administrations.¹⁵⁴ Once a duty shared by Congress and the President, the 'task of concluding international agreements has come to be borne almost entirely by the President alone'¹⁵⁵ with minimal ex-ante direction. Today, the vast majority of binding international agreements entered into by the United States are concluded by the President through what are referred to as 'executive agreements.'

These agreements are executed outside the template of traditional Article II treaties which require Senate approval. They encompass 'sole executive agreements', agreements made by the President without any congressional involvement; and 'ex ante congressional-executive agreements', agreements made by the President using broad delegated authority granted to him in advance by Congress.¹⁵⁶ These latter grants of authority are frequently vague, open-ended, and not time-limited, providing general advance authorization to make an agreement that the President in his discretion can negotiate, conclude, and 'ratify without ever returning to Congress for its review, much less approval.'¹⁵⁷ They allow the President to negotiate agreements with maximum discretion and flexibility, and put them into force without any further congressional approval or consultation, sometimes many decades after the statutory authority is first granted.¹⁵⁸ Executive agreements which the President negotiates and concludes are thus often 'approved' by Congress in the narrow legal sense of having stemmed from a grant of statutory authority. But once Congress has given away the power

¹⁵² Eric A. Posner and Adrian Vermeule, 'Tyrannophobia' in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012) 326, 346; Arthur Schlesinger, *The Imperial Presidency* (n 150) 206-208.

¹⁵³ Kristen E. Eichensehr, 'Courts, Congress, and the Conduct of Foreign Relations' (2018) 85 *University of Chicago Law Review* 609, 612.

¹⁵⁴ Curtis Bradley, 'The Irrepressible Functionalism of US Foreign Relations Law' (n 69).

¹⁵⁵ Oona Hathway, 'Presidential Power over International Law-Making: Restoring the Balance' (n 63) 144.

¹⁵⁶ *Ibid.*

¹⁵⁷ Curtis Bradley and Jack L. Goldsmith, 'Presidential Control Over International Law' (n 61) 1213.

¹⁵⁸ *Ibid.* 1205.

to conclude agreements on a given topic there is little genuine cooperation between the President and Congress in the process of creating international agreements.¹⁵⁹ With respect of these kinds of agreements, Congress generally has no involvement in shaping their substance and is nearly powerless to prevent an agreement with which it disagrees from becoming law.¹⁶⁰

These agreements are not reserved for insignificant matters, but can be used to create extraordinarily consequential international agreements unilaterally.¹⁶¹ In the previous decade, an average of between two and three hundred of these kind of executive agreements have been concluded each year, touching on ‘nearly every subject of international law—at times with substantial effect.’¹⁶² By comparison, the United States has only ratified roughly twenty Article II treaties annually during the same decade. The vast majority of international and transnational agreements of the US are currently made through unilateral presidential decision ‘without meaningful interbranch deliberation’.¹⁶³ Goldsmith and Bradley estimate that genuine ‘interbranch collaboration via Article II treaties or ex post congressional-executive agreements occurs for approximately 6-7% of binding U.S. international agreements.’¹⁶⁴

Presidents also exercise predominant power over treaty termination. The text of the U.S. Constitution does not specifically address which actor has authority to act on behalf of the United States in terminating a treaty. Treaty termination since the Founding has been effectuated by statute, by subsequent treaty, by presidential action along with the Senate, or by unilateral presidential action. The descriptive and normative dimensions of this question have deeply divided scholars.¹⁶⁵ Since the early twentieth century, however, Presidents have in practice come to dominate treaty termination just as they have the making and interpretation of treaties.¹⁶⁶

President Trump provides a vivid example of how significant this termination authority can be. In little over three years President Trump has unilaterally brought enormous change to

¹⁵⁹ *ibid* 1214.

¹⁶⁰ Oona Hathway, ‘Presidential Power over International Law-Making: Restoring the Balance’ (n 63) 215.

¹⁶¹ Curtis Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (n 61) 1248.

¹⁶² Oona Hathway, ‘Presidential Power over International Law-Making: Restoring the Balance’ (n 63) 144.

¹⁶³ Curtis Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (n 61) 1213.

¹⁶⁴ *Ibid* 1214.

¹⁶⁵ For a useful overview of the academic debate *see* Daniel J. Hessel, ‘Founding-Era *Jus Ad Bellum* and the Domestic Law of Treaty Withdrawal’ (2015) 125 *Yale Law Journal* 2394-2444.

¹⁶⁶ Curtis Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (n 61).

the United States approach to international law and institutions. Under his administration, the USA has withdrawn from a number of important international agreements, organizations, and negotiations including the Trans-Pacific Partnership, Transatlantic Trade and Investment Partnership, UNESCO, the UN Human Rights Council, the Paris Climate Agreement and the Joint Comprehensive Plan of Action (“the Iran Nuclear Deal”).¹⁶⁷ He has also forced renegotiation of the North American Free Trade Agreement with Canada and Mexico.¹⁶⁸ Some of these decisions will no doubt have profound economic and political repercussions, domestic and international, and are testament to the fact the US constitutional order lives in an ‘era of unprecedented presidential dominance over international law.’¹⁶⁹

Despite having significant constitutional powers, it is evident Congress generally does not use them to try and conduct or direct US foreign policy, and its formal authority undoubtedly ‘exceeds its functional willingness to deploy it.’¹⁷⁰ This is attributable to the institutional factors considered above: the fact it is a multi-member deliberative body that has difficulty acting with dispatch; that it has considerable difficulty maintaining secrecy; and the fact it is not always in session raises continuity problems for addressing unpredictable foreign affairs issues that arise.¹⁷¹ Moreover, a critical mass of members have simply been unwilling, over sustained periods of time and across administrations, to take responsibility for setting foreign policy, preferring to leave ultimate ‘decision making - and any blame - with the President.’¹⁷² Congress's use of its copious legal power is therefore typically modest compared to the executive. If Congress *were* to act to demand the President take or not take certain action in realm of foreign affairs, the *Youngstown* framework ensures the latter’s power could be at its lowest ebb if he disobeyed.¹⁷³ Yet Congress does not attempt to closely guide the executive’s conduct of foreign policy through statute, but instead relies on mechanisms like reporting and consultation requirements, oversight hearings, budgetary powers, the threat of censure - to wield indirect influence.¹⁷⁴ Congress may also advance its agenda by using ‘process-controls’ to structure executive branch decision-making in a manner which can reduce the risk presidential foreign policy discretion will be used in a partisan or opportunistic

¹⁶⁷ See Jack Goldsmith and Shannon Mercer, ‘International Law and Institutions in the Trump Era’ (Forthcoming, 2020) German Yearbook of International Law.

¹⁶⁸ Curtis Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (n 61) 1225.

¹⁶⁹ Jack Goldsmith, ‘Book Review: Harold Koh, *The Trump Administration and International Law* (Oxford University Press, 2018)’ (Forthcoming, 2020) American Journal of International Law.

¹⁷⁰ Rebecca Ingber, ‘Congressional Administration of Foreign Affairs’ (Forthcoming 2020) 106 Virginia Law Review.

¹⁷¹ Ian Shapiro, *Politics Against Domination* (Harvard University Press, 2016) 69.

¹⁷² Harold Koh, ‘Why the President (Almost) Always Win in Foreign Affairs’ (n 93) 1304; Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (n 94) 213-224.

¹⁷³ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952).

¹⁷⁴ Curtis Bradley and Jack L. Goldsmith, ‘Presidential Control Over International Law’ (n 61) 1271.

manner.¹⁷⁵ For example, by making executive action conditional on certain factual circumstances or findings¹⁷⁶, or the agreement of a technocratic official.¹⁷⁷

Legislative inertia and willingness to leave the substantive direction of foreign policy to the executive can certainly be shifted by events of intense political controversy. The years following the Vietnam war provide a good example and bore witness to a backlash against the wisdom of presidential unilateralism and congressional attempt to reassert its institutional muscle over sensitive aspects of foreign affairs. This period included passage of the War Powers Act,¹⁷⁸ Arms Control Export Act and Foreign Intelligence Surveillance Act.¹⁷⁹ But such attempts did little to dent executive predominance long-term, given Congress' institutional handicaps in formulating and executing foreign policy¹⁸⁰, handicaps which spurred deference and delegation to the executive in the first place.¹⁸¹

CONCLUSION

In the United Kingdom and Ireland, the executive has always been the predominant political actor, notwithstanding the impressive formal legal power of the legislative branch. The most profound change in the realm of foreign affairs in these respective systems, from the perspective of assessing executive predominance, has been the increased importance of international and transnational policy making to domestic politics. As the former increased in influence, the executive's control of the direction and influence of foreign policy gave it *de facto* increased authority over domestic policy, alongside less legislative control.

The inability of the legislature to exercise substantive direction over the executive in the international plane has, as foreign affairs became more significant, bolstered the executive's constitutional predominance. The picture in the US is slightly different and is one of a titling

¹⁷⁵ Rebecca Ingber, 'Congressional Administration of Foreign Affairs' (n 170).

¹⁷⁶ For example, in 2017 Congress used the National Defence Authorisation Act to limit the President's ability to conduct bilateral military operations with Russia. The president cannot do so unless the Secretary of State and Defence jointly agree Russia has ceased its occupation of Ukraine and does not pose a threat to any NATO member countries.

¹⁷⁷ The Trade Expansion Act 1962 allows the President to increase tariffs on a country if the Secretary of Commerce, in consultation with the Secretary of State, determine current trade practices pose a risk to national security.

¹⁷⁸ Enacted in 1973 in the aftermath of the Vietnam war, the statute represents one of the more substantive attempts at congressional constraint on unilateral executive war making. Its main provisions require the President to submit a report to Congress within 48 hours whenever armed forces are introduced 'into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.' After the President reports the introduction of forces into imminent or actual hostilities, the Resolution requires him to withdraw those forces within 60 days (or 90 days, based on military necessity) in any situation where the US are engaged in 'hostilities' or 'likely hostilities' unless authorized by congress.

¹⁷⁹ Brian McKeon and Caroline Tess, 'How Congress Can Take Back Foreign Policy: A Playbook for Capitol Hill' (2019) 98 Foreign Affairs 76.

¹⁸⁰ Rebecca Ingber, 'Congressional Administration of Foreign Affairs' (n 170).

¹⁸¹ Harold Koh, 'Why the President (Almost) Always Win in Foreign Affairs: Lessons of the Iran-Conta Affair' (n 93) 1295.

equilibria. Congress and the President both have considerable formal authority over foreign affairs and, in practice, for periods of time both enjoyed large degrees of practical control over foreign policy making. However, the factors outlined in Parts I and II gradually enabled the President's authority to dominate the foreign affairs arena, over time working out as a net transfer of policymaking power from Congress to the President. This occurred both through presidential assertion of constitutional power as the primary organ of communication and diplomacy, and Congressional acquiescence and delegation of broad statutory authority.

The influence of political party loyalty, informational and expertise asymmetry, structural advantages, and political incentive have cumulatively tilted the balance in favour of executive predominance in each system. The legislature still retains various tools to influence foreign policy, even if its impact on the formation of substantive commitments is weak. Its very existence, and its considerable formal powers, no doubt also ensure the executive will invariably anticipate and factor its reaction when formulating its own proposals, and perhaps eliminate or ameliorate proposals that would run into severe opposition.¹⁸² Yet, the arc of constitutional politics in each system has bent toward increased executive power over foreign affairs, and relegation of the legislature to a subsidiary, frequently reactive role.

As with developments in other chapters, at the heart of these trends is an attempt by each constitutional system to match these state's capacity to project public power with political expectation for goods like prosperity, security, welfare, and useful foreign relations. Achieving these goods in an increasingly interconnected world, where the unilateral capacity of states is stymied, spurred vertical delegation of normative power to the international plane; and a horizontal shift to the executive based on perceptions it was best placed - due to its institutional advantages in structure, information, expertise - to navigate between the domestic and international plane.

¹⁸² Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017); Aaron Wildavsky, 'The Two Presidencies' (n 66) 162.

CHAPTER V: EXECUTIVE UNBOUND? THE EXECUTIVE AND EMERGENCY POWERS

INTRODUCTION

One of the most difficult and recurring questions troubling constitutional systems has been reconciling constitutional government, which constrains government power through law, and providing the kind of broad discretionary power needed to deal with emergency events threatening the welfare, or even survival, of the polity.¹ Given this difficulty, it is unsurprising a large body of commentary has emerged grappling with the appropriate positive and normative stance constitutional orders should take toward emergency powers. In this context, we can understand the term emergency powers to refer to measures expanding governmental authority in response to an event perceived as sparking a ‘sudden and unexpected rise in social costs’ accompanied by a ‘great deal of uncertainty about the length of time the high level of cost will persist’.² Economic collapse, natural disaster, epidemics, mass displacement, political subversion, terrorist attacks; are just a small snap-shot of the kinds of challenges prompting calls for emergency powers. Compressions in time and space brought about by modern technologies ensure these threats are not as easily bound, temporally or geographically, as previous eras.³ Such events can put immense strain on the capacity of the constitutional order to respond in a manner which both protects the safety and welfare of its citizens, but limits scope for arbitrary and oppressive action. Action which might undermine the fundamental values of the polity, or survival in its current constituted form.⁴ Questions of the appropriateness of emergency powers and their scope has thus been a rich source of controversy and debate along several dimensions: empirical, normative, and theoretical.

The main object of this chapter is to provide a positive account of how emergency powers have been created, distributed, and employed in each system. In so doing, I have four objectives. First, I demonstrate that they are an important variable assisting the permanent

¹Clement Fatovic and Benjamin Kleinerman, ‘Introduction: Extra-Legal Measures and the Problem of Legitimacy’ in Clement Fatovic and Benjamin Kleinerman (eds.), *Extra-Legal Power and Legitimacy* (Oxford University Press, 2013) 1; Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 1; Jules Lobel, ‘Emergency Power and the Decline of Liberalism’ (1989) 98 *Yale Law Journal* 1385, 1386.

² Mark Tushnet, ‘The political constitution of emergency powers: parliamentary and separation-of-powers regulation’ (2008) 3 *International Journal of Law in Context* 275.

³ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 1) 209.

⁴ Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional’ (2003) 112 *Yale Law Journal* 1011, 1015.

augmentation of executive authority, its capacity to project public power to secure political objectives, and its arch toward predominance relative to other institutional actors.

Second, I hope to show that while executive empowerment via emergency powers is particularly evident during periods of upheaval and intense political crisis, they are frequently retained long after the original event spurring their enactment has subsided, allowing use of such powers to bleed into periods of normalcy, making them permanently useful political tools in the executive's armoury.

Third, I seek to highlight executive empowerment through emergency powers came through the co-operation of each branch, and not usurpation. The typical pattern is as follows: in response to events threatening social upheaval the executive moves to seek extensive powers in the name of maintaining public welfare. In response, the legislature obliges, deferring to the executive's claim of necessity and its claims of specialist and sensitive knowledge, extending broad and deep authority subject to modest oversight. In turn, when this authority is invariably challenged for impinging rights or liberties, the judicial branch accepts executive characterisation of the situation as an emergency, extending considerable deference to its actions, and a latitude it may not have given during periods of 'normalcy', offering push-back only against the most aggressive of executive claims. The resulting delegated powers greatly increase the capacity of the executive to project public power in a manner it best deems fit to respond to the crisis situation, in a manner thinly constrained by law.

Fourth, I argue treatment of emergency powers in each constitutional order says a lot about the nature of executive power in each system and its tension between political dominance and subservience to law. On the one hand, its power has waxed considerably as a response to align state capacity to the expectations and fears of the polity, to the extent legal norms articulated by Parliaments and courts provide a thin constraint on its activity. That said, legal constraints remain important to understanding the conceptual nature of executive power in these constitutional systems. They remain important, as they demonstrate political legitimacy and morality in these systems remains tied to legality, even if its substantive ability to bind a political predominant executive ex-ante is often weak. Explicit calls for the executive to act without any legal authorization, or beyond the acknowledged scope of its constitutional powers, are vanishingly rare. Even if the resulting acts would be for the public good.⁵ Claims

⁵ Nomi Claire Lazar, 'Prerogative Power in Rome' in Clement Fatovic & Benjamin Kleinerman (eds.), *Extra-Legal Power and Legitimacy* (Oxford University Press, 2013) 27.

to do so are rarely, if ever, advanced in legal or political discourse.⁶ However, before offering this positive account, I first give an overview of the rich literature and theoretical discussion of emergency powers. Beginning with an examination of these questions through engagement with historical political thought, helps us ‘understand the source of contemporary theoretical assumptions about emergency powers’ and the different forms they can take in practice.⁷

Part I outlines different theoretical models of emergency powers. Part II outlines constitutional emergency powers in each system. Part III outlines the approach of each system to statutory emergency powers. Part IV outlines the different factors driving executive predominance over this policy sphere.

I. THEORETICAL MODELS OF EMERGENCY POWER

The question of how constitutional regimes should respond to emergencies has plagued polities ‘powerful and weak, rich and poor’.⁸ Times of acute crisis are amongst the ‘greatest and most serious danger to constitutional freedoms and principles’ and even the survival of the constitutional order.⁹ The difficulty constitutional systems face is clear: if the constitutional order is unable to develop capacity to tackle a crisis, its citizens may suffer greatly, and question its ability to safeguard their most basic needs for safety and welfare, placing the legitimacy of the regime in jeopardy. But providing this capacity may come at a steep cost in respect of the important values underpinning the legal order it is designed to safeguard, such legally bounded government, the rule of law, and rights and freedoms.¹⁰ It is a dilemma concretely manifesting tensions between the ‘enablement and constraint of power’ inherent in any constitutional regime.¹¹ For the purposes of this section, I have sought to arrange different responses to this problem into three broad ideal types, which distil the main theoretical accounts into familial camps.

The first can be considered an extra-legal model, which considers it legitimate for political actors to use discretionary state power outside the legal order, or even directly contrary to

⁶ Jack Goldsmith, ‘The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation’ in Clement Fatovic and Benjamin A. Kleinerman (eds.), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford University Press, 2013).

⁷ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, 2009) 11.

⁸ Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional’ (n 4) 1015.

⁹ *ibid* 1027.

¹⁰ Mark Tushnet, ‘Controlling the Executive Power in the War on Terrorism’ (2005) 118 *Harvard Law Review* 2673.

¹¹ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 2.

law, in order to preserve the fundamental core of the political community.¹² As Aquinas put it, if a case arises where the ‘observance of...law would be hurtful to the general welfare, it should not be observed.’¹³ The concept of extra-legal power - which Locke dubbed *prerogative* - has been immensely controversial. It has largely been rejected in each system and political actors are consistently at pains to insist each and every emergency power must have a statutory or constitutional basis.

The second model is a dictatorship model. This is where the constitutional order provides for an institutional mechanism whereby a ‘commissarial dictatorship’ can be established to ensure the continuity and survival of its substance during times of great crisis.¹⁴ The dictatorship model typically vests a political actor with vast power to accomplish its goal and preserve the state, even if this means suspending or acting contrary to norms which would otherwise apply when the dictatorship is not in being.

The third is a legality model. This comes in countless variations, but broadly speaking it seeks to apply ordinary constitutional and legal rules and procedures without any substantive suspension of ordinary statutory or constitutional norms, even during pressing emergencies. It seeks to accommodate state capacity to respond to crisis within the existing legal structure of the constitutional order; recognising the potential necessity for broad state authority but avoiding allowing such broad power potential to undermine or subvert the normal functioning of the constitutional order. Thus, it does not encompass action which is *contra legem* like the Extra-legal model, nor temporary commissarial dictatorships largely unmoored from constitutional norms during the term of its mandate.

Each model has several commonalities. Each bestows a core role to the executive in meeting crises and emergencies facing the polity, based on assumptions of institutional superiority relative to other political actors. As with the attitude of institutional actors in respect of the administrative state and foreign affairs, the executive is regarded rightly or wrongly, as enjoying advantages relevant to addressing issues thrown up by emergencies. It is attributed advantages like dispatch, unity, secrecy and access to a broader range of information - which are all said to make it cumulatively better equipped than the legislature or judiciary to play a

¹² Ibid 2.

¹³ Thomas Aquinas, *Summa Theologica: Treatise on Law* in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 18 Aquinas II* (1990) 234.

¹⁴ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 41.

leading role in responding to urgent crisis.¹⁵ Additionally, each model is implicitly premised on an ambitious empirical claim – that they are a superior tool to regulate political risk¹⁶ compared to its counter-part models. The ongoing theoretical dispute about the positive and normative import of each model is testament to the sheer difficulty of verifying these conflicting premises.

A. Extra-legal models

Thomas Hobbes looms large in any account of sovereignty, its expression through state power, and what limits can or should exist on this power. Hobbes famously argued that sovereignty required supreme, indivisible power to determine duties and obligations. His argument starts with the famous claim that absent the unified, final authority of sovereignty, social order will collapse, risking a ‘warre’ of all against all and profound misery.¹⁷ Hobbes followed Jean Bodin in arguing that constitutional arrangements which purport to diffuse and split sovereign power are inherently unstable, as it must eventually, ‘come to arms until such a time as sovereignty resides in the prince, in the lesser part of the people, or in all the people.’¹⁸ This position arises from the precautionary premise only absolute authority can reliably produce political stability, due to its ability to adjudicate disagreements with finality, as well as its control of the means of violence.¹⁹ Hobbes adds another prescriptive claim, stating that the *purpose* of the state – safety and stability - requires unified sovereignty, because the unity of state power is crucial in order to avoid instability and war.²⁰ Indeed, Hobbes believed divided sovereignty, as an empirical matter, risks ending social order, an experience clearly based on his observations of political struggle in the English constitutional order.²¹

To refract Hobbes’ thought through the lens of emergency power then, there can be no plausible scope for limiting the state’s authority to quell emergencies. Because securing political order and stability is at the very root of its purpose.²² Indeed, even the concept of special emergency powers is anathema to Hobbesian thought, given that the *salus populi* is

¹⁵ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 3) 205; Harold H. Koh, ‘Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair’ (1988) 97 *Yale Law Journal* 1255, 1292.

¹⁶ See Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, 2014).

¹⁷ Thomas Hobbes, *Leviathan*, in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 21* (1990) 99-102.

¹⁸ See Jean Bodin, *On sovereignty: four chapters from the six books of the commonwealth* (Edited and translated by Julian Franklin, Cambridge University Press, 1992).

¹⁹ Daniel Engster, ‘Jean Bodin, scepticism and absolute sovereignty’ (1996) 17 *History of Political Thought* 469–499.

²⁰ Deborah Baumgold, *Hobbes’s political theory* (Cambridge University Press, 1988) 65.

²¹ Deborah Baumgold, *Hobbes’s political theory* (n 20) 69.

²² John Ferejohn and Pasqual Pasquino, ‘The law of the exception: A typology of emergency powers’ (2004) 2 *International Journal of Constitutional Law* 210, 224.

the ‘only and constant function of the government’.²³ Whether it is a king, executive, legislative assembly, or the people who are sovereign, its means to this end are bound, both in peace and times of emergency, only by what is possible. The Hobbesian would view rigid insistence on legal doctrines like separation of powers and restricting the power of the state through individual liberties or rights - as inviting instability - particularly during times of acute stress. They might render a polity incapable of preserving peace and social order in a chaotic, unstable, world.²⁴ In other words, placing legal limits on the sovereign’s power to tackle problems facing the polity is normatively and empirically unwise.²⁵

John Locke is another prominent theorist whose work engages with the interaction of state power and emergencies. For Locke, political society exists as a *means* to secure the natural rights of man, the preservation of his life, liberty, and property – which would be impossible in an anarchic state without order. Unlike Hobbes however, Locke argued that as soon as political power is established for this end, it ought to be channelled into different institutional forms: into ‘legislative and executive powers for the making of known, settled, standing rules in legislation, and for employing the force of the community both to punish crimes at home and to repel and avenge foreign injuries’ respectively.²⁶ Locke argued for the separation of powers on the basis that, contra Hobbes, concentration of unlimited power in one entity was deeply imprudent. For Locke, it was an indisputable historical fact that kings, with a monopoly of public power, had a ‘poor record of keeping their hands to themselves and judging justly’.²⁷ Hence, Locke argued for a separation and diffusion of power as a counter-weight to the risk of abuse of political power.

While in Lockean theory the executive is presented as normally bounded and subservient to law²⁸, he goes on to suggest the executive’s role could modify during times of great strife, because aside from having a duty to execute the laws, it had ‘prerogative’ power. A power to ‘act according to discretion, for the public good, without the prescription of the law, and sometimes even against it’.²⁹ While the executive is generally bound by the dictates of the legislature, its perpetual nature and ability to act decisively and with force to unanticipated

²³ *ibid* 237.

²⁴ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 79.

²⁵ *Ibid*.

²⁶ John Locke, *Second Treatise on Government* in (ed.) Mortimer J. Adler (ed.), *Great Books of the Western World*, (2nd Edition, 1990) 199.

²⁷ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 76.

²⁸ John Locke, *Second Treatise on Government* (n 26) 134; Harvey Mansfield, *Taming the Prince: The Ambivalence of Executive Power* (John Hopkins University, 1993) 200.

²⁹ Saikrishna Prakash, *Imperial From the Beginning: The Constitution of the Original Executive* (Yale University Press, 2015) 207.

events, place on its shoulders an overriding duty³⁰ orientated toward the ‘preservation of the whole’³¹ of the body politic. Given that the end of political community ultimately concerns the ‘preservation of men, not the laws’ the executive must consequently be capable if need be of ‘overriding the laws or the legislature’.³²

The executive’s overriding duty to secure the means by which men and their rights are preserved might involve it taking extra-legal means to do so, an affirmation of the Ciceronian maxim ‘*Salus Populis Supreme Lex*’. Emergency action which is *contra legem* may be required to preserve state order;³³ as political institutions for Locke are the means of getting from the state’s duty to ‘preserve and further the good of the people’ to an end where this obtains’.³⁴ Locke assumed there would be ‘no judge on earth’ for evaluating proper use of prerogative³⁵ but that the decision whether to ratify or condemn those invoking prerogative lay with the polity ex-post. Locke assumed the risk of revolt and personal danger weighed against opportunistic abuse of prerogative by the executive.³⁶

A contemporary account of the extralegal model is defended by Oren Gross and Fionnula Ni Aolain. Gross and Ni Aolain argue it may be the most appropriate method to deal with extremely grave national dangers and threats, while simultaneously preserving the substance of the legal order and core constitutional principles. Their rationale is partly due to efficacy – that such measures may quite simply be necessary to meet grave threats to the polity - but also has a deep vein of principle running throughout. Namely, concern that attempting to subsume all action taken during emergencies under the rubric of legality and constitutionality, no matter how extreme, will simply legitimise that which should remain beyond the pale of law. On their account, protecting the values associated with constitutional government is best served by excluding certain actions from the legitimising cloak of legality. And, if one is forced to use extra-legal measures to save the polity, accepting the consequences of doing so ex-post.³⁷ To do otherwise risks corruption of the constitutional order, providing superficial veneers of legality, legitimacy, and normality to conduct clearly

³⁰ Ibid.

³¹ John Locke, *Second Treatise on Government* (n 26) 171.

³² Saikrishna Prakash, *Imperial From the Beginning* (n 29) 203.

³³ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 88.

³⁴ Ibid.

³⁵ John Locke, *Second Treatise on Government* (n 26) 168.

³⁶ Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional’ (n 4) 1103.

³⁷ *ibid* 1101.

at odds with core constitutional values.³⁸ The assumption underpinning this argument is that this corruption of legality will ultimately degrade or undermine the whole constitutional order by breeding disrespect for its legitimacy. This is how Gross envisages the extra-legality model operating:

the Extra-Legal Measures model calls upon public officials to act outside the legal order while openly acknowledging their actions. They must assume the risks involved in acting extralegally. It is then up to the people to decide, either directly or indirectly (e.g., through their elected representatives in the legislature), how to respond *ex post* to such extralegal actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. Alternatively, they may act to approve retrospectively her actions.³⁹

At this point, those sitting in judgment *ex-post* may choose to condemn through criminal sanction, impeachment, or to ratify action by conferring immunity or indemnity.⁴⁰ The authors argue chronological separation of extra-legal action, and subsequent public judgment raises uncertainty, and thus the stakes for an actor taking extra-legal action.⁴¹ Executive officers will internalize, as a restraining influence, the possibility they may well be held civilly or criminally liable, or impeached for their unlawful actions, unless the public ratifies them.⁴² Gross and Ni Aolain make clear this model, if it is not to degenerate into lawlessness, must be paired with a political culture with an ethic of responsibility amongst political elites and the public, and willingness to exercise critical moral judgment when deciding whether to ratify, or condemn, violations of legal and constitutional principles.⁴³ If this political culture is absent, then there is little to prevent extralegal action becoming a regular fixture of politics that can slowly rupture the existing order. This model has clear continuities with Locke's concept of prerogative.⁴⁴ The largest differential between each model is their formalisation of the importance of *ex-post* public judgment. Whereas Locke considered there was two options – implicit acceptance or revolution – this model is much more explicit about

³⁸ Fiona De Londras and Fergal F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19, 25.

³⁹ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional' (n 4) 1099.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² George Winterton, 'The Concept of Extra-Constitutional Executive Power in Domestic Affairs' (1979) 7 *Hastings Constitutional Law Quarterly* 1, 43.

⁴³ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional' (n 4) 1102.

⁴⁴ *ibid* 1104.

requiring formal ratification or rejection and punishment by the public.⁴⁵ It is ‘not enough’, Gross writes, that ‘there is general agreement that the actions taken were the right thing to do at the relevant time. Something more is needed – and that something is the public’s explicit, particular, and ex-post ratification.’⁴⁶

B. Dictatorship Model

The Roman Republic is often presented as the archetypical example of a political system adopting constitutional emergency powers which link temporary authoritarian power to the overriding goal of preserving the substance of the Constitution.⁴⁷ During times of normalcy, the constitutional system of the Roman Republic was characterised by elaborate complexity, with multiple checks and balances and veto-points designed to prevent concentration of power in one body or class. This system also made swift and decisive action difficult, ensuring that Rome’s complex system of government was ‘unequal to the exigencies of a great national crisis.’⁴⁸

The Roman Republic thus developed the constitutional institution of dictatorship, where at moments of intense crisis the Roman Senate would propose to the political executive, the two consuls elected for that year, appointment of a dictator to wield emergency powers to restore order. Upon appointment, the dictator enjoyed vast military and civil power, including over life and death and authority to temporarily override or suspend the laws – effectively whatever was necessary to preserve order and the fundamentals of the Roman Constitution.⁴⁹ There were *some* limitations on dictatorial power, including procedural limits on who could be made dictator, and for how long: a consul could not nominate himself as dictator, and the dictators’ powers expired after 6 months. Strong norms also surrounded the office. For example, dictators did not direct their authority toward altering the structures of the state, changing the laws, extending their period in office, or appointing other dictators just before their time in office elapsed.⁵⁰ Dictators were also reliant on the Senate for funds

⁴⁵ *ibid* 1104.

⁴⁶ *ibid* 1105.

⁴⁷ Nomi Lazar, ‘Prerogative Power in Rome’ (n 5) 27.

⁴⁸ Carl Schmitt, *Dictatorship: from the origin of the modern concept of sovereignty to proletarian class struggle* (Translated by Michael Hoelzl and Graham Ward, Polity Press, 2014) 2-3; Clinton Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1963) 5-6.

⁴⁹ John Ferejohn and Pasqual Pasquino, ‘The law of the exception: A typology of emergency powers’ (n 22) 212.

⁵⁰ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 3) 23-34.

and could not launch wars of aggression. Their role was defensive and limited to dealing with threats of invasion and insurrection.⁵¹

Outliving the Republic from which it sprang, the institution of dictatorship looms large in the work of political theorists grappling with the interaction between constitutionalism and emergencies. The institution was praised by Machiavelli as one of Rome's great political innovations⁵², giving the Republic capacity to take immediate decisions during times of stress, without 'fear of bureaucratic hinderance, the need for time-consuming attempts at consensus building and all the various veto points characteristic of representative government'.⁵³ Machiavelli argued that without such a mechanism, a republic would be at risk of falling into to ruin⁵⁴ from assault on two fronts. From the suffocating effect of hyper-legality, or the corrosive effect of outright unlawful action.⁵⁵ On the one hand, scrupulous adherence to the normal operation of the legal system and letter of the law in all circumstances, could simply stymie measures necessary to save the polity, sacrificing the flesh and blood of the body politic to arid legalisms.⁵⁶ Conversely, Machiavelli worried unlawful conduct could create unsavoury precedent for future unlawfulness, which could eat at the cultural and political norms underpinning the vitality of the republic, leading him to condemn governing with extraordinary extralegal methods.⁵⁷

One of the most prominent 20th century scholars to revive interest in the institution was Carl Schmitt, whose work has had a lingering impact on debates concerning emergency powers and the constitutional order. A great deal of Schmitt's work, like Hobbes, was a contextual response to contemporary political problems; namely the chaotic years characterising the birth, existence, and death of the Weimar Republic. These tumultuous events had an obvious impact on the development of Schmitt's political and legal thought, and his turn toward Neo-Roman institutional mechanisms like dictatorship. A core theme of Schmitt's work around this time was his belief that the highly democratic and liberal nature of the Weimar order made it deeply unsuited for constraining serious social and political conflict. Schmitt's critique revolved around different strands: First, he thought its openness and commitment

⁵¹ *ibid* 22.

⁵² Carl Schmitt, *Dictatorship* (n 48) 4-5; Niccolò Machiavelli, *Discourses on Livy* (eds.), Harvey Mansfield and Nathan Tarcov (University of Chicago Press, 1998) 95.

⁵³ Jack Balkin and Sanford Levinson, 'Constitutional Dictatorship' (2010) 94 *Minnesota Law Review* 1789, 1800.

⁵⁴ Niccolò Machiavelli, *Discourses on Livy* (n 52).

⁵⁵ Jack Balkin and Sanford Levinson, 'Constitutional Dictatorship' (n 53) 1801.

⁵⁶ *Ibid*.

⁵⁷ Niccolò Machiavelli, *Discourses on Livy* (n 52) 95-96.

to parliamentary procedure and individual rights, even during periods of upheaval, smoothed the way to destructive forces within the state. Second, he thought its insistence on separating and diffusing state powers made these forces harder to combat.⁵⁸

For Communists and National Socialists, the liberal constitutional system was merely a means to a higher political end. Both sought to use the existing system to ‘solidify their position relative to that of their opponents’ by lending constitutional status to their ‘view of proper human association’ before eventually eliminating their opponents.⁵⁹ Schmitt thought commitment to parliamentary and liberal norms of deliberation, formal legality, and proper procedure - even in the face of this severe and often violent political enmity - invited chaos, disorder, and weakening of the constitutional order in the face of such enemies.⁶⁰ Schmitt’s *Dictatorship* was written against this backdrop.⁶¹ In this work, Schmitt is deeply critical of what he regards as liberalism’s banishment of concepts necessary to deal with emergencies and secure the normal functioning of the constitutional order from dangerous threats.⁶² That is, Schmitt thought liberal constitutionalism held a deeply naïve view of politics and the inevitability of conflict; put simply, a belief that law is omnipresent, omnipotent, and that prior legal rules and statutes can regulate for any crisis.⁶³ Schmitt also argued liberal constitutionalism combined this political naivety with blind faith in the ability of its ‘technical apparatus’ and institutions to absorb any challenges, without needing to ever suspend the letter of the legal order.⁶⁴

In contrast, Schmitt argued adherence to the procedural letter of the constitution, and associating legitimacy with legality, downplayed the true source of the legal order’s political legitimacy, which for Schmitt was the sovereign decision of the German people to constitute the Weimar order. Intensely sceptical of what he considered liberal fetishisation of legality, Schmitt argued the constitutional order could, and should, rely on the institution of commissarial dictatorship as a technical-authoritarian mechanism to preserve the real source of the polity’s legitimacy. Drawing on the Roman and Machiavellian tradition of dictatorship,

⁵⁸ Nomi Lazar, ‘Prerogative Power in Rome’ (n 5) 38.

⁵⁹ Jeffrey Seitzer, ‘Carl Schmitt’s Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis’ (1997) 10 Canadian Journal of Law & Jurisprudence 203, 212.

⁶⁰ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 39.

⁶¹ Carl Schmitt, *Dictatorship* (n 48); John P. McCormick, ‘The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’ in David Dyzenhaus (ed.), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (1998) 218.

⁶² Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 38.

⁶³ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 3) 164.

⁶⁴ Jack Balkin and Sanford Levinson, ‘Constitutional Dictatorship’ (n 53) 1797; John P. McCormick, ‘The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’ in David Dyzenhaus (ed.), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (1998) 220.

Schmitt argued a commissarial dictatorship could be charged to do whatever was necessary in moments of exceptional crisis to restore order and preserve the polity.⁶⁵ Schmitt advocated the institution as a corrective to the tendency of liberal constitutionalism to disregard the inevitability of existential political conflict and crisis.

Dictatorship, Schmitt argued, could provide the constitutional order the necessary capacity to suspend or disregard whatever formal legal norms it had to, in order to preserve its substance from internal and external enemies.⁶⁶ The commissarial dictatorship is constituted, and given power by, the existing constitutional order and does so to preserve, not transform, the regime.⁶⁷ As with its Roman progenitor, the authority of Schmitt's commissarial dictator would be very broad - enough to do whatever required to preserve the constitution - even if it involved suspending large elements of the legal order. This is because Schmitt thought what measures would be required to combat an exceptional crisis could not be usefully foreseen or specified *ex-ante* in formal legal sources like statutes or constitutional provisions. His power is thus utterly goal-orientated toward preserving the constitutional order; bound, not so much by moral or legal constraints, as by his 'own perception of that goal and how most efficiently to meet it'.⁶⁸

That said, his power *is* prescribed both temporally and constitutionally in some respects.⁶⁹ Most fundamentally, the institution of commissarial dictatorship is contingent on being *necessary to preserve the existing order*, or in Schmitt's eyes, the 'sovereign will' that brought the existing order into being.⁷⁰ Thus, after a crisis threatening the constitutional order subsides, dictatorial power is surrendered until it must be taken up again. Schmitt's advocacy for constitutional dictatorship is thus not apiece with his later advocacy of executive absolutism and sovereign dictatorship.⁷¹

C. Legality Model

This model is the most common amongst constitutional democracies empirically and, broadly speaking, the model largely adopted by Ireland, United Kingdom and the United

⁶⁵ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 3) 224.

⁶⁶ Ibid.

⁶⁷ Jack Balkin and Sanford Levinson, 'Constitutional Dictatorship' (n 53) 1797.

⁶⁸ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 41.

⁶⁹ Thomas Crocker and Michael Hodges, 'Constitutions, Rule Following, and the Crisis of Constraint' (2018) 24 *Legal Theory* 3, 11.

⁷⁰ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (n 7) 231.

⁷¹ *ibid* 238.

States. The model is of course diverse and comes in many different variations. But, the different varieties of this model have several commonalities - the most striking being their attempt to offer a *via media* between two goals: ensuring state capacity to surmount emergencies and crises and protect public welfare, but doing so without creating long-term damage to foundational constitutional commitments.⁷² This model attempts to reconcile these goals through putting great faith in *institutional design* capable of facilitating increased power during times of perceived emergency, but preventing them spiralling out of control and destroying the constitutional framework and principles they are aimed at protecting.⁷³ A typical example is the use of ordinary legislative procedure to delegate very broad statutory authority to the executive. The use of banal procedure to vest extraordinary power.

II. CONSTITUTIONAL EMERGENCY POWERS IN EACH SYSTEM

The executive in these systems have generally not relied on claims of special extra-legal powers to tackle emergencies. The response in each system to emergency powers has instead drawn on a hybrid of the dictatorship and legality models. Assertions of expanded constitutional authority and legislative delegations of statutory authority have been the staple of executive emergency powers.⁷⁴ The former is perhaps the most controversial mechanism by which emergency powers are subsumed into the legal order, and it is to claims of inherent constitutional power to respond to emergencies this section turns.

United Kingdom

The UK constitutional order lacks a centralized codified constitution. It consequently does not have textual provisions governing the extent of the executive's constitutional emergency powers.⁷⁵ However, given the prominence of prerogative power to constitutional controversy across UK history, it is unsurprising copious ink has been spilled debating whether there is a royal prerogative,⁷⁶ or common law,⁷⁷ power for the executive to act to put down internal rebellion, invasions, or subdue grave emergencies threatening the polity.⁷⁸

⁷² Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1044.

⁷³ *ibid* 1040.

⁷⁴ Clement Fatovic, 'Blurring the Lines: The Continuities between Executive Power and Prerogative' (2013) 73 Maryland Law Review 15, 22.

⁷⁵ Paul B. Rava, 'Emergency Powers in Great Britain' (1941) 21 Boston University Law Review 403.

⁷⁶ O'Connor MR in *Egan v Macready* [1921] 1 I.R. 265 held that the power to declare martial law to suppress serious threats to the realm are aspects of the Crown's prerogative power.

⁷⁷ Paul B. Rava, 'Emergency Powers in Great Britain' (n 75) 427.

⁷⁸ See Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press, 2015).

While interesting, debate is largely academic and otiose as the UK executive has rarely,⁷⁹ and recently never, claimed authority deriving from either source to grapple with domestic crises or emergencies,⁸⁰ still less authority to act contra legem.⁸¹ Through two World Wars, the Troubles in Northern Ireland, and responding to recent terrorist attacks by religious fundamentalists, the executive has typically tried to meet such emergencies by seeking, and being granted, very wide statutory powers by Parliament. There may well be a lingering extra-legal power, whether prerogative or reason of state, the executive can draw upon to protect the polity from threats to domestic security. But it has long lain dormant.

United States

The U.S. Constitution contains few provisions which are concerned with emergency powers.⁸² The most prominent is the ability of Congress to suspend habeus corpus ‘when in Cases of Rebellion or Invasion the public safety may require it’.⁸³ The President also has authority to call the state militia into service during times of invasion or insurrection and to direct them as Commander-in-Chief.⁸⁴ Aside from this, there is no provision for emergency powers in the Constitution altogether, let alone vested in the President. The lack of explicit emergency powers provision can be ascribed to several rationales. It may be relevant the Philadelphia convention delegates were deeply divided between those who wished for a strong energetic executive, and those who feared creation of the ‘foetus of monarchy’ through a powerful President.⁸⁵ This debate may explain why there is nothing approximating provision for an institution like a Roman commissarial dictatorship able to suspend legal norms in order to restore order during emergency periods. For devoted students of the history of the Roman Republic, such a mechanism was perhaps viewed as too risky for the young polity, and a disturbing invitation to Caesarism. Another explanation is that the founders were content the national federal government they were bringing into being would have ample authority, shared between Congress and the presidency, to respond robustly and constitutionally to any emergency situation, without providing for dictatorship.⁸⁶ Indeed,

⁷⁹ Executive attempts to rely on prerogative powers to enforce martial law during the Irish war of independence ran into judicial opposition, who regarded it as an attempt to unilaterally circumvent parliamentary statutes regulating the scope of emergency power. In *Egan v Macready* [1921] 2 AC 570 O’Connor MR held that commander of Crown forces in Ireland could not rely on the royal prerogative to impose martial law and implement military tribunals, on the basis that the area was regulated by statute. Due to parliamentary supremacy, the prerogative could not supersede the statute.

⁸⁰ Paul B. Rava, ‘Emergency Powers in Great Britain’ (n 75) 404.

⁸¹ Saikrishna Bangalore Prakash, ‘The Imbecilic Executive’ (2013) 99 Virginia Law Review 1361, 1365.

⁸² Jules Lobel, ‘Emergency Power and the Decline of Liberalism’ (n 1) 1387.

⁸³ Article I, Section 9, Clause 2.

⁸⁴ Article II, Section 2.

⁸⁵ Debates on the Constitutional Convention, June 1787: https://avalon.law.yale.edu/18th_century/debates_601.asp

⁸⁶ Arthur Schlesinger, *The Imperial Presidency* (Houghton Mifflin Company, 1973).

central to arguments made by Hamilton for a robust national government in the *Federalist* papers, was the need to avoid overly constraining state power, so that it could better respond to the exigencies and necessities of political life.⁸⁷ If government was not strong enough, argued Hamilton, then there was a risk it might have to ‘over-leap the bounds’ imposed by law, just as Rome was obliged to create dictators who could suspend the law in an attempt to save the polity.⁸⁸ Vermeule has dubbed this the ‘Publius Paradox’, a principle of Hamiltonian constitutional design which cautions against excessively weakening the executive out of fear of abuse.⁸⁹ This principle cautions against over-constraint of the executive on the basis that it may have the perverse effect of *strengthening* it excessively.⁹⁰ This paradox is realised in circumstances where the executive might be forced, in order to safeguard the polity, to break from restraints it has been put under and act extra-legally out of sheer necessity to protect the political community.⁹¹ ‘If the bonds of constitutionalism are drawn too tight’, says Vermeule, ‘they will be thrown off altogether when imperative need arises.’⁹² Hamilton’s caution against overly constraining the national government’s capacity to respond to sudden contingencies may be indicative that he, along with the other framers, thought the powers vested in the federal government – shared between Congress and President - were adequate for unexpected emergencies. And that there was no need to resort to measures like extra-legal prerogative or dictatorship.⁹³

Thus, political actors in the United States have attempted to subsume power to respond to crisis and emergencies within constitutional text and structure.⁹⁴ One of the most controversial means has been through expansive interpretations of the executive’s constitutional authority. Many presidential administrations have advanced interpretations of executive power which go well beyond those explicitly enumerated in Article II. These articulations go well beyond an understanding of the executive as faithful law-executor but

⁸⁷ Alexander Hamilton wrote: ‘The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.’ ‘The Federalist No.23.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

⁸⁸ Alexander Hamilton, ‘Constitutional Convention. Remarks on the Necessity for a National Government’ in H. C. Syrett (ed.), *The Papers of Alexander Hamilton*, vol 4, January 1787–May 1788 (Columbia University Press, 1962) 212–213.

⁸⁹ Adrian Vermeule, ‘The Publius Paradox’ (2019) 82 *Modern Law Review* 1-16.

⁹⁰ Madison writes ‘It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions’. James Madison, ‘The Federalist Number 41’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

⁹¹ Adrian Vermeule, ‘The Publius Paradox’ (n 89) 2.

⁹² *Ibid.*

⁹³ Saikrishna Bangalore Prakash, ‘The Imbecilic Executive’ (n 81) 1365.

⁹⁴ *ibid* 1368.

have encompassed broad emergency power within the constitutional understanding of ‘executive power’. This conception is usually built-up through reliance on the ‘executive Power’ clause, the Commander in Chief clause, and the executive’s implied power over foreign affairs.⁹⁵ The idea that the executive’s constitutional powers expand during periods of acute emergencies straddles the conceptual line between a dictatorship model (where temporary broad powers otherwise prohibited are unlocked in dire circumstances) and legality model (where emergency powers are subsumed within existing legal text and structure).

Presidents of all political stripes, including Lincoln, both Roosevelts, Truman, Nixon⁹⁶ and George W. Bush, have articulated broad understandings of executive power to tackle emergencies. These claims ranged in scope and intensity, but have the core commonality that the concept of executive power carries a residuum of authority to protect the United States constitutional order from serious crises.⁹⁷ One iteration of this view is that the U.S. President has inherent or implied executive power to respond to urgent emergency situations to protect the nation without express statutory authorization, provided he does not violate a clear constitutional or statutory command.⁹⁸ A more aggressive version, one pursued by the Bush administration in the early 2000’s, is that the President’s authority over national security includes plenary power to respond to emergencies and crises, even if directly contrary to statute.⁹⁹ Any congressional restriction on this power could be unconstitutional, in a direct inversion of the *Youngstown* framework for assessing the constitutionality of executive power.¹⁰⁰

The rich academic and political debates surrounding these competing visions, and every conceivable shade of nuance in between, do not yield clear answers on the extent of presidential power in practice.¹⁰¹ What can be said is that the former view is closer to a consensus than the latter, and that legal and political opinion broadly coalesce around the notion the President has a residuum of power to act to protect the country in times of crisis

⁹⁵ Jules Lobel, ‘Emergency Power and the Decline of Liberalism’ (n 1) 1404.

⁹⁶ Encapsulated in Richard Nixon’s infamous assertion to Robert Frost that, when ‘the president does it, that means that it is not illegal’. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. *TIMES*, May 20, 1977.

⁹⁷ Abraham Sofaer, ‘Presidential Power and National Security’ (2007) 37 *Presidential Studies Quarterly* 101-123; Jules Lobel, ‘Emergency Power and the Decline of Liberalism’ (n 1) 1405.

⁹⁸ Henry P. Monaghan, ‘The Protective Power of the Presidency’ (1993) 93 *Columbia Law Review* 1, 11.

⁹⁹ Jenny Martinez, ‘Inherent Executive Power: A Comparative Perspective’ (2006) 115 *Yale Law Journal* 2480, 2495.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

and emergency, especially where Congress has not had time to react. But that this power is ultimately subject to congressional will.

Article II based authority has been used unilaterally in high profile and controversial instances of wartime and emergency. One of the most famous examples was President Lincoln's invocation of sweeping presidential power to crush Confederate rebels and prevent secession.¹⁰² He did so by raising an army, blockading Southern ports, suspending Habeus Corpus, establishing non-statutory military tribunals, and emancipating southern slaves all without Congressional authorisation. Lincoln argued that his actions were constitutional due to *necessity*, that his oath to protect and defend the Constitution and take care the laws are faithfully executed, included a residual constitutional authority. 'Measures otherwise unconstitutional', Lincoln maintained, 'might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the Nation'.¹⁰³ No President since Lincoln has attempted to stretch the constitutional bounds of Article II quite so far. FDR perhaps came the closest during the Second World War, through successful efforts to try and execute Nazi saboteurs through a non-statutory military tribunal¹⁰⁴ and the evacuation and internment of Japanese-American citizens *en masse* based on racial stereotyping.¹⁰⁵ More recently, George W. Bush asserted Article II power to detain enemy combatants without charge, establish non-statutory military commissions to charge them with weak procedural protections, and to engage in warrantless surveillance contrary to statute. However, such broad claims of executive power gradually tapered away after being met with suspicion in the Superior Courts.¹⁰⁶ Despite intense debates over this issue, and occasional high-profile uses of inherent executive power during acute crisis, it is delegated statutory authority has emerged as the most important accelerator for executive control over emergency powers.¹⁰⁷

Ireland

¹⁰² Arthur Schlesinger, *The Imperial Presidency* (n 86). In the first days of the Civil War, Lincoln expanded the army and navy, suspended habeus corpus, blockaded southern ports and ordered the arrest and detention of Confederate sympathizers – all without congressional approval. Later during the war, Lincoln would rely on his executive power and position as Commander-in-Chief to censor publications, proclaim martial law, and issue the Emancipation Proclamation to end slavery. No president prior to Lincoln had ever exercised such broad power absent Congressional authorisation.

¹⁰³ *ibid* 58-64.

¹⁰⁴ Andrew Kent, 'Judicial Review for Enemy Fighters: The Court's Fateful Turn in *Ex Parte Quirin*, the Nazi Saboteur Case' (2013) 66 *Vanderbilt Law Review* 153, 163.

¹⁰⁵ An order swiftly ratified by congress. *See* Amanda L. Tyler, 'Courts and the Executive in Wartime' A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today' (2019) 107 *California Law Review* 789, 791-793.

¹⁰⁶ *See* Harold Koh, 'Setting the World Right' (2006) 115 *Yale Law Journal* 2350-2379.

¹⁰⁷ Abraham Sofaer, 'Presidential Power and National Security' (n 97).

Emergency powers have been part and parcel of Irish government from the earliest days of independence. One prominent theme in Ireland's long history of emergency powers has been its tendency to subsume expansive – even dictatorial powers – into a constitutional framework. Both the Free State Constitution and Constitution of 1937 provided mechanisms for empowering the political branches during a grave emergency to suspend otherwise constitutionally entrenched provisions.

In contrast, Irish governments have very rarely advocated or defended their actions in terms of extralegal necessity, with one stark exception: the Irish Civil War. In the earliest days of the Civil War the Provisional Government¹⁰⁸ lacked formal emergency powers – constitutional or statutory – to quell the vicious conflict it faced. The Provisional Government frequently turned to severe extralegal methods to preserve the nascent Free State Constitutional order.¹⁰⁹ Prior to enactment of the Free State Constitution, the Provisional Government engaged in the widespread arrest, detention, and use of lethal force against designated enemy combatants and their supporters, all without a constitutional or statutory basis.¹¹⁰ These extralegal decrees were explicitly justified by appeals to military necessity and the need to 'safeguard the life of the nation itself'.¹¹¹ Even after abolition of the Provisional Government and passage of the Free State Constitution – with its impressive guarantees of civil liberties¹¹² – the Dáil and Executive Council of the Free State for a time continued to exercise draconian,¹¹³ sometimes extralegal, authority to crush a vicious guerrilla war enveloping the Irish countryside.¹¹⁴

¹⁰⁸ The pro-treaty majority of the revolutionary Dail appointed – pursuant to the Anglo-Irish Treaty – a Provisional Government that would oversee the transition of power from the British administration to a Constituent assembly which would enact a Free State Constitution. However, before the enactment of this Constitution the Provisional Government faced an existential threat from anti-treaty Republican forces. From the outset, the Provisional Government's policy was clear and inflexible: it would not tolerate armed resistance to its rule and introduced draconian laws to crush opposition.

¹⁰⁹ Eunan O'Halpin, *Defending Ireland: The Irish State and Its Enemies Since 1922* (Oxford University Press, 1999) 29.

¹¹⁰ The Provisional Government also implemented decrees impacting the civilian populace, including widespread censorship (making every newspaper seek approval of the National Army censors prior to publication), and banning importation of goods considered valuable to anti-treaty forces such as petrol, cars, and wireless radios. See Colm Campbell, *Emergency Law in Ireland: 1918-1925* (Clarendon Press, 1994).

¹¹¹ Bill Kissane, 'Defending Democracy? The Legislative Response to Political Extremism in the Irish Free State, 1922-1939' 34 *Irish Historical Studies* (2004) 156, 157.

¹¹² Gerard Hogan, *Origins of the Irish Constitution: 1928-1937* (Royal Irish Academy, 2012).

¹¹³ Bill Kissane, 'Defending Democracy?' (n 111).

¹¹⁴ When the Third Dail met as a Constituent Assembly on 9th September 1922 the Provisional Government was abolished and its functions merged with the Dail Cabinet. The Dail passed an Army Emergency Powers Resolution to sanction draconian new powers for the National Army. Like the decree of the Provisional Government, this was not an Act of Parliament. The Resolution sanctioned establishment of military courts which could impose the death penalty on non-military personnel, indefinite detention without trial, and gave power to the National Army command to create new offences triable by military court. The Free Constitution came into being on 6th December 1922 and executive power of the Dail Cabinet passed to the Executive Council. Sometimes they authorised extrajudicial executions: the most infamous example being the execution of four leading anti-treaty Republicans in reprisal for an IRA assassination of a member of parliament. See Eunan O'Halpin, *Defending Ireland* (n 109) 34-35.

However, as large-scale armed resistance to the Free State began to crumble, government and Parliament eventually began to replace extralegal measures with a formalised a regime of statutory emergency powers.¹¹⁵ This came with an Indemnity Act to provide legal cover for all acts carried out by the National Army.¹¹⁶ The use of draconian extralegal methods did not appear to provoke a crisis of legitimacy for the Free State government, who endured in power for some time after, suggesting that a majority of the polity accepted these measures as necessary for preservation of the State.¹¹⁷ Aside from this period, successive Irish executives subsumed emergency powers – no matter how draconian – under the rubric of constitutional or statutory authority, perhaps indicative of the growing importance of perceptions of legality to political legitimacy. At least absent a scenario as grave as civil war.

The constitutionalisation of emergency powers took a dramatic turn in 1931, when the Cumann na Gaedheal Government, concerned about the upsurge in paramilitary activity and fearful of the activities of left-wing republican sympathizers, introduced the Constitution (Amendment No. 17) Bill 1931. This measure effected far-reaching change to the Free State Constitution by inserting Article 2A. The powers of Article 2A could be invoked by the political executive whenever it thought expedient. The article provided for a system of military tribunals with drastic powers - including ability to impose the death penalty in any case it thought expedient to do so. This decision was not subject to appeal.¹¹⁸ Article 2A also provided that it would take precedence over every other provision of the Constitution, effectively allowing the executive to suspend the Constitution and its judicially protected rights for as long as it wished.¹¹⁹ Article 2A was put into abeyance by the Finna Fail government in 1932, only to be swiftly brought back into use to combat political subversion of Fascism and militant Republicanism.

The 1937 Constitution's approach to emergency powers marked a mid-way point between the extra-legal approach of the Provisional Government, and the 'grotesque' dictatorial mechanism of Article 2A of the Free State, which effectively allowed the Executive Council to lawfully suspend much of the Constitution when deemed expedient.¹²⁰ Article 28.3.3.

¹¹⁵ Colm Campbell, *Emergency Law in Ireland: 1918-1925* (n 110).

¹¹⁶ Indemnity Act 1923.

¹¹⁷ Eunan O'Halpin, *Defending Ireland* (n 109) 37.

¹¹⁸ Gerard Hogan, *Origins of the Irish Constitution: 1928-1937* (n 112).

¹¹⁹ Gerard Quinn, 'Dangerous Constitutional Moments: the "Tactic of Legality" in Nazi Germany and the Irish Free State Compared' in Morrison, McEvoy and Anthony (eds.), *Judges, Transition and Human Rights* (Oxford University Press, 2007).

¹²⁰ Which is how Department of Justice official Stephen Roche described Article 2A during his work on the Constitution Review Committee. Gerard Hogan, *Origins of the Irish Constitution: 1928-1937* (n 112).

instead provided a more procedurally qualified dictatorial model, whereby a declaration of emergency could be made by the Oireachtas, and not unilaterally by the executive, and then only for defined reasons. These included a time of rebellion, war, or armed conflict in the State. Or, where an armed conflict or war was taking place outside the state, the Oireachtas could resolve that ‘arising out of such armed conflict, a national emergency exists affecting the vital interests of the State.’ Legislation and actions taken to preserve public safety on these occasions is immune from judicial scrutiny, for as long as a declaration of emergency is in force.¹²¹ These powers are formidable, enabling ‘draconian steps to be taken to deal with threats to the security of the State’ even where nothing ‘approximating to a state of war or rebellion exists within its boundaries.’¹²² Article 28.3.2 is even more draconian, but has never been invoked. It provides that in the case of actual invasion the executive may take whatever steps they ‘may consider necessary for the protection of the state’ until the Oireachtas convenes at the earliest practicable date.

The Oireachtas has twice passed the appropriate resolutions for the purposes of Article 28.3.30.¹²³ Indeed, the Irish State has officially been in a state of emergency for most of its history, from 1939-1977 and 1978-1995. During the course of periods known as ‘the Emergency’ and ‘the Troubles,’ this Article was employed by the Oireachtas to pass the Emergency Powers Act 1939. This Act vested the executive with wide-ranging, and constitutionally immune, authority to promulgate regulations to control economic activity, establish military courts with power to issue the death penalty¹²⁴, arrest and detain suspects without charge for an extended period for breach of any regulation¹²⁵, and establish internment without trial for any non-Irish national when the Government considered it expedient.¹²⁶ Emergency powers have thus been part of the Irish constitutional landscape since its violent inception – beginning with extralegal executive decrees motivated by necessity, to wide executive dictatorial powers via Article 2A, before evolving into a more procedurally qualified dictatorial constitutional mechanism. While this dictatorial power now formally rests with the Oireachtas, its invocation has still served to greatly bolster the power of the executive to subdue emergencies and subversion, even by acting in disregard of otherwise core constitutional commitments like due process and liberty. However, the

¹²¹ *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159. See generally, Gwynn Morgan, ‘The Emergency Powers Bill Reference I’ (1978) 13 Irish Jurist 67; Gwynn Morgan ‘The Emergency Powers Bill Reference II’ (1978) 14 Irish Jurist 253.

¹²² Ronan Keane, ‘The Will of the General: Martial Law in Ireland, 1535-1924’ (1990) 25 Irish Jurist 150, 179-180.

¹²³ *Report of the committee to review the Offences Against the State Act 1939-1998 and related matters* (Dublin, 2002) para. 5.5.

¹²⁴ *ibid* para. 4.24-4.25.

¹²⁵ *ibid* para. 4.35.

¹²⁶ *ibid* paras. 4.23, 4.29.

Oireachtas has used the special dictatorial legislative power granted in Article 28.3.3 sparingly, and the legislation created pursuant to it has been allowed to lapse.¹²⁷

III. STATUTORY EMERGENCY POWERS IN EACH SYSTEM

United Kingdom

Statutory delegation of emergency power to the executive in the UK constitutional order rapidly expanded in the 20th Century. During the First and Second World Wars, Parliament delegated to the executive a ‘virtually unlimited range of power to deal with emergency situations’ thrown up by the course of each conflict.¹²⁸ The Defence of the Realm Act 1914 (**‘DORA’**) and Emergency Powers Act 1939 both granted the political executive authority to make regulations capable of meeting every exigency posed by war-time threats. Statutes provided near plenary authority to make provision for economic necessities, control essential industries linked to the war effort, requisition private property, order arrests and detention, impose travel restrictions, and implement censorship - all based on subjective executive assessment of the interests of public safety.¹²⁹ These powers were wielded with muscularity: during war-time thousands were detained without trial and government moved to exercise very considerable control over the economy and private property.¹³⁰ These powers had some procedural limits: while the DORA did not provide for a sunset clause it was eventually repealed in 1920, with very little of its emergency powers remaining in operation during peace-time.¹³¹ The EPA 1939 provided for a residual role for Parliament by giving it a veto power over regulations made under the Act. It also provided the Act would elapse in a year unless extended by Parliament, and was allowed to lapse in the 1950’s. But these modest procedural limitations did not change the fact statutory delegation granted enough power over social and economic life to, in the words of one contemporary commentator, invite comparison with the totalitarian nations Britain was battling.¹³²

Aside from war-time threats, a great deal of emergency powers legislation in the UK has been directed toward combatting internal political violence. The long-standing ‘Troubles’ in Northern Ireland (a euphemism for a vicious three decade long sectarian conflict) providing a particularly intense example. The Civil Authorities (Special Powers) Act 1922 gave the

¹²⁷ Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018) 96.

¹²⁸ Paul B. Rava, ‘Emergency Powers in Great Britain’ (n 75) 450.

¹²⁹ *ibid* 405.

¹³⁰ H.W.R. Wade, *Administrative Law* (3rd edition, Clarendon Law Series, 1974) 319-321.

¹³¹ Paul B. Rava, ‘Emergency Powers in Great Britain’ (n 75) 438.

¹³² Amanda L. Tyler, ‘Courts and the Executive in Wartime’ (n 105) 813-826.

devolved Northern Irish government power to establish regulations ‘as may be necessary for preserving the peace and maintaining order’, which served as the basis for controversial internment powers against those perceived to have militant Republican sympathies. When direct rule was reintroduced, this was replaced by the Northern Ireland (Emergency Provisions) Act 1973 and Prevention of Terrorism (Temporary Provisions) Act 1974 which retained internment, collectively introduced special non-jury courts¹³³ to deal with terrorist offences, and power to proscribe any organization seen as engaged in or promoting terrorism. Post - 9/11 terrorism legislation in the UK further expanded the executive’s authority to engage in the surveillance and monitoring of suspected terrorist suspects without trial. A raft of Anti-Terrorism legislation passed by the New Labour governments of Prime Ministers Tony Blair and Gordon Brown provided for broad powers like indefinite detention without trial of deportable aliens¹³⁴ and imposition of control orders on suspects¹³⁵ suspected of engaging in terrorist-related activity (which could encompass provision for curfews, electronic tagging, restrictions on association and use of communications devices).¹³⁶ They also increased periods of pre-charge detention for up to 28 days¹³⁷, bolstered surveillance power, and proscribed speech likely to be understood as encouraging or glorifying terrorism.¹³⁸ Conservative governments from 2011 to the present day broadly continued these policies, with modest modification. They tapered down some aspects of the previous administration - reducing pre-charge detention periods to 14-days and replacing control orders with the slightly less onerous Terrorism Prevention and Investigation Measures.¹³⁹ However, successive executive actors have kept the main scaffolding erected by them predecessors. In addition, Conservative governments have placed more emphasis on other aggressive measures, like deporting foreign terrorist suspects,¹⁴⁰ citizenship stripping,¹⁴¹

¹³³ These courts also operated with less due process protections in respect of the right to silence and informer evidence.

¹³⁴ This was declared incompatible with the Human Rights Act 1998 by the judicial committee of the House of Lords in *A v Secretary of State* [2004] UKHL 56.

¹³⁵ Defined as ‘an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.’ Clive Walker, ‘Keeping Control of Terrorists Without Losing Control of Constitutionalism’ (2007) 59 *Stanford Law Review* 1395.

¹³⁶ Including Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism Act 2005 and Terrorism Act 2006. Helen Fenwick and Gavin Philipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond’ (2011) 56 *McGill Law Journal* 863, 876-877.

¹³⁷ Lydia Morgan and Fiona DeLondras, ‘Is there a ‘Conservative’ Counter-Terrorism?’ (2018) 29 *King’s Law Journal* 187, 200.

¹³⁸ *Ibid.*

¹³⁹ Terrorism Prevention and Investigation Measures Act 2011. These measures require a higher evidential standard than reasonable suspicion – requiring reasonable belief. They do not include the same amount of onerous provisions which can be imposed as Control Orders but do retain provision like electronic tagging and over-night residence requirements. *See* Helen Fenwick and Gavin Philipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond’ (n 136) 917-918.

¹⁴⁰ *See* (n 142).

¹⁴¹ After lying dormant for decades, between 2006 and September of 2016, statutory powers were triggered to strip dozens of Britons of their citizenship due to association with terrorism. *See* Patrick Weil and Nicholas Handler, ‘Revocation of

and exclusion of those suspected of engaging in terrorism abroad from returning to the UK.¹⁴² The broad bi-partisan¹⁴³ consensus on the need for broad executive authority to deter, prevent, and respond to terrorism have helped deeply embed sweeping anti-terror powers in UK law, incrementally adding to the armoury of the executive long-after the immediate crisis's spurring their enactment have dissipated.¹⁴⁴ Instead of these powers representing a 'fire-fighting' approach to tackling a crisis after it erupts, as the 'classic understanding of a state of emergency conceptualises' them, they serve as a potent tool for the executive to control subversion and prevent threats to security in the first instance. The result being that 'restoration of the status quo or 'normalcy' is either perpetually suspended or rejected as the goal.¹⁴⁵

Delegation of impressive emergency powers to the political executive has not been restricted to wartime, nor for the purposes of combatting terrorism, but has extended to preventing or remedying events like socio-economic disruption or dangers to public welfare. For example, in the early 20th Century emergency legislation was enacted to undermine the power and influence of Britain's powerful Labour movement – out of fear of a Bolshevik inspired revolution precipitated by widespread strikes.¹⁴⁶ The Emergency Powers Act 1920 gave the political executive extensive statutory power to issue regulations to restore order where it appeared to the government essential services were threatened by any action by any body of persons.¹⁴⁷ This vague statutory enabling language was deployed on several occasions to ameliorate the economic impact of strike action and to facilitate strike-breaking action by the authorities.¹⁴⁸

The Emergency Powers Act 1939 was replaced by the Civil Contingencies Act 2004, which similarly grants the political executive capacious power to declare an emergency and issue regulations to combat it. The use of emergency powers is set out in Part 2 of the Civil Contingencies Act 2004. The Act provides the Government with powers to issue emergency regulations to deal with emergencies that threaten serious damage to human welfare, the

Citizenship and Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime' (2018) 36 Legal and History Review 295, 353.

¹⁴² Counter-Terrorism and National Security Act, 2015.

¹⁴³ Lydia Morgan and Fiona DeLondras, 'Is there a 'Conservative' Counter-Terrorism?' (n 137).

¹⁴⁴ Colm O'Coinneide, 'Controlling the Gorgon of State Power in the State of Exception: A Reply to Professor 'Tushnet' (2007) 3 International Journal of Law in Context 289, 295.

¹⁴⁵ Alan Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35 Legal Studies 594, 597.

¹⁴⁶ Clive Walker and J. Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, 2006) 39; H.W.R. Wade, *Administrative Law* (n 130) 319-321.

¹⁴⁷ *ibid* 39.

¹⁴⁸ *Ibid*.

environment, or security of the UK. Damage to human welfare is broadly defined in the Act to include disruption to transport networks or the supply of food, money, energy, or health services. Guidance produced by the Cabinet Office states that powers under the Act should be reserved for extremely serious or catastrophic emergencies – a statutory last resort. If triggered, the powers are wide-ranging, providing the Government with plenary power to make any provision that could be made by an Act of Parliament or through the use of the royal prerogative. The regulations may, among other potential uses: amend primary legislation, confiscate property (with or without compensation); prohibit or require the movement of people to or from specified places; prohibit assemblies of certain kinds; and create criminal offences for failing to comply with the regulations.¹⁴⁹ These powers have not been invoked, but are amongst the most far-reaching delegations of administrative and regulatory power to the executive on the statute books, subject to moderate parliamentary and judicial oversight.¹⁵⁰

United States

From the earliest days of the American Republic, Presidents have been vested with potent statutory powers from Congress during periods of emergency. In the 20th century this trend exploded: from the Great Depression throughout the Cold War, Congress passed hundreds of statutes granting the President statutory power which could be triggered during a declared ‘national emergency’.¹⁵¹ Wary of this sprawling patchwork of emergency powers, Congress eventually enacted the National Emergencies Act 1976 to provide a unified procedural framework for presidential invocation of statutory emergency power. The Act requires the President to publish all declarations of emergency, specify which statutory provisions bestowing emergency powers are being invoked, and to report to Congress on executive orders made under them. The Act provides each state of emergency ends automatically one year after its declaration, unless the President publishes a notice of renewal in the Federal Register within 90 days of the termination date and notifies Congress of same. Under the National Emergencies Act, Congress can rescind any emergency declaration through a simple majority vote of both houses – but this is subject to presidential veto. This power has

¹⁴⁹ With limited penalties.

¹⁵⁰ Regulations must be laid before Parliament as soon as is practicable, and they lapse after seven days if not approved by both Houses of Parliament. Post-approval emergency regulations lapse a maximum of 30 days later but can be renewed. Regulations are treated like secondary legislation for the purposes of the Human Rights Act 1998, allowing them to be quashed by judicial review.

¹⁵¹ Amy L. Stein, ‘A Statutory National Security President’ (2018) 70 Florida Law Review 1183, 1193; Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 Yale Law Journal 1029, 1078-1081.

only been invoked *once*, in 2019, and was predictably vetoed by President Trump, a veto Congress failed to gain the requisite two-thirds majority to override.¹⁵²

Statutory emergency powers vested in the President are breathtakingly broad and span domestic and foreign policy domains. Statutory powers available as a result of a declaration of emergency by the President range from: authority to freeze and block movement of any asset or transaction in which a foreign national or terrorist has an interest,¹⁵³ ban or restrict travel to and from proscribed countries,¹⁵⁴ authority to effectively nationalise important industries,¹⁵⁵ fund large-scale domestic infrastructure construction to aid the armed forces,¹⁵⁶ engage in extensive domestic surveillance of suspected terrorist suspects with minimal judicial oversight,¹⁵⁷ engage in prolonged detention of terrorist suspects without trial,¹⁵⁸ authority to order lethal drone strikes on US citizens abroad considered enemy combatants,¹⁵⁹ and power to inflict economic embargoes, tariffs, or sanctions against foreign countries or designated entities.¹⁶⁰ Upon presidential declaration of an emergency, these impressive powers can be used unilaterally and without consent from any other political actor, while being theoretically subject to congressional rescission and judicial review.¹⁶¹ This increased discretion is closely bound with loosening checks on the boundaries of permissible statutory delegation to the executive from Congress. Thus, as with the creation of the administrative state apparatus, the Presidents' current vast array of emergency authority took

¹⁵² Jacob Pramuk, 'House fails to override Trump's veto on bill that would have blocked his national emergency' *CNBC* (March 26, 2019).

¹⁵³ Under the International Emergency Powers Act 1977.

¹⁵⁴ In *Trump v. Hawaii* 585 U.S. (2018) the Supreme Court found that President Trump's executive order to exclude aliens from several countries, many of which were majority Muslim, did not violate the establishment clause due to religious discrimination. On one view, some of the President's statements were 'smoking gun' evidence that the executive order arose from a desire to target foreign nationals on the basis of religion. However, the Court deferred to the executive's assertion the purpose of the 'travel ban' was national security based and anchored on an uncertainty of the adequacy of current vetting procedures. Satisfied the executive had *bona fide* national security concerns the Court was unwilling to subject the executive order to searching review but applied rational basis scrutiny to see if the measure was rationally tailored to its objective. See Harold Koh, 'Trump Change: Unilateralism and the "Disruption Myth" in International Trade' (2019) 44 *Yale Journal of International Law Online* (2019) 96, 100; Case Note, *Trump v Hawaii* (2018) 132 *Harvard Law Review* 327, 334.

¹⁵⁵ Amy L. Stein, 'A Statutory National Security President' (n 151) 1194.

¹⁵⁶ Scott R. Anderson and Margaret Taylor, 'What Authorities is President Trump Using to Build a Border Wall?' *Lawfare* (15 February 2019).

¹⁵⁷ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2011) 46.

¹⁵⁸ *Ibid.*

¹⁵⁹ Andrew Kent, 'Disappearing Legal Black Holes' (2015) 115 *Columbia Law Review* 1029, 1057-1058.

¹⁶⁰ Under the International Emergency Economic Powers Act.

¹⁶¹ On previous occasions, broad statutory delegations of power have been used for purposes as diverse as providing billions of dollars to rescue stricken financial institutions from imminent collapse, unilaterally announce a four-day bank-holiday to prevent a run the banking system and evacuate and intern Japanese-Americans during war-time. See Jack Balkin and Sanford Levinson, 'Constitutional Dictatorship' (n 53) 1833-1836.

co-ordinated effort. It involved presidential seeking of additional power, congressional granting of it, and judicial quiescence in its delegation and exercise.¹⁶²

The President's permanent authority has increased through congressional and judicial compliance with executive requests, and a reluctance from Congress to rescind or taper these powers, making emergency powers a powerful political tool for all seasons. The executive can often rely on emergency powers to pursue generic domestic policies, when there is no widely recognised emergency situation. President Trump's pursuit of core campaign policy promises, from promoting economic protectionism¹⁶³ to 'building the wall'¹⁶⁴ on the United States-Mexican border, all unilaterally through means facilitated by emergency powers legislation, is a vivid example of this phenomenon in action.

Ireland

As noted, the Irish polity's response to emergency situations has also largely relied on elements of the dictatorial and legality models. As large-scale armed resistance to the Free State crumbled, the government and Parliament began to move away from extra-legal force to provide a formal statutory basis for its national security policies through the Public Safety (Emergency Powers) Act 1923.¹⁶⁵ The Act contained wide powers for the Executive Council to order the indefinite detention of anyone it was satisfied was engaged in armed rebellion against the state or presented a threat to public safety. It also prescribed the death penalty and flogging for a wide range of offences, all triable by military tribunal with minimal due process.¹⁶⁶ This Act was substantively re-enacted through the Public Safety (Powers of Arrest and Detention) Temporary Act 1924 and Public Safety (Punishment of Offences) Temporary Act 1924, with the major difference being that the death penalty was no longer prescribed as a punishment.¹⁶⁷ These measures expired after a year and were replaced with the less draconian Treasonable Offences Act 1925, which provided for a broad definition of treason, but did not alter the ordinary mode of trial or special power of arrest or detention.

¹⁶² See generally, Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 157).

¹⁶³ Scott R. Anderson and Kathleen Claussen 'The Legal Authority Behind Trump's New Tariffs on Mexico' *Lawfare* (3 June, 2019); Timothy Meyer and Ganesh Sitaraman, 'Trade and the Separation of Powers' (2019) 107 *California Law Review* 583, 649-651; Ryan D. Williams, 'The Commerce Department's Self Defeating Conception of National Security' *Lawfare Blog* (26 February, 2018).

¹⁶⁴ 10 U.S.C. s.2808 provides that in the event of a declaration by the President of a national emergency the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law *that are necessary to support such use of the armed forces.* See Scott R. Anderson & Margaret Taylor, 'What Authorities is President Trump Using to Build a Border Wall?' *Lawfare Blog* (15 February 2019).

¹⁶⁵ Colm Campbell, *Emergency Law in Ireland: 1918-1925* (n 115) 171.

¹⁶⁶ *ibid* 172.

¹⁶⁷ *ibid* 177.

In 1931, in response to a spike in perceived left- and right-wing political subversion, a more draconian version of these statutory powers was effectively codified into the Free State Constitution via Article 2A of the Free State.¹⁶⁸

Since the passage of the 1937 Constitution, the Oireachtas has used ordinary legislative procedure to grant expansive statutory power to the executive to combat perceived threats to public order and state security.¹⁶⁹ The most important measures in this vein were passed during the Second World War - a period of turmoil for the young Irish State known as 'the Emergency'. The Offences Against the State Act 1939 (as amended) is the most far-reaching emergency powers legislation enacted under ordinary legislative procedure, as opposed to the special constitutional procedure provided in Article 28.3.3. The Act provided for non-jury Special Criminal Courts, departure from ordinary evidential rules to assist prosecution,¹⁷⁰ power to proscribe and suppress organizations, and increased power over arrest and detention without charge, as under the Act suspects can be detained for up to 72 hours.¹⁷¹ Its most expansive power, however, was its provision for internment. Provided for by Part II of the Offences against the State (Amendment) Act 1940. When introducing the Bill to the Dáil, the Government made it clear it was keen to make provision of internment a tool available beyond the limited circumstances in Article 28.3.3.¹⁷² Part II comes into force when the Government publishes a proclamation declaring that internment is necessary to secure the preservation of public peace and order, and it ceases to be in force when the Government publishes a proclamation revoking it. Provision is also made for Dáil Éireann, at any time while Part II is in force on foot of a proclamation by the Government, to pass a resolution annulling that proclamation. If a proclamation is in force, the Government may order the indefinite detention of any person where it is satisfied that they are engaged in 'activities calculated to prejudice the preservation of the peace, order, or security of the State'.¹⁷³ This power is entirely subjective to executive assessment, and there is no requirement the individual should be suspected of actually engaging in terrorism, organized crime or any criminal activity.¹⁷⁴ When in force, internment was used aggressively by the government to target what it considered political subversion.

¹⁶⁸ Gerard Hogan, *Origins of the Irish Constitution: 1928-1937* (n 112).

¹⁶⁹ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis* (n 3) 309.

¹⁷⁰ Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) 248.

¹⁷¹ With Judicial approval.

¹⁷² Dáil Éireann, Second Stage Debate, Wednesday 3 January 1940.

¹⁷³ John Maguire, 'Internment, the IRA and the Lawless Case in Ireland: 1957-1961' (2004) *Journal of the Oxford University Historical Society* (2004) 1,4.

¹⁷⁴ *Ibid.*

While internment has not been utilised since the IRA ‘border campaign’¹⁷⁵ of the 1950’s-1960’s, other parts of the Act have become established parts of the criminal justice system. Use of Special Criminal Courts to conduct jury-less trials and utilise special evidentiary rules offering less procedural protection to defendants, have become settled features of Irish criminal law; as have the Act’s greater provision of increased discretion over arrest and detention. In recent years, the executive has gradually expanded use of these potent tools, and they are no longer solely directed toward tackling terrorism.¹⁷⁶ Increased detention powers can be directed in respect of any Offence added to the schedule of the Act by the executive, even if the offence in question in a given case is unrelated to political subversion.¹⁷⁷ By adding new offences to the schedule, the executive has also expanded the jurisdiction of the Special Criminal Court in recent years. Its work now extends to prosecutions brought against members of organized criminal groups, extending the remit of the Court far beyond its initial purpose of combatting political subversion threatening state institutions.¹⁷⁸ In some respects, these powers and institutions create a parallel system of policing, one which eases the executive’s burden of maintaining security and public order,¹⁷⁹ an ease which undoubtedly comes at the cost of tapering down legal due process guarantees traditionally associated with the common law and 1937 Constitution.¹⁸⁰

The response of the constitutional order to Ireland’s financial crisis is another vivid testament to the fact constitutional systems extend expansive emergency powers outside the context of terrorism or wartime, but also to combat perceived socio-economic threats. Indeed, the Irish response to financial emergency aped its response to these other scenarios: in response to an event threatening social upheaval the executive moved to seek extensive powers in the name of maintaining public welfare. In response, the legislature obliged, deferring to the executive’s claims of specialist and sensitive knowledge, extending broad and deep authority subject to modest oversight. In turn, when the legislation is challenged for impinging rights, the judicial branch accepts executive characterisation of the situation

¹⁷⁵ The Government’s proclamation, dated 5th July 1957, appeared in a special issue of *Iris Oifigiúil* on 8th July 1957.

¹⁷⁶ Shane Kilcommins and Barry Vaughan, ‘A Perpetual State of Emergency: Subverting the Rule of Law in Ireland’ (2004) 35 *Cambrian Law Review* 55, 56.

¹⁷⁷ *ibid* 61.

¹⁷⁸ Fergal Davis, *The History and Development of the Special Criminal Court 1922-2005* (Four Courts Press 2007) 64-70. Kilcommins and Vaughan note how ‘Offences without subversive connections which have been tried in the Special Criminal Court include the supply of cannabis, arson at a public house, theft of computer parts, kidnapping, the murder of Veronica Guerin, receiving a stolen caravan and its contents, the unlawful taking of a motor car, and the theft of cigarettes and £150 from a shop’. *Ibid* 62.

¹⁷⁹ *Ibid* 55.

¹⁸⁰ Alan Greene, ‘Shielding the state of emergency: organised crime in Ireland’ (n 145) 258.

as an emergency, extending considerable deference to its actions, and a latitude it may not have given during periods of ‘normalcy’. The resulting delegated powers greatly increase the capacity of the executive to project public power in a manner it best deems fit to respond to the perceived emergency situation, in a manner thinly constrained by law and other actors.

By late 2007, the Irish economy truly faced a crisis of potentially calamitous proportions. With Irish banks under enormous stress due to plummeting housing prices, a crippled construction sector, and high levels of debt, the Irish executive responded with a series of sweeping initiatives designed to maintain the flow of credit and international market and political confidence, desperately attempting to prevent a banking collapse. On the night of 29th September 2008, a panicked Irish government, or more accurately the Taoiseach, Minister for Finance and a handful of advisors, unilaterally decided to guarantee all deposits and liabilities of several Irish financial institutions, following a meeting with high-level officials from the impaired banks.¹⁸¹ Having done so, the executive swiftly sought legislative approval for the move. Enacted barely 24 hours later, the Credit Institutions (Financial Support) Act 2008 granted the executive immensely consequential authority, allowing it to provide financial support or incur a liability on the part of the State in respect of a credit institution - without *any monetary limit* set in the legislation itself.¹⁸² The executive could do so after forming the opinion there was a serious threat to the stability of credit institutions in the state generally, and that action was necessary for maintaining the stability of the financial system in the state, and for remedying a serious disturbance in the economy. But having formed such an opinion, the executive’s decisions did not have to be counter-signed by the legislature, nor were they subject to judicial oversight. In reliance of these capacious powers, the executive advanced a staggering €30.6 billion in promissory notes to various stricken credit institutions during 2010, the terms of which required repayments on an annual basis until 2031 of €3.06 billion every year between 2011 and 2024, decreasing until the promissory notes were completely repaid in 2031.¹⁸³ The annual expenditure committed to service these repayments became non-voted expenditure, meaning they would be automatically disbursed from the state Central Fund every year *without* an annual parliamentary vote, despite constituting a sizable part of annual state spending.

¹⁸¹ Stephen Coutts, ‘The Oireachtas and the Eurocrisis: Empowerment through Crisis’ (2018) 60 *Irish Jurist* 67, 73-74.

¹⁸² *Collins v Minister for Finance* [2016] IESC 73.

¹⁸³ For context, the Estimates for 2011 presented to the Dáil provided for total state expenditure of €49 billion.

Allied to these powers, additional measures were introduced by the executive designed to reduce the level of non-performing loans held by Irish banks and to facilitate significant cuts to public expenditure. In both instances, the executive was bestowed unprecedented¹⁸⁴ statutory powers to interfere in economic activity and private contractual relations. In respect of the former, the NAMA Act 2009 provided capacious authority for the National Assets Management Agency, a special administrative body, to acquire distressed loans between private actors. The Agency's acquisition and management of those loans was designed to assist banks in clearing their balance sheets of potentially problematic assets and help with meeting strict capital requirements to ensure the soundness of the banks. Under the Act, NAMA enjoyed extensive authority to designate loans as non-performing and compulsorily acquire them, subject only to the most basic of constitutional due process.¹⁸⁵ Around the same time, enactment of the Financial Emergency Measures in the Public Interest Act 2009 implemented significant cuts to public sector pay and pensions. The Act gave the executive authority to reduce the national minimum wage, unilaterally alter contracts of service entered into by the state and non-state parties, and discretion to alter or exempt the classes of public sector worker subject to pay and pension cuts at its discretion.¹⁸⁶ These extensive powers were consistently upheld by the courts, even though the measures in question clearly 'adversely affected contractual and other entitlements protected' by the property provisions of the Constitution.¹⁸⁷ The choices made by the executive when wielding these accumulative statutory powers had enormous repercussions for state fiscal and social policy, impacting virtually facet of Irish life: including the funding of core State services like education, health, and welfare. For good or ill, these measures bolstered executive capacity to project public power and stamp its political vision onto complex real-world conditions, with relatively minimal ex-ante constraint.¹⁸⁸

¹⁸⁴ In *NAMA v Dellway* IESC 4 [2010] the State itself described the Acts constituting 'an unprecedented scheme of legislative intervention in privately run commercial activity directed towards preserving the economic wellbeing of the State from immediate and substantial threats.'

¹⁸⁵ *NAMA v Dellway* IESC 4 [2010].

¹⁸⁶ *Garda Representative Association v Minister for Finance* [2010] IEHC 78. The Act provided a residual discretion is vested in the Minister to exempt a particular class or group of public servants, or to otherwise modify the obligation to pay under section 2. This would allow the Minister, for instance, to defer payments for a particular period, or to exempt a particular kind of public servant either entirely or by reducing the full extent of the statutory obligation just set out above.

¹⁸⁷ Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country' in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019) 1360.

¹⁸⁸ Stephen Coutts, 'The Oireachtas and the Eurocrisis: Empowerment through Crisis' (n 181) 73-75.

IV. INCENTIVES DRIVING EXECUTIVE PREDOMINANCE

Parts II and III highlighted that the executive's emergency powers have stemmed from assertions of broad executive power and delegations of statutory power. This section considers the incentives driving the executive to delegate statutory power and the judiciary to frequently defer to its exercise.

Legislative delegation

Several institutional and structural forces converge to incentivise legislative acquiescence and delegation to the executive during times of perceived crisis. For a start, the executive's general predominance over political initiative, partly secured as a result of the political party apparatus and its emergence as key policy maker, provide it with plausible claims to relative expertise for the proposals it puts forward in respect of emergency situations. As does its closer proximity, as chief executor of the law, to actors such as law enforcement and security agencies.¹⁸⁹ As a matter of institutional competence, the executive's proximity to these agencies facilitate its claim to better appreciate, and understand, what powers they 'need' to ensure public safety when proposing measures balancing liberty and security.

In addition, legislatures appear to buy into the long-standing tendency in constitutional theory and politics to associate the executive with distinctive institutional qualities – such as dispatch, secrecy, and unity in action. On such accounts, when the executive squares off against an emergency situation, it does so armed with peculiarly useful and sensitive information and in possession of greater ability to react with decisiveness and speed to fast-moving developments. At least compared to a procedurally cumbersome legislature or an epistemically hobbled court. In other words, the executive knows more than the other branches about the crisis and is in a position to actually formulate and execute a decisive response.¹⁹⁰

Other structural factors which tend to channel greater authority to the executive are the 'pull' factors of threat and fear.¹⁹¹ As a crisis generates fear, it is the executive who is primarily

¹⁸⁹ Colm O'Connell, 'Controlling the Gorgon of State Power in the State of Exception: A Reply to Professor Tushnet' (n 144) 293-294.

¹⁹⁰ Alan Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (n 145) 594; Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 157) 43.

¹⁹¹ Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (n 106).

looked to as the state's main policy-maker, to match state capacity with public expectation for safety and security. Failure to meet this expectation may put failure to prevent a crisis materialising firmly on the political branches.¹⁹² Attempts to match this expectation with state power is at the heart of pushes the executive toward seeking delegation of capacious power,¹⁹³ and what presses the legislature to grant it, tightening already strong bonds of party discipline.¹⁹⁴ As noted in chapter II, the political party apparatus helps to bring together informally what formal institutions separate. During times of high political tension, this apparatus is more likely to impose discipline on its members in the executive and legislature to reach consensus on a similar political response.¹⁹⁵ For example, in the UK during votes on emergency legislation, it would not be uncommon for a 'three-line whip' to be imposed, with the result that any rebellion will result in expulsion from the party.¹⁹⁶

That is not to say dissent is non-existent, or behind the scenes legislative lobbying cannot influence or dilute executive proposals in each system.¹⁹⁷ It clearly can and does. To continue with an example from the UK, the legislative defeat of the then Labour Government's controversial attempt to introduce 90-day arrest without charge for terrorist suspects provides a vivid example of the impact parliamentary push-back can have.¹⁹⁸ Similarly, the well-resourced and non-partisan Joint Committee on Human Rights has consistently critiqued the proportionality of executive initiatives with respect to human rights concerns, with modest success.¹⁹⁹ Post 9/11, Congress certainly granted very broad power to the executive through the PATRIOT Act and AUMF, but did so alongside rejection of even more ambitious requests for statutory authority, citing concerns over civil liberties and presidential overreach.²⁰⁰ These examples demonstrate the capacity of well-resourced and motivated legislatures to scrutinise executive action pre and post enactment, and provide critical advice and comment. They can raise public awareness of a controversy, and potentially raise the political costs of the executive to disregard parliamentary input and

¹⁹² Helen Fenwick and Gavin Philipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (n 136) 868.

¹⁹³ Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (n 106).

¹⁹⁴ Colm O'Cinneide, 'Controlling the Gorgon of State Power in the State of Exception' (n 144) 292-293.

¹⁹⁵ Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (n 10) 2679.

¹⁹⁶ Fiona deLondras and Fergal Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (n 38) 34.

¹⁹⁷ Ewing writes that the lesson from the UK experience 'would appear to be that while the government can be expected to prevail on the substance in times of crisis, there will always be a group of usually backbench MPs able to mobilise enough resistance to require important changes to the detail in order to uphold important points of principle.' Keith Ewing, 'The Political Constitution of Emergency Powers: A Comment' (2007) 3 *International Journal of Law in Context* 313, 315.

¹⁹⁸ Jenny Martinez, 'Inherent Executive Power: A Comparative Perspective' (n 99) 2499.

¹⁹⁹ See Aileen Kavanagh, 'Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Hunt, Hooper and Yowell (eds.), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015).

²⁰⁰ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (n 157) 46.

increase executive incentive to anticipate and avoid such criticism. Indeed, it can be said the mere existence of the legislature and ongoing requirement to gain its approval (and maintain its confidence in a parliamentary system) are deterrents to the executive broaching activity it knows may be unacceptable to it – helping it set the overton window of political possibility in which the executive must navigate.²⁰¹

However, once an executive is intent on pursuing a measure, legislative modifications to its policies are usually modest. Indeed, when a legislative majority turns against the executive, it is usually only when it senses public opinion has shifted against the latter's credibility.²⁰² To paraphrase O'Connell, if political 'headwinds can overcome most legal or institutional obstacles' they also serve as a robust constraint against the executive when they blow the other way. Thus, overall, it is fair to say executives have generally got what they wanted from the legislature in times of crisis – through a combination of party discipline, belief in executive expertise, and the pull factor of fear - even if they have had to make minor concessions on major points of principle if facing motivated legislative and public resistance.

Judicial deference

If any consensus can be said to exist in the rich literature on emergency powers, it is that the ability of judicial review to provide a robust control on executive emergency power has a deeply mixed historical record.²⁰³ Rare are the accounts which suggest courts have acted as a muscular bulwark capable of substantively altering a course set by the political executive to tackle a crisis which might impinge on rights and freedoms. However, equally rare are accounts suggesting courts completely abnegate their responsibilities during times of crisis, for example by rendering any issue colourable as involving an emergency as non-justiciable. Thus, the real debate is not whether the judiciary has served as a strong check on executive emergency powers. The real debate is more muted. It is whether courts, on balance, have served as a modest check against the outer extremities of executive power or, conversely, a constitutional accelerator for executive power by largely legitimating whatever actions it decides to take.²⁰⁴

²⁰¹ Paul B. Rava, 'Emergency Powers in Great Britain' (n 75) 443.

²⁰² Fiona deLondras and Fergal Davis, 'Controlling the Executive in Times of Terrorism' (n 38) 34-35.

²⁰³ In the context of the UK, Ewing has written 'Until recently, the history of the United Kingdom would thus generally support Professor Tushnet's views of the courts as 'weak reeds', generally unwilling to challenge the exercise of executive power.' Keith Ewing, 'The Political Constitution of Emergency Powers: A Comment' (n 197) 314.

²⁰⁴ Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (n 10) 2679.

Why are judicial checks said to fail in robustly checking executive power during emergencies? The answer provided by many commentators is stark – the problems with judicial review in this arena are simply manifold. First, there is the question of delay and the time-lag that can exist between executive action and judicial proceedings. By the time cases come before the courts, the executive will have already taken action and staked out its political and legal justification for same, in an attempt to shore its legitimacy, giving it ability to alter the political status quo.²⁰⁵ The ability of the executive to take initiative and move quickly will have altered the political and legal landscape in which the judiciary operates and may, if the measure has already gathered political and popular credibility, make it a more onerous burden for the judiciary to second-guess or invalidate, particularly if anchored on a plausible legal claim.²⁰⁶

Second, judges in this domain can feel stifled by informational poverty and a lack of institutional confidence in assessing and considering whether to second-guess state action attempting to balance sensitive interests like liberty, security, and public welfare.²⁰⁷ As with the legislature, the judiciary frequently believes the executive is in possession of peculiarly pressing or sensitive information regarding current crisis', linked to its position as executor of the laws and chief policy-maker.²⁰⁸ Often the first-hand information relied upon by the executive for its assessments of risk, and necessity of its action to combat risk, will also be informed by technocratic and scientific information, highly sensitive, and perhaps subject to privilege, hindering the judiciary's ability to second-guess it or form its own opinion.²⁰⁹

Third, the executive is also regarded as possessing greater institutional capacity to react to emergency situations, being associated with traits, even tropes, of constitutional discussion of executive power – unity, dispatch and secrecy – which make it well-equipped to tackle complex, uncertain, and fast-moving problems. On this view, the legal order rests responsibility to meet emergencies with the executive, and courts should be mindful and respectful of this difficult duty when weighing in on the legality of its actions. For many judges, these previous two factors give the executive relative institutional superiority in formulating, and executing, responses to crisis. *Relative* in the sense that, even if the

²⁰⁵ Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 157) 53.

²⁰⁶ Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (n 10) 2678.

²⁰⁷ Mark Tushnet, 'The political constitution of emergency powers: parliamentary and separation-of-powers regulation' (n 2) 277.

²⁰⁸ Cora Chan, 'Business As Usual: Deference in Rights Review' in Fergal Davis and Fiona DeLondras (eds.), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, 2014) 228-250; Helen Fenwick and Gavin Philipson, 'Covert Derogations and Judicial Deference' (n 136) 894.

²⁰⁹ Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape' (2011) 9 *International Journal of Constitutional Law* 172, 177.

executive's information or capacity to act is non-ideal, it remains superior to an epistemically impoverished and unelected court.

Fourth, for judges staring down the barrel of high-stakes emergency powers litigation beset by epistemic poverty, deference is a 'rational response to uncertainty' in a situation where the wrong decision could risk serious consequences.²¹⁰ Judicial action invalidating executive action may simply carry the kinds of consequences an unelected and largely unaccountable court may not wish to risk.

Cumulatively, courts have strong institutional incentives to extend deference to executive assessments of risk, and necessity of emergency measures, on the basis that the executive knows more about the crisis it is facing, and is in a position to actually formulate and execute a decisive political response to such a sensitive and high-stakes issue.²¹¹

These factors and fears are given concrete manifestation in the hurdles those seeking to challenge any executive action implicating emergency powers may have to overcome, including deferential review anchored on functional or normative grounds. Typically, rather than find that executive action in national security matters is beyond the reach of law, or a 'legal black hole', courts in each system now tend to scrutinize whether there is formal legal authorization for the action. However, when it is satisfied it has a formal constitutional or statutory basis it will, more often than not, apply a deferential standard of review when assessing the rights impact of any executive measures. For example, asking whether it has a rational basis and is not wholly arbitrary.²¹² In other words, judges often help create a 'legal grey holes' whereby their level of scrutiny imposes *some* legal constraints on executive action – such as that action cannot be clearly *contra legem* or irrational - but which are thin enough to provide the executive very ample room for manoeuvre in addressing a crisis.²¹³

In light of this structural tendency towards deference, the real debate is, as noted above, whether the judiciary has on balance served as a modest check, or constitutional accelerator, for executive power. Those inclined to the former view tend to focus on head-line cases, or influential dissents, where judges 'held the line' against the executive, and did not show

²¹⁰ *ibid* 178.

²¹¹ Fiona deLondras and Fergal Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (n 196) 27.

²¹² David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) 42.

²¹³ *Ibid*.

uncritical deference to claims of necessity, arguing they serve as rallying points for political push-back²¹⁴ and useful precedents which are internalized by political actors.²¹⁵ In the United States, this might include the famous *Youngstown* decision, which held the President's unilateral seizure of steel-mills during the Korean War to be unconstitutional, notwithstanding national security arguments based on military necessity, or the famous dissents offered in *Korematsu*. In the UK, the paradigmatic example is the dissent of Akins J. in *Liversidge*, where he insisted on a strict interpretation of executive detention powers infringing common law rights like liberty and preserving a judicial role in assessing the probity of executive evidence underpinning detention. In an Irish context, this may include the famous dissent of Kennedy CJ. invoking natural law against the legality of the draconian Article 2A amendment to the Constitution, or the decision of Gavan Duffy J. in *State (Burke) v Lennon*,²¹⁶ which found statutory provision of a subjective executive internment power amounted to a breach of the right to liberty, and an unconstitutional vesting of judicial power, a decision effectively overruled by the Supreme Court shortly after in a highly deferential judgment.²¹⁷

Even if not politically impactful immediately, these kinds of judgments might provide focal points for what Tushnet dubs 'social learning', where infamous precedents can become regarded as wrongly decided post-crisis - even part of a constitutional anti-canon - and unsuitable for future reliance.²¹⁸ Instead, influential dissents are regarded as exemplars of judicial courage and correct statements of law that should guide future actors. Some commentators argue courts in several common law jurisdictions, including the UK and US, have appeared to learn from previous instances of judicial abdication, said to be typified by majority opinions in *Korematsu* and *Liversidge*, and increasingly shown themselves willing to force governments into more rights-compliant positions than legislative processes have allowed for. Or which the executive would settle for on its own initiative. For example, courts in each system have retreated from a position which would treat issues concerning emergency powers and national security as *par excellence* non-justiciable issues.²¹⁹ Cases like *A*

²¹⁴ Colm O'Cinneide, 'Controlling the Gorgon of State Power in the State of Exception' (n 144) 300.

²¹⁵ Harold Koh, 'Setting the World Right' (n 106).

²¹⁶ *State (Burke) v Lennon* [1940] IR 136.

²¹⁷ *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470.

²¹⁸ Mark Tushnet, 'Defending *Korematsu*? Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273-307.

²¹⁹ Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts' (n 209).

*v Secretary of State*²²⁰, *Rasul*²²¹, *Hamdan*²²², *Boumediene*²²³ which all handed down qualified defeats for the executive in the UK and US respect of their desired post 9/11 anti-terror policy outcomes, are frequently cited as examples of this shift.²²⁴

However, the cogency of this account is hotly disputed. The main counterargument being that the *arch* of the court's work in the field of national security has been to legitimise the bulk of executive activity, and to rule against it only at the margins. At the tail end of the more aggressive claims of statutory or constitutional power. In other words, for some commentators, the kind of judicial intervention highlighted by commentators is superficially impressive.²²⁵ It has the veneer of a high stakes judicial check or rebuke to executive overreach, but in reality, has modest impact on its behaviour.²²⁶ Critics of this view argue honing in on a handful of qualified executive defeats in court is to severely miss the wood for the trees. While judicial review may provide some remedial value at the margins, by pushing the executive to adopt slightly different means to achieve its goals, it does not alter

²²⁰ *A v Secretary of State for the Home Department* [2005] 2 AC 68. The House of Lords found s.23 of the Anti-Terrorism, Crime and Security Act 2001 incompatible with the Human Rights Act 1998. The impugned provision permitted the executive to indefinitely detain non-nations determined to be a security risk, but where they could not be deported, for example due to concerns over torture etc. The provision did not apply to nationals determined to be a security risk. A majority of the Law Lords deferred to the government's declaration of a public emergency, which permitted derogations from the European Convention under Article 15 provided they are strictly required by the situation. The Court disagreed that the provisions adopted were strictly required by the exigencies of the situation, finding them disproportionate and discriminatory *inter alia* on the ground that they did not allow for the detention of UK nationals who might have posed a similar level of threat.

²²¹ 542 US 466 (2004). The Supreme Court found the federal habeas corpus statute gave Guantanamo detainees a statutory right to judicial review of their detention in federal Court, rejecting an executive's interpretation that would have excluded them from the scope of habeas corpus.

²²² 548 US 557 (2006). The Supreme Court found presidential attempts to establish non-statutory military tribunals to try enemy combatants was *ultra vires* statutes passed by Congress and Treaties which, after ratification, became part of Federal Law. The proposed non-statutory military tribunals would have had less procedural protection than envisaged by the statutory scheme passed by Congress.

²²³ 553 US 723 (2008). The Supreme Court found a statute attempting to strip the Federal Courts of jurisdiction to hear habeas corpus claims from Guantanamo Bay was an unconstitutional suspension of the Writ of Habeas Corpus. The Court found detainees not only enjoyed a statutory right to habeas corpus, but a constitutional one. The Supreme Court further found the constitutional privilege of habeas corpus extended to those detained in Guantanamo Bay, and thus could only be suspended in cases of invasion or rebellion. Because there was neither invasion or rebellion in the US, the statute was held unconstitutional.

²²⁴ DeLondras suggests the 'trajectory of these decisions reflects not only the Supreme Court's commitment to preventing unchecked Executive action, but also the systematic Congressional failure to provide effective oversight.' Fiona deLondras and Fergal Davis, 'Controlling the Executive in Times of Terrorism' (n 196) 39.

²²⁵ For accounts in this vein See Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 157); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (n 212).

²²⁶ *Hamdi v Rumsfeld* 542 U.S. 507 (2004) provides an excellent example for critics of this view. In *Hamdi*, the President's expansive claims of an inherent constitutional power to detain enemy combatants did not obtain support by the majority of the Justices, who refrained from deciding this issue, based on its proposition that the executive branch acted within the authorization of Congress under the AUMF Act 2001. The Court also rejected the assertion courts could not question the factual basis for executive determinations of enemy combatant status. Due process required that *some* independent mechanism exist to review the basis for detention. Reaction to the judgment has been divisive. Some argue it represents a judicial rejection of broad claims of expansive and unilateral executive power, and example of the judiciary upholding the rule of law - by requiring an affirmative congressional basis for depriving suspected enemy combatants of liberty, and a measure of due process before depriving an enemy combatant of liberty. Another reading of *Hamdi* is that the Court upheld and legitimized an enormous delegation of authority to the executive, concurring in a broad reading of the statutory powers contained in the AUMF and allowing the President authority to indefinitely detain anyone he suspects is an enemy combatant, subject only to flimsy quasi-judicial due process review of factual basis. The Court clipped the wings of the more aggressive claims of executive power but legitimated the bulk of them.

the fundamental terms of engagement for addressing an emergency. Which remain overwhelmingly set, and enforced by, the executive.²²⁷

Some critics go further still. Vermeule, for example, suggests judicial attempts to constrain executive power and force its policies into more rights-compliant positions can have the perverse consequence of empowering it from the baseline the judges find it. As illustrative examples, Vermeule cites the Supreme Court's restriction on the executive's detention power over enemy combatants in Guantanamo imposed during the Bush-era. Vermeule suggests these restrictions were a big factor incentivising the Obama administration's ratcheting up of the drone-strike programme shortly after. In other words, greater judicial restrictions imposed on emergency detention powers, incentivised reliance on emergency powers deploying lethal force. This programme, he writes pithily, had 'the great virtue – from the administration's standpoint – of evading all the legal constraints on detention.'²²⁸

So, although courts occasionally do act in high-profile instances to counter-act executive action, or put limits on its outer-bounds, the more descriptively accurate account is that more often than not they subject executive action to deferential standards of review, uphold the legality of most of its actions, and thus legitimise the increased delegation of authority to the executive, providing legal precedent for future action.²²⁹ The judicial branch simply does not, in the majority cases invoking emergency powers, present the executive with too great an obstacle in choosing its response to what it deems a crisis situation.²³⁰ While courts in each system are likely to scrutinize executive action for its formal legal authorization, it is unlikely to subject the substance of such action to searching factual or legal review. Even enthusiastic proponents of judicial review in this area tend to caveat their account of recent judicial behaviour by noting it comes fast on the heels of a 'rather unimpressive historical record'²³¹ across many constitutional systems over extended periods of time.²³²

CONCLUSION

²²⁷ Colm O'Cinneide, 'Controlling the Gorgon of State Power in the State of Exception' (n 144) 298.

²²⁸ Adrian Vermeule, 'The Publius Paradox' (n 89) 7.

²²⁹ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional' (n 4) 1097.

²³⁰ *Ibid.*

²³¹ Fiona deLondras and Fergal Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (n 196) 38.

²³² Helen Fenwick and Gavin Philipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (n 136) 915.

Copious power has flowed to the executive in the name of counteracting emergencies, but each constitutional order has largely tried to subsume this authority under constitutional or statutory authorisation. The executive has very rarely claimed authority to act *contra legem* or directly contrary to the Constitution or statute. As each system has embraced elements of the liberal constitutional tradition which fears perhaps above all, arbitrary state power, it is not surprising ‘extralegal...and unauthorized acts’ are considered deeply troubling, even if done to preserve public safety or welfare.²³³ In the vein of this tradition, each order has expressed marked reluctance to countenance acting explicitly contrary to legal norms, even under colour of emergency or wartime.

There are two main ways emergency powers are subsumed within the institutional framework of each constitutional order. First, political actors in Ireland and the United States have articulated and legitimised expansive understanding of constitutional authority to tackle emergencies. Ireland’s embrace of a qualified dictatorial model explicitly provides emergency powers that can be triggered by the Oireachtas. These are formidable and have enabled executives to take draconian steps, otherwise contrary to constitutional rights, to combat perceived threats to the security of the state. But the Oireachtas has used its special dictatorial legislative power sparingly, preferring to create emergency authority through ordinary legislative procedure. Although lacking the same firm textual basis as their Irish counterparts, successive US President’s and their legal advisors have articulated broad and nebulous claims of ‘inherent’ or ‘implied’ power to tackle emergency threats under Article II. A common argument is that these kinds of presidential powers fluctuate where necessary to tackle emergencies and respond to grave crisis. In other words, special constitutional authority required to protect the political community not available during peacetime might be triggered during times of crisis. Reliance on expansive constitutional authority triggered in special circumstances is seen as conceptually distinct from Lockean prerogative. While prerogative is explicitly extralegal and relies on ex-post ratification for legitimacy, reliance on special expanded constitutional power is rooted within the constitutional order and straddles the conceptual line between a commissarial dictatorship (where temporary broad powers otherwise prohibited are unlocked) and legality model (where emergency powers are created through the ordinary bounds of powers existing within text and structure).

²³³ Judith Shklar, ‘The Liberalism of Fear’ in Nancy L. Rosenblum (ed.), *Liberalism and Moral Life* (Harvard University Press, 1989) 30.

Second, emergency powers are brought into being through proliferation of legislative delegations of broad statutory authority to the executive, empowering it *ex-ante* to act in statutorily defined circumstances. In other words, using relatively banal ordinary legislative procedure to create and vest extraordinary legal authority. This has been the most prominent commonality between each system. Executives, whether Presidential or Prime Ministerial, have increasingly turned to the legislature for statutory delegations of broad and deep power to tackle crisis situations, subject to nominal legislative and judicial supervision of their invocation and exercise. Emergency powers are often usually theoretically banal, given that their proliferation has largely occurred through standard legal mechanisms, like delegating statutory power from the legislature to the executive. Its practical significance instead comes from the *depth* and *volume* of the power delegated. In facilitating and permitting this delegation, the other branches have comparatively self-limited their law-making and law-checking role in any muscular sense and provided, at best, thin to moderate constraint. The import of these factors is that, unlike the extra-legal model, action taken outside the bounds of statutory or constitutional authority is not envisaged. Additionally, unlike the dictatorship model, the means by which emergency powers are utilised are technically not unbounded from other formal legal norms during a time of crisis.

Each system therefore tries to reconcile granting the executive immense discretionary power but subsuming it within the thin binds of legality.²³⁴ This highlights the two divergent faces of executive power which emerge throughout this thesis: politically predominant and beyond tight control by legal rules articulated by constitutional text, legislatures, and courts, but nonetheless still subservient to law in some residual and important sense.²³⁵ This tense duality between dominance and subservience underscores not only the dominant political power of the executive, but the enduring importance of perceptions of legality to political legitimacy in these systems. The sole *raison d'être* of the constitutional order in each system is certainly not limitation of arbitrary state power.²³⁶ But it is an important facet of each order – rooted in the liberal constitutional tradition - which has staying power even in the face of a precipitous institutional growth in executive capacity and its emergence as leading state actor.²³⁷

²³⁴ Jack Goldsmith, 'The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation' (n 6).

²³⁵ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 24 Canadian Journal of Law & Jurisprudence 321.

²³⁶ Clement Fatovic and Benjamin Kleinerman, 'Introduction: Extra-Legal Measures and the Problem of Legitimacy' (n 1) 7.

²³⁷ *ibid* 8.

PART FOUR: HOW LAW CONSTRAINS AND EMPOWERS THE EXECUTIVE

CHAPTER IV: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

INTRODUCTION

Chapter III outlined how increased state activity in social and political life spurred a move toward new forms of government structure designed to meet fresh challenges posed by its unprecedented level of intervention, toward an expansion in the administrative and law-making activity of the executive branch.¹ Part four of this thesis looks at legal constraints imposed on the executive and administrative state via the judiciary and internal legal advisors working within the executive branch. This part argues that ostensible legal constraints on the executive can, in fact, act as a source of empowerment.

This chapter argues the growth and consolidation of the administrative state, which is so critical to the executive's political predominance, was aided by judicial articulation of relaxed legal rules and standards. The legislature and judiciary therefore both broadly worked in tandem, over sustained periods of time to affirm, delegate, and legitimate increased executive authority. As the power of the executive waxed, these organs in turn have frequently self-limited their own law-making and law-checking authority. The judiciary have not abnegated their judicial authority, but they frequently offer only modest to moderate counterbalance on the executive's expanded power, which facilitates its predominance over projections of public power. The judicial branch could attempt to tightly constrain the executive's authority by aggressively reviewing their exercise for compliance with legal principles. Courts in each system are certainly not supine institutions. Apex courts in each system have effectively asserted ultimate authority and duty as 'guardians of the Constitution' to interpret the meaning of both statutes and constitutional principles for the other branches.²

But despite having robust conception of their own authority, courts have not used their ample formal powers to intensely constrain and obstruct the political executive or administrative state action. Formally speaking, the courts remain legal overseers of the acceptable boundaries of the executive and administrative state, but in practice there is a

¹ Adrian Vermuele, *Laws Abnegation: From Laws Empire to the Administrative State* (Harvard University Press, 2016) 9.

² See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boland v An Taoiseach* [1974] I.R. 338; R (*Miller*) v Prime Minister [2019] UKSC 41.

dissonance between the appearance of robust judicial power and the reality of the fact they have carved out a very wide scope for executive discretion. I outline how judges have articulated flexible constitutional rules and standards, such as the delegation doctrine and reasonableness standards of administrative review, which provide the executive wide scope to make and implement policies and rules governing swathes of national political issues. I also probe the reasons why they have opted for relaxed legal rules and standards, including concerns over democratic legitimacy; pragmatic appreciation of the limits of judicial competence in light of the complex problems the political executive grapples with; and perhaps implicit recognition the awesome responsibility of governing ultimately rest heavily on the executive's shoulders, and courts should not seek to make the task of achieving substantive policy goals more difficult than it already is.

The legislature's willingness to delegate capacious statutory power, and judicial readiness to articulate relaxed legal rules and standards, mean the executive-led administrative state was created and nurtured from the broad outline of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order.³ Part I examines the approach of the courts in each system to delegated statutory power. Part II considers the courts approach to the control and review of discretionary administrative power.

I. JUDICIAL REVIEW OF DELEGATED RULE-MAKING

United Kingdom

There are 'virtually no constitutional restraints' on Parliament's ability to delegate regulatory and administrative power to subordinate actors.⁴ Parliamentary supremacy ensures that judges cannot develop something akin to a non-delegation doctrine to invalidate primary legislation in the same manner as the U.S. and Ireland.⁵ Nor is there a general common law obligation for a rule-maker to provide notice to, or hear comments from, any parties affected by secondary regulation.⁶ Overall, judicial control of the delegation of rule-making power is 'very weak'.⁷

³ Adrian Vermuele, *Laws Abnegation* (n 1) 7; Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 435.

⁴ Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford University Press, 2007) 151.

⁵ *ibid* 151-158.

⁶ Robert Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995) 75.

⁷ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 297.

However, those vested with authority to issue secondary regulation can be subject to a measure of judicial scrutiny on the basis they have exceeded statutory boundaries, acted inconsistent with the primary statute, or unreasonably.⁸ In *R (Public Law Project) v Lord Chancellor*⁹ the UK Supreme Court held it is well established that, unlike primary statutes, the lawfulness of statutory instruments can be challenged in court. The Court articulated the basis for invalidating secondary legislation as ‘upholding the supremacy of Parliament over the Executive’¹⁰ by preventing the latter from making an order which is outside the scope of the power which Parliament has given via primary statute. The Court suggested that the consequence is that judicial review of secondary legislation ‘vindicates, instead of undermines, the sovereignty of Parliament. In other words, the justification is the classical ultra vires theory of judicial review’¹¹ of upholding parliamentary intention.

Ireland

Irish judges wield considerable power.¹² However, judges have not wielded their power in a manner which has frustrated the growth in the size or capacity of the administrative state. Judicial responses to these constitutional developments have tended, in the main, toward acceptance and deference.¹³ This section traces how the Irish courts have aided the emergence of the executive-led administrative state through the articulation of loose rules and deferential standards which allow administrative actors to act largely unimpeded from onerous judicial scrutiny that could act as a choke-point to action. This section focuses on the court’s treatment of legislative delegation, and I suggest they generally facilitate, not frustrate, the acceptance, growth, and operation of the administrative state apparatus.

The historical backdrop to Article 15 of the Constitution suggests two primary underpinning objectives. First, the provision represented an emphatic reassertion of the freedom of the Irish polity from legislative control from Westminster.¹⁴ Second, the drafting history suggests Article 15 was designed to cabin executive law-making and promote the primacy of

⁸ Ibid.

⁹ [2016] UKSC 39.

¹⁰ [2016] UKSC 39, para. 22-23.

¹¹ Jake Rylatt and Joe Tomilson, ‘Delegated Legislation, Brexit, and the Courts’ (2017) 22 *Judicial Review* 320, 323.

¹² See generally Oran Doyle, *Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018) 18-22. Doyle describes the Irish separation of powers as fundamentally bi-partite, between a fused executive-legislature on the one hand, and judiciary on the other.

¹³ Adrian Vermeule, *Laws Abnegation* (n 1). Although writing in respect of the US constitutional order, much of Vermeule’s observations apply with equal force to Ireland.

¹⁴ *Laurentiu v Minister for Justice* [1999] 4 IR 26, 83.

parliamentary law-making.¹⁵ It is this second objective which the Court's jurisprudence has grappled with. Doing so has proven difficult as courts attempt to reconcile pluralist and competing principles. Namely, the paramountcy of parliamentary law-making on the one hand, and accommodating vast swathes of state activity in social and economic life on the other. Tension between these principles bends largely in favour of facilitating the latter, and the arch of the court's jurisprudence has been toward policing the outer bounds of legislative delegation: negating delegations of regulatory authority effectively devoid of statutory guidance by the Oireachtas.

The stated constitutional basis for limiting delegation of statutory power stems from the somewhat paternalistic desire to ensure law-making power is not 'abnegated' or 'alienated' by the Oireachtas.¹⁶ This has been attributed to judicial attempts to keep faith with the democratic principles articulated in Articles 5 and 15.¹⁷ As Hogan J. put it, by ensuring 'policy decisions having a legislative character are taken by the body directly accountable to the People' as opposed to technically indirectly accountable executive actors.¹⁸ A subsidiary rationale is the Madisonian notion that preventing broad delegation of statutory power safeguards the rights of citizens by preventing excessive accumulation of authority in the executive.¹⁹

In the now canonical²⁰ *Cityview Press* case, the test the courts have articulated to vindicate these principles, requires that delegated statutory power must not go beyond giving effect to 'principles and policies' contained in the authorizing primary legislation.²¹ If it goes beyond

¹⁵ A memorandum from the Attorney General's Office during the drafting period suggested that Article 15 would require principles of legislation be definitely enacted in the statute, and that while secondary rules and orders may prioritise matters such as 'form, time and manner' of carrying into effect the objects of the statute, a rule that sought to 'depart from the scope of the statute, impose new obligations or confer new rights ... could be properly set aside by the Courts' as ultra vires. Gerard Hogan, *Origins of the Irish Constitution, 1928–1941* (Royal Irish Academy 2012) 480. (My emphasis). See also Maria Cahill & Sean O'Conaill, 'Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution' (2017) 36 *University of Queensland Law Journal* 259, 265.

¹⁶ See *Cityview Press v AnCo* [1980] IR 381, 399. O'Higgins CJ stated that 'ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution'; *Laurentiu v Minister for Justice* [1994] 4 IR 26, 63. Denham J. held that 'The power of the legislature must be protected. The power is for that body for the benefit of democratic government and may not be surrendered'.

¹⁷ *Kennedy v Law Society* [2002] 2 IR 458, 486. Fennelly J. held that any 'excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle'. Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury, 6th edn. 2018) 283.

¹⁸ *Bederev v Ireland* [2015] IECA 38, para 63; *Laurentiu v Minister for Justice* [1999] 4 IR 26, 61.

¹⁹ *Laurentiu v Minister for Justice* [1999] 4 IR 26, 70. Barrington J. suggested that 'Absolute power may not be delegated to any executive agency because to do so would be inconsistent with the rights of citizens'.

²⁰ Described as such in *Collins v Minister for Finance* [2013] IEHC 530.

²¹ *Cityview Press v AnCo* [1980] IR 381, 398.

this, it strays from permissible subordinate regulatory power to unconstitutional delegation of legislative power.²²

However, the Court's pragmatic awareness of the need for capacious delegation in a political community with a large administrative state largely, but not entirely, trumps its concerns over parliamentary supremacy.²³ The Court has implicitly recognised that tightly circumscribing the power of the Oireachtas to delegate statutory power may simply undermine its institutional power, by frustrating its ability to meet its policy objectives.²⁴ The existence of the administrative state in Ireland, and its relation to delegated statutory power, has been acknowledged by the judiciary as far back as the late thirties, in the earliest days of the constitutional order. For example, in the 1939 case of *Pigs Marketing Board v. Donnelly*²⁵ Hanna J. observed that the functions of government were so numerous and complex that 'of necessity' a wider sphere had been recognised for the regulatory activity of 'subordinate agencies, such as boards and commissions', especially in commercial and economic matters.²⁶ Recognition of the *necessity* of the administrative state apparatus to facilitate widespread state activity is perhaps the most commonly articulated judicial rationale for granting the Oireachtas wide latitude to vest regulatory power in the executive and administrative bodies. Indeed, has become a near constant leitmotif of delegation-doctrine jurisprudence.

The Court's understanding of necessity in this context has two related strands. One stems from the complexity of social and economic matter the Oireachtas seeks to regulate, which requires a level of expertise, information, and technocratic skill the legislature may not possess as a body of generalists.²⁷ The second stems from the fact that the conditions for regulating social and economic issues change rapidly and demand a level of policy-adjustment Parliament is institutionally ill-equipped to provide due to time and informational constraints.²⁸ As a result of these realities, there has been judicial recognition wide latitude

²² O'Donnell J stated in *McGowan v Labour Court* [2013] IESC 21: 'If in truth any piece of regulation amounted to truly delegated legislation, it would offend Article 15, since it is plain from the very language thereof, and indeed the constitutional structure, that the function of legislation is one that cannot be delegated by the Oireachtas to any other body'.

²³ Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (2011) 33 *Dublin University Law Journal* 220, 222.

²⁴ *Bederev v Ireland* 3 IR [2016] 31, 53.

²⁵ [1939] 1 I.R. 413.

²⁶ [1939] 1 I.R. 413.

²⁷ *Cityview Press v Anco* [1980] IR 381, 398; *Laurentiu v Minister for Justice* [1999] 4 IR 26, 70-71. In *Maher v Minister for Agriculture* [2001] 2 IR 139, 245 Fennelly J. considered that delegated legislation is 'by common accord, indispensable for the functioning of the modern state. The necessary regulation of many levels of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules'.

²⁸ *Maher v Minister for Agriculture* [2001] 2 IR 139, 245. Fennelly J. added that 'there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances.'

for delegated statutory power carries ‘obvious attractions’ and is ‘indispensable’ to the ‘functioning of the modern state’ due to the ‘complex, intricate and ever-changing situations’ confronting the political branches.²⁹ Thus, the courts have been aware of the fact the legislature can have very good reason to exercise its legislative power to bestow broad regulatory authority on another institution. The courts appear to appreciate that if broad delegation was impermissible, it would hamstring the substantive capacity and power of the Oireachtas, all in the name of safeguarding its formal prerogatives.³⁰ This is because the Oireachtas may need to delegate broad statutory authority if it wants to achieve valuable and complex policy objectives, precisely because as an institution it might lack capacity, time, and expertise to specify in primary legislation how it intends to address a given issue.³¹

These pluralist principles are in constant tension, and judicial attempts to reconcile them have led to striking dichotomy between the judicial test as cited, and as applied. The test the Oireachtas must articulate all relevant principles and policies in primary legislation delegating statutory power, is applied with considerable laxity. Elegant in theory, but difficult to apply in practice, the test is undoubtedly nebulous and its application ensures only a small fraction of statutes delegating regulatory power will risk falling foul of Article 15.³² This suggests judicial recognition of the pragmatic necessity of delegation to the functioning of the administrative state has taken precedence over concerns of legislative abnegation.³³ It is clear application of the test permits the executive to formulate rules of binding conduct, provided there are *some* guiding principles and policies contained in the primary statute to guide the discretion of the delegate.³⁴ Only statutes which are strikingly absent of same are invalidated on the basis they constitute an abdication of law-making which leaves the executive entirely ‘at large’ to regulate a particular policy.³⁵ Statutes which contain *some* principles, policies, standards, goals, factors, and purposes to guide the executive are typically upheld, even if

²⁹ See *Cityview Press v Anco* [1980] IR 381 and *Maher v Minister for Agriculture* [2001] 2 IR 139; Eoin Carolan, ‘Democratic Accountability and the Non-Delegation Doctrine’ (n 23) 228.

³⁰ *Ibid.*

³¹ *National Union of Railwaymen v Sullivan* IR [1947] 77, 84. In *BUPA Ireland v Health Insurance Authority* [2006] IEHC 431. McKechnie J. considered that ‘it would be impossible, or at least highly impracticable, to oblige the Oireachtas to respond in a timely manner to ever changing and evolving circumstances which could have a major impact on fundamental issues’; *Bederev v Ireland* 3 IR [2016] 31, 53. Charleton J. held that many ‘cases emphasise that without delegation the very exercise of legislative authority by the Oireachtas could be undermined. Where the Oireachtas to legislate for every aspect of a particular statutory scheme, it would quickly become enmeshed in details and in the task of precisely predicting future developments as opposed to legislating for existing trends which may change as to detail’.

³² Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (n 17) 306.

³³ Eoin Carolan, ‘Democratic Accountability and the Non-Delegation Doctrine’ (n 23) 221.

³⁴ Eoin Carolan, ‘Democratic Control or High-Sounding Hocus-Pocus – A Public Choice Analysis of the Non-Delegation Doctrine’ (2007) 29 *Dublin University Law Journal* 111, 130.

³⁵ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (n 17) 306.

they leave a large measure of normative and policy discretion.³⁶ Moreover, in recent years courts has increasingly viewed provision of an Oireachtas annulment or ‘veto’ power over secondary legislation as a mechanism which may compensate for an absence of principles and policies in a primary statute.³⁷

The Court’s formal articulation of the principles and policies test proceeds on a caricature of the executive-led administrative state, one that reduces wielders of delegated power to diligently sketching the details of normative choices and objectives definitively decided upon by Parliament.³⁸ This transmission belt conception depicts the executive led-administration as an ‘impotent political force, its capacity for wielding creative power castrated by the specificity of the legislative order upon which it acts’.³⁹ This simple principal-agent conception is hard to square with the fact the executive and administrative bodies are typically not tightly constrained by statutory directions, but given wide flexibility to make normative decisions within vague guidelines, which the executive itself has usually drafted.⁴⁰ Judicial application of the test, in contrast, appears to accept the need for this level of flexibility in order to allow the political branches, through the administrative state apparatus, to pursue complex policy objectives.

Indeed, the Court’s starting point for assessing the permissible boundaries of legislative delegation already qualifies the absoluteness of the legislature’s power in important respects. The courts have never tried to enforce a strict interpretation of legislative power which would reserve to the legislature the sole authority of promulgating binding rules of conduct. This would prevent the executive from doing so under the guise of delegated statutory authority and restrict it to the *execution* of primary legislation through individual administrative decisions. This position has found some support in Anglo-American public law.⁴¹ A very strict test has the benefit of clarity and coherence: (a) Legislative power consists of stipulating binding rules of conduct, (b) allowing the executive to do this is an alienation

³⁶ James Casey opined that it is ‘not easy to imagine what would not’ pass muster under the non-delegation doctrine. James Casey, *Constitutional Law in Ireland* (2nd edn., Sweet & Maxwell, 1992) 181.

³⁷ *Bederev v Ireland* [2015] IECA 38, para 24; Maria Cahill and Sean O’Conaill, ‘Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution’ (n 15) 266.

³⁸ Eoin Carolan, ‘Democratic Control or High-Sounding Hocus-Pocus’ (n 34) 116-117.

³⁹ *Ibid.* 119.

⁴⁰ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (n 17) 307; Jerry Mashaw, *Greed, Chaos and Governance* (Yale University Press, 1997) 152-155.

⁴¹ See Gillian E. Metzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (2016) 131 *Harvard Law Review* (2016) 1; Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2015); Adrian Vermeule and Cass Sunstein, ‘The New Coke: On the Plural Aims of Administrative Law’ (2015) *The Supreme Court Review* 41.

of legislative power, (c) the executive should thus be restricted to executing detailed statutory directives. This hypothetical non-delegation test is no doubt theoretically possible, but deeply impractical and burdensome from the perspective of actors in the administrative state, which requires capacious delegated power and flexibility to function in any robust manner. Irish courts would decisively reject this approach and have never viewed executive formation of binding rules of conduct with suspicion. Instead they pitch their test for permissible statutory delegation as scrutiny of the *degree* of statutory power vested in the executive by the Oireachtas. As it is concerned with the *degree* of the vesting of power to create binding rules of conduct, rather than the *fact* of delegation of this authority, its enforcement of the doctrine is perhaps inevitably amorphous, sporadic, and inconsistent.

It is thus unsurprising judicial application of the test has attracted criticism, both from those who would increase the stringency of its application, or abandon it entirely.⁴² Each approach would carry its own normative tradeoffs⁴³, depending on how one views the legitimacy of state involvement in social and economic life and the importance the Oireachtas have more of a substantive say over policymaking.⁴⁴ But the former would be most inimical to the functioning of the administrative state apparatus. Given strong judicial acceptance of the existence of the administrative state, and pragmatic recognition that broad delegation is a necessity to its operation, it is unlikely the *Cityview* test will harden in future.⁴⁵ Recent decisions from the Supreme Court in *Bederev v Minister for Justice*⁴⁶ and *O'Sullivan v Sea Fisheries Protection Authority*⁴⁷ suggest courts may, in future, approach the test negatively and in a manner more in keeping with its actual lax application to date. Asking whether the absence of statutory guidance to the executive about the objective to be achieved and the scope of powers given, represents a trespass on the power of the Oireachtas. As opposed to assessing whether *all* relevant principles and policies concerning a policy issue are contained in a parent statute.⁴⁸

⁴² For the former view see Maria Cahill & Sean O'Connell, 'Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution' (n 15) 268. For an ambivalent view see Rossa Fanning, 'Reflections on the Legislative Process following *Leontjava v Director of Public Prosecutions*' (2004) 39 Irish Jurist 286. For arguments in favour of abandoning the doctrine see Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (n 23) 247-249.

⁴³ For example, there is risk a reinforced doctrine would 'simply replace a system without scrutiny with one under which unelected judges would wield enormous, and unpredictable, supervisory powers.' Eoin Carolan, 'Democratic Control or High-Sounding Hocus-Pocus – A Public Choice Analysis of the Non-Delegation Doctrine' (n 34) 131-133.

⁴⁴ Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (n 23) 222.

⁴⁵ Eoin Carolan, 'Democratic Control or High-Sounding Hocus-Pocus' (n 34) 114.

⁴⁶ *Bederev v Ireland* 3 IR [2016] 31.

⁴⁷ *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, paras. 39-40.

⁴⁸ *Ibid.*

United States

The US Constitution vests ‘legislative power...herein granted’ in Congress. This provision is understood as meaning that Congress has been delegated this power by the People, and it cannot abdicate this responsibility or surrender it to another body.⁴⁹ Some have argued the most plausible reading of Article I is that it only prohibits total and irrevocable surrender of the bicameral legislative process from Congress to another body. Aside from this hard limit, some scholars regard the implementation of statutory authority, no matter how capacious, as an exercise of executive power and constitutionally permissible.⁵⁰ The judiciary do not share this conception and the Supreme Court has long held Congress’ ability to delegate statutory authority is limited.⁵¹

This placed courts in a difficult conceptual position. On the Court’s view, while Congress can delegate statutory authority to make binding rules of conduct, if they delegate *too much* statutory authority it may constitute an effective surrender of legislative power – *de facto* even if not *de jure*.⁵² As under this conception permissibility is a matter of degree, judicial attempts to articulate a workable doctrinal test have floundered and led to widespread non-enforcement.⁵³ In *J.W. Hampton v United States*, the Supreme Court held that if Congress lays down in its statute an intelligible principle to which a delegate must have regard to when sketching in the details of a statutory scheme then there has been no delegation of legislative power. Based on this test, the Court has upheld sweeping delegations of statutory authority to the executive and administrative bodies.⁵⁴ In *Whitman v American Trucking Associations, Inc*, Scalia J. noted how in ‘the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance’.⁵⁵

Any sustained judicial effort to enforce the doctrine in a firm manner was abandoned during the New-Deal era.⁵⁶ The doctrine lives on in some respects as a canon of statutory

⁴⁹ *Field v Clark* 143 U.S. 649 (1892); *J.W. Hampton, Jr v. US* 276 U.S. 394 (1928); *Whitman v American Trucking Association* 531 U.S. 457, 472 (2001).

⁵⁰ See Nicholas Bagley and Julian Davis Mortenson, ‘Delegation at the Founding’ (Michigan Law School Working Paper, 31st December 2019) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154; Adrian Vermeule & Eric Posner, ‘Interring the Non-Delegation Doctrine’ (2002) 69 University of Chicago Law Review 1721-1762.

⁵¹ *Field v Clark* 143 U.S. 649 (1892).

⁵² *J.W. Hampton, Jr v. US* 276 U.S. 394 (1928); *Whitman v American Trucking Association* 531 U.S. 457, 472 (2001).

⁵³ Aditya Bamzai, ‘Delegation and Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law’ (2019) 133 Harvard Law Review 164-199; Adrian Vermeule, *Law’s Abnegation* (n 1) 52; Cass Sunstein, ‘Nondelegation Canons’ (2000) 67 University of Chicago Law Review 315, 322.

⁵⁴ 276 U.S. 394 (1928) 409.

⁵⁵ 531 U.S. 457 (2001) 474-476. The Court cited *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵⁶ Peter Cane, *Controlling Administrative Power* (n 7) 78-80; Cass Sunstein, ‘Nondelegation Canons’ (n 53) 322; Gary Lawson, ‘The Rise and Rise of the Administrative State’ (1994) 107 Harvard Law Review 1231, 1232; Bruce Ackerman, *We the People*:

construction, as courts may narrow broad delegations of statutory power through a statutory presumption that there are particular activities which administrative bodies cannot pursue absent express and clear congressional authorisation. Including extending the scope of regulations extraterritorially, taking action with negative effects for native Americans, or exempting groups from generally applicable federal policies like tax or competition law.⁵⁷ Sunstein refers to these ‘nondelegation canons’ as representing a kind of ‘democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree’.⁵⁸

But the courts articulation of the non-delegation test proper, recently reaffirmed in *Gundy v. United States*⁵⁹, is now best regarded a largely symbolic judicial effort to harmonize and reconcile the administrative state apparatus with traditional notions of representative government and legislative supremacy.⁶⁰ Notwithstanding some vocal calls for stricter enforcement of the doctrine⁶¹, for now judicial articulation and non-enforcement of this loose standard provides capacious scope for executive and administrative body law-making subject to vague statutory guidelines, making it an important variable explaining their contemporary capacity.

II. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

United Kingdom

For at least 400 years, the U.K. legal order has had, in one form or another, a body of jurisprudence concerned with the ‘legal constraints’ placed on the executive and bureaucracy.⁶² From as early as the 16th century, judges would review administrative action under heads of review contemporary commentators would recognise as procedural fairness, legality, and review for reasonableness.⁶³ It is fair to say that, in recent decades the circumstances in which judges have been prepared to review and invalidate administrative

Foundations (Harvard University Press, 1991); Cass R. Sunstein, ‘Constitutionalism after the New Deal’ (1987) 101 *Harvard Law Review* 421, 447-448.

⁵⁷ Cass R. Sunstein, ‘Nondelegation Canons’ (n 53) 315.

⁵⁸ *ibid* 317.

⁵⁹ 139 S. Ct. 2116 (2019).

⁶⁰ Jerry Mashaw, Richard A. Merrill, Peter M. Shane, *Administrative Law: The American Public Law System, Cases and Materials* (3rd Ed, West Publishing, 1992) 56.

⁶¹ See Gillian E. Metzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (n 41); Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2015); Adrian Vermuele and Cass Sunstein, ‘The New Coke: On the Plural Aims of Administrative Law’ (n 41).

⁶² Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 26-27.

⁶³ *ibid* 44.

action has ‘expanded in spectacular fashion’⁶⁴ and become a factor deeply embedded in executive policy-making.⁶⁵ Commentators have noted how U.K. judges began to take a more assertive approach to judicial control of administrative action in recent decades. Particularly following passage of the European Convention on Human Rights Act 1998.⁶⁶ However, as I will outline, while judges have increased their willingness to subject administrative action to a broader and deeper range of review⁶⁷, they have long balanced a desire to combat risks of government abuse of power on the one hand, with concern for ensuring the executive can effectively implement policy to promote the public interest and common good.⁶⁸

Before discussing the law on this area, a brief account of the underlying constitutional basis of judicial review is warranted. A bedrock principle of the U.K. constitutional order is the legal doctrine of parliamentary sovereignty. This is the principle there is no legal limitation on the jurisdictional competence of Parliament, and that an Act of the Crown-in-Parliament is the highest expression of positive law in the U.K.⁶⁹ There is scholarly debate whether the legal doctrine is distinct from, and conflated with, a political conception of sovereignty which is more complex and contingent on evolving political circumstances. Thus, some commentators argue the legal supremacy of Parliament should not be conflated with the locus of political sovereignty in the U.K., which could evolve in ways that could qualify the legal doctrine.⁷⁰ Devolution, emergence of referendum culture to resolve momentous political disputes, long-time membership of the EU, incorporation of the ECHR, decline in membership and participation in party politics and elections, are all said to cumulatively undermine the feasibility of the Westminster Parliament presenting itself as the ‘authoritative voice of the political nation’. Instead, some argue that authoritative voice is better considered the voice of several nations - or more broadly - ‘the people’ of the U.K.⁷¹

For the purposes of this section, I do not propose to enter the thicket of this debate, but to flag that while deeply contested, the *legal* concept of parliamentary supremacy remains

⁶⁴ Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (8th ed. Sweet & Maxwell, 2018) 7.

⁶⁵ Terence Dainith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, Control* (Oxford University Press, 1999) 207-208.

⁶⁶ Peter Cane, *Controlling Administrative Power* (n 7) 161; Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (8th ed. Sweet & Maxwell, 2018) 206-207.

⁶⁷ Peter Cane, *Controlling Administrative Power* (n 7) 162.

⁶⁸ Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 62) 64.

⁶⁹ Martin Loughin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 *Modern Law Review* 989, 1000.

⁷⁰ *ibid* 1004.

⁷¹ *ibid* 1015.

broadly accepted by apex political and legal actors.⁷² Even if some commentators think it is under pressure from changing political circumstances.⁷³ For example, apart from the statutory authority to grant a declaration of incompatibility under s.4 of the Human Rights Act 1998,⁷⁴ the notion the judiciary could declare invalid parliamentary legislation remains intensely controversial.⁷⁵ Attempts by judges to invalidate a statute would be deeply contrary to orthodox understandings of core constitutional norms and the Rule of Recognition in the U.K.⁷⁶

This principle of legal supremacy thus remains crucial to discussing the conceptual basis for judicial review in the U.K. However, as with the concept of Parliament sovereignty, the precise relationship between parliamentary legal supremacy and the basis for, and scope of, judicial review is also controversial and contested. There are several bases put forward for justifying judicial review of administrative action on grounds such as legality, procedural fairness, and unreasonableness. The classic theory of ultra vires is that judicial review seeks to give effect to parliamentary intent in a specific case.⁷⁷ This theory involves attributing a specific legislative intent that Parliament intended that any administrative power created by statute would be exercised, for example, in a reasonable manner and with due regard for fair procedures, at least absent explicit language.⁷⁸ Thus, any action inconsistent with this imputed intent would be beyond the statutory competence of the executive. The general-intent model of judicial review rejects as unrealistic the notion Parliament, in practice, would intend a specific statute to be interpreted in a manner consistent with certain principles in any given case. Instead, this approach takes Parliament to intend that statutory power it confers will conform to basic principles of fairness and justice judges have associated with constitutional democracy and the rule of law.⁷⁹ On this view, the more particular application of these principles case-by-case is effectively delegated by Parliament to the courts, subject to Parliament's ultimate ability to override or change the law. The common law approach rejects both these approaches as implausible and anchored on an unnecessary legal fiction.

⁷² Donnelly notes that notwithstanding many attacks on the doctrine 'the importance of the underlying principle of parliamentary sovereignty in English judicial thinking should not be underestimated'. Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (n 4) 158.

⁷³ Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (n 69) 1016.

⁷⁴ Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (n 4) 158.

⁷⁵ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 253.

⁷⁶ *Ibid.*

⁷⁷ Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 *Cambridge Law Journal* 129; Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 122.

⁷⁸ Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 62) 128-129.

⁷⁹ Woolf, Jowell, Donnelly, Hare, *De Smith's Judicial Review* (8th ed. Sweet & Maxwell, 2018) 14.

The common law approach instead argues that judicial review developed as a body of law in the same manner as common law doctrines like contract or Tort. Craig suggests that, like these private law doctrines, judicial review too is molded by judicial articulation of concepts like rights, justice, and the appropriate relationship between state and individual and Court and legislature – underpinned by their understanding of the underlying political values of the legal order.⁸⁰ On this conception, the principles of judicial review are clearly created by the courts, and not a result of a fictional delegation of responsibility from Parliament.⁸¹ This position is said to be consistent with acceptance of parliamentary supremacy as the highest legal norm, as legislative intent expressed through statute is still of crucial importance where Parliament has made its intent clear. But, where Parliament have not spoken explicitly, it is not necessary to cloak judicial review principles in the garb of specific or general parliamentary intent.⁸²

For the purposes of this section, the important conclusion to draw from this brief overview of a complex and nuanced debate is that, despite their distinct approaches, each recognises the continuing centrality of the legal supremacy of Parliament to administrative law. A bedrock principle of administrative law remains Parliament’s ability – if it speaks clearly to an issue – to legislate how it likes and bestow whatever administrative and regulatory authority it sees fit.

Statutory Interpretation and Error of Law

Statutory interpretation in the U.K. legal order is highly centralized. Unlike in the U.S. where statutory interpretation involves a collaborative division of labor between the executive and judiciary – exemplified by the *Chevron* doctrine⁸³ - U.K. courts have claimed a near-monopoly over interpreting parliamentary intent. There is no real doctrinal equivalent of *Chevron* affording administrative bodies and the executive deference for reasonable interpretation of statutes.⁸⁴ Instead, judges approach statutory interpretation on the presumption there is a correct legal interpretation of parliamentary intent which is controlling on the executive, and failure to adhere to same can leave a decision *ultra vires* due to error of law.⁸⁵ Previously, courts have attempted to offer executive actors a measure of leeway over errors of law, by

⁸⁰ Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 62) 154.

⁸¹ Paul Craig, ‘Competing Models of Judicial Review’ (1999) *Public Law* 428.

⁸² Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 62) 154.

⁸³ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

⁸⁴ Peter Cane, *Controlling Administrative Power* (n 7) 209-210.

⁸⁵ Paul Daly, ‘Deference on Questions of Law’ (2011) 74 *Modern Law Review* 694, 698.

asking variously whether an error of law was jurisdictional or not, or whether the error of law was sufficiently material. However, toleration of a measure of legal error has narrowed with the effective abolition of distinction between jurisdictional and non-jurisdictional error, making any decision containing error of law – in theory – open to being quashed.⁸⁶

The position all errors of law are liable to be quashed by the judiciary is partly qualified by the passage of the Tribunals Courts and Enforcement Act 2007. This Act rationalized the UK's ad hoc system of administrative appeals tribunals⁸⁷ into a new unified structure in one executive agency. It included creating two new tribunals, the First-tier Tribunal and the Upper Tribunal, staffed by a mixture of legal and non-legally trained personnel. These tribunals are designed to hear appeals on a countless range of administrative decisions – ranging from employment, immigration, psychiatric detention, social welfare, and tax – in a rationalized and efficient manner.⁸⁸ Under the Act, in most cases, a decision of the First-tier Tribunal may be appealed to the Upper Tribunal and a decision of the Upper Tribunal may be appealed to a court, but must relate to a point of law. The rights to appeal may only be exercised with permission from the tribunal being appealed from or the tribunal or court being appealed to. Some decisions of the Upper Tribunal, such as whether to allow an appeal to the Court of Appeal, are themselves unappealable. The question of whether the ordinary courts retain a robust role in subjecting these kinds of decisions to judicial review has proven controversial. For example, what should the High Court do if the First Tribunal errs in law, but the Upper Tribunal refuses permission to appeal on the basis it considers there is no legal error?⁸⁹

*Cart v. Upper Tribunal*⁹⁰ saw the Supreme Court attempt to respond to this precise question and reconcile the pull and tug of 'judicial control' of administrative action with 'tribunal autonomy'.⁹¹ *Cart* concerned the question of the extent to which judicial review was available for unappealable decisions of the Upper-Tribunal on whether to hear an appeal on an error of law. On the one hand, the Court was concerned restricting judicial review to only

⁸⁶ See *Anisminic v Foreign Compensation Commission* 2 AC 147; *R v Hull University Visitor, ex p Page* [1993] AC 682; *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23; *R (on the application of BBC) v Information Tribunal* [2007] 1 WLR 2583; *R (Cart) v Upper Tribunal* [2012] 1 AC 663.

⁸⁷ Tribunals, Courts and Enforcement Act 2007.

⁸⁸ Philip Murray, 'Judicial Review of the Upper-Tribunal: Appeal, Review and the Will of Parliament' (2011) 70 Cambridge Law Journal 487-489.

⁸⁹ Joanna Bell, 'Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law' (2019) 39 Oxford Journal of Legal Studies 74, 87.

⁹⁰ *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

⁹¹ Paul Craig, 'Judicial review of questions of law: a comparative perspective' in Susan-Rose Ackerman, Peter Lindseth and Blake Emerson (eds.), *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing, 2017) 389-404.

exceptional cases could allow tribunals to frequently err in law, meaning parliamentary intent could be undermined by executive misapplication of the law. On the other, allowing the full panoply of judicial review would also undermine parliamentary intent - to restrict appeals on points of law to within the tribunal system, and provide tribunals a mandate to carry out specialized functions efficiently without being excessively obstructed.⁹² To thread the needle between these positions, the Court set the scope of judicial review in a way that was ‘necessary and proportionate to keep such mistakes to a minimum’, but still constrained by ‘the bounds of practical possibility’.⁹³ The Court would thus tolerate the risk a tribunal would act on the basis of an error of law because to allow for unrestricted judicial review would excessively dampen its ability to act efficiently and practically. Post-*Cart*, a claimant must show that the application for judicial review of an Upper Tribunal decision to refuse an appeal on an error of law must raise some important point of legal principle or practice, or that there was some other compelling reason for the ordinary courts to undertake judicial review.⁹⁴

U.K. courts thus have a large degree, but not monopoly, of control over statutory interpretation. This gives the judiciary a mechanism to control administrative action not enjoyed by other political actors. Moreover, it should also be noted the kind of executive actors who are given a measure of interpretive flexibility are expected to act quasi-judicially and independently of the political executive in discharging their statutory functions.

Substantive review of Administrative Action

The basic approach of the UK judiciary toward substantive review is facilitative of administrative action. It is rooted in an amorphous ‘reasonableness’ standard of review which ensures the courts will not ‘lightly interfere’ with administrative decisions.⁹⁵ The famous *Wednesbury* standard of reasonableness involves a court evaluating a decision for whether no administrator in the position of the decision-maker could have thought the decision was reasonable. Later, in the influential *GCHQ* case,⁹⁶ the House of Lords phrased the standard as applying to a decision which is so outrageous in its ‘defiance of logic or of

⁹² Joanna Bell, ‘Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law’ (n 89) 83; Mark Elliott and Robert Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) 71 *Cambridge Law Journal* 297, 314-315.

⁹³ R (*Cart*) v *Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, para. 40-50.

⁹⁴ Philip Murray, ‘Judicial Review of the Upper-Tribunal: Appeal, Review and the Will of Parliament’ (n 88) 487-489.

⁹⁵ *Associated Provincial Picture House v Wednesbury Corporation Ltd* [1948] 1 KB 223, 254.

⁹⁶ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.⁹⁷ The broad heading of unreasonableness now subsumes considerations such as whether a decision-maker acts in bad-faith, dishonestly, places excessive weight on some factors compared to others, lacks logical connection between a decision and reasons offered, or is overly oppressive.⁹⁸ As these kinds of tenets were subsumed into the unreasonableness standard, the contemporary test was framed as demanding a decision fall within a ‘range of reasonable responses’ in light of the statutory context the decision-maker operates in.⁹⁹ This contemporary standard encompasses evaluation of the act in question and its relationship to statutory purposes and ends, but still typically provides a decision-maker broad discretion to tailor this relationship.¹⁰⁰

Incorporation of EU law and ECHR into UK law helped spur movement toward greater judicial scrutiny of the merits and factual underpinning of administrative decisions – a proportionality standard of review.¹⁰¹ These standards arguably place a greater justificatory burden on decision makers, and more hurdles to surmount for a decision to be upheld as proportionate, particularly when fundamental rights are involved. This standard also undoubtedly narrows the range of legally acceptable outcomes a decision-maker can arrive at, given that it demands a ‘close and penetrating examination of the factual justification of the restriction’ including whether a decision has a rational connection to a legitimate objective, goes no further than necessary to achieve this objective, and whether the good of the objective to be achieved is fairly balanced against the extent of the right infringement.¹⁰² The courts have explicitly adopted proportionality review for interference with rights contained in the Human Rights Act 1998, but have not affirmatively adopted it as a general head of review for all administrative decisions.¹⁰³

Thus, the ‘prevailing orthodoxy’¹⁰⁴ is that reasonableness review applies to the majority of administrative decision-making. The courts have adopted a flexible and contextual approach to this standard, which varies in intensity depending on subject matter, the importance of

⁹⁷ *ibid.*

⁹⁸ Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (n 79) 601-604.

⁹⁹ *Ala v Secretary of State for the Home Department* [2003] EWHC 521, para 44-45.

¹⁰⁰ Peter Cane, *Controlling Administrative Power* (n 7) 254-255.

¹⁰¹ *Pham v Secretary of Home Department* [2015] UKSC 19 para. 104; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; Alison Young, ‘Will You, Won’t You, Will You Join the Deference Dance?’ (2014) 34 *Oxford Journal of Legal Studies* 375, 376.

¹⁰² *R v Minister for Defence ex. Parte Smith* [1996] Q.B. 517.

¹⁰³ *Pham v Secretary of Home Department* [2015] UKSC 19.

¹⁰⁴ Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (n 79) 635.

the right in question, and the extent of encroachment upon that right.¹⁰⁵ On some occasions, reasonableness review may encompass scrutiny of the proportionality of a decision, between the means used and the balance struck between ends sought to be achieved and its impact on the applicant. In other words, on some occasion's reasonableness review may well be deployed in a manner making it nearly indistinguishable from proportionality analysis.¹⁰⁶ So, it cannot be said judicial review offers the administrative state no more than token constraint.

But contextual consideration of the court's role as a check on administrative action must also bear in mind that judges frequently afford deference¹⁰⁷ to first-instance decision-makers on several grounds.¹⁰⁸ For example, if they invoke superior institutional legitimacy over a decision through its democratic credentials – for example because it is made by a Minister answerable to Parliament for their actions.¹⁰⁹ This deference is based on a reluctance to second-guess democratically accountable actors when it comes to resolving difficult questions concerning sensitive economic, social, and political questions.¹¹⁰ This is particularly the case if executive actors make attempt to factor the rights impact of a decision into consideration before making a decision, and turned its mind to the question of how to balance that with its public interest based goals.¹¹¹ Judges may also be more likely to defer where they are reviewing decisions of a body possessed of expertise, or technical skill, beyond the institutional competency of generalist lawyers to competently assess and pass judgment on. A deference to technocratic competence.¹¹²

The total absence of a non-delegation doctrine, enduring use of capacious standards like reasonableness to assess the substance of administration action, and the embeddedness of

¹⁰⁵ *Pham v Secretary of Home Department* [2015] UKSC 19; *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, paras 51-54; *A v Secretary of State for the Home Department*; *X v same* [2005] 2 A.C. 68 at para 80; *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554.

¹⁰⁶ Woolf, Jowell, Donnelly, Hare, *De Smith's Judicial Review* (n 79); Paul Craig, 'The Nature of Reasonableness' (2013) 66 *Current Legal Problems* 131-167.

¹⁰⁷ Which Kavanagh defines as assigning 'varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy'. Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) *Law Quarterly Review* 222, 223; Alison L. Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554-580.

¹⁰⁸ There is debate whether courts have a general disposition to defer in certain swathes of cases, or whether they have a non-doctrinal approach, which considers deference a case-by-case question factored into ordinary judicial scrutiny. See Alison Young, 'Will You, Won't You, Will You Join the Deference Dance?' (n 101) 385.

¹⁰⁹ Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th edition, 2016) 623-628.

¹¹⁰ Woolf, Jowell, Donnelly, Hare, *De Smith's Judicial Review* (n 79) 24-25; *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142, [2004] ICR 1364, paras 90-92.

¹¹¹ Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) 130 *Law Quarterly Review* 235, 237; Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142, 163.

¹¹² Woolf, Jowell, Donnelly, Hare, *De Smith's Judicial Review* (n 79) 24-25; *Electronic Collar Manufacturers Association v Secretary of State for Environment* [2019] EWHC 2813 (Admin); *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696.

deference in legal doctrine, cumulatively ensure the administrative state apparatus is not tightly constrained by courts while discharging its work. Courts can, and do, subject administrative action affecting a sub-set of legal rights to more intense proportionality review. But on balance, they generally facilitate, not frustrate, the capacity and operation of the executive-led administrative state.¹¹³ It is also crucial to note that while the grounds for judicial review have expanded, it remains in some respects ‘sporadic and peripheral’.¹¹⁴ The practical and logistical difficulties of litigation alone ensure that only a minority of administrative action will ever be subject to judicial scrutiny.¹¹⁵ The vast majority of administrative action will be guided by internal circulars, rules, and guidance, directed in part through executive interpretation of judicial doctrine, but also mindful of the need to achieve substantive statutory goals in an efficient and resource conscious manner.¹¹⁶

Ireland

The lives of Irish citizens are regularly affected by administrative action, and more likely to be impacted by state action through this modality than through adjudication by an Article 34 Court or legislative enactment.¹¹⁷ Until the 1970’s and 1980’s, Irish administrative law was conceptually undeveloped, unsure of the relationship between the traditional ambit of common law judicial review¹¹⁸ and the substantive values contained in the 1937 Constitution. In more recent decades, Irish courts have cobbled together an ad hoc administrative law jurisprudence, comprising of these traditional common law judicial review principles with shades of constitutionalisation. Broadly speaking then, Irish administrative law represents a ‘tension between continuity and change, between retaining the status quo and making a radical break with the past’ – between the UK common law tradition and the influence of the 1937 Constitution.¹¹⁹

Robust Approach to Statutory Interpretation & Fair Procedures

One prominent feature of Irish administrative law is that judges take a very assertive stance in respect of statutory interpretation, rejecting any suggestion administrative bodies should

¹¹³ Woolf, Jowell, Donnelly, Hare, *De Smith’s Judicial Review* (n 79) 24-25.

¹¹⁴ *Ibid* 10.

¹¹⁵ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Bloomsbury, 2016) 212.

¹¹⁶ See generally Terence Dainith and Alan Page, *The Executive in the Constitution* (n 65).

¹¹⁷ John M. Kelly, ‘Administrative Discretion and the Courts’ (1966) 1 *Irish Jurist* 209, 210.

¹¹⁸ As inherited from the UK legal order.

¹¹⁹ Paul Daly, ‘The Constitutionalisation of English Judicial Review in Ireland: Continuity and Change’ in Michael Ramsden and Swati Jhaveri (eds.), *Indigenizing Administrative Law* (Forthcoming, Cambridge University Press, 2020).

be afforded deference to reasonable interpretations of their statutory mandate.¹²⁰ As Daly has put it, the courts control the ‘articulation of legal norms, giving little or no weight to the views of non-lawyers about the meaning of law.’ This is because Irish judges rely on a distinction between ‘questions of law, which are reserved to the courts, and questions of fact, discretion or policy, which are for nonlawyers.’¹²¹ Because of this distinction, where an executive body adopts a statutory interpretation a Court finds unpersuasive, decisions flowing from it will typically be quashed for error of law and acting in excess of statutory jurisdiction.¹²² As in the UK, in principle any decision inconsistent with judicial understanding of a statute’s ‘correct’ interpretation will be vulnerable.¹²³ One by-product of this is that the result is that the ‘ability of statutory bodies staffed by experts to develop their own understandings of their parent statutes – often highly technical and shot through with ambiguous or vague statutory language – is extremely limited.’¹²⁴

Irish courts also adopt a robust stance in respect of reviewing administrative discretion for conformity with fair procedures, given a constitutional foundation in Article 40.3.¹²⁵ Administrative decisions which engage a constitutional or legal right or interest must satisfy requirements such as reason giving, avoiding bias, providing for notice and comment.¹²⁶ While administrative bodies may act ‘informally’ in crafting their procedural rules, the courts will have the last word on their legality and have often second-guessed statutory procedures if they consider them insufficiently stringent commensurate to the interest at stake.¹²⁷ Administrative decisions which are likely to have a severe impact on individual rights, most notably the right to a good name, may attract a panoply of quasi-judicial procedural rights articulated in *Re Haughey*.¹²⁸ Including a right to be represented by counsel and cross-exam evidence offered against one’s interest. However, courts have rejected arguments that this panoply of procedural will rights apply in every instance where an interest or right is affected by administrative discretion. They have noted that to extend trial-type rights to the

¹²⁰ *Shannon Regional Fisheries Board v An Bord Pleanala* 3 IR [1994] 449, 456. Barr J. stated emphatically that statutory interpretation is ‘solely a matter for the courts and no other body has authority to usurp the power of the court in performing this function’. For recent affirmations of this approach see *Minister for Communication, Energy and Natural Resources v Information Commissioner* [2019] IECA 68; *Murray v Pensions Ombudsman* [2007] 2 I.L.R.M. 196, 207 per Kelly J.; *The Revenue Commissioners v O’Flynn Construction Company Ltd* [2013] 3 I.R. 533, 562.

¹²¹ See Paul Daly, ‘The Irish Courts and the Administrative State’ in Hardiman & Howlin (eds.), *Oxford Handbook of Irish Politics* (Oxford University Press, 2019).

¹²² *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, 400.

¹²³ Paul Daly, ‘The Irish Courts and the Administrative State’ (n 121)

¹²⁴ *Ibid.*

¹²⁵ See David Kenny, ‘Fair Procedures in Irish Administrative Law: Toward a Constitutional Duty to Act Fairly in *Dellway Investments v Nama*’ (2011) 34 *Dublin University Law Journal* 47-73.

¹²⁶ See Gerard Hogan and David Gwynn Morgan, *Administrative Law* (Roundhall, 4th Edition, 2012).

¹²⁷ Paul Daly, ‘The Irish Courts and the Administrative State’ (n 121).

¹²⁸ *Re Haughey* [1971] IR 217.

administrative process would severely impeded the efficacy, and vastly increase the costs, of administrative bodies attempting to meet substantive political goals.¹²⁹ Courts have also rejected the argument procedural mechanisms like notice and comment apply to exercises of statutory authority permitting a body to issue secondary legislation prescribing rules of binding conduct.¹³⁰

Substantive Review of Administrative Action

Through countless statutes the Oireachtas vests swathes of administrative power on Ministers and administrative bodies. In marked contrast to their robust stance toward statutory interpretation and fair procedures, Irish courts have been largely reluctant to review administrative decisions on substantive grounds¹³¹ and subject exercises of administrative power to intense scrutiny. Administrative power must certainly be exercised in a manner consistent with constitutional obligations.¹³² For example, this ensures courts will, even if a statute is silent on the question, interpret a statute to include an implied statutory obligation to act consistent with fair procedures. Another, perhaps the most significant, implied constitutional limitation on administrative power is that it must be exercised reasonably.¹³³ But the basic approach of Irish courts is, like its U.K. cousins, quite facilitative of administrative action, but can wax and wane in intensity depending on context (such as whether rights are engaged) and perceptions of appropriate levels of deference.¹³⁴

In *State (Keegan) v The Stardust Victims Compensation Tribunal*¹³⁵ Henchy J. articulated a standard of review for administrative action broadly consonant with the test outlined by the UK courts in *Wednesbury*¹³⁶. For the Supreme Court, the necessarily implied statutory limitation of administrative power is that a decision may not ‘plainly and unambiguously flies in the face of fundamental reason and common sense’.¹³⁷ Henchy J. was careful to distinguish this from whether a decision accords with moral standards, or even logic per se, where an illogical decision is not in the teeth of reason and common sense.¹³⁸ A statute explicitly authorizing

¹²⁹ *Shatter v Guerin* [2019] IESC 9; *Crayden Fishing Company Ltd v Sea Fisheries Protection Authority* [2017] IESC 74; *Rowland v An Post* [2017] IESC 20.

¹³⁰ Unlike statutory provision in American Administrative Procedure Act 1947, a right to notice and comment in respect of secondary regulation.

¹³¹ Insofar as one can sever substance and procedure.

¹³² *Donegal Co-operative Livestock Market Ltd v Attorney General* [1970] 1R 317.

¹³³ *The State (Lynch) v. Cooney* [1982] I.R. 337; Gerard Hogan and David Gwynn Morgan, *Administrative Law* (n 126) 514.

¹³⁴ Conor Casey, ‘Courts, Public Interest Litigation, and Homelessness: A Commentary on Recent Case-Law’ (2020) 42 *Dublin University Law Journal* (Forthcoming, 2020).

¹³⁵ [1986] IR 642, 658.

¹³⁶ [1948] 1 KB. 223, 230.

¹³⁷ [1986] IR 642, 658.

¹³⁸ [1986] IR 642, 658.

a decision-maker to act unreasonably would be of dubious constitutionality. This amorphous constitutionally imposed standard gives wide scope for administrative action, policing the outer bounds of statutory power and giving ample scope for maneuver, subject to judicial policing at the margins. Two additional questions impact how the Court's apply this general 'reasonableness' standard of review: deference and fundamental rights. The first acts to depress the standard of review, the second to increase its intensity.

Like their UK counterparts, judicial deference to administrative actor's exercise of administrative discretion is a deeply embedded feature of Irish administrative law. Irish courts typically afford deference to the decision made at first instance for several reasons. For example, if a decision-maker can invoke superior institutional legitimacy over it through its democratic credentials – for example because it is made by a Minister constitutionally answerable to the Dáil for their actions. This deference is based on a reluctance to second-guess democratically accountable actors when it comes to resolving difficult questions concerning sensitive economic, social, and political questions linked to the common good.¹³⁹ Courts also defer where they are reviewing the work of a body possessed of expertise¹⁴⁰ or technical skill. The reason being that courts have a pragmatic appreciation that it may be difficult for generalist judges to competently comprehend, let alone second-guess the judgement of bodies navigating complex and often epistemically uncertain policy issues.¹⁴¹ This second kind of deference is typified in the thin irrationality test outlined in *O'Keffee v An Bord Pleanála*¹⁴², which stipulates the onus is on the applicant to show that there was 'no evidence' before the decision maker which could justify his decision before the courts will intervene.¹⁴³

¹³⁹ *Garda Representative Association v Minister for Finance* [2010] IEHC 78 at para. 22 Charleton J: '[t]he further a decision operates within the boundary of political choice, the more care the court should exercise in interfering with a discretion granted by statute'; See also *Quinn v Financial Services Ombudsman* [2016] IEHC 453.

¹⁴⁰ *M. and J. Gleeson and Co. v. Competition Authority* 1999 1 ILRM 401, 410; *Orange Communications v Director of Telecommunications Regulation & Meteor Mobile Communications Ltd* [2000] 4 IR 159, 238; *Ejé v Minister for Justice* [2011] IEHC 214. In the latter case Hogan J. held at para 14 that it is 'quite clear that decisions which emanate from agencies or persons with proven and established technical and administrative skills enjoy a special degree of deference'.

¹⁴¹ Conor Casey, 'Courts, Public Interest Litigation, and Homelessness: A Commentary on Recent Case-Law' (n 134); Gerard Hogan, David Gwynn Morgan, Paul Daly, *Administrative Law in Ireland* (Roundhall, 5th Edition, 2019) 923.

¹⁴² [1993] 1 IR 39, 72.

¹⁴³ [1993] 1 I.R. 39, 70. Finlay C.J. observed 'I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it *no relevant material* which would support its decision.' In *Aer Rianta cpt v. Commissioner for Aviation Regulation* [2003] IEHC 12 O'Sullivan J. enunciated the relevant test for review in the following colorful terms: 'the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong; he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality.'

Where administrative discretion engages fundamental rights under the Constitution, Convention, or Charter, the courts augment their standard of review to more closely examine the substantive content of a decision.¹⁴⁴ These developments were spurred by judicial concern that standards of review anchored on irrationality or reasonableness provided an insufficient remedy to vindicate fundamental rights – because they only policed the margins of administrative action, even if it negatively impacted these rights.¹⁴⁵ The Supreme Court’s decision in *Meadows v Minister for Justice*¹⁴⁶ infused the *Keegan* reasonableness test for review of administrative decisions with an element of proportionality analysis. There is deep doctrinal uncertainty about what role proportionality plays: whether it is a free-standing standard of review or an analytical tool serving as a strong indicator of reasonableness.¹⁴⁷ The balance of authority suggests proportionality is impressionistic.¹⁴⁸ That is, rather than constituting a separate head of review, it serves as a useful heuristic to aid scrutiny of whether a decision is unreasonable. Put another way, a decision that is disproportionate in the context of fundamental rights will typically be found to be unreasonable and therefore beyond the boundaries of constitutionally permissible administrative action.¹⁴⁹ The precise reason why there is judicial reluctance to ratchet the intensity of review by adopting a free-standing proportionality test is hard to conclusively establish. But it can probably be linked to long-standing concern about the constitutional or normative propriety of second-guessing decisions made in complex policy areas by institutions with greater institutional legitimacy – whether through democratic credentials or superior technocratic expertise.

As with delegation of statutory power, judicial articulation of these standards is a mediation between pluralist constitutional principles. A mediation between judicial fear of administrative power exercised insufficiently cognizant, or directly contrary, to constitutional values on the one hand, and recognition that administrative bodies pursue invaluable social and political objectives of great importance to the lives of citizens and policy goals of government, a mandate that would be frustrated if choked and obstructed by generalist judges with little expertise over the complex and epistemically uncertain issues they review.¹⁵⁰

¹⁴⁴ *Clinton v. An Bord Pleanála (No. 2)* [2007] IESC 19, [2007] 4 I.R. 701, 741; *ISOJ v Minister for Justice* [2010] IEHC 457; *Eje v Minister for Justice* [2011] IEHC 214. Hogan J. held at para 28 that it is plain that a majority of the Supreme Court in *Meadows* was prepared to ‘apply a general proportionality test in respect of all decisions affecting fundamental rights.’

¹⁴⁵ *Eje v Minister for Justice* [2011] IEHC 214.

¹⁴⁶ [2010] 2 I.R. 701.

¹⁴⁷ For an outline of the doctrinal debate. See Hilary Biehler and Catherine Donnelly, ‘Proportionality in the Irish courts: the need for guidance’ (2014) 3 European Human Rights Law Review 272-283.

¹⁴⁸ See *Donegan v Dublin City Council* [2012] 3 IR 600; *Dun Laoghaire Rathdown County Council v West Wood Club Limited* [2019] IESC 43; *Hughes v Irish Blood Transfusion Service* [2019] IEHC 439.

¹⁴⁹ Gerard Hogan, David Gwynn Morgan, and Paul Daly, *Administrative Law in Ireland* (n 141) 956.

¹⁵⁰ Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (n 126) 492.

Irish Judges thus largely restrict themselves to policing the outer bounds of administrative discretion, and do so in a context where litigation only engages a tiny fraction of this activity – giving the executive-led administrative state apparatus ample room for maneuver.¹⁵¹

United States

Administrative Body Statutory Interpretation

A distinguishing feature of US administrative law when compared to its common law cousins in Ireland and the U.K., is that statutory interpretation is not the sole preserve of the judiciary.¹⁵² In the U.K., courts are regarded as agents of Parliament, attempting to faithfully give effect to the sovereign will of Parliament as embodied in its statutes and safeguard the rule of law against executive encroachment. Authority to interpret parliamentary statutes is regarded as a core aspect of this power. In Ireland, while the Constitution provides for three co-ordinate and co-equal branches of government, the power over constitutional and statutory interpretation is regarded as a core judicial activity. Ireland's strong embrace of judicial supremacy means that Article 34 has been interpreted in a jealous manner to prevent encroachment on judicial power over statutory interpretation.

In contrast, in the U.S. the question of who has ultimate interpretive authority over the Constitution is more contentious, and issues of judicial supremacy hotly disputed. Each branch is co-ordinate and co-equal and has claimed authority to interpret the Constitution as an expression of popular sovereignty on behalf of the American people, making it a more collaborative enterprise. This collaborative and diffused approach to interpretive authority has bled into statutory interpretation. While s.706 of the APA provides that a reviewing court shall decide all relevant questions of law, under the *Chevron* doctrine¹⁵³ Federal Courts will, if an administrative body's constitutive statute is ambiguous, defer to its reasonable interpretation.¹⁵⁴

¹⁵¹ *ibid* 22-23.

¹⁵² Peter Cane, *Controlling Administrative Power* (n 7) 213.

¹⁵³ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Justice Stevens offered this rationale: 'While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.'

¹⁵⁴ John C. Reitz, 'Deference to the Administration in Judicial Review' (2018) 66 *American Journal of Comparative Law* 269, 285; Cass R. Sunstein, 'Beyond Marbury: The Executive's Power to Say What the Law Is' (2006) 115 *Yale Law Journal*

This process encompasses two steps. At ‘step one’, the Court must look at the statute in question to see if Congress has spoken clearly. If they have, this is the end of the matter and the courts interpretation of congressional intent is controlling. At ‘step two’, if the statute is silent or ambiguous on the question at issue, the court will defer to an administrative body’s construction if it is reasonable, even if the court would reach a different conclusion using formal tools of legal analysis *de novo*.¹⁵⁵ The courts extension of deference to statutory interpretation is based on the premise that where interpretation is ambiguous, choosing between different reasonable interpretations – often in a complex policy environment - is as much a question of policy judgment as legalistic deliberation. Adopting this premise, the courts have implied a fictional legislative intent on behalf of Congress that the executive branch, which has both superior democratic credentials *and* access to technocratic expertise, should decide which reasonable interpretation is preferable by exercising a policy judgment.¹⁵⁶

In *Seminole Rock* and *Auer* the Supreme Court extended the reach of deference further, not only to administrative body interpretation of their constitutive statutes, but to their interpretation of secondary regulations created pursuant to these statutes.¹⁵⁷ Thus, courts will defer to reasonable administrative body interpretation of the regulations and policy documents they issue, as long as they are ambiguous. Like *Chevron*, this deference is based on the legal fiction that Congress intended administrative bodies would, due to superior expertise or political accountability, have authority to say what ambiguous regulations would mean and not generalist and unelected courts, provided their interpretation is reasonable and within statutory constraints of the primary statute.¹⁵⁸ Although some elite judicial and political actors have expressed deep disquiet at *Chevron* and *Auer*,¹⁵⁹ for now both doctrines

2580, 2588; Antonin Scalia, ‘Judicial Deference to Administrative Interpretations of Law’ (1989) 3 Duke Law Journal 511, 517.

¹⁵⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) 842-843.

¹⁵⁶ See (n 154).

¹⁵⁷ *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945); *Auer v. Robbins*, 519 U. S. 452 (1997). The Supreme Court explained that the ultimate criterion for judicial construction of an ambiguous regulation is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

¹⁵⁸ See Adrian Vermeule and Cass Sunstein, ‘The Unbearable Rightness of *Auer*’ (2016) 84 University of Chicago Law Review 297.

¹⁵⁹ Several current justices of the Supreme Court have expressed reservations at *Chevron* or *Auer*, including Alito J., Gorsuch J., Kavanaugh J., Roberts CJ., and Thomas J. See Gillian E. Metzger, ‘The Supreme Court 2016 Term Foreword: 1930’s Redux: The Administrative State Under Siege’ (n 41); Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2015); Adrian Vermuele and Cass Sunstein, ‘The New Coke: On the Plural Aims of Administrative Law’ (n 41).

remain deeply embedded and were recently reaffirmed by the Supreme Court in *Kisor v. Wilkie*.¹⁶⁰

A central proposition of these doctrines is that, within the realm of reasonableness, it ought to be the case that ‘key judgments are made by policymaking officials’ who possess greater democratic accountability and technocratic expertise, not by those with strictly legal competence.¹⁶¹ This has no doubt expanded the capacity of the executive to achieve its objectives by giving greater discretion and scope for administrative bodies to adopt and adapt policy positions within the bounds of ambiguous statutory text, undermining the risk of legalistic judicial obstruction.¹⁶² Judicial authority remains at the margins of statutory interpretation of executive action, but certainly not abnegated. Courts retain authority to say whether a statute or rules are ambiguous in the first instance, or whether a body’s interpretation of a rule is reasonable or not. Moreover, whether a Court defers to an agency interpretation does not necessarily mean that it will approve its action, which must also satisfy other requirements of due process and rationality.

Substantive Review of Administrative Action

The APA subjects virtually all federal administrative body action – whether rulemaking or adjudication – to a common set of minimum statutory standards to ensure persons subject to regulatory action have access to judicial review for compliance with substantive and procedural limits. As will be noted below, these statutory limitations apply to all executive actors except for the President himself. Administrative action coming directly from the President has its own set of limitations, which I outline below.

The types of procedural obligations which attach to administrative bodies varies depending on the form of action taken, of which there are four: (i) formal rulemaking (ii) formal adjudication (iii) informal rulemaking (iv) informal adjudication. In respect of the first two types, if another statute requires administrative action be ‘determined on the record after an agency hearing’ then the formal procedural requirements contained in the APA will apply. This involves providing persons affected by administrative body action notice of the facts and proposed legal basis for a decision or proposed rule. A formal hearing will take place

¹⁶⁰ 139 S. Ct. 2400 (2019). Aditya Bamzai, ‘Delegation and Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law’ (n 53).

¹⁶¹ Cass R. Sunstein, ‘Beyond Marbury: The Executive’s Power to Say What the Law Is’ (n 154) 2598.

¹⁶² See Cass R. Sunstein, ‘Chevron as Law’ (2019) 107 *Georgetown Law Journal* 1613; Peter L. Strauss, “‘Deference’ Is Too Confusing, Lets Call Them “*Chevron* Space” and “*Skidmore* Weight” (2012) 112 *Columbia Law Review* 1143.

involving written submissions and exhibits at a pleading stage, and oral submissions and cross-examination of witnesses in favor or against a rule or decision at trial-stage, which can be presented in person or through counsel. Presiding administrative body officials may administer oaths and affirmations, issue subpoenas for evidence and witnesses, rule on evidentiary and procedural matters, and make final decisions regarding the rule or decision. A finding after this process must include reasons and conclusions on issues of law and fact.

In respect of the latter two types of administrative body action – which are by far the most prominent form of decision-making - the APA stipulates much less onerous procedural requirements. For informal rule-making all that is required is (i) notice of a proposed rule, (ii) allowing interested parties to make submissions on them, and (iii) the administrative body consider the comments and formulate replies to them in the final decision or rule. In *Vermont Yankee*, the Supreme Court held that the Federal Courts could not add to these statutory requirements.¹⁶³ The APA also provides that the Federal Courts may review administrative body action on several substantive grounds. These include review for legality, rationality review for whether action is arbitrary and capricious, and whether administrative body action is consistent with due process requirements.

The traditional, and highly deferential approach, to administrative decision making was a rational basis review, which merely asked whether there was a plausible basis for the decision in question.¹⁶⁴ But the 1960's and 1970's saw increased political and judicial scepticism over the ability of expert and technocratic officials to tackle complex and sensitive social and economic tasks free from capture or influence by powerful interest groups. Faith in technocratic expertise as *the* legitimating factor for administrative action waned as 'experience eroded the general belief in an objective public interest' and the political disinterestedness of administrative bodies in pursuit of their mandate.¹⁶⁵ From the judicial perspective, such scepticism was compounded by a widespread move away from formal rule-making and adjudication - which involved compiling an extensive record of pleadings, oral submissions and evidence – to informal rule-making where public participation and evidence collecting obligations were much less onerous.

¹⁶³ *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 US 519, 523-25 (1978).

¹⁶⁴ Adrian Vermeule and Jacob Gersen, 'Thin Rationality Review' (2016) 114 Michigan Law Review 1356 (2016); *Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

¹⁶⁵ Robert Baldwin, *Rules and Government* (n 6) 34-35.

In response to fears of arbitrary bureaucratic action, this period saw judges interpret the grounds of judicial review in the APA in a more expansive and searching manner – in what has been described as an attempt to promote transparency and pluralist participation in the rule-making process, and a sound evidential basis for executive policy choices. This was done with the intent of undermining the scope for arbitrary and unreasoned administrative body behavior. In the landmark *State Farm* decision, the Supreme Court held that Federal Courts could set aside agency action, whether rulemaking or an adjudicatory decision, where it is arbitrary and capricious. This standard was interpreted to entitle courts to subject a decision to ‘hard look’ review of the reasons underlining the decision contained in the record and facts found by the relevant body.¹⁶⁶ The Court found a decision would be:

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁶⁷

This standard therefore focuses on the analytical relationship between the administrative bodies’ conclusions and the material in the record upon which they are based. The standard demands a strong logical relationship between the conclusion of the administrative body and the material before it, requiring them to provide a reasoned policy analysis of their regulatory choices - social, economic, scientific - within the bounds of statutory constraint.¹⁶⁸ For example, an administrative body cannot simply point to a bare presidential directive to take certain action as a justification.¹⁶⁹ The standard instead requires administrative bodies justify their substantive choices by providing reasons why they have adopted the position they have, reasons which they can link to a body of evidence compiled contemporaneously in a record.¹⁷⁰ These requirement is linked by scholars to the importance of both legality and technocratic expertise to the perceived legitimacy of executive policy-making and independent administrative bodies in the polity.¹⁷¹ That administrative action is within the bounds of the statutory mandate issued by Congress and evidentially sound.

¹⁶⁶ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance* 463 U.S. 29 (1983).

¹⁶⁷ 463 U.S. 29 (1983) 43.

¹⁶⁸ Jerry Mashaw, ‘Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State’ (2001) 70 *Fordham Law Review* 17, 22.

¹⁶⁹ *ibid.*

¹⁷⁰ Elizabeth Magill and Adrian Vermeule, ‘Allocating Power Within Agencies’ (2011) 120 *Yale Law Journal* 1032, 1053.

¹⁷¹ (n 170).

While this decision may appear to provide for intense review, some note the Supreme Court, in fact, largely applies *State Farm* in a deferential and ‘thin’ fashion. That it merely obliges administrative bodies to supply *reasons* for their actions from the record which are not contrary to their statutory mandate.¹⁷² On this view, the Supreme Court has not placed a burden on executive bodies to show that their decision is, for example, *optimally* efficient when subject to cost-benefit analysis, or is *the best* when compared to feasible policy alternatives in light of the evidential record. Instead, courts will generally apply the test in a manner where something which is arbitrary and capricious is not just ‘poorly supported’ but is ‘essentially unsupported’ by evidence or relevant statutory factors.¹⁷³ Gersen and Vermeule argue that rightly understood, as long as an administrative body is acting within its statutory mandate:

‘arbitrary and capricious review...does not require agencies to use cost-benefit analysis; it does not require the resolution of scientific uncertainty; it does not require that agencies pick the optimal policy, or the most accurate policy, or the best feasible policy, or anything of that sort. It simply requires that agencies act based on reasons.’¹⁷⁴

Due Process and Administrative Action

Administrative body action must also be consistent with due process requirements under the Fourteenth Amendment. The judicially articulated test for what process is constitutionally due is outlined in *Mathews v Eldridge*,¹⁷⁵ which requires an administrative body must design procedures in a fair manner by balancing three factors. First, the nature of the private interest affected. Second, the risk of erroneous deprivation of the right through the procedures adopted and the probable value, if any, of additional procedural safeguards. Third, the Government’s interest vis a vis the function involved, including fiscal and administrative burdens imposed by additional procedures.¹⁷⁶ Again, however, the judiciary have limited their scrutiny role over procedural fairness by deferring to reasonable administrative body decisions about design of procedural arrangements, subject to arbitrariness review.¹⁷⁷ While

¹⁷² Adrian Vermuele, *Law’s Abnegation* (n 1) 167.

¹⁷³ Jeffrey Pojanowski, ‘Neoclassical Administrative Law’ (2019) 133 *Harvard Law Review* 853, 866; John C. Reitz, ‘Deference to the Administration in Judicial Review’ (n 154) 273.

¹⁷⁴ Adrian Vermeule and Jacob Gersen, ‘Thin Rationality Review’ (n 164) 1406.

¹⁷⁵ 424 U.S. 319 (1976).

¹⁷⁶ 424 U.S. 319, 335 (1976).

¹⁷⁷ Adrian Vermuele, *Law’s Abnegation* (n 1) 89-90.

courts require administrative bodies to apply the *Mathews* calculus, they will not independently assess their judgment, but subject it to something approximating rationality review.¹⁷⁸ As Vermuele puts it, courts have recognised that agency procedural decisions carry profound implications for their substantive mandate, and involve decisions of policy and institutional design, which generalist judges may be ill-suited to scrutinize through the forum of episodic lawsuits. However, as with statutory interpretation, courts do not give administrative bodies free rein in designing procedures and retain authority to review these arrangements for rationality.¹⁷⁹

Reviewing Presidential Administrative Action

Administrative action in the U.S. - adjudication and rule-making – is mostly undertaken by the President’s subordinates or independent agencies. As noted in the previous Chapter, these actions are subject to centralized oversight by the President and sometimes prompted by the White House. These kinds of actions are subject to the requirements of the APA. However, sometimes administrative action comes directly and unilaterally through the President himself. These unilateral written directives publicly issued by the President, can be labelled ‘executive orders’ ‘proclamations’ or ‘presidential memorandum.’ These orders must be authorized by some source of law, either in Article II or congressional statute. These orders can directly create legally binding obligations if authorised by statute or the Constitution. Or, they can direct other administrative bodies to exercise statutory power in a particular way. In the second instance, if an agency head fails to comply with a non-legally binding order, they might risk termination via the president's power of removal.

Administrative action which comes directly from the President is subject to less onerous review than other executive actors. In 1992, the Supreme Court concluded that the APA reaches only agencies, not the President,¹⁸⁰ with part of its reasoning being that Congress did not intend to subject the President to the same constraints as agencies; as while the latter might need judicial review to ensure political accountability, the President did not as he is a highly politically accountable actor. As a result, the constraints of the APA simply do not apply to claims brought against executive orders issued by the President, including claims that directly challenge their legality.

¹⁷⁸ Adrian Vermuele, ‘Deference and Due Process’ (2016) 129 Harvard Law Review 1890, 1904.

¹⁷⁹ Adrian Vermuele, *Law’s Abnegation* (n 1) 123-124.

¹⁸⁰ *Franklin v Massachusetts*, 505 US 788, 800-01 (1992). The case in which it held that, as a matter of statutory interpretation, the APA’s references to ‘agency’ do not include the president.

Of course, the courts will not blindly accept a President's conclusions regarding his own authority, and the Supreme Court has acknowledged the legality of presidential administrative action can be challenged. The precise standard of review is unclear due to sparse case law,¹⁸¹ but in the very recent *Trump v Hawaii*¹⁸² case the Supreme Court approached the issue in a very restrained manner. The Court subjected the presidential executive order in question to rational basis review, a highly deferential form of review that simply asks whether there is a plausible rationale for the decision, giving Presidents broad scope for administrative decision-making.¹⁸³

CONCLUSION

Courts in each system are certainly not supine institutions given that, for example, the apex courts in each system have effectively asserted they have the ultimate authority and duty to interpret the meaning of both statutes and constitutional principles for the other branches.¹⁸⁴ The judicial branch in each system could therefore use this authority to attempt to tightly constrain the work of the administrative apparatus by aggressively reviewing their exercise for compliance with legal norms like reasonableness, proportionality or due process, or whether there has been an unconstitutional delegation of legislative authority. But although they have a robust conception of their own authority, courts have generally not used their ample powers to intensely constrain and obstruct the political executive or administrative bodies under their direction. Of course, each system has its own distinct approaches. For example, in respect of deference to statutory interpretation we can see a broad spectrum of attitudes: Irish courts are perhaps the rigorous in insisting on a monopoly on statutory interpretation whereas U.S. courts, in contrast, are more likely to defer.

However, taken in the round, the approach to each judicial branch to reviewing delegated statutory power and administrative action is similarly broadly, but not boundlessly, facilitative of executive action. Of course, there is no denying that abiding by standards of review like reasonableness and proportionality and requirements like fair procedures do impact the way the administrative state functions. While relaxed, these rules and standards can nudge it in certain directions and cabin the executive's scope for blatantly unreasoned,

¹⁸¹ *Armstrong v Exceptional Child Center* 135 S Ct 1378 (2015).

¹⁸² 585 U.S. ____ (2018).

¹⁸³ David M. Driesen, 'Judicial Review of Executive Orders' Rationality' (2018) 98 Boston University Law Review 1013.

¹⁸⁴ See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boland v An Taoiseach* [1974] I.R. 338; R (*Miller*) v *Prime Minister* [2019] UKSC 41.

capricious, or procedurally unfair action. Adhering to these requirements requires additional effort and resources on the executive's part, and have the capacity to slow executive action down.¹⁸⁵ But it certainly cannot be said that their reviewing function severely constraints its room for maneuver. Instead, the judicial branches articulation of relaxed rules and standards to govern the administrative state, combined with the complexity and sheer scale and volume of its activity, mean that judicial review can only be brought to bear on a sliver of its activities. The judiciary only have the capacity and inclination to police the outer bounds of executive and administrative action - the clearly arbitrary, capricious, and ultra vires.

This common facilitative approach is linked to several rationales explored in this chapter. From concerns over the democratic legitimacy of second guessing decisions engaging questions of the common good, judicial recognition of their own lack of political accountability, pragmatic appreciation of the limits of their competence engaging with complex technocratic problems the executive grapples with, and perhaps implicit recognition the onerous responsibility of governing rest heavily on the executive's shoulders, and courts should not seek to make this task more difficult than it already is.

When read in light of the previous chapter, it is clear the executive-led administrative state was not a result of unilateral empire-building, but created and nurtured from the broad outline of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order.¹⁸⁶ Diffusion of legislative authority to the executive by the legislature, and the executive's attempt to centralize control over the administrative apparatus, were both very important to this development. But this chapter makes clear that these political choices in each system were invariably facilitated and framed, in turn, by judicial articulation of flexible constitutional rules and standards, such as the delegation doctrine and reasonableness standards of administrative review. Through such capacious and flexible standards, the judiciary has provided the executive very wide scope to make and implement policies and rules governing swathes of political issues.

¹⁸⁵ Nicholas Bagley, 'The Procedure Fetish' (2019) 118 Michigan Law Review 345.

¹⁸⁶ Martin Loughlin, *Foundations of Public Law* (n 3).

CHAPTER VI- THE GATEKEEPERS: EXECUTIVE LAWYERS AND EXECUTIVE POWER

INTRODUCTION

With a growth in the capacity and power of the executive branch; through the political party system, rise of the administrative state, predominance over foreign affairs, and increased use of emergency powers, concerns that these extensive powers are subject to law has taken on increased salience in constitutional systems. Legislatures and courts play an obvious role in subjecting these powers to external scrutiny. However, it is executive lawyers who are at the front-line of advising whether executive actions or policy proposals are in accordance with law. In many ways, the work of executive legal advisors can have a greater impact on what government decides to do – or not do – than what courts decide.¹ Thus, as the constitutional centrality of the executive has become more pronounced, the influence of its legal advisors as potential veto players in the constitutional order has similarly grown.² In each system, the political executive frequently binds themselves to advice tendered by legal advisors, despite there being no rule of law requiring this.

This chapter argues apex executive branch lawyers play a Janus-faced role in respect of executive power in the UK, United States, and Ireland. This chapter argues that while executive lawyers can often operate as a genuine constraint on the executive branch, on balance they offer a critical source of empowerment. They are a source of empowerment as their work, the personnel who undertake it, and the extent to which it is disclosed for scrutiny, can all be structured in a manner most suitable to the executive and its policy agenda. I argue this makes executive branch lawyers an important variable to consider when assessing executive predominance. Part I outlines the appointment system for executive lawyers in each system and their roles. Part II outlines the procedures governing advice giving. Part III outlines the substantive norms governing the provision of legal advice to the executive. Part IV outlines the approach of each system to the publication of legal advice and how the executive retains high levels of control over disclosure. Finally, part V critically analyses the impact of executive lawyers on executive power and outlines how it not only

¹ Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (The Constitution Unit, 2013) 16.

² Veto players are described as an 'individual or collective actor whose agreement...is required for a change in policy'. George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1999) 25 *British Journal of Political Science* 289, 301.

operates as a source of constraint, but also empowers the executive, by undergirding its policies with the legitimating force of legality.

I. STRUCTURE OF WORK OF EXECUTIVE LAWYERS

United Kingdom

Legal advice to the executive in the United Kingdom³ is characterized by a fusion of pluralism and centralisation. In some respects, provision of legal advice is highly porous; with several government departments primarily relying on internal legal advisors for a majority of their advice. In these departments, routine legal problems are primarily dealt with by its own internal legal staff.⁴ In other respects, provision of legal advice is centralised, given that a majority of government departments rely on the same provider for legal advice: the Government Legal Department (“GLD”), which has a staff complement of over 2000⁵ and is headed by the Treasury Solicitor.⁶

At the apex of government legal advisors stand the Attorney General and Solicitor General, collectively known as the Law Officers.⁷ The Attorney General is an office ancient in origin, which can trace its roots back to the 13th Century.⁸ The Solicitor General is of a similarly ancient vintage, and acts as a deputy to the AG.⁹ Today, the main function of the Officers is to serve as legal advisors to the Crown via her Prime Minister and the Cabinet. The Law Officers are, by convention, not members of cabinet¹⁰ but the AG attend its meetings on request as a need for advice arises.¹¹

The Officers thus act as a quasi-centralized source for legal advice for all government departments, helping to co-ordinate government legal policy concerning the most difficult,

³ For the purposes of this chapter, as with the rest of this thesis, I focus on the chief executive of the United Kingdom – the Prime Minister of the United Kingdom and her Cabinet. Thus, I do not consider in detail the powers devolved to regional executive’s in Northern Ireland and Scotland. Consequently, when I discuss executive legal advisors in this chapter, I refer to the advisors of the UK government, and not the legal advisors to Northern Ireland and Scotland who have their own dedicated legal advisors.

⁴ Elwyn Jones, ‘The Office of Attorney-General’ (1969) 27 *Cambridge Law Journal* 43, 46.

⁵ <https://www.gov.uk/government/publications/workforce-management-information-for-gld-ago-and-hmcpai-201819>.

⁶ Barry K Winetrobe, ‘Legal Advice and Representation for Parliament’ in Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament* (Butterworth, 1998) 95. For a list of departments see <https://www.gov.uk/government/organisations/government-legal-department/about#corporate-information>.

⁷ Peter Archer, ‘the role of the law officers’ 339 *Fabian Research Series* (November 1978) 3.

⁸ See S.C. Silkin, ‘The Function and Position of the Attorney-General in the United Kingdom (1978) 12 *Bracton Law Journal* 29, 34; Hugh H. L. Bellot, ‘Origin of the Attorney-General’ (1909) 25 *Law Quarterly Review* 400, 411.

⁹ J.L.J. Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) 1-11.

¹⁰ The AG has not been a member of cabinet since 1928. *Ibid* 310-318.

¹¹ Elwyn Jones, ‘The Office of Attorney-General’ (n 4) 47; S.C. Silkin, ‘The Function and Position of the Attorney-General in the United Kingdom’ (n 9) 34.

pressing, and sensitive legal and political issues.¹² The Cabinet Office's *Ministerial Code* specifies that the Law Officers be consulted if: the legal consequences of action by the government has important policy repercussions; if a department legal advisor is unsure of the legality or constitutionality of legislation; the *vires* of subordinate legislation is in dispute; where two or more departmental advisors are in disagreement.¹³ There is thus no legally grounded central control over the provision of legal advice¹⁴; but a convention that the AG's advice be sought out in certain serious circumstances, and accepted as authoritative when provided.¹⁵

United States

A core function of the President is to take care the laws are faithfully executed.¹⁶ To execute the law the President must first interpret what it means. He thus acts as both law-interpreter and law-enforcer.¹⁷ In performing this duty, the President and his subordinates make countless decisions implicating questions of constitutionality and legality.¹⁸ Every President, from Washington to Trump, has received legal advice from executive branch lawyers to assist them in this task.¹⁹

The primary legal actors performing the role of legal advisor to the President is the Office of Legal Counsel ("OLC"). However, sometimes the President will rely on the White House Counsel's Office ("WHC"). Although the clear majority of executive branch lawyers are career lawyers, the OLC and WHC are dominated by political lawyers.²⁰ From President Carter onwards, appointment to the leadership of both offices has taken on an explicitly political bent.²¹ Since 1950, the OLC have been delegated the statutory power of the Attorney-General²² to issue legal advice to the President and departments of the executive

¹² S.C. Silkin, 'The Function and Position of the Attorney-General in the United Kingdom' (n 9).

¹³ *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, 2001) para 22.

¹⁴ J.L.J. Edwards, *The Attorney-General, Politics and the Public Interest* (n 9) 192.

¹⁵ Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press, 1999) 323; Cabinet Office, *Ministerial Code* (January 2018) para 2.10.

¹⁶ Article II of the United States Constitution.

¹⁷ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (Norton & Co., 2009) 33; Randolph D. Moss, 'Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel' (2000) 52 *Administrative Law Review* 1303, 1315.

¹⁸ Dawn E. Johnsen, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2007) 4 *UCLA Law Review* 1560, 1564; Cornelia T. Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (2005) 103 *Michigan Law Review* 676, 687.

¹⁹ Arthur H. Garrison, 'The Opinions of the Attorney General and the Office of Legal Counsel: How and Why They Are Significant' (2012) 76 *Albany Law Review* 217, 220.

²⁰ Bradley Lipton, 'A Call for Institutional Reform of the Office of Legal Counsel' (2010) 4 *Harvard Law & Policy Review* 249, 254-256.

²¹ Daphna Renan, 'The Law President's Make' (2017) 103 *Virginia Law Review* 805, 829; Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press, 2010) 114.

²² Arthur H. Garrison, 'The Opinions of the Attorney General and the Office of Legal Counsel' (n 19) 225.

branch.²³ The core function of the OLC is to act as a centralized source of legal advice to the Presidency and other executive departments when requested, and to ensure that they are faithfully executing the laws.²⁴ This includes an obligation to review all legislation and executive orders proposed by the White House for legality.²⁵ It can also involve resolving intra-executive branch disputes over legal issues.²⁶ The OLC employs around two dozen lawyers led by a presidentially nominated and Senate confirmed Assistant Attorney-General, several Attorney-General appointed deputies, and one Deputy who is not politically appointed.²⁷ The office also employs a handful of civil-service career lawyers.²⁸

The Office of Legal Counsel is considered an elite government institution, with one commentator describing it as an ‘elite professional corp that produces legal opinions of the highest technical quality’.²⁹ Its leadership regularly fluctuates, altering with every change in administration. The Office of White House Counsel is part of the President’s White House staff. The WHC act as the President’s personal legal adviser, but its exact functions are more amorphous than those of the OLC. The Office provides advice and assistance on issues as diverse as overseeing judicial nominations, advising presidential staff on conflicts of interest and ethical issues, and managing contact with Congress to advance the President’s legislative agenda.³⁰

Ireland

The Irish Attorney General (AG) is an office in many common law systems with shared roots in English history.³¹ It is given constitutional status in Ireland by Article 30 of the Irish Constitution. Article 30 provides that the AG is ‘the adviser of the Government in matters of law and legal opinion’ and is to perform this function, and any others provided for by law, including representation of the public in litigation and defence of public rights.³² The AG is

²³ Anonymous, ‘Developments In the Law: Presidential Authority’ (2012) 125 Harvard Law Review 2057, 2092; Trevor Morrison, ‘Constitutional Alarmism’ (2012) 124 Harvard Law Review 1688, 1709.

²⁴ Ibid.

²⁵ Arthur H. Garrison, ‘The Opinions of the Attorney General and the Office of Legal Counsel’ (n 19) 236.

²⁶ Ibid.

²⁷ Trevor Morrison, ‘Constitutional Alarmism’ (n 23) 1710.

²⁸ Ibid 1710.

²⁹ Bruce Ackerman, *The Decline and Fall of the American Republic* (n 21) 68.

³⁰ Trevor Morrison, ‘Constitutional Alarmism’ (n 23) 1732.

³¹ See generally J Edwards, *The Attorney General, Politics and the Public Interest* (n 9).

³² See Article 30.1. & 30.4 (1937). The Constitution also makes the Attorney General responsible for prosecution of crimes in the name of the People, but this has been delegated by law to a dedicated Director of Public Prosecutions. Prosecution of Offences Act 1974. See James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (Roundhall, 1996).

the legal adviser of the *government*, and not the Parliament³³ or the President.³⁴ Unlike the AG in the UK, the Irish AG sits in Cabinet meetings; and he or she is appointed by and serves at the pleasure of the Taoiseach.³⁵ The close relationship between the AG and government, particularly the Taoiseach, is also reflected in their physical proximity. The AGO is adjacent to the Taoiseach's Office on Merrion Street and cabinet meetings are held in the complex of the AG's Office.³⁶ Moreover, the AG holds a prized seat at the cabinet table, very close to the Taoiseach.³⁷ The AG has almost always been a lawyer of eminence and long standing that was a member of, or has some political affiliation with, one of the parties in government.³⁸

The size and complexity of modern government has put increased demand on the capacity of the AG; making it implausible for him to personally discharge their constitutional function to provide legal advice to the executive branch in every instance. The AG has thus always maintained a staff of civil servant lawyers to support him discharge his role. The main functions of the Office are performed by the Advisory Counsel, which is responsible for the provision of legal advice and oversees the most important cases (particularly constitutional cases) to which the State is a party.³⁹ The office has expanded considerably over the years.⁴⁰

The Attorney General acts as a centralised provider of legal advice for the Cabinet, all government departments, as well as administrative bodies. The AG advises not only on issues of constitutionality, but on international instruments, EU law, and ordinary questions of domestic criminal law, commercial law, etc. The Office is staffed by civil servants, who are generally former practicing lawyers of some years' experience. Previously Advisory Counsel were only recruited from the ranks of the bar. However, now solicitors and barristers may become advisory counsel. As civil servants, Advisory Counsel serve across administrations and are not recruited on the basis of ideological affinity with the incumbent

³³ Declan Costello, 'Reviews and Notices' (1985) 20 Irish Jurist 223-225, 224.

³⁴ David Gwynn Morgan, 'Mary Robinson's Presidency: Relations with the Government' (1999) 34 Irish Jurist 256, 259. Morgan notes that President Robinson sought advice from the then chairman of the Bar Council Frank Clarke SC (Now Chief Justice) on when the presidential prerogative to refuse a dissolution of the Dail could be exercised. It was accepted that the president could not, and should not, seek such advice from the Attorney-General.

³⁵ He or she is formally appointed by the President, but the nomination is made by the Taoiseach, and the President has no discretion to refuse to make the appointment.

³⁶ See Office of the Attorney General, *Annual Report 2016*, 7.

³⁷ Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' in O'Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance*, (Institute of Public Administration, 2012) 49.

³⁸ By convention (but not by law), the Attorney General refrains from engaging in private practice while holding the office. James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 305

³⁹ See Office of the Attorney General, *Annual Report 2006*. http://www.attorneygeneral.ie/pub/Annual_Report_2006.pdf.

⁴⁰ Office of the Attorney General, *Annual Report 2016*, 10.

government. Many Advisory Counsel serve the majority of their professional careers in public service.

II. PROCEDURES GOVERNING PROVISION OF ADVICE

United Kingdom

The work of executive legal advisors is deeply integrated into departmental policy making.⁴¹ The involvement of lawyers in respect of administrative decisions and policy making has accelerated as the ambit of judicial review in administrative law increased,⁴² in particular following the enactment of the Human Rights Act 1998.⁴³ As noted, most legal advice provided to government comes from internal legal advisors staffed within a department or, for several departments, lawyers from the GLD.

Advice tendered is generally accepted by government departments. Where advice is questioned, where there is inter-departmental disagreement, or where the advice raises issues of importance, legal advice can be referred to the Law Officers for resolution. A request may also be made directly to the AG at cabinet level, particularly if it involves an issue on which the Prime Minister has taken a policy lead.⁴⁴ In other words, a policy which has not originated from any particular department.⁴⁵ The decision of the Law Officers is, by convention, accepted as binding;⁴⁶ making it the last word on internal legal questions for the executive.⁴⁷ The precise form of AG's advice is characterized by fluidity, and can come in an informal form, through phone calls, conversations, emails or short written notes.⁴⁸ Advice can also come in the form of lengthier, more formal written opinions,⁴⁹ which can be presented at Cabinet.

United States

The Office of Legal Counsel respond to requests for legal advice across the vast plethora of departments and agencies which constitute the executive branch. The OLC does not, and

⁴¹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 323.

⁴² *ibid* 336.

⁴³ Section 19 provides that a minister must: 'make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights' or if he is 'unable to make such a statement of compatibility the government nevertheless wishes to proceed with the Bill'. <https://www.legislation.gov.uk/ukpga/1998/42/section/19>.

⁴⁴ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 302.

⁴⁵ JIJ Edwards, *The Attorney-General, Politics and the Public Interest* (n 9) 187.

⁴⁶ A.H. Dennis, 'Place of the Official Lawyer in the Constitution' (1925) 41 *Law Quarterly Review* 378, 387.

⁴⁷ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 308. Edwards has described the AG as occupying a position analogous to a 'final Court of Appeal' on matters of strictly legal advice. JIJ Edwards, *The Attorney-General, Politics and the Public Interest* (n 9) 185.

⁴⁸ Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (n 1) 59.

⁴⁹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 299.

could not, address every legal issue arising in the executive branch.⁵⁰ However, agencies across the federal government send their more difficult and consequential legal questions to the OLC.⁵¹ There is no statutory requirement this advice be accepted as binding, but by convention and tradition OLC opinions are regarded as controlling.⁵² An OLC opinion can only be countermanded by the Attorney General or President himself. Additionally, the President can, and has on rare occasions, opted to short-circuit the OLC and follow a preferred legal opinion provided by the WHC.⁵³ However, Presidents have typically been reluctant to cut OLC out of this process, given the level of professional regard their legal judgment is generally held in elite legal and political circles.⁵⁴

Ireland

Any policy proposal generated by government begins with consultation by the relevant Minister or department of the Taoiseach's office and the Department of Finance. Should a policy contain 'any substantive constitutional or legal dimension', the Attorney General's Office must be consulted as well.⁵⁵ The current AG has described his office as a hub where almost everything of major governmental importance passes through.⁵⁶ For example, any proposal leading to legislation must undergo prior consultation with the AG.⁵⁷ If full legal advice is required from the Attorney, this is acquired and considered before a memo is circulated to government. If this advice is not obtained, any policy proposal to government may be withdrawn by the Taoiseach in consultation with the AG.⁵⁸ In this way, the AG is intimately involved in the formulation of policy from its inception, and no policy with significant legal dimensions can take shape without its guidance. In the ordinary course of things, all policymaking and law-making is done under the influence of the Attorney's advice.⁵⁹

How this advice is formulated is shrouded in some secrecy, as the detailed internal workings of the office are not regularly discussed publicly, and have been the subject of limited

⁵⁰ See generally David Fontana, 'Executive Branch Legalisms' (2012) 126 *Yale Law Journal* 21.

⁵¹ Trevor W. Morrison, 'Stare Decisis in the Office of Legal Counsel' (2010) 110 *Columbia Law Review* 1448, 1461.

⁵² Ibid, 1464; Bruce Ackerman, *The Decline and Fall of the American Republic* (n 21) 98; Dawn E. Johnsen, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2007) 4 *UCLA Law Review* 1560, 1577.

⁵³ Ibid.

⁵⁴ See generally, Trevor Morrison, 'Constitutional Alarmism' (n 23).

⁵⁵ Office of the Attorney General, *Annual Report 2006*, 32.

⁵⁶ Anne Marie-Hardiman, 'The Lawyer at the Centre' (2017) 22 *The Bar Review* 124-126.

⁵⁷ Office of the Attorney General, *Annual Report* (2006) 36.

⁵⁸ Office of the Attorney General, *Annual Report* (2006) 32.

⁵⁹ David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (Forthcoming, 2020) 42 *Dublin University Law Journal*.

academic enquiry.⁶⁰ However, we can infer some of the office's internal procedures from the smattering of publicly available materials produced by the AG's office. When advice is requested, a permanent advisory counsel researches the constitutional issues raised and helps the AG in preparation of advice.⁶¹ This process might also involve liaising with the in-house legal advisors of a department.⁶² It is also known that barristers are commonly employed to write opinions and give advice on particularly difficult or contested points of law to aid the AG.⁶³ Any matter that is 'legally significant or novel, politically important, sensitive or financially valuable'⁶⁴ must be brought directly to the attention of the AG as soon as possible.

Again, the practice of the AG in presenting advice to Cabinet is not publicly discussed, and it seems that the practice varies. The background legal advice, either from internal Advisory Counsel or external barristers, is preparatory and not final material. The AG will consider this work, form an opinion in consultation with these advisors, and prepare materials for government on foot of this. Sometimes, advice will be incorporated into a policy memo or proposal that comes before Cabinet.⁶⁵ Sometimes, advice is given *viva voce* at Cabinet.⁶⁶ With major and specific constitutional issues, the Attorney General may prepare a formal memorandum of advice for Cabinet.⁶⁷

III. SUBSTANTIVE NORMS GOVERNING ADVICE PROVISION

United Kingdom

Given the secrecy surrounding legal advice, it is hard to be definitive about the substantive norms governing its provision. For example, it is unclear whether the AG's duty is to give the most authoritative interpretation of the law regardless of the government's position, or choose from a range of *plausible* interpretations of the law which is most conducive to the government's policy interests.⁶⁸ From what evidence is available, it appears the ideal pursued

⁶⁰ Ibid.

⁶¹ Office of the Attorney General, *Annual Report 2006*, 8. http://www.attorneygeneral.ie/pub/Annual_Report_2006.pdf.

⁶² James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 139.

⁶³ The Office has panels of barristers that are specialists in particular areas; these are often employed in litigation, but may also be asked for advice.

⁶⁴ Office of the Attorney General, *Annual Report 2006*, 21 http://www.attorneygeneral.ie/pub/Annual_Report_2006.pdf.

⁶⁵ Department of the Taoiseach, *Cabinet Handbook* (2006) 32.

⁶⁶ James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 112.

⁶⁷ Ibid.

⁶⁸ Neil Walker, 'The Antinomies of the Law Officers' in (eds.), Sunkin Maurice and Sebastian Payne, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 159.

by the Law Officers is to offer impartial detached advice in the manner of counsel's advice to any client: to give an objective analysis of the law as he sees it.⁶⁹ One previous holder of the office suggested that while it cannot be denied that the Officers are highly political animal, given they are ministers and parliamentarians, the Officers have always striven for impartiality and detachment when giving legal advice.⁷⁰ Executive interpretation of the scope of judicial authority on the application of a statutory, or common law power, are said to be the most important source of law informing the advisory work of executive lawyers. Examples of conscious cultivation of a legal position by an executive department in a manner directly *contrary* to judicial opinion are rare.⁷¹ The ideal pursued by government legal advisors is thus ostensibly orientated toward detached and impartial assessment of the policy against his objective sense of what the law requires.

But many have speculated about how the political nature of the Law Officers may influence its work.⁷² Some explicitly praise the political nature of the AG and his status as a Minister as the precise *reason* his advice has primacy over other legal advisors.⁷³ When the AG provides advice, he takes the issue out of a framework of intradepartmental discussion between civil servant lawyers and their ministers – and into the realm of inter-ministerial discussion.⁷⁴ His status as *both* legal advisor and Minister are said to combine to orientate the AG toward providing an objective view of the law as he sees it, but combined with a professional politician's understanding of the problems confronting politicians.⁷⁵ This involves weaving the professional skill of the trained lawyer with the desire to share in the common goal of implementing executive objectives.⁷⁶ Some maintain advice of the Attorney General is more likely to be accepted and respected by Ministers precisely because it comes from one of their own, a political actor understands the wider political and policy context in which they operate, as opposed to advice from an externally contracted technocrat.⁷⁷ It is precisely the AG's membership of the Government which is said to give advice to Ministerial colleagues its authority and credibility.⁷⁸

⁶⁹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 297.

⁷⁰ Elwyn Jones, 'The Office of Attorney-General' (n 11) 50.

⁷¹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 297.

⁷² Gabrielle Appleby, 'Reform of the Attorney General: comparing Britain and Australia' (2016) *Public Law* 573, 585; Elwyn Jones, 'The Office of Attorney-General' (n 9) 47.

⁷³ *ibid* 585.

⁷⁴ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 301.

⁷⁵ *ibid* 327-328.

⁷⁶ JIJ Edwards, *The Attorney-General, Politics and the Public Interest* (n 9) 185.

⁷⁷ Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, (17 October 2006) 13.

⁷⁸ Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (n 1) 61.

However, others take a less sanguine view of this fusion, and strongly argue it hinders provision of independent and impartial advice. That the dual party political and legal role of the AG invariably invite a conflict of interest in respect of his advisory function, particularly over controversial issues of intense interest to the government.⁷⁹ Jowell cites the controversy surrounding advice provided by then AG Lord Goldsmith QC on the legality of the 2003 British and US invasion of Iraq as justification for this concern. Debate has raged over whether the AG was placed under intense political pressure to give an opinion helpful to the government's policy.⁸⁰ This controversy became even more acute when it was revealed the AG initially advised an invasion would not be legal under international law, but subsequently changed his mind. Jowell suggests the case provides a stark illustration of the obvious inherent tension between the AG's political and legal roles and how this 'inevitably lends itself to charges of political bias in legal decisions'⁸¹ of high salience to the executive.

United States

In the U.S., the OLC has tried to cultivate institutional cultural norms governing its advice-giving to the executive.⁸² These norms are said to permeate its work and transcend administrations, helping it resist executive pressure to endorse partisan legal outcomes.⁸³ OLC's approach has been defended as an articulated mode of legal review, where the office reviews questions of law and issues formal opinions generally binding on executive actors, while remaining institutionally insulated from external pressures leveraged by those it serves.⁸⁴ To live up to this ideal type image, the office emphasises the need for its personnel to observe robust detachment from such political pressure, and strong attachment to professional integrity and lawyerly craft.

One former OLC head described advice from the office as neither like advice from a private attorney nor like a politically neutral ruling one ideally expects from a court. Rather, it is

⁷⁹ See Neil Walker, 'The Antinomies of the Law Officers' (n 68). House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, (17 July 2007) 22-24. The Committee concluded that 'On balance we have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government. The Attorney General's ministerial functions should be exercised by a minister in the Ministry of Justice. Where Ministers instruct the independent head of the prosecution service on public interest grounds, whether national security or other grounds, the Secretary of State for Justice would be accountable to Parliament for the instruction'.

⁸⁰ Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' *Independent* (29th April, 2005).

⁸¹ Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, (n n 77) 11.

⁸² Curtis A. Bradley and Trevor W. Morrison, 'Presidential Power, Historical Practice, And Legal Constraint' (2013) 113 *Columbia Law Review* (2013) 1097, 1135.

⁸³ *Ibid.*

⁸⁴ Daphna Renan, 'The Law President's Make' (n 21) 816.

something ‘inevitably, uncomfortably, in between’.⁸⁵ Uncomfortability arises from the fact an OLC attorney must reconcile several different, even conflicting, objectives. An OLC attorney must be a ‘careful lawyer, must exercise good judgment, must make clear his independence’ from the executive, but must also ‘help the President find legal ways to achieve his ends’.⁸⁶ This might involve devising alternatives to a legally dubious proposal, but while striving to avoid sanctioning a vaguely plausible, but ultimately misrepresentative picture of what the law allows.⁸⁷ The OLC is therefore caught between defining the limits of executive action in a relatively detached manner *and* the President’s desire to receive legal advice which helps him operationalize policy choices.⁸⁸ OLC’s best practice guidelines thus commit its Attorneys to offer something in-between the best view of law a detached legal interpreter might arrive on the one hand, and a merely plausible view of the law on the other.⁸⁹ The extent to which the office has lived up to this aim, or whether the aim is even coherent, is the subject of intense debate.⁹⁰

Ireland

The substantive norms underpinning legal review in Ireland are also shrouded in some secrecy, so it is unclear what standard the AG applies when assessing constitutionality. There are several conceivable approaches an executive legal advisor can adopt when providing advice.⁹¹ The AG could attempt to approximate how a court would interpret the constitution and assess a policy against this standard. This might work in tandem with a risk-assessment approach, sanctioning a policy as constitutional based on a probabilistic assessment of the likelihood of a declaration of unconstitutional/adverse court ruling. Or, similar to the Office of Legal Counsel in the US Department of Justice, it could seek a middle ground to interpret the law in an accurate way that also protects the executive’s institutional prerogatives. This could encompass encouraging a distinct interpretation of the Constitution, unique to the political branches and their expertise. Or the AG could act in a partisan way, using legal craft to offer plausible legal arguments which help uphold and implement the executive’s policy

⁸⁵ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (n 17) 35.

⁸⁶ See also John O. McGinnis, ‘Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon’ (1993) 15 *Cardozo Law Review* 375, 442.

⁸⁷ Dawn E. Johnsen, ‘Faithfully Executing the Laws: Internal Legal Constraints on Executive Power’ (n 18) 1582.

⁸⁸ Griffin B. Bell and Ronald J. Ostrow, *Taking Care of the Law* (Mercer University Press, 1982) 185.

⁸⁹ Richard Pildes, ‘Law and the President’ (2012) 125 *Harvard Law Review* 1381, 1402.

⁹⁰ See Bruce Ackerman, *The Decline and Fall of the American Republic* (n 21) for a strongly critical view. See Trevor Morrison, ‘Constitutional Alarmism’ (n 23) for an impassioned rebuttal.

⁹¹ Randolph D. Moss, ‘Executive Branch Legal Interpretation’ (n 17) 1306.

choices, even if they depart from the best view of the law a more detached judicial body might reach.⁹²

The intense secrecy surrounding the review process makes it impossible to conclusively deduce which approach is preferred, or if one consistent approach is adopted. It seems, however, that advice on constitutionality generally focuses on a court-mimicking,⁹³ probabilistic assessment – having regard to the prevailing law and outlook of the courts – of the act being invalidated as unconstitutional by the superior courts on constitutional grounds.⁹⁴ On at least two recent occasions the AG advised on issues of considerable constitutional and political sensitivity squarely anticipating what the Court might say. On both occasions the AG was concerned above all about the ‘consequences of getting it wrong’.⁹⁵ Conversely, there is no available evidence that the AG tries to consider issues of constitutionality in a less tactical, broader way, or encourages the government to form independent or distinct constitutional interpretations by virtue of its institutional role.

A court-mimicking approach is perhaps unsurprising, given that the AG has always been a practising barrister, generally advised by Advisory Counsel, who have been practising lawyers and currently practising barristers.⁹⁶ It makes sense that the advice the Attorney gives is similar to legal advice that legal practitioners would give clients anticipating litigation. Based on this advice, and any other information that the AG might provide to cabinet, the government will make decisions about what policies and enactments to pursue and not pursue.

IV. PUBLICATION OF ADVICE

United Kingdom

⁹² Cornelia T Pillard, ‘The Unfulfilled Promise of the Constitution in Executive Hands’ (n 18) 685.

⁹³ Because of the secrecy of the Office and the unwillingness of government to publish its advice, it is impossible to rule out the possibility that particular AG’s may have, in fact, take a broader approach to the role of legal adviser on constitutional issues. The most we can say is that there is no evidence available in published government papers or analysis of the AG’s role that suggests this has ever been the case.

⁹⁴ See generally James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 110.

⁹⁵ Ruadhan Mac Cormaic, ‘Where Politics and the Law Meet’ *The Irish Times* (Dublin, 9 July 2013). The examples Mac Cormaic gives are Máire Whelan AG’s advice that a referendum was required to ratify the 2012 fiscal treaty despite Irish diplomats’ strong contention it fell below the ‘Crotty test’ outlined by the Supreme Court; and the AG’s advice that abolishing upward-only rent reviews without compensation would be unconstitutional.

⁹⁶ See Ruadhan Mac Cormaic, ‘Not Unusual for some Barristers to Make €500,000 from AG’s Office’ *The Irish Times* (7th January 2014).

Intense secrecy pervades the provision of executive legal advice in the UK. There is a strong convention against disclosure of AG's advice.⁹⁷ Indeed, it has been suggested that the very *fact* advice has been sought and given cannot be disclosed;⁹⁸ a convention which has been included in the current Cabinet Office Ministerial Guide.⁹⁹ There is also a measure of debate whether the consent of the AG is required before advice can be disclosed, or whether the Minister in receipt of legal advice can disclose it without such consent.¹⁰⁰ Despite the convention contained in the Cabinet Manual, legal advice has been disclosed in exceptional circumstances.¹⁰¹

United States

In contrast, many OLC opinions are published. The best practice guidelines explicitly dedicate OLC to publication of their important opinions where possible.¹⁰² This serves several purposes.¹⁰³ For a start, publication ensures the legal justification for many important government decisions are available for examination, allowing interested parties outside the government to challenge OLC's reasoning.¹⁰⁴ However, not all OLC opinions are published. Much of OLC's work is by its very nature confidential.¹⁰⁵ This means many opinions implicating classified information, or national security concerns have not been released.¹⁰⁶ Some OLC's most controversial opinions have been withheld. For example, the controversial memos concerning the extent of Presidential national security powers were not disclosed until a much later date and under the orders of a new administration. Another controversial example has been the heavy redaction of an OLC opinion sanctioning the legality of drone strikes against enemy combatants, including US citizens, abroad.¹⁰⁷ Ultimately it is up to the President to decide whether and when to release a sensitive legal opinion.

Ireland

⁹⁷ K.A. Kyriakides, 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73, 76.

⁹⁸ Elwyn Jones, 'The Office of Attorney-General' (1969) (n 4) 48.

⁹⁹ Cabinet Office, *Ministerial Code*, (January 2018) para 2.13.

¹⁰⁰ Matthew Windor, 'Government Legal Advisers through the Ethics Looking Glass' in David Feldman (ed.) *Law in Politics, Politics in Law* (Bloomsbury, 2015) 133.

¹⁰¹ *ibid*; Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (n 1) 62.

¹⁰² Office of Legal Counsel, 'Memorandum for Attorneys of the Office: Best Practice for OLC Legal Advice and Written Opinions' (July 16, 2010) 5-6.

¹⁰³ Harold Hongju Koh, 'Protecting the Office of Legal Counsel from Itself' (1993) 15 *Cardozo Law Review* 513, 517.

¹⁰⁴ Rachel Ward Saltzman, 'Executive Power and the Office of Legal Counsel' (2010) 28 *Yale Law & Policy Review* 439, 459.

¹⁰⁵ Bradley Lipton, 'A Call for Institutional Reform of the Office of Legal Counsel' (n 10) 249.

¹⁰⁶ Office of Legal Counsel, 'Memorandum for Attorneys of the Office: Best Practice for OLC Legal Advice and Written Opinions' (n 102) 5-6.

¹⁰⁷ Anonymous, 'Developments In the Law: Presidential Authority' (n 23) 2105.

The advice of the Irish Attorney is, like the UK, rarely published, and has not been published at all in recent decades. The detailed reasons, or written advice of the AG, is not released for parliamentarians to assess and scrutinise. The *fact* of the advice – that the AG has advised that some policy is constitutional or not – is often disclosed if the policy (or the failure to pursue it) is politically controversial and questioned in Parliament. The reason for this secrecy seems largely a matter of convention: the advice is not published because it was not generally published. However, since it was not common practice to share the advice of the Attorney, a convention to this effect grew up from the earliest days of the Free State¹⁰⁸ and has become even stronger in recent years.¹⁰⁹

The contemporary rationale is related to the confidentiality of cabinet meetings. In 1997, the Constitution was amended to secure and clarify the right of cabinet confidentiality, which had been practiced by convention and upheld by the Supreme Court.¹¹⁰ The Cabinet acts collectively;¹¹¹ all actions are taken as one, and dissent and disaffection with particular choices are not aired outside the cabinet room. Discussions held at cabinet meetings are thus confidential. The argument goes that the advice of the Attorney, which is used at cabinet meetings and influences decisions, cannot be published without breaching this confidentiality. This led, it seems, to the assertion of the Taoiseach in recent years that he *could not* cause the advice of the Attorney to be published, that it was beyond the government's power.¹¹² The opinion of governments on the publication of the Attorney's advice has clearly hardened in recent years, and the convention that the advice is not generally published has become that it can never be published. In 2011, then Taoiseach Enda Kenny stated that he could not think of an instance where the Attorney General's advice has been published.¹¹³ This practice perhaps fits with a general inclination for government in Ireland to be, as Chubb describes it, 'cagey and secretive'.¹¹⁴

¹⁰⁸ This convention was established by the first president of the Executive Council, W.T. Cosgrave. Cosgrave refused to disclose a copy of the AG's opinion to a public inquiry. Cosgrave stated he held very strongly it would be "contrary to the public interests" and "interests of good government in the future, to create the precedent of publishing the confidential legal advice obtained by the Executive Council...this being the first instance in which such a request has been made in this country...my considered opinion is that I should not create this precedent". James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 142-143.

¹⁰⁹ Ibid.

¹¹⁰ Seventeenth Amendment of the Constitution Act, 1997

¹¹¹ Article 28.4.2 of the Irish Constitution. See also Brian Farrell, "Cagey and Secretive": Collective Responsibility, Executive Confidentiality and the Public Interest" in Ronald J Hill and Michael Marsh (eds.), *Modern Irish Democracy: Essays in Honour of Basil Chubb* (Irish Academic Press, 1993) 82.

¹¹² James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 142.

¹¹³ Dáil Éireann Debate, 31st Dail, Vol. 732 No.4, (Wednesday 18th May 2011).

¹¹⁴ Basil Chubb, 'The Political Role of the Media in Contemporary Ireland' in Brian Farrell (ed.), *Communications and Community in Ireland* (Cork, 1994) 79

But advice of the AG *has* been published on several occasions it suited the government to do so. On at least six occasions, the Attorney General's advice on constitutional matters has been published. In 1983, in the run up to a referendum that would ultimately insert a new provision protecting the right to life of the unborn and constitutionally limiting abortion, the advice of the Attorney General on the problematic ambiguousness of proposed referendum language was published in the *Irish Times* having been released by the Minister for Justice.¹¹⁵ The government was in this case hoping to secure the support of the opposition for an alternative, simpler wording in light of this advice.¹¹⁶ Similarly in the run up to a referendum on lifting the constitutional ban on divorce in 1995, the Attorney's advice on the adequacy of proposed new divorce regime was published by the government to attempt to disarm arguments mounted against the proposal. On various occasions, the government has allowed opposition members to meet with the AG to discuss advice the government was relying on;¹¹⁷ sent letters of advice to the opposition;¹¹⁸ has read large parts of the Attorney's detailed advice into the parliamentary record;¹¹⁹ or provided advice to parliamentary committees. Most recently, in January 2018, a summary of the AG's advice on the constitutional effects of removing or replacing Ireland's constitutional prohibition on abortion was released by the government.¹²⁰ Even then, the Taoiseach described this action – inaccurately – as being unprecedented.¹²¹ It is more accurate to say advice is published when it suits, when it is most politically expedient.

This secrecy has several effects, the main one being that parliamentarians and the public cannot assess the cogency and quality of the AG's advice, or the sincerity of government's stated reliance on it. Those outside the inner circle of Cabinet have to take the quality and contents of the advice on faith, trusting the government's judgment on its quality and the action it necessitates.¹²²

V. IMPACT ON EXECUTIVE POWER

¹¹⁵ Irish Times, 'Attorney-General rules out wording', *The Irish Times* 16th February 1983.

¹¹⁶ Olivia O'Leary, 'Sutherland says wording might legalise abortion', *The Irish Times* (16th February 1983).

¹¹⁷ Haughey allowed opposition to consult AG over dissolution questions. James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 120.

¹¹⁸ James Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutors* (n 32) 126

¹¹⁹ Government rejecting opposition amendments to EU treaty ratification read AG's advice into the record. *ibid* 123.

¹²⁰ A copy of the advice is available at <https://www.irishtimes.com/news/politics/full-text-of-attorney-general-s-advice-on-repeal-of-eighth-amendment-1.3374141>.

¹²¹ Dáil Éireann Debates, 32nd Dail, Vol. 964, No 4, (January 30th 2018).

¹²² Ruadhan MacCormaic, *The Supreme Court* (Penguin Books, 2016) 7.

The work of executive lawyers ultimately has a Janus-Faced impact on the constitutional order. On the one hand, it can act as a potentially influential constraint on the executive in the pursuit of its policy preferences, binding it to the law and the constitution and restraining its freedom of action. Conversely, constitutional advice can also empower the executive by providing legalistic credibility to executive action or inaction, even in controversial or contested cases. Which, given the importance of legality to political legitimacy in most constitutional cultures, has substantial political effects.

a. Source of Constraint

Legal advice is deeply embedded in the policy-making process of each system considered here. One consequence of this is that the work of executive lawyers can have a real constraining effect on the scope of executive discretion, potentially directing executive actors away from courses of action they might otherwise consider more politically expedient or wise.¹²³ Even if an executive lawyer does not definitively rule out a course of action, adhering to legal advice may still dilute, divert, or modify the policy as initially envisaged and desired. This raises important questions about the incentives driving the executive to structure executive legal review in a manner which binds its political discretion and ability to achieve its substantive goals. In other words, why would the executive fetter its discretion through the work of executive legal advisors at all? After all, they are not final or authoritative decision makers on legality or constitutional advice. *De jure*, their role is advisory only;¹²⁴ the decision to accept or reject advice rests with the executive.

I suggest the constraining role of executive lawyers in these systems is linked to the importance of perceptions of legality to political legitimacy¹²⁵ in constitutional systems. In the incentives and beliefs of political actors like ‘voters, officials, political parties, interest groups, and social movements’.¹²⁶ The rhetoric of legality and its normative pull have strong political and social force, which limit the bounds of executive authority and discretion.¹²⁷ As Yong puts it pithily, ‘law and legality are now ever-present considerations in the policy and

¹²³ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 306-307.

¹²⁴ Matthew Windsor, ‘Government Legal Advisers through the Ethics Looking Glass’ (n 100) 133.

¹²⁵ To quote a commentator speaking in the US context, offering ‘an accurate political economy of executive restraint must identify a range of mechanisms in which both legal and political elements play roles.’ Aziz Huq, ‘Binding the Executive (by Law or by Politics)’ (2012) 79 *University of Chicago Law Review* 777, 807.

¹²⁶ See Eric A. Posner and Adrian Vermeule, ‘Demystifying Schmitt’ in Jens Meierhenrich & Oliver Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016) 165.

¹²⁷ Aziz Huq, ‘Binding the Executive (by Law or by Politics)’ (n 125).

decision making process. Government cannot escape from the reach of the law – if it ever could.’¹²⁸

So, for instance, public revelation an executive official has taken a contentious policy decision without seeking legal advice in the first instance can invite political backlash for showing insufficient respect for legal constraint.¹²⁹ An executive actor acting, or who seeks to act, contrary to the clear advice of legal advisor would likely invite more intense political controversy.¹³⁰ A judicial pronouncement of unconstitutionality of a major executive action can carry with it negative political consequences. There is thus an incentive for executive actors to seek advice from their advisors, particularly on contentious issues, to guard against negative political consequences of perceived illegality.¹³¹ Indeed, the normative force accorded to constitutional and legal norms in each system means that executive officials are likely to have internalized a norm that the law must be taken very seriously as an aspect of their political morality.¹³²

A rarity of documented cases where the executive has deliberately acted contrary to legal advice might suggest it is so self-evident that clear legal advice will be followed, that to do otherwise would be considered offensive to core political values in each system.¹³³ Partly because of the cultural premium placed on legality in each constitutional order, publicly verifiable commitment to it through executive deference to legal advisor advice¹³⁴ is closely linked to justifying assertions of, and delegations of power to, the executive.¹³⁵ This is common to each jurisdiction.

To take the example of the OLC, the question of whether it acts as a rubber stamp for the Presidency, or if this depiction grossly caricatures its work, has sparked divisive debate.¹³⁶ Defenders of OLC argue its cultural norms of professional integrity are largely internalized by actors in the executive branch, who respect its role and detachment from partisan politics. They add that if OLC is perceived as a rubber-stamp for the President, it may undermine its

¹²⁸ Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (n 1) 94.

¹²⁹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 302.

¹³⁰ Barry K Winetrobe, ‘Legal Advice and Representation for Parliament’ (n 6) 99.

¹³¹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15).

¹³² Daphna Renan, ‘Presidential Norms and Article II’ (2018) 131 *Harvard Law Review* 2187, 2199.

¹³³ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 15) 328.

¹³⁴ *Ibid.*

¹³⁵ Julian Davis Mortenson, ‘Law Matters, Even to the Executive’ (2014) 112 *Michigan Law Review* 1015, 1036.

¹³⁶ *See* the discussion in (n 90).

ability to legitimise policies through legalistic analysis.¹³⁷ Defenders of the office argue that only because OLC's work is taken seriously as sober works of legal analysis, and not partisan advocacy, will its opinion be worth seeking out and respecting.¹³⁸ It is in the executive's own interest to strike a balance between getting their way on a policy, and the long-term need to safeguard OLC's reputation by respecting the constraints of its judgments.¹³⁹ But presidential self-binding may go beyond political self-interest: a President might be committed to advertising his dedication to legality not just because it will help yield success in pursuit of interests independent of law, but because 'being perceived to act lawfully is itself part of what he wants from his presidency'.¹⁴⁰ It may be an aspect of his sense of political morality. In short, the pull of a culture of legality may operate as a political constraint on action for reasons either because of public/political perception, or because of a genuine moral sense of being bound by the advice. In Ireland and the UK, there are also several examples that show this constraining effect in action.

The political tumult in the UK following the triggering of Article 50 of the TEU to exit the European Union also provided vivid case-studies of the constraining effect legal advice can have, and how dedication to perceptions of legality is not limited to issues of low salience, but can constrain the executive in respect of crucial policies it would otherwise be eager to pursue. One of the most pressing obstacles facing then Prime Minister Theresa May's attempt to secure parliamentary approval for her draft Withdrawal Agreement, was fear elements of the agreement would be immensely difficult to disengage from should the EU and UK find it difficult to negotiate the agreement for their prospective relationship. In particular, the Northern Ireland protocol (or backstop) caused considerable consternation amongst influential backbenchers in her own party, her confidence and supply partners and members of the opposition. Legal advice given by AG Geoffrey Cox in respect of the 'backstop' arrangement did little to provide reassurance to such concerns. The AG's position was that if the UK and EU simply cannot conclude a future trade deal that would replace the backstop - not because of bad faith, but simply because of intractable differences - then the UK would have no lawful means of exiting the backstop unilaterally.¹⁴¹ This advice clearly proved a major thorn in former Prime Minister Theresa May's ability to gain support for the

¹³⁷ Anonymous, 'Developments In the Law: Presidential Authority' (n 23) 2098.

¹³⁸ Trevor Morrison, 'Constitutional Alarmism' (n 23) 1722.

¹³⁹ Daphna Renan, 'The Law President's Make' (n 21) 882.

¹⁴⁰ Curtis A. Bradley and Trevor W. Morrison, 'Presidential Power, Historical Practice, And Legal Constraint' (n 82) 1144.

¹⁴¹ Geoffrey Cox AG, 'Legal Effect of the Protocol on Ireland/Northern Ireland' (Attorney General's Office, 13th November 2018).

Withdrawal Agreement her government had negotiated. Parliamentarians from the opposition benches, her confidence and supply partners, and her own party all explicitly cited the legal risk identified in the advice as a reason to reject the agreement.¹⁴²

In March 2019, the government agreed several additional instruments and declarations with the EU to assuage concern the backstop would endure indefinitely, with a clear hope the AG may alter his legal advice accordingly.¹⁴³ However, the AG stated that, despite these additions, the Protocol on Ireland/Northern Ireland still could not be legally unilaterally terminated by the UK save in very limited circumstances.¹⁴⁴ The AG's legal opinions – the advice of the executive's own leading lawyer – were a major factor in the parliamentary rejection of this agreement, providing a very real constraint on the executive. The Prime Minister could no doubt have replaced the AG and forum shop for legal advice until a more helpfully permissive legal opinion was found harmonising the law with the executive's preferred policy outcome. But to do so would have left her open to severe political critique on the basis such a maneuverer represented a cynical circumvention of legal constraints.

The importance of perceptions of genuine commitment to legality by the executive to political credibility can also be discerned in the now well-trodden controversy surrounding the advice outlined by AG Lord Goldsmith on the legality of the 2003 British invasion of Iraq. As is well documented, intense debate has raged over whether the AG was placed under political pressure by senior executive figures to give a legal opinion helpful to the government's intention to invade Iraq.¹⁴⁵ The legality of the proposed invasion became a major source of political conflict, and affirmation of its validity crucial to support for it. Prior to invasion, it was widely accepted within UK political circles that AG's legal clearance would be required before military force could be deployed.¹⁴⁶ Despite there being no rule of law mandating executive commitment to their legal advisors' advice, its *potential* to cabin

¹⁴² Rowena Mason and Rajeev, 'ERG signals it could back May's Brexit deal if legal advice is clearer' (13rd March, 2019). Available: <https://www.theguardian.com/politics/2019/mar/13/erg-signals-it-could-back-may-brexit-deal-legal-advice-is-clearer>.

¹⁴³ These instruments included that there would be a "best endeavours" requirement which would mean the EU could never just refuse to negotiate a new agreement, trapping the UK in the backstop in perpetuity. The UK and EU would agree that a joint interpretation would be placed on the backstop arrangements. The UK could also make a unilateral declaration as to its intention not to be bound permanently to the Irish protocol.

¹⁴⁴ Geoffrey Cox AG, 'Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement' (Attorney General's Office, 12th March 2019) at para. 19. Richard Vaughan, 'Geoffrey Cox deals crushing blow to Theresa May's Brexit deal' (12th March 2019). Available: <https://inews.co.uk/news/brexit/geoffrey-cox-deals-crushing-blow-to-theresa-mays-brexit-deal/>.

¹⁴⁵ Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' *Independent* (29th April 2005).

¹⁴⁶ Matthew Windsor, 'The Special Responsibility of Government Lawyers and the Iraq Inquiry' (2016) 87 *The British Yearbook of International Law* 159, 161.

executive policies highlights their capacity to act as a veto-player and internal constraint on important policy issues.

The fact AG's advice was not sought until late in the day, and that he may have been put under political pressure to change his mind, does not undermine the suggestion the AG functions as an important veto-player. Indeed, the explosive political fall-out from allegations the executive tried to circumvent the AG's initial advice underscores that, even if advice *can* be ignored or circumvented, it will come at immense cost to political credibility and reputation when revealed – providing plenty of incentive not to do so. Revelation by the Chilcott Inquiry the AG had initially advised on several occasions an invasion could not be reasonably justified lawful under international law - but subsequently altered his opinion - became a matter of ongoing national controversy for years.¹⁴⁷ This episode even more starkly demonstrates a tendency in UK political culture of suspicion toward executive action cynically, or overtly, aimed at circumventing legal constraints.

Similar examples of the binding quality of executive legal advice can be found in recent political controversies in Ireland. Between 2011-2016, the then Fine Gael-Labour Coalition government faced several calls by factions in the Oireachtas and pro-choice advocacy groups to allow an exception to Ireland's strict abortion regime for fatal foetal abnormalities. On each occasion, the government reported to the Oireachtas that the AG had advised any such move would be unconstitutional by virtue of Article 40.3.3. This advice was explicitly relied for not including this ground in the Protection of Life During Pregnancy Act 2013,¹⁴⁸ and for later voting down a private member's bills in 2015 that would have allowed for it.¹⁴⁹ On both occasions, members of the socially liberal Labour Party, who had long campaigned on liberalising Ireland's abortion regime, were whipped to vote *against the bill* based on this advice.¹⁵⁰ Then Minister for Health Leo Varadkar went so far as to state that the fact of the matter was that the government *could not* introduce any legislation to the Oireachtas if the

¹⁴⁷James Blitz, 'Why the attorney-general will matter on Brexit' *Financial Times* (26th October, 2018). <https://www.ft.com/content/813612fe-d914-11e8-ab8e-6be0dcf18713>

¹⁴⁸ See Speech by the Minister for Justice, Equality and Defence, Alan Shatter, TD, during the debate on the Protection of Life During Pregnancy Bill 2013: Report Stage - 10/11 July 2013, available at <<http://www.justice.ie/en/JELR/Pages/SP13000294>> last accessed 26th February 2019.

¹⁴⁹ Independent TD Clare Daly's Bill would have allowed for abortion in cases of fatal foetal abnormality. Resisting opposition calls to disclose the legal basis for the government's opposition to the bill, The Irish Times reported that Taoiseach Enda Kenny "ruled out accepting the legislation, having received an opinion from Attorney General Máire Whelan that it was unconstitutional. He said the AG's advice would not be published, in line with precedent." Michael O'Regan, 'Government defeats Daly's abortion Bill with big majority' (10th February 2015).

¹⁵⁰ Lucinda Creighton, 'Why an attorney general's advice should be public: Opinion Governments should not use secret legal advice as an excuse for policy U-turns' *The Irish Times* (6th April 2015).

AG had advised it was unconstitutional, effectively turning her advice into an ex-ante binding rule of law.¹⁵¹ Adopting this premise, the Minister concluded that he would be opposing the proposed legislation ‘because, although it is well intended, it is unconstitutional.’¹⁵² Though some members of the governing executive were either strongly in favour of, or sympathetic to, liberalising Ireland’s abortion regime for moral and political reasons, the AG’s opinion on the measures illegality seems to have been regarded as determinative of the issue.

Another recent Irish example of the AG’s power to constrain executive action came with news in 2018 that Irish State would honour repayments to holders of around 270 million euro of junior (subordinated) bonds sold by the Bank before its collapse and nationalisation during the financial crisis. These bondholders were unsecured creditors who had entered into a riskier investment in hope of a windfall but, in the end, suffered a loss when the bank collapsed and was nationalised. News the bonds were to be repaid by the Fine Gael minority government came as a surprise, due to repeated assurances by the Irish government during the Fine Gael/Labour coalition of 2011-2016 that they would not be, and that all available legal means would be made to resist any attempt at repayment.¹⁵³ The only apparent basis for this unpopular policy change was that the AG advised the Department of Finance that any move not to pay the bondholders would not withstand a constitutional challenge.¹⁵⁴ The AG advised such a move would be an unjustified interference with their property rights.¹⁵⁵ This advice apparently contrasted with a former AG’s, who, during the financial crisis, apparently stated losses could be imposed on junior bondholders.¹⁵⁶ That the AG’s view was so respected, even if it meant upholding a politically unpopular decision, highlights the constraining effects of this role.

B. Source of Empowerment

While it is clear legal advice can and does constrain executive actors, this is not the whole story, and the broader impact of legal advice on executive power must be considered. For example, even if legal advice does not always favour the executive’s preferred course of

¹⁵¹ Leo Varadkar TD bluntly stated that the bill was “unconstitutional in the view of the Attorney General, and for those reasons we will not support this Bill.” Dáil Éireann Debate, 31st Dail 886 No.4 Friday, 6 February 2015.

¹⁵² Dáil Éireann Debate, 31st Dail 886 No.4 Friday, 6 February 2015.

¹⁵³ Joe Brennan, ‘Repayment to junior Anglo bondholders unpreventable, said AG’ *Irish Times* (19th December, 2018).

¹⁵⁴ RTE News, ‘IBRC to fully repay junior bondholders - what does this mean?’. Available at: <https://www.rte.ie/news/business/2018/12/18/1017943-qa-ibrc-to-fully-repay-junior-bondholders/>.

¹⁵⁵ Joe Brennan, ‘Repayment to junior Anglo bondholders unpreventable, said AG’ *Irish Times* (19th December, 2018).

¹⁵⁶ ‘Then AG Paul Gallagher SC ‘confirmed repeatedly’ that the ‘only obstacle to imposing losses on senior unsecured bondholders was obtaining troika approval, not any legal issue.’ Peter O’Dwyer, ‘Irish taxpayers could have been spared €14bn’ *Irish Examiner* (July, 2015).

action, the *fact* that the executive is subject to legal review provides a source of critical political credibility.¹⁵⁷ Credibility is central to effective use of executive power. Without it, the executive's ability to employ its constitutional, statutory, and political authority is impaired and might receive public, legislative or judicial pushback.¹⁵⁸ Constitutional review builds credibility as executive commitment to binding itself to its legal advisors articulation of constitutionality constitutes a form of reputation building.¹⁵⁹ Binding itself to legal advice signals to other political actors that the executive acts in accordance with law, and is willing to sacrifice some freedom of action to do this.¹⁶⁰ While elite actors, political opponents, or the electorate might viscerally dispute a government policy or ethical or moral grounds, they cannot as easily attack it on *legal or constitutional grounds* if a perception exists that it has undergone robust and detached scrutiny for compliance with legality. This is particularly the case when advice is not published, and its cogency cannot be assessed in depth.

Several examples from Ireland, the UK and the US show how constitutional advice is frequently central to political legitimation of controversial executive policy positions, just as or more than ethical or moral arguments. As advice is frequently highly secretive, it can be hard to know if the advice being relied upon justifies the particular course of action or inaction. Or if the executive is using secretive legal advice as dubious legalistic cover. This could be done with the collaboration of an executive lawyer that has allowed ideological loyalty to cloud independence. Or the advice could be exaggerated, using the cloak of opacity to present advice as firm, when it is really equivocal. In either case, the result could be a substantial bolstering of the executive's position using contestable legal advice; allowing the executive to deploy the 'technicalities of legal discourse' to place a 'seal of legitimacy' on political decisions.¹⁶¹

On several recent occasions, the UK government explicitly leaned on legal advice to justify intensely controversial political decisions involving the use of armed force. As discussed above, prior to the invasion of Iraq in March 2003, severe pressure mounted on the then Labour Government to make public advice it had received providing an affirmative legal basis for military action. In the years following, it emerged Lord Goldsmith had altered his

¹⁵⁷ Richard Pildes, 'Law and the President' (n 89) 1390; Adrian Vermuele, 'Conventions of Agency Independence' (2013) 113 *Columbia Law Review* 1163, 1210.

¹⁵⁸ Adrian Vermuele and Eric A. Posner, 'The Credible Executive' (2007) 74 *University of Chicago Law Review* 865, 913.

¹⁵⁹ Daphna Renan, 'The Law President's Make' (n 21) 818.

¹⁶⁰ See generally Adrian Vermuele and Eric A. Posner, 'The Credible Executive' (n 158).

¹⁶¹ Tanja Aalberts and Lianne Boer, 'Entering the Invisible College: Defeating Lawyers on their Own Turf' (2018) 87 *The British Yearbook of International Law* 1, 17.

views on the legality of the war. Differences between the original advice tendered by the AG to Prime Minister Tony Blair, and the summary of advice eventually published at the time of Parliament's vote, gave rise to speculation the AG had been placed under political pressure to temper his original opinion. To alter it to better align it with the Government's intentions.¹⁶² After all, Prime Minister Blair himself stated during his testimony to the Iraq Inquiry that it was 'absolutely clear' that if the AG 'in the end had said, "This cannot be justified lawfully", we would have been unable to take action'.¹⁶³ AG's advice there was a reasonable case for invading Iraq was thus crucial to legitimizing the Government's immensely controversial decision.¹⁶⁴

Since the conflict in Iraq, the executive has on several additional occasions heavily relied on advice given to it by Law Officers regarding the legality of deploying the armed forces abroad to anchor the political legitimacy of the action. Debates on armed intervention in Libya, the Syrian Civil War and against ISIS, all involved executive invocation of 'almost every conceivable legal justification for the use of force' before the Parliament¹⁶⁵ in a bid to secure political approval for the exercise of prerogative power.

For instance, in November 2015, Parliament debated whether the UK could, and should, extend airstrikes against ISIS into Syrian territory. Then Prime Minister David Cameron broached Parliament for political support for the measure. Prominent amongst his justifications for military action was that intervention had a strong legal, as well as moral, basis.¹⁶⁶ The Prime Minister explicitly told MPs he had been advised there was no barrier in international law to extending the UK's support for the Iraqi Government against ISIS into Syria,¹⁶⁷ being at pains to point out the government had a clear legal basis for military action

¹⁶²One commentator suggested that the Report issued by the Chilcott Inquiry 'sustains a strong inference that the Attorney General had been placed under considerable pressure to produce advice that corresponded with preordained foreign policy priorities.' Matthew Windsor, 'The Special Responsibility of Government Lawyers and the Iraq Inquiry' (n 146) 4.

¹⁶³ Transcript of evidence given by the Rt Hon Tony Blair, 29 January 2010, 150. Available at: <https://webarchive.nationalarchives.gov.uk/20171123123234/http://www.iraqinquiry.org.uk/the-evidence/witnesses/b/rt-hon-tony-blair/>.

¹⁶⁴ Mallory and Moosavian suggest Goldsmith 'was a crucial player, and the deployment of UK troops depended upon his legal approval.' Rebecca Moosavian and Conall Mallory, 'How Tony Blair, Jack Straw and Lord Goldsmith come out of the Chilcot Report' *The Conversation* (July 19, 2016); Jim Edwards, 'Blair did NOT tell the cabinet that the attorney general initially advised the Iraq War would be illegal' *Business Insider* (July 6th 2016); BBC News, 'Q&A: Iraq legal advice row' (28th April 2005).

¹⁶⁵ Colin Murray and Aoife O'Donoghue, 'Toward Unilateralism? House of Commons Oversight of the Use of Force' (2016) 65 *International and Comparative Law Quarterly* 305, 306; Matthew Windsor, 'The Special Responsibility of Government Lawyers and the Iraq Inquiry' (n 146) 3

¹⁶⁶ Prime Minister's Office, 'Memorandum to the Foreign Affairs Select Committee Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria' (November 2015) 15-17.

¹⁶⁷ Colin Murray and Aoife O'Donoghue, 'Toward Unilateralism? House of Commons Oversight of the Use of Force' (n 165) 334.

founded on the right of self-defence recognised in article 51 of the United Nations Charter.¹⁶⁸ However, in response to calls for the Government to publish the advice in full, the Prime Minister pointed to long-standing convention that legal advice given by law officers to the Government is not disclosed publicly. Thus, although legal advice was critical to the executive's claims in respect of the legitimacy of armed action before Parliament, the latter had 'no access to the Government's detailed legal advice and so could not analyse its reasoning' or offer robust scrutiny of its cogency.¹⁶⁹

Around the same time, it emerged that UK armed forces had carried out a lethal drone-strike on a UK citizen fighting with ISIS. In a statement to the Commons then Prime Minister Cameron said he 'had been killed in an act of self-defence, to protect the British people from a direct threat of terrorist attacks being plotted and directed'.¹⁷⁰ The Prime Minister argued that the drone strike was legal under Article 51 of the UN Charter as an imminent necessity to prevent an attack against the UK. The Prime Minister leaned on Attorney General's advice that there was a clear legal basis in international law, namely the UK's inherent right to take necessary and proportionate action to defend itself against terrorist attack.¹⁷¹ The AG declined to disclose to a parliamentary committee the legal test he had applied when advising that there was a clear legal basis for the drone strike, on the grounds that this would disclose the detailed content of his advice in breach of the 'Law Officers' Convention'.¹⁷² Despite the fact the 'limits of self-defence against a terrorist group under of international law are contested and difficult to fulfil' and that parliamentary oversight of such 'claims is all but impossible' without access to legal advice, AG's advice was withheld.¹⁷³ So while the legitimating quality of AG's advice was utilised heavily by the executive, the underlying basis for the advice was not disclosed for contestation.

Following use of chemical weapons by Syrian Armed Forces against civilians in 2018, the United Kingdom participated in deterrent retaliatory strikes alongside France and the United States. The UK government did not seek parliamentary approval for these strikes but relied

¹⁶⁸ HC *Hansard*, 26 November 2015, cols 1489–94.

¹⁶⁹ Colin Murray and Aoife O'Donoghue, 'Toward Unilateralism? House of Commons Oversight of the Use of Force' (n 165) 339.

¹⁷⁰ Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing, Second Report of Session 2015-2016*, para. 1.3.

¹⁷¹ Colin Murray and Aoife O'Donoghue, 'Toward Unilateralism? House of Commons Oversight of the Use of Force' (n 165) 335.

¹⁷² Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing, Second Report of Session 2015-2016*, para. 3.12.

¹⁷³ Colin Murray and Aoife O'Donoghue, 'Toward Unilateralism? House of Commons Oversight of the Use of Force' (n 165) 335.

on its prerogative power to act unilaterally. Prime Minister Theresa May responded to critique of her failure to seek parliamentary approval by insisting the action was ‘moral and legal’¹⁷⁴ and swiftly released a summary of the legal position justifying the strikes.¹⁷⁵ Release of an outline of the Government’s legal position was unsurprising, given how legal advice received by the government has become central to the inevitable political argument over the rights and wrongs of military action.¹⁷⁶ But again, a full legal opinion was not forthcoming for scrutiny.

Some commentators argue the legal justifications proffered in some of these instances was, insofar as it could be critiqued in the absence of disclosure of full legal advice, based on ‘legally dubious...doctrines’¹⁷⁷ which merely clothed contentious political action in a cloak of ‘superficially-impressive legalese’.¹⁷⁸ Whatever the merits of the advice, what is important for the purposes of this chapter is that affirmative legal advice is clearly central to legitimisation of controversial decisions of the government in the eyes of political actors and the public, perhaps in equal measure to more openly ethical and moral concerns about executive action.

Ireland

Irish Governments have also regularly relied on the advice of the AG to justify controversial policy positions.¹⁷⁹ On several recent occasions, the government expressly anchored its policy position on the advice of the AG (and not on more openly political grounds) when the AG’s advice was contestable and contested by commentators as overly cautious or conservative. This has given rise to the concern government simply did not wish to pursue a particular policy, and AG’s advice may have been employed to legitimise and justify its inaction without spending political capital.

For example, in 2006, the issue of same-sex marriage was gaining traction and the government’s position on reform became a matter of considerable controversy. The Minister for Justice commented to media that the government could not legislate for marriage for same-sex couples as the Attorney General advised that legislation of this sort would be

¹⁷⁴ BBC News, ‘Syria air strikes: Theresa May says action ‘moral and legal’, 17th April 2018. Available at: <https://www.bbc.co.uk/news/uk-politics-43775728>.

¹⁷⁵ Prime Minister’s Office, ‘Syria action – UK government legal position’ (14th April 2018).

¹⁷⁶ BBC News, ‘Syria air strikes: UK publishes legal case for military action’ (14th April 2018).

¹⁷⁷ Colin Murray and Aoife O’Donoghue, ‘Toward Unilateralism? House of Commons Oversight of the Use of Force’ (n 165) 340.

¹⁷⁸ *Ibid* 306.

¹⁷⁹ Eoin Daly, ‘Reappraising judicial supremacy in the Irish constitutional tradition’, in Hickey, Cahillane and Gallen (eds.), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017) 40.

unconstitutional, and a referendum would be required.¹⁸⁰ This position sparked debate amongst legal commentators: while some believed the AG's advice was correct, some argued that—since marriage was undefined in the Constitution—the Oireachtas was free to define it in legislation as including same-sex couples and would likely receive deference from the courts in doing so.¹⁸¹ Despite this disagreement, the government cited AG's advice as justification for not considering legislative change, maintaining that a referendum would be required, but that as it would be too divisive it would not be in favour of holding one. A referendum was eventually held almost ten years later.¹⁸²

Between 2011-2020, the then Fine Gael-Labour Coalition government and Fine Gael minority government faced a deepening homelessness crisis. The government received considerable critique for its alleged lack of robust action. On several occasions, the government claimed to face very severe limitations on legislative action due to AG's advice on constitutional property rights. This manifested itself through the government asserting that several measures proposed by backbenchers to adopt to tackle the growing housing crisis - including vacant site levies, land hoarding restrictions, capping mortgage interest rates, eviction protections, and regulation of 'vulture funds' – were all stymied by AG's advice.¹⁸³ Then Minister for Housing Alan Kelly TD explicitly stated after his period in office that these measures were sincerely desired by government, and were hampered not by political or financial obstacles or objections, but solely by the AG's advice on constitutional property rights.¹⁸⁴ The Government used AG's advice to refuse to pursue particular measures, to undermine the legitimacy of opposition policies, and to refuse a money message via Article 17.2.

But the AG's stated position on many of these points has been hotly contested¹⁸⁵ on the basis that under Supreme Court precedent, property rights can be highly qualified in the

¹⁸⁰ Carl O'Brien, "Lenihan rules out 'divisive' referendum on gay marriage", *The Irish Times* (5 December 2007).

¹⁸¹ Conor O'Mahony 'Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage' (2012) 35 *Dublin University Law Journal* 199.

¹⁸² Katherine Zappone, 'In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection' (2013) 10 *The Equal Rights Review* (2013) 115.

¹⁸³ David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark-Side of Political Pre-Enactment Review in Ireland and Japan' (2020) 18 *International Journal of Constitutional Law* 51; David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency'(n 59); Finn Keyes, 'Property rights and housing legislation' *Oireachtas Research & Library Service Briefing Paper* (2019).

¹⁸⁴ Kitty Holland, 'Kelly says Constitution blocked attempts to tackle housing crisis' *The Irish Times* (31st March 2016).

¹⁸⁵ See Edmund Honohan, 'Open letter to Alan Kelly - 'Don't blame the housing crisis on the Constitution' *Irish Independent* (3rd April 2016).

interests of the common good and social justice.¹⁸⁶ As the advice was not published, the cogency of the AG's reasoning—or how the government portrayed the AG's reasoning—could not be assessed. Some commentators suggested the AG may have given advice that was highly cautious and based on a conservative reading of judicial precedent. Others speculated that the executive likely presented the AG's advice in an overly-cautious manner to provide favourable legal cover for what was, in reality, ideological political preference for market-based solutions to the housing crisis and an unwillingness to undertake aggressive state action. Although hard to conclude which is more plausible due to the secretive nature of the advice giving process, the latter would if true represent a powerful example of the sort of executive empowerment discussed above. Allowing the executive to use secretive advice to maintain contentious positions, while deflecting criticism as based on unconstitutional objections.

Another high-profile example where the executive relied on the advice of the Attorney General to justify controversial policy positions came in 2018, when the constitutional amendment Bill to remove the Eighth Amendment from the Constitution — which recognised the right to life of the unborn, and effectively banned abortion on a constitutional level — was introduced to Parliament.¹⁸⁷ Serious differences emerged between a citizen's deliberation body and a parliamentary committee over whether or not the provision should be entirely repealed or replaced. The Citizens' Assembly's substantive recommendation was that Article 40.3.3 should be replaced with a constitutional provision which gave the Parliament exclusive right to legislate on termination of pregnancy, to offset risk of judicial intervention in the area. In contrast, the cross-party Oireachtas Joint-Committee on the Eighth Amendment advocated for simple repeal, arguing that no replacement was necessary. This was politically contentious, as pro-abortion lobby groups favoured the outright repeal option. The government requested AG advice on the potential constitutional implications of these options. The AG advised that if Article 40.3.3 were simply repealed, it might be argued before the courts that the unborn have residual constitutional rights that might invalidate legislation passed by the Oireachtas and put the Governments' policies in jeopardy. Therefore, the AG advised the wording should be inserted expressly affirming the right of the Oireachtas to legislate for the regulation of termination of pregnancy, but not

¹⁸⁶ Severe restrictions on property rights were taken to alleviate the problems the country faced during this period, including through the National Asset Management Agency Act 2009 and Financial Emergency Measures in the Public Interest Act 2009. None of these provisions were invalidated despite their stringent nature.

¹⁸⁷ David Kenny, 'Abortion, the Irish Constitution, and Constitutional Change' (2018) 5 *Revista de Investigacoes Constitucionais* 257, 268.

explicitly exclude judicial review, which the Committee had objected to. Following calls to publish the AG's advice, a summary (but not the full version) was published. The Taoiseach explicitly linked the AG's advice to the government's decision to adopt the enabling clause wording, contrary to the recommendation of the Oireachtas Committee and demands from various advocacy groups.¹⁸⁸

Two more remarkable examples of the government relying on AG's advice to undergird controversial executive decisions came immediately preceding, and then during, the recent 2020 general election.¹⁸⁹

In a revealing exchange in late 2019, Taoiseach Leo Varadkar told the Dáil it would not be appropriate to issue a 'money message' for a private members bill pursuant to Article 17.2., if he was advised by the AG the bill would be unconstitutional, or contrary to European law or any international treaties Ireland is party to.¹⁹⁰ If this statement accurately reflects government practice (and there is no reason to suggest otherwise) then it appears recent executive actors have been interpreting Article 17.2. in a very expansive manner based on AG's advice. This interpretation effectively provides the executive with a veto authority over which private members bills receive a money message, and thus continue to proceed through the legislative process. This interpretation, and the authority it vests in the executive and AG, is striking because it is clearly beyond the textual scope, or purpose of Article 17.2. This provision was intended to prevent the Oireachtas enacting bills of significant financial consequence for the State, without first receiving executive consent. The provision was never intended to vest a generic veto power over the legislative activity of the Oireachtas in the executive and AG.¹⁹¹

Perhaps a starker example came during the 2020 general election. While the polling date was set for 8th February 2020, uncertainty emerged following the sudden death of a candidate in the Tipperary constituency. Section 62 of the Electoral Act 1992 provides that in such circumstances: 'all acts done in connection with the election (other than the nomination of

¹⁸⁸ Dáil Éireann Debates, 32nd Dail, Vol. 964, No 4, (January 30th, 2018).

¹⁸⁹ David Kenny and Conor Casey, 'Legal challenge over Tipperary poll now seems inevitable' *The Irish Times* (Dublin, 6th February, 2020).

¹⁹⁰ Dáil deb 4 December 2019 vol 990 no 5.

¹⁹¹ David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (n 59); Eoin Daly and David Kenny, 'Government Blocking of Legislation Is Constitutionally Dubious' *The Irish Times* (Dublin, 14 June 2019).

the surviving candidates) are void and that a fresh election will be held.’ On foot of this provision, the returning officer for the constituency postponed the polling date, and 29th February was suggested as an alternative. However, Article 16.3.2 of the Constitution states that a general election must be held not later than 30 days after the dissolution of the Dáil. Applying the 1992 Act, and restarting the electoral process in Tipperary, would take the poll outside that time period. Evidently concerned that postponement of the Tipperary poll could leave the whole election open to challenge as a breach of Article 16.3.2, the government issued a ‘special difficulty order’¹⁹² purporting to suspend operation of s.62 and allow the poll to continue on 8th February 2020. The government justified its decision by citing the advice of the AG, who seemingly advised that, contrary to clear legislative provision in s.62, the poll should go ahead on the basis it was unconstitutional having regard to 16.3.2.¹⁹³

Even if s.62 is of dubious constitutionality, the government’s actions were an unprecedented exercise of executive authority. It is a bedrock tenet of the Irish constitutional order that the executive cannot suspend a duly enacted statute, whether through its Article 28 executive power,¹⁹⁴ or by relying on a statutory administrative power.¹⁹⁵ The Government and AG are, of course, entitled to hold the view that a given statutory provision is unconstitutional. But the Constitution explicitly vests the power to invalidate unconstitutional laws in the Superior Courts. Unlike in the United States, where there is debate over whether the President can refuse to execute a statute he considers unconstitutional, such an authority has never been considered a feature of Ireland’s constitutional separation of powers.¹⁹⁶ In order to justify these actions, which involved unusually broad assertions of executive authority, the legitimating quality of AG’s advice was critical, and heavily leaned on by the government.¹⁹⁷

¹⁹² Department of Housing, Planning and Local Government, ‘Special Difficulty Order - Dáil Election in the Tipperary Constituency to be held on 8 February 2020’ (5th February, 2020) < <https://www.housing.gov.ie/local-government/voting/dail-elections/special-difficulty-order-dail-election-tipperary-constituency>>. Accessed 29th February, 2020.

¹⁹³ RTÉ News, ‘Tipperary election Candidates withdraw legal action’ (6th February, 2020) < <https://www.rte.ie/news/election-2020/2020/0206/1113639-election-tipperary-mcgrath/>> accessed 29th February, 2020.

¹⁹⁴ Conor Casey, ‘Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order’ (2017) 40 *Dublin University Law Journal* 1, 28.

¹⁹⁵ Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional, 2019) para. 4.2.27

¹⁹⁶ For an overview of this debate see Saikrishna Prakash, ‘The Executive’s Duty to Disregard Unconstitutional Laws’ (2008) 96 *Georgetown Law Journal* 1615.

¹⁹⁷ Department of Housing, Planning and Local Government, ‘Special Difficulty Order - Dáil Election in the Tipperary Constituency to be held on 8 February 2020’ (5th February, 2020) < <https://www.housing.gov.ie/local-government/voting/dail-elections/special-difficulty-order-dail-election-tipperary-constituency>>. Accessed 29th February, 2020.

These examples show the executive linking a contentious political choice to contestable AG's advice to bolster its legitimacy. These incidents have given rise to the suggestion that, as one former Minister put it, it is a long-standing game in Irish public life for the executive to refer to AG's advice both to shore up support for hotly contested political decisions, and to deflect blame for unpalatable ones:¹⁹⁸ using AG's advice to bolster the executive's political position and insulate it from attack.¹⁹⁹

United States

In the US, OLC endorsement of a presidential policy can increase its perceived legitimacy by the other branches of government and public at large. Presidential self-binding to OLC opinions, even if they are not always in his favour, is an important source of self-imposed constraint critical to executive credibility.²⁰⁰ Partly because of the cultural premium placed on legality, public commitment to it through accepting it as a potential constraint is key to justifying assertions of presidential power.²⁰¹ Allied to this legitimation function is the fact OLC opinions *are* statistically favourable to the executive,²⁰² frequently providing legalistic affirmation in the pursuit of controversial political policies.²⁰³ Use of executive legal advice has been central to affirmatively bolstering and legitimating broad presidential authority over controversial issues ranging from foreign affairs, national security, war powers, and separation of powers.²⁰⁴ Moreover, given that OLC relies on its own precedent, generous interpretations of presidential authority pass on an increasingly 'presidentialist' set of opinions and precedents for future OLC officials and Presidents to build on.²⁰⁵ Some go as far as accusing the OLC of enabling 'plebiscitary caesarism' by providing cover for aggressive claims of executive power behind the legitimacy of the Constitution.²⁰⁶

¹⁹⁸ Lucinda Creighton, 'Why an attorney general's advice should be public: Opinion Governments should not use secret legal advice as an excuse for policy U-turns' *The Irish Times* (6th April 2015). See also Sunday Business Post, 'Child's play? Maire Whelan profiled' *Sunday Business Post* (18th November 2012).

¹⁹⁹ David Kenny and Conor Casey, 'Shadow Constitutional Review' (n 183).

²⁰⁰ Richard Pildes, 'Law and the President' (n 89) 1390; Adrian Vermuele, 'Conventions of Agency Independence' (n 157) 1210.

²⁰¹ Julian Davis Mortenson, 'Law Matters, Even to the Executive' (2014) (n 135) 1036.

²⁰² Daphna Renan, 'The Law President's Make' (n 21) 869. As Renan puts it, 'the Office usually *does* say yes. And it has developed a more executive-leaning view of the law than the courts'.

²⁰³ Trevor Morrison, 'Constitutional Alarmism' (n 23) 1717-1718. Morrison cites to a study of all publicly released OLC opinions from the Carter Administration to the beginning of the Obama Administration. 13% of opinions went 'predominantly against the White House', while 79% found in its favour 'without significant limitation'.

²⁰⁴ Rachel Ward Saltzman, 'Executive Power and the Office of Legal Counsel' (n 104) 453.

²⁰⁵ Bruce Ackerman, *The Decline and Fall of the American Republic* (n 21) 114.

²⁰⁶ Gerhard Casper, 'Caesarism in Democratic Politics: Reflections on Max Weber' *Robert G. Wesson Lecture in International Relations Theory and Practice, The Freeman Spogli Institute for International Studies at Stanford University* (March 13, 2007) 23.

OLC's current work under the President Trump administration is no exception, as it has been on the 'frontlines defending some of the Trump Administration's most politically fraught policies.'²⁰⁷ For example, it approved President Trump's controversial executive order relying on emergency statutory powers to reallocate funding to pay for his long sought-after border wall, after when Congress looked like it would not appropriate funds. Its opinions have also been deployed to buttress controversial positions taken by the President vis a vis Congressional scrutiny; such as the Secretary of Treasury's refusal to turn over President Trump's personal tax returns to Congress and the executive's broad claims of executive privilege.²⁰⁸

The degree of informal pressure brought to bear on the OLC by the White House has also been highlighted as a threat to its independent judgment. Intense national security concerns, in particular, are said to put enormous pressure on the OLC to justify expansive understanding of presidential authority.²⁰⁹ Perhaps the most egregious example of an OLC opinion bending legal sources to justify extremely generous interpretations of presidential power because of such pressures came during the Bush presidency. The OLC provided several opinions upholding every aspect of the Bush administration's aggressive antiterrorism initiatives, including torture, based on an extremely aggressive and broad understanding of presidential war powers, effectively putting them beyond congressional limitation.²¹⁰ The memos were eventually withdrawn,²¹¹ and regarded in American legal circles as replete with strained legal reasoning and lacking support in judicial precedent, a strain linked to fear of denying power which could prevent further deadly terrorist attacks.²¹² This suggests that intense political pressures, combined with an overtly political appointments process, might compromise the independence of legal advice and tend towards executive empowerment.

Critics of OLC's impartiality also suggest institutional competition with other executive legal advisors can push it to adopt a more pro-presidential tenor. The argument proceeds on the premise that, if it consistently stone walls executive policies, it will encourage the President

²⁰⁷ Shalev Roisman, 'The Real Decline of the Office of Legal Counsel' *Lawfare Blog* (8th October, 2019).

²⁰⁸ Johnathan Shaub, 'The Prophylactic Executive Privilege' *Lawfare Blog* (June 14th, 2019).

²⁰⁹ Neal Katyal, 'Internal Separation of Powers: Checking Today's Most Powerful Branch From Within' (2006) 115 *Yale Law Journal* 101, 124.

²¹⁰ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (n 17) 98.

²¹¹ Trevor W. Morrison, 'Stare Decisis in the Office of Legal Counsel' (n 51), 1454; Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (n 17) 10.

²¹² Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (n 17) 146-150; Cornelia T. Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (n 18) 677.

to short-circuit the OLC when seeking legal advice.²¹³ Fear of being frozen out by other actors such as the WHC, is said to incentivise OLC to look more favourably on White House requests than it might otherwise be.²¹⁴ Presidents can seek a more compliant opinion from another legal advisor, such as the WHC's office, if they suspect the OLC will not be forthcoming with pliant advice. A prominent recent example came during the Obama administration, when the President rejected the OLC's informal advice on the compatibility of airstrikes in Libya pursuant provisions of the War Powers Resolution. The OLC reportedly informally advised the president US involvement in airstrikes would likely require congressional authorisation after a period of 60 days. Instead of requesting a formal OLC opinion and binding himself to this position, the President proceeded with his desired course of action armed with a more favourable opinion from the State Department and WHC's office.²¹⁵

CONCLUSION

This chapter explored the ways executive branch lawyers play a Janus-faced role in respect of executive power. Despite their divergent constitutional orders and traditions, executive legal review is structured in a manner where the executive binds themselves to advice tendered by its lawyers, despite there being no rule of law requiring this. This makes legal advisors' important gatekeepers of executive action; and an important variable to consider when assessing the power of the modern executive. The processes and substantive norms governing their work is of importance to the allocation of public power in constitutional democracies, by helping to both cabin and legitimate how the contemporary executive chooses to deploy its expansive authority.

I argue they are on balance a source of empowerment in each system as their work, the personnel who undertake it, and the extent to which it is disclosed for scrutiny, can all be structured in a manner most suitable to providing legalistic legitimacy to the executive's

²¹³ *ibid* 717.

²¹⁴ Anonymous, 'Developments In the Law: Presidential Authority' (n 23) 2094.

²¹⁵ Goldsmith provides a useful overview of the situation: 'President Obama rejected the views of top lawyers at the Pentagon and the Justice Department when he decided that he had the legal authority to continue American military participation in the air war in Libya without Congressional authorization. The Acting head of the Office of Legal Counsel, Caroline Krass, and the General Counsel of the Department of Defense, Jeh Johnson, advised the President that military activities in Libya constituted "hostilities" under the War Powers Resolution and thus Section 5(b) of the WPR required him to terminate or scale back the mission after May 20. The President – himself a lawyer – rejected this advice and instead sided with the White House Counsel, Robert Bauer, and the State Department Legal Advisor, Harold Koh, who argued that the actions in Libya fell short of "hostilities" and thus did not implicate Section 5(b)'s termination provisions.' *See* Jack Goldsmith, 'President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution', *Lanfare Blog* (Friday, June 17, 2011).

policy goals. Despite differences in each system, the work of executive lawyers provides a useful source of empowerment because they help provide the executive capacious legal space in which to pursue its policies. This reality is particularly acute in the United States, where the OLC has consistently offered opinions favourable to very broad interpretations of executive authority in the realm of national security and separation of powers disputes. However, as noted above, both the Irish and UK Attorneys-General have also articulated legal arguments favourable to the executive, which appear stretched or strained in light of constitutional or international law. The work of executive lawyers also constitutes a source of empowerment by offering a source of legalistic legitimation which can bolster the executive's political credibility, a legitimation that stems from what the professional work of executive lawyers represents – respect for the law and its boundaries – which remain important for maintaining legitimacy.

This chapter highlights that depending on what structure a legal order opts for, the work of executive legal advisors will be more likely to operate either as a legalistic brake, or constitutional accelerator for executive power. It is reasonable to suggest that a more politically infused structure which is opaque, is more likely to act as an aggressive tool of executive empowerment than a system which is characterized by relative bureaucratic detachment and transparency, which might tend more toward constraint. Given that each system's structure of executive legal review involves considerable opacity and political alignment between the political executive and their apex lawyers, the fact that they act, on balance, as a source of empowerment which help bolster the perceived legitimacy of controversial executive action, is perhaps unsurprising. These variables, which lie within the gift of executive actors to mould to their advantage, sit at the core of what can make apex lawyers an important variable for executive authority.

The fact executive lawyers come in many different manifestations, each with their own difficult normative trade-offs, is perhaps the reason their representation abounds in the political and popular imagination, and that depending on the conventions, norms, and structure in which they operate executive lawyers can be seen as Machiavellian counsellors and hired gun moving mountains to provide executive policy proposals with a shield of legal legitimacy; or the conscience of the administrator tasked with 'speaking law to power'.²¹⁶

²¹⁶ Matthew Windsor, 'Government Legal Advisers through the Ethics Looking Glass' in David Feldman (ed.) *Law in Politics, Politics in Law* (Bloomsbury, 2015) 117.

PART FIVE: CONSTRAINED EXECUTIVE PRIMACY

CHAPTER VIII: BETWEEN DOMINANCE AND SUBSERVIENCE: THE CONSTRAINED PRIMACY MODEL OF EXECUTIVE POWER

INTRODUCTION

This penultimate chapter ties together the trends of how the executive became predominant outlined in previous chapters. I argue a core strand of these trends, which captures the heart of the *why* of executive predominance, is the attempt to better pair and match state power with political expectation.¹ By this I mean a political community's ability to use the public power of the state to execute political decisions meeting the expectations and needs of citizens and secure the common good.

After outlining this argument, I consider what the shift to constitutional predominance can tell us about the conceptual nature of the contemporary executive branch based on similarities in each system. I provide a conceptual typology of the main meaningful cluster of features of the executive branch in each system, and argue the executive branch is an institution characterized by a common and pronounced tension between its role as subservient faithful executor of law, and status as dominant political decision maker charged with steering the state. Because of this tension, it is neither subordinate nor supreme in the exercise of public power. It is instead very predominant over exercises of public power, but genuinely constrained by legality, even if statutory or constitutional restrictions can often be weak. Traditional conceptual accounts prominent in constitutional theory which portray the executive as a faithful executioner of the will of a preeminent legislative branch are therefore deeply unsatisfactory. They simply do not capture the real role and responsibilities of the executive branch, of which law execution is just a small sliver.

Conversely, accounts of the executive branch in these systems as largely unbound from law, subject only to moral checks imposed by political concerns and public opinion, would also be myopic. This account would give inadequate weight to how perceived commitment to legality and constitutional limits remain critical to political legitimacy and political morality. While the executive may not often be tightly constrained by law, due to the broad and deep

¹ As Cane puts it, executive primacy is partly a result of 'citizen's demands and expectations that the state will step in to deal with social problems that can be tackled only by coordinated action at the social level'. Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 Washington International Law Journal 527, 561.

discretionary powers it exercises, the outer bounds of its power remain fettered by law. For example, it would be anathema in each system for the executive to rely on its constitutional powers to suspend the law or claim ability to side-step the legislature and to act by decree. An accurate conceptual typology of the executive branch must therefore be able to tie these different elements together. I make the case that each system is helpfully understood as having a ‘*Constrained Primacy Model of Executive Power*’, which is:

- (i) highly predominant in the formation and execution of domestic and foreign policy;
- (ii) vested with very capacious administrative, regulatory, and security powers;
- (iii) committed to acting within the bounds of legality; accepting of statutory & constitutional limitations, including lawful democratic controls where present;²
- (iv) distinct from a concept of the executive as a faithful agent of legislative will, acting as a secondary actor to a politically predominant legislature;
- (v) also distinct from a conception of executive power which is autocratic and lacking genuine constraint by legality.

Part I offers an argument for why the executive is constitutionally predominant. Part II turns to offering a persuasive conceptual account of the contemporary executive in these systems.

I. THE WHY OF EXECUTIVE PREDOMINANCE

a. Trends Empowering the Executive

Chapters II-VIII of this thesis gave an account of the important factors helping make the political executive the predominant constitutional actor in each system. As noted at the

² At a minimum, lawful democratic control typically requires the executive to periodically seek the endorsement of the people through free and fair elections as regulated by statute or constitutional provisions. Actions taken contrary to these kinds of regulations like corruption, vote rigging, voter suppression, or deliberate undermining of political competition by advantaging the ruling party are all likely to compromise democratic control. *See* Tarunabh Khaitan, ‘Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism’ 17 (2019) *International Journal of Constitutional Law* 342, 349.

outset of this thesis, power is a contested concept, but I have worked with a definition common to political and constitutional theory, one which understands power to consist of the ability to control the outcomes of contested decision making processes and secure preferred policies or the ability to effect substantive policy outcomes by influencing what the state will or will not do.³

Chapter II argued the development of political parties and mass democracy profoundly influenced and altered the logic of separation of powers norms. That is, norms premised on the Madisonian notion branches of government can be personified as actors with interests and wills of their own; whose members would be locked in a struggle to aggrandize or safeguard their own institutional power.⁴ The premise members of the legislative branch would fiercely guard their institutional power from encroachment from the executive and so on. This was undermined as political parties, in both presidential and parliamentary systems, grew to become a central extraconstitutional mechanism driving the institutional behaviour of government branches. They facilitate greater levels of cohesion between the legislature and executive in the pursuit of a similar political vision. This collaboration undermines the notion each branch had a distinct institutional interest which would naturally result in friction which other branches attempting to aggrandize their own potentially conflicting interest. This cohesion became particularly strong in Westminster parliamentary systems, leading to a large degree of fusion between the branches and allowing the nominally weak executive to effectively leverage dominance over Parliament in terms of agenda setting and policy formulation. Such fusion became one of the most defining features of parliamentary systems. In presidential systems, the impact of disciplined organized political parties on the executive branch is more complex and nuanced. But in the United States it bears strong familial resemblance to parliamentary systems during periods of unified government when the presidency and majority of Congress are drawn from the same party. The fusion of legislative and executive power through the political party apparatus has facilitated the latter's role as chief policymaker and legislative actor.

Chapter III argued that increases in state activity in social and political life spurred movement toward new forms of governance better able to meet fresh challenges posed by its unprecedented levels of involvement. These changes sprang from the perceived inadequacy

³ Daryl J. Levinson, 'Foreword: Looking for Power in Public Law' (2016) 130 Harvard Law Review 1, 33.

⁴ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers' (2006) 119 Harvard Law Review 1,3.

of traditional law-making through primary legislation, and common law adjudication, as a means of reconciling state capacity to political expectation, leading to creation of the administrative state and expansion in the law-making activity of the executive branch. The administrative state was created and nurtured from the capacious shell of the traditional tripartite separation of powers, growing to occupy the gaps and silences of the constitutional order. Another trend explored was the tendency toward centralization of the capacity of the administrative apparatus in the political executive, ensuring it now sits at the apex of an apparatus with potent regulatory reach. Power and control over the administrative apparatus largely flowed to the executive branch due to its superior capacity to grapple with complexity and volume of policy challenges facing contemporary government. A capacity built on its comparative advantages in structure, expertise, and resources.⁵

Chapter IV noted how questions of domestic political concern and importance are frequently shaped by, and interdependent on, developments and decisions taken outside national politics. Achieving political goods like economic prosperity and domestic security in an increasingly interconnected world, where the unilateral capacity of states is stymied, spurred vertical delegation of normative power to the international plane. This was accompanied by a horizontal shift to the executive based on perceptions it was best placed - due to persistent views about its institutional advantages in structure, information, expertise - to navigate between the domestic and international plane. The arch of constitutional politics in each system has bent toward increased executive power over foreign affairs, and relegation of the legislature to a subsidiary, frequently reactive role. Its greater control over the formation and execution of foreign policy gave it more de facto influence in the domestic sphere.

Chapter V argued that copious power has flowed to the executive in the name of counteracting perceived emergencies. The executive has very rarely claimed authority to act *contra legem* or directly contrary to the Constitution or statute. As each system has embraced elements of the liberal constitutional tradition which fears perhaps above all, arbitrary state power, it is not surprising 'extralegal...and unauthorized acts' are considered deeply troubling, even if done to preserve public safety or welfare.⁶ In the vein of this tradition,

⁵ See Cass R. Sunstein, 'The Most Knowledgeable Branch' (2016) 164 University of Pennsylvania Law Review 1606-1648.

⁶ Judith Shklar, 'The Liberalism of Fear' in Nancy L. Rosenblum (ed.), *Liberalism and Moral Life* (Harvard University Press, 1989) 30.

each order has expressed marked reluctance to countenance acting explicitly contrary to legal norms, even under colour of emergency or wartime. There are two main ways emergency powers are subsumed within the institutional framework of each constitutional order. First, political actors in Ireland and the United States have articulated and legitimised an expansive understanding of constitutional authority to tackle emergencies. Second, emergency powers are brought into being through proliferation of legislative delegations of broad statutory authority to the executive, empowering it *ex-ante* to act in often vague statutorily defined circumstances. This has been, by far, the most prominent commonality between each system, spanning the regime differences of each order. Executives, whether Presidential or Prime Ministerial, have increasingly turned to the legislature for statutory delegations of broad and deep power to tackle crisis situations. Emergency powers are thus usually theoretically banal, given that their proliferation has largely occurred through standard legal mechanisms, like delegating statutory power from the legislature to the executive. Its practical significance instead comes from the *depth* and *volume* of the power delegated. In facilitating and permitting this delegation, the other branches have comparatively self-limited their law-making and law-checking role in any muscular sense and provided, at best, moderate constraint.

Chapter VI argues the growth and consolidation of the executive-led administrative state was also aided by judicial articulation of relaxed legal rules and standards governing its work.⁷ The legislature and judiciary broadly worked in tandem, over sustained periods of time to affirm, delegate, and legitimate increased executive authority.⁸ As the power of the executive waxed, these organs in turn have frequently self-limited their own law-making and law-checking authority. These branches have not abnegated their legislative and judicial authority, but frequently offer only modest to moderate counterbalance on the executive's expanded power, which facilitates its predominance over projections of public power. The judicial branch could attempt to tightly constrain the executive's authority by aggressively reviewing their exercise for compliance with legal principles. Courts in each system are certainly not supine institutions. For example, the apex courts in each system have effectively asserted ultimate authority and duty to interpret the meaning of both statutes and constitutional principles for the other branches.⁹ But despite this robust conception of their own authority, courts invariably do not use their ample powers to intensely constrain and obstruct the political executive or administrative state action. I noted that they do not do so

⁷ See Adrian Vermuele, *Laws Abnegation: From Laws Empire to the Administrative State* (Harvard University Press, 2016).

⁸ *Ibid.*

⁹ See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boland v An Taoiseach* [1974] I.R. 338; *R (Miller) v Prime Minister* [2019] UKSC 41.

for several reasons: including concerns over democratic legitimacy; pragmatic appreciation of the limits of judicial competence in light of the complex problems the executive grapples with; and perhaps implicit recognition the awesome responsibility of governing ultimately rest heavily on the executive's shoulders, and courts should not seek to make the task of achieving substantive policy goals more difficult than it already is.

Chapter VII argued that, although an ostensible internal constraint, executive branch lawyers in fact play a Janus-faced role in respect of executive power in each system. Executive lawyers can both constrain and empower the executive branch. While offering a genuine constraint, there are plausible grounds to suggest on balance they often tend more toward the latter, giving critical legalistic credibility to executive policy choices. The processes and substantive norms governing their work is of importance to the allocation of public power in constitutional democracies, by helping legitimate the expansive authority of the contemporary executive. They are a source of empowerment as their work, the personnel who undertake it, and the extent to which it is disclosed for scrutiny, can all be structured in a manner most suitable to the executive. Despite differences in each system, on balance, the work of apex lawyers has been structured in a manner which provides a useful mechanism helping legitimise the scope of executive power and controversial political choices made by the executive.

Taken together, these trends help make the political executive the directive and energetic branch of state. The branch responsible for articulating solutions to every conceivable political vicissitude, for leading the state and guiding it through the difficulties besetting all political communities. To do whatever they can, accrue whatever power they must, to deal with the never-ending problem of political contingency. Or as Machiavelli memorably put it, to grapple with the reality 'things arise and accidents come about that the heavens have not altogether wished to be provided against'.¹⁰ The contemporary executive's functions are thus necessarily open-ended.¹¹ Its function is - and this is as about as precise as one can be - to get things done, to identify political problems, and to find solutions, making the essential executive question: what is to be done? The executive is proactive in undertaking this role,

¹⁰ Niccolò Machiavelli, *Discourses on Livy* (eds.), Harvey Mansfield and Nathan Tarcov (University of Chicago Press, 1998) 197.

¹¹ Timothy Endicott, 'The Stubborn Stain Theory of Executive Power: From Magna Carta to *Miller*', *Policy Exchange: Judicial Power Project* (Policy Exchange, 2017).

the other branches reactive and deliberative.¹² In determining the ends to which public power will be directed to deal with these ‘things and accidents’ of political contingency, and the ends the polity will pursue, the political executive has accrued primary responsibility for maintaining the common good and public welfare.¹³

b. Matching Public Power with Political Expectation

A core strand of these distinct trends – which captures the heart of the *why* of executive predominance – is the attempt to better pair state power with political expectation.¹⁴ By this I mean a political community’s ability to project and use public power to execute decisions meeting the political expectations of citizens, both material and moral.¹⁵ Expectations and needs which invariably exist in a thicket of complex and difficult real-world conditions:¹⁶ from securing domestic order, building useful foreign relations, promoting economic prosperity, providing demanding goods like education, health care, infrastructure, welfare, securing social justice, and protecting national security from domestic and foreign enemies.¹⁷ Conditions which are ultimately linked to securing the common good - the state of affairs in which ‘each individual within a political community and the political community as a whole is flourishing.’¹⁸ All these demands are primarily addressed to the political executive, the locus of public power and focus of political hope, who is expected to provide ‘direction, forceful energy and initiating drive on behalf of society’s welfare and the nation’s interest’ and stamp its own socio-political vision on private life.¹⁹ Stretched like elastic, the executive branch has ‘expanded to meet the needs of changing times and circumstances.’²⁰

¹² Steven Calabresi, ‘Some Normative Arguments for the Unitary Executive’ (1995) 48 *Arkansas Law Review* 23, 39; Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Rand McNally, 1967) 136.

¹³ Thomas Poole, ‘The Executive in Public Law’ in (eds.), Jeffrey Jowell and Colm O’Cinneide, *The Changing Constitution* (9th edn., Oxford University Press, 2019) 188-208.

¹⁴ Peter Cane, ‘Executive Primacy, Populism and Public Law’ (n 1) 561.

¹⁵ I do not say, as Tocqueville did, that state capacity has expanded as an attempt to slake man’s desire or expectation for *material* improvement. I also include the polity’s ability to project public power to grapple with citizens abstract feelings and general anxiety and unease about the political direction the community is heading, what values it is directed by and what political vision guides it. See Leo Strauss and Joseph Cropsey (eds.), *History of Political Philosophy* (University of Chicago Press, 3rd edition, 1987) 769.

¹⁶ Michael Mann, ‘The autonomous power of the state: its origins, mechanisms and results’ (1984) 25 *European Journal of Sociology* 185, 189.

¹⁷ Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (n 3) 46; Daryl J. Levinson, ‘Incapacitating the State’ (2014) 181 *William & Mary Law Review* 181, 195; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000) 5.

¹⁸ George Duke, ‘Sovereignty and the Common Good’ (2019) 17 *International Journal of Constitutional Law* 66, 75; Gregoire Webber & Paul Yowell, ‘Introduction: Securing Human Rights through Legislation’ in (eds.), Gregoire Webber, Paul Yowell, Richard Ekins, Maris Kopcke, Bradley W. Miller & Francisco J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2019) 3; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 64; John Finnis, *Natural Law and Natural Rights* (2nd edn. Oxford University Press, 2011) 154-155.

¹⁹ Michael Foley, *The Rise of the British Presidency* (Manchester University Press, 1993) 164. See also K. Sabeel Rahman, ‘Reconstructing the Administrative State in an era of Economic and Democratic Crisis’ (2018) 131 *Harvard Law Review* 1671, 1684.

²⁰ Charles Dunn, ‘The Presidency in the Twenty-First Century: Continuity and Change’ in (eds.), Charles Dunn, *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 2.

Executive predominance a non-partisan trend

Of course, it should go without saying citizens and political elites disagree vociferously on their understanding of what prosperity, economic welfare, social justice, and useful foreign relations look like. They also clearly disagree on the best ideological vision for pursuing these goals, some favour neoliberalism, some social democracy, some libertarianism etc. In other words, ideological sympathy to different forms of state involvement in social and economic life, such as whether it engages in regulative and redistributive tasks, or a aggressively deregulatory role.²¹ But regardless of partisan affiliation, citizens and political actors in these constitutional systems are largely not content with a nightwatchman state,²² an executive that only protects against a ‘warre’ of ‘every man, against every man’.²³ Even if they have very different views on how to promote the common good, or can, in the end, do little to resolve difficult policy issues, it is a non-partisan fact that it is ‘difficult to think of a single area of governance’ the contemporary executive in these systems can safely ignore.²⁴

Intense pressures put on the state to meet these kinds of political expectations, however concretely expressed, sit at the heart of what drives the executive to seek and accrue institutional power. And for the other branches to delegate and legitimate such power; a level of institutional power not immediately discernible or reflected in core constitutional text or legal doctrine concerning the executive. Courts were too tied to precedent and lacking in a democratic mandate or institutional capacity to meet such a challenge²⁵ and legislatures too procedurally cumbersome, slow, and unable to act with decisiveness. It falls primarily on the executive to articulate political responses aimed at securing the welfare of citizens and the common good, and act upon them with dispatch and decisiveness.²⁶

Cultivation of state capacity to tackle political problems

²¹ Nicholas F. Jacobs, Desmond King, and Sidney M. Milkis, ‘Building a Conservative State: Partisan Polarization and the Redeployment of Administrative Power’ (2019) 17 *Perspective on Politics* 453; Stephen Skowronek, ‘The Conservative Insurgency and Presidential Power: A Development Perspective on the Unitary Executive’ (2009) 122 *Harvard Law Review* 2071-2103; Edward Corwin, *The President: Office and Powers 1787-1957* (University of London Press, 1966) 294. These articles chart both conservative and progressive efforts to empower the presidency due to increased political expectation for government involvement in matters of general welfare and public concern, albeit for different conceptions of political good.

²² Of the kind promoted by theorists like Robert Nozick. See Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 2013).

²³ Thomas Hobbes, *Leviathan* in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 21* (1990) 99-109.

²⁴ Daryl Levinson, ‘Empire-Building in Government in Constitutional Law’ (2005) 118 *Harvard Law Review* 915, 957; William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton University Press, 2003) 180.

²⁵ Rosalind Dixon and Julie Suk, ‘Liberal Constitutionalism and Economic Inequality’ (2018) 85 *University of Chicago Law Review* 369, 397.

²⁶ Stephen Skowronek, ‘Shall We Cast Our Lot With the Constitution? Thinking about Presidential Power in the Twenty-first Century’ in (eds.), Charles Dunn, *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 37.

To meet political expectation for these complex and demanding goods, each polity cultivated greater institutional capacity to tackle them.²⁷ This saw a dramatic evolution in their legal orders, from where the legislature held theoretical primacy and the executive a modest role, to an executive-led order designed to be better able to use public power to tackle shifting problems faced by the contemporary polity.²⁸ This encompassed the rise of political parties to better tie the executive and legislature together and give the former greater ability to shape laws and engage in greater levels of legislative activity; exponential diffusion of delegated administrative and regulatory power to a powerful administrative state and national security apparatus. It also saw increased delegation of authority to the international and transnational governance sphere, which became more important for domestic policy making.

Vesting control of capacity in political executive

Compared to any other political actor, the executive enjoys the balance of control *over* the capacity of the state.²⁹ The political executive has sought, and been bestowed, the primary role of wielding this increased capacity, to steer the polity through the contingencies and dangers of government. Vesting control over state capacity primarily in the political executive was anchored on intertwined assumptions of structural necessity and pragmatism. That meeting amorphous, complex, and fast-changing political challenges demanded increased and expansive discretionary power be granted to it, due to its superior capacity to use it.³⁰ That its ability to act with dispatch, energy, expertise, and unity make it more suitable, relative to a cumbersome multi-member legislature or unelected judiciary, to wield public power effectively. These developments vindicate the relevance and prescience of the observations of Hamilton in the *Federalist Papers*. Whether discussing the administrative state, emergency powers, foreign affairs, his list of concrete features characteristic of an energetic executive recur repeatedly in any account of executive predominance: unity, perpetuity, ability to act with dispatch. These are exactly the kinds of institutional advantages cited to justify broad and deep delegation of statutory power to the executive, and frequent deference from the judicial branch.

This evolution to executive-led governing was profound, and critically not achieved through executive effort alone. Rather, executive predominance was aided by other constitutional

²⁷ Terry Moe and Scott A. Wilson, 'Presidents and the Politics of Structure' (1994) 57 *Law and Contemporary Problems* 1, 11.

²⁸ Adrian Vermuele, *Law's Abnegation* (n 8).

²⁹ Daryl J. Levinson, 'Foreword: Looking for Power in Public Law' (n 3) 1.

³⁰ Terry Moe and Scott A. Wilson, 'Presidents and the Politics of Structure' (n 27).

organs. The legislature and judiciary broadly worked in tandem, over sustained periods of time to affirm, delegate, and legitimate increased executive authority.³¹ As the power of the executive waxed, these organs in turn frequently self-limited their own law-making and law-checking authority. These branches have not abnegated their legislative and judicial authority, but they frequently offer only modest to moderate counterbalance on the executive's expanded power, which help facilitate its predominance over projections of public power.

For example, the legislature could, formally speaking, strip the executive branch of much of its capacity for action, through its power over law-making and the public purse.³² The political executive depends for its sustenance, after all, on a continuing flow of funds and statutory authorizations from the legislature.³³ But here is where 'formal power and incentives do not align'³⁴ given the legislatures similar interest in matching the political expectations of citizens and interest groups, something which could be hampered if the institutional power of the executive were permanently dismantled in the name of upholding legislative primacy. The power and influence of legislatures is frequently underappreciated and caricatured when, in fact, the legislative branch in each system has arguably never been as well-resourced or staffed.³⁵ But what has undoubtedly instead taken place is that the institutional power of the legislature, *relative* to the executive, has steadily waned or plateaued.³⁶

The judicial branch could also attempt to tightly constrain the executive's authority by aggressively reviewing their exercise for compliance with precepts of legality. They could, for example, intensely scrutinise exercises of administrative discretion for clear statutory authorization, rationality and proportionality, and enforce firm limits on broad delegations of regulatory power. Similarly, they could taper down deference traditionally offered on matters implicating emergency powers or foreign policy. Doing so systematically could well dent the executive's capacity to project public power to achieve its goals, perhaps bolstering

³¹ Adrian Vermuele, *Laws Abnegation* (n 8).

³² Charles Black, 'The Working Balance of the American Political Departments' (1974) 1 *Hastings Constitutional Law Quarterly* 13, 15.

³³ Hugh Hecllo, 'The Once and Future Presidency: Prophecy versus Prediction' in (ed.), Charles Dunn, *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 21.

³⁴ William Howell and David Brent, *Thinking About the Presidency: The Primacy of Power* (Princeton University Press, 2013) 111.

³⁵ Conor Casey, 'The Constitution Outside the Courts – The Case for Parliamentary Involvement in Constitutional Review' (2019) 61 *Irish Jurist* 36; Philip Norton, 'Is the House of Commons Too Powerful? The 2019 Bingham Lecture in Constitutional Studies' (2019) *Parliamentary Affairs* 1-18; Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017).

³⁶ William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (n 24) 112.

the institutional power of both the court and legislature. Courts in each system are certainly not supine institutions; for example, the apex courts in each system have effectively asserted they have ultimate authority to interpret the meaning of both statutes and constitutional principles for the other branches.³⁷ But although they have a robust conception of their own authority, courts have generally not used their ample powers to intensely constrain and obstruct the political executive. They do not do so for a plethora of reasons, from concerns over democratic legitimacy, pragmatic appreciation of the limits of judicial competence in light of the complex problems the political executive grapples with, and perhaps implicit recognition the awesome responsibility of governing, keeping the polity safe, secure, and flourishing ultimately rest heavily on the executive's shoulders and courts should not seek to make this task more difficult than it already is.

Executive predominance an interactive development

Executive predominance thus cannot be considered a result of unilateral empire-building by the executive branch.³⁸ It is better understood as the form of constitutional government evolved and maintained in these systems – through sustained interaction of their institutions – to better respond to social and political problems facing the contemporary state. The current predominance of the executive can be regarded as an evolution of the traditional separation of powers framework adopted in each system, from where the legislature held theoretical primacy and the executive a modest role.³⁹ Power formally assigned to a 'body structurally unsuited to its exercise, has flowed, through the inactions, acquiescences and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration'.⁴⁰ Through this shift, the constitutional order has adapted to its surroundings, reconstituting itself and its relationship to its citizens and their political expectation.⁴¹

This does not mean the power invested in the executive has fulfilled, or ever can fulfil, the promise of meeting the diverse political expectations of its citizens and securing the common

³⁷ See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boland v An Taoiseach* [1974] I.R. 338; R (*Miller*) v *Prime Minister* [2019] UKSC 41.

³⁸ Daryl Levinson, 'Empire-Building in Government in Constitutional Law' (n 24) 950-958.

³⁹ Adrian Vermuele, *Law's Abnegation* (n 8).

⁴⁰ Charles Black, 'The Working Balance of the American Political Departments' (n 32) 17.

⁴¹ William Howell and David Brent, *Thinking About the Presidency: The Primacy of Power* (n 34) 88.

good.⁴² The demands and expectations placed on the political executive may well always outstrip its capacity and powers. But this does not undermine the proposition we have witnessed the long-term rise of executive predominance, or that *attempts* to match public power with political expectation were, and remain, at the heart of its emergence and consolidation.

c. Comparative Study of Executive Power

My comparative study of executive predominance contributes to constitutional study of the executive branch in several different ways. First, through its insight into the types of social and political forces and pressures which can inflate the executive's authority. Knowing the main factors driving this transformation – political party collaboration across the branches, rise of the administrative state, foreign affairs dominance, proliferation of emergency powers - serve as useful inductive comparators. They can be used to contrast trends of executive power in different political systems, where similar factors may be absent or present. This is useful for public lawyers both sympathetic to, and sceptical of, executive predominance who wish to understand the factors which facilitate it. For those concerned with both a powerful or weak executive, these trends may paint a pathway for reflection or reform.

Second, my account underscores how grasping the mechanics of executive predominance is critical to accurately capturing how constitutional power is allocated and exercised by institutional actors in these systems. Relying on accounts offered by traditional separation of powers doctrine, or bare text and structure alone, with its modest place for the executive and primacy of the legislative branch, completely miss where the constitutional centre of gravity lies.⁴³ A more contextual account of executive power like the one I have provided more accurately maps the distribution of constitutional power and the actual role of constitutional institutions in the contemporary state. My case-studies are an instructive example of the fact that contextual social and political forces and trends profoundly shift allocations of public power, and alter the scale, structure, and responsibilities of formal constitutional institutions. They demonstrate the usefulness, and necessity, of analysing constitutional institutions like the political executive in their thick socio-political surround to grasp their true influence and power. This highlights that our understanding of how the executive functions – and indeed how constitutional institutions work in general - will be

⁴² Theodore Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Cornell University Press, 1985).

⁴³ Adrian Vermeule and Eric Posner, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010); Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009).

impoverished and inaccurate shorn of this context and largely relying on a master-text document and the legal doctrine interpreting it.

Third, my study informs current political or normative debate on the predominance of executive power. A solid descriptive grasp of the why of executive predominance, and its limits, informs these evaluations. Given constitutionalism's importance to the assessment of political legitimacy, an impoverished understanding of how political actors actually allocate and use constitutional power is deeply unsatisfactory.⁴⁴ Understanding the boundaries of executive power and the reasons its constitutional power has dramatically expanded, allow for more situated critique and evaluation. Only if we can assess where constitutional power rests, and why, can we begin to consider if contemporary institutional arrangements are consistent with, for example core constitutional principles internal to the legal order, or external first-order political values like whether it promotes the common good. Whether in light of these kinds of principles the executive branch is in need of defence, reform, or reconsideration. Only after considering the various explanations for executive empowerment can we assess whether these explanations justify this predominance; or go on to argue it should be regarded as too powerful, or perhaps too constrained. Put simply, there may or may not be very good constitutional and political reasons for executive predominance, which may weigh heavily in any evaluation of its desirability.⁴⁵

A few necessary caveats are required. This thesis has not attempted to give a comprehensive account of how each of the broad factors and trends explored in each chapter interacted with local arrangements in each jurisdiction, to make the executive a predominant political actor. Different factors will, of course, have had a greater or lesser impact in each system. Nor have I sought to offer an exhaustive account of all the possible factors which help lead to executive empowerment. The kind of variables relevant to this question clearly resist precise quantification. Even the multi-factor account I aim to give cannot purport to provide an exhaustive analysis. Instead, I have given a robust explanatory account, which uses for its theoretical scaffolding some of the most important factors which have helped shape the power of the contemporary executive in broadly similar stable constitutional systems.⁴⁶

⁴⁴ As Bruce Ackerman puts it, 'Law legitimates power. Constitutionalism has played an increasingly dominant role in this process of legitimation over the past century. Its rise has profoundly reshaped modern notions of lawful authority'. Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press, 2019) 1.

⁴⁵ Adrian Vermeule and Eric Posner, *The Executive Unbound* (n 43) 5; Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, 2005) 19.

⁴⁶ Peter Cane, *Controlling Administrative Power: An Historical Comparative* (Cambridge University Press, 2016) 13.

II. THE CONSTRAINED PRIMACY MODEL OF EXECUTIVE POWER

a. Executive as Subservient Redux

Chapter I outlined how the conceptual gist of executive power in constitutional thought, at least from the 18th century onward, was the legal duty and power to ensure the ‘implementation of instructions and authority that came’ from the legislative authority. The executive branch on this conception is ‘guided by law, ‘fetter’d by system,’ and ‘manacled both by man and measures.’⁴⁷ Under this understanding, the core responsibility of the executive is closely identified with faithfully executing laws enacted by the legislature, converting the will of the law into action.⁴⁸ In a system where this dictionary definition of executive prevailed, the legislature would be the ‘centre of gravity of the governmental system’ and the executive an actor who carries out its will and instruction as expressed through statutes into effective execution.⁴⁹

This understanding of executive power connotes an element of executive subservience to the legislature.⁵⁰ Some type of principal-agent relationship is assumed, where the agent (executive) faithfully follows the principal’s (legislature) edict. For the framers of the US Constitution, for example, the concept of executive power was, ‘intrinsicly an empty vessel, awaiting instructions from an exercise of the legislative power that would give it something to execute.’⁵¹ The hand that wields the sword of state power is, on this account, theoretically directed by the legislative body and not by executive will.⁵² This is the modest conception of executive power Madison had in mind when he contrasted with some worry the ‘weight of the legislative authority’ against the ‘weakness of the executive’ and considered the former as posing the greatest risk to political stability and good government.⁵³

The flip side of this traditional conception is, of course, an exclusive grant of law-making power to the legislative branch and hostility at the idea of unilateral executive law-making,

⁴⁷ Julian Mortenson, ‘The Executive Power Clause’ (Forthcoming, 2020) 167 *University of Pennsylvania Law Review* 1, 93.

⁴⁸ Carl Schmitt, *Dictatorship: From the origin of the modern concept of sovereignty to proletarian class struggle* (Translated by Michael Hoelzl and Graham Ward, Polity Press, 2014) 102.

⁴⁹ Peter Cane, ‘Executive Primacy, Populism and Public Law’ (n 1) 548; Julian Mortenson, ‘Executive Power Clause’ (n 47) 24.

⁵⁰ Robert J. Spitzer, ‘Is the Constitutional Presidency Obsolete?’ in Charles Dunn (eds.), *The Presidency in the 21st Century* (University Press of Kentucky, 2011) 58; Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993) 7.

⁵¹ Julian Davis Mortenson, ‘The Executive Power Clause’ (n 47) 62.

⁵² Hugh Liebert, *Executive Power in Theory and Practice* (Palgrave MacMillan, 2012) 100.

⁵³ James Madison, ‘The Federalist Paper No. 51.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

dispensing, or suspending powers.⁵⁴ The constitutional traditions of Ireland, United Kingdom, and United States all share core understandings of the boundaries of executive power linked to this conception: through subordination of the executive to the rule of legislation, the executive's duty to faithfully execute the law even if it disagrees with it, and prohibitions on unilateral executive suspension or abrogation of law. The modest formal place of the executive in each system contrasts with legislative pre-eminence. In the constitutional tradition of the UK, Parliament has long been supreme, while in the United States and Ireland, the legislative branch is *primus inter partes*.⁵⁵ Elements of this conception of executive power are embedded in each system and demonstrable in judicial doctrine.⁵⁶

Dedication to legality and constitutional norms also manifests through long-standing political practice in each system. For example, despite their divergent constitutional orders and traditions, the political executive in each system binds themselves to advice tendered by its legal advisors. This embeds provision of legal advice into the heart of the policy-making process and work of the executive. Although I argued in chapter VII that their work frequently assists legitimization of the expansive authority of the contemporary executive, it also has a genuine constraining function, as legal advice potentially directs executive actors away from courses of action they might otherwise consider more politically expedient or wise.⁵⁷

Why is legal advice sought in the first place if it can have a constraining effect? It is because respect for legality is perceived as a core component of good government and political morality in the constitutional culture of each system. Political discourse frequently turns, not only on the substantive political merits of a policy, but on its legality and fidelity to constitutional norms.⁵⁸ Revelation an executive official has taken a contentious policy decision without seeking the advice of legal advisors in the first instance can invite political backlash.⁵⁹ An executive official acting, or who seeks to act, contrary to clear advice of his legal advisor would invite even more intense political controversy.⁶⁰ It would not invite such

⁵⁴ Samuel Issacharoff, 'Democracy's Deficits' (2019) 85 *University of Chicago Law Review* 485, 498.

⁵⁵ Charles Black, 'The Working Balance of the American Political Departments' (n 32) 15.

⁵⁶ See *R v Miller* [2017] UKSC 5; *Duggan v An Taoiseach* [1989] ILRM 720; *NHV v Minister for Justice & Equality* [2017] IESC 35; 343 *Youngstown Sheet & Tube Co. v Sawyer* U.S. 579 (1952).

⁵⁷ Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press, 1999) 306-307.

⁵⁸ Julian Davis Mortenson, 'Law Matters, Even to the Executive' (2014) 112 *Michigan Law Review* 1015, 1037.

⁵⁹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 57) 302.

⁶⁰ Barry K Winetrobe, 'Legal Advice and Representation for Parliament' in Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament* (Buttersworth, 1998) 99.

intensity of critique because of the esteem in which legal advisors are held, but for what their work represents – respect for the law and its boundaries. The sheer rarity of documented cases where the executive has acted contrary to legal advice, or contrary to judicial precedent, is strongly suggestive of a broad expectation of executive deference to legal advisor advice. This reflects both an acknowledgment that commitment to legality is critical for political credibility and legitimacy, and an internalisation of this commitment amongst executive officials⁶¹ as a moral requirement of how the duties of executive office are to be performed.⁶²

Similarly illuminating for understanding attitudes to executive power is the hostility in each system to extralegal measures taken for the public good, even during emergency periods.⁶³ With very few notable exceptions, actors in each regime have been dedicated to subsuming even the most open-ended and vague emergency powers under the rubric of statute or constitutional sanction.⁶⁴ Again, this is due to both a commitment to the ideal that the executive must act in accordance with legal sanction (seemingly no matter how vague or rhetorical) and to the idea commitment to legality is closely link to political legitimacy.⁶⁵

A conceptual account of executive power that omits the importance of law and legal constraint, will thus be substantially incomplete.⁶⁶ The ideal of the political executive as a law-bound faithful executor cannot be removed from conceptual analysis of the executive.⁶⁷ But its presentation as subservient to law clearly cannot operate as its sole conceptual bases if it is to remain rooted in reality. Indeed, while its executing function may have previously been its dominant one, in each system, it has never been its *only* one.

b. Executive as Dominant Redux

Considered cumulatively, the institutional capacity, political responsibilities, and scale of the executive branch have transformed utterly in each system. The historical conception is a mere instrument for implementing legislative dictates, but the contemporary executive would be considered as completely failing in its responsibility if it contented itself to acting as an errand boy that merely executes legislative directives.⁶⁸ The executive is, in fact, the

⁶¹ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 57) 328.

⁶² Daphna Renan, 'Presidential Norms and Article II' (2018) 131 *Harvard Law Review* 2187, 2199.

⁶³ Carl Schmitt, *Dictatorship* (n 48) 86.

⁶⁴ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009) 253.

⁶⁵ *Ibid.*

⁶⁶ Aziz Huq, 'Binding the Executive (by Law or by Politics)' (2012) 79 *University of Chicago Law Review* 777, 799.

⁶⁷ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 *Canadian Journal of Law & Jurisprudence* 321, 334.

⁶⁸ See Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993).

locus of political hope and expectation. The formal powers of the executive are clearly inadequate for the tasks it is now charged with, given they are expected to deliver the polity from any conceivable threat, but lack power over the purse or law-making.⁶⁹ But its formal powers, as executor of the laws, is only a sliver of its current role.

Aside from its formal constitutional powers, the executive now invariably determines the policies underpinning most of the law which binds citizens and drafts the bulk of statutes and regulations giving them effect. It also effectively makes its own binding law through use of copious delegated statutory power addressing every conceivable policy area. It also sits atop, and exercises considerable direction over, a powerful administrative apparatus staffed by civil servants and technocrats with regulatory reach over swathes of social and economic life. Its predominance over foreign affairs ensures it acts as the key mediator between the national and international political sphere, providing it even more leverage to shape domestic policy. Its predominance over policy also encompasses frequent ability to act unilaterally, whether through broad statutory powers or constitutional authority. The real, practical, informal executive is therefore clearly far more powerful than the ‘supposed, theoretical, formal executive’⁷⁰ of traditional conceptions. To meet expectations placed on it the executive became, to invert Madison’s famous warning about the legislative branch, the vortex which draws in public power in staggering amounts.⁷¹

C. Constrained Primacy Model of Executive Power

We are therefore confronted with an institution of apparent contradictions. Both political dominance and formal legal subservience are hard-wired elements of the conceptual nature of the contemporary executive. As a constitutional formality, principles governing executive power often emphasise its formal subordination to law and the legislature.⁷² Through its traditional role as law executor, it strives to faithfully implement legislative will. It is certainly the case that none of the polities I consider express anywhere near full commitment in practice, to the classic constitutionalist concept of executive-as-faithful executioner.⁷³ But, significantly, nor have they rejected the principle the executive is nominally subordinate to law, with an overriding duty to be its faithful implementer. Political actors and citizens in

⁶⁹ William Howell & David Brent, *Thinking About the Presidency: The Primacy of Power* (n 34).

⁷⁰ Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993) 4.

⁷¹ Martin Flaherty, ‘The Most Dangerous Branch’ (1996) 105 *Yale Law Journal* 1725, 1817; Clinton Rossiter, *The American Presidency* (Harvest Press, 1960) 83.

⁷² See *R v Miller* [2017] UKSC 5; *Duggan v An Taoiseach* [1989] ILRM 720; *NHV v Minister for Justice & Equality* [2017] IESC 35; 343 *Youngstown Sheet & Tube Co. v Sawyer* U.S. 579 (1952).

⁷³ *Ibid.*

these systems also generally have a normative preference for legality and constitutionality, which manifests in not pursuing policy preferences over the legality of the methods used to obtain them.⁷⁴ These core commitments remain deeply embedded in political morality and are manifested in, for example, judicial doctrine and the centrality of legal advice to policy formation.⁷⁵

The executive being the locus of public power has thus not jettisoned the ongoing importance of legality to its political legitimacy, and the enduring hostility of contemporary constitutional democracies to unconstrained public power. Perceptions of genuine commitment to legality remain highly important to constitutional culture, and critical to maintaining political credibility. Legal principles concerning the executive's subordination to law remain core tenets of each constitutional order. The political system in each system might expect much of their executives, but their constitutional culture remains deeply ambivalent toward concentrated executive authority, and hostile to executive authority unbound by law.⁷⁶ Empirically, it would be a mistake to underestimate the role of legalism in each system, as law clearly serves as a 'forceful player' and perceptions of genuine commitment to it are crucial for executive legitimacy.⁷⁷ Commitment to legality also appears internalized amongst executive officials⁷⁸ as a moral requirement of how the duties of their office are to be performed.⁷⁹

There are therefore certain things the political executive simply cannot do unilaterally, absent plausible statutory or constitutional foundations. For certain kinds of authority, it requires assistance from the legislature.⁸⁰ The notion of executive prerogative to act contrary or beyond law for the public good is regarded as anathema, as is the notion the executive can legislate by decree and without legislative concurrence, or that the executive could disregard or ignore a judicial ruling.⁸¹ Thin, even if sometimes totemic, legal constraints imposed by

⁷⁴ Aziz Huq, 'Binding the Executive (by Law or by Politics)' (n 66) 801.

⁷⁵ David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan' (2020) 18 *International Journal of Constitutional Law* 51; Julian Davis Mortenson, 'Law Matters, Even to the Executive' (n 58), 1017; Curtis A. Bradley and Trevor W. Morrison, 'Presidential Power, Historical Practice, And Legal Constraint' *Columbia Law Review* (2013) 113 1097; J.L.J. Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984).

⁷⁶ William Howell and David Brent, *Thinking About the Presidency: The Primacy of Power* (n 34).

⁷⁷ Defined by Shklar as 'the ethical attitude that holds moral conduct to be a matter of rule-following, and moral relationships to consist of duties and rights determined by rules'. Judith Shklar, *Legalism* (Harvard University Press, 1964) 1.

⁷⁸ Terence Daintith and Alan Page, *The Executive in the Constitution* (n 57) 328.

⁷⁹ Daphna Renan, 'Presidential Norms and Article II' (2018) 131 *Harvard Law Review* 2187, 2199.

⁸⁰ Aziz Huq, 'Binding the Executive (by Law or by Politics)' (n 66) 792.

⁸¹ William Howell and David Brent, *Thinking About the Presidency: The Primacy of Power* (n 76) 139.

statutes and outer constitutional limits are of enduring importance to the entire work of the executive branch.⁸² In addition, the political executive in these systems is subject to democratic control, through electoral systems regulated by both Constitution and statute, which facilitate elections characterizable as free-and-fair. Every aspect of the work of the executive is thus influenced, to some extent, by a political eco-system laced with legal and democratic controls expressed through statutory or constitutional rules.⁸³ For citizens, courts, and executive officials, core constitutional principles like these continue to matter deeply to their ‘conceptions of the nature’ of executive office and the ‘norms that create obligations and provide motivations for action’.⁸⁴

Yet, in its contemporary function as predominant decision-maker in the administrative and political sphere,⁸⁵ the executive is charged with and expected to overcome complex social, economic, and political challenges facing the polity. It is, simply put, looked to as the primary custodian of the common good.⁸⁶ This responsibility presses it to accrue a measure of institutional power often only thinly constrained by legal norms, and with limited proactive input by legislatures over the direction of public policy. As primary custodian of securing the common good, it wields vast delegated authority subject to often modest legislative control or oversight and in terms of legal constraint, some constitutional law and administrative rules arguably offer executives avenues of action that present effective façades of being directed by law, in that they offer executives relative freedom to act with largely unfettered discretion.⁸⁷

Consider, for example, legislative willingness to bestow capacious and extensive regulatory authority, and judicial deference to administrative action. These are paradigmatic examples of how the executive is not tightly bound by law, as both the legislature and judiciary only act to cabin the outer bounds of executive action. Legal constraints on its administrative and regulatory authority imposed by legislatures and courts are thus more akin to a loose-fitting

⁸² As Huq puts it in the context of the US, ‘no political actor openly claims the right to pick and choose among constitutional provisions.’ Aziz Huq, ‘Binding the Executive (by Law or by Politics)’ (n 66) 807.

⁸³ Aziz Huq and Tom Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *University of Chicago Law Review* (2018) 78, 89-90; Terry Moe and Scott A. Wilson, ‘Presidents and the Politics of Structure’ (n 27) 21.

⁸⁴ Thomas Crocker and Michael Hodges, ‘Constitutions, Rule Following, and the Crisis of Constraint’ (2018) 24 *Legal Theory* 3, 15.

⁸⁵ Margit Cohn ‘Tension and Legality: Towards a Theory of the Executive Branch’ (n 67).

⁸⁶ Thomas Poole, ‘The Executive in Public Law’ (n 13) 188-208.

⁸⁷ Margit Cohn ‘Tension and Legality: Towards a Theory of the Executive Branch’ (n 85) 322; Adrian Vermuele, ‘Our Schmittian Administrative Law’ 122 *Harvard Law Review* (2009) 1095 -1149.

garment than a straightjacket.⁸⁸ Not tightly binding, yet ever present and unable to be discarded entirely, as the mantle of legality is crucial to maintaining political credibility and legitimacy.⁸⁹ The executive's predominant role in domestic and foreign policy-formation also underscores the extent to which legislatures, while highly influential actors, remain secondary ones. Extraconstitutional mechanisms like political parties also helped to change these shifts in institutional allocations of power, by acting as a buckle the legislature and executive with a belt of a similar political vision. Even ostensible internal constraints on the executive, such as executive lawyers, can also act to empower it, by bestowing critical legalistic credibility on controversial exercises of executive authority.

The contemporary executive must therefore operate both as a faithful executor of law committed to legality and constitutional commitments, and as 'CEO, entrusted with steering the state in sickness and health'.⁹⁰ As the capacity of the executive has waxed, the efficacy of constraints imposed by law have waned, but not come undone. It is at once subservient and predominant - law bound, but in some respects its political predominance is beyond legal control in any substantial, or tightly binding, sense. Core constitutional limits and statutes constrain the outer bounds of executive action, as do basic principles of administrative law. The executive cannot merely be considered a faithful executioner, but neither is it a kind of Schmittian sovereign figure who can openly suspend legal constraints if they impede its political preferences or vision.⁹¹ It is something uncomfortably in-between. The executive is predominant but shares public power with other actors and is not free to rule by decree.⁹²

How to reconcile these dualities? What does executive predominance tell us about the conceptual nature and place of the modern executive in these kinds of constitutional systems? On the one hand stand the common and enduring historical inheritance of each system, legal principles emphasizing restraining executive power under law. On the other, the developments I have traced over the preceding chapters which have empowered the

⁸⁸ Margit Cohn 'Tension and Legality: Towards a Theory of the Executive Branch' (n 67) 322. For an argument this is generally a good way to structure legal constraints on executive power see Adrian Vermeule, 'The Publius Paradox' (2019) 82 *Modern Law Review* 1, 14-16.

⁸⁹ Thomas Crocker and Michael Hodges, 'Constitutions, Rule Following, and the Crisis of Constraint' (n 84) 26. The authors argue 'commitments to background principles make possible a normative order in which particular practices have meaning and through which citizens and courts can evaluate not only the legality, but also the propriety of actions and policies.'

⁹⁰ Margit Cohn 'Tension and Legality: Towards a Theory of the Executive Branch' (n 67) 345.

⁹¹ See Carl Schmitt, *Political Theology: Four Chapters on the Concept of the Political* (Translation by George Schwab, University of Chicago Press, 2005).

⁹² William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (n 24); Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (Free Press, 1990) 29.

political executive immensely. A persuasive account of the position of the contemporary executive in these systems, I propose, must be one that fully acknowledges and grapples with this conceptual tension. It must be a conceptual model of executive power which ties together its conflicting trade-offs and reconciliations between principle and pragmatism, law and practice.⁹³ Any conception of the executive branch in these systems, and similar ones, must unite them in their complexity. This ambiguous and multifaceted model of executive power I dub the '*Constrained Primacy Model of Executive Power*.'⁹⁴ The constrained primacy model of executive power means a political executive which is:

- (i) highly predominant in the formation and execution of domestic and foreign policy;
- (ii) vested with very capacious administrative, regulatory, and security powers;
- (iii) committed to the practice of acting within the bounds of legality; accepting of statutory & constitutional limitations and democratic constraints imposed by law;⁹⁵
- (iv) distinct from a modest concept of the executive as a faithful discharger of legislative will, acting as a secondary actor to a politically predominant legislature;
- (v) also distinct from a conception of executive power which is autocratic and lacking genuine normative commitment to legality and/or accepting of constitutional limits and democratic control;

⁹³ Thomas Poole, 'The Executive in Public Law' (n 13) 188-208.

⁹⁴ This model enjoys commonalities with recent accounts offered by several public law scholars. It bears most similarity to Professor Margit Cohn's internal tension model, which she argues means that the 'the executive, entrusted with the role of management of the polity under law, operates as both an "executor" of law, under its commitment to the rule of law and subject to the political ideal of separation of powers, and as an "executive," or CEO, entrusted with steering the state in sickness and in health.' Margit Cohn 'Tension and Legality' (n 67) *Canadian Journal of Law & Jurisprudence* 321, 345. It is also compatible with Chang-Yi Huang's description of executive primacy as 'the leading and dominant role of the executive branch, especially the chief executives, either presidents or prime ministers, to control political agenda on policy issues' Chang-Yi Huang 'Unenumerated Power and the Rise of Executive Primacy' (2019) 28 *Washington International Law Journal* 395, 400.

⁹⁵ Tarunabh Khaitan, 'Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism' (n 2) 349.

- (vi) *prima facie* capable of encompassing the political executive in liberal and illiberal constitutional democracies, both of which have grown in power over time.⁹⁶

This way of understanding the executive branch provides a descriptively accurate account of its current status in constitutional systems like Ireland, the United Kingdom and United States. It is more accurate than accounts of the executive as absolutist, authoritarian, or unbound from law. Or formalist liberal constitutionalist accounts of a genuinely subordinate, modest, faithful executioner of law on the other. The constrained primacy model instead captures the complexity and extent of the executive's current role and status in these constitutional democracies, avoiding the Scylla of myopic formalism and Charybdis of alarmist hyperbole. The former masks the central position of the executive in the constitution, while the latter gives inadequate weight to how both genuine and perceived commitment to legality and constitutional limits remain critical to political legitimacy and morality.⁹⁷ Even if executive actors do not feel morally constrained by legal limitations, and intensely resent them, cultivating the perception they are genuinely constrained remains critical.

It could be argued the contemporary political executive is not really constrained by legality, as any constraint is highly contingent. It is highly contingent as there will always be a sovereign authority retaining a latent capacity to act extralegally and dispense with law when it deems necessary. For Schmitt, the sovereign is he who decides on the exception.⁹⁸ That is, the actor in a political community with capacity to suspend otherwise applicable legal norms and decide when they should reapply, or even capacity to decide if there should be a new legal order entirely based on a discretionary political judgment of who the friends or enemies of the political community are. Schmitt associated the institutional *capacity* to decide on exceptions to the normal functioning of a legal system with the executive branch, given its typical link with emergency and security powers. For Schmitt, these kinds of decisions are of pure political judgment not reducible to legal norms. So, Schmitt might argue the executive branch is constrained only in an illusory sense, as the legal system applies largely

⁹⁶ Mark Graber, 'What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy' in Graber, Levinson, Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 682-683.

⁹⁷ Thomas Poole, 'The Executive in Public Law' (n 13).

⁹⁸ Carl Schmitt, *Political Theology* (n 91) 1.

at its say-so. Law binds the executive to the extent it consents to being bound, whereas the executive enjoys a Petrine like authority to bind and loose the law.⁹⁹

A full response would require deep consideration of points outside the scope of this thesis, and here I confine myself to a brief critical comment. I accept as plausible Schmitt's theoretical premise that any given legal system may have a latent actor with the capacity to suspend the legal order given the right context, usually of intense political instability. However, I think this premise can exist alongside the fact that the political executive in each system has genuinely been, bar some limited instances, an institution bounded by the claims of legality. The link between political legitimacy and legality has typically been very close, even in times of immense strain like wartime or financial crisis. In contrast, claims to extralegal authority are very rare. This is not to say that the latent potential for extralegal power can ever be removed from a legal system. But it is to say that their invocation has been so rare that it is plausible to conceptualize the political executive as an institution which has, up to this point, been committed to acting – even if sometimes only for political optics - within the bounds of legality. Given the right political circumstances this commitment might change, but it does not change the typical situation which has long characterized these constitutional systems, crisis or no.

D. Theoretical Study of Executive in Constitutional Theory

The *constrained executive primacy* model provides a conceptual account of the executive branch which is accurate and not distorted, built with detailed case-studies of contemporary constitutional practice in three constitutional systems as its foundations.¹⁰⁰ It also provides a sound basis for critical evaluation of the place of the executive branch in these systems, provides a useful analytical tool for comparative constitutional theory, facilitating the comparing and contrasting of different conceptual accounts of executive authority and their merits and drawbacks and finally, it bolsters scholarship justifying study of the executive branch from a theoretical perspective.

i. Conceptual Accuracy

⁹⁹ Ibid.

¹⁰⁰ Concepts provide the 'mental architecture by which we understand the world and are ubiquitous in social science as well law. Conceptualization involves the process of formulating a mental construct at a particular level of abstraction'. Tom Ginsburg and Nicholas Stephanopoulos, 'The Concepts of Law' (2017) 84 University of Chicago Law Review 147, 150.

One aim of constitutional theory is to identify and reflect on the ‘character of actual existing constitutional arrangements’ and offer explanations of the character of the practice.¹⁰¹ Constitutional theory which proceeds with inaccurate concepts of institutions and their ‘characteristics, behaviour and patterns’ of practices only misleads and obfuscates how political power is actually allocated and controlled by constitutional arrangements.¹⁰² If it is inaccurate then its use to constitutional theory, whether for comparative, theoretical, normative purposes, is compromised.

Other possible conceptual accounts inaccurate

I suggest two of the most frequent ways the executive branch has been conceptualised in constitutional theory are indeed compromised, by failure to grasp the core features of the contemporary executive in these systems. In contrast, the constrained primacy model provides a more accurate and contextual conceptual account of the political executive and its role and responsibilities in these constitutional democracies.

Historically grounded conceptions of the executive as faithful executioner of the law and policies created by powerful legislative assemblies, are deeply embedded in constitutional thinking.¹⁰³ A picture where the political executive has the duty and power to follow legislative instruction and ‘transform [legislative] intentions into reality’¹⁰⁴ through the use of coercive state power.¹⁰⁵ But this conception has long offered a deeply unsatisfactory account of the political executive.¹⁰⁶ It overlooks important facets of the contemporary executive branch, especially by omitting the immense range of its by now long-established roles and responsibilities. Indeed, there are probably no current constitutional systems where the legislative branch is genuinely predominant over a modest subordinate executive. Relying on these accounts to understand the executive only serves to obfuscate and muddle our thinking about what the executive branch does in practice, risking a very obvious divergence between doctrine or rhetoric emphasising the centrality of the legislature, and the actual reality of how institutions with separated powers interact.¹⁰⁷ An accurate account of its contemporary position would not begin from the premise the role of the executive is to modestly

¹⁰¹ See also Graham Gee and Grégoire Webber, ‘Rationalism in Public Law’ (2013) 76 *Modern Law Review* 708, 727; Martin Loughlin, ‘Constitutional Theory – a 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 183, 186.

¹⁰² See Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009).

¹⁰³ Margit Cohn, ‘Tension and Legality: Towards a Theory of the Executive Branch’ (n 67).

¹⁰⁴ Julian Davis Mortenson, ‘Article II Vests the Executive Power, Not the Royal Prerogative’ (2019) 119 *Columbia Law Review* 1, 64.

¹⁰⁵ N.W. Barber, *Principles of Constitutionalism* (Oxford University Press, 2018) 65.

¹⁰⁶ Eoin Carolan, *The New Separation of Powers* (n 102).

¹⁰⁷ *Ibid.*

implement laws. Constitutional ‘practice has outrun theory’, and our 18th century conceptions of executive authority, modest and subservient to the legislature, no longer can be said to ‘function as intended.’¹⁰⁸ It would be more accurate to begin from the premise the executive is the leading branch of state, responsible for directing it through crafting policies and laws, and with primary responsibility for securing the common good, subject to checking and oversight from the legislature and courts and requiring assent of the former to make legally binding statutes.

Equally unsatisfactory are conceptual accounts which argue the executive branch in these systems is more or less unbound from law, constrained only by political forces or public opinion.¹⁰⁹ This kind of conceptual account has three main problems. It overstates the dominance of the executive branch and caricatures the institutional power of legislatures and courts, eliding the line between predominance and supremacy. Executive predominance need not mean a supine legislature or court. The predominant executive can, and does, exist alongside institutions with their own robust power. It also gives inadequate weight to how perceived commitment to legality and constitutional limits remain critical to political legitimacy and morality.¹¹⁰ Finally, overlooking the importance of legality also incidentally omits how the political executive’s relationship to democratic control and public opinion through an electoral system, is inevitably heavily regulated via constitutional and statutory provision.

Both accounts mask the true allocation of power common in these constitutional systems and the real nature of their constitutional arrangements. Both lack real descriptive power, incapable of accurately depicting the institutional reality of the contemporary state, by downplaying or overplaying the dominance of the executive. It is better to start any study of the executive branch, whether comparative, theoretical, or normative, with a clear grasp of its conceptual facets, and not relying on out-dated or inaccurate concepts.

Different possible conceptual accounts of executive power

¹⁰⁸ Andrea Scoseria Katz, *The President in His Labyrinth: Checks and Balances in the New Pan-American Presidentialism* (Unpublished PhD dissertation, Yale University Department of Political Science, May 2016) 13. On file with author.

¹⁰⁹ See Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press 2014) 412; Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 43); Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press, 2010).

¹¹⁰ Thomas Poole, ‘The Executive in Public Law’ (n 13) 188-208.

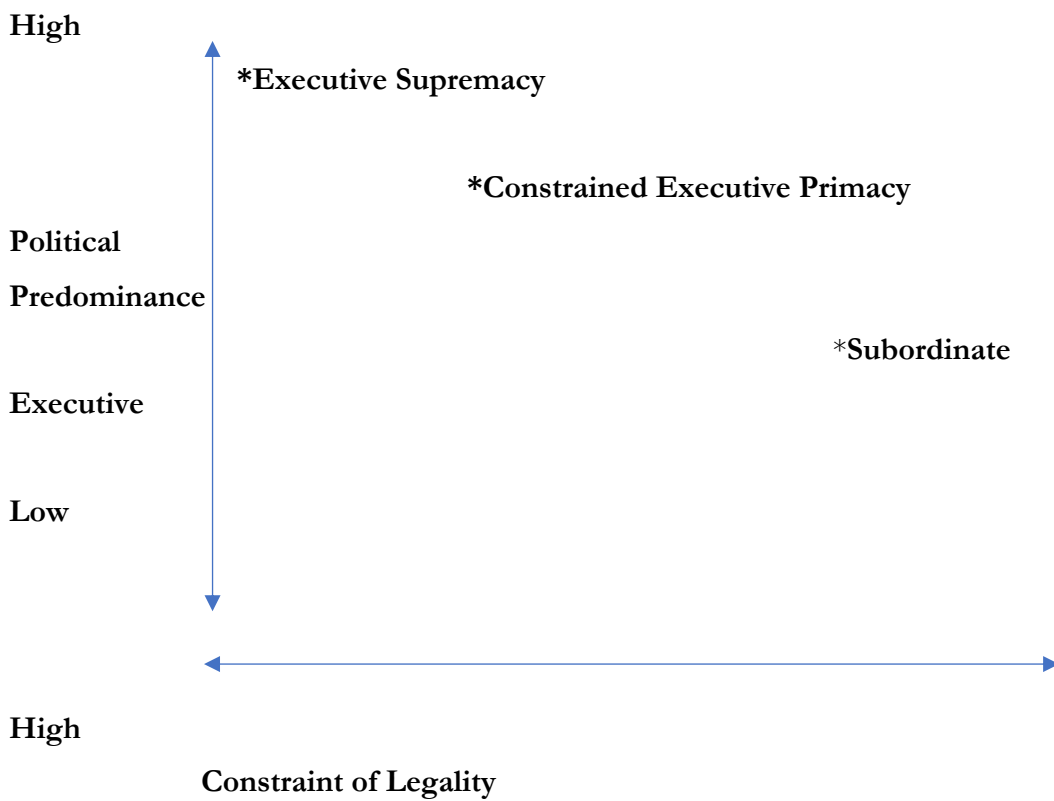
The constrained primacy model contributes to the theoretical constitutional study of the executive by moving past these inaccurate concepts, by identifying the actually existing core facets of the contemporary executive in these systems. As the constrained primacy model accurately captures the main features of executive power in these constitutional democracies, it offers a conceptual typology to engage and discuss the political executive in a more accurate and useful way. To better see how this model fits alongside other accounts in constitutional theory and political thought, I provide a simple sketch of the different possible conceptual accounts of executive power, and their constitutive features in the tables below. This typology differentiates the overarching institution of the political executive into more analytically rigorous conceptual categories and outlines their constitutive features accordingly.

Figure 1: Conceptual Accounts of Executive Power

Types of Political executive	Subordinate Executive	Constrained Executive Primacy	Executive Supremacy
Primary political actor?	<ul style="list-style-type: none"> • Legislative branch primary actor in formulating policy. Role largely restricted to executing statutes. 	<ul style="list-style-type: none"> • Executive highly predominant but not unchecked in the formation and execution of domestic and foreign policy. 	<ul style="list-style-type: none"> • Executive essentially unchecked in the formation and execution of domestic and foreign policy by other institutional actors.
Level of legal authority vested	<ul style="list-style-type: none"> • Executive not vested with significant administrative, regulatory, and security statutory discretion. Limited unilateral policy-making ability. 	<ul style="list-style-type: none"> • Vested with very capacious administrative, regulatory, and security statutory powers. 	<ul style="list-style-type: none"> • Vested with very capacious administrative, regulatory, and security statutory powers.

Constraints on Executive Authority	<ul style="list-style-type: none"> Tightly constrained by the bounds of legality; accepting of statutory & constitutional limitations on policy preferences. 	<ul style="list-style-type: none"> Modest to moderate constraint by the bounds of legality; accepting of statutory & constitutional limitations on policy preferences. 	<ul style="list-style-type: none"> Weak to no constraint to acting within the bounds of legality; or statutory & constitutional limitations on policy preferences.
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Figure 2 - Power and Constraint in different types of Political Executive



Models of executive power like that promoted in 18th century constitutional theory are better described as a subordinated executive. While this conception looms large in formal accounts of executive power contained in foundational statutes and constitutional text, it is at this point largely a historical artefact.¹¹¹ But this model does serve as a useful tool for contrasting how powerful the contemporary executive is, and how its features have evolved from this

¹¹¹ Eric A. Posner and Adrian Vermeule, 'Tyrannophobia' in (ed.), Tom Ginsburg, *Comparative Constitutional Design* (Cambridge University Press, 2012) 317-346.

classic historical account. It shows the stark gap between the ideal of the modest executive articulated in some constitutional thought and contemporary political reality of executive predominance.

Authoritarian regimes are more likely to embrace a model of executive supremacy than constrained executive primacy. As they are much more likely to be shorn of constraints such as commitment to legality, constitutional limits, or democratic controls imposed by law.¹¹² At its most extreme, in a system characterized by executive supremacy all political decisions can potentially be made by a 'single decision-maker, whose decisions are both formally and practically unregulated by law.'¹¹³ Not subject to substantial legal, constitutional, or democratic control.¹¹⁴ Absolute monarchies, Marxist-Leninist party dictatorship, Fascistic regimes based on leadership worship, and military juntas are paradigmatic examples.¹¹⁵ Under a system of executive supremacy, ostensible legal and constitutional constraints may be ignored if convenient, or the law applied in a partial or partisan manner.¹¹⁶ A system characterized by executive supremacy may be able to accommodate weak commitment to legality, constitutional limits, or democratic controls imposed by law.¹¹⁷ For example, cynical commitment for strategic reasons: to ease coordination within the authoritarian ruling group, or to provide credibility signals to outsider economic or political observers.¹¹⁸ Democratic controls may also be weakly present, but likely that laws formally regulating elections can be undermined through corruption, vote rigging, voter suppression, or deliberate undercutting or intimidation of political competition.¹¹⁹ In other words, an executive supremacy model of executive power would have, at best, weak legal, constitutional, or democratic constraints, and will probably adhere to them for so long as doing so serves the executive's interests.¹²⁰

¹¹² Gabor Attila Toth, 'Constitutional Markers of Authoritarianism' (2018) 11 *Hague Journal on the Rule of Law* 37, 48; Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391-461; Mark Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in (eds.), Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014) 36-48; Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 *Journal of Democracy* 112, 119.

¹¹³ N.W. Barber, *Principles of Constitutionalism* (n 105) 76-77.

¹¹⁴ Eric A. Posner and Adrian Vermeule, 'Tyrannophobia' (n 111) 317-346.

¹¹⁵ Gabor Attila Toth, 'Constitutional Markers of Authoritarianism' (n 112) 48.

¹¹⁶ Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019) 16.

¹¹⁷ Mark Tushnet, 'Authoritarian Constitutionalism' (n 112) 448.

¹¹⁸ *Ibid.*

¹¹⁹ Tarunabh Khaitan, 'Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism' 17 *International Journal of Constitutional Law* (2019) 342.

¹²⁰ Wojciech Sadurski, *Poland's Constitutional Breakdown* (n 116) 16; Mark Tushnet, 'Authoritarian Constitutionalism' (n 112) 431; Tamir Mustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics', in *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2012) 4.

From the perspective of capturing the nature of the political executive in the systems I consider, the constrained primacy model accounts for their dual nature in a way these other two conceptual accounts do not. The account reconciles the fact these systems grant the executive immense discretionary power but subsume it within the binds of genuine legal constraint, even if it is often thin. This model highlights the two faces of contemporary executive power which emerge continuously throughout this thesis: politically predominant and often beyond tight control and direction by legal rules articulated by legislatures and courts, but operating in a system where perceived subservience to law remains critical to moral and political legitimacy.¹²¹ While copious power has flowed to the executive in the pursuit of matching political expectations placed on the state, each constitutional order has largely tried to subsume this authority under plausible legal authorisation.¹²² To sustain coercive executive power under constitutional or statutory provision even if this basis only provides thin constraint on executive discretion.¹²³ The executive has very rarely claimed authority to act directly contrary to the Constitution or statute, or set generally applicable rules of conduct binding on individuals absent legislative consent.¹²⁴

A legal actor like the executive might relatively easily be able to get around these kinds of limitations. Through, for example, using mechanisms like political parties to gain broad delegations of administrative and regulatory power from the legislature. But even seeking to overcome these limiting norms in this fashion, means they do so by first elaborately honouring them, by bowing to the legislatures formal predominance and not circumventing it.¹²⁵ This underscores their enduring significance to constitutional culture and political legitimacy,¹²⁶ as the spectre of an executive dispensing with statutes or trying to rule by executive decree is anathema to the constitutional culture of each system. The stark fact

¹²¹ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (n 67).

¹²² Julian Mortenson, 'Executive Power and the Discipline of History' (2011) 78 *University of Chicago Law Review* 377, 400-403.

¹²³ This certainly does not mean that the political executive has followed what legal practitioners or judges would view as the best view of the law, or even a reasonable view. In the U.S. in particular, Presidents have sometimes adopted positions starkly opposed to the Federal Courts understanding of what the Constitution demands. However, their interpretations invariably remain fixed with what they consider within the plausible boundaries of statute and the Constitution. Often, their view triumphs over the long-term, the paradigmatic case being the stand-off between President Roosevelt and the New-Deal era Supreme Court. However, there have been genuine assertions of extra-legal power in each system. In the Irish context, during the Civil War period. In the U.S. context, Lincoln's decision to suspend habeas corpus can be seen in this vein, as can FDR's ominous warning to the Supreme Court in the *Quirin* case that he would not listen to any judgment which did not uphold the legality of trying the Nazi saboteurs by military commission. But, in the overwhelming majority of cases, the executive will always attempt to navigate its policies with the bounds of statute and constitutional constraint.

¹²⁴ Conor Casey, 'Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40 *Dublin University Law Journal* 1, 24-25.

¹²⁵ Jenny S. Martinez, 'Horizontal Structuring' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 556.

¹²⁶ Stanley Fish, 'The Law Wishes to Have a Formal Existence', in Stanley Fish, *There's No Such Thing as Free Speech: and It's a good thing too* (Oxford University Press, 1993) 163.

remains such norms cannot be dispensed with outright in these systems without severely risking political legitimacy.¹²⁷ As each system has embraced elements of the liberal constitutional tradition which fears, perhaps above all, arbitrary state power it is not surprising ‘extralegal...and unauthorized acts’ are considered troubling and politically illegitimate,¹²⁸ even if done in the name of preserving public safety or welfare.¹²⁹

The sole *raison d’être* of the constitutional order in each system is not the precautionary limitation and division of state power,¹³⁰ but this remains an important facet of each order.¹³¹ A facet rooted in a liberal constitutional tradition which has staying power even in the face of a precipitous institutional growth in executive capacity.¹³² The executive’s tense duality between formal weakness and practical strength underscores not only the dominant political power of the executive in these constitutional systems, but the enduring importance of perceptions of legality to political legitimacy and constitutional culture. By tying these features together, formal constitutional weakness and practical political strength, it therefore accurately captures the nature of executive power in Ireland, the UK and U.S. better than other conceptual accounts.

Constrained primacy model good basis for theoretical study of executive

If the experience of these systems is reflective of other polities, it may suggest a long-term trajectory across a wide range of political systems. One in favour of the diffusion of power to the political executive due to similar pressures. It may suggest that, whatever formal constitutional provisions might say about it, executive predominance is a deeply embedded and perhaps inevitable fixture of constitutional government. If the model is indeed broadly applicable, then the constrained executive primacy account, and its constitutive features, might then offer an analytical tool to explore the conceptual nature of executive power in constitutionalism more generally. It might highlight that in contemporary constitutional systems the executive will invariably be the predominant actor, due to a common need to reconcile public power with political expectation. But, in comparison to forms of non-constitutional government like deeply authoritarian regimes, it will also be an actor genuinely

¹²⁷ For example, Professor Monaghan’s observation that the argument the executive can dispense with or act contrary to statute is considered so beyond the pale it is rarely if ever advanced in the U.S. system are equally applicable to Ireland and the U.K. See Henry P. Monaghan, ‘The Protective Power of the Presidency’ (1993) 29 *Columbia Law Review* 1, 29.

¹²⁸ Carl Schmitt, *Dictatorship* (n 48) 86.

¹²⁹ Judith Shklar, ‘The Liberalism of Fear’ in Nancy L. Rosenblum (ed.), *Liberalism and Moral Life* (Harvard University Press, 1989) 30.

¹³⁰ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (n 64) 7.

¹³¹ Carl Schmitt, *Dictatorship* (n 48) 101.

¹³² Clement Fatovic, *Outside the Law: Emergency and Executive Power* (n 64) 8.

bound and constrained by statutory and constitutional norms. This makes it a useful candidate to replace the outmoded concept of executive as executioner prominent in constitutional theory.

Constrained Primacy model offers insights into attitudes toward executive power

The model also has much to tell us about the disposition of constitutional systems toward executive power in these, and similar systems. As I note throughout this thesis, the diffusion of power toward the executive stems from a recognition of structural necessity. That promoting the common good by achieving security, stability, redistribution and promoting welfare, can only be secured with a robust executive given broad and deep discretion. The executive is now responsible for articulating policy solutions to every conceivable political vicissitude, for leading the state and guiding it through the difficulties besetting all political communities. To do whatever they can, accrue whatever power they must, to deal with never-ending problems of political contingency. But the enduring symbolic and rhetorical importance of the executive's formal modest status as faithful executioner, suggests a lingering ambivalence about executive power, an unease about public power concentrated in the hands of the few and not always closely tied by law. Persistent unease about executive predominance is perhaps not surprising in systems where the political origins of contemporary constitutionalism, and tying the executive to law, lay in fierce battles over the scope of monarchical prerogative. After all, an essential quality associated with contemporary constitutionalism is 'legal limitation on government', with its opposite being 'government...of will instead of law.'¹³³ A predominant executive vested with broad and deep discretionary power raises the uncomfortable spectre of monarchy and rule by will - of power untied from law.

The constrained primacy model thus indirectly tells us much about the ever-awkward place of the executive in constitutional government. The invariable tendency of political communities like the ones I consider to empower the executive to get things done, while maintaining ambivalence and anxiety about this empowerment.¹³⁴ These systems have made the executive the primary constitutional actor, not through executive usurpation, but through

¹³³ N.W. Barber, *The Principles of Constitutionalism* (n 105) 7; Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, 2008) 17.

¹³⁴ The tendency of constitutional systems toward executive predominance no doubt spans the Global North and South. See David Bilchitz and David Landau, *The Evolution of the Separation of Powers: Between the Global North and Global South* (Edward Elgar, 2018) 4.

cooperation across all three branches over sustained periods of time.¹³⁵ But a great deal of constitutional thought appears to resent the fact this is so. Such resentment likely comes from deep attachment to a particular ideal of how constitutional government ought to work, one operating with a predominant legislative assembly deliberating and making laws for the common good, which are then faithfully enforced by a law-bound executive. Typically, in this vision the hand that wields the sword of state power is directed by the legislative body appointed by the people, not by executive will. To paraphrase Schmitt, liberal constitutionalism permits the executive to remain on the throne in the sense that it remains the embodiment of the state's use of force – the hand wielding the sword.¹³⁶ But this is as long as its own will and ability to make decisions is 'paralyzed' and controlled by the legislature and law.¹³⁷ While each system's move to the constrained primacy model of executive power suggests such an ideal is never practicable for long as a matter of actual politics,¹³⁸ it also highlights it has had an enduring half-life in constitutional thought and the imagination of constitutional actors.

ii. Informs Contemporary Political Debate on Executive Predominance

Second, my conceptual account is useful for informing political or normative debate on the appropriate place of the executive branch. An accurate conceptual account of the executive is a necessary precondition to this kind of evaluation. Understanding the dualities underpinning the executive branch, its formal legal subservience and informal political dominance, is necessary before we can form an opinion on whether the executive branch should be regarded as too powerful, or perhaps too constrained.

An accurate conceptual account allows us clearer insight into the reasons and motivations of the political communities who cemented the executive's current position - an attempt to promote the common good through the reconciliation of vesting it with immense power but imposing genuine legal constraints. This account, and its tension between legal subservience and political dominance, echoes one of the most enduring tensions of constitutionalism: between the need to sufficiently empower the state to co-ordinate human endeavour in the interests of the common good, and ensuring such capacity and power will not be abused.¹³⁹ An enfeebled executive could leave the polity hapless against the challenges of governing in

¹³⁵ Adrian Vermuele, *Laws Abnegation* (n 8).

¹³⁶ Carl Schmitt, *Political Theology* (n 91) 59.

¹³⁷ *Ibid.*

¹³⁸ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (n 133) 80.

¹³⁹ *Ibid.*

a highly complex societies. Less able to secure domestic order, social justice, and project national interests at the international level. But of course, a powerful executive power is also a more efficient tool for evil purposes, as it faces less veto-points in having its bad preferences changed into public policy. It is inevitably a double-edged sword as when the 'rights of government are unduly stressed, the rights of individuals are often threatened; when the latter are overemphasized, government becomes too weak to keep order.'¹⁴⁰ This tension permeates each constitutional order, notwithstanding their different formal characteristics expressed through constitutional text, structure or judicial doctrine.

Some will no-doubt consider the account a disturbing one and use it as a basis to argue for a more constrained executive, and for legislatures to reassert a primary position over policy and law-making, or for Courts to exercise greater scrutiny over executive action. Others, in contrast, may argue the account satisfactorily reconciles constraining executive power, while still bolstering state capacity to project public power to implement policies for the common good. Some may go further and argue for a loosening of legal constraints on the executive branch in favour of focusing on cultivating greater moral checks. But if we either overestimate its dominance (by ignoring the relevance of legal and constitutional constraint to political legitimacy) or underestimate its power and influence (by merely focusing on its law execution role) then our critical evaluation will invariably be skewed. Similarly, if we do not know the purposes and motivations behind executive predominance, we might omit the very good reasons which may exist for its current position.

iii. Analytical Tool for Comparative Constitutional Theory

Third, this conceptual account offers a useful analytical tool for comparative constitutional study. For identifying whether similar forms of executive power exist in other systems and for contrasting conceptions of executive authority in different systems. Other conceptual accounts of executive power no doubt exist and instantiated in other political communities, or at least have been at different points in history. Given this variety of conceptual accounts, it is important we can articulate facets of the political executive which distinguish its core features in different political regimes, between say, the political executive likely to exist in constitutional democracies as opposed to more authoritarian regimes. Drawing distinctions between accounts of the executive branch that are conceptually distinct, based on their different constituent features and practices, allows for clearer understanding of the range of

¹⁴⁰ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, 2008) 80.

different forms it can take. This, in turn, aids analysis of the purposes behind each conceptual account, and their respective merits and drawbacks.

This adds analytical clarity to the study of executive power from a comparative, theoretical, or normative perspective. Understanding what makes the constrained primacy model distinct from other accounts of executive power, helps to avoid an unhelpful collapse of all types of political executive into the same conceptual account. The constrained model, for example, shows us that the contemporary executive in these constitutional systems is a much more powerful institution than that articulated in classic constitutional theory. But it also shows us the features which distinguish a powerful contemporary executive in constitutional systems, like in the systems I consider, from their counterparts in more authoritarian regimes. While both exercise capacious power and are predominant actors, the latter system lacks the critical importance of commitment, or perceived commitment, to legality to political legitimacy.

Thus, these conceptual typologies allow us to see more clearly the core features of different concepts of executive authority, and the reasons motivating the institutional practices which constitute each kind of conceptual account, and their advantages & disadvantages. It also allows us to see the factors which would have to change for one concept of executive power to morph to another. This is especially useful as focusing on formal constitutional provisions concerning executive power do not facilitate us in distinguishing between a political executive in a dictatorship and a constitutional democracy.¹⁴¹ It ultimately allows us to help determine which conceptual account provides the best institutional structure through which to channel politics and promote the common good.

There will be blurred lines when attempting to characterize which conceptual account of executive authority best suits a particular country. For example, there may be considerable and deep-seated disagreement about whether a given political executive is committed to or constrained by the claims of legality, constitutional, or lawful imposed democratic controls, or is merely abusing each of these ideals in order to reinforce their authority and ideological goals.¹⁴² This is an accusation which has been levelled at political executive's operating within

¹⁴¹ Statistical studies have demonstrated that there is 'little evidence that executive power varies much between constitutions written by dictators and those written by democrats.' Tom Ginsburg, Zachary Elkins & James Melton, 'The Content of Authoritarian Constitutions' in Tom Ginsburg and Alberto Simpser, (eds.), *Constitutions in Authoritarian Regimes* (n 112) 155.

¹⁴² Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545, 548.

a ‘delegative democracy’¹⁴³ and constitutional systems with little affection for liberalism, but who have preference for thick conceptions of the good anchored on religious or illiberal beliefs.¹⁴⁴ The incumbent governments of Hungary and Poland are prime examples of the latter in comparative literature.¹⁴⁵ Adherents of this view might consider that in these kinds of illiberal constitutional systems, adherence to legality and constitutional rules is merely instrumental, and morally repugnant means, of bolstering executive power and eroding any effective institutional competition – leading to de facto executive supremacy. So, for example, scrupulous adherence to the letter and of the Constitution and statute in promoting reforms which strengthen the political executive at the expense of judiciary or legislature.

Others might argue that the regimes frequently criticized for ‘abusive constitutionalism’¹⁴⁶ are in fact subject to regular free and fair elections regulated in accordance with law, command genuinely democratic majorities, and do have commitment to legal and constitutional limits. They might add that critics are confusing a lack of genuine commitment to legality with the use of statutory and constitutional rules to pursue legitimate political goals, and that exploiting the malleability of legal argumentation to further political aims is an established facet of constitutional politics in many constitutional systems. They are also likely to maintain they are only subject to sustained critique because they are hostile to particular tenets of *liberalism* commentators prize. That critical claims made that they lack sincere commitment to constitutional or democratic constraint are pretextual and ideologically blinkered.¹⁴⁷

There is little that can be said to resolve these kinds of disputes, other than that whether the political executive of a given polity best fits one or another conceptual account will inevitably involve a mixture of empirical fact and irreducible ideological contest - it may often be in the eye of the beholder. But the possibility of disagreement over the applicability of different conceptual accounts does not undermine their potential usefulness as analytical devices for constitutional theorists.

¹⁴³ An ideal type of democracy advanced by professor Guillermo O’Donnell, where a powerful executive rules following a democratic mandate with little horizontal check by the legislature of judicial branch. But in his account such an executive is not ‘all-powerful and comes up against limits, even among its political allies, in the course of power plays he says often involve the invocation of legal rules. But it can be unclear whether legal rules genuinely constrain or a result of political expediency. This makes it hard to characterize as firmly in the ‘constrained executive primacy’ or ‘executive supremacy’ camp. See Guillermo O’Donnell, ‘Delegative Democracy’ (1994) 5 *Journal of Democracy* 55-69.

¹⁴⁴ Patrick Deenen, *The End of Liberalism* (Yale University Press, 2018).

¹⁴⁵ Bojan Bugarić, ‘Central Europe’s descent into autocracy: A constitutional analysis of authoritarian populism’ (2019) 17 *International Journal of Constitutional Law* (2019) 597-616.

¹⁴⁶ David Landau, ‘Abusive Constitutionalism’ (2013) 47 *University of California Davis Law Review* 189.

¹⁴⁷ Adrian Vermuele, ‘Liturgy of Liberalism’ *First Things* (January 2017).

iv. **Justifies Comparative and Theoretical Study of Executive**

Finally, my conceptual account bolsters recent scholarship arguing our understanding of the executive branch in contemporary constitutional systems must encompass the full reach of its institutional capacity and political responsibilities. Both the factors which make it predominant, as well as its ongoing commitment to legality, in order to be accurate or useful to public law scholarship or political debate. My account thus buttresses Professor Margit Cohn's recent work on executive power. Cohn argues the contemporary executive can be understood theoretically, and not just on a system-by-system basis.¹⁴⁸ Cohn further argues that study of the executive branch in constitutional theory can lack sophistication, as it is often split between 'two opposing normative camps, the first advocating executive supremacy, the second calling for its full subjection to law.'¹⁴⁹ Cohn has attempted to move beyond these stark dichotomies and sketched a general theoretical account of the executive branch. She argues it is an institution characterised by 'ingrained tensions' built 'around competing conceptual bases'¹⁵⁰ of formal weakness and practical strength. For Cohn neither:

'complete submission to the legislature nor imperialism fully characterizes the executive... Yet none of these conclusions should be viewed as a failure of theory. On the contrary: both subservience and dominance of the executive prosper in reality'.¹⁵¹

My comparative study of Ireland, the U.K., and the US builds on Professor Cohn's argument in two ways. First, it affirms Professor Cohn's position on the benefit of comparative engagement with the executive, beyond system-specific study. The constrained primacy model I build is common to each system, notwithstanding important differences in each regime on everything from electoral structure to their system of judicial review. It reveals deep commonalities in the conceptual nature of their political executives stretching beyond individual domestic arrangements. Namely, the fact the executive branch is predominant and characterized by a fusion of practical strength and formal weakness. Second, my account shows the potential explanatory force of elements of the internal tension theory, at least as

¹⁴⁸ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (n 67) 325.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid 344.

applied to the political executive in systems like the ones I consider. I agree with Cohn's argument the subordinate executive and unbound executive would offer myopic accounts of executive power in contemporary constitutional systems like Ireland, the UK and US.

But my account differs from Cohn's in important respects. Professor Cohn seeks to offer a *general theory* of executive power from the top-down, heavily anchored on political and constitutional theory. My ambition, in contrast, has been to offer a conceptual account of the political executive from the bottom-up, based on detailed comparative case-studies in three constitutional systems. I do not seek to offer a general theory of executive power. Indeed, I have shown how the political executive is undoubtedly *conceptually distinct* and highly varied depending on the political regime it is embedded within. I have argued not every political executive can be conceptually characterized as having an 'internal tension' between legal constraint and political predominance. Some political regimes are best characterized as having a political executive characterized by executive supremacy, where the constraints imposed by legality are extremely weak or non-existence.

Should my constrained primacy model of executive power, built-up from detailed case-studies, be generalisable to constitutional systems similar to Ireland, the UK and US, then it may meet elements of Cohn's theory in the middle. Although it might not support a general theory, to the extent it is generalisable to similar systems, then my arguments would bolster the descriptive insight of the internal tension model at least when systems like Ireland, the United Kingdom, and United States are concerned.

CONCLUSION

In this chapter I first tied together the trends of how the executive became predominant outlined in previous chapters. I argued a core strand of these trends – which I suggest captures the heart of the *why* of executive predominance – is the attempt to better pair public power with political expectation.¹⁵² I then considered what the shift to constitutional predominance can tell us about the conceptual nature of the contemporary executive branch. I offered a conceptual typology of the main distinctive facets of the executive branch in each system. I demonstrated that each system is helpfully understood as having a '*Constrained Primacy Model of Executive Power*'.

¹⁵² Peter Cane, 'Executive Primacy, Populism and Public Law' (n 1) 561.

This thesis concludes with a qualified normative defence of the constrained primacy model of executive power. I accept a powerful executive is inevitably a double-edged sword. A powerful executive branch is a more efficient tool for evil purposes, as it faces less veto-points in having its bad preferences changed into public policy. But I also argue an enfeebled executive would leave the polity hapless against the challenges of governing in a highly complex and interdependent world. Less able to secure domestic order, social justice, and project national interests at the international level – conditions closely linked to the common good. I thus conclude with a qualified defence of executive predominance. I suggest in the end it is not the mere existence of a powerful executive that should be our primary concern, but who wields this authority, where its power is directed, and why.

CHAPTER IX: A QUALIFIED DEFENCE OF CONSTRAINED EXECUTIVE PRIMACY

*'on his choice depends the safety and health of this whole state.'*¹

INTRODUCTION

In this concluding chapter, I assess the merits and drawbacks for a political system which has a constrained primacy model of executive power. As a comprehensive evaluation would deserve a thesis in its own right, I limit myself to offering two different analytical frameworks commonly used by public lawyers to critically evaluate the merits of this account, its risks and benefits, before offering a brief qualified defence. My normative evaluation is abstract because I have been building a conceptual account of the executive based on a comparative study of three different systems, and not in a given jurisdiction. As such, the discussion of merits and drawbacks will be similar in type to how arguments for and against constitutional concepts like 'judicial review' or different forms of separation of powers like 'presidentialism' or 'parliamentarianism' are advanced in constitutional scholarship. I consider what the merits and demerits of this conception of executive power would be in a political community where a certain set of conditions prevail. In this instance, a political community with a constitutional² and political³ culture broadly dedicated to aiming public power toward the common good.⁴ This is a broad criterion, but excludes, for example, political regimes run for the oligarchical self-interest of a narrow few, or a deep tyrannical regime.⁵ Thus, the kind of political executive might be suitable in one jurisdiction with these background conditions might not be in another very different one at a given moment.

In examining these critical frameworks, I do so from a particular perspective. I do not evaluate whether the predominant position of the contemporary executive is problematic or not due to its break with the intentions and designs of foundational statutory or

¹ William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act 1, Scene 3.

² By constitutional culture I refer broadly to the practices, norms, habits of thought, social beliefs, and values held by both officials and citizens relevant to interpreting the substance of the Constitution and transforming its words into concrete consequences. It also determines what constitutional arguments we credit or discredit as plausible. See Andrew Siegel, 'Constitutional Theory, Constitutional Culture' (2016) 18 *University of Pennsylvania Journal of Constitutional Law* 1067, 1107; Reva Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA' (2006) 94 *California Law Review* 1323-1325; Robert Post, 'Foreword: Fashioning the Legal Constitution: Culture, Courts and Law' (2003) 117 *Harvard Law Review* 4, 8.

³ By political culture I refer to the attitudes, beliefs and values which inform and govern political behaviour.

⁴ Similar, for example, to Professor Waldron's contingent framing of his argument against strong-form judicial review. See Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346-1406.

⁵ Amitai Etzioni, 'The Common Good' in Michael Gibbons (ed.), *The Encyclopedia of Political Thought* (Wiley, 2015) 2.

constitutional provisions. So, it is distinct from a critique one might see advanced by an originalist scholar, who might consider the contemporary political executive regrettable *because of the fact* its capacity and power is beyond the original anticipation of the ratifiers of a master-text legal document.⁶ Instead, I examine merits and problems from a pragmatic and functional lens. Simply put, I consider different critical frameworks from the point of view of whether this account of executive power is conducive or not to the common good. This is a contested concept to be sure, but for the purposes of this chapter I work with a broad-church definition which can be more or less found in a range of political theories, from the Natural Law tradition to communitarianism: that the common good of the polity involves pursuing a state of affairs in which ‘each individual within a political community and the political community as a whole is flourishing.’⁷ Even if this is unrealizable in practice, I take it to be a ‘regulative ideal’ and the yardstick for political deliberation over the merits or drawbacks of executive predominance.⁸ I offer it as a broad ‘external benchmark capable of being applied by an outsider to a political community’ and not ‘tailored to specific social, cultural and geopolitical contexts’ but capable of ‘application across a very broad range of quite heterogeneous cases.’⁹

Part I considers the dangers of executive predominance to constitutional government and the common good. There are several related objections made in contemporary literature. The first is that it is a more efficient tool for political evil, because the fewer veto points it faces, the potential for abusive state action expands. Second, a predominant executive has been associated with the risk of a gradual erosion of core features of constitutional government. These objections view executive predominance as a potent danger to good government, and for those inclined to view constitutional design through a ‘negative’¹⁰ or ‘precautionary’¹¹ vantage point will likely view the constrained executive primacy model with

⁶ See e.g. Gary Lawson, ‘The Rise and Rise of the Administrative State’ (1994) 107 *Harvard Law Review* 1231.

⁷ For arguments discussing the critical importance of the common good to political communities, ranging across the Natural Law and communitarian traditions, see George Duke, ‘Sovereignty and the Common Good’ (2019) 17 *International Journal of Constitutional Law* 66, 75; Gregoire Webber and Paul Yowell, ‘Introduction: Securing Human Rights through Legislation’ in Gregoire Webber, Paul Yowell, Richard Ekins, Maris Kopcke, Bradley W. Miller & Francisco J. Urbina (eds.), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2019) 3; Amitai Etzioni, ‘The Common Good’ in (n 5); Alasdair MacIntyre, *After Virtue* (Duckworth, 3rd edition, 2007); Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 64; Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed, Cambridge University Press, 1998); Amy Gutmann, ‘Communitarian Critics of Liberalism’ (1985) 14 *Philosophy & Public Affairs* 308-322; John Finnis, *Natural Law and Natural Rights* (2nd edn. Oxford University Press, 2011) 154-155.

⁸ Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (n 7) 64.

⁹ Aziz Huq, ‘Hippocratic Constitutional Design’ in Tom Ginsburg and Aziz Huq (eds.), *Assessing Constitutional Performance* (Cambridge University Press, 2016) 40.

¹⁰ N.W. Barber, *Principles of Constitutionalism* (Oxford University Press, 2018) 2-6; Adrian Vermuele, *The Constitution of Risk*. (Cambridge University Press, 2014) 10-14.

¹¹ *Ibid.*

alarm or suspicion because of these risks, characterised by too much political primacy and not enough legal constraint. On this premise, constitutional actors should ideally work to contain or weaken the executive to avoid such risks, or at least regard it with deep suspicion.

Part II considers the benefits of a predominant executive. It does so, first, by considering a negative defence of executive strength which highlights the dangers of a weak executive. Secondly, I explore the more positive argument that a predominant executive might be necessary for the common good. I consider the argument that for constitutional actors, designers, and scholars, placing one's primary emphasis on avoiding or lamenting the risk of abuses of executive authority, may be a myopic way of thinking about the distribution and organization of constitutional power. Another starting point for considering the position of the constrained executive primacy model, would be to accept its power as an indispensable tool for bolstering state capacity to take positive action in pursuit of the common good. If one accepts this starting point, more profit may be had adopting a 'positive'¹² or 'optimizing'¹³ approach to executive power than a 'negative' or 'precautionary' one. Not abandoning legal or institutional constraints but acknowledging the good reasons for maintaining a robust executive and putting greater focus on ensuring its capacity is orientated to instantiating the aspirations of citizens and the common good, than blunting its capacity altogether.

Part III concludes this thesis with a qualified defence of the constrained primacy model of executive power. I do so primarily because of the force of arguments presented in part II, namely that adequately responding to the challenges of contemporary government can require embrace of strong executive power. My defence is qualified in the sense I argue a predominant executive must be accompanied by a constitutional¹⁴ and political¹⁵ culture broadly dedicated to aiming its capacity toward the common good. This is because a powerful executive is inevitably a double-edged sword. It is potentially a more efficient tool for evil purposes, as it faces less veto-points in having its bad preferences changed into public policy. As such, a combination of such a potent institution with the erosion of a political culture orientated toward common good could easily produce toxic consequences.¹⁶ But an enfeebled executive can leave the polity less able to use public power to secure conditions

¹² Ibid.

¹³ Ibid.

¹⁴ See (n 2).

¹⁵ By political culture I refer to the attitudes, beliefs and values which inform and govern political behaviour.

¹⁶ Adrian Vermeule, 'Instrumentalisms' (2007) 120 Harvard Law Review 2113, 2120.

closely linked to the common good. Excessive weakness of executive power may, in fact, have a perverse tendency to mutate into excessive strength in the form of fomenting authoritarian temptation to sweep aside constraints seen as impeding the common good.¹⁷ Offering a *via media* between these concerns, I conclude it is normatively defensible to argue that, in political systems where the right conditions hold, it is not the mere existence of a powerful executive that should be our primary concern, but who wields this authority, where its power is directed, and why.

In some respects, my position is anathema to core tenets of liberal constitutionalism, which is deeply suspicious of increased executive power, prizes the primacy of the legislative branch, and liberty in the form of individual autonomy and freedom from state interference.¹⁸ But I suggest there can be good reasons for constitutional actors in many systems to loosen ties to the liberal aspect of their constitutional traditions, at least in so far as it is hostile to state power and gives centre stage to individual negative liberty and legislative primacy.¹⁹ In the end, the best argument for tempering traditional liberal constitutional hostility to executive power is recognising that without adequate state capacity, a constitutional order may be hapless in tackling social-political problems harmful to a healthy political community.

I. NEGATIVE CONSTITUTIONALISM AND THE DANGERS OF EXECUTIVE PREDOMINANCE

A necessary evil?

Executive power in strands of liberal and republican thought, is something of a constitutional anomaly - a 'necessary evil'.²⁰ There are several reasons the executive is seen as troublesome in these intellectual traditions. For a start, the functions and power of the executive are, in practice, irreducible to the kind of clear predictable rules said to be necessary for narrowing the possibility of arbitrary use of power.²¹ Broad and deep discretionary power, often thinly constrained by law, is a mainstay of the contemporary executive, and this is troubling for those who see the potential for arbitrary political power as posing the greatest risk to good government and the common good.²² Concentration of immense political

¹⁷ Adrian Vermeule, *The Constitution of Risk* (n 10) 13.

¹⁸ Patrick Deenen *Why Liberalism Failed* (Yale University Press, 2018); Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) 3-5.

¹⁹ Adrian Vermeule, *The Constitution of Risk* (n 10) 12-14.

²⁰ Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993).

²¹ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2006) 31.

²² Judith Sklar, *Legalism* (Harvard University Press, 1964) 23.

authority and leadership in the hands of a narrow few in the political executive can also invoke the uncomfortable spectre of monarchy.²³ As such, suspicion toward executive power is perhaps not surprising given contemporary constitutionalism's origins in revolts against the abuses of monarchical authority untied from, or too loosely bound, by law.²⁴

Of course, not all political theorists have been overly concerned with highly concentrated political power. Hobbes famously pointed to the risks of social disorder stemming from an excessive weakness of government – a war of all against all – to justify robust political authority. For Hobbes, fear of the evils accompanying social anarchy was a compelling reason against separating the sovereign power of the state into distinct bodies, or qualifying it with legal constraints.²⁵ But even Hobbes admitted the absolute power of the sovereign could be abused, and that the political figure with the 'power to protect all also has the power to oppress all'.²⁶ For theorists in the liberal constitutional tradition less sanguine about the trade-off between liberty and security Hobbes was prepared to make, separating the powers of the state was clearly required to combat absolutism and tyranny. Locke and Montesquieu pointed to the 'long train of abuses, prevarications and artifices' associated with absolute rule to justify concepts like separating political power in different institutions and for a modest executive role.²⁷ Their observations remain enormously influential and are found in common arguments in liberal constitutional theory concerning the executive branch. Chiefly, that a powerful executive faces fewer veto-gates when trying to turn its power to abusive ends, and that this is dangerous and undesirable. Indeed, it has been suggested the argument that 'too *little* constraint can have bad effects such as abuse of power' might be the 'main thought of liberal constitutionalism'.²⁸

Stronger executive more capable of abusing power

There is clearly a basis for this concern in the case of a political executive with characteristics fitting into the constrained primacy model. For a start, weaker procedural and substantive constraints imposed on the executive clearly have an impact on the *capacity* for executive abuse.²⁹ Within recent times, the history of 20th and 21st Century politics is filled with

²³ Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press, 2006) 311.

²⁴ NW Barber, 'Constitutionalism: Negative and Positive' (2015) 38 *Dublin University Law Journal* 249, 255.

²⁵ Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (n 7) 61.

²⁶ Leo Strauss & Joseph Cropsey (eds.), *History of Political Philosophy* (University of Chicago Press, 3rd edition, 1987) 409.

²⁷ *Ibid.*

²⁸ Adrian Vermeule, 'The Publius Paradox' (2019) 82 *Modern Law Review* 1, 10.

²⁹ This has long been recognized as a truism in political philosophy, even amongst intellectual traditions sanguine about the use of state power to promote thick conceptions of the common good. Thomas Aquinas, for example, suggested that while

appalling executive abuses - including the horrors committed by Communist, Fascist, and Nazi dictatorships. But abuse of executive power is not confined to totalitarian regimes, and one need only glance at the history of each system to see how such power can be used to abuse, detain, or persecute citizens in constitutional systems as well.

The contemporary executive in these systems undoubtedly has the capacity to turn its power to abusive ends. The combined availability of broad and deep delegated statutory authority over every area of policy, dominance over foreign affairs, copious security powers, and executive lawyers with a tendency to legitimate their actions, all ensure fewer impediments to the executive regulating or enforcing the law in a way that abuses individual citizen or harms the political community. As too does the tendency for the judicial and legislative branches to exercise deference toward exercises of executive power across many domains. Moreover, a predominant executive with a close relationship with the legislature and the authority to appoint civil servants and judges, ensures it is easier for an abusive political faction to gain access to all the levers of power.

As the political executive is a potent political tool – one with command over a formidable bureaucratic and security apparatus - if that tool is wielded by a leader with demagogic and abusive impulses, then the scope for harmful political action faces fewer obstacles.³⁰ Because of this fact, and the reality its potent capacity can be directed toward bullying vulnerable minorities, or advancing policies harmful to the polity as a whole, with greater ease than a subordinate one, some view executive predominance as posing an inherent risk to the common good.³¹ This view is typically accompanied by a pessimism about the motivations of those in political power, and the view that if state power *can* be abused it likely or inevitably *will* be.³² Adopting a precautionary lens, constitutional structure and the constraints it puts

in theory the 'unconditional rule' of the 'single wise man' for the 'sake of virtue' is the ideal form of political regime, man's susceptibility to corruption and the vast powers vested in him may lead to tyranny and the worst of all regimes. As a result, the best form of regime achievable in practice is a mixed regime blending the best features of monarchy, aristocracy and democracy, anchored on the rule of law framed by wise men. Leo Strauss and Joseph Cropsey (eds.), *History of Political Philosophy* (n 26) 256.

³⁰ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 125; Claire Finkelstein, 'The Imperial Presidency and the Rule of Law' in Claire Finkelstein and Michael Skerker (eds.), *Sovereignty and the New Executive Authority* (Oxford University Press, 2018) 149; Bruce Ackerman *Decline and Fall of the American Republic* (Harvard University Press, 2010).

³¹ Friedrich Hayek, *The Road to Serfdom* (Routledge, 2001).

³² Adrian Vermeule, *The Constitution of Risk* (n 10) 48; Bruno Frey, 'A Constitution for Knaves Crowds out Civic Virtues' 107 *The Economic Journal* (1997) 1043, 1044.

on the executive, exist precisely to straighten the crooked timber of humankind and its perceived tendency, encapsulated in Lord Acton's famous dictum, to abuse power.³³

Strong executive risks executive aggrandizement and retreat from constitutional government

The second fear associated with executive predominance is that it makes it easier to further the aggrandizement of its authority, in manner which might erode important and beneficial checks critical for constitutional government constrained by law. An avalanche of scholarship has emerged extremely critical of recent trends in several constitutional democracies, trends characterized by a move away from what scholars consider a just or legitimate version of constitutional government. Scholars of comparative constitutional law have been severely critical of what they consider a retrogression from constitutional democracy in a wide range of countries, including Hungary, Poland, Russia, Thailand, Turkey, Ukraine, Venezuela, amongst others.³⁴ Scholars have variously suggested executive actors in these constitutional systems are practicing 'abusive constitutionalism'³⁵, 'authoritarian constitutionalism'³⁶, 'anti-constitutional populist backsliding'³⁷, 'autocratic legalism'³⁸, 'populist constitutionalism'³⁹ 'constitutional rot'⁴⁰ and 'constitutional retrogression'.⁴¹

Huq and Ginsburg have provided a typology of the pathways common to these various trends: the centralization of power in the executive branch; the elimination of institutional checks on its authority; contraction of a public sphere independent from executive influence; and the erosion of political competition.⁴² A unifying core of all these pathways is that the political executive uses its predominant position to gradually, but systematically, weaken any real institutional checks on, or competition to, its power. This process of 'executive aggrandizement' can culminate in the 'systemic dismantling of checking mechanisms that liberal democratic constitutions typically put in place to ensure the accountability of the

³³ Ian Shapiro, *Politics Against Domination* (Harvard University Press, 2016) 68; Jeremy Waldron, *Political Political Theory* (Harvard University Press, 2014) 280.

³⁴ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (n 30) 119.

³⁵ David Landau, 'Abusive Constitutionalism' (2013) 47 University of California Davis Law Review 189.

³⁶ Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391.

³⁷ Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

³⁸ Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

³⁹ David Landau, 'Populist Constitutions' (2018) 85 University of Chicago Law Review 521.

⁴⁰ Jack Balkin, 'Constitutional Rot' in Cass R. Sunstein (ed.), *Can It Happen Here?: Authoritarianism in America* (Harper Collins, 2018).

⁴¹ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (n 30) 78.

⁴² Ibid 130.

political executive' and prevent excessive concentration of state power.⁴³ For example, by using its command of a legislative majority of political party supporters to propose statutes or constitutional amendments designed to bolster executive power.⁴⁴ Or its authority over appointment and removal to the bureaucracy and judiciary to appoint partisan loyalists to pursue its ideological goals and stymie opponents.⁴⁵ This latter process can be a way to defang independent checking institutions that might attempt to impede exercises of executive authority. These developments overlap with characteristics of political behaviour Weber dubbed 'Caesarism', including plebiscitary politics, disdain for parliamentary deliberation, preference for governing with the help of emergency legislation, nontolerance of any autonomous power within the government, or failure to suffer independent political critique.⁴⁶

Even worse, executive aggrandizement is also seen as a potential pathway to completely hollowing out well-established norms and rules associated with good government - like prosecutorial independence, freedom of speech, press-freedom, and free and fair electoral competition - laying the groundwork for an authoritarian retreat from government organized and constrained through constitutional rules altogether.⁴⁷ In other words, to move from constrained executive primacy to outright executive supremacy.

The constrained executive primacy model undoubtedly vests considerable public power in the political executive, and so this gives it greater institutional capacity to pursue this kind of executive aggrandizement if it were minded. At least when compared to a highly constrained or subordinate executive. Conversely, where a political executive faces intense checks or competition from legislatures and constitutional courts, they can face more constraint, slowing the centralization of state authority and the possibility it can be turned to ends which will regress constitutional government.⁴⁸

For those inclined to view constitutional design from a 'negative' or 'precautionary' lens, for the reasons above we should view the constrained primacy model with either alarm or

⁴³ Tarunabh Khaitan, 'Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism' (2019) 17 *International Journal of Constitutional Law* 342.

⁴⁴ *Ibid*; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (n 30) 78.

⁴⁵ *Ibid*.

⁴⁶ Gerhard Casper, 'Caesarism in Democratic Politics: Reflections on Max Weber' *Robert G. Wesson Lecture in International Relations Theory and Practice, The Freeman Spogli Institute for International Studies at Stanford University* (March 13, 2007) 4.

⁴⁷ Bojan Bugarić, 'Could Populism be Good for Constitutional Democracy?' (2019) 15 *Annual Review of Law and Social Science* 41, 47; Jeremy Waldron, *Political Political Theory* (n 33) 30-36; Adrian Vermeule, *The Constitution of Risk* (n 10) 25.

⁴⁸ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (n 30) 125.

continual deep suspicion. Characterised by too much political primacy and not enough legal constraint. If one adopts this premise, constitutional actors should work to contain the political executive – like a physician would a dangerous pathogen posing a risk of infection to the health of the body. This kind of concern animates much of contemporary constitutional literature on executive power.⁴⁹ Gardbaum, for example, has recently called for constitutional lawyers and scholars to focus on promoting an ‘anti-concentration principle’ as a cardinal political precaution.⁵⁰ That is, institutional designs or reforms that would make dismantling institutional checks on executive power more difficult to accomplish. For those who share this concern, if power and capacity exist and are vested in the political executive, so too is the unacceptable risk it will be abused by officials to erode constitutional norms in the ways outlined above. So, as a precaution this power and capacity should be cabined to make sure it cannot be abused when knaves⁵¹ and not ‘enlightened statesmen’⁵² are at the helm, even if it inevitably sacrifices certain other ‘plausible and desirable constitutional goals’.⁵³

Attempting to offset these perceived risks could encompass promoting more legal constraint to taper down the executive’s primacy over exercises of public power. It could involve fostering more aggressive policing of the executive by the legislative and judicial branches. On the judicial front, it could involve subjecting executive action to greater scrutiny via judicial review by abandoning deference and rigidly policing of separation of powers doctrine like the delegation doctrine. On the legislative front, it could involve subjecting executive action to more detailed statutory frameworks designed to minimise discretion which might be used abusively. More ambitiously, it might also involve dismantling the administrative state apparatus and ensuring the majority of policy issues are substantively debated and decided by representative legislative assemblies, and not decided by the executive or regulatory bodies its direction and supervision.⁵⁴ If the administrative apparatus is retained, attempts could be made to ensure it is better insulated from politicized control by the

⁴⁹ See e.g. Tarunabh Khaitan, ‘Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism’ (n 43) 342; Aziz Huq & Tom Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 30) 78; Bruce Ackerman, *The Decline and Fall of the American Republic* (n 30).

⁵⁰ Stephen Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (UCLA School of Law, *Public Law & Legal Theory Research Paper No. 19-45*).

⁵¹ The philosopher David Hume suggested it is wise that when framing political institutions ‘every man must be supposed a knave’. Leo Strauss and Joseph Cropsey (eds.), *History of Political Philosophy* (n 26) 552.

⁵² James Madison, ‘Federalist No. 10.’ in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

⁵³ Professor Gardbaum’s position is nuanced, and he expressly notes the extent to which one should sacrifice valuable goals to prevent power concentration depends on the situation of a given political community. Stephen Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (n 26).

⁵⁴ For arguments in this vein see Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014).

political executive, to a greater degree than it currently is, by cementing civil service independence and technocratic insulation from partisan politics.

II. POSITIVE CONSTITUTIONALISM AND THE BENEFITS OF EXECUTIVE PREDOMINANCE

No feasible institutional alternative

Perhaps the most modest argument in favour of executive predominance is that it is desirable in the ‘thin sense’ that ‘there is no feasible way to improve upon it’ under current conditions facing governments.⁵⁵ That it will not be going away anytime soon and it is therefore futile to advocate for a greatly weakened executive. This argument begins from the position that executive predominance is often deeply entrenched as a form of government, precisely because it does not spawn from unilateral executive aggrandizement, but through continuous cycles of democratic politics and enthusiastic co-ordination of constitutional institutions and political actors.⁵⁶ This enthusiastic co-ordination came from a desire to pair state capacity with the growing socio-political expectations of citizens. As long as these driving forces remain – which they do - it stands to reason that executive predominance is here to stay absent determined, radical, and unprecedented constitutional change and upheaval in favour of a nightwatchman style executive.

Absent this, there appears to be vanishingly little likelihood of a steep decline in executive primacy and reversion to a tightly constrained and subordinated ‘messenger-boy’ executive.⁵⁷ The current status of the executive thus places constitutional systems like Ireland, the UK and US, at an impasse of sorts. For some commentators, if drastically reducing executive power appears outside the political window of possibility, the pressing normative question then surely becomes - out of necessity - not what to do *about* executive primacy as such, but what politics ought to do *with* it. On this view, attacking executive predominance is energy wasted, and commentators would be better directing their critiques toward the moral and political vision of those who occupy the office and wield its potent powers.

Risks of weakened political executive

⁵⁵ Adrian Vermeule and Eric Posner, *The Executive Unbound* (n 18) 5.

⁵⁶ Adrian Vermeule, *Laws Abnegation: From Laws Empire to the Administrative State* (Harvard University Press, 2016).

⁵⁷ This was the phrase the dissenting Chief Justice Vinson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708.

Another version of this argument, which suggests weakening the executive can carry its own serious dangers, comes in the form of what Vermeule dubs the ‘Publius Paradox’. This paradox is based on an observable tendency for different political regimes to create perverse consequences through attempts to constrain or incapacitate executive power. The perverse consequence is that if the state is denied the:

‘power to do what is necessary in order to survive, it will be forced to push past the boundaries that the law imposes — either by changing the law to meet the demands of new and unforeseen situations or, in extremis, by throwing off the restraints of law altogether.’⁵⁸

In other words, an excess of constraint can ironically lead to unintended executive empowerment.⁵⁹ These new and unforeseen circumstances can variously be read to encompass threats posed by the natural world, like environmental catastrophes, from internal political troubles, or from dangers outside the polity.⁶⁰ The take-away point from the paradox is that constitutional designers should not over-emphasise the risks of executive abuse or undervalue the need for a robust executive, as an excessively weak executive carries its own, potentially serious, dangers to a political community. For example, an executive branch unable to respond robustly to social and economic issues of great concern to the polity may eventually prompt ‘procedural impatience and general contempt for parliamentary institutions’ and legal constraints perceived as a chokepoint to robust political action, and demand for extraconstitutional action.⁶¹

Useful tool to promote common good

Another, more positive argument for executive predominance, is that those who are deeply concerned about it can over-emphasise the risk of abuse *while* seriously discounting the value of a robust executive. One strand of this argument is that aversion to centralising power in the executive based on fears of arbitrary power or tyranny is frequently ‘rooted in historical experience’ rather than contemporary reality.⁶²

⁵⁸ Paul F. Scott, ‘The “Publius Paradox” and the United Kingdom: Comments on Adrian Vermeule’s 2018 Chorley Lecture, “The Publius Paradox” (2019) 82(1) *Modern Law Review* (2019) 1-16’ (2019) *Modern Law Review Forum* 1.

⁵⁹ Eric A. Posner and Adrian Vermeule, ‘Tyrannophobia’ in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012) 317-346.

⁶⁰ Paul F. Scott, ‘The “Publius Paradox” and the United Kingdom’ (n 58) 5.

⁶¹ Jeremy Waldron, *Political Political Theory* (n 33) 30-36; Adrian Vermeule, *The Constitution of Risk* (n 10) 80.

⁶² Eric A. Posner and Adrian Vermeule, ‘Tyrannophobia’ (n 59); Eric A. Posner and Adrian Vermeule, *The Executive Unbound* (n 18) 176-205.

Another strand is that for constitutional actors, designers, and scholars, placing one's primary emphasis on avoiding the risk of abuse of executive authority can be a myopic way of thinking about the distribution and organization of constitutional power.⁶³ A different starting point for considering the position of the constrained executive primacy model, would be to view it as a potent institutional tool through which politics can pursue the common good. That more profit may be had adopting a 'positive'⁶⁴ or 'optimizing'⁶⁵ approach to executive power than a 'negative' or 'precautionary' one. Certainly not outright abandoning existing legal constraints on executive power, but recognizing the value of robust executive authority, and putting greater focus on ensuring its capacity is orientated to securing the common good, than disassembling executive capacity altogether or overly constraining it.

After all, the diffusion of power toward the executive stems from a recognition of practical necessity, and that achieving security, social stability, redistribution and promoting welfare, can only be secured with a robust executive given broad and deep discretion. Vesting control over state capacity primarily in the political executive was, as I have already documented, anchored on intertwined assumptions of structural necessity and pragmatism. That meeting amorphous, complex, and fast-changing challenges demand increased and expansive discretionary power be granted to the executive, due to its superior institutional capacity to use it. That its ability to act with dispatch, energy, expertise, and unity make it more suitable - relative to a cumbersome multi-member legislature or unelected judiciary - to wield this power effectively. Instead of attempting to introduce a myriad of new legal constraints or rigid policing of a formalist conception of the separation of powers, which may undercut critically valuable governmental capacity in the name of preventing worst-case political risk, proponents of robust executive authority argue politics could renew focus on cultivating a constitutional culture conducive to orientating the motivation of public officials toward pursuit of the common good.⁶⁶

Proponents of robust executive authority argue that constitutional systems already include mechanisms like legislative scrutiny and judicial review for blocking undesired governmental

⁶³ Adrian Vermeule, 'The Publius Paradox' (n 28).

⁶⁴ N.W. Barber, *The Principles of Constitutionalism* (n 10) 6-7.

⁶⁵ Adrian Vermeule, *The Constitution of Risk* (n 10).

⁶⁶ Adrian Vermeule, 'The Publius Paradox' (n 28).

action.⁶⁷ Further blunting executive power in these systems through legalistic tools, based on a fear of abuse of power, may well carry serious costs worth considering soberly. For example, it may detract the state's capacity to tackle the kind of social and economic ills that push politics towards despair and openness to authoritarianism and contempt for political constraint in the first place: poverty, social displacement, erosion of social cohesion, corrosive inequality etc.⁶⁸ Those sympathetic to a predominant executive accept that, while a powerful executive is a potentially more dangerous institution than a weak subordinate one, it is an indispensable institution for tackling these complex and fast-moving socio-economic problems, which are truly toxic to a healthy constitutional and political culture.⁶⁹ As such, they consider we should be more concerned about *who* controls the institution and *where* its power is being directed, rather than the *fact* it is powerful. An approach less concerned with confronting the executive's predominant structural power, but keen to appropriate it, and effectuate the common good through it.

III. QUALIFIED DEFENCE OF CONSTRAINED EXECUTIVE PRIMACY

I consider the constrained primacy model a normatively defensible conception of executive power. A political executive whose outer bounds are genuinely constrained by claims of legality, but which has broad and deep discretion and power enabling it to respond to, and grapple with, complicated challenges and threats facing the political community, whether foreign or domestic. My defence is qualified, as I argue any embrace of executive predominance must be accompanied by, or embedded in, a concomitant constitutional and political culture dedicated to orientating its potent capacity to the common good. If the political and constitutional culture of a community curdles and degrades sufficiently, then the best means to slow an assault on the common good may require, all things considered, increased institutional restraints on the political executive.⁷⁰

⁶⁷ Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 University of Chicago Law Review 485, 514.

⁶⁸ Patrick Deenen, *Why Liberalism Failed* (n 18); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018) 219; K. Sabeel Rahman, '(Re)Constructing Democracy in Crisis' (2018) 65 UCLA Law Review 1552, 1567; Jeremy Waldron, *Political Political Theory* (n 33) 302.

⁶⁹ For example, studies have suggested the single greatest predictor of democratic fall to authoritarianism is the wealth, and distribution of wealth, of the polity in question. Where immense poverty and inequality exist, the greater the risk of democratic collapse. See Eric A. Posner and Adrian Vermeule, 'Tyrannophobia' (n 59) 317-346.

⁷⁰ Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991) 257.

Executive predominance useful institutional structure to achieve common good

The best argument for tempering hostility to robust executive authority is appreciating that without it, the ability of a constitutional order to tackle the social-political problems toxic to the common good may be seriously hampered.⁷¹ An enfeebled executive would leave the polity hapless against the challenges of governing in a highly complex modern society, less able to use public power to secure domestic order, social justice, or project national interests at the international level.

The emergence of populism should give scholars of public law and constitutionalism considerable food for thought when considering how to best set the bounds of executive authority. Citizens in contemporary constitutional systems are said to live in an era of unparalleled freedom and prosperity, a time where they have a prominent say over questions affecting their lives – both in the autonomous conduct of their personal affairs and over their political community.⁷² In the latter case, they exercise control primarily through their participation in elections and democratic processes, using rights protected and embedded in law. However, for many there is a disjunct between promised images of autonomy, liberty, prosperity, political control etc, and their lived experience, a disjunct which is alienating and born from the discontent of citizens in the face of economic, social, and political challenges and changes. Challenges and changes of enormous complexity and depth: from material problems like poverty and inequality; to more inchoate but potent feelings amongst segments of the populace of social alienation; of separation from effective political influence over, and concern from, those wielding public power; or a general anxiety and unease about where the political community is heading, and the goals and values which animate it.⁷³ The growing distance for many between a political regime's claims and its actuality can increasingly spur 'doubts about those claims' rather than 'engendering trust' the gap will be narrowed.⁷⁴ Many successful populist and illiberal movements – left and right – are created and sustained from this very kind of perceived powerlessness, and a feeling that status quo governing institutions are incapable of changing course.⁷⁵

⁷¹ For example, in the U.S. context, K. Sabeel Rahman has argued that concerns over authoritarian democratic backsliding should not overshadow other substantive issues also deeply corrosive to constitutional democracy, such as 'the systematic inequalities in political power as evidenced by the power of business interests and the systematic exclusions of communities and particular issues from the larger political and legal debate'. No doubt similar sentiments could be expressed in the context of many other constitutional systems. See K. Sabeel Rahman, '(Re) Constructing Democracy in Crisis' (n 68) 1566.

⁷² Patrick Deenen, *The End of Liberalism* (Yale University Press, 2019).

⁷³ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (n 68) 218; Marc Plattner, 'Liberal Democracy's Fading Allure' (2017) 28 *Journal of Democracy* 4, 12-13.

⁷⁴ Patrick Deenen, *Why Liberalism Failed* (n 18) 3.

⁷⁵ Oran Doyle, Erik Longo and Andrea Pin, 'Populism: A Health Check for Constitutional Democracy' (2019) 20 *German Law Journal* 401; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (n 68) 218.

Does a constitutionalism concerned with, above all, abuse of executive power have institutional answers to these kinds of difficulties? Constitutionalism, at least in some liberal manifestations, is anchored toward protecting individual rights against collective and state power,⁷⁶ or at best viewing state power with suspicion, as a regrettable necessity.⁷⁷ But this way of viewing the separation of powers, through the lens of a negative constitutionalism of fear is, whatever its merits, not very well-equipped to provide an institutional route to sustain the kind of state capacity required to tackle the socio-political problems noted above. The very kind of demands and expectations which drove the move to executive predominance in the first place – for security, prosperity, welfare and other conditions linked to securing the common good.⁷⁸ The difficulties noted above appear to come from how political power is used, or not used; which political priorities the polity will pursue and direct the capacity of the state toward. They do not appear to stem from the *fact* of executive predominance, but how this capacity is deployed.

Therefore, in a polity where citizens might report feeling powerless over economic and political forces shaping their lives, it may be contrary to promoting the common good to unwind the capacity of its leading political actor and locus of political expectation.⁷⁹ Although a strong proponent of curbing presidential power through greater legal constraint, Ackerman soberly recognizes his proposals would have negative knock-on consequences for defenders of ‘activist government—dedicated to the ongoing pursuit of economic welfare, social justice, and environmental integrity’.⁸⁰ Ackerman is correctly under no illusions blunting executive efficacy to prevent arbitrary abuse of power, comes with its own tough choices and trade-offs, such as the fact a political society whose institutions are anchored on a fearful focus of the worst-case scenario of executive abuse, might risk making its political executive less capable using broad and deep discretionary power to satiate, or sustain, political hope amongst large sectors of the political community it is supposed to lead.⁸¹

⁷⁶ See N.W. Barber, *The Principles of Constitutionalism* (n 10); Adrian Vermeule, *The Constitution of Risk* (n 10).

⁷⁷ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ in (eds.) Thomas Christiano & John Christman, *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009) 267; Charles Wilson, ‘Separation of Powers Under Democracy and Fascism’ 52 *Political Science Quarterly* (1937), 481, 489.

⁷⁸ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (n 68) 219. Moyn argues that central to state attempts to promote vast improvements in welfare provision and greater equality in nation states in the twentieth century, was sanguinity about robust state power.

⁷⁹ K. Sabeel Rahman, ‘(Re)Constructing Democracy in Crisis’ (n 68) 1567.

⁸⁰ Bruce Ackerman *Decline and Fall of the American Republic* (n 30) 124.

⁸¹ On the importance of hope to man as a political animal see Adrian Vermeule, ‘According to Truth’ *The Josias* (July 19th, 2018); Ian Shapiro, *Politics Against Domination* (n 33) 12-13.

Constitutions, institutional mechanisms, legal doctrine, rules, and principles, should all ultimately exist to serve men and women and their common good, and not the other way around.⁸² If a political regime is to accommodate their citizens aspirations and expectations, they must clearly attempt to ‘respond to the deep challenges’ of their time.⁸³ Responding to the challenges of today just might require adequate state capacity in the form of constrained executive primacy, in order to use broad and deep discretionary public power to better secure domestic order, build useful foreign relations, promote economic prosperity, secure social justice, provide demanding goods like education, health care, decent infrastructure, welfare, and protect national security from domestic and foreign enemies.⁸⁴ If one accepts this premise, then there might be little to be gained from defanging the contemporary executive’s power, but quite a lot to lose.

As noted above, preserving constitutionalism in the face of authoritarian temptations may, in fact, demand cultivating a politics sanguine about the fact a robust executive may be critical to maintaining the common good of the political community, and recognizing that power can be abused as much by *inadequate* as *excessive* concentration, by political gridlock and state inaction as much as action.⁸⁵ When considering the common good, and our ability to address difficulties affecting contemporary polities which might interfere with it, it may be a more appropriate question to ask who wields executive authority, where its power is directed, and why. More appropriate to be less concerned with confronting the executive’s predominant structural power, but more concerned with who appropriates it and what policies they effectuate through it, and whether they promote the common good.

Importance of constitutional and political culture to justify executive predominance

But promoting sanguinity about the predominance of the executive, must also be combined with dedication to directing the potency of the executive-led state toward human dignity and the common good. As the power of legal norms to cabin executive discretion is often thin, and the likelihood of stripping the executive of power remote, it becomes more incumbent on polities like those I consider to foster or maintain a constitutional culture broadly

⁸² Oran Doyle, ‘Populist Constitutionalism and constituent power’ (2019) 20 *German Law Journal* 161-180; John Finnis, ‘A Grand Tour of Legal Theory’ in John Finnis *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press, 2013)153; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (n 7) 61-64.

⁸³ Oran Doyle, Erik Longo and Andrea Pin, ‘Populism: A Health Check for Constitutional Democracy’ (n 75) 405; K. Sabeel Rahman, ‘(Re)Constructing Democracy in Crisis’ (n 68) 1567; Ian Shapiro, *Politics Against Domination* (n 33) 46.

⁸⁴ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (n 68) 219; Daryl J. Levinson, ‘Foreword: Looking for Power in Public Law’ (2016) 130 *Harvard Law Review* 1, 46; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000) 5.

⁸⁵ Charles Wilson, ‘Separation of Powers Under Democracy and Fascism’ (1937) 52 *Political Science Quarterly* 481, 485.

dedicated to harnessing and orientating its potent power to the proper end of political authority – human flourishing.⁸⁶ The executive is invested with incredible authority and power, which make it capable of pursuing great virtue or evil. The only real way for executive predominance to be justified as an appropriate institutional structure for political action, is that public officials and citizens alike must internalize a tangible sense of moral duty to orientate politics and political life to this end.⁸⁷

Although legal constraints fetter the outer bounds of executive authority – the clearly ultra vires and arbitrary and capricious - there is a risk equating the kind of constraint conducive to good government with legalism, will obfuscate the critical importance of moral constraint and scrutiny to curbing abusive executive action.⁸⁸ In 2014, during a speech concerning exposure of a mass surveillance programme carried out by the NSA, then President Barak Obama said: ‘Our system of government is built on the premise that our liberty cannot depend on the good intentions of those in power; it depends on the law to constrain those in power.’ There is truth to this statement, and for that reason it remains a core tenet of contemporary constitutionalism.⁸⁹ However, it is also true, and perhaps fitting in a speech concerning an immensely controversial act of executive power, that constitutional government cannot, in the long run, depend on law alone to constrain actions which corrode the common good. Constitutional government which curbs abuse of power also *does* depend, in the last, on the good intentions and morals of those in power and those who put them there.

Constraints imposed by official’s internalized sense of political morality, and by public opinion and scrutiny expressed through public and electoral contestation, all help constitute perhaps the most effective fetters on abuses of contemporary executive power,⁹⁰ and a critical complement to legal constraints setting the outer bounds of executive authority. This is because the ‘fragility of constitutionalism’ is as much, if not more, about the attitudes of those who inhabit its governing institutions, and citizens who legitimize these political actors, than questions of formal legal structure.⁹¹ Although a thinker often associated with the

⁸⁶ See (n 7).

⁸⁷ Bruce Ackerman, *We the People: Foundations* (n 70) 257.

⁸⁸ Bruno Frey, ‘A Constitution for Knaves Crowds out Civic Virtues’ (1997) 107 *The Economic Journal* 1043 (n 32); Judith Shklar, *Legalism* (n 22) 1.

⁸⁹ Adrian Vermeule, ‘The Publius Paradox’ (n 28) 10.

⁹⁰ Wojciech Sadurski, *Poland’s Constitutional Breakdown* (n 37) 183; Thomas Crocker, ‘Constitutions, Rule Following, and the Crisis of Constraint’ (2018) 24 *Legal Theory* 3-38.

⁹¹ *Ibid.*

importance of institutional checks and balances, these sentiments echo one of Madison's most enduringly relevant admonishments in the *Federalist Papers*: that without a robust constitutional culture capable of constraining executive excess by fixing politics toward the public interest, legal checks may, in the end, be a weak restraint on abuse; in some instances little more than 'parchment barriers.'⁹² Even the cleverest of constitutional designs, Ackerman reminds us, can be 'swept away by a people that has lost all sense of decency'⁹³ or concern about how public power is wielded.⁹⁴

Executive predominance consistent with constitutional government

Being sanguine about executive predominance might strike some as contrary to core tenets of contemporary constitutionalism, which in some iterations is deeply suspicious of increased executive power.⁹⁵ However, constitutionalism is a political concept with a rich intellectual tradition and has not always been synonymous with deep suspicion of state power. There is nothing inherent in the concept requiring its concrete institutional instantiation to prize negative liberty from state involvement, individual autonomy, and voluntarism; or to remain agnostic to using state power to promote the common good.⁹⁶ Executive predominance can be entirely consistent with the positive intellectual tradition of constitutionalism, which regards constitutional law not only as a means of constraining power, but a functional tool for empowering and co-ordinating state action for the common good.⁹⁷

For the reasons outlined in parts II and III, there may be good reason for constitutional actors in many systems to loosen ties to the liberal aspect of the constitutional tradition, at least in so far as it is hostile to state power, gives normative primacy to the legislature, and is hostile to robust executive authority. The weightiest argument for tempering traditional liberal constitutional hostility to robust executive power, I suggest, may be recognising that without adequate state capacity, a constitutional order may be hapless in tackling social-political problems deeply harmful to a healthy polity.⁹⁸

⁹² James Madison, 'The Federalist No. 48', in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 40* (1990).

⁹³ Bruce Ackerman, *We the People: Foundations* (n 70) 257.

⁹⁴ See also Thomas Aquinas, *Summa Theologica: Treatise on Law* in Mortimer J. Adler (ed.), *Great Books of the Western World Volume 18 Aquinas II* (1990) 214. Aquinas argued that 'the common good of the state cannot flourish unless the citizens be virtuous, at least those whose business it is to govern'.

⁹⁵ N.W. Barber, *The Principles of Constitutionalism* (n 10) 2-6; Jeremy Waldron, *Political Political Theory* (n 33) 30-36; Jeremy Waldron, 'Constitutionalism: A Skeptical View' (n 77) 267; Eric A. Posner and Adrian Vermeule, *The Executive Unbound* (n 18) 3-5.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (n 68) 218.

Even if my qualified defence is found unpersuasive, these normative considerations should encourage scholars to avoid considering a powerful or predominant executive *per se* contrary to good government. To side-step the crude ‘assumption that limitation of the executive (as of the state more generally) is good, and the more restrictions that exist the better’.⁹⁹ Instead, I hope it provides arguments which encourage constitutional designers and scholars to approach the question of executive authority with full and sharper consideration of the complex and tough moral and political trade-offs involved in setting the boundaries of its powers. Thus even if scholars conclude that the current extent of executive authority is too broad, I hope they acknowledge that there are no monistic, one-size-fits all approaches to structuring executive power, and that anxiety and tension about the right balance between empowerment and constraint has always been, and probably always will be, a core feature of debating executive power in constitutional systems. To appreciate that legitimate concern over abuses of power should not *excessively* cloud judgment about the potential value of, and good reasons that can exist for, a robust executive.¹⁰⁰

Promoting robust constitutional culture

Finally, a brief word on the qualified nature of my defence is warranted. I have said executive predominance is a desirable conception of executive power provided it is set in the right constitutional and political culture. A culture broadly dedicated to wielding state authority toward the common good and human flourishing, even if there are conflicting ideological positions on how best to achieve this. This of course raises an obvious question - how can this kind of culture be promoted and sustained? What role do constitutional lawyers or scholars have in this area? The blunt answer is that, while it is extremely hard to know for certain, and it is beyond the scope of this thesis to offer any suggestions, it is very unlikely that promoting and sustaining the kind of culture capable of ensuring executive predominance is directed to the common good is within the skill set of the public lawyer, or ambit of constitutional theory. As with so much else in life, the answers to our ultimate hopes lie elsewhere. If such a culture can be consciously promoted at all, its cultivation surely lies in the domain of ethics, philosophy, and theology.

⁹⁹ Paul F. Scott, ‘The “Publius Paradox” and the United Kingdom’ (n 58) 5.

¹⁰⁰ Adrian Vermeule, *The Constitution of Risk* (n 10).

More manageable for the public lawyer, perhaps through inter-disciplinary collaboration, might be the task of *assessing* or *measuring* how particular constitutional cultures are sustained. To be sure, this too would be an extremely difficult task requiring require very detailed local case-studies of a different range of political systems, to ascertain why different political communities maintain a particular attitude about how public power should be exercised and what factors can corrode this disposition. An analogy might be drawn with studies which have attempted to explain why, and when, constitutional governments are likely to fall to authoritarianism.¹⁰¹ Some of these studies have suggested that wealth, and the distribution of wealth, of a polity are central to the preservation of constitutional government. Thus, where immense poverty and inequality exist, the weaker the constitutional order and greater the risk of collapse from constitutional government into authoritarianism.¹⁰²

Studies into the sustenance of constitutional cultures which broadly aim public power toward the common good, might yield some generalizable factors which have predictive power across a range of systems. Alternatively, they might highlight that forming and sustaining a healthy constitutional culture is inevitably heavily influenced by an existing set of 'local norms, practices, and standards' rooted in a state's unique economic, social, and political history. In other words, it may be that promotion and sustenance of a healthy constitutional culture is inevitably based on 'particular, contextual, contingent, and local' factors rather than anything we can consider 'general, objective, and global'.¹⁰³ But regardless of the answers offered, these are questions surely worth pursuing for public law scholars hoping to learn more about the factors which built, and can help sustain, healthy constitutional cultures.

¹⁰¹Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (n 30) 81; Eric Posner and Adrian Vermeule, *The Executive Unbound* (n 18).

¹⁰² *Ibid.*

¹⁰³ See David Kenny, 'Proportionality and the Inevitability of the Local: a comparative localist analysis of Canada and Ireland' (2018) 66 *American Journal of Comparative Law* 537.

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