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A Theory of Institutional Separation for the Administrative State

Ph.D in Law

2006

Eoin Carolan

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SUMMARY

In its efforts to elaborate an institutional theory of separation for the administrative state, this thesis employed a number of distinct methodologies. Its key methodological step was the development of evaluative criteria of institutional efficacy. This suggested that a theory could only be successful if it was instrumentally effective and internally coherent. For an institutional theory in a constitutional state, that instrumental function was to fulfil a normative-systemic role as a demonstrable example of social values in action. By this process, the unity of the constitutional polity would be strengthened.

Having outlined this yardstick of institutional success, this thesis then applied it to the dominant contemporary model of the separation of powers. This section of the work was primarily descriptive in nature. It analysed the extent to which the courts' treatment of the theory could be said to achieve liberty-optimal outcomes, or to support the prevailing social consensus. It concluded that the theory failed on both these grounds.

Drawing on Unger's discussion of counter-exceptions, the thesis then concentrated its attention on the areas in which the orthodox model of separation of powers encountered particular difficulties. Unger speculated that these exceptional issues indicate the existence, at a deeper level, of a conceptual conflict between the dominant traditional theory, and a more radical alternative which it seeks to subdue.

The descriptive discussion of the various operational failings of the separation of powers theory thus became the basis for a prescriptive elaboration of an amended understanding of the institutional order. In some ways, this resembled an effort to introduce *ex post facto* order to an existing state of affairs. As such a radically alternative state of affairs does not actually (as yet) exist however, the methodology deployed in this aspect of the thesis was perhaps more like Rawls' notion of reflective equilibrium – the attempt to construct a stable and balanced institutional system, capable of accommodating underlying normative ideals, institutional efficacy and the operational realities of the contemporary state. To this end, a hypothetical institutional architect, aware of the normative and operational characteristics of the system, was employed as a creative and evaluative tool. This is clearly reminiscent of Rawls' famous idea of the original position.

Unger's exceptions served as the starting point for this effort, identifying the key areas of conflict in which reflective development was more required. Furthermore, the efforts by the courts to address these issues – as an attempt by the judiciary to apply basic principles to problematic issues – provided some directional pointers as to the ways in which equilibrium might be achieved.

Attempting to balance the administrative realities of contemporary governance with the normative intuitionism of the constitutional state, a constituency-oriented model of institutional separation was suggested. From the point of view of the system's underlying values, it was comparable to republican ideas of government. From a practical perspective, it also appeared to provide an effective means of institutionally organising the state. On the application of the thesis' criterion of institutional efficacy, it was thus much more successful than the traditional theory of separation of powers.

The thesis thus concluded that a more suitable model of institutional separation would be one in which bodies exercised power on a constituency-oriented basis. Institutions would be charged with the advancement of a particular interest. Clarifying the nature of each institution's competence, this model allows the development of more reliable inter-institutional safeguards.

In terms of the constituent interests employed, the thesis approaches the issue from the standpoint of the rational and autonomous individual actor, thus replicating the analytical approach adopted in earlier chapters. It suggests, therefore, that the abstract interests of the collective and of the individual should be represented, at a macro-organisational level, by the elected organs of state and by the courts, respectively. Furthermore, the model incorporates the administrative branch of government into its conclusions by suggesting that it should be seen as a way of securing the rational non-arbitrariness of government acts at the micro-institutional level. Discretion is not a threat to legitimacy but a way of enhancing it, by adjusting the judgments of the more abstract organs in light of the actual circumstances of an individual case.

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A Theory of Institutional Separation for the Administrative State

Chapter 1

SOCIETY, CONSTITUTIONALISM AND THE STATE:

EVALUATING INSTITUTIONAL THEORY IN A CONSTITUTIONAL SYSTEM

Introduction

A 'central concept of modern constitutionalism'[1], the theory of the separation of powers enjoys a position of almost unparalleled global repute as a foundational tenet of liberal democracy. A doctrine of long-standing historical and political significance, it exerts considerable influence over the attitudes, opinions and public pronouncements of academics, officials, and individual citizens alike. The theory has, in recent times, even attracted favourable comment from a number of prominent English academics – a notable development in a jurisdiction whose Diceyan heritage had inculcated the orthodox disparagement of the doctrine as a 'rickety chariot'[2] of alien invention and dubious design. Recent reforms of the United Kingdom's constitutional order have been acclaimed by jurists such as Masterman[3] and Malleson[4] as a welcome attempt to introduce elements of the separation theory into the British constitutional order. Woodhouse has even raised the possibility of "parliamentary sovereignty being replaced as the defining principle of the constitution by a more robust version of the separation of powers"[5]. In a similar vein, the Irish Supreme Court has recently proclaimed the doctrine to be 'of itself, a high constitutional value'[6], through the ideological prism of which all other constitutional provisions ought to be perceived.

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[1] Barendt, "Separation of Powers and Constitutional Government" (1995) *PL* 599, at 599.
[2] Robson, *Justice and Administrative Law* (2nd ed. Stevens, 1947), at 14.
[3] Masterman, "A Supreme Court for the United Kingdom: One Step Forward, Two Steps Back" (2004) P.L. 48.
[4] Malleson, "Modernising the Constitution: Completing the Unfinished Business" (2004) 24 *Legal Studies* 119, at 123.
[5] Woodhouse, "The Constitutional and Political Implications of a United Kingdom Supreme Court" (2004) 24 *Legal Studies* 134, at 153.
[6] *T.D. v. Minister for Education* [2001] 4 IR 259, at 362 *per* Hardiman J.

An attempt to challenge a concept of such seemingly compelling charms might appear a needlessly obdurate, if not entirely foolhardy, undertaking. After all, the doctrine's recurring prominence as a basic staple of constitutional and political discourse suggests a theory beyond effective reproach. The model's virtually universal acceptance ought not, however, obscure the fact that various aspects of it have been subjected to adverse academic comment. That the doctrine prevails (and even proliferates) in the face of such critical scrutiny would seem to suggest that these attacks are inaccurate, ill-conceived, or quite simply incorrect. This thesis, however, will attempt to argue that the theory's constitutional constancy is the result not of its innate ideological veracity but rather of its continued identification with a series of distinct institutional values which are, in themselves, deserving of (and thus the basis for the doctrine's continuing) support. This work will therefore aim to develop a revised institutional theory of separation which draws on these values whilst also managing to avoid the problems which the persistent invocation of the traditional theory involves.

An evaluation of the relative merits of rival institutional theories clearly demands the elucidation of some form of analytical criteria. The success or otherwise of a given theory of institutional arrangement can only be adequately assessed in the context of a full and proper understanding of the part which institutional theories play in the constitutional order. The remainder of this chapter will therefore be devoted to the development of just such an understanding. If a clearer conception of the normative purposes underpinning the adoption of an institutional theory can be established, it should assist in the elaboration of appropriate evaluative criteria against which the separation of powers – or, indeed, any other theory – can be systematically assessed.

Invariably occurring as a single, albeit significant, element of the overall constitutional structure of a state, an analysis of the role and function of an institutional theory ought obviously to commence with an examination of the place and purpose of constitutionalism in general.

I. CONSTITUTIONALISM AND THE STATE

A. The social significance of a constitution

A constitution, in contemporary terms, tends to connote a written document which enshrines certain substantive and institutional principles. These values are generally enforceable by a judicial branch dedicated to the upholding of this ostensibly foundational text.[7] Constitutions, on this view, are generally regarded as a form of received and settled fact, a fixed declaration of those political precepts which are socially cherished as essential ideals. The written constitution is treated as a legal instrument of virtually sacred value, a higher-order statement of rules which serves as the foundation of social and political order in that state. The U.S. Constitution, the Supreme Court has declared, constitutes that country's 'social fabric'[8], 'the only true foundation of every power in … government'[9]. Similarly the Irish Supreme Court has expressed the opinion that, in 1937, '[a] new constitutional basis for the State was laid'[10], thereby equating the enactment of a revised constitutional text with a recasting of the Irish state and its structures. As Budd J. had previously proclaimed, '[t]he Constitution brought into existence a new State, subject to its own unique and basic law'[11].

Martin Loughlin has, however, strongly criticised this tendency to treat the written constitution as antecedent social fact, decrying such 'constitutional legalism' for its failure 'to acknowledge the provisional character of constitutional arrangements'[12]. In contrast to the common conception of the document as fixed positivist fact, Loughlin proffers instead a dynamic vision of constitutional theory as a flexible framework which both structures and reflects the shifting character of everyday political practices. Constitutionalism does not denote an absolutist belief in the top-down authority of a

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[7] This was the logic used to justify the existence of the power of judicial review in the seminal American case of *Marbury v. Madison* 1 Cranch 137; 5 U.S. 137; 2 L. Ed 2d 60 (1803).
[8] *Brent v. President of the U.S.*, 35 U.S. 596, 627 (1836).
[9] *Newton v. Stebbins*, 51 U.S. 586, 607 (1851), *per* Daniel J. dissenting.
[10] *Maguire v. Ardagh* [2002] 1 IR 385, at 570, *per* Denham J.
[11] *Riordan v. An Tanaiste* [1995] 3 IR 62, at 81.
[12] Loughlin, "Constitutional Law: The Third Order of the Political" in Bamforth & Leyland ed., *Public Law in a Multi-Layered Constitution* (Hart, 2003) 27, at 48.

particular text. Rather its roots lie in a reciprocal relationship between political reality and constitutional practice.

This refusal to regard the constitution as the rigid and immutable foundation of social order is traceable to Schmitt's theory of the political.[13] Characterising conflict as an essential and enduring feature of human existence, Schmitt's work, at its very simplest, can be taken to deny the very possibility of a permanent social settlement. In this Schmitt echoes the views advanced by James Madison in *Federalist Paper No. 10*. Madison felt that '[a]s long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed'[14]. Thus, there will always be an enemy to be countered. Politics arises from conflict, and requires it for its continuance. One man's unchallengeable truth will always be another's misguided dogma. There is, therefore, no universal good upon which all states and societies can be constructed. There is instead, only the provisional personal conception of the good, which must be defended against any alternative enemy understandings.

B. The state, politics, and internal social divisions

The state, in Schmitt's view, is presented as a means by which human conflict can be successfully internalised. In his theory, the state structure emerges as a mechanism for the management of this perpetual conflict, creating a unifying entity with which the individual can himself identify, and which, just as significantly, allows him to identify others and their collective entities as an enemy:

> With the recognition of a 'we' that can be set against the 'they' of the rest of mankind, the friend-enemy distinction [which inheres in human relationships] is capable of being externalised.[15]

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[13] Schmitt, *The Concept of the Political* (1932), Schwab trans., (University of Chicago Press, 1996). For further discussion of Schmitt's theories, see, for example, Dyzenhaus, *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press, 1998); Mouffe (ed), *The Challenge of Carl Schmitt* (Verso, 1999); and Scheuerman, *Carl Schmitt: The End of Law*. The interpretation of his work presented here is that provided by Loughlin as part of his wider analysis of constitutionalism.

[14] Madison, *Federalist Paper No. 10* (1788) in Kramnick ed, *The Federalist Papers* (Penguin, 1987), at 123.

[15] Loughlin, *op.cit.*, at 34.

It is important to bear in mind that Schmitt's state does not seek to eliminate internal conflict entirely. Schmitt, in fact, regards such a classically utopian vision of social harmony as an undesirable outcome. '[G]roup life without conflict – society without politics – constitutes a denial of the human condition which, if ever realised, would amount to a moral loss.'[16] Thus, the state must provide for the effective management of domestic conflict. Disputes will inevitably arise but must be dealt with in such a way that the internal unity of the state is not destroyed. Intra-state conflict must be acknowledged and accepted as an ever-present element of the entity's existence. It should therefore be factored into the construction and design of the state structures. As Loughlin explains:

> Since the state [must be] ... able to institutionalise domestic political antagonism at a lower level of intensity than that of friend versus enemy, one of its most basic achievements is that of being able to keep conflict and disagreement within a framework of order. For these conditions to be realised, however, the tensions that exist within the state must be actively managed.[17]

Loughlin, like Machiavelli,[18] sees the practice of politics – that is the active regulation of internal divisions – as one way in which the state undertakes this task. 'The conduct of politics ... is not built on the celebration of conflict: it is generated by the need to ensure its effective management.'[19] Efficacy is the touchstone of political action. The constitution, on this understanding of the state, thus appears not as a testament to the state's normative foundations but as a tool for the successful management of internal conflict. It is thus not the basis for the existence or creation of the state. Rather it is simply another way in which the state – the unified 'we' which has emerged – can actively and efficaciously address the potential danger of internal divisions. The

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[16] *Ibid.*, at 35.
[17] *Ibid.*, at 34.
[18] Machiavelli, *The Prince* (1513), Milner trans. (Dent, 1995). Loughlin prefers Machiavelli's conception of the practice of politics to that of Schmitt. Schmitt, he feels, sees conflict as an principle to be embraced whereas Machiavelli views it as an inevitability to be managed by the successful statesman.
[19] Loughlin, *op. cit.*, at 39.

constitution is but a by-product of the practice of politics[20] – a purposive device whose true value lies in its instrumental efficacy rather than its ontological legitimacy. 'Writings about constitutions', it is clear, 'are always undertaken in the service of political theory'[21].

II. A Political Tool? – The Constitution as Unifying Force

A. Substantive constitutional values

Constitutionalism's political utility therefore derives from the extent to which it supports the existence of a unitary sense of social consciousness. Preuss has noted how 'the common feeling of a group's oneness is the determining state-building social energy'[22]. The constitution, its existence and accepted authority predicated on the presence of a common identity, reinforces public belief in the reality of a homogenous social unit, and thereby supports the state's efforts to successfully manage any internal conflicts. The establishment of a constitution proclaims the unitary nature of the state, and demands the obedience of the citizenry on that basis. By accepting its authority, the citizens also implicitly acknowledge their individual identification with the unitary vision advanced therein. This recognition of the authority of the constitution, and thus also of the state, enhances the centripetal force of this centralised social identity, thereby also reducing the centrifugal pressures created by any internal political conflict.

It is clear therefore that public acceptance of the authority of the constitution is a key stage in the development of a stable governing structure capable of effective internal conflict-management. The citizens must feel as if they owe allegiance to the constitutional order if the state is to profit from its adoption of a constitution. A positivist

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[20] What Loughlin refers to as the third order of the political.

[21] Barber, "Prelude to the Separation of Powers" (2001) 60 C.L.J. 59, at 63.

[22] Preuss, "Political Order and Democracy: Carl Schmitt and his Influence" in Mouffe (ed) *op. cit.*, at 157, cited with approval in Loughlin, *op.cit.*, at 39.

declaration of a shared normative conception of society is one obvious way in which the existence of the essential common identity can be both acknowledged and encouraged. If the stated conception is one which receives widespread public acclaim, not only is the homogeneity of the unit reinforced but, in addition, the mandate of the state to speak and act for the social unit – and thus also to exercise authority over it – is greatly enhanced. The enactment of a purportedly authoritative enumeration of a society's most fundamental beliefs implicitly confirms the existence of a normatively-unified social entity. At the same time, its enforcement encourages the continuing public espousal of the designated social values into the future. If a constitution is widely believed to promote, support – and, in its operations, exemplify – some objective concept of communitarian good, it is considerably less likely that it will lose the allegiance of its public at a given point in the future.

It is in this context that a theory of assertedly objective appeal has value. Schmitt's work may be taken to deny such doctrines the possibility of universal acclaim. It does not, however, disavow their utility. Schmitt suggests that opponents will invariably emerge to contest any particular position. From the point of view of state stability, the key requirement is that this opposition functions at a manageable level of sub-constitutional conflict. Disputes at this level will be settled in accordance with constitutional rules which are uncontested by the parties. Schmitt's theory indicates that they may not be accepted by all, but constitutional principles clearly require broad popular approval. Those concepts which have been derived from objectivity or reason are more likely to command that widespread public support which is so essential. Schmitt's analysis can thus be argued to support the claim that universal notions of the good are instrumentally important, even as it rejects their aspirations of popular universality. As this thesis will subsequently propose an institutional theory of ostensibly universal value,[23] this is a significant point.

The tendency in contemporary liberal democracies to textually entrench certain substantive normative values provides an instructive example of the operation in practice

[23] *See* Chapters 4 and 5, *infra*.

of the constitution-as-unifying-force. As Bamforth has noted, liberal democracies are inclined to evince an intuitive opposition to the coercive use of power by the organs of the state, demanding instead that any exercise of public power be legitimated by way of its compliance with the society's unifying normative vision.[24] Power can only be used for legitimate purposes, and in normatively legitimate ways. The insistence on the essentiality of legitimacy, however, implicitly accepts the managerial authority of the state, while also reassuring the citizenry that such power will only be used for purposes that are normatively 'good'. Thus, not only is the authority of the state over the social unit affirmed, but the public's acceptance of such authority as a social good to which they owe allegiance is encouraged. The initial emergence of the unified state may not be predicated on its pursuit of an objective or external notion of the good but the internal adoption of such an idea serves to enhance the individual's identification with, and belief in the value of, the common identity upon which the state is, in actual fact, founded. The institution and enforcement of a central normative vision can therefore have the effect of cementing the cultural bonds of the state structure. Thus, in our liberal democracies, the public tends to have considerable confidence in the constitutional order, its faith secured by that order's demonstrable commitment to a socially accepted understanding of the communitarian good.

B. The institutional arrangement

The institutional elements of a constitution can also support such a public belief in the integrity and veracity of the state's governing authority. The enactment of a lofty commitment to substantive normative goods is, by itself, insufficient to secure continued public confidence in, and allegiance to, the constitutional order. Individuals will not value a public statement of principles unless they have faith that the principle will be properly reflected in the daily actions of the state. Thus, 'the cultivation of a sense of even-handedness constitutes a vital aspect of the project of state-building'[25]. The prospect of unbiased institutional action proffered therein is likely to secure the continued acceptance

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[24] *See* Bamforth, "The Public Law – Private Law Distinction: A Comparative and Philosophical Apparoach" in Leyland & Woods ed., *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone, 1997) 136, at 138.

[25] Loughlin, *op. cit.*, at 40.

by the public of the justifiable authority of the state. Individuals are much more amenable to placing their faith in the values of the substantive aspects of the text if they are offered assurances that these values will function with equal and consistent force in every situation. This constancy is the very essence of their constitutional status. The constitution's authority as a formal declaration of basic social values rests on its related promise to ensure that the substantive values proclaimed therein will be recognised and respected as the community's universally binding normative constants. Its principles cannot be unevenly applied, ignored or abandoned when convenience so dictates. As ostensibly authoritative norms, they must appear to be beyond question, above political debate or influence.

> The evolution of institutions of government that aspire to operate at one remove from direct manipulation by power-wielders removes certain decisions and disputes from partisan political processes and ... serves to bolster faith in the system. The cultivation of a belief in the law-governed nature of the state is, in short, a means of generating political power and an especially powerful aspect of state-building.[26]

The state must therefore provide some form of institutional structure which confers on the constitutional text a reputation for such consistent and authoritative operation.

The substantive and institutional elements of a written constitution therefore play a significant part in the state's critical task of establishing and maintaining a shared sense of community. The substantive aspects of the text provide a unifying normative vision to which all can pledge allegiance, thereby confirming the existence of a communitarian cultural identity. The institutions of the state, meanwhile, offer a guarantee that this statement of societal values will operate in a suitably authoritative and even-handed way, enforcing the central tenets of the text with the unbiased consistency which befits their constitutional status. The constitution's utility as a political tool thus arises from the way

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[26] *Ibid.*, at 41.

in which it helps to counteract the socially destructive effects of domestic conflict by reinforcing a common social view.

C. The problem of inevitable conflict

This instrumental understanding of the constitution is directly traceable to Schmitt's insistence on the inevitability of political conflict. If, however, we have accepted such conflict as inevitable, it seems problematic to then, at the same time, rest the constitution's utility on its acclaimed (and thus also authoritative) status as a fixed declaration of shared social values. If internal conflict is to be an inevitable occurrence in the state, a settled conception of social values is clearly an impossibility. Conflict will inexorably arise over the normative values of the relevant society, thereby calling into question the extent to which an unchanging constitutional text reflects the views of the state's citizenry. If the substantive elements of the document fail to reflect such changes, the authority of the constitution will necessarily be undermined. If this was to occur, so, also, would its essential ability to retain the allegiance of the population at large.

It is obvious, therefore, that a fixed declaration of substantive social values will be incapable, over time, of maintaining its centralising authority over the people of the state. The substantive normative elements of the text are thus, by themselves, insufficient if the constitution is to successfully fulfil its political function over an extended period of time. The institutional architecture of the state must be designed in such a way that it is capable of confronting the problems posed by internal normative conflicts. An institutional theory, it would seem, must necessarily constitute more than the mere organisational instantiation of a society's substantive normative views. It should therefore be assessed accordingly.

III. The Constitution and Changing Social Tastes

A. Unifying by example

A comprehensive analysis of an institutional theory must therefore reflect the extent to which it successfully performs this normative-systemic function. As Shapiro explains:

> Normative-systemic arguments first point to the existence of norms of right conduct. They then urge that to vindicate these norms we should try to increase the incidence of right actions and decrease the incidence of wrong ones. A major mechanism for doing so is to reinforce attitudes important in the genesis of right actions and to attenuate other ones. This can be done in part by pursuing and observing certain social practices and appropriately endorsing them .... The arguments, in short, recommend programs for learning ... through the construction of community institutions.[27]

On this view, the institutional architecture of a constitutional system is conceived as an orienting framework with a socially pedagogic role. The substantive elements of the constitution, it was argued above, attempt to authoritatively enumerate the 'norms of right conduct' in which the community believes. It then falls to the institutional aspects of the constitutional structure to encourage continued public faith in, and adherence to, this unifying normative vision. The initial adoption of the constitution as a public declaration of the good establishes a normative presumption in favour of the future actions of the institutions which apply its principles. The effective enforcement of the authoritative precepts of the constitutional order can therefore, if correctly carried out, validate, reinforce, and, crucially, *instruct* the public in the application of this established normative vision. Mashaw maintains that 'our positive beliefs about what is, powerfully constrain and shape our normative beliefs about what is good and desirable'[28]. Thus, an institutional theory, if it is to assist in the active management of internal conflict, should

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[27] Shapiro, "The Technology of Perfection: Performance Enhancement and the Control of Attributes" (1991) 65 S. Cal. L. Rev. 11, at 52.

[28] Mashaw, *Greed, Chaos & Governance* (Yale University Press, 1997), at 2.

draw on the potential for the 'is' (the presumed fact that the constitution represents a vision of the good) to influence the public perception of the 'ought' (what is an appropriate vision of the good) in such a way that the cementing effects of the substantive elements of the constitution continue to endure. '[R]epeated exposure to representations or ideas'[29] can have profoundly taste-shaping consequences, thereby institutionally counteracting the problem posed by the inevitability of internal normative conflict.

There are echoes of this analysis in Hart's well-known discussion of the reflexive way in which individual citizens respond to the orienting effects of legal rules. Hart correctly identified how the enactment of a legal rule or obligation 'mak[es] certain types of behaviour a standard'[30] for society as a whole, thereby furnishing individuals with a determinate yardstick against which, they are aware, their own behaviour is likely to be publicly assessed.

> [W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying such sanctions.[31]

These rules, therefore, act as a guide for citizens in the everyday conduct of their lives, colouring their perception of what is in their society, and what ought to be. The values and standards proclaimed therein help to shape individual citizens' own opinions as to what constitutes socially acceptable action. Thus does Hart's concept of an internal understanding of an individual social unit develop – a point of view which, unlike its external analogue, fully captures the extent to which the laws (or constitution) of a state influence the intuitive actions of its population. The external observer is compared unfavourably to:

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[29] *Ibid.*, at 3.
[30] Hart, *The Concept of Law* (Clarendon, 1961) at 83.
[31] *Ibid.*, at 82.

> [O]ne who, having observed the workings of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the lights merely as a natural sign that people will behave in certain ways .... In so doing, he will miss out on the whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour...[32]

Through the conditioning effects of these express standards of public conduct, legal or (at a more abstract level of reasoning) constitutional rules have such unifying and taste-shaping effects.

B. Unifying by reaction and response

Of itself, however, the general social recognition of a constitutional structure as a morally authoritative system deserving of public obedience is not enough to forever forestall the possibility that internal dissent could produce seriously disintegrating effects. Hart has demonstrated quite clearly that it is generally sufficient for a rule to be recognised as a legal (or in this context constitutional) provision for it to be observed by the public independently of the probability that it will actually be enforced. However, he also recognised that this general attitude of acquiescence is itself contingent upon the existence of a majoritarian belief that the system, as a whole, is efficacious.[33] Such efficacy, in the context of the issue currently under examination, rests upon the public's acceptance of the constitution's substantive values as normatively good. The institutional employment of these values can, it has been claimed, encourage this acceptance by a subtle process of habituation by enforcement. However, it is equally obvious, that in the event of a sufficiently serious dislocation between constitutional principle and public belief, the unifying effects of the constitutional order would be negated. In light of this

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[32] *Ibid.*, at 87-88.

[33] Hart concludes that the internal perspective is that of 'those who normally are the majority of society'. *Ibid.*, at 90. The relationship between a system's efficacy and Hart's presumption of majority support is examined further in "Revolt of Revolution – A Hartean Analysis" (2002) 5 TCLR 292.

chapter's characterisation of conflict as an inevitable ingredient in human affairs, this is a scenario which institutional taste-shaping, of itself, might not be able to prevent. Thus it is not enough for the state's institutional structures to reinforce a set vision by simple repetition. It must also provide for some mechanism by which it can adjust to, and accordingly reflect, the shifting nature of public opinion.

If the constitutional structure of a state is to fulfil its designated function as an instrument of social cohesion, it must therefore also be able to react to the outcome of internal normative disputes, and to thereby evolve in such a way that it retains the allegiance of the public. This public allegiance, as already discussed, is a prerequisite for the maintenance of the constitution's status as an authoritative statement of public values, upon which the force of its unifying effects is contingent. The constitution's institutional structures should be taste-responsive as well as taste-shaping.

How might this be achieved? The state, it would seem, must institutionally provide for the possibility of future amendments to its initially authoritative statement of norms. The values which the constitution affirms must retain sufficient flexibility that they may be dynamically developed to reflect the prevailing social view. Public debate about the normative content of the constitutional order must be tolerated, indeed encouraged, by its institutions. As an apparent inevitability, it should obviously be incorporated in their initial design. If a state's institutions do not embrace debate, it is difficult to imagine how they might ever be equipped to respond to it.

(i) Institutional design and normative debate – the place of public justification

The importance, from the state's perspective, of engaging with this process of value evolution is reflected in the significance which several prominent theorists attach to the institutional value of public justification. Vile, reviewing the historical development of institutional theory, remarked that:

> [T]he clash of interests in the real world is so sharp that the nature of the governmental structures through which decisions are arrived at is critically

> important for the content of these decisions. There has therefore been, since earliest times, a continuous concern with the articulation of the institutions of the political system and with the extent to which they have promoted those values that are considered central to the 'polity'.[34]

Thus, the consistent *public* enforcement of a particular set of values encourages their adoption as a template for the citizenry's interaction with both state institutions and each other. Rawls noted how:

> The publicity of the rules of an institution insures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations.[35]

Internal debate is therefore not only tolerated but actively managed. An institutional structure which seeks to expose its processes to the public allows for debate but structures and orients it in such a way that the importance of the central constitutional text is ultimately confirmed.

Openly allowing for the possibility of public interaction encourages individual citizens to put their alternative perspectives to the institutions of the state. Dissent – Schmitt's ubiquitous engine of political action – is not excluded or ignored (and thus allowed to foment) but is brought within the institutional structures of the state.

A forum is provided for the presentation of conflicting normative views. This allows the state to establish its ownership of the debate at issue, imposing certain institutional strictures to which the participants of the process must conform. State control allows it to shape the ensuing public debate, effectively imposing a type of institutional etiquette in accordance with which all claims must be articulated. This requires any assertions of value to draw on the language, content and form dictated by the existing constitutional

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[34] Vile, *Constitutionalism and the Separation of Powers* (Clarendon, 1967), at 1.
[35] Rawls, *A Theory of Justice* (revised ed., Oxford University Press, 1999), at 49.

text. The constitution's ostensibly authoritative status proclaims the existence of a social consensus, the continued value of which is implicitly affirmed by the attempts of individual citizens to invoke it. After all, a dissenter who seeks to rely on the existing constitution to support his normative stance cannot subsequently try to impugn the communitarian authority of the text.

An institutional theory which provides a forum for the articulation of varying domestic views thus plays a valuable part in preserving the unifying force of the constitutional order. For Rawls, this transparent process is additionally useful in light of the institutional opportunity which arises therein to reiterate by example the merit of the constitution's normative vision. The publicly reasoned application of its principles, on his view, cannot but demonstrate to individual doubters the inherent veracity of the initial constitutional arrangement. The state's institutions should therefore assist the political process of successfully managing internal normative dissent by demonstrably persuading the public that the constitution's central substantive values continue to operate in a way which is worthy of their social support.

> To justify our political judgments to others is to convince them by public reason, that is, by ways of reasoning and inference appropriate to fundamental political questions, and by appealing to beliefs, grounds and political values it is reasonable for others also to acknowledge.[36]

Rawls' understanding of institutional public justification, however, clearly connotes the existence of an objective external conception of social good. 'Public justification', he suggests 'proceeds from some consensus: from premises all parties in disagreement, assumed to be free and equal and fully capable of reason, may reasonably be expected to share and freely endorse'[37]. Disputes, therefore, result not from the possibility of divergent normative views but rather from the inability of certain individuals to identify the true principles of social justice by themselves. The reasoned public application of

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[36] *Ibid.*, at 27.
[37] Rawls, *Justice as Fairness: A Restatement* (Belknap, 2001), at 27.

these principles therefore encourages these recalcitrant citizens to recognise the value of the objective (Rawlsian) concept of justice.

(ii) Public reason and evolving social values

However, it has repeatedly been argued in the course of this chapter that the nature of mankind automatically precludes the isolation of such a universally accepted objective good. Thus, Allan's more nuanced interpretation of public reason is preferable for the purposes at hand. In his consideration of this question, Allan accepts that individual citizens, when engaging in political or normative arguments, tend not to confine themselves to an agreed or objective premise from which all legitimate discussion must proceed. A society's view of its shared values will not remain forever constant. Thus, if the institutional architecture is to continue to support the authority of the state, it cannot be content simply to enforce a fixed normative view, confidently trusting that the exposure of the public to the way in which the constitution is practically applied will invariably convince them of its value. State institutions must not only allow the constitution to be justified and explained to the public, but must also ensure that the public regards the proffered justification as a reasonable one.

> A purported legal principle that had no counterpart in ordinary moral discourse could provide no justification for anything: its recognition would show that an insular preoccupation with the niceties of a technical legal craft had been substituted, unacceptably, for a proper concern for the requirements of … the public good.[38]

Thus, Allan's concept of public reason requires *both* publicity and rationality. The public must observe the ostensible authoritative text in practice but must also accept and embrace it as a reasonable reflection of their social views. A difficult balancing act is therefore required. After all, if the institutions are obliged to respond to shifting public tastes, can they also produce the necessarily unifying taste-shaping effects examined

[38] Allan, *Constitutional Justice* (Oxford University Press, 2001), at 292.

above? Would not the claims of a constitution to social or normative authority inevitably be undermined if it was to regularly amend its supposedly central tenets?

In this context, Allan emphasises the essentiality of providing some form of institutional adjudication. The existence of such a public forum, as the previous section has shown, has the advantage of encouraging normative dissidents to implicitly draw on the existing text when framing and presenting their alternative views. However, the inclusion of an element of authoritative adjudication also allows for the dynamic and conclusive resolution of such disputes. Institutional adjudication is not simply designed to allow those citizens lacking faith in the substantive constitutional structure to be shown the error of their ways. To so see public adjudication is to demonstrate an ill-conceived and unquestioning acceptance of the constitution at issue as a tangible manifestation of the (chimeric) universal and objective good. On the contrary, a developed notion of the process of public adjudication should acknowledge the way in which it allows the state to position any emerging social views within the parameters of the existing understanding of the constitution. This reinforces its authority. Not only are the divergent social claims expressed in the rhetoric of the constitutional order, but the institutions of the state will also publicly ensure that the provenance of any determinative resolution is traced back to the constitutional text.

This analysis is very clearly illustrated by Dworkin's concept of interpretative integrity.[39] The notion of 'integrity' draws attention to the way in which the system attempts to seamlessly evolve to embrace any reflect any shifting social mores. Changes are publicly justified by reference to principles and values whose authority has been confirmed by consistent public repetition over time. The taste-shaping effects of institutional activity conditions the public to accept these principles as constitutive of the community's good. However, this general social acceptance also allows the system to respond to changing social tastes. The state's institution publicly invoke these tenets to justify any changes they adjudge to be necessary, thereby investing these 'new' social understandings with

[39] See, for example, Dworkin, *Taking Rights Seriously* (Duckworth, 1977); and *Law's Empire* (Fontana, 1986).

the authoritative reputation cultivated by the public use and repetition of the 'old'. 'Constitutional adjudication ... resolve[s] our political disputes successfully ... as it instructs us in our shared political principles'.[40] This is a taste-shaping and taste-responsive technique which, Selznick notes, the law has long employed:

> By inviting argument and making the law forever fluid and debatable, the common law tradition [like constitutional adjudication] ensures that the law that is merges with the law that ought to be .... Common law reason cannot escape social and political tradition: 'Custom must stand the test of reflection; reflection must yield to the verdict of experience'.[41]

Thus a picture of unity is presented to the public which binds new community values into the constitution's reputation as the authoritative exposition of normative social goods – even if that reputation originally rested on an alternative understanding of the state. Furthermore, the reputation of the state's institutions for even-handed and consistent treatment of the constitutional text reinforces public faith in the outcome of any such debate. It was noted in an earlier section how an aura of operational consistency can affirm the authoritative status of the constitutional text by confirming the public's view of its values as central social norms with a universally powerful force. In this context, this purported consistency serves to support the public assertion that the decision taken does not distort the normative unity of the constitutional order. Adjudication is thus a value-affirming exercise through the public use of which the institutions of the state are able to evaluate, synthesise and ultimately legitimate the evolution of public views.

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[40] Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985), at 43.

[41] Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992), at 450, cited with approval by Allan, *loc. cit.*, at 291. The passage is based in part on Blackstone's work in *Commentaries on the Laws of England.*

IV. CONCLUSION

The most common contemporary evaluative approach to issues of institutional architecture and design is one which examines whether the implementation of a particular structural model generates results which reflect the normative values underpinning its initial adoption. Institutional efficiency is typically regarded as the touchstone of theoretical success. As Barber explained; '[a] constitution is efficient in so far as it promotes the purposes for which it was established. It is inefficient in as far as it fails to fulfil these aspirations'.[42]

Thus, to turn to the example of the separation of powers, academics are inclined to argue about the extent to which its employment by the organs of the state yields liberty-optimal outcomes. It is beyond question that this is a valid means of inquiry. It would clearly be impossible to justify the continued usage of a doctrine which ultimately fails, in the situations it creates, to vindicate the normative value which justified its original utilisation by the state.

However, the preceding section has shown quite clearly that this cannot exhaust the scope of an academic inquiry into the operation of a constitution. Constitutional theory is not simply a question of manufacturing norm-appropriate outcomes. To instrumentally assess a model on the basis of the extent to which its outputs reflect the foundational values upon which its employment is contingent is to adopt an unduly circumscribed understanding of the institutional structure's constitutional utility. Such a narrow view of institutional instrumentality necessarily ignores the two key lessons of the earlier aspects of this chapter – that the public's belief in the normative values upon which the institutions were initially erected is unlikely to remain constant over time; and that the way in which the institutions publicly engage with and treat these values is arguably as significant (from the perspective of ensuring the constitution adequately fulfils its unifying function) as the normative integrity of the outcomes thereby produced. A proper conception of constitutional design must, it is clear, treat it as more than a mechanical exercise in producing norm-maximising effects.

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[42] Barber, *loc. cit.*, at 65.

A comprehensive analysis of an individual theory of institutional arrangement should therefore assess the extent of its contribution to the maintenance and development of the social, cultural and normative consensus which forms the centrepiece of the structure of that state. The theory should be examined not only for its compliance with the substantive values underlying its use, but also for the way in which it performs its critical taste-shaping and taste-responsive role. If it fails to properly fulfil this latter function, the likelihood is that the substantive values which the constitution espouses will remain fixed over time, ultimately leading to a loss of public belief in, and therefore allegiance to, the text. This would undermine its authority as a declaration of a shared social view, thereby damaging the state's ability to successfully manage its inevitable internal divisions.

This work must therefore consider, not only the question of whether the separation of powers theory, in its everyday incarnation, consistently produces libertarian outcomes but also whether the way in which the theory is institutionally employed publicly reinforces the constitution's legitimacy (and thus unifying force) as an authoritative statement of common social beliefs. The institutional devices (such as public adjudication) and process values (consistency, publicity, rationality) which support this task must form part of any full assessment of the constitutional utility of the separation of powers theory. The next section of this work will thus examine the separation of powers doctrine in the light of this dual conception of its constitutional utility. The next chapter will therefore attempt to examine:

(a) whether contemporary institutional instantiations of the theory tend to systematically produce norm-appropriate outcomes which reflect the substantive values underlying its usage;

(b) whether the way in which the institutions engage with the separation of powers theory both reflects and reinforces the public's equation of the authority of the state with the pursuit, enforcement and achievement of socially-accepted normative goods.

Chapter 2

THE TRIPARTITE THEORY OF INSTITUTIONAL SEPARATION

I. A UNIVERSAL SEPARATION OF POWERS DOCTRINE?

A. The problems of a 'pure' theory

A preliminary problem for any purported analysis of the separation of powers is the absence of an agreed understanding of the theory. It is one of the peculiarities of the concept that, despite its status as an ubiquitous tenet of constitutional thought, it remains an analytical subject of considerable imprecision. As a doctrine, it defies universal definition. The most obvious instantiation of the theory – a pure Montesquian model of three distinct organs independently exercising power – has not been wholly reproduced in the institutional architecture of any modern state. There must accordingly be serious doubts about its contemporary relevance. This so-called 'pure' theory of the separation of powers is, in fact, generally regarded as a practically impossible, or even undesirable, mode of government, a reputation chiefly acquired after its inauspicious cameo appearance in the formative years of the American constitutional experience.

The 17th and 18th centuries marked the undoubted political and theoretical highpoint of the 'pure' conception of the separation of powers. At a time of rising resentment at the repressive orthodoxy of absolute monarchies and unrepresentative rule, Montesquieu's idealised depiction of the English organs of public life as a paradigm of fair and balanced government served as the template for those seeking to reform or replace existing state systems. It was thus to his blueprint that the American revolutionaries turned. Intoxicated by the potent taste of their new-found freedom, conscious of the historical significance of the opportunity to fashion their own social and political structures free from the constraints of traditional dogma, those charged with the creation of the American state predictably acted with an absolute conviction. In their words and deeds, they exhibited an

ideological purity untainted by extended experience of the practical realities of government rule. Statements of principle and declarations of intent – whether rhetorical, political or constitutional – were sonorously delivered in stridently aspirational terms, as befitted the character of men committed to the establishment of a determinedly radical state. Acting in the first flushes of their revolutionary ardour, their dedication to a faithful recreation of Montesquieu's abstract scheme was total.[1] Thus Virginia's constitution declared that:

> [T]he legislative, executive and judicial powers of government ought to be forever separate and distinct from each other.[2]

This absolutist view was also evident in the constitution of Maryland, which similarly insisted '[t[hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other', adding that 'no person exercising the functions of one of said Departments shall assume or discharge the duties of any other'.[3]

Practical difficulties, however, inevitably arise when a theoretical abstraction is reborn in tangible form. The American constitutionalists, acting as midwife at the birth of this hybrid offspring of ideology and politics, could only expect to encounter such labour pains. As Barber has commented:

> A political philosopher can produce a utopian vision of the ideal world, uncluttered by the limitations inherent in all human endeavour. A utopian constitutional theory, on the other hand, [is] a waste of time.[4]

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[1] Although the theories of John Locke obviously also had a significant influence on the actions of these constitutional creators, it should be noted that 'Americans looked for specifics to Montesquieu, not to Locke'. Richards, *Foundations of American Constitutionalism* (Oxford University Press, 1989), at 120. Locke's justification of revolutionary action against tyrannical rule was arguably his greatest influence on events in America. See McLaughlin, *Constitutional History of the United States* (Appleton-Century, 1935), at 96-98.

[2] Constitution of Virginia, adopted on June 29, 1776. A copy of the constitution is available at http://www.yale.edu/lawweb/avalon/states/va05.htm (last visited March 29, 2006).

[3] Maryland Declaration of Rights, Article VI, adopted on November 11, 1776. The text of the declaration is available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm> (last visited March 29, 2006).

[4] Nicholas Barber, "Prelude to the Separation of Powers" (2001) 60 C.L.J. 59, at 62-63.

From a practical perspective, the hermetic division of governmental functions envisaged by these texts was impossible to achieve. The extensive powers exercised by the organs of the state could never be satisfactorily reduced to a simplistic three-way allocation of tasks. Further, the very notion of subjecting public bodies to a concept of independence so austere as to prohibit any substantial institutional interaction bore little relation to the realities of an efficient administration. Some degree of co-operation and co-ordination between branches is essential if the state is to function in a remotely cohesive manner. 'It is naïve ... to think of separation of powers rules as capable of creating sealed chambers, each of which must contain all there is of the executive, legislative and judicial powers. Overlap is inevitable.'[5]

The chastening experiences of the founders of the early American states demonstrated quite clearly the veracity of this view. It is an eloquent, if implicit, recognition of the practical difficulties which the earliest attempts at institutional choreography encountered, that only a very short time after Maryland and Virginia saw fit to assert their commitment to Montesquieu's ideal in such absolute terms, the constitutional texts of neighbouring states opted instead to present their own division of functions in a more measured fashion. The fiery zeal of the revolutionary had been replaced by the practical realism of the politician. Madison saw the constitution of New Hampshire as a product of this gradual process, noting how its position as the last state to enact a constitution allowed it to be 'fully aware of the impossibility and inexpediency of avoiding any mixture of these departments'[6]. It avoided, in his view, the errors of the earlier documents, which bore 'strong marks of the haste, and still stronger of the inexperience under which they were framed'[7], displaying a more pragmatic degree of ideological circumspection. Its commitment to the separation of powers was expressed in considerably more qualified terms:

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[5] Bator, "Constitution as Architecture: Legislative and Administrative Courts under Article III" (1990) 65 Ind. L.J. 233, at 265.
[6] Madison, *The Federalist* (2nd ed., University of Chicago, 1990), Book 47, at 155.
[7] *Ibid.*, at 156.

> [T]he legislative, executive and judiciary powers ought to be kept as separate from, and independent of each other as the nature of free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity.[8]

The American experience thus demonstrated the inefficacy of the purest conception of the separation of powers as a workable model of government. Today, the pure theory is accordingly treated with considerable scepticism. The South African Constitutional Court, for example, accepted in *S. v. Dodo* that 'there is in our constitution no absolute separation of powers'[9]. Worldwide experiences, the South Africans feel, have instead demonstrated that 'there is no universal model of separation of powers', and that 'in democratic systems of government in which checks and balances [exist] ... there is no separation that is absolute'.[10] To this end, the Canadian courts, like Kenny J. in the Irish context,[11] have noted that their constitutional text 'does not insist on a strict separation of powers'[12].

These decisions reinforce Gwyn Morgan's remark that the 'Platonic ideal' of the *trias politica* 'has not been followed in any working constitution in the world'[13]. It would seem that a model of such pristine academic integrity is impossible to effect in practice. As the South African courts have confessed, '[n]o constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation'[14].

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[8] Constitution of New Hampshire. Georgia (1777), New York (1777) and Vermont (1786) are amongst the states who favoured a more qualified approach to their constitutional adoption of the separation of powers theory. The texts of these documents, and other from the same era, are available at <http://www.yale.edu/lawweb/avalon/18th.htm> (last visited March 29, 2006).

[9] *S. v. Dodo* 2001 (5) BCLR 423; 2001 (3) SA 382, at para 22.

[10] *Re Certification of the Constitution of South Africa* (the First Certification case) 1996 (4) SA 744, at para.s 106-8.

[11] Kenny J. accepted in *Abbey Films v. A.G.* that 'the framers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers', a 'realistic' appraisal of the position which, Morgan notes, has not always been adhered to by the courts. *See Abbey Films v. A.G.* [1981] IR 158, at 171, and Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall, 1997), at 26-32.

[12] *Re Reference re Secession of Quebec* [1998] 2 SCR 217, at para 15.

[13] Morgan, *op. cit.*, at 24.

[14] 1996 (4) SA 744, at para. 109.

In its place, a variety of these partial theories of the separation of powers have emerged. Schemes of separation have been put forward from a host of theoretical and practical perspectives.

> [S]cholars [have]... staked claims for a de-evolutionary versus an evolutionary approach; a neoclassical versus a pragmatic approach; an originalist versus a non-originalist interpretation, or judicial literalism versus judicial interpretation.[15]

The existence of such myriad interpretations of the theory makes any overarching analysis of its efficacy very difficult.

B. The ubiquity of the institutional trinity

These differing doctrines do, however, tend to be united in their invocation of, and reliance upon, Montesquieu's original tripartite vision of the state. Although none of them seek to embrace and adopt it in its entirety, the three-way classification of state power as legislative, executive or judicial recurs as a central feature of almost all understandings of the separation of powers. Differences arise not over the validity of this initial threefold categorization of the governing functions of the state, but rather over the particular inter-institutional allocation of power. Thus, although the pure model of separation has been generally discounted as a viable institutional theory, its central threefold vision retains its influence as a guiding principle of power distribution. The model of a legislative-executive-judicial division of functions continues to appear as an essential element of any constitutional discourse. Disputes arise not over its inherent validity but over the mechanics of its actual operation. Contemporary theorists therefore tend to implicitly accept the veracity of this three-fold division of power, striving not to replace but to re-calibrate it for the modern world. It is through its reliance upon the tripartite model of institutional power that a conception of the state becomes recognisably a theory of *the* separation of powers. Thus it seems also a suitable starting point for any analysis of its efficacy as an institutional theory.

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[15] Brown, "Separated Powers and Ordered Liberty" (1990) 139 U. Pa. L. Rev. 1513, at 1522-23.

II. The Separation of Powers as an Effective Institutional Theory

A. Indeterminacy as an institutional problem

As an institutional doctrine, the theory of the separation of powers has a clearly defined role in helping to structure and direct the distribution and division of institutional power. Proffering a particular vision of institutional order, it ought to act as a guide to those who wish to establish an efficacious system of governance. After all, if an institutional theory is to convincingly support its claims of normative value, it must first fulfill its primary duty of organising and arranging the allocation of institutional power in that state.

As a theory, the tripartite understanding of the separation of powers has always been notable for its communicative simplicity. The idea of three separate organs with independent powers is easy to explain and to appreciate. This vagueness certainly did not hinder the global diffusion of the doctrine. Such an 'open texture, which enabled people to see in it what they liked, and take from it what they wanted, was no disadvantage to its reception or employment'[16]. This same simplicity, however, makes it problematic to apply. An institutional theory, it has been argued above, should actively assist in shaping the structure of a state if it is to retain any practical utility. It should therefore provide sufficiently specific criteria to decisively determine initial, and indeed ongoing, disputes over inter-institutional competences. The tripartite model, however, is so abstract that it is almost always unclear what it actually enjoins in an individual instance. As this section will seek to show, it would seem that the doctrine is, in fact, so indeterminate that it is ultimately devoid of any practical efficacy.

B. Indeterminacy in action – the absence of directive details

Easy to express, the Montesquian model is, as an interpretative principle, extraordinarily problematic to apply. Montesquieu himself made no attempt to establish a workable

[16] C. Munro, *Studies in Constitutional Law* (2nd ed, Butterworths, 1999), at 302.

scheme of institutional separation and others since then have struggled with the doctrine's definitional indeterminacy. The key difficulty is the imprecision inherent in the theory's central terms. For example, the two dominant versions of the theory in the extensive US literature on this issue both depend, for their everyday usage, on essentially indefinable notions.

(i) The formal doctrine

The formalist conception of the separation of powers attempts simply to preserve the distributional integrity of the tripartite model. From a normative point of view, formalists trust entirely to the model's inherent veracity. When faced with a question of disputed competences, the formalist court or commentator is concerned chiefly to identify and classify the task at hand. Once characterised as a legislative, executive or judicial function, the task is allocated to the appropriate institution. The initial classification thus effectively exhausts the formalist enquiry. This step necessarily involves, however, the adoption and employment of essentially arbitrary definitional criteria. How, for example, should an executive function be defined? And how can a court distinguish between a legislative and judicial task? The courts in Ireland and the US have conspicuously failed to provide a convincing and determinative account of the critical characteristics of the respective institutional functions.

Irish judges have, for their part, intermittently attempted to develop an authoritative definition of the judicial function. The indeterminacy of this concept has meant, however, that they have been forced to rely on a capriciously chosen check-list of apparently important features. Kenny J. in *McDonald v. Bord na gCon (no. 2)* opined that the 'characteristic features' of the administration of justice were:

(1) a dispute or controversy as to the existence of legal rights or a violation of the law;

(2) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

(3) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

(4) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;

(5) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.[17]

Like the efforts of earlier Irish courts in *Lynham*[18] and *Shanahan*[19], however, this definition provides only a descriptive summary of the everyday workload of the contemporary court. An *ex post facto* overview of the average judicial caseload, it does not offer a suitably prescriptive analysis of the core concepts of the judicial function. The logic of Kenny J.'s position is hopelessly circular, relying on the current nature of the court's activities to define its function into the future. The *McDonald* criteria reflects the judge's estimation only of what the courts do, rather than what they ought to do. In this, it owes more to historical happenstance than conceptual coherence.

The alternative, however, is for a court to content itself to 'say in a given instance whether or not the procedure is an exercise of [judicial] power, rather than to identify a comprehensive check-list for that purpose'[20], categorising instances of institutional power on a case-by-case basis. This 'easier, if intellectually less satisfying'[21] approach has been adopted by the US and Irish courts in several cases. It is, however, similarly affected by the connected problems of indeterminacy and arbitrariness.

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[17] [1965] IR 217, at 231.

[18] *Lynham v. Butler (no. 2)* [1933] IR 74. In this case, Kennedy C.J., interpreting A. 64 of the 1922 Free State Constitution, attempted to define the judicial power in a lengthy section which, he admitted, was offered 'by way of description rather than of precise formula'. Like the *McDonald* criteria, it functioned more as a description of what the court did rather than an analysis of what it ought to do.

[19] *State (Shanahan) v. A.G.* [1964] IR 239. Here Davitt P., denying any attempt on his part to fully define the judicial power, nonetheless set out another lengthy description of what he saw as its essential features.

[20] *Per* McCarthy J. in *Keady v. Garda Commissioner* [1992] 2 IR 197, at 204.

[21] [1992] 2 IR 197, at 204.

The Irish courts have oscillated between bold (but necessarily incomplete) attempts to identify the essence of institutional functions and a more realistic recognition that 'this question is likely ... to be resolved on a pragmatic case-by-case basis rather [than] by reference to a pre-defined set of principles'[22]. Because the functions are so difficult to define, the court is forced to identify, distinguish and allocate institutional powers on the basis of unconvincing, inauthoritative and ever-shifting criteria. Thus the Irish courts have in recent years experimented with auxiliary options – namely the historical[23], contextual[24] and incidental[25] approaches. These methods differ considerably, however. The conceptual approach, for example, resembles the *McDonald* checklist in that it seeks to reduce an abstract and elusive concept to a precise and comprehensive definition. The contextual and incidental options, on the other hand, involve a more intuitive examination of the measure at issue, the existing institutional context and the centrality of the power impugned to the conduct of the body in question. Theoretical esoterics are eschewed in favour of a pragmatic and definitionally-indeterminate approach. That the courts see fit to intermittently rely on such varying interpretative techniques – with Kearns J. actually considering all three in the course of a single decision in *O'Donoghue v. Ireland*[26] without comment or complaint – illustrates the problematic dearth of clarity or certainty in this area of the law.

From an American perspective, *INS v. Chadha*[27] provides an excellent example of the problems involved with this sort of case-by-case approach. Faced with a purported legislative veto of the decision of an immigration judge to suspend Chadha's deportation, the majority, noting the impact of the decision on the applicant's rights and liabilities, defined the power as a legislative one. Powell J., on the other hand, classified it as a judicial function – powerfully demonstrating the intensely subjective nature of the judges' individual analyses.

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[22] Hogan & Whyte, *Kelly: The Irish Constitution* (4th ed., Butterworths, 2003), at 627.
[23] *Keady v. Garda Commissioner* [1992] 2 IR 197.
[24] *O'Donoghue v. Ireland* [2002] 2 IR 168.
[25] *Murphy v. G.M.*, Unreported, High Court (O'Higgins J.), 4 June 1999. For a further discussion of these three approaches, see Morgan, *op. cit.*, at Chapter 4, and in "Judicial-o-centric separation of powers on the wane?" (2004) XXXIX *Irish Jurist* 142, at 154-158.
[26] [2000] 2 IR 168.
[27] 462 US 919 (1983).

Similar problems apply to any attempt to identify the essence of the executive function. It is difficult to identify any clear conception of exactly what constitutes the executive. Thus the English courts have:

> [C]ontinued to use the language of Queen and Crown to signify an executive which has been transformed almost out of all recognition since the seventeenth and eighteenth centuries.[28]

This reflects the fact that:

> [T]his notion [of an executive branch] principally seems to exist to capture all that is excluded from the other two categories[29].

Apparently incapable of definition in its own terms, the concept of the executive thus encounters the same difficulties outlined above in respect of the judicial function. Once again, courts and commentators are forced to identify executive organs on an effectively ad hoc basis.

The inconsistency inherent in this type of palm-tree justice is directly attributable to the indeterminacy of the concepts which are central to the use of this formalist theory. The formal view of the separation of powers 'depends upon a belief that the legislative, executive and judicial powers are inherently distinguishable as well as separable from one another', a proposition which, judicial experience has shown to be a 'highly questionable premise'[30]. The reality, as Stevens J. recognised, is that:

> [T[he exercise of legislative, executive and judicial powers cannot be categorically distributed among three mutually exclusive branches of government [because] governmental power cannot always be readily characterised with only

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[28] Daintith & Page, *The Executive in the Constitution* (Oxford University Press, 1999), at 26.
[29] Barber, *loc. cit.*, at 71.
[30] Brown, *loc. cit.*, at 1525.

one of those three labels. On the contrary ... a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.[31]

(ii) The Functionalist Approach

The functionalist conception of the separation of powers, on the other hand, acknowledges the impossibility of the formalist school's neatly compartmentalised vision, opting to concentrate instead on the preservation of the normatively crucial inter-institutional balance. Aspiring, as it does, to ensure that no single body assumes a disruptive position of excess power, this deliberately echoes the foundational objectives of the doctrine. Once again, however, the simplicity of the tripartite model is practically problematic. How is this notion of balance to be assessed, let alone secured? How can the respective institutional strengths of the three organs of the state be compared? One need only look at the way in which the legislature,[32] the executive[33] and the judiciary[34] have, at various times, been characterised as the single greatest threat to civil governance to see that this is an endlessly impracticable task. Just as the formalist theory necessarily (and misguidedly) assumes the ability to accurately define and thus distinguish the three functions of the state, so the functionalist approach similarly demands the apparently impossible capacity to define, adopt and consistently employ the essentially indefinable notion of institutional balance.

Like its formalist rival, the functionalist approach tends to result in the *ad hoc* and uneven judicial treatment of separation of powers issues. Judges in the US have been unable to successfully elaborate universal criteria for these cases. The central concepts of the tripartite model – the characteristic functions of each institution and the balance to be

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[31] *Bowsher v. Synar* (1986) 478 US 714, at 749.

[32] Madison, like many of his contemporaries, regarded the legislature as the greatest institutional threat to constitutional government.

[33] See, for example, Hewart, *The New Despotism* (Benn, 1929) in which the former Lord Chief Justice railed against the dangers of increasing executive power.

[34] Academic commentary in the U.S. in the years after the Warren Court considered in some detail the argument that the court's power of judicial review makes it the most prominent threat to democratic government. This directly contradicted Hamilton's view of it as the least dangerous branch of government. See, for example, Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., Yale University Press, 1986), and Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990). *Cf.* Hamilton, *op. cit.*, Book 78.

maintained between them – have proved impossible to define. Judges have thus been cast in a reactive rather than a prescriptive role, adjusting their view of the relevant criteria to reflect the issues raised in an individual case.

The consequence of the absence of comprehensive curial guidelines in the U.S. courts has been that:

> [T]he Court has appeared to decide each case as if it were the first of it kind, with each individual justice apparently weighing the costs and benefits according to some idiosyncratic scale of value … which may vary from case to case.[35]

Both the formalist and functionalist versions of the separation of powers theory are thus crippled by the central indeterminacy of the tripartite model. The nature of the branches, and the distinction between them, cannot, it is clear, be determined 'with mathematical precision'[36]. Definitional uncertainty, as Marshall and Jennings have commented, is typical of all aspects of the theory.[37] The doctrine provides guidance and direction only to the extent to which it is supplemented by the court's own intuitive choice of independent evaluative criteria. The use of the tripartite model necessarily involves a choice between the Scylla of subjective inconsistency and the Charbydis of arbitrary determinacy. The formalists and functionalists face essentially the same problem of trying to construct an operational theory of power allocation from an institutional model, the details of which are hopelessly unclear. The tripartite theory provides a vision of constitutional governance but no guidance as to how to achieve it in practice. As Brown comments, the formalists and functionalists differ 'in the end [on] no more than a question of where the proper point lies in the flexibility/determinacy matrix'[38].

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[35] Brown, *loc. cit.*, at 1518.
[36] *Springer v. Government of the Philippines* (1928) 277 US 189, at 211, *per* Holmes J.
[37] *See* Marshall and Jennings, *op. cit.*
[38] Brown, *loc. cit.*, at 1530.

C. Indeterminacy of objectives

The simple Montesquian model is therefore insufficiently specific to effectively serve as a directive principle of institutional organisation. It is, of itself, too vague and imprecise to authoritatively regulate the institutional structures of the state. For the doctrine to function effectively, some external criteria or value capable of supplying the certainty lacking in its basic design is required. One solution would obviously be to interpret the theory in the light of the objective which it aims to achieve. Here again, however, determinacy difficulties arise. The separation of powers has historically been justified by reference to several discrete normative values. Morgan, for example, identifies four policies which have been advanced, at various times, as the foundational objectives of the doctrine.[39] Gwyn, for his part, posits five[40]. These differing policies are not necessarily mutually exclusive. They do, however, variously suggest that the separation of powers doctrine aims, *inter alia*, to:

- Prevent tyranny by ensuring that power is not vested in any single individual or organ.
- Secure a balance between institutions such that they are capable of supervising each other's actions through a system of checks and balances.
- Ensure law is made in the public interest by establishing a balance of power between institutions, or representative groups.
- Enhance efficiency by giving responsibility for individual tasks to the most appropriate institutional actors.
- Prevent partiality and self-interest by separating the personnel involved in decision-making.
- Ensuring objective and generality in the creation of laws by separating the tasks of law-creation and law-enforcement.

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[39] These are (i) balance of power, (ii) efficiency, (iii) preventing a conflict of interests, and (iv) ensuring law is public, objective and precise. *See* Morgan, *op. cit*, in Chapter 2.

[40] '(1) To create greater government efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people's representatives to call executive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers', Gwynn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (Tullane Studies, 1965), discussed in Morgan, *op.cit.*, in Chapter 2.

- To allow elected and representative officials to supervise the actions of executive officials and call them to account if necessary.

There is, it is obvious, considerable overlap between several of these objectives. An institutional balance, for example, could clearly be devised which was capable of increasing the possibility that laws be enacted in the public interest while, at the same time, safeguarding the state from the ills of unilateral rule. Equally, however, these values are not neatly co-extensive. Securing the public-spiritedness of official acts requires a much more elaborate structure than one focused primarily on the prevention of tyranny. A citizen, intolerant of what he sees as intrusive government, may support the idea of avoiding a solitary concentration of public power but may object to the establishment of a more complex and instrumentally-calibrated institutional structure. An individual's view of what the separation of powers prescribes is thus dependent, in the first place, on their perception of its specific aspirational objectives. Does it dictate a simple separation of personnel, or does the doctrine demand the establishment of a particular institutional balance? Does it require that legislation is enacted in the public interest, or is the theory satisfied once Acts are expressed in sufficiently general terms? Does it, in fact, impose no limitations on the content or language of legislation, insisting only that it be created by the designated legislative organ of that state? The separation of powers theory is clearly capable of encompassing a host of varying views of the state. It does not, in itself, indicate a particular hierarchy of values or provide any guidance as to the appropriate prioritisation of objectives in cases of choice, or indeed conflict between them.

This poses problems for those who seek to rely on the doctrine, or, indeed, to assess it. Barber emphasised that '[t]esting the efficiency of an institution requires the clear identification of its goals and a careful practical examination of its outcomes'[41]. With its ambiguous values and objectives, the separation of powers theory defies both usage and analysis. Its indeterminacy, once again, 'enable[s] people to see in it what they lik[e], and take from it what they wan[t]'[42], creating an impression of popular support for a single

[41] Barber, *loc. cit.*, at 66.
[42] Munro, *op. cit.*, at 302.

theory which in fact conceals beneath its surface considerable scope for serious disagreement on important constitutional questions.

D. Confusion in the courts

This view of the theory as all things to all people is most starkly demonstrated by the doctrine's frequent appearance on opposing sides of the same argument. This has been evident even as far back as the American caselaw of the early 19th century. The political, constitutional and jurisprudential processes leading to the adoption of the legitimacy of judicial review by the U.S. Supreme Court in *Marbury v. Madison*[43] are well-known and need no more than the briefest description here. Marshall C.J.'s rejection of the 'honied Mansfieldism of Blackstone's'[44] equation of popular sovereignty with legislative supremacy was founded on the federal Constitution's clear classification of the people as ultimately supreme. The Constitution was not only the source of the powers of government agencies but also of the limitations imposed on these organs of the state. The 'original and supreme will' of the American people, as expressed in their enactment of the Constitution, 'organises the government and assigns to different departments their respective powers. The powers of the legislature are limited and defined'. The presence of such constitutional limits necessarily implies the existence of a body capable of adjudicating on alleged transgressions of these boundaries. As an issue of legal interpretation, the separation of powers principle clearly dictates that such questions ought to be entrusted to the judiciary. Of this, Marshall C.J. had no doubt:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution ... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[45]

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[43] 1 Cranch 137; 5 U.S. 137; 2 L. Ed 2d 60 (1803).
[44] Edward Corwin, 'The Higher Law Background of American Constitutional Law' (1928-29) 42 Harvard Law Review 149, 365, cited in Geoffrey Marshall, op. cit. 104.
[45] 1 Cranch 137 (1803), at 177-178.

However, there were those who saw the theory instead as insisting on the exclusion of the judiciary from what was, for them, patently an issue of legislative action. Gibson J., for example, delivering a dissenting opinion in the 1825 Pennsylvanian case of *Eakin v. Raub*[46] questioned the validity of the supervisory jurisdiction of the courts. Adjudicating on the normative disabilities of an elected assembly – what Kelsen later portrayed as the exercise of a negative legislative power[47] – was not, according to Gibson J., a responsibility which ought to vest in the judicial branch. The significant point, however, is that his objection rested on his own view of the separation of powers as a principle which demanded that the organs of state not interfere in what were the *prima facie* areas of activity of their theoretically co-equal counterparts. As a dissenting judgment in a state court, Gibson J.'s decision was not, in itself, constitutionally significant. However, it does demonstrate quite clearly how the separation of powers theory can be plausibly invoked in support of very different ideas of judicial review. As Marshall remarked:

> In reality, arguments from the separation of powers, though frequently mentioned, are ultimately of little force on either side of the controversy. As a consideration in favour of review, the doctrine is too vague and (since better arguments exist) superfluous. As an argument against review, it is in its commonest forms unconvincing.[48]

The doctrine's chameleon-like capacity to serve both sides of an argument was again evident in *Myers v. U.S.*[49], and in *Youngstown Sheet and Tube Co. v. Sawyer*[50]. In both these cases, the majority and minority of the U.S. Supreme Court invoked the separation of powers theory in support of their very differing conclusions. In the latter case, for example, the majority invalidated a Presidential attempt to seize and operate steel mills in the midst of the Korean War. They based this decision on their strong conviction that the separation of powers ought to operate as a guarantee of liberty. To allow such a unilateral

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[46] 12 *Sergeant and Rawle* (Penn.) 330 (1825).
[47] Kelsen, "La Garantie Juridctionelle de la Constitution" (1928) 44 *Revue du Droit Public* 197.
[48] Geoffrey Marshall, *Constitutional Theory* (Clarendon, 1971), at 108.
[49] 272 U.S. 52 (1926).
[50] 343 U.S. 579 (1952).

executive seizure of individual property rights, even during wartime, would constitute an unacceptable infringement of this value.

The minority, on the other hand, advanced an efficiency-based understanding of the separation of powers doctrine in support of their position that the executive ought to be able to carry out such acts without being obliged to have disruptive recourse to the other branches of government. The theory, in their view, created an executive power so that such managerial judgments could be unilaterally made in times of crisis.

Recent judicial allusions to the theory in Britain have also been notable for their vastly varying views of what the idea of a separation of powers involves. In Lord Steyn's eyes, the theory envisages an independent, institutionally-separate court, charged with the intensive scrutiny of the other branches of government.[51] To Lord Hoffman, it requires only judicial caution and restraint, constraining the ability of the court to investigate matters allocated by the theory to the other organs of the state.[52]

This uncertainty and confusion as to the institutional dictates of the doctrine has also characterised the recent attitude of the Irish Supreme Court to the theory. The court unanimously agreed in *T.D. v. Minister for Education*[53] that the tripartite theory is a constitutional principle of considerable influence in the Irish legal order. What was striking, however, was the extent of the differences between the members of the court on the nature of the theory itself. Marshall had remarked in his work on the inability of advocates of the idea of a three-way institutional separation to conclusively determine whether a scheme of checks and balances constituted a central tenet of the theory, or rather a justifiable departure from its strictest demands. The Supreme Court seemed to share this confusion. Denham J., in her dissenting opinion, clearly envisaged the existence of a system of scrutiny as a 'breach [of] a rigid concept of the separation of

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[51] Lord Steyn, "The Case for a Supreme Court" (2002) 118 L.Q.R. 382, at 383.
[52] Lord Hoffman, "The COMBAR Lecture 2001: Separation of Powers" (2002) 7 Judicial Review 137. *Cf.* Martin Chamberlain, "Democracy and Deference in Resource Allocation Cases" (2003) 8 Judicial Review 12. Lord Hoffman's view echoes the more traditional judicial view of separation of powers, evident in authorities such as *Dupont Steels v. Sirs* [1980] 1 WLR 142.
[53] [2001] 4 I.R. 259.

powers'[54]. Keane C.J., however, seemed to regard such inter-institutional restraint as a requirement of the theory itself, citing Hardiman J.'s words in the earlier *Sinnott*[55] case in support of his own conclusion that the principle 'exists to prevent the accumulation of excessive power ... and to allow each [organ] to check and balance the other'[56]. Hardiman J., for his part, evinced a more pragmatic attitude to such checks, appearing to view them as a practical necessity of the administration of power. He insisted that their instantiation in the Irish order did not denote that the constitution's brand of separation of powers was 'in any general sense a porous one'[57]. Murray J. (as he then was) expressly acknowledged the existence of these varying views of the theory, admitting that it could be, and indeed has been, construed either as a 'distribution of powers' between branches, 'or [as]a balancing of power among these [organs]'[58]. That such contrasting conceptions can co-exist beneath the same constitutional banner provides clear evidence that Marshall's accusations of unavoidable conceptual confusion were well founded.

The theory, in its various guises, is clearly capable of supporting diametrically opposite understandings of the state. It is uncertain, in any given situation, whether the doctrine in fact enjoins the separation or the blending of the state's institutions. Plausible arguments can be constructed in support of either point of view. Its utility as an institutional theory is thus seriously compromised. In reality, it seems no more than a political catchphrase of limited polemical utility, devoid of any sort of central ethos or ideological essence. It serves only as a rhetorical rallying-point, a convenient label for an *a priorii* conclusion reached in reliance on any number of external considerations. By itself, it supplies scant direction for the institutional actors in the state, offering equal backing for an array of diverse and divergent views. As Marshall so famously remarked, the theory is:

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[54] [2001] 4 I.R. 259, at 306.
[55] *Sinnott v. Minister for Education* [2001] 2 I.R. 545.
[56] [2001] 4 I.R. 259, at 286.
[57] [2001] 4 I.R. 259, at 367.
[58] [2001] 4 I.R. 259, at 329.

> [I]nfected with so much imprecision and inconsistency that it may be counted as little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.[59]

E. The historical origins of the uncertainty

This problem is not simply a product of an inadequate contemporary understanding of the doctrine. Magill argues persuasively that this fatal indeterminacy is, in fact, an inescapable element of the theory of the separation of powers. Examining the historical emergence of the idea, she notes how it developed as an amalgamation of the older doctrine of mixed (and later balanced) government with the concept of the separation of government functions. Both ideas aimed to structure state power in such a way that the evil of tyrannical rule would be avoided – an objective which, it was outlined above, the separation of powers is generally accepted to share. These two theories, however, sought to achieve this end in clearly divergent ways.

United in their emphasis on the importance of ensuring an institutional 'balance', these theories actually defined that notion in very different ways. Separating the functions of government demanded a distinct division and separation of institutional competences between independent state organs. The mixed/balanced theories, on the contrary, required the co-operative participation of the state's distinct social classes, through their institutional representatives, in its governance.[60] It is scarcely surprising, therefore, that the modern 'marriage of the two [pre-constitutional] ideas is a troubled one'[61]. The contemporary lack of such clearly-defined social classes leaves the institutions of the state as the locus for both separation and balancing. The institutions are supposed to be separate to avoid tyranny, but are also required to co-operate to achieve an appropriate institutional equilibrium. 'The system of separation of powers is equated with balance

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[59] Geoffrey Marshall, *op. cit.*, at 124.
[60] *See* Chapter 5, *infra*, for a more extensive discussion of the mixed theory of government.
[61] Magill, "The Real Separation in Separation of Powers Law" (2000) 86 Va. L. Rev. 1127, at 1166.

among the government departments', thus, 'collaps[ing] both strategies into one objective'.[62]

The two theories are treated as complementary elements of a unified ideal, with the result that this ostensibly cohesive doctrine is, in actual fact, unclear as to whether it instinctively demands a system of separation or of checks and balances. These twin pillars of the theory are actually uncomfortable ideological bedfellows, straining to conceal their differences behind a show of joint support for a tripartite model of institutional arrangement. Their shared attachment to the number three is insufficient, however, to obscure the fact that they incline in contradictory directions, seeking constitutional salvation by the very different paths of institutional separation or blending, with all the contradictory requirements such opposite approaches entail.

III. VALUE-SHAPING AND THE SEPARATION OF POWERS

A. The problem of hidden normative judgements

Indeterminacy, it has been demonstrated, thus affects all aspects of the tripartite separation of powers theory, necessarily casting doubt on the specifics of its details, ideals and instrumental objectives. The doctrine, of itself, does not actually demand the adoption or indeed rejection of a particular scheme of institutional arrangement. It is but a convenient label for the articulation of various concerns about the regulation of the structure of the state, lending rhetorical colour to an argument advanced on essentially independent grounds. This indeterminacy of detail makes the model, taken seriously, an institutional theory of minimal merit. Necessarily unable to provide concrete criteria for the resolution of questions of disputed or uncertain institutional competence, the doctrine is pathologically incapable of fulfilling the primary role of any institutional theory – that of directing the arrangement and interaction of the organs of the state. That it has become

[62] *Ibid.*, at 1167. Magill goes on to note that this unified approach could only succeed if a causal connection could be established between the fact of functional separation and the existence of an institutional balance. This, however, cannot be satisfactorily established in the absence of measurable criteria of balance, forcing the separation of powers theory to rest its validity on a 'fanciful premise'. See Magill, at 1170-1174.

a doctrine of such widespread and recurring constitutional import in spite of this problem is concerning in itself. However, its indeterminacy of objectives further undermines the theory's utility in a manner which is arguably more serious, adversely affecting its ability to discharge the constitutionally crucial task of norm-reinforcement, identified in Chapter 1.

It was suggested in the previous chapter that an institutional theory, through its reliance on notions of public reason and justification, plays an important part in supporting and shaping the shared normative values of a state. The way in which the institutions openly invoke and employ common communitarian principles affirms the foundational status of these values, whilst simultaneously encouraging citizens to continue to rely on them in any future interaction with the state. It is thus essential that this process of institutional exposition sufficiently informs the public about the nature and characteristics of these constitutionally central values. The separation of powers, however, has been shown to be demonstrably lacking in such specifics. By itself, it is but a 'desiccated concept that waits for the introduction of a stronger normative thesis before it generates a full conception of the doctrine that can provide any institutional considerations.'[63] Any theory of separated institutional power depends for its details on the political vision upon which it is premised.

Yet, in many jurisdictions, these normative assumptions remain untested by political or judicial debate. This calls into question the extent to which the doctrine, as an institutional theory, is performing its value-shaping or value-reinforcing role. Instead of articulating a complete theory of the system's directive principles of institutional separation, discussions instead tend to concentrate on individual aspects of the institutional arrangements at issue – the delegation of legislative power in Ireland, for example, or the position of the Lord Chancellor or House of Lords in the U.K. The intuitive simplicity of the tripartite model has the unfortunate effect that it can come to be

[63] Barber, *loc. cit.*, at 65-66.

used as an underdeveloped article of constitutional faith, a concept 'admired without being analysed, and imported to [a legal system] with little or no debate'[64].

Commentators have remarked on how the American courts, for example, tend to treat the theory as an end in itself,[65] a 'self-executing safeguard'[66] to be interpreted and upheld without any examination of the deeper normative origins of the judge's individual understanding of what the doctrine demands. In this, U.S. judges are not alone. This inclination to rely on the theory as if it reflected a single unitary vision of the state inhibits the public's ability to properly understand it. It has been demonstrated that the theory is little more than a broad rhetorical church, under the auspices of which essentially rival sects seek shelter. The theory is determinate (and thus usable) only when viewed from a particular political or theoretical perspective. Its portrayal in the courts as 'an ostensible theory of the constitution'[67] conceals such subjective value judgments behind a putatively apolitical façade. 'Separation of powers theory claims to be an exercise in constitutional theory, and in so doing distinguishes itself from exercises in pure political theory'[68] at the same time that it depends upon the adoption of controvertible political concepts for its institutional efficacy. The political foundations of a court's interpretation of the doctrine are, however, rarely made explicit in its judgment. Thus, the public are unable to understand or engage with the normative substance of the institutional decision. Public justification centres solely on a tripartite model which, when it is subjected to more intensive scrutiny, is cripplingly uncertain.

The contemporary approach to the separation of powers thus serves to shape, support and encourage continued public allegiance to a tripartite model about which there are profoundly differing views. The model is treated as a value or end in itself at the same time that it gives sustenance to contrasting conceptions of the state and its structures. It is commonly used as an *ex post facto* label for a conclusion reached on other, crucially unspoken, grounds. It therefore fails to exert the vital unifying influence which an

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[64] Morgan, *op. cit.*, at 297.
[65] *See*, in particular, Brown, *loc. cit.*
[66] *Buckley v. Valeo* 424 US 1 (1976), at 122.
[67] Barber, *loc. cit.*, at 62
[68] *Ibid.*, at 62.

institutional theory ought to exercise, rallying the public behind a rhetorical standard which ostensibly unites all but actually persuades none.

The recent caselaw of the Irish courts provides the perfect illustration of this point. The presence of divergent judicial interpretations of the theory has already been alluded to above. The majority of the court in the *T.D.* decision, it should be remembered, rested their conclusions almost entirely on the doctrine of the separation of powers. They did not, however, advert to the political origins of their position. Favouring a dogmatically strict understanding of the separation of powers, it is clear, from closer examination of the judgments, that these judges were decisively influenced by a majoritarian conception of democracy. At not stage, however, did they engage with the substance of that theory, or attempt to justify it by the institutionally valuable process of public reason.

The majority did not question the entitlement of the individual applicant's to the protection of Article 42. 4. Rather Keane C.J. expressed the 'gravest doubts' about the judiciary's entitlement to enforce this type of socio-economic right, seeing in Kelly J.'s actions the 'far-reaching assumption by the courts of what is, *prima facie* at least, the exclusive role of the executive and legislature'[69]. This *prima facie* view reflected a clearly-held *a priorii* position. As the Chief Justice commented, 'a Rubicon has been crossed'[70] – but one which sprang not from an express constitutional mandate, but rather from a political philosophy he personally regarded to be in the constitutional ascendancy.

The leading majority judgment of Hardiman J. concurred in this opinion of the primacy of a 'strict separation of powers', going so far as to require the individual's express constitutional rights to be interpreted as subject to its values. Thus the long-standing assertion by an earlier Supreme Court that the judiciary's power was 'as ample as the defence of the Constitution requires'[71] was, in Hardiman J.'s view, to be restricted by reference to an understanding of the separation of powers which he saw as 'fundamental

[69] [2001] 4 I.R. 259, at 285.
[70] [2001] 4 I.R. 259, at 288.
[71] *Per* O'Dalaigh C.J. in *State (Quinn) v. Ryan* [1965] I.R. 70, at 122.

to all … provisions'[72] of the constitutional text. This was not, in his opinion, to neglect the express references to the right to free primary education in the document. Hardiman J.'s perception of the separation principle's primacy necessarily required, however, that such claims could only be entertained in 'an absolutely extreme situation … as an absolutely final resort in circumstances of great crisis, and for the protection of the constitutional order itself'[73]. Given the vindication of very significant, expressly guaranteed, and necessarily transient,[74] constitutional rights did not satisfy such stringent criteria, it is difficult to imagine what would. The *T.D.* majority therefore chose to read express constitutional precepts in light of an implicit, perhaps only organisational principle, which they elevated to the status of a 'high constitutional value'[75]. This was, of course, a permissible (if arguably novel) interpretation of the text. The difficulty lies in the fact that it was a decision evidently derived from unarticulated and unacknowledged assumptions of political theory. Hardiman J.'s judgment was inspired by the sort of basic majoritarian understanding of the democratic state about which Craig has been especially scathing.

> The assertion [of a counter-majoritarian difficulty with rights-based judicial review] is uttered as if this were a self-evident and straightforward proposition. It is, of course, nothing of the sort. It is based on an implicit conception of democracy, in which the essence of that concept is captured by the notion of majoritarianism. This certainly does not capture the totality of almost any sophisticated exposition of democracy, whether it be modern or classical in nature.[76]

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[72] [2001] 4 I.R. 259, at 369.
[73] [2001] 4 I.R. 259, at 372.
[74] Kelly J. had relied heavily on the fact that, as this right was available only until each applicant reached the age of 18, the government's delay in providing the necessary facilities effectively denied forever the individual's prospect of seeing their constitutional rights vindicated.
[75] [2001] 4 I.R. 259, at 362.
[76] Craig, "Public Law, Sovereignty and Citizenship" in Blackburn ed., *Rights of Citizenship* (Mansell, 1993), at 330. Although Craig was not specifically discussing the separation of powers, he was criticising the type of majoritarian distrust of judicial action as 'unelected' and, thus, potentially 'anti-democratic' which informed the majority's interpretation of the separation of powers in *T.D.* As this section has shown, the formal model was simply the vehicle for the articulation of these counter-majoritarian concerns.

That the court's conclusions proceeded from political theory rather than constitutional thought was made clear in the dissenting judgment of Denham J. She discussed at some length what was required by the concept of democracy. Citing the decision of Barak C.J. in the Israeli case of *Migdol Village*[77], Denham J. expressed her preference for a doctrine of 'substantive democracy'. According to this conception of democracy, the protection of human rights took precedence over bare majoritarianism. Denham J. envisaged the separation of powers as a 'functional' theory which, she felt, should be subject to those higher principles expressly adverted to in the Constitution. She saw the document as requiring 'not [an] absolute system of separation', but rather 'a fundamental principle ... applied in a functional manner' in order to achieve a 'just and constitutional balance'[78]. On the facts of the case therefore, although she felt Kelly J.'s actions lay 'at the extremity' of the court's power, she regarded it as justified by the 'firm constitutional grounding' of the right under discussion.[79] Denham J.'s judgment thus represents a more appropriate attempt at publicly justifying her position on the separation of powers. By clearly outlining the political origins of her particular interpretation of the doctrine, she allowed for the possibility that the public could engage with the issues being debated. The majority, on the other hand, failed to put forward the determinative reasons for their decision, thus denying the public the opportunity to understand, evaluate and be convinced by their conclusions.

B. Public support and the separation of powers

(i) A divergence of institutional and public opinion?

The problems – from the point of view of value-reinforcement – posed by the *T.D.* majority's failure to adequately and publicly justify the nature of the individual state's separation of powers theory are obvious. The theory cannot be effectively employed by a court without the adoption of some necessarily controversial political values. The use of the theory, therefore, must always involve the implicit (and perhaps unwitting) invocation of a particular political perspective. This, in itself, is not objectionable. A successful state, Chapter 1 suggested, will usually coalesce around a specific political or normative vision.

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[77] *United Mizrahi Bank v. Migdol Village* 49 (4) P.D. 221 (1995).
[78] [2001] 4 I.R. 259, at 306-307.
[79] [2001] 4 I.R. 259, at 315.

The contemporary tendency, however, to treat the tripartite model as an objective in itself conceals its central political principles from public view. The valuable process of unifying the public by institutional example is thus inhibited. More seriously however, it allows for the possibility that the separation of powers theory might serve as a vehicle for the surreptitious introduction of subjective political beliefs into the fabric of the constitutional order. There is a clear risk that the court (perhaps unintentionally) will covertly adopt a political theory with which the public does not agree. Such a rupture in the relationship between the institutional and public perceptions of the state's normative foundations might not be instantly identifiable. In the long term however, this type of value dislocation cannot but be problematic. If the public believe that the separation of powers theory reflects one particular normative understanding of the state whilst the organs of the state consistently rely on a competing institutional vision, social disharmony would seem to be inevitable. Public expectations of institutional conduct would, in such a scenario, be regularly disappointed. For how long could unrepresentative institutions claim continuing public confidence? Will the public feel bound to offer allegiance to an institutional system with which they do not identify? Ultimately, a constitutional system stripped of popular support is likely to function as a disruptive rather than a unifying force, thereby severely undermining the normative authority of the state.

(ii) Disappointed expectations – the concentration on institutional interests

A similar situation could arise in the possibly more plausible event that consistent discrepancies emerge between the rhetoric and the reality of an institutional theory's actual operation. Public justification, as a process, operates by way of example as well as expression. Once again, if the institutions of the state declare the doctrine to guarantee particular normative values, the public will expect to see those values featuring prominently in any institutional invocation of the theory. A consistent failure to do so would confound public expectations and, again, undermine the institutions' claim to normative authority. Yet, that is what appears to regularly occur in the case of the separation of powers. Courts, especially in the U.S., are inclined to affirm the doctrine's libertarian credentials in strident and sonorous terms, perpetuating the historical assertion

that 'no political truth is ... of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty'[80] than the tripartite understanding of the separation of powers. The same courts then, however, apply it without any practical consideration of the consequences for the citizen's liberty of the action impugned.

Brown, in particular, has been highly critical of how '[t]he brief bow to Madison so often performed ... is more a ritualistic gesture than a meaningful framework for the inquiry at hand'[81]. The focus of the court's concern is generally the inter-institutional framework of the tripartite theory. The court confines itself to an examination of the impact of the action impugned on the institutional prerogatives of the relevant branches of government. Thus in *Chadha*, the legislature's attempt to veto the decision to allow Chadha to remain in the US (which approximated to the abuse of bills of attainder which was one of the doctrine's earliest concerns) was not discussed in terms of its adverse impact on Chadha's interests, or the partiality inherent in a legislative organ acting against named individuals. Rather the majority mechanically considered whether the veto process conformed to the strict letter of the constitutional structures. Although the process was adjudged unlawful on this basis, the obvious implication of so narrow a ground of challenge was that the legislature could have vetoed the deportation judge's decision in an individual case if it had only properly followed the constitutional requirements of bicameralism and Presidential seal. As Powell J., in his dissenting judgment, remarked:

> [Congress' defence] does not address the concern that the Congress is exercising unchecked judicial power at the expense of individual liberties. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers.[82]

The individual citizen is thus excluded from an analytical process publicly proclaimed to secure his liberty:

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[80] Madison, *The Federalist* (1990, University of Chicago, 2nd ed.), Book 47, at 153.
[81] Brown, *loc. cit.*, at 1515.
[82] 462 US 919 (1983), at 963.

> The judicial opinions addressing the separation of powers ... tend to place primary emphasis not on the prevention of tyranny or protection of individual liberties, but on the advancement of the institutional interests of the branches themselves, as if that goal were itself a good.[83]

This tendency to treat separation of powers issues as an 'institutional turf-war' is evident in the Irish authorities on this issue as well. The majority decision in *T.D.*, as we have seen, concentrated chiefly on the question of whether the judiciary had interfered in its institutional counterparts' sphere of influence. The earliest Irish caselaw to expressly consider the separation of powers theory is similarly almost entirely concerned with ensuring that the legislature or executive did not trespass upon the judicial function[84], a theme repeated with regularity up to today.[85] Academic commentary too, has tended to implicitly accept the institutional focus of contemporary Irish separation of powers caselaw, discounting the individual citizen from its analytical calculus. Morgan's discussion of the most recent Irish cases concerns itself, for example, with the inter-institutional implications of the relevant decisions. The focus of the separation of powers, on this view of Irish law, is 'the borderline between the judicial and political organs'[86]. The individual appears nowhere in the analysis – a peculiar position for a theory ostensibly aiming at the protection of the state's citizens.

(iii) Executive dominance

Nor do such questions of public credibility arise only in the context of the court's consistent focus on institutional rather than individual interests. The claim that the doctrine represents a normatively acceptable structuring of the public activities of the state is further undermined by the extent to which the tripartite theory increasingly fails to reflect the reality of institutional activity. The continued deployment of the doctrine is publicly justified on the basis of two interconnected assertions – that the tripartite model

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[83] Brown, *loc. cit.*, at 1513.
[84] See, for example, *Buckley v. A.G.* [1950] I.R. 67, *Deaton v. A.G.* [1963] I.R. 170, and *Maher v. A.G.* [1973] I.R. 140.
[85] See, for example, *Blehein v. Minister for Health* [2004] 3 I.R. 610 and *Brennan v. Minister for Justice* [1995] 1 I.R. 612.
[86] Morgan, *loc. cit.*, at 143.

safeguards the citizen against government tyranny, and that it actually encapsulates the way in which state power is institutionally arranged and exercised. The modern system of executive dominance, however, severely undermines such claims – at least in an Irish context. The unifying feature of contemporary separation of powers theories, this chapter has noted, is that they necessarily involves some three-way division of power between a legislative, executive and judicial branch. The existence of three co-equal independent branches, all understandings of the theory agree, in some way counteracts the possibility of unilateral rule.[87] How then can these claims be reconciled with the reality that the Westminster-influenced Irish system of cabinet government produces a 'nearly complete fusion of the executive and legislative powers'[88]? A system of cabinet government inevitably blurs the division of responsibility, influence and power between Parliament and the executive. The rise of the centralised political party structure, to which legislators owe their primary allegiance, has necessarily undermined the assertedly essential ability of the legislature to supervise and, where required, obstruct the activities of the executive branch. There is thus, once again, a very obvious divergence between the institutional rhetoric used to justify the importance of the tripartite separation thesis, and the actual reality of its operation.

Nor is the artificiality inherent in this depiction of the legislature and executive as entirely independent actors a uniquely Irish phenomenon. The realities of modern politics dictate that the dominance of the legislature by the executive organ is a feature found in many states. Kopecky has described how the new democracies of Eastern Europe, virtually all of which were designed to create a strong legislature and weak executive, have almost universally experienced a shift in favour of the executive's power, such that 'the balance of power between the executives and legislatures has increasingly been tipped in favour of the former'.[89] The reasons for such changes are not surprising. Kopecky concludes that 'the stabilization of political parties … [has] enabled political leaders to organize the

[87] As previous sections have shown, this is generally achieved either by a balanced system of institutional checks and balances or, in the alternative, by complete separation of these bodies in the belief that the three-way division will, by its very nature, produce a balanced system of government.
[88] Walter Bagehot in Paul Smith, *Bagehot's The English Constitution* (Cambridge University Press 2001), 8-9. *See also* Ian Ward, "Bagehot: Critic, Constitutionalist, Prophet?" (2005) P.L. 67.
[89] Petr Kopecky, "Power to the executive! The changing executive-legislative relations in Eastern Europe" (2004)10 Journal of Legislative Studies 142, at 146.

relationship between the executive and legislative branches much better and to impose a dose of party discipline and cohesion'[90]. This description could be applied to almost all European democracies.

History offers similar examples of systems that have succumbed to the inevitable consequences of centralised party politics. Ireland's first constitution, Constitution of the Irish Free State of 1922 made a conscious effort to establish a system in which the executive and legislature would act independently of each other. The document's adoption of a proportional representation system and express provision for so-called 'extern' ministers who would not be members of the parliament (*Dail*) or of any of the parties therein, reflected the vision of those, like the Minister for Justice Kevin O'Higgins, who felt that the legislature would be composed solely of 'small groups of seven or eight', rather than large 'parties on definite lines of political cleavage'[91]. Unsurprisingly, the extern Minister experiment was quickly abandoned once the inescapable logic of the Westminster party system began to assert itself.

Even in the U.S. system, with its institutionally-distinct and separately-elected organs, the anti-constitutional impact of the political party has been observed with some apprehension. Jackson J. warned in *Youngstown* of the importance of having regard to contemporary political realities when interpreting separation of powers arguments:

> [The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of [the President's] 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 the 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.[92]

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[90] *Ibid.*, at 148.
[91] F.S.L. Lyons, *Ireland Since the Famine* (2nd ed. Fontana Press 1985), at 475.
[92] 343 U.S. 579 (1952), at 654.

It is clear, therefore, that the tripartite model's vision of independent and co-equal legislative and executive branches bears little resemblance to the modern realities of political power. In reality, any separation 'really come[s] down to two, not three institutions: the judiciary and the 'political organs''[93].This calls into question the doctrine's ability to adequately explain the practices and conduct of contemporary institutions. More significantly, however, it also undermines one of the doctrine's central guarantees of citizen liberty. As Nedham commented in the 17th century, such effective 'placing [of] the legislative and executive powers in the same persons is a marvellous in-let of corruption and tyranny'[94]. In spite of this, however, contemporary institutions continue to perpetuate the myth of a protective legislative-executive division. This practice arguably threatens the very notion of individual liberty which the theory so publicly espouses. The doctrine's very prominent promise of systematic protection discourages any attempts to re-adjust the institutional balance to produce more liberty-optimal outcomes. Citizens are instead encouraged to trust in an empty formalism which essentially absolves all institutional actors of the obligation to consider the impact of their individual actions on the liberty or interests of the citizen. The design of the system, they suggest, constitutes a more than sufficient safeguard. That this institutional device evidently does not operate in the way in which it was intended must, however, necessarily undercut any such public assertions of normative worth.

(iv) The separation of powers in the administrative state

The contemporary relevance of the tripartite model has been further damaged by the gradual emergence of the administrative state. The breadth and diversity of the modern system of bureaucratic government – most notably the expansion of the powers and responsibilities of government agencies, and the proliferation of organisations in the penumbra between classically public and private bodies – defies the simplistically categorical approach to official actors demanded by the common three-way conceptions of the separation of powers.

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[93] Morgan, *loc. cit.*, at 142.

[94] Nedham, *A True State of the Case of the Commonwealth* (1654), at 10. Cited in Munro, *op. cit.*, at 297.

> Both the variety and the dispersion [of administrative agencies] are inconsistent with any notion that the powers of government are or can be neatly parceled out into three piles radically separated the one from the other and each under the domination of its particular 'branch'.[95]

Although it may once have encapsulated the essence of state governance, the notion that government can be reduced to a trinity of functions is, in today's terms, anachronistic in the extreme. These bodies do not conform to any single design, and are therefore, virtually impossible to corral within the narrow confines of even a broad three-fold classification. Rather, they display an institutional fluidity which has come to characterise the administrative state's organisational complexity, exercising at once powers which would formerly have been adjudged as executive, judicial, or legislative in nature. The rise of supranational organisations, and other bodies which defy the traditional 18th century understanding of the state, has served only to further accentuate the present-day inadequacies of the conventional separation of powers theory.

The courts, wedded to an outdated understanding of the state, have struggled to conceptualise these developments. Administrative agencies have been uncomfortably shoehorned into the tripartite structure, their legitimacy located in the normative authority of the nominated supervising branch. That they, in fact, tend to exercise a range of powers drawn from across the putative legislative-executive-judicial divide is explained away by the convenient invention of intermediate categories of quasi-functional classification. The 'evident conceptual embarrassment of the qualifying quasi'[96] demonstrates quite clearly, however, that the three-pronged model is terminally unable to accurately reflect, explain or legitimise the way in which the organs of the state today exercise their powers. As Jackson J., in a dissenting judgment, admitted:

> The mere retreat to the qualifying 'quasi' is implicit with confessions that all recognized classifications have broken down, and 'quasi' is a smooth cover which

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[95] Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) Columbia Law Review 573, at 581.
[96] *Ibid.*, 639.

> we draw over our confusion as we might use a counterpane to cover a disordered bed.[97]

Furthermore the tripartite model again, it can be argued, adversely impacts on the protection of the very values which the theory publicly claims to uphold. The model's incompatibility with the administrative state has led the courts, generally, to simply classify these entities as aspects of the executive power of the state. This process of taxonomy by deduction tends to occur, however, without any consideration of the effect of such a move on the level of liberty protection. This question will be examined in greater depth in the next chapter but, in short, the practical outcome of the vesting of these powers in the executive branch is that they are exercised on a discretionary and often unsupervised basis by unelected bureaucratic officials. Ministers are too overburdened to involve themselves in every – or indeed most – departmental decisions. The legislature, controlled as it is by the executive, tends to delegate broad and effectively unlimited powers to these officials. The courts, meanwhile, encouraged by the tripartite theory's myopic ignorance of administrative power, offer only the illusory protection of ineffective formal devices like the non-delegation doctrine.

> The court's approach seemed to be founded on a concept of its institutional competence under the model of division and separation of powers in which it was not the function of the court to get entangled in issues involving policy choice .... This [inactive formalist] solution ... required administrative procedures only for those aspects of administrative decision-making which most closely resembled adjudication [and thus the judicial process]. While this left a range of decision-making processes free from judicial review, the courts preserved the form of the traditional model in suggesting that such processes are subject to legislative scrutiny.[98]

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[97] *FTC v. Ruberoid Co.* 343 US 470 (1952), at 488.
[98] Loughlin, "Procedural Fairness: A Study in the Crisis in Administrative Law Theory" (1978) 28 U. Toronto L. J. 215, at 219-221.

Judges felt that the separation of powers dictated that they not involve themselves in what the doctrine defined as executive or legislative functions. They therefore withdrew to oversee a narrowly-drawn judicial area within which they could feel completely confident in their unquestioned hegemony. A wide range of administrative actions were thus left effectively unchecked, restrained only by the platitudinous constraints of formalistic devices like ministerial responsibility and the non-delegation doctrine. For example, the Supreme Court's justification of a broad and essentially unfettered delegation of power to an executive official on the basis that 'the Constitution affords a strikingly wide latitude to the Oireachtas in adopting whatever form of legislation it considers appropriate'[99] entirely ignores the reality that, in an administrative state of executive dominance, the citizen is thereby placed at the mercy of an arbitrary exercise of discretionary power by unelected individuals. Fruitless limitations of form are offered as protection in place of real and proper scrutiny. The separation of powers, originally 'adopted ... to preclude the exercise of arbitrary power' has thus, in more recent decades, often actually protected such situations from an appropriately intensive level of examination. Once again, there is a clear discrepancy between the rhetoric by which the doctrine is publicly justified, and the reality of its everyday operation.

IV. CONCLUSION

The contemporary curial treatment of the theory of the separation of powers is thus institutionally deficient in several significant respects. The separation of powers is, put simply, an institutional vision in search of an ideal. This poses a number of practical problems. In the first place, the courts have failed to adequately define the nature and characteristics of the theory which they so regularly employ. This has generated considerable uncertainty over what the doctrine actually entails – an unacceptable situation for a theory apparently concerned with practical matters of power ordering and distribution. Thus, the theory is functionally ineffective.

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[99] *Leontjava v. D.P.P* [2004] 1 IR 591, at 636 *per* Keane CJ. The power in question in this case had been held in the High Court judgment of Finlay-Geoghegan J. to be impermissibly broad.

In addition, however, the courts have relied on an underdeveloped version of the tripartite theory as a rhetorical device which provides an *ex post facto* explanation of a decision reached on alternative grounds. This ensures that the doctrine, as an ostensible constitutional theory, also fails to fulfill its socially significant role of reinforcing the shared normative values of the state. Institutional theories typically perform this function by publicly reasoning and justifying their actions, thereby providing demonstrable examples of the constitutional good in action. The separation of powers, on the contrary, is typically used to conceal the court's political or normative principles from public view. This obviously limits the extent to which it can institutionally reinforce its central values.

Furthermore, its indeterminacy can result in the courts adopting and enforcing principles which fail to reflect either the public's particular normative views, or their perception of what the doctrine actually entails. Thus, the Irish courts' particular interpretation of the separation of powers has embraced majoritarianism as a matter of high constitutional fact – a questionable normative development in a state traditionally committed to principles of intensive judicial review and substantive human rights. Crucially, this change of values occurred without any attempt to publicly rationalise or justify it in its own terms.

Similarly, the Irish and American courts have, in practice, cut the doctrine adrift of its libertarian moorings. The courts have enforced an imprecise tripartite model as an end in itself rather than as an institutional attempt to serve a particular conception of the public good. This has not, however, prevented them from continuing to rhetorically rely on the citizen's liberty as the idea's normative anchor. There has been a notable and consistent failure to interpret and apply the separation of powers theory in a sufficiently public and transparent manner. This failure calls into question not only the doctrine's utility as an institutional theory, but also the extent of public support for the normative authority of the state. The practice of surreptitiously enforcing a particular political viewpoint while publicly declaring the state's support for an alternative position is not a viable long-term option. That this normative divergence may occur unwittingly does not detract from the

potential threat it poses to the unity of a state's shared social vision, or from its objectionability in a polity ostensibly committed to representative governance.

Finally, the tripartite model lacks real descriptive power. Incapable of accurately depicting the institutional reality of the contemporary state, the theory has proved unable to cope with either the executive dominance of the cabinet system or the emergence of powerful administrative agencies. That it continues to be used in spite of its descriptive inadequacy has had the unfortunate effect of perpetuating public reliance on hopelessly ineffective structural safeguards. Thus it has arguably undermined the libertarian values which it is publicly pledged to support.

There is, therefore, a notable discrepancy between the way in which the theory is publicly justified, and the way in which it actually operates. This cannot but undermine the theory's ability to perform its necessary normative-systemic role on an ongoing basis. As Chapter 1 argued, an institutional theory must, if it is to function effectively, reflect and reinforce the public's equation of the authority of the state with the pursuit, enforcement and achievement of socially-accepted normative goods – something which the courts' contemporary treatment of the separation of powers has conspicuously failed to achieve, and, arguably, actually managed to frustrate.

Chapter 3

INSTITUTIONAL LEGITIMACY AND THE ADMINISTRATIVE STATE

I. A NEW UNDERSTANDING OF THE ADMINISTRATION?

A. Exceptions, counterprinciples and the process of reform

Uncertain in its ideology and indeterminate in its details, the tripartite theory of the separation of powers remains a doctrine to which the organs of the state have surprisingly regular recourse. The inadequacies identified in Chapter 2 have not prevented it from being invoked and applied whenever issues of institutional power allocation arise. The ubiquity of the theory is, it has already been argued, in part attributable to the way in which it provides support for a range of alternative – occasionally even opposing – positions. It is also proceeds in part, however, from the residual attractiveness of some system of institutional separation. This work has thus far taken issue, not with the notion of a separation of powers, but rather with the particular tripartite model which presently predominates. As the previous chapter noted, this Montesquian model suffers from a number of critical flaws. Some of these are inherent in the theory itself. Others, however, relate to its dysfunctional relationship with contemporary governance. Even a doctrine as intrinsically malleable as the tripartite theory of the separation of powers has been unable, for example, to adequately account for the emergence of an administrative branch of government. The theory has instead attempted to preserve its explanatory power through the creation of convenient fictions and unconvincing exceptions. A dubious reliance on the notion of ministerial accountability is but one example of the way in which the doctrine has been stretched to accommodate contemporary developments. The model's continued descriptive capacity has thus been maintained only by the elaboration of a strained conception of tripartite separation. The presence of these analytical pressure points necessarily undermines the theory's claim to institutional appropriateness. However, they arguably also provide valuable guidance in the search for a more suitable

scheme of governmental separation. The noted Critical Legal Studies scholar, Roberto Unger, argued that the existence of such counter-normative exceptions would not only undermine the ostensible authority of the dominant ideology (in whatever area of law is under examination), but also hesitantly intimate the outlines of an available alternative model.

> When you add up the exclusions, the exceptions, and the repressions, you begin to wonder in just what sense traditional ... theory dominates at all. It seems like an empire whose claimed or perceived authority vastly outreaches its actual power.[1]

Unger thus argued in favour of a greater academic focus on these areas of 'deviationist doctrine', seeing in these exceptions and counterprinciples the potential for the articulation of more appropriate normative models. 'Once the crucial role of the counterprinciples has been recognised, the appeal to a larger vision of the possible and desirable models ... becomes inevitable.'[2]

Those situations in which the separation of powers is discovered to be descriptively inadequate are thus more than merely atypical exceptions. On the contrary, they should be understood as challenges to the theory's underlying ideology, the very existence of which necessarily undermines any claims on its part to political or constitutional primacy. That problems occur at this superficial level of legal practice automatically calls into question the accuracy and appropriateness of the deeper normative judgments from which such everyday practices proceed.

> Each time the next deepest level is exposed, the exposure produces a twofold destabilising effect. The more superficial level is shown to be but a flawed realisation of the deeper one, while the empirical and normative beliefs that constitute this deeper level are made controversial, if not implausible, in the very process of being exposed. Alongside these vertical tensions between levels of

[1] Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561, at 617. The focus of Unger's analysis in this article was the law of contract.
[2] *Ibid.*, at 618.

> legal analysis, the reconsideration of law in untried contexts generates horizontal conflicts within each level. For each is revealed as the stage for a contest of ideals, a contest that becomes fiercer as we move down the sequence of levels.[3]

As a constitutional principle, the separation of powers already operates at one of these more subterranean levels of systemic abstraction. The difficulties which the doctrine encounters when seeking to describe and explain the structure and conduct of contemporary government should therefore be understood as the localised *foci* of an intensive normative debate. The internal weaknesses of the tripartite theory itself are not at issue here. Rather, the theory's relationship with the external reality of governmental power – and thus its position of constitutional pre-eminence – is in question. Those instances in which the doctrine is unable to account for the way in which contemporary governance functions evidently reveal the instability of its constitutional foundations. Crucially, however, they also serve to expose in part the presence in the system of competing normative visions.

The tripartite model's persistent problem with administrative power thus provides not only a ground of criticism but also a focus for possible reforms. This is especially appropriate in light of the administration's own systemic significance. '[A]dministrative law is about the exercise of power in society; it cannot be divorced from broader political choices about the structure of government and the constitutional order.'[4] An intensive examination of the relationship between administrative process and the separation of powers can thus be regarded as 'part of a wider debate about the forms of political and legal accountability'[5]. Whereas Chapter 2 was content to simply identify the many difficulties inherent in the tripartite model of separation, this chapter will seek to examine and explain *the way* in which the theory's difficulties with external reality occur, in the hope that the insights thereby obtained might ultimately allow the articulation in later chapters of an alternative, more institutionally appropriate scheme of separation. In this

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[3] *Ibid.*, at 647.
[4] Boyle, "Sovereignty, Accountability and the Reform of Administrative Law" in Richardson & Genn ed., *Administrative Law and Government Action* (Clarendon, 1994), at 103.
[5] *Ibid.*

way, this work will attempt hopefully to 'transform the deviant into the dominant for the sake of a vision which becomes clearer in the course of the transformation itself'[6].

II. LIBERAL DEMOCRACY AND ADMINISTRATIVE POWER

A. The need for normative justification

Liberal democratic theories have traditionally been suspicious of any exercise of the coercive powers of the state, fearing the subjugation of the individual citizen to the oppressive claims of collective interest. Hart maintained that 'the use of legal coercion by any society .... [is] something *prima facie* objectionable to be tolerated only for the sake of some countervailing good'[7]. Liberalism's instinctive opposition to the deployment of public powers thus required that there be a 'sound normative justification' for any action undertaken on behalf of the state.[8] 'The decisions of officials exercising public power should comply with certain principles of justification.'[9] Legitimacy, it is clear, must be earned, not assumed. Individual power-wielding decisions should be capable of being demonstrably legitimised by reference to accepted normative criteria. In liberal democratic systems, this legitimation has traditionally been achieved in one of two ways – through the personal consent of the individual citizen; or by way of the impersonal application of suitably general principles.[10] These justificatory techniques aimed to protect the individual from arbitrary or majoritarian rule, thereby acknowledging the normative importance of securing each citizen's autonomy of thought and deed. In this way, liberal concerns about centralised government have historically been assuaged.

Liberal democratic theories have thus traditionally refused to tolerate the exercise of discretionary power by unelected officials. Contractarian conceptions of government

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[6] Unger, *loc. cit.*, at 618.
[7] Hart, *Law, Liberty and Morality* (Oxford University Press, 1963), at 20.
[8] Bamforth, "The Public-Private Law Distinction: A Comparative and Philosophical Approach" in Leyland & Woods ed., *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997) at 138.
[9] Richardson, "The Legal Regulation of Process" in Richardson & Genn ed., *op. cit.*, at 124.
[10] Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985), at 224-225.

located the state's legitimacy in the individual citizen's putative consent to the jurisdiction of an elected law-making organ. On such a view, the vesting of any form of creative rule-making capacity in bureaucratic officials was normatively illegitimate. Dicey, for example, abhorred the idea of discretionary power, disparaging it as an unjustifiable affront to the rule of law.[11] Kenneth Culp Davis similarly equated the pursuit of justice with the elimination of excessive administrative discretion.[12] Liberal democracy has hence been understood to demand that creative power be exercised only by elected – and thus publicly accountable – officials. In this way, the citizen's consent to what would otherwise be regarded as arbitrary rule is secured. 'Accountability for the exercise of public power lies at the heart of democratic government .... [and] is fundamental to the concept of representative democracy.'[13] Unelected officials lack such direct democratic accountability. The liberal insistence on either generality or consent therefore dictates that they must be denied the possibility of ever exercising such powers. Discretionary decision-making on their part is, from a strictly liberal perspective, arbitrary, unaccountable, and thus illegitimate.

B. Administrative legitimacy and discretionary power

This antipathy towards discretionary power poses considerable problems for the administrative branch of government. Administrative officials habitually employ an extensive range of discretionary powers. Discretionary decision-making is, in fact, a central, some might say, defining feature of the administrative process. It is clear, however, that it also appears to infringe the foundational principles of liberal democratic thought upon which so much of our constitutional and political structures are based.

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[11] Dicey 'associated discretion with arbitrary power, and hence found it to be incompatible with the rule of law as he understood it'. Leyland & Woods, "Public Law History and Theory: Some Notes Towards a New Foundationalism" in Leyland & Woods ed., *op. cit.*, at 390.

[12] Culp Davis, *Discretionary Justice: A preliminary inquiry* (University of Illinois Press, 1971).

[13] Radford, "Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability" in Leyland & Woods ed., at 35.

> The ultimate problem is [therefore] to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.[14]

The traditional solution to this dearth of bureaucratic accountability has been to identify the offending administrative entity with one of the three 'legitimate' Montesquian organs of state. Administrative bodies thus obtain a type of parasitic legitimacy, finding normative justification in the authority of their parent institution. Any capacity for independent decision-making on their part is thereby denied. They are instead accorded the status of institutional underworkers, adhering faithfully to the orders issued by the presumptively legitimate organs of the state. Officials are characterised as directed drones rather than autonomous actors in the policy-making or policy-implementing processes of government. Power is instead nominally confined to the parent organs of the executive, legislative or judicial processes. This approach is prompted by an obvious elision of the separation of powers and liberal democratic thought. Stewart thus concludes that:

> [T]he traditional conception of administrative law does ... bespeak a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable.[15]

This approach has been applied, most particularly, to those bodies exercising ostensibly creative powers. The process of creating new rules, policies or administrative guidelines carries with it the ever-present threat of arbitrary governance. Creative power is, by its very nature, effectively unguided. Guaranteeing the general applicability of newly-formed rules does little to mitigate the adverse effects of any rules which are, in their basic content, objectionable. This legislative power has therefore traditionally been confined to the elected organ of the state. Administrative agencies have consequently been identified with such bodies. They are, to adopt Stewart's seminal terminology, 'conceive[d] of ... as a mere transmission belt for implementing legislative directives in

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[14] Stewart, "The Reformation of American Administrative Law" (1974-75) 88 Harv. L. Rev. 1667, at 1688.
[15] *Ibid.*, at 1671.

particular cases'[16]. The spectral vision of administrators exercising discretionary power is thus exorcised by promises of specific statutory guidance, or ministerial control. Popular accountability is preserved by the involvement of elected officials.

C. The 'transmission belt' theory and the courts

This 'transmission belt' theory of legislative power allows the judiciary a very limited role. Given the courts' equivalent lack of a direct electoral mandate, the involvement of judges in the supervision or direction of administrative agencies was normatively unnecessary. Furthermore, the separation-of-powers-inspired identification of any agencies exercising creative power with the elected institutions of the state discouraged an active judicial involvement in their operation.

It has already been noted in Chapter 2 how the formal understanding of the tripartite theory has tended (in decisions such as *T.D.*,[17] *Dupont Steel*[18] and *Chadha*[19]) to encourage the courts to avoid the active scrutiny of elected organs. This has even been the case in the United Kingdom where it has been argued that 'some notion of separation of powers, though scarcely articulate, has acted as a constitutional restraint'[20]. As Chapter 2 demonstrated, however, the theory of the separation of powers is, of itself, insufficiently specific to demand the adoption and observance of this particular conception of electoral pre-eminence. This follows, rather, from the way in which supporters of the formal theory are inclined to refract the Montesquian model through a majoritarian prism. In the English system, this deferential attitude to the creative competence of elected bodies has obviously been influenced by the orthodox doctrine of parliamentary supremacy. *Leontjava* and *T.D.* illustrate, however, the extent of this idea's influence in the Irish courts as well. The formalists' insistence on all rule-making powers being vested in the legislature is the product not of a tripartite institutional model, but of a majoritarian belief that creative power can only be validly exercised by elected officials. The separation of powers is a vehicle for the expression of these deeper demands. Thus it

[16] Stewart, *loc. cit.*, at 1675.
[17] *T.D. v. Minister for Education* [2001] 4 IR 259.
[18] *Dupont Steel v. Sirs* [1980] 1 All ER 529; [1980] 1 WLR 142.
[19] *INS v. Chadha* 462 US 919 (1983).
[20] Boyle, *loc. cit.*., in Richardson & Genn ed., *op. cit.*, at 81-82.

is not strictly accurate to speak of the influence of the separation of powers theory on the court's approach to the problem of administrative discretion. It must instead be understood as but one element of a more expansive model of majoritarian rule.

Identified with the other branches of the tripartite model, the administration thereby becomes a matter of presumptively non-judicial concern. The formal theory's focus on separation and restraint, rather than supervision and checks and balances, has encouraged the judiciary to withdraw to an 'inactive formalist' position, according to which they intensively engage only with those adjudicative bodies whose processes approximate to those of the courts themselves. These procedural resemblances to the judicial process justify the courts' involvement in areas automatically committed by the formalist conception of the state to the other branches of government. As Loughlin, reviewing the response of courts in Canada and the U.K. to the rise of the administration, remarked:

> This solution, the one adopted [by the courts], required administrative procedures to conform to minimum requirements of judicial procedure only for those aspects of administrative decision-making which analytically most closely resembled adjudication. While this left a range of decision-making processes free from judicial review, the courts preserved the traditional model in suggesting that such processes are subject to legislative scrutiny.[21]

Irish authorities such as *Lynham v. Butler (no.2)*[22] and *State (Crowley) v. Irish Land Commission*[23] can be seen in the same light. In these decisions, the court's conclusion depended on its preliminary finding as to whether the body was, in the case in question, exercising a judicial or an administrative function. If the power at issue was adjudged to be judicial, the body was obliged to act judicially. As a result, the applicant was then entitled to demand that officials observe the requirements of natural justice.

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[21] Loughlin "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) U. Toronto L.J. 215, at 221.
[22] [1933] I.R. 74.
[23] [1951] I.R. 250, expressly applied in *Foley v. Irish Land Commission* [1952] I.R. 118.

In respect of all other (non-judicial) administrative bodies, the transmission belt theory of the administration found normative justification in the supervisory involvement of the elected organs. Individuals seeking procedural protections beyond those set out in statute were met with the brusquely excusatory response that 'the discretion of [administrative officials on such matters] is quite unfettered'[24]. The courts were accordingly cast in the minor technical role of policing the boundaries of administrative powers. The nature and quality of decisions made was outside the designated area of curial concern. 'Judicial review was designed to keep administrators within their jurisdictions and harnessed to the values and purposes expressed in the macropolitical process of legislation and electoral accountability.'[25] Judges were charged simply with ensuring – through the use of devices such as the non-delegation doctrine, ministerial accountability and *ultra vires* review – that these bureaucratic bodies adhered to the instructions given to them by the elected (and thereby legitimately creative) institutions of the state. In this way, popular accountability, and thus normative legitimacy, would be preserved.

III. THE *IMPERIUM* MODEL OF GOVERNMENT

A. Electoral legitimacy and the sovereign power

Administrative law, as Boyle has noted, forms but one element of a wider constitutional conversation about the nature and legitimacy of government rule. The development of a particular understanding of the administration necessarily rests on broader notions of legitimacy and accountability. The transmission belt theory must therefore be conceived of as part of a more expansive image of constitutional governance. According to the transmission belt theory, legitimacy lies in the connection of an individual decision-maker to a normatively superior authority. This logically requires the existence of a defined hierarchy of power. It is clear that this understanding of the administration

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[24] *State (Costelloe) v. Irish Land Commission* [1959] I.R. 353, at 375, *per* Maguire C.J. The Supreme Court held that, regardless of the desirability or otherwise of the applicant's request to be furnished with inspector's reports upon which the Commission might rely, the court could not review the officials' exercise of what were found to be administrative powers.

[25] Mashaw, *Greed, Chaos and Governance* (Yale University Press, 1997), at 112.

implicitly connotes the presence of a central repository of creative power, to which all decisions must ultimately be attributable. This authoritarian model has obvious common law origins.

> [L]egal philosophy in Britain was [historically] dominated by the Hobbesian theory that at the foundation of every legal system there is a 'sovereign', who is the creator of all law and whose power is therefore above the law .... [F]or every law there had to be a law-maker .... But since there cannot be an infinite regress of law and law-makers, it seemed reasonable to postulate the existence in every legal system of an ultimate law-maker, or sovereign.[26]

Government, on such a view, is primarily a matter of command and control. Orders are centrally issued, officially applied and individually obeyed. Furthermore, this model retains its explanatory power, even if the anachronistic Hobbesian idea of an individual authority figure is discounted. The authoritarian structure survives the death of Leviathan.

> In H.L.A. Hart's modern legal philosophy, the authority of the sovereign is replaced with that of secondary rules .... The decisively rejected image of domination by a personal sovereign gives way to an image of domination by impersonal rules – the rule of law.[27]

The transmission belt model of administrative organs as the meek handmaidens of a central sovereign can thus be regarded as a modern incarnation of an age-old understanding of government. This hierarchical conception of a top-down authority represents what Cotterell calls the *imperium* image of society – 'an image of individual subjects of a superior political authority'[28].

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[26] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon, 1999), at 236-237.
[27] Cotterell, "Judicial Review and Legal Theory" in Richardson & Genn ed., *op. cit.*, at 20-21.
[28] *Ibid.*, at 20.

B. Sovereign authority and the democratic state

Contemporary developments have, of course, required the details of this model to be amended. The advent of democracy (or at least the majoritarian understanding of it under examination here) dictated that creative power should reside in the elected organs of government. Generalised rules have replaced the arbitrary whims of an absolute leader. The conduct of government is conceived of as a rule-governed activity. The legitimacy of government actions depends upon the identity of the rule-maker rather than any external assessment of the quality of the conduct in question. The system, however, is still recognisably one of centralised authority.

> The hierarchy is now conceived in abstract, impersonal terms .... But the fundamental conceptual structure of authoritarian (even fascist) legal systems would not be significantly different, in terms of Hart's central theoretical preoccupations, from those of democratically based ones. Law for Hart, no less than for Austin, is positive law; posited on the basis of a hierarchy of authority.[29]

The formal theory of the separation of powers is also infused with the ideology of the *imperium* model. Montesquieu's three branches of government are defined by their place in the process under which rules are enacted, interpreted and applied. Authority, in a formal separation of powers system, is centrally located in the institutions of the state. Each exercises complete authority in its particular area of competence, conforming to the theoretical image of a hierarchical structure. The mechanics of the institutional separation are dictated by the organ's involvement in that rule-making process which the model regards as the central case of government activity. Government action is again epitomised by the top-down declaration of general rules.

C. Sovereign authority and the limits of state power

From the liberal point of view, the existence of such an omnipotent centralised power was permissible because of the restricted scope of state competence. 18th century ideas of political authority and separation of powers regarded the state as an essentially negative

[29] *Ibid.*, at 23-24.

instrument of limited social control. The liberty of the individual was secured by the extensive freedom which he enjoyed in arranging his relationships with other members of society. This was reflected, for example, in the way in which American administrative law was historically confined to the protection 'of a small class of private liberty and property interests against unauthorised governmental intrusions'[30]. This limited review was seen as sufficient to cover the likely extent of government activity. In this, the influence of Locke's limited conception of the state can clearly be discerned.

Man, on Locke's view, was 'born ... with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature'. As a corollary of this entitlement, he also had an inherent power to act so as to 'preserve ... his life, liberty and estate, against the injuries and attempts of other men'[31]. In a pre-legal society, his ability to do this was obviously dependent upon the strength and force of his own personality and position. With his 'enjoyment of [this right] ... very uncertain, and constantly exposed to the invasion of others', the individual thus entered into a social contract with his fellow citizens to ensure 'the mutual preservation of their lives, liberties and estates'[32]. This implied that '[t]he great and chief end ... of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property'[33]. Civil society was based on a desire to secure 'comfortable, safe, and peaceable living [by citizens]..., in a secure enjoyment of their properties, and [with] a greater security against any that are not of it'[34]. It was thus also so limited:

> [T]he power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good; but is obliged to secure every one's property ... And so whoever has the legislative or supreme power of any

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[30] Stewart, *loc. cit.*, at 1716.
[31] Locke, *Second Treatise of Government: Of political or civil Society*, at para. 87, in Shapiro ed., *Locke: Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003), at 136
[32] *Of the Ends of political Society and Government*, at para. 123, *ibid.*, at 154-155.
[33] *Of the Ends of political Society and Government*, at para. 124, *ibid.*, at 155.
[34] *Of the Beginning of Political Societies*, at para. 95, *ibid.*, at 142.

> commonwealth, is bound to govern ... [in such a way as] to be directed to no other end but the peace, safety and public good of the people.[35]

The state thus acted as a restricted 'neutral guardian of the social order'[36]. Public and private affairs were clearly delineated, with the organs of the state excluded from issues of private power-ordering.

It is clear that the traditional understanding of the administrative process is a specific instantiation of this historical model of government. The image of the elected organs of the state as politically pre-eminent, like the formal separation of powers theory and transmission belt conception of the administration, is premised on an *imperium*-inspired understanding of government. This places the central institutions of the state at the apex of a rule-governed hierarchy, in which an individual exercise of power is legitimised by reference to its direct connection to the elected repositories of creative authority. Again, there are strong echoes here of Lockean political thought. Occupying a position at the apex of the state's creative capacity, the legislature was regarded by Locke as the supreme organ of state power. What this chapter will now seek to assess, however, is the extent to which this authoritarian model accurately reflects the reality of governance in an administrative state.

IV. *IMPERIUM* AND THE ADMINISTRATIVE STATE

A. The imperium idea comes under pressure

As the previous section has shown, the traditional model's response to the gradual emergence of an administrative branch of government was to downplay the development's institutional and normative significance. Administrative agencies did not exercise power in a manner consistent with the traditional commitment to government-by-rules. More generally, they also tended to involve themselves in areas conventionally

[35] *Of the Ends of political Society and Government*, at para. 131, *ibid.*, at 156-157.
[36] Unger, *loc. cit.*, at 193.

regarded as being beyond the borders of the state's constrained competence. The transmission belt theory thus sought to cloak these changes in the orthodox fabric of conventional dogma. The well-recognised reality, however, is that this adherence to the idea of *imperium* studiously overlooks the very changed nature of the contemporary state.[37]

B. The interventionist state

Dicey, espousing the prevailing Whig wisdom of his day, rejected that '[collectivist] school of opinion ... [which] favour[ed] the intervention of the State, even at some sacrifice of individual freedom, for the purpose of confirming benefit upon the mass of the people'[38]. *Laissez-faire* individualism eschewed public involvement in private matters, which were seen as falling outside the legitimate limits of state concern. The rise of the welfare state in Europe, however, and the New Deal reforms of the 1930's in the U.S., rendered such a starkly privatist view essentially obsolete. The modern state has embraced precisely this type of interventionist approach, according to which the government seeks to organise and structure society in a generally beneficial way. The state exercises an increasingly pervasive regulatory power, ordering society in whatever manner it sees fit. As Bamforth has commented, the state today provides the legal and social framework within which individual activity occurs. In this way, it seeks to direct and shape the conduct of its citizenry.[39]

Public power can therefore no longer be regarded as a neutral guarantee of social order. It is rather perceived as an instrument of social reform. Improving the position of individual citizens – which was formerly seen as a purely personal matter of self-arrangement – has instead become the paradigmatic focus of government action. 'The administrative state of the 20th century thus engages in a large number of managerial functions'[40]. Administrative-governmental bodies have accordingly proliferated in the increasingly

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[37] Commentators have long ago identified the inconsistency between the traditional model of a neutral state and the more activist understanding of 20th century government. See, for example, Landis, *The Administrative Process* (Yale University Press, 1938).
[38] Dicey, *Law and Public Opinion in England* (2nd ed., Macmillan, 1914).
[39] Bamforth, *loc. cit.*, at 141.
[40] Loughlin, *loc. cit*, at 240.

uncertain penumbra between public matters and private affairs. 'Private ordering has been swallowed up government, while government has become in part a species of private ordering .... [T]he government and private spheres are thus melded'[41]. Officials who, on a transmission belt interpretation, blindly adhere to superior orders have, in reality, been entrusted with sweeping discretionary powers. The administration has become 'to a great extent, the central core of the governmental process'[42] at the same time that traditional institutional theory has attempted to confine and incorporate it into an outdated ideal of 18th century governance.

> The traditional model is an essentially negative instrument for checking government power; it does not touch 'the affirmative side' of government 'which has to do with the representations of individuals and interests' and the development of government policies on their behalf.[43]

C. The decentralisation of public power

The descriptive incoherence of the traditional model is not simply confined to the question of the appropriate scope of state activity. There is a similarly stark divergence between theory and reality in respect of the centralised nature of public authority. The continuing influence of the *imperium* image of public governance has already been outlined above. This top-down conception of a hierarchical rule-making structure also fails to reflect more recent developments in the administrative and governmental spheres. The 'blurring of the division between the public and private spheres' has resulted in an increasing recourse on the part of the state to self-regulation – 'the delegation of public policy tasks to private actors in an institutionalized form'[44] – to accomplish particular policy ends. As the accepted area of state competence has expanded, so its direct involvement in many of these matters has actually declined. '[E]ven if ... central ... government does not actually provide or administer the services concerned, the state still devises and administers the overall framework within which the service provision takes

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[41] Stewart, *loc. cit*, at 1760.
[42] Loughlin, *loc. cit*, at 220.
[43] Stewart, *loc. cit*, at 1687, citing Fuchs, "Concepts and Policies in Anglo-American Administrative Law Theory" (1938) 47 Yale L.J. 538, at 540.
[44] Graham, "Self-Regulation" in Richardson and Genn ed., *op. cit.*, at 189-190.

place.'[45] The service providers are generally allowed, however, considerable latitude in determining the details of their operations. Delegating statutes tend to offer little in the way of specific instructions, providing instead a broad framework for administrative action. The widespread privatisation of these governmental processes has led to a centrifugal decentralisation of the sources of social authority. Although the mandate of many of these bodies is, of course, traceable to the legislative organ of the state, this cannot conceal the fact that they operate in practice independently of any central scrutiny or control. Account must also be taken of those bodies exercising a historic supervisory jurisdiction over important areas of human activity which do not depend for their power on any statutory *fiat*. Organisations like the Takeover Panel or Jockey Club are allowed to regulate the actions of individuals in their area of expertise without the detailed statutory delegation which a strict adherence to the traditional model would demand. The *imperium* image of a central sovereign power issuing specific orders, it would appear, has profound difficulties in adequately accommodating the contemporary trend towards state privatisation.

D. The place of rules in the administrative state

This growth in administrative-governmental bodies has also undermined the traditional model's insistence upon a rule-based system of governance. The state's transformation from a directive sovereign to the facilitator of social frameworks has reduced the practical importance of generalised governing rules. Power is no longer exercised in accordance only with centrally-created rules. Statutory delegations of power are, it has been noted, permissively framed, allowing administrative officials considerable latitude when choosing a course of action. 'Increasingly, ... primary legislation has become a skeletal enabling framework conferring not just the functions of detailed implementation but the power to determine major policy questions'[46]. Discretionary decisions, transient policy positions[47] and executive-adopted tertiary rules[48] now feature alongside legislative

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[45] Bamforth, *loc. cit.*, at 141.

[46] Hayhust & Wallington, The Parliamentary Scrutiny of Delegated Legislation [1988] PL 547, at 551, quoted with approval in Baldwin, "Governing with Rules: The Developing Agenda" in Richardson & Genn ed., *op. cit.*, at 165.

[47] The practice of administrative adherence to these non-statutory policy 'rules' has been considered (and accepted as constitutionally permissible) in cases such as *British Oxygen v. Board of Trade* [1971] A.C.

provisions as commonly used instruments of political or legal change. The traditional model nevertheless holds fast to a conception of the system according to which political choices are normatively obliged to be made by elected officials.

E. The emerging accountability crisis

This again illustrates quite clearly the extent to which adherents of the traditional theory are obliged to deny, or at least overlook, the realities of contemporary governance. More problematically, however, the traditional theory's insistence on the normative superiority of the elected organs of state perpetuates a belief in essentially outdated notions of liberal legitimacy. Liberal theory, it was noted in section II, has historically required that government action be legitimised by obtaining the individual citizen's personal consent to the exercise of power, or by ensuring that any principles are impersonally applied. The liberal insistence on the presence of personal consent traditionally manifested itself in a belief in the political pre-eminence of the elected institutions of the state. This type of electoral exaltation has, however, been conspicuously undermined by the willingness of these bodies to delegate and decentralise extensive political powers. Supporters of the traditional model have thus sought to sustain the notion of a central elected authority by developing mechanisms of electoral control, such as the non-delegation doctrine, or the principle of ministerial accountability. These constitutional devices profess to ensure that government power remains vested in the normatively appropriate institutions of the state. In reality, however, these doctrines are legal fictions, offering illusory protection against ostensibly illiberal abuses of public power.

(i) Parliamentary accountability

Ministerial accountability, for example, is premised on the idea that an executive official's answerability to Parliament preserves some measure of legislative (and thus elected) control over the exercise of administrative powers. In reality, however, the doctrine is the product of an acknowledgment by the courts of the unavoidably delegated character of contemporary executive action. Courts, noting how 'the giving of powers to

610; *Re Findlay* [1985] A.C. 318; *Association of General Practitioners Ltd. v. Minister for Health* [1995] 1 I.R. 382; and *McCann v. Minister for Education* [1997] 1 I.L.R.M. 1.

[48] *See* Baldwin, *loc. cit.*

a ... subordinate body ... has been a feature of legislation for many years'[49], have accepted it 'would do a disservice to the efficiency of government administration if [they] were to overlook the practical necessity for delegation in much of the machinery of State'.[50] The courts have thus sought justification for this process in the doctrine of parliamentary accountability. As Greene M.R. explained:

> In the administration of government in this country the functions which are given to ministers are functions so multifarious that no minister could ever personally attend to them .... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department .... Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority .... The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.[51]

In contemporary terms, however, this doctrine suffers from two key flaws. In the first place, the enormous expansion in the administrative functions of the state makes it effectively impossible for a minister to properly supervise the actions of those for whom he is ostensibly accountable. '[M]inisters can expect to become personally involved only in the most important decisions and, inevitably, most of the work will be delegated to officials'[52]. In fact, the advent of privatisation has removed even this minimal level of ministerial involvement from many areas of governmental activity. Greene M.R.'s belief that the Minister will be involved at even the basic level of allocating particular tasks to individual officials seems quaintly antiquated in the era of the shrinking state.

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[49] *Cityview Press v. An Comhairle Oiliuna* [1980] IR 381, at 398.
[50] *A.G. v. Cooper* [1974] 2 NZLR 713, at 724.
[51] *Carltona v. Commissioner of Works* [1943] 2 All ER 560, at 563.
[52] Radford, *loc. cit*, at 39.

Privatisation and the process of contracting-out previously public tasks means that administrative decisions are regularly made without any reference to the relevant Minister. It has even been argued that the increasing move towards ever more autonomous entities allows the minister 'while retaining overall political responsibility ... to pass the buck of operational responsibility to the executive agencies'[53], thus further undermining the administrative process' claims to accountability.

> The danger as far as agencies are concerned is that 'there will be a bureaucratic Bermuda Triangle' into which accountability disappears with neither minister nor chief executive responding to troublesome questions.[54]

With such a stark decline in the practice of ministerial involvement in, or responsibility for, administrative actions, it is clear that the protection offered by the principle of parliamentary accountability is hopelessly insufficient.

Secondly, even in those atypical situations of actual ministerial supervision, the dominance of the executive organ, as identified in Chapter 2, means that, in practical terms, the legislature is 'too weak to vindicate to the just satisfaction of the citizen its historic power to control the Executive in the name of the people'[55]. Party political control of the legislature ensures that an embattled minister will inevitably survive unless 'his or her own backbenchers conclude that the political damage caused by resignation is less than that arising from the minister remaining in post'[56]. This is a result of the fact that:

> It is a characteristic of the British [and Irish] political system that when the future of a minister is in question, it will be regarded as first and foremost an aspect of

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[53] Austin, "Administrative Law's Reaction to the Changing Concepts of Public Service", in Leyland and Woods ed., *op. cit.*, at 14.
[54] Woodhouse, *In Pursuit of Good Administration: Ministers, Civil Servants and Judges* (Clarendon, 1997), at 11, quoting Bogdanor's memorandum to the Treasury and Civil Service Committee (TCSC), HC 390-II (1992-3).
[55] Sedley, "Governments, Constitutions and Judges" in Richardson & Genn ed., *op. cit.*, at 42.
[56] Radford, *loc. cit.*, at 41.

the continuing party conflict rather than as an occasion for the House to act collectively to discipline the executive.[57]

Noting these deficiencies, Austin has dismissed the convention of ministerial responsibility as a case of the Emperor's New Clothes, an 'old constitutional sacred cow' with little relevance to contemporary affairs[58].

Yet, in spite of its evident inadequacy, the doctrine continues to be relied upon as one of the formal constituents of the constitutional order. This has a number of potentially debilitating effects. The continued invocation of this concept openly encourages the public to trust in a constitutional doctrine which, on even the most cursory examination, is revealed as an empty formalism. In addition, its persistence as a fanciful and ineffective guarantee of liberal legitimacy might also serve to discourage attempts to develop a more relevant model of normatively appropriate governance. Furthermore, the doctrine can be taken to inhibit the involvement of other branches in any examination of executive or administrative processes at the same time as it conspicuously fails to properly fulfill this function. Accountability, on this model of government, is defined as 'predominantly a political issue'[59], from which the courts are thereby presumptively excluded. Adhering to this logic, the English courts have historically regarded the merits or otherwise of official actions as a question for the legislature alone, confining themselves to the 'determination of the limits of [the] power'[60] at issue. In this way, the rhetorical commitment to this constitutional dogma can be argued to have precluded the use of one of the more obvious means of redressing both the absence of effective accountability, and thus the resulting democratic deficit.

(ii) The non-delegation doctrine

The Irish and American experiments with a non-delegation doctrine have been similarly fruitless. Like the concept of ministerial accountability, the non-delegation doctrine

[57] *Ibid.*, at 40.
[58] Austin, *loc. cit.*, at 7-8.
[59] Radford, *loc. cit.*, at 36.
[60] Radford, *loc. cit.*, at 36.

aspires to act as a bridge between the strict dictates of the traditional model (that power be exercised by the elected sovereign authority) and the contemporary reality that the delegation of power to administrative bodies is a 'necessary evil'[61], 'by common accord, indispensable for the functioning of the modern state'[62]. Thus, the courts require that any statutory delegation to an inferior body be sufficiently specific to exhaust the normatively crucial task of policy creation. The Irish courts have therefore demanded that the delegation in question be no 'more than a mere giving effect to principles and policies'[63], thereby supporting the claim that all creative power remains vested in the elected institutions of the state. In practice however, the Irish courts have tended to apply an understanding of the test which is so broad as to effectively exempt all but the most obvious abuses[64] from challenge. In *Leontjava*,[65] the Supreme Court was satisfied that a legislative direction that *some* regulation was required was sufficient to satisfy the *Cityview Press* test. As Casey observed in respect of an equally indulgent earlier decision, '[i]f provisions of such vagueness can pass muster, it is not easy to imagine what would not'[66]. The suspicion must be that the Irish non-delegation doctrine, like its under-utilised American counterpart[67], is 'little more than high-sounding hocus-pocus, in which the Court mutters beguiling incantations while blowing smoke in the face of

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[61] Ganz, "Delegated Legislation: A Necessary Evil or a Constitutional Outrage?" in Leyland & Woods ed., *op.cit.*, at 80.

[62] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, at 245 *per* Fennelly J.

[63] *Cityview Press v. Anco* [1980] I.R. 381, at 399.

[64] The Irish courts have adopted a two-pronged approach to Article 15. The 'principles and policies' test – which can be regarded as an illustration of the classical non-delegation doctrine – represents the first line of Irish authority. The second concerns the amendment or repeal of primary legislation by way of delegated legislation. The courts have consistently held this to be unconstitutional; *Harvey v. Minister for Social Welfare* [1990] 2 IR 232. However, this rule derives chiefly from a textual interpretation of Article 15 rather than a vigorous application of the non-delegation doctrine. The court's strict approach to this second limb thus does not really address the academic criticism of the principles and policies test as unjustifiably weak. *See* Hogan and Morgan, *Administrative Law in Ireland* (3rd ed., Round Hall Sweet & Maxwell, 1998).

[65] *Leontjava v. D.P.P.* [2004] 1 I.R. 591, at 624.

[66] Casey, *Constitutional Law in Ireland* (2nd ed., 1992), at 181, cited in Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, 1997), at 239.

[67] The U.S. Supreme Court has struck down legislation on the basis of the non-delegation doctrine on only two occasions: *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Furthermore, these authorities are at least in part inspired by the peculiar environment of the New Deal era in which the Supreme Court conducted a long-running political battle with President Roosevelt's Progressive reform programs. They thus cannot be taken as generally representative of the American courts' point of view.

statutory reality'[68]. It appears no more than an 'empty exercise in judicial rhetoric'[69] invoked for reasons of ritual rather than real analytical aid. Once again, therefore, the traditional model's attempts to preserve its conception of normative legitimacy in the face of contemporary reforms have been shown to be ill-founded and functionally ineffective.

F. The citizen-state relationship redefined

The problems previously identified can clearly be regarded as evidence of a profound dysfunction in the traditional image of a sovereign power. The *imperium* conception of rule-based and centralised power bears little resemblance to the actualities of an administrative state in which discretionary powers are exercised by unelected officials on a broadly dispersed basis. Normative justification for the use of public power rests on an outdated understanding of the institutional structures of the state, which has been shown to be functionally ineffective when faced with the realities of modern government. This, in itself, seems sufficient to condemn the traditional model as a historical anachronism. The weakness of its accountability arrangements have, however, been exacerbated by the development of a changed conception of the public service. Recent decades have witnessed a significant transformation in the relationship between the citizen and the state. Some of the preceding sections discussed how state power historically required some sort of special justification. This recognised the fact that '[u]nlike the free market where there is freedom of contract between individuals equal in the eyes of the law, there is an inherent inequality between state institutions and the individual'[70]. Thatcherite-style reforms have, however, recast the citizen in a more contractual and consumerist light.

Woodhouse contrasts the traditional 'public service' model of administrative action with this 'New Right' or 'public management' model. The public service model is predicated on a 'commitment to the public interest'[71], which manifests itself in the importance

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[68] Farina, "Statutory Interpretation and the Balance of Power in the Administrative State" (1989) 89 *Colum. L. Rev.* 452, at 480.
[69] Farina, *loc. cit.*, at 480.
[70] Austin, *loc. cit.*, at 23.
[71] Faulkner, Crouch, Freeland and King, Memorandum to the TCSC, HC 27-III (1993-4), cited in Woodhouse, *op. cit.*, at 27.

historically attached to the values of 'rationality, consistency and justifiability'[72]. Parliamentary accountability is a cornerstone of this conception of the administration, operating as a constant reminder of the public nature of official functions, and of their associated need for normative legitimitation. This understanding of the administration fosters a culture of public service which 'encourages adherence to constitutional principles and to principles which protect the individual', taking as its operational lodestar the 'liberal values [of] fairness, equity and reasonableness'[73].

On the contrary, the public management model prioritises a very different set of principles.

> Most significant is the domination of efficiency which is supported by the language of consumerism and the values of the competitive market. The mechanisms of control and accountability also have an emphasis which accords more readily with management theory and with accountability to the market rather than to the public interest.[74]

Officials' self-perception of their role, and the obligations which it imposes, has accordingly been altered. This managerial vision of the administrative process is 'largely uncluttered by notions of public service, or concepts such as fairness, equity and reasonableness'[75]. Thus, whereas civil servants were formerly encouraged to consider themselves as representatives of the state who were thereby bound by certain principles of public service, officials are now presented as decentralised service-providers, freed from any additional notions of public duty.

Baldwin has remarked that, on any examination of the way in which delegated powers are employed, 'it proves difficult to make clear-cut claims to legitimacy on their behalf

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[72] Brown & Steel, *Administrative Process in Britain* (2nd ed., Methuen, 1979) at 199.
[73] Woodhouse, *op. cit.*, at 34.
[74] *Ibid.*, at 46.
[75] *Ibid.*, at 51.

other than on the bases of expertise and efficiency'[76]. This 'search for efficient government' has been argued to 'undermine the [impartiality, integrity and objectivity which have traditionally been regarded as] the key characteristics of the civil service'[77].Traditional ideas of normative justification – the existence of a legislative mandate, the presence of accountability controls, fairness of action[78] – have been supplanted by the language of the free market contract. This is animated by a desire to empower the citizen-consumer to directly interact with the provider of his services, rather than encouraging a reliance on the state to allocate resources as it sees fit. However, this free market ideology overlooks the absence of a genuine freedom of contract between citizen-consumer and service provider. On the contrary, the citizen-consumer is at risk of being presented with a contractual *fait accompli* which provides a lower level of protection and redress than that offered under judicial review's traditional ideals of legality and fairness. Thus, public power has been decentralised to administrative agencies at the same time that these bodies have begun to define themselves (and their duties) in terms of restricted privatist notions of efficient service provision.

> [P]ublic service is no longer the service of the public as a collective, but rather the service of the individual consumer of specific and limited public services. This is reinforced by the weakening or even removal of the traditionally public, institutional and constitutional mechanisms for accountability and redress ... and their replacement by individualised, atomistic relationships between the citizen *qua* consumer and the providers of public service.[79]

This cannot but exacerbate the accountability and legitimacy deficit inherent in the traditional model of centralised governance. The validity of a normative legitimacy which rests on the idea of ministerial accountability has already been rejected. Furthermore, it is now clear that the various devolved bodies – which constitute the real *loci* of administrative power – do not evince a particular commitment to the traditional

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[76] Baldwin, *loc. cit.*, at 170.
[77] Woodhouse, *op. cit.*, at 7.
[78] Baldwin argues that these are the other headings under which state actions have traditionally claimed legitimacy. See Baldwin & McCrudden, *Regulation and Public Law* (1987), Chapter 3.
[79] Austin, *loc. cit.*, at 23.

requirements of liberally legitimate government. There is, therefore, a clear 'danger that real political responsibility and accountability to the public through its representatives will fall into this gap between traditional doctrine and the practical realities of the modern structure of government'[80].

V. THE IMPERIUM MODEL AND THE COURTS

A. The judicial response

Cumulatively, these charges of explanatory incoherence and normative failure demonstrate quite clearly the incongruity of the *imperium* theory in the era of the administrative state.[81] Thus, it is scarcely surprising that the courts' support for this idea has, in recent decades, become increasingly inconsistent. Exposed as an inadequate and anachronistic vision, judicial adherence to the traditional model has been in a steady, if gradual, decline. Stringent compliance with the archetypal image of a dominant central sovereign invested with ultimate political authority required the courts, in the context of judicial review of administrative actions, to confine themselves to the enforcement of the limits and obligations laid down by statute. The courts could not intervene to examine the standard and quality of decisions of bodies which, in accordance with the separation of powers, were allocated to the elected branches of government. Judges were entrusted with a limited and technical task. It has been notable, however, how the courts have moved beyond these restrictive limitations at the same time that the state has moved beyond the 18th century characterisation of it as a neutral rule-governed hierarchy of limited competence. As the justification for the use of this model has evolved from the veracity of its normative vision to the simple fact of historical tradition, so the courts have been less inclined to abide by its restraints. Mr. Justice Sedley, writing in an extra-judicial capacity, has expressly tied the expansion in the courts' administrative competence to the changing nature of the modern state. Actions which would have been

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[80] Austin, *loc. cit.*, at 5.

[81] Given its derivative attachment to the idea of a central creative institution, this obviously also implicitly affects the institutional appropriateness of the formal theory of the separation of powers.

adjudged impermissible under the traditional theory have been undertaken, in his view, 'as a response to the growth of a corporate state in which the executive, far from exercising restraint, was itself heavily interested'[82]. Judicial reforms should be understood as a response to the novel innovations of this 'great wave of regulatory governmental institutions'[83]. Lord Irvine too regarded 'the want of Parliamentary control over the executive' to have been 'to an important degree, mitigated by the rigours of judicial review'[84]. That it not to say, of course, that the image of the *imperium* has been entirely abandoned by the courts. On the contrary, it continues to influence extensive areas of constitutional jurisprudence. However, recent decades have witnessed the creation of an increasing number of exceptions to its most rigorous requirements. In keeping with Unger's thesis, these exceptions deserve particular analysis. Representing those issues in which the existing orthodoxy has come under the most significant strain, these points of controversy identify the areas in which it is practically or theoretically deficient. They also, however, illustrate the attempts which the system's institutional actors have made to deal with these developments, thereby potentially providing some outline indications of the possible shape of an alternative model of legitimate governance.

B. The public-private distinction

It may therefore be prudent to look in more detail at the ways in which the courts have begun to move away from the *imperium* model. The judiciary's rejection of the historical insistence on a brightline demarcation of public and private spheres is one of the changes which has, for example, attracted considerable academic attention. The decision in *R v Panel on Takeovers and Mergers, ex parte Datafin*[85] is rightly regarded as a seminal constitutional moment, in which the traditionally restricted scope of judicial review was profoundly redefined. The courts had previously followed the formalistic approach of categorising administrative entities in accordance with their specific legal origins. The decisions of bodies whose authority was based on an express statute delegation were, in accordance with the idea of the legislature as the source of public power, subject to

[82] Sedley, *loc. cit.*, at 40.
[83] Sedley, *loc. cit.*, at 41.
[84] Irvine, "Judges and Decision-Makers: The Theory and Practice of Wednesbury Review" (1996) PL 59, cited in Radford, *loc. cit.*, at 37.
[85] [1987] 1 QB 815; [1987] 1 All ER 564; [1987] 2 WLR 699.

scrutiny. The court in *Datafin* re-oriented this analytical approach, focusing not on artificial classifications but on the consequences of the impugned action for the affected individual. At a time when the corporate state was asserting its authority in areas historically regarded as outside its area of competence whilst also devolving significant powers to quasi-private bodies, it was telling that the court eschewed the opportunity to provide a definitive formulation of the extent of judicial review. It concentrated instead on the more individually-oriented criteria of the potential consequences of the act.[86] From an institutionally-categorical point of view, Donaldson MR envisaged only minor limitations on the courts' supervisory powers.

> Possibly the only essential elements [for an institution to be susceptible to judicial review] are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.

Review, the Court of Appeal therefore concluded, could lie against any body which could be said to exercise a 'governmental' function – a flexibly expansive approach which greatly increased the courts' capacity to investigate the actions of an ever-evolving administrative branch.

C. The relaxation of the standing rules

In addition to this broadening of the courts' supervisory jurisdiction, judges have also demonstrated a willingness to entertain challenges which would formerly have fallen foul of the rules on standing. There has been a noticeable worldwide move towards a more liberal *locus standi* regime. The traditional requirement of a direct personal interest in the subject-matter of the dispute has been waived in instances where, for example, no other challenger was likely to emerge.[87] This reflects a very different interpretation of the purposes of the review process, and of the place of the courts in the constitutional

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[86] For a further analysis of the importance of this emphasis on the individual rather than the institutional, *see* Chapters 3, 4 and 6, *infra*.

[87] See, for example, *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 AER 93; *R. v. Sec. State for Foreign Affairs, ex. p. World Development Movement Ltd* [1995] 1 AER 611; *Thorson v. AG for Canada* (1974) 43 D.L.R. (3d) 1 (S.C.C.); *SPUC v. Coogan* [1989] I.R. 734.

structure. The *imperium* model provides that the courts, when considering a judicial review case, are being asked to correct a wrong allegedly perpetrated by an official body against the applicant. More recent authorities, however, demonstrate a general concern to ensure the legality of government actions irrespective of the specific impact of the impugned measure on any one individual. As Keane C.J. commented in the course of his decision in *T.D.*, the traditional insistence on a sufficiently individuated legal interest:

> [M]ust on occasions yield to the overriding necessity that laws passed by the *Oireachtas* or acts and omissions of the executive should not go unchallenged, simply because it is difficult, if not impossible, for individual citizens or groups to establish that their individual rights are affected.[88]

The Canadian courts have echoed this opinion, allowing standing to be asserted in the public interest so as to deny the possibility of legislation or official acts being effectively exempted from challenge.[89] This focus on the legality of the official conduct in question transforms the nature of the judicial review hearing from a bilateral adjudication to something approximating to a 'surrogate political process'[90]. This characteristic is one of those enumerated by Chayes as an *indicia* of public law litigation. 'The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy'.[91]

The decision of Otton J. in *ex parte Greenpeace*[92] provides further support for this amended understanding of the judicial review process. Standing was granted to the applicant pressure group in that case on the basis, not of any individual interest in the dispute at issue, but rather as a result of the judge's estimation that they were the body best equipped to put forward the case in question.

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[88] *T.D. v. Minister for Education* [2001] 4 IR 259.
[89] See *Canadian Council of Churches v. R & Ors.* (1992) 88 DLR 193 ; *Hy and Zelaposs Inc v. AG of Ontario* (1994) 107 DLR 634 .
[90] Stewart, *loc. cit.*, at 1670.
[91] Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harvard Law Review 1281, at 1302.
[92] *R. v. Inspectorate of Pollution ex. p. Greenpeace Ltd (No. 2)* [1994] 4 AER 329.

> It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way of bringing the issues before the court ... It is unlikely that [other individual applicants] would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the Court's resources and which would not afford the Court the assistance it requires in order to do justice between the parties.[93]

Otton J.'s decision has attracted favourable comment from some Irish judges.[94] Australian courts have also, on occasions, adopted a similar approach.[95] This concentration on the applicant's capacity to advance its case seems, logically, to support the view that the objective of the court in a judicial review application is to ensure the legality of the administrative process. It is not, in contrast to the traditional understanding, to defend the rights of the individual in a particular public law context. In response to the state's adoption of increased administrative powers and, arguably, the decreased utility of the traditional mechanisms of normative accountability, it thus appears as if the courts now conceive of themselves as a general check on unlawful (or, perhaps even, normatively illegitimate) governmental action, rather than as defenders of the restricted range of individual rights protected under the 18th century model of limited public power.

D. Increasing standards of review

The traditional image of a rule-based sovereign power also logically dictated that the courts could, in the review process, investigate only the extent of administrative adherence to the rules at issue. The court could not examine actions undertaken within the parameters set out in the relevant statutory provision. Neither, as a sub-sovereign organ, could it question the merits of the political choices behind each individual rule.

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[93] *R. v. Inspectorate of Pollution ex. p. Greenpeace Ltd (No. 2)* [1994] 4 AER 329, at 350.
[94] *Per* Denham and Keane JJ. in *Lancefort Ltd v. An Bord Pleanála (No. 2)* [1999] 2 IR 270; *Per* Kearns J in *Murphy. v. Wicklow County Council* , High Court, March 19, 1999; *Irish Penal Reform Trust v. Governor of Mountjoy Prison*, High Court, Unreported, September 2nd, 2005 (Gilligan J.).
[95] See, for example, the judgment of Wilcox J in *Ogle v. Strickland* (1987) 71 ALR 41 ; *Right to Life Association (NSW) Inc. v. Sec., Dept. of Human Services and Health* (1995) 128 ALR 238 .

The judiciary was obliged to confine itself to a process of *ultra vires* review, in which acceptability of administrative action was equated with the presence of a sufficiently specific statutory jurisdiction.

Once again, however, the limitations inherent in the traditional model have been ignored with progressively greater frequency. The actions of administrative bodies – and indeed the ostensibly authoritative elected organs – have been subjected to an increasingly intensive examination. From the theoretical perspective, this more rigorous approach has crucially expanded the review process beyond the simple supervision of the rule-based boundaries of administrative power. Obligations have been imposed upon administrative bodies which are nowhere set down in statute. The development of the *Wednesbury*[96] jurisdiction, for example, has allowed the courts to consider the rationality of the official conduct in question, evaluating it in accordance with a judicially-created duty of reasonable behaviour. The restrained formulation of the test does, of course, show deference to the elected organs of the state. However, the fact remains that the *Wednesbury* decision asserts a residual power of rationality review which is entirely inconsistent with the traditional conception of a central and all-powerful authority figure. The more recent elaboration of a sub-*Wednesbury* species of 'anxious' or 'heightened' review[97] emphasises the willingness of the judiciary to engage in a process of strict scrutiny whenever it is adjudged to be appropriate. It also underlines the extent to which the courts now appear to regard themselves as an autonomous check on normatively unacceptable official action. Such an attitude would not be tolerated under a strict application of the sovereign *imperium* model.

This pattern of expanding judicial authority is replicated in decisions such as *Anisminic*[98], *Lain*[99] and *GCHQ*[100]. In *Anisminic*, 'the Lords opened up to judicial review effectively

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[96] *Associated Provincial Picture Houses v. Wednesbury* [1948] 1 K.B. 223.
[97] *R. v. Home Secretary, ex parte Brind* [1991] A.C. 696; *R. v. Home Secretary, ex parte Bugdaycay* [1987] A.C. 514; *R. v. Minister of Defence, ex parte Smith* [1996] Q.B. 517.
[98] *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147.
[99] *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 QB 864.
[100] *Council of Civil Service Unions v. Minister of State for the Civil Service* [1985] A.C. 374.

every error of law, far beyond the strict jurisdictional error'[101] to which the courts had traditionally confined their focus. *Lain* rejected the historical limitations of rule-based statutory review, subjecting the exercise of prerogative powers to the scrutiny of the courts. In *GCHQ* meanwhile, Lord Diplock famously outlined a series of independent heads of judicial review – illegality, irrationality and procedural impropriety – which, again, effectively require administrative bodies to meet standards of behaviour above those expressly specified by any sovereign-issued rule. The courts have even shown themselves to be prepared, in appropriate instances, to examine the actions of the elected institutions of the state. Even in advance of the enactment of the Human Rights Act 1998, the English courts had claimed in cases such as *Derbyshire County Council*[102], the capacity to enforce positive common law rights. The incorporation of the European Convention of Human Rights obviated any necessity to rely on this power. Its assertion in *Derbyshire C.C.* did demonstrate, however, a belief on the part of some judges in the courts' ability to intervene in defence of rights adjudged to exist independently of any centrally-enacted legal text. The Irish doctrine of unenumerated rights could arguably be seen in a similar light.[103] That the rule of law has replaced *ultra vires* as the academically-accepted basis for English judicial review demonstrates quite clearly the changes which have been wrought in the relationship between the judiciary, the administration and the elected organs of the state. The recent *obiter* observations of a number of the Law Lords on the possibility of imposing judicial limitations on the power of Parliament are telling.

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances

[101] Sedley, *loc. cit.*, at 39.
[102] *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534.
[103] *See Ryan v. A.G.* [1965] I.R. 294.

could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.[104]

These comments are little short of revolutionary. It is evident that the orthodoxy of *imperium* is under severe pressure in a much-changed modern era. A very plausible argument can now be constructed for a form of judicial review which rests on the protection of external values rather than on the dependent idea of enforcing rule-based expressions of the sovereign will. As Hailsham L.C. observed in *Evans*, the purpose of judicial review arguably now appears to be 'to ensure that the individual receives fair treatment'[105] – a position seemingly dictated by the underlying substantive values of the current constitutional order.

E. Procedural fairness

In keeping with this analysis, the trend towards the judicial imposition of non-statutory standards has been, perhaps, most evident in relation to the development of a duty of procedural fairness. In Ireland, this duty was conveniently derived from the text of the Constitution. Walsh J.'s doctrine of constitutional justice, 'understood to import more than the ... well-established principles'[106] of the common law notion of natural justice, allowed the courts to rest their development of enhanced standards of administrative conduct on a firmly positivist footing. A contextualised and flexible concept, constitutional justice has been held to involve 'a range of (as yet) imprecise procedural guarantees which are designed to avoid the unfair treatment'[107] of individuals. The insistence on ensuring procedural fairness was thus presented as a by-product of the existing constitutional order, rather than as a challenge to the influential (albeit less so in an Irish context) idea of centralised electoral authority.

Not all courts have been able to invoke this sort of usefully justificatory device. However, in those jurisdictions which lacked a constitutional document (like England and, at the

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[104] *R (Jackson) v. A.G.* [2006] 1 AC 262, at para. 102, *per* Lord Steyn.
[105] *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155, at 1161.
[106] *McDonald v. Bord na gCon* [1965] I.R. 217, at 242.
[107] Hogan & Morgan, *op. cit.*, at 501.

time, Canada[108]) the courts proved themselves to be nonetheless prepared to insist on certain autonomous standards of procedural propriety. 'Acting entirely on their own initiative, the courts ... developed common law standards which, in the absence of statutory provisions to the contrary, they ... require of public officials'[109]. This occurred in spite of the fact that the dominant Diceyan 'expression of the rule of law ... makes no commitment to a principle of procedural due process'[110]. Procedural obligations had traditionally been confined to a narrow doctrine of natural justice, which applied only to judicial or quasi-judicial bodies.[111] The courts, however, gradually expanded both the scope[112] and nature of the procedural review process, identifying an independent 'duty to act fairly'[113] which has subsequently served as the vehicle for the imposition upon administrative bodies of significantly broader legal duties. The flexible and contextualised nature of this general duty has allowed the courts to considerably expand the range of administrative agencies to which the principle is applied. As Galligan has commented, 'all areas of administration are now, in principle, subject to the requirements of procedural fairness', which is accepted as a 'dynamic principle from which other doctrines besides the hearing and bias rules (which traditionally exhausted the duties entailed by the principles of natural justice) can be derived'[114]. Thus, administrative bodies have been required to give reasons for their decisions,[115] to abide by previously announced policies,[116] and to allow affected individuals some say in the initial policy-forming process.[117] In fact, the 'most rigorous court-set standards'[118] of procedure can, in reality, often approximate to some form of substantive merits-based review of a type

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[108] See, for example, Loughlin's discussion of this, *loc. cit.*, at 230-236.
[109] Radford, *loc. cit.*, at 47.
[110] Galligan, *Due Process and Fair Procedures* (Clarendon, 1996), at 184.
[111] See, for example, *B. Johnson & Co. (Builders) v. Minister for Health* [1947] 2 All E.R. 395, at 398 in which Greene MR opined that the appropriate remedy for allegations of unfair administrative actions lay in the political arena. Legal obligations arose only in relation to 'that particular stage [of the administrative process] ... [where] there is superimposed on [the Minister's] administrative character, a character which is loosely described as 'quasi-judicial''.
[112] *Ridge v. Baldwin* [1964] A.C. 40.
[113] *In re H.K. (an infant)* [1967] 2 Q.B. 617.
[114] Galligan, *op. cit.*, at 330.
[115] *Stefan v. General Medical Council* [1999] 1 WLR 1293; *State (Daly) v. Minister for Agriculture* [1987] I.R. 165, at 172; *International Fishing Ltd. v. Minister for the Marine* [1989] I.R. 149.
[116] *R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299
[117] *R. v. Secretary of State for Health, ex parte U.S. Tobacco International Ltd* [1992] Q.B. 353.
[118] Fordham, "Surveying the Grounds: Key Themes in Judicial Intervention", in Leyland and Woods ed., *op. cit.*, at 189.

entirely alien to the traditional theory. The court's emphasis on procedural fairness can probably be regarded as an attempt to conform to the constitutional orthodoxy, given the fact that 'procedural fairness fits, by its very nature, within the notion of a truly supervisory jurisdiction'[119]. However, as the obligations required under its rubric increase, so the 'simple distinction between substance and procedure begins to blur'[120], taking the courts far outside their traditionally restricted role.

F. Legitimate expectations

This duty has even extended, in certain cases, to the enforcement of what the court classifies as legitimate expectations. These entitlements do not exist in any historically-familiar legal form. The courts, it has been explained above, could traditionally act only to prevent the infringement of a recognised legal right. In private law, these tended to be contractual interests. In public law, they would be based on statute. The recognition of legitimate expectations thus marks a further move away from the rule-centred positivist conception of state authority. Founded on an external idea of fairness, the development of a doctrine of legitimate expectations is but one more example of the way in which the relationships between the citizen and the state, the administration and the courts, and the judicial and elected organs of government appear to have been redefined in non-traditional terms. Richardson has admitted that 'it is ... har[d] to find a justification in orthodox constitutional theory for the imposition of common law procedural requirements'[121]. It appears more accurate, therefore, to conclude that there has emerged :

> [A] new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.[122]

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[119] *Ibid.*, at 188.
[120] Fordham, *loc. cit.*, at 189.
[121] Richardson, *loc. cit.*, at 109.
[122] *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941, at 945.

That these standards are defined independently of the putative sovereign power on the basis of an external conception of fairness illustrates quite clearly the contemporary incoherence of the traditional *imperium* model.

VI. CONCLUSION

It is important, of course, not to over-extend this argument. The traditional model of centralised authority must continue to feature prominently in any analysis of the contemporary constitutional order. The formal conception of a sovereign, rule-based power colours the approach of the instititutions of state to many important areas of modern government. The courts may, on the one hand, have demonstrated a willingness to ignore the strict requirements of the model in certain situations but their attitude in other areas bears strong testimony to the enduring influence of the *imperium* image.

The insistence on a *procedural* notion of administrative fairness demonstrates, for example, a reluctance to move too far beyond the confines of the traditional theory. Even if Fordham is correct that procedural review is, in many cases, closer to a substantive examination of the merit of the action impugned, the fact remains that the courts continue to couch their approach in the language of orthodox constitutional theory. Similarly, many judges continue to espouse a commitment to the *ultra vires* theory of limited judicial review whilst simultaneously attempting to enforce what appears to be an autonomous understanding of the rule of law.

Nor is the impact of the *imperium* orthodoxy confined to the constitutional niceties of judicial rhetoric. Attempts to assert what seem to be novel powers on the part of the courts are regularly hampered by the decisions of subsequent judicial panels to re-introduce elements of the traditional theory. Thus the development of a general administrative duty to act fairly has been qualified by a continued insistence on 'interference with the right or interest of an individual, and the decision of a body

exercising a public function'[123] as precursors to judicial scrutiny. These requirements – which recall the image of strictly defined public and private sphere – can generate potential rigidity in an area where the overall trend appears to be towards contextual flexibility. The decision in *Aga Khan*[124], for example, is strongly reminiscent of the sterile categorical approach previously adopted by the courts. Opting to ignore the effective monopoly powers of the body in question (and, by its inaction, the clear tacit approval of it by the government), the Court of Appeal simply repeated the orthodox position that the courts could not review the decisions of associations whose powers were founded on the consensual submission of individuals to its authority. Similarly, the continued formal classification of interests as rights or privileges to be found in decisions such as *Schmidt*[125] or *McInnes*[126] seems to resurrect in part the approach which cases like *Ridge* and *H.K.* had appeared to abolish. The courts, it is suggested, seem torn between the enunciation and adoption of a radically different theory of governance and, on the contrary, attempting to incorporate ideas of procedural fairness within the orthodox understanding of public power. It is clear, however, that the historical model cannot logically be expanded to comfortably embrace reforms which are, in their essence, entirely alien to its conception of the state. The latter attitude appeals to a non-existent normative consensus, and is accordingly doomed. The search for a unified approach seems, in reality, an exercise in Sisyphean futility.

> The key to the problem ... lies in the failure to recognise the pervasive influence in administrative law of the traditional model and, in particular, to recognise the change in the method of legal discourse and function of the courts required if the [alternative fairness-based] approach is to be adopted.[127]

The next chapter will therefore seek to explore more comprehensively the way in which this type of alternative approach could take shape. The 'contradiction between ideal and

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[123] Richardson, *loc. cit.*, at 115.
[124] *R. v. Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 W.L.R. 909; [1993] 2 All E.R. 853. *Cf. R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-*Mundy [1993] 2 All ER 207.
[125] *Schmidt v. Home Secretary* [1969] 2 Ch. 149.
[126] *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211.
[127] Loughlin, *loc. cit.*, at 236.

reality within the traditional [image]'[128] makes it an unsustainable model for an administrative state. The challenge, therefore, is to construct from the courts' initial efforts at escaping its outdated strictures a more appropriate theory of normative and institutional arrangement.

[128] *Ibid.*, at 241.

Chapter 4

INSTITUTIONAL SEPARATION IN THE ADMINISTRATIVE STATE

I. ISSUES OF INSTITUTIONAL DESIGN

A. The need for a new model of separation

Après le déluge, la renaissance. The critical deconstruction of existing orthodoxies is, without question, a scholastic endeavour of considerable social utility. The identification and analysis of the nature and origins of any existing difficulties is an obvious prerequisite for the effort to articulate a more appropriate model. As an academic undertaking, however, it is necessarily incomplete. The sceptic can tell us much about the myriad ways in which contemporary society errs or fails. He does not, however, prescribe a panacea for these ills. Diagnosis without remedy is of limited value to an ailing patient. The aspiring critic ought really, therefore, to attempt to develop an alternative doctrine which might, in time, prove capable of occupying its forerunner's abandoned ideological plinth. This is not an easy task. From an academic perspective it is infinitely simpler to destroy than to create. Scepticism is, inevitably, a double-edged sword. The construction of a successful academic theory is invariably hampered by the very academic questioning upon which the initial stages of the enterprise depend. Given the greater difficulty involved in this task, those who criticise should be obliged, if only by some sense of natural justice, to offer up their own ideas for similar scrutiny. This chapter, therefore, should be considered in this vein.

At this point, a brief overview of the general arguments advanced thus far is, perhaps, apposite. Chapter 2 sought to critically assess the theory of the separation of powers. It concluded that the dominant tripartite understanding of the doctrine is indeterminate, underdeveloped and functionally ineffective. Chapter 3 further suggested that the theory, in its current guise, is, in fact, inapplicable to our existing system of governance. Based

on an anachronistic 18th century understanding of society, the separation of powers theory is unable to adequately account for or explain the emergence of the administrative state. This chapter will therefore attempt to address what must logically be the next stage of this study – the development of a more appropriate theory of institutional separation.

B. Assessing institutional success

Questions of institutional appropriateness can, it is obvious, only adequately be considered in the context of some conception of the place and purposes of institutional ideas in our governing structures. Chapter 1's examination of the social utility of constitutional thought is thus an instructive starting point for this analysis. This chapter, it will be recalled, rejected the common perception of the constitution as a fixed statement of static normative values. Premised on Schmitt's prediction of unending political conflict, the constitution was instead instrumentally portrayed as a socially centralising force. The elaboration of an ostensibly authoritative normative text, it was suggested, had the doubly-unifying effect of declaring the existence of a shared social consensus, which, by virtue of this asserted authority, demanded individual citizens' continued allegiance in the future. In this way the central state's authority was both proclaimed and perpetuated.

The establishment of a constitutional order was, however, but one element in this process of social construction. The simple articulation of a specific normative understanding is not, of itself, sufficient to command the continued acclaim of the public. The presence of public support for a particular system of government is predicated on an enduring public belief in that system's values. Government must therefore continue to be seen as a good if it is to retain the support of the majority of its citizens. The confidence of the citizen in his government's normative merits must be supported and secured on an ongoing and continuous basis. Institutions evidently play an important part in underpinning such perceptions. As the representative agents of this central normative authority, they are obliged to adhere to its values in both word and deed, thereby providing the individuals with whom they deal with an example of the suggested social norms in action, and thus also a reason to expect, and believe in, their continued enforcement into the future. Government bodies must publicly fulfil their functions in an effective and – crucially –

norm-appropriate manner. The means adopted (at least in public) are as important as the ends achieve. The actions and decisions of government institutions must be publicly justifiable if they are to successfully exemplify and inculcate the constitution's normative vision.

It is clear, therefore, that an institutional theory will fall to be assessed on the basis of both its instrumental efficiency and normative appropriateness. Thus, the choice of a particular institutional model ought to be determined by the application of combined criteria of efficacy and value. This echoes Rawls' imprecation to the constitutional creators in his original position. Their task, in his view, was to 'choose the most effective, just constitution, the constitution that satisfies the principles of justice and is best calculated to lead to just *and* effective legislation'[1]. Institutional design is clearly an important part of this process. As outlined above, the bare delineation of a normative blueprint is insufficient, of itself, to counter the centrifugal forces of domestic political conflict. A constitution can only be successful when it is supported by an active institutional structure. Acting as the persuasive personification of the constitution's normative vision, these bodies should be designed in such a way that they sustain public confidence in their everyday operations. The particular model of institutional arrangement should therefore be one which is not only founded upon the constitution's normative values but is also likely to demonstrably reflect these principles on a daily basis.

C. The failure of the traditional separation of powers theory

Can the separation of powers be considered as adequately fulfilling this function? Chapters 2 and 3 would seem to suggest not. From the point of view of normative value, the honourable aspirations of its creators are beyond reproach. The doctrine was intended as a foundational principle of good governance. It sought to ensure the establishment and development of a system which the public would be entitled to regard as just and fair. In practice, however, has, these aspirations have not been met. Chapter 2 addressed the doctrine's inability to successfully perform even the most basic task of an institutional

[1] Rawls, *A Theory of Justice* (revised ed., Oxford University Press, 1999) at 173. Emphasis added.

theory – that of providing determinate criteria for the resolution of any questions of institutional competence which arise. In fact, this indeterminacy has even led to its occasional invocation in support of arguments and outcomes which are normatively alien to its original formulation. That the doctrine is functionally incapable in its tripartite form of ensuring the adoption of a norm-appropriate process (let alone result) indicates quite clearly that it is deficient on the grounds of both efficacy and value.

Chapter 3, however, further attacks the theory's utility, decrying its anachronistic inapplicability to contemporary governance. Issues of efficacy and value can obviously only be properly assessed in the context of a specific social system. Rawls' own effort at social construction implicitly demonstrates this by removing the original position's constraints of ignorance at the point of constitutional creation. 'They are no longer limited to the information implicit in the circumstances of justice.' On the contrary, his would-be framers 'now know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on'[2].

Ideals of justice, it is clear, are quite capable of being considered in the abstract. To put forward a model of justice is to make an obvious claim to universality on its behalf. A constitution, on the other hand, is inextricably tied to the political and social context in which it is developed. Constitutions, it should be remembered, aim to achieve a unifying effect in a particular society. They must therefore be carefully and contextually calibrated to increase their chances of success in that specific social environment. The institutional architect, after all, is charged with the creation of a normatively appropriate *and effective* system. Any scheme of institutional interaction must therefore necessarily draw on, and reflect the reality of the social and political structures within which it operates.

As Chapter 3 indicates however, the separation of powers has been unable to cope with the emergence of an administrative state. The doctrine's authority has been disfigured by its numerous normative and descriptive inadequacies. In an era of decentralised decision-

[2] Rawls, *op. cit.*, at 172-173.

making bodies, the separation of powers' insistence on a unitary, *imperium*-inspired legislative organ seems startlingly incongruous. Similarly, the extensive exercise of discretionary powers by administrative agencies makes the traditional model's commitment to a rule-based conception of government appear hopelessly outdated. A similar charge can be laid against the theory's continued reliance on notions of limited and tentative government, even as the organs of the state adopt an ever more interventionist role. In fact, the doctrine's continued insistence on the legislature's position as the sole legitimate source of creative power has only served to exacerbate the accountability deficit in modern governance, by attempting to perpetuate the public's belief in a system of parliamentary accountability which is patently unsuitable to achieve this end. Contextually neither just nor effective, it is plain that the tripartite theory is an inappropriate institutional choice for the modern administrative state.

D. Justice, legitimacy and institutional success

The challenge in this chapter, and for the remainder of this work, is therefore to design and develop an institutional model which is capable, not only of addressing these administrative innovations, but of doing so in a normatively appropriate manner. The issue of appropriateness is, of course, contextual. An approach can only be adjudged appropriate in the light of a clear understanding of the purpose it aims to achieve. It is important, therefore, to draw a distinction between the way in which the abstract constitution, on the one hand, and institutional structure, on the other, support and sustain social unity.

Chapter 1 has already discussed the importance of publicity in some detail. As Machiavelli noted, political success depends not on the realities of government action, but on the public's perception of that activity, 'because the masses are always impressed by the superficial appearance of things'[3].

[3] Adams ed., *Machiavelli: The Prince* (2nd ed., Norton, 1992) Ch. XVIII, at 49.

> Political power depends primarily on what the people believe. The distinction between appearance and reality is irrelevant to the pursuit of politics: appearances – what the people believe – is the reality of politics.[4]

Thus, 'to govern well, rulers must be able to cultivate a reputation for being good'[5] – an analysis underscored by Allan and Rawls' previously-observed insistence on the essentiality of institutional public reason.

Justice – or rather, the public's perception of justice – is, therefore, the foundation of governmental authority. The constitutional and institutional orders, however, contribute to this perception in quite different ways. A constitutional text tends to operate in the abstract, affirming the normative superiority of very broadly-defined principles of justice. Freed from the complicated nuances of factual situations, the constitution can be regarded as part of a general social discourse with which individuals can effortlessly engage. Furthermore, the very vagueness of the constitution's principles will usually allow it to assert and establish its normative merit with relative ease. It is much simpler to construct a social consensus in support of ambiguous ideals of equality, fairness and justice (for example) than it is to apply those values to complex or emotive cases. Who, for example, would claim to oppose equality? The constitution, therefore, will generally derive its unifying force from broad notions of normative value.

There are, however, significant problems with an institutional reliance on such imprecise concepts. Broad ideas of justice or fairness do not, for example, always produce determinate outcomes in individual cases. These principles are of limited value for the institutional actor. Furthermore, this indeterminacy risks allowing the emergence of a divergence of individual views on the appropriate course of action in any context – thereby undermining the very social unity which the system is supposed to support.

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[4] Loughlin, "Constitutional Law: The Third Order of the Political" in Bamforth & Leyland ed., *Public Law in a Multi-Layered Constitution* (Hart, 2003) 27.
[5] Loughlin, *op. cit.*, at 37.

In addition, the decentralised nature of contemporary decision-making makes it impracticable to attempt to ensure that a norm-appropriate outcome results from every individual exercise of public power. Any student of the law and economics movement will be painfully aware of the enormous informational costs associated with any effort to comprehensively examine, let alone respond to, the innumerable outputs of government bodies.[6] This impossibility of analysis is obviously even more pronounced in the case of the individual citizen. If the government, with the resources of the state and its agencies at its disposal, cannot inform itself about the normative outputs of its decision-making bodies, the citizen cannot hope to come to any sort of concrete opinion on the merits, or otherwise of these institutions' actions. In fact, this lack of information is also likely to affect the individual's understanding of individual decisions of the system. Most citizens will have neither the ability nor the inclination to fully inform themselves about the facts and circumstances of the many cases which administrative bodies must decide on a daily basis. Their perception of the system is ill-informed, and thus highly unpredictable. This uncertainty of support has the capacity to seriously undermine the ostensibly unifying effects of the institutional order. To design and develop an institutional structure based only on notions of abstract justice would seem, therefore, an imprudent and potentially ineffective choice.

It is clear, therefore, that the idea of institutional justice is of a very different order to its more abstract constitutional counterpart. Public justice – in the sense of being seen by the citizenry to be just – requires in the institutional context, that the actions of government agencies be perceived as taken in accordance with fair and just procedures. These procedural or (to use the term favoured by the more extensive American literature on this topic) process values are thus based not on esoteric notions of extant moral right, but rather on a more grounded estimation of the type of institutional techniques which will generally be regarded as just. Evidently, these techniques must conform to the normative tenets of the overarching constitutional vision. Their immediate concern, however, is not with the outcome of specific cases but with the regular public application of procedurally

[6] See, for example, the discussion of the issue of externalities in Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1981) *Stanford Law Review* 387.

fair processes. This consistency of use ensures the repeated exposure of the public to these processes in a wide variety of situations. Individuals are thus better equipped to arrive at an overall (and, if the principles of justice are well chosen, presumably positive) impression of the institutional system. In this way, the institutional order is able, through the typical process of normative exposition and advertisement, to fulfil its vitally unifying social function.

These distinct conceptions of constitutional and institutional justice do, of course, operate in tandem. The normative claims of institutional justice necessarily rest on the more abstract merits of the constitutional principles which the individual agencies are asked to interpret and apply. The consistently fair treatment of normative commands is without benefit if those commands are, themselves, misconceived.

> Only against the backdrop of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedures exist.[7]

In this way, the system is one of cascading normative legitimacy. The claim to moral authority is based, not on the intrinsic merits of the individual decision, but on its adherence to the normative judgment of a higher power. Thus, the individual decision-maker attributes his authority to the principles of institutional justice, the moral worth of which is, of course, parasitic upon the normative vision, which the constitution aims to instantiate. By allying decisions with the more general (and popular) attractions of abstract principles, the institution increases the possibility of public support, thereby reinforcing its own moral authority, as well as that of the system as a whole. More pragmatically, 'the practical advantage of pure procedural justice is that it is no longer necessary to keep track of the endless variety of circumstances and the changing relative positions of particular persons'[8].

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[7] Rawls, *op. cit.*, at 76.

[8] *Ibid.*, at 76. Of course, as Rawls notes, it is impossible to construct a system of perfectly pure procedural justice. There is, therefore, a recurring necessity to monitor the general outputs of the system as a whole.

Institutional justice is thus distinguished by its relative lack of concern for more lofty discussions of abstract principle. Connected to the constitution's claims of normative value, it obviously plays an important part in legitimising the actions of government in the eyes of the general public. This legitimacy, however, depends upon the procedures which it employs when faced with concrete and specific cases, rather than on the claims of individual administrators to moral or normative enlightenment. This has its disadvantages as well as its benefits. On the one hand, it avoids the impossible task of convincing individual citizens that those amongst them who serve in an institutional capacity in some way exercise a higher moral power. On the other hand, it requires the institutional architects to develop notions of procedural justice capable of operating effectively in a host of very different situations. This is no easy task.

In the context of this piece, however, it is useful to bear the moral limitations of this undertaking in mind. An institutional theory must, if it is to be successful, be seen to be just. This justice is, however, a considerably constrained concept. An institutional theory makes no claims of abstract normative worth. It does not derive its force from external moral values. On the contrary, it seeks simply to establish a series of procedural or process values which, if properly applied, are likely to prove effective. This efficacy of course involves, in part, the public application (and propagation) of moral principles, but the system's overall assertion of moral authority is based, in large part, on the constitutional statement of abstract principles. Procedural justice is insufficient, of itself, to shore up the authority of an immoral system. It is but an instrument (albeit an important one) of a higher normative vision, upon the popularity of which the systems will succeed or fail. This piece, therefore, will not concern itself with abstract philosophical notions of justice, morality or right conduct. Rather, it will proceed on the basis of an assumption that the system's – any system's – constitutional basis has been established and accepted as just. The question, at that point, is how best to design a system able to support that claim to justice in practice. The actions of the institutions

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However, this analysis does usefully illustrate the more restricted claims which institutional justice makes to moral value.

must be procedurally just if they are to sustain the state's claim to moral authority, and thus legitimacy. The search, therefore, is for a theory of institutional justice which is capable of effectively and convincingly legitimising the actions of our administrative state.

II. The Search for Legitimising Process Values

It is a truism of liberal thought, already addressed, that the power-wielding actions of organs of government are presumptively illegitimate. Legitimacy is afforded only to those activities undertaken in accordance with accepted principles of good governance. As the previous section sought to show, this 'goodness' of government is generally based on a public perception that the system, as a whole, is just and effective. In normative terms, this claim to justice rests on the system's commitment to the procedurally just pursuit of that society's stated moral vision. Procedural justice and administrative legitimacy are, it is obvious, inextricably linked. Thus, the system's legitimising value(s) must be demonstrably and defensibly just if it is to succeed on an ongoing basis. This section will therefore seek to assess the relative justice of contemporary criteria of legitimacy.

A. Democracy, accountability and consent

The tendency, in recent times, has been to equate democratic accountability with normative legitimacy. The existence of an electoral mandate has been accepted, in decisions such as *T.D.*[9] and *Leontjava*[10] as *de facto* evidence of an office-holder's or institution's legitimacy, and thus, decision-making authority. Courts and commentators alike have acclaimed and exalted popular sovereignty as the superior norm in our law-making system, thereby following 'Bickel['s] conflat[ion] [of] very different strains of thought from Thayer to Wechsler into a single, national commitment to majority rule, or

[9] *T.D. v. Minister for Education* [2001] 4 I.R. 259.
[10] *Leontjava v. D.P.P.* [2004] 1 I.R. 591.

democratic faith'[11]. Such conduct draws on the traditional liberal belief that individual consent is one of the primary means of allowing 'the state [to] exercise power while avoiding the legitimation of [normatively unacceptable] personal domination'[12]. From an institutional design perspective, this preference for popular accountability and control has operated in two obvious ways.

In the first place, the apparent creative hegemony of 'pure' democratic organs has encouraged the courts to constrain the competence of unelected bodies. This perception of electoral primacy has even encouraged the courts (and other unelected organs) to defer to elected agencies in areas in which their own ability to act has already been clearly established, either by statute or tradition. Thus, as detailed at some length in Chapter 2, the Irish Supreme Court refused in *T.D.* to issue a mandatory expenditure order to the executive in a situation where an express constitutional right was at issue. This decision demonstrates the extent to which this exaltation of an electoral mandate has conditioned the courts to allow the *Oireachtas* a 'strikingly wide latitude'[13] in the exercise of its powers. Nor are the Irish courts alone in this attitude. As the statements of the *Chadha*[14] majority showed, the American Supreme Court has adopted a similarly permissive position, being apparently prepared to tolerate the actions of the legislature in singling out specific individuals for arbitrary treatment, largely on the basis of that body's electoral legitimacy.

That a democratic mandate is taken by many courts to confer legitimacy, and thus authority, without the imposition of any additional requirements of justice was further confirmed by the decision of the Canadian Supreme Court in *A.G. v. Inuit Tapirisat*[15]. This case concerned a challenge to an appeal decision of the Governor in Council in respect of the fixing of telecommunication rate structures. This appeal power was

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[11] Brown, "Accountability, Liberty and the Constitution" (1998) 98 Colum. L. Rev. 531, at 550.
[12] Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985), at 224.
[13] *Leontjava v. D.P.P* [2004] 1 IR 591, at 636 *per* Keane C.J.
[14] *INS v. Chadha* 462 US 919 (1983).
[15] [1980] 2 S.C.R. 735. This case continues to be affirmed by the Canadian courts. See, for example, *Wells v. Newfoundwell* [1999] 3 S.C.R. 199. Cartier suggests that the decision in *Baker v. Canada* [1999] 2 S.C.R. 817 might ultimately lead to a change in this line of authority. *See* Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 U. Toronto L.J. 217.

conferred on the body by statute. The seminal *Nicholson*[16] judgment had previously held that there existed a duty of fairness in the context of administrative decisions. The appeal decision in question occurred in the context of a regulatory statutory regime, and was delivered by what would have to be categorised as an administrative body. Crucially, however, the members of this body were all directly elected ministerial members. The duty to act fairly was therefore adjudged by the Supreme Court not to apply in this case, in part as a result of the 'very nature'[17] of the Governor in Council[18]. This is a clear affirmation of the democratic belief that 'legitimacy stems from the [fact] that the views of the citizen have already been taken into account through the electoral process'[19]. In this way, their activities are alleged to be just. Elected bodies, it would appear, are, by reason of that electoral link, automatically accorded decision-making authority.

The second obvious consequence of this widespread attachment to this idea has been to encourage a reflexive reliance on ideas of electoral accountability in cases of questionable legitimacy. The discretionary powers of administrative agencies are, it has previously been argued, difficult to justify in a liberal democratic state. The academic and curial reaction to this legitimacy crisis has thus been to introduce and develop notional electoral controls. The transmission belt theory of the administration is one obvious example of the judicial deployment of this technique. The concepts of parliamentary and ministerial accountability have also been advanced in a similar vein. The limitations of invoking ideas which, in a system characterised by the dominance of the executive organ, must be regarded as either 'dangerous myth or … dangerous reality'[20] have already been canvassed. However, even the more sophisticated modern efforts at justifying the administration as an extended system of interest representation continue to rely on democratic participation as the primary criteria of institutional legitimacy. Thus it has been suggested that judicial developments have, in recent decades moved towards a model, according to which:

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[16] *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] S.C.R. 311.
[17] [1980] 2 S.C.R. 735, at 753.
[18] [1980] 2 S.C.R. 735, at 753.
[19] Cartier, *loc. cit.*, at 242.
[20] Sutherland, "Responsible Government and Ministerial Responsibility: Every reform is its own problem" (1991) 24 Can. J. of Pol. Sc. 91, at 91.

> [T]he function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of interests in the process of administrative decision [sic] .... Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review so that its dominant purpose is ... the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies .... Agency decisions [so] made ... would have, in microcosm, legitimacy based on the same principle as legislation.[21]

The influence of the idea of democracy-as-legitimacy here is obvious. It is therefore appropriate to examine and consider its claims as a theory of institutional justice in greater detail.

B. The majoritarian idea of legitimacy

The majoritarian claim to creative authority is founded, in large part, on the way in which democracy functions as a universalist calculus of political preferences. The mass aggregation of individually-expressed desires both directs and justifies the taking of particular policy decisions on the basis of their superior social support. Numerical supremacy is the majoritarian democrat's criterion of legitimacy. Proposals are adopted or dismissed by reason alone of their public popularity. The fact that a majority of people in a specific society demonstrably favour a particular policy is sufficient to oblige the government to accede to their so-stated views. In an election (on this analysis), society speaks – and its edicts ought, accordingly, to be observed, and enforced.

At first glance, the majoritarian appeal to justice appears premised on the presence of popular support for the impugned programme of governance. Government action is attributable to, and thus legitimated by, the enumerated opinions of the majority of the state's citizenry. Lincoln's familiar and oft-invoked refrain that democracy is a system of

[21] Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1669, at 1670, 1712.

government 'by the people, for the people' is confirmed by the direct involvement of the citizens in determining the political direction of their state. Political decisions are centrally taken but popularly inspired. The liberal objection to the adverse impact of state rules on individual freedom is avoided by the system's obvious invocation of a contractarian conception of governance. The institutional reliance on elections as structured mechanisms of social choice confirms the citizen's status as societal stakeholders. Such ballots also thereby affirm the authority and legitimacy of the institutions of state that are so selected.

(i) The concern for electoral accuracy

Majoritarian legitimacy, on this analysis, would seem, therefore, to depend on the extent to which the democratic system accurately monitors and reflects the popular preferences of the state's citizenry. The capacity of the system to properly gauge public opinion is central to its appeal. It seems logical, therefore, to expect a democratic system to attach particular importance to ensuring and, where possible, improving the accuracy of its enumeration process. Democracy, as currently incarnated, appears not, however, to exhibit this type of concern.

In the first place, the general election, as an occasional national consultation of the electorate, does not really allow for the expression of nuanced or individualised views. Voters are asked to adjudicate on the rival merits of broadly-drawn (and often poorly-explained) political programmes. The system does not allow the citizen to communicate his opinion on specific issues. Rather he must choose the package which most closely approximates to his general political preferences. The Irish referendum process does, of course, offer the individual an opportunity to adjudicate on a particular policy matter. Such appeals to popular judgment are only provided, however, on a sporadic and intermittent basis. The continued deployment of these crude metrics of popular preference must call into question the seriousness of the system's commitment to the accurate assessment (and thus representation) of its citizens' wishes.

Ely suggests, however, that this institutional insistence on reducing complex political questions to a single moment of electoral communication is, in fact, an attempt to calculate the relative intensity of competing individual preferences. The voter cannot simply insist upon the satisfaction of all of his desires. On the contrary:

> [M]ore often than not we will be confronted with a choice amongst candidates who all hold some positions with which we disagree. How, then, do we choose? In large measure by placing greatest stress on those issues about which we care most, that is by taking into account our various intensities of preferences.[22]

In this way, 'our democratic system is one that is ... programmed, at least roughly, to register intensities of preference'[23]. The questionably blunt election process is, by this argument, in fact transformed into a positive institutional acknowledgment of the importance of enumerative accuracy.

The majoritarian account of democracy as responsive government writ large continues, however, to lack sustained explanatory power. A closer examination of our democratic structures demonstrates clear discrepancies between the system's suggested adherence to a model of accurate preference-aggregation, and the everyday reality of its actual operation. That a system which ostensibly seeks to account for, and act upon, the views of the majority of its citizens also at the same time tolerates the non-expression of individual political preferences seems somewhat incongruous. If an elected institution's legitimacy does, indeed, rest on the extent to which its actions are directed by the registered desires of those over whom it exercises power, it would seem logical to establish a system of compulsory voting. If, come election time, every citizen was forced to select their favoured outcome, the result of the relevant ballot could truly be acclaimed as an authoritative statement of popular preferences. The legitimacy of actions undertaken on foot of this result would thus also be assured.

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[22] Ely, *On Constitutional Ground* (Princeton University Press, 1996), at 13.
[23] *Ibid.*, at 14.

Technological developments have similarly undermined the system's insistence on a one-vote-fits-all approach. Ely, it has been noted, sough to justify this as a means of ascertaining the relative intensity of particular preferences. The very rough calculation involved in this single electoral system evidently deprived individuals of the ability to accurately register their views on a range of important issues. This crude approximation of public demands may have been appropriate at a time when it was administratively impractical to allow individuals direct input into each policy debate. In this logistically-limited scenario, requiring individuals to self-assess the importance to them of specific issues could plausibly be construed as a way of ensuring that the system remained proportionately attuned to public opinion on the most critical matters. Technological improvements have, however, removed the majority of these administrative constraints. Individuals today regularly participate, often at personal expense, in privately-organised surveys of public opinion. Television shows have quite clearly demonstrated the capacity of modern communications technology – be it the internet, text message, or mobile phone – to calculate popular preferences on an ongoing and very regular basis. For the first time since the age of Athens and Rome, it is practically feasible to call for the construction of a system of government by perpetual plebiscite. That governments have failed to evince even the slightest interest in this type of project belies the majoritarian definition of democracy as a simple exercise in opinion aggregation.

(ii) Historical scepticism

In truth, these examples are specific instantiations of a more general objection to this characterisation of democracy as the merely instrumental mechanism by which society's political preferences are measured. These cases demonstrate quite clearly that a description of democracy as a simple tool of social accountancy does not tally with our intuitive understanding of the system.

Past constitutionalists certainly did not seem to equate democracy with majoritarian governance. Madison, Alexander and Jay, in their *Federalist Papers*, in fact 'eschew[ed] what many thought [(and seem, again, today to think)] democracy to be about – local

autonomy, direct citizen participation, and the sovereignty of popular majorities'[24]. They saw in such majority control the 'dangerous vice'[25] of factionalism. Noting the tendency of all individuals to exercise power in accordance with the interests of either themselves or a group to which they happen to belong, Madison insisted that the creative power of the majority should be curtailed rather than acclaimed.

> When a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such faction ... is then the great object to which our inquiries are directed.[26]

Madison's constitutional project was thus dedicated to the restriction rather than the facilitation of majority rule. Pure democracy, as evidenced in the ancient 'petty republics of Greece and Italy' would inevitably result in a 'state of perpetual vibration between the extremes of tyranny and anarchy'[27]. Majoritarian influence, on this view, was an 'imperfectio[n] ... [to be] lessened and avoided'[28], instead of a foundational democratic principle to be observed.

(iii) Normative intuitionism

Of course, the opposition of historical figures, no matter how eminent, is not, of itself, a reason to reject a particular theory of government. The contemporary conception of democracy seems equally, however to regard the doctrine as more than the instrumental means by which the aims of the collective are assessed. It is instead understood as a process which is, in itself, normatively significant.

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[24] Mashaw, *Greed, Chaos and Governance*, (Yale University Press, 1997), at 4-5.
[25] Madison, *Federalist Paper No. 10* (1788) in Kramnick ed., *The Federalist Papers* (Penguin, 1987), at 122.
[26] *Ibid.*, at 125.
[27] Alexander, *Federalist Paper No. 9* (1788) in Kramnick ed., *The Federalist Papers* (Penguin, 1987), at 118.
[28] *Ibid.*, at 119.

A simple example will suffice to illustrate this point. Dworkin, in his work, distinguished between the ideas of 'bare' and 'moral' harm. Bare harm, in his view, is that injury or inconvenience suffered by an individual adversely affected by the actions of the state. Moral harm, on the other hand, refers to the idea that the unjust or undeserved infliction of injury or inconvenience is, in fact, a matter of more serious and objectionable import. As he explains:

> We must distinguish ... between what we might call the bare harm a person suffers through punishment, whether that punishment is just or unjust – for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed – and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice. I shall call the latter ... his 'moral' harm.[29]

Applying his analysis, Dworkin identified how a system designed for the sole pursuit of cost-efficient outcomes is unable to include this notion of moral harm in its utilitarian calculations.

In a similar way, a democratic model which concentrated solely on the ever-more accurate aggregation of individual preferences would not capture our understanding of the system's moral dimensions. A purely instrumental analysis of democracy would see only a minimal bare harm in any rejection of the individual's right to vote. The political choices of a solitary citizen are, after all, unlikely to alter the outcome of the majoritarian calculus. The bare harm thereby incurred is decidedly insignificant, carrying with it 'a loss of political power so minute that cold calculation should convince us that our personal franchise in practical, political terms is valueless'[30]. In reality, however, such disenfranchisement would be understood to constitute an enormous injustice. To exclude a voter from the collective's act of conscious policy creation implicitly (and, to our minds, unacceptably) abjures the individual's status as citizen.

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[29] Dworkin, *A Matter of Principle* (Harvard University Press, 1985), at 80.
[30] Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 163.

This illustrates, quite clearly, that our democratic system aspires to the protection and enforcement of values beyond those demanded by a simple pursuit of aggregative accuracy. As this section has shown, the 'involvement in the process of political decision making ... seems to be valued for its own sake'[31]. This protection of the individual's entitlement to participate in an election is evidently not mandated by a system of majority-oriented utilitarianism. More individualistic values are at work. Our system, as Mashaw notes, seems instead to be characterised by an intuitive commitment to some type of 'model of dignitary values'[32]. The individual citizen's status as the normative basis for all social action must be acknowledged and assured. A theory of institutional justice, if it is to operate successfully, must recognise and reflect such in-built intuitions. The asserted justice of the majoritarian paradigm must, therefore, rest upon its treatment of the demands and desires of the individual rather than those of the collective. The next section will therefore attempt to examine whether a majoritarian theory can be convincingly constructed from so individualistic an outlook.

III. Individualism and the Democratic State

A. Democracy as equality

The emphasis on the normative importance of the individual citizen reflects the liberal concern, already considered, to ensure that the interests of the collective do not displace those of the individual. The status of the citizen, it was noted in Chapter 3, has traditionally been secured by the use of one of two techniques. 'The first is consent; the second, the use of impersonal rules or principles'.[33] Democratic structures could arguably be justified on either of these grounds. It would not be difficult, for example, to construe the casting of a vote at election time as an act of individual consent to the authority and legitimacy of any institution established as a result. This analysis will be considered in

[31] *Ibid.*, at 163.
[32] *Ibid.*, in Chapter 4.
[33] *Ibid.*, at 224.

due course. Advocates of democracy could, alternatively, rest its claim to normative justification on the system's evident impersonality.[34] Democracy in action is a grand exercise in non-discrimination. Every citizen of voting age is entitled to participate in the electoral process, regardless of religion, class, colour, and so on. Such absolute parity of treatment suggests a system-wide commitment to the concept of equality – a value which, by its impeccable impersonality, could quite plausibly support the system's claims to moral worth.

Democratic majoritarianism is, fundamentally, a strictly egalitarian theory. Consistent with the liberal insistence on the importance of the individual in society, majoritarianism offers each citizen an exactly equal opportunity to influence the actions and opinions of the government. The democratic system does not distinguish between citizens on the basis of wealth, intelligence, ability, moral capacity, or any other individualised grounds. All are equal in its eyes. Equality, for the majoritarian theorist, provides the necessary assurance of institutional fairness. Justice as equality is thus at the root of the majoritarian's assertion of normative legitimacy.

Is this trust in majoritarianism as the touchstone of normative legitimacy appropriate? Madison and Alexander's predictions of majority factionalism highlight an obvious potential criticism of the attempt to rely on majoritarianism as a legitimating value. The unfettered vesting of creative power in elected agencies has the clear potential to produce policies or decisions which adversely impact on the interests of specific groups or, some cases, society as a whole. Is the equality of involvement of each individual citizen in the framing of such policies sufficient to overcome this possible objectionability of outcome? Is this input equality enough to vindicate the majoritarian claim to justice? That Madison sees factional discord as the inevitable (rather than simply possible) consequence of any endorsement of this approach poses obvious problems for this contention. A constitution, it must be remembered, should be designed to be both just and effective – just in the principles it espouses, and effective in the way in which it is likely to produce just and

[34] Mashaw, in his work, classifies majoritarian voting as an impersonal means of resolving political conflicts, rather than one based on personal consent.

effective outcomes. That a solely electoral system seems likely to result in tyrannical or anarchical rule necessarily calls into question the efficacy of its putative pursuit of justice.

More profoundly, it illustrates the difficulties inherent in resting an assertion of justice on a narrow concept of equality of input. Equality is an inherently empty principle. Devoid of any extant conception of moral right or wrong, it finds justice in a bare guarantee of equal treatment. It is therefore just as capable of supporting deteriorating standards of state conduct towards individual citizens, as it is of demanding an improvement in such activities.

> It is obvious ... that law and institutions may be equally executed and yet be unjust. Treating similar cases similarly is not a sufficient guarantee of substantive justice .... There is no contradiction in supposing that a slave or caste society, or one sanctioning the most arbitrary forms of discrimination, is evenly and consistently administered [so as to satisfy the requirements of the equality principle].[35]

This is especially so with a guarantee of equality of input. This aspiring principle of institutional justice does not offer the citizen any assurances that the organs of the state will properly respect his rights or interests. Its justice speaks to Chance rather than to Reason. The individual is offered the institutional equivalent of an all-or-nothing gamble, a type of political Russian roulette in which the protection proffered is the structural guarantee that the citizen is (formally) no more likely than anyone else to fail.

In practice, of course, this emphasis on formal equality overlooks the systemic inequalities which, Ely, Galbraith and others have noted are likely to disrupt the individual's chances of success.[36] Can such a system truly be regarded as just? Or, in its failure to offer even minimal protection to the unlucky or the unpopular, does it fail to

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[35] Rawls, *op. cit.*, at 51.

[36] See, for example, Ely, *Democracy and Distrust* (Harvard University Press, 1980); Galbraith, *The Culture of Contentment* (Penguin, 1993).

reflect the intuitive understanding of justice set out above? Such 'a purely formal conception of equality' it is clear, 'seems unacceptably narrow'[37].

The indiscriminate nature of this particular conception of equality is also normatively unsatisfactory. The Aristotelian conception of justice famously required that like be treated as like, and that, accordingly, those who are different be treated differently. The utilitarian equality upon which the majoritarian principle is premised makes no such allowances for individual differences. Its equality is a matter of bare mathematics. The citizen is treated, not as an individual, but as a unit of preference to be aggregated in a grand electoral exercise in social calculation. In this way the individual becomes commodified. The unchecked creative primacy of elected institutions which majoritarianism seems to espouse ensures that the individual is only normatively and institutionally significant at specific intermittent moments of electoral addition. Upon the conclusion of these occasional ballots, the citizen becomes, once more, a passive object over which the state (as directed by the majority) is entitled to exercise full control. Such is the evidently unacceptable fate of the citizen in a majoritarian system animated by its starkly egalitarian understanding of democracy.

Democracy's asserted adherence to ideals of equality cannot, it is clear, provide adequate support for the majoritarian claim to moral legitimacy. As an apparently impersonal means of liberal legitimation, this egalitarianism goes too far. Offering impersonality without personhood, pure electoral equality actually subverts the individuality upon which it is ostensibly based. The system's insistence on such equality is justified as an acknowledgment of the normative importance of each individual being. Majoritarian democracy, it is claimed, is inspired and directed by a commitment to the autonomy and dignity of every citizen of the state. That democracy treats each equally is said to affirm the individual's inherent normative value. This absolute equality in fact serves only to deny the individual's moral worth. The failure to recognise or react to individual differences dehumanises rather than dignifies the citizen. Furthermore, the refusal to require the state to submit to any form of minimum substantive standards challenges the

[37] Allan, *Law, Liberty and Justice* (Oxford University Press, 1993), at 164.

system's alleged belief in the value of each individual. That majoritarianism would, by itself, tolerate the unjust treatment of minorities or individuals must undermine its claimed commitment to individual dignity or autonomy.

The majoritarian interpretation of equality thus appears to proceed from an *imperium* understanding of state power. Egalitarian protection is projected from the centre, rather than required by any acknowledgment of the importance of individuality. It is treated as a formal tenet of institutional operation rather than a guiding principle of substantive moral value. Its dictates are determined by a centralised conception of public power – it is a principle which the system sees fit to observe in a particular political context, rather than one which is consistently respected as the normative foundation of legitimate rule. Thus, it cannot be convincingly regarded as a morally legitimate form of majoritarian governance.

B. Democracy, autonomy and consent

The alternative interpretation of majoritarian democracy as a system premised on the electoral provision of personal consent would appear to address a number of these concerns. Most obviously, this model relies on the conscious involvement of the individual voter as its central legitimising value. This re-humanises democracy's normative foundations. The individual citizen is a self-directed actor, contributing to his society's choice of suggested political options. The citizen helps to direct the institutional actions of the central political organs. He thereby becomes an active participant in the process of co-ordinating the collective, rather than the passive object of its operations. Even if an individual is unhappy with the results of the process, his voluntary submission to the rules and principles of the electoral procedure is sufficient to morally secure his personal consent. The consent provided by this personal involvement will normatively suffice, as long as it is treated in a just and fair fashion. After all, an individual cannot participate in a just and fair process, only to withdraw his consent when it produces an adverse outcome. Equality thus serves here as a supporting principle of institutional justice. Furthermore, the temporal nature of any specific instance of majoritarian control guarantees the dissatisfied citizen a future opportunity to register his objections and

attempt to amend the political direction of his state and society. The system thus recognises and affirms the citizen's decision-making capacity on an ongoing basis, demonstrating a clear commitment to our intuitive ideals of individual dignity and autonomy.

The consent-based conception of majoritarian democracy thus echoes more closely our conventional understanding of normatively acceptable authority. However, the concept's application to contemporary governance is, on closer examination, open to challenge. The system's assertion of legitimacy centres, it is clear, on the presence of individual consent to the actions of government. The casting of an individual vote is interpreted as providing implicit consent to the activities of state institutions over a number of years. This characterisation is, however, tenuous in the extreme. The individual at the ballot box has not even anticipated, let alone approved of, the vast majority of future government actions. This is particularly true in the modern era of decentralised public power. Administrative agencies today exercise extensive discretionary powers, generally with little or no input from central government. It is thus no longer realistic (if it ever was) to describe our system of government in terms of the individual voter's consent to the creative authority of a single unitary and centralised institution.

> [T]o argue that, by electing representatives, citizens consent in advance to abide by discretionary decisions made by administrative authorities under the authority of a statute legitimately enacted by the legislative assembly, assumes that the consent originally given is very broad.[38]

This is especially so in light of the usual lack of specificity in such statutes. The analysis of majoritarian democracy in terms of individual consent thus, like the equality rationale examined above, again appears to depend on an emptily formal acknowledgment of the importance of the individual, rather than on any real commitment to ensuring the active participation of the citizen in the framing of public policy.

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[38] Cartier, "Willis and the Contemporary Administrative State: Administrative Discretion as Dialogue" (2005) 55 U. Toronto L.J. 629, at 651.

The actively interventionist character of the contemporary state offers further confirmation of the anachronistic nature of this notion of citizen consent. A reliance on the occasional presence of personal consent to legitimise the actions of central government would be more justifiable in the 18th century context of essentially negative and limited governance. In that environment, the potential risk of individually-adverse government decisions was mitigated by the weakness of the central governing structures. The liberty, autonomy and dignity of the individual was guaranteed not by government, but by the lack of it. 'The old constitutional conception of government called to mind a policeman; government's role entailed minimal intrusion on private affairs and a *laissez-faire* reliance on the invisible hand'[39] of self-directed economic activity. The individual was charged with the basic protection of his own interests. The government's conscious inaction effectively affirmed the autonomy of the individual by entrusting him with almost complete responsibility for his own actions. State action was minimalist and sporadic. Its relative lack of impact could thus be regarded as justifying the insistence on only occasional individual consent.

Today's managerial state, on the contrary, functions in a much more interventionist manner, organising and structuring the social framework within which individuals are entitled to operate. The contemporary state exercises control over considerable areas of social activity. This both restricts the decision-making freedom of the individual, and increases the possibility that adverse and intrusive measures will be enacted. The greater involvement of the state in the everyday activities of its citizens necessitates the incorporation of greater process values into the democratic system. The simple presence of a vague and poorly-defined personal consent to government authority can no longer be regarded as a legitimate foundation for the actions of the multi-faceted contemporary state.

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[39] Edley Jr., "The Governance Crisis, Legal Theory and Political Ideology" (1991) 41 Duke L.J. 561, at 581.

C. The enduring importance of the individual

Neither the equality- or consent-inspired conceptions of majoritarianism thus convince as methods of legitimate governance. Neither appears to attach sufficient significance to the adequate protection of the individual's position. These majoritarian models do, of course, allow the individual to engage with society's decision-making process, but they are primarily preoccupied with the examination and enforcement of the majority's desires. The constrained nature of this individual involvement does not tally with our intuitive understanding of institutional justice. Our system has traditionally and instinctively opposed the unjustified use of public power against a morally undeserving individual. Institutional guarantees such as the separation of powers were inspired in large part by the perception of such acts – for example in bills of attainder – as normatively unacceptable. Liberal theory could not countenance a sacrifice of individual interest for those of the collective, insisting instead upon the essentiality of institutional respect for the citizen's dignity and autonomy.[40] This individualistic outlook has permeated the fabric of our constitutional and institutional traditions. It underlies the democratic commitment to voluntary voting rather than obligatory aggregation. It supports the system's preference for a decision-making system designed with active participation rather than absolute accuracy in mind. It lies at the heart of our basic belief that the denial of the individual's right to vote is a matter of much greater injustice than the mere loss of that franchise's minimal influence would suggest is appropriate. Government, if it is to be legitimate, and thus effective, must reflect these foundational values.

The contemporary trend towards majoritarianism is, in fact, nothing more than a move towards a modern absolutism. Legitimacy in a majoritarian system is based on the source of political power rather than the quality of its exercise. Just as the actions of the absolute monarchs of old were justified by the assertion of an inherent moral entitlement to direct and dictate public policy, so the contemporary majority claims superiority on the basis of

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[40] For a recent affirmation of this principle in Irish law, *see* the decision of the Supreme Court in *C.C. v. Ireland* [2006] IESC 33, where Hardiman J. struck down the strict liability offence of unlawful carnal knowledge. He objected to the utilitarian nature of the offence, decrying the way in which it 'permits the imposition of an admitted injustice on a discrete class of person on the sole justification of effectiveness .... To put it another way, it is not a balancing of the blameless [individual's] rights against those of the rest of society: it is a negation of those rights in the interest of a concept of the social good'.

what it is, rather than what it does. This is exactly the sort of logic which our institutional structures evolved to counter. Separation of powers, the guarantee of equal treatment, the insistence on institutional justice, and so on, were designed and defended as principles of good governance. As a defender of the New Deal once remarked, 'government, or any part of it, is not in itself something; it is for something'[41]. For the liberal thinkers of the past, that objective was the protection of the moral autonomy of the individual citizen from the dangers of self-animated factionalism. Majoritarianism undermines this value by presumptively doubting the normative acceptability of such individual-oriented restrictions. The People (or, more accurately, the majority) are instead invested with inherent political power, to be exercised as arbitrarily as they please. The voter is seduced by the tantalising prospect that he might someday be in a position to have power exercised in *his* favour, rather than in that of his fellow citizens. A situation of unfettered, self-interested kingship is, after all, only objectionable to those excluded from court. Majoritarianism offers the individual the tempting possibility of an absolute furtherance of his own interests. *L'etat, c'est vous*. Majoritarianism is less a theory of justice than an effective institutional strategy, the genius of which lies in the way in which it is able to broaden its appeal beyond those who will actually benefit from its adoption. Its popularity cannot, however, obscure its innate lack of regard for the excluded individual. In this, it contrasts sharply with our intuitive understanding of our institutional system. It thus cannot convincingly serve as the constitution's organising principle of institutional justice. On the contrary, there is a clear need to consider and construct a richer and more sophisticated conception of procedural justice. The system, if it is to be fair and effective, must insist on the protection of stronger process values, ideals which chime more closely with liberalism's central commitment to the dignity and autonomy of the individual. In this way, a more appropriate theory of institutional justice might be developed.

D. Individualism, citizenship and the state

This chapter has so far argued in favour of a re-orientation in our institutional outlook, away from the current concentration upon the claims of the majoritarian collective and towards a renewed emphasis on the interests of the individual. This individualism should

[41] Tugwell, *The Battle for Democracy* (1935), cited in Edley Jr., *loc. cit.*, at 581.

not, however, be interpreted as an inherently anarchical force. An autonomy- or dignity-inspired theory of procedural justice will obviously regard the position of the individual citizen as the relevant departure point for its normative analysis. This concern for the citizen will inevitably inculcate a logical scepticism about any central organisation of public power. This scepticism should not be confused, however, with an enduring or outright opposition to these activities. The demand for justification of state action does not arise from a desire to avoid, if possible, the vesting of authority in central institutions. On the contrary, the interests of the individual are clearly served by such organised co-ordination of collective power. The construction of a power-wielding state has obvious potential benefits for the individual actor. The idea of public governance is clearly premised on the advancement of the position of the individual citizen. This type of associative endeavour aims to secure increased advantages for the constituent members of the group. It is an idea of ancient standing that this type of activity satisfies the needs and demands inherent in mankind's characterisation as a *politikon zoon*.[42] However, even aside from the intangible improvements this co-operative conduct may confer upon individual citizens, it is beyond question that the machinery of the state provides each with the opportunity to achieve that which they, by themselves, could not.

The oft-cited example of the 'Tragedy of the Commons' is a useful illustration of this relational theory of the state. Rational self-interest dictates that the individual hunter will, in all probability, find his position greatly enhanced by the emergence of a system of public rules, enforced by way of centralised sanctions.[43] Some free riders may, of course, find themselves economically disadvantaged by such a development. However, this is a purely short-term analysis. If all are free riders, then, ultimately, all will lose from the over-farming of the commons. The long-term advantages of this type of centralised system of coercive enforcement are even more assured if it is assumed that the hunters

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[42] Aristotle, *The Politics*, I. ii. 9. Although this is often translated directly as a 'political animal', it must be remembered that Aristotle was referring to man's tendency to associate with those of his own kind. Political, in this context, is related to the *polis* or city-state unit of Ancient Greece, rather than the power relationships and tactical techniques more typical of the writings of Macchiavelli.

[43] Although he does not approach this issue from the point of view of a strictly economic analysis, Finnis agrees with the conclusion that the individual benefits from associative conduct. He regards communal life as the appropriate context for the pursuit of his self-evident human goods, listing 'sociability' as one of his seven forms of human good. *See* Finnis, *Natural Law and Natural Rights* (1980).

are concerned for the future of their families.[44] In this situation, centralised enforcement assures even the offspring of the free rider of a basic share in the commons, regardless of their capacity or strength. It is clear, therefore, that, on the whole, each individual stands to significantly benefit from this type of system.

The advantages of a centralised system of rules are equally obvious from even a cursory examination of the Hobbesian individual in the pre-legal state. Free he may be, but this individual, dependent for his position on his own physical strength, is famously condemned to a life which is 'solitary, poor, nasty, brutish and short'[45]. The establishment of a system of public rules will inevitably restrict the theoretical autonomy of the individual citizen. The case of the Hobbesian citizen underlines, however, that abstract freedoms are, in the absence of supportive legal structures, effectively worthless. The citizen may, in practice, retain an autonomy of action but this is not guaranteed for the future. Security is an essential prerequisite to the existence of assured personal freedom. Without it, liberty rests only on individual or group strength. Once again, the establishment of some form of governing, sanction-based structure will clearly improve the position of a significant majority of society.

Furthermore, it should be born in mind that freedom *tout court* is a chimeric ideal. Aside from the issue of security, the existence of a guaranteed personal freedom depends, on a Hohfeldian analysis, on a complicated network of interlocking no-rights and freedoms, immunities and disabilities. Every individual freedom necessarily impacts on the liberty of action of some other citizen. A brief (if controversial) example will suffice. Those who advocate the existence of a legal abortion regime often express their opinions in the language of such freedoms – specifically, the mother's freedom of choice. However, the legal protection of that freedom necessarily restricts the freedom of their opponents to live in a society which does not allow such activities. More conventionally, a

[44] This could be argued to be a natural tendency in mankind, implicit in the emphasis attached by both Aristotle and Finnis to the communal aspects of life. The family is, in most cultures, the most accurate example of a functioning communal unit. However, even from the point of view of rational self-interest, this could also be justified as securing the position of the farmer in his old age. In the absence of a centralised state system with some form of social welfare, he may be forced to rely on his offspring. He thus clearly has a personal interest in ensuring their long-term welfare.

[45] Hobbes, *Leviathan*, Pt. 1, Chapter 13.

pornographer's freedom of speech will evidently impact on the freedom of the sensitive or moral citizen to inhabit a society devoid of this type of material. Individual freedom is necessarily dependent, not only on the security or stability of a functioning rule-based system of sanctions, but also on the normative priorities enshrined in the rules of that system.

The existence of a centralised, public government does not, therefore, necessarily represent a significant encroachment on the liberty of the individual. On the contrary, it enhances the citizen's situation by providing the stability and certainty necessary for any true autonomy of action – albeit only within the areas designated by the central authority. It is clear, therefore, that the individual citizen is better off in the legal, rather than the pre-legal state. There is, it is clear, a basic duality at the centre of the concept of government. The normative foundation of governance – a concern for the autonomy and dignity of the individual citizen – can be taken to justify both the facilitation and restriction of centrally-organised rule. Liberal individualism is not a doctrine of disestablishmentarianism. The restriction of state power cannot rationally be justified for simple restriction's sake. An appropriate theory of institutional justice is necessarily more complex than one animated by an instinctive opposition to state authority. This type of theory must recognise and acknowledge the social essentiality of institutional action, balancing the individual-inspired need for publicly-exercised powers with a residual protection of the interests of each citizen. This affirmation of the individual as the normatively-constituent unit of all social organisation thereby demands the development of a much more subtle and sophisticated system of institutional justice.

E. Universality, individualism and the philosophy of Kant

This characterisation of the individual as the central criterion of normative value finds obvious parallels in the philosophy of Kant. This chapter's earlier critique of majoritarianism focused on the essentially dehumanising effect of its ideas of equality or consent. The key intuitive objection to its attitude towards the individual was its utilitarian treatment of the citizen as a passive unit of social accounting. The individual, at the moment of voting, was implicitly regarded as a means of calculating collective

preferences, rather than as an active moral agent, deserving of respect and consideration in his own right. This contrasts with Kant's conception of the citizen as a 'noumenal being who is free'[46]. The right to vote was, therefore, effectively an institutional instrument of aggregative accuracy rather than a normative recognition of the individual as a conscious and rational actor. This, to paraphrase Kant's most famous incantation, was to treat the individual as a means rather than an end, thereby undermining the majoritarian claim to justice, and thus, legitimacy. A bottom-up perspective, which takes seriously the normative challenge to defend the individual, is, instead, required.

The Kantian order to '[a]ct so that you use humanity ... always ... as an end, never merely as a means'[47] has, however, been criticised on the basis of its excessive individualism[48]. Society may be a relational structure for the advancement of individual interests but it does not provide a panacea for the absolute satisfaction of all individual wants. The inevitable contradiction of distinct individual desires ensures that the achievement of all individual ends remains an impossible project.

Mashaw persuasively disputes this reading of Kant. The instruction to treat the individual as an end is an imprecation to ensure a universality of principle, rather than an effort to fulfil every demand that is made. This reflects the fact that this well-known directive is but one element of Kant's overarching command – 'Act only according to that maxim by which you can at the same time will that it should become a universal law'[49]. Thus:

> The injunction to treat persons always as ends in themselves is derived from the universalization requirement of Kant's categorical imperative. [It] ... must be read as related to an objective or universal realm of ends or moral persons. So construed, the injunction relates not to the frustrating of any person's goals or purposes in life, but to frustrating that person's exercise and development of a

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[46] Reiss, *Kant: Political Writings* (2nd ed., Cambridge University Press, 1991), at 18.
[47] Gregor ed., *Kant: Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), at 38.
[48] See, for example, Scruton, *The Meaning Of Conservatism* (3rd ed., Palgrave, 2001).
[49] Gregor ed., *op. cit.*, at 31.

> good will. Each person thus is an end in himself *because* each person participates in, or strives for, objective moral goodness.[50]

In this way, Kant's theory of moral universality is 'rescued from the incessant and competitive claims of the self-realising ego'[51]. This insistence on universality echoes and explains the liberal preference for the impersonal application of institutional principles. Universality treats each citizen as an individual, but crucially does so in a manner which recognises the person's normative worth. It rests not on an arbitrary egalitarianism, or on an empty assurance of individual consent, but rather on a symbolic acceptance of the citizen's entitlement to individual respect. A system which essays to adopt only truly universal rules thereby recognises the individual as a morally-important entity. It does not offer the dehumanising prospect of absolutely equal inputs or outputs. It takes its responsibilities to each person seriously, refusing to tolerate the dismissive subjugation of the individual citizen to the interests of the collective. However, it also acknowledges the reality that an organised society cannot expect to satisfy all of the desires of its citizens. These facts are thus reflected in the system's normative insistence that '[t]he freedom of each individual has consequently to be regulated in a universally binding manner'[52].

Universality is, in effect, a prudential principle of institutional operation, admitting the necessity for co-ordinated social action but restricting it to those situations in which the activities undertaken can be said to demonstrate an appropriate concern for the normative status of the individual. In so doing, the principle acknowledges the basic duality of our social structures in a way which reflects our intuitive understanding of justice. Universality affirms the moral autonomy of all persons at the same time that it justifies (and thus legitimises) the possibility of individual-adverse outcomes. In its simultaneous approval of both action and restriction, it has obvious potential as an organising principle of institutional justice.

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[50] Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 193. Emphasis in text.
[51] *Ibid.*
[52] Reiss, *op. cit.*, at 22.

F. Universality, Rawls and the original agreement

As Mashaw recognises, a concern for such universality animates Rawls' idea of the original agreement.

> The original position might be viewed as an approach to the kingdom of ends; the veil of ignorance as a technique for protecting the universal or good will from the clash of contingent purposes that punctuate the phenomenal world. The choices of the disembodied rational wills posited by Rawls are universal by definition, and the pursuit of the principles of justice by a rational placeholder, who does not know where he will end up in the social scheme, necessarily treats all rational beings as ends in themselves.[53]

Rawls' seminal thought experiment can thus be construed as an imaginative updating of the Kantian requirement that 'our social and political relations should be governed and our public conflicts settled in a universal manner'[54]. The model of contextually-ignorant actors indicates, by its very neutrality, the normative importance of each person's moral autonomy. The citizen, unaware of his position in the society in question, is deployed as an evaluative tool as well as an instrument of theoretical creativity. This reliance on the putative consent of the imagined individual implicitly confirms the citizen as a rational and autonomous agent. The justice of the institutional order is examined from the perspective of an ideally universal person. The archetypal citizen serves as the directive inspiration for a notion of justice which, being so inspired, affirms the individual's capacity for rational thought and moral action. This copperfastens the citizen's status as the normative foundation of social action. Respect for the individual is 'the intuitive bedrock upon which ... bargains are based, and ... the test of the moral legitimacy and relative desirability'[55] of these eventually-agreed principles. In this way, the theory of justice is freed of the distortion caused by the chance concerns of personal circumstance, and is thereby rendered acceptably universal.

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[53] Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 194-195.
[54] Reiss, *op. cit.*, at 20.
[55] Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 195.

The model of the universal individual can thus both describe and explain the way in which we perceive particular conceptions of institutional justice.[56] This chapter's prior examination of the majoritarian principle concluded that it failed to reflect our intuitive ideas of institutional justice. A consultation with this imaginary citizen confirms the veracity of this view, but also, crucially, identifies the reasons for this reflexive reaction. Would a person, acting under a veil of individualised ignorance, consent to a system in which unfettered public power was vested in the representatives of a bare majority of voters? It is possible, of course, that a gambler would submit to this type of proposal. Would that, however, constitute a rational choice? The rational autonomy of the individual citizen is, it must be remembered, the justification for the system's insistence on a universalist theory of institutional justice. It should, therefore, obviously impact on the system's ultimate choice of institutional design. The reckless abandonment of individual interests to an all-or-nothing gamble cannot be regarded as a rational or prudent choice. Majoritarianism is thus objectionable as an arbitrary, and accordingly irrational, way of structurally organising a society of independent moral agents.

G. Respecting individual autonomy

(i)Equality

How then should the system fulfil this normative obligation to recognise and respect the rational individuality of each citizen? That each must be dealt with as a distinct and autonomous entity would seem to suggest some institutional requirement of equality. Dworkin, for example, posits a notion of institutional integrity in which all individuals must be equal before the law. Decisions must adhere to principles which are expounded and enforced on a consistent, institution-wide basis. In this way, the individual is assured of equal treatment. This commitment to a concept of 'formal equality' does seem to demonstrate the requisite desire to secure the necessary universality of principle.

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[56] It is important to underline, at this point, the limitations of this piece. Rawls relied on his vision of the pre-constitutional original position to construct an overarching theory of social justice. Such an ambitious enterprise is far outside the ambit of this piece. Rather, the original position of personal ignorance will be used in order to assess the attractions for the unwitting individual of a particular type of institutional order.

In reality, however, this notion of formal equality cannot adequately explain the actions of contemporary institutions. Disparities of treatment are not simply allowed but are actually encouraged, provided that they proceed from an institutional recognition of rationally legitimate differences. A commitment to equality dictates only that 'we treat equals equally and unequals unequally'[57]. It does not require the establishment of a blind system of enduring egalitarianism. Dependent for its operation on the presence of an independent criterion of comparative value, it is a normative principle of ancillary importance, inspired by a deeper, more fundamental belief in protecting the autonomy of the individual. 'Formal equality reflects the principle that everyone should be accorded proper respect as a person of moral independence'[58]. It does not, therefore, exhaust the obligations imposed by ideas of institutional justice. The courts' interpretation of the constitutional equality guarantee, both in Ireland and abroad, tends to concentrate on ensuring that discriminatory state action has rational foundations rather than the abstract enforcement of a dehumanising egalitarianism.[59] 'Formal equality, in the sense of the equal application of the law must, as a matter of logical consistency, be accompanied by [a] more substantive doctrine, forbidding hostile discrimination'[60]. It is clear, therefore, that the contemporary conception of institutional justice is more accurately explained as a structural commitment to the rational treatment of the morally autonomous individual, rather than as an abstract belief in absolute equality.

(ii) Institutional rationality

There is a clear connection, therefore, between a systemic acceptance of the need for operational universality and a guarantee of rational institutional dealings. In keeping with the constrained focus of this piece, rationality as justice does not attempt to assure the individual of perennially positive decision-making outcomes. It acts only as a process value, guaranteeing the citizen that any individually-adverse (or indeed positive) exercise

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[57] *de Burca v. A.G.* [1976] I.R. 38, at 68.
[58] Allan, *Law, Liberty and Justice, op. cit.*, at 164.
[59] See, for example, *Brennan v. A.G.* [1983] ILRM 449; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321; *An Blascoad Mór Teoranta v. Commissioners of Public Works* (no. 3) [2000] 1 I.R. 6. This is, of course, in part attributable to the fact that the text of Article 40. 1 expressly permits discrimination on social, moral and physical grounds.
[60] Allan, *Law, Liberty and Justice, op. cit* , at 170.

of public power will be objectively justifiable, and publicly so explained.[61] A rationality requirement confirms the entitlement of 'any citizen ... to an explanation of why her private harm is at least arguably outweighed by some coherent and plausible conception of the public good'[62]. This explanation thereby appeals to, and thus affirms, the individual's capacity for rational action. In so doing, it confirms the institutional order's reputation for justice. 'This reason giving is necessary, both to redeem prior promises of rationality, and to provide guidance of the individual's future planning'[63]. The liberty and autonomy of the individual thus 'depends on some notion of predictability or ... rationality in government as a basic prerequisite to fair decision making'[64]. This tallies with the Hartean interpretation of law as a scheme of individual and social orientation, 'a stable framework of rules, which enables everyone to pursue his own aims in reasonable confidence about the likely conduct of others'[65], and the probable actions of government. In the way in which it affirms the normative importance of the individual while facilitating the citizen's advantageous use of the available social structures, this process value has much to recommend it to our evaluative archetype.

(iii) Non-arbitrariness

Despite its obvious attractions, however, rationality is not of itself sufficient to secure the requisite level of institutional fairness. Pure rationality, after all, would tolerate the total mistreatment of an individual citizen in situations where such conduct would be of long-term social benefit. Any procedural insistence on legislative rationality must therefore be connected, at all times, to the system's normative commitment to the protection of the individual. Institutional actions must be both rationally motivated and morally universal. It is therefore arguably more correct to characterise the contemporary system's requirement of rationality as the product of a more general belief in the normative essentiality of non-arbitrariness. This principle in effect unites the process values of equality and rationality. It allows for the possibility of individually-divergent exercises of

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[61] The need for public application of principles in an theory of institutional justice has already been explained in Chapter 1.
[62] Mashaw, *Greed, Chaos & Governance, op. cit.*, at 68.
[63] Mashaw, *Due Process in the Administrative State, op. cit,*, at 176.
[64] Brown, *loc. cit.*, at 1534.
[65] Allan, *Law, Liberty and Justice, op. cit,* at 24.

public power but demands that these differences of treatment are not only capable of rational justification but are, in fact, based on a non-partial objective of universalist inspiration. This value speaks to the citizen's dual interest in state operations, by permitting public actions only when they cannot be construed as the targeted mistreatment of particular groups. State bodies are allowed the freedom to act in the way that they see fit, as long as they are able to rationally justify their conduct by reference to appropriately general principles. Non-arbitrariness is thus, effectively, a form of modified rationality. It combines the positive benefits of a pledge of rationality – the recognition of the individual as rational agent, the establishment of expected norms of social and institutional action, the treatment of the individual as an active participant in the system rather than the passive object of its operations – with a universalist protection against the potentially dehumanising effects of a purely logical system of governance.

H. Non-arbitrariness as a normative value

There is considerable academic support for this suggestion of the systemic importance of the principle of non-arbitrariness. Bressman, for example, contends that the formative doctrines of American constitutional history 'understood the aim of the constitutional structure as the protection of individual liberty from arbitrary governmental intrusions'[66]. She thus argues that the 'risk of arbitrary … decision-making' is a 'concern of paramount constitutional significance'[67]. Brown agrees, arguing that 'the separation of powers was adopted by the Convention of 1787 … to preclude the exercise of arbitrary power'[68]. Allan, similarly, sees the rule of law in terms of 'its core … conviction that law provides the means of protecting each citizen from the arbitrary will of others'[69]. Mashaw's remark that 'th[e] promise of non-arbitrariness helps make acceptable the inevitable sacrifice of private interests in pursuit of collective ends'[70] encapsulates the essence of the principle's appeal for the idealised citizen, charged as he is with assessing the

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[66] Bressman, "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State" (2003) 78 N.Y.U.L. Rev. 461, at 470.
[67] *Ibid.*, at 466.
[68] Brown, *loc. cit.*, at 1534.
[69] Allan, *Law, Liberty and Justice, op. cit*, at 22.
[70] Mashaw, *Greed, Chaos & Governance*, *op. cit.*, at 52.

suitability of an institutional theory for a system predicated on the attempted satisfaction of two, essentially opposing, individual desires.

Non-arbitrariness offers a bridge between the citizen's interests in social action and individual protection. It is this duality of concern which underscores the principle's allure for our imagined institutional architect. Devoid of any knowledge of his own personal position, aware of his responsibility to construct an institutional model capable of according appropriate respect to the moral autonomy of each citizen[71], this individual is torn between an appreciation of the benefits proffered by a system of social co-ordination and, on the other hand, a defensive desire to protect his interests from potentially adverse outcomes. Non-arbitrariness neatly avoids the worst excesses of these dual objectives. It accepts the possibility (in reality, a virtual certainty) that there will be some decisions which negatively affect the individual. However, it also provides an effective guarantee of institutional fairness, assuring the individual that any disagreeable decisions will be based on objective principles of universal application.

The rational assumption at the heart of this analysis is that, on balance, the situations of all shall be improved by the cohesive system of collective co-operation thereby created. As the Tragedy of the Commons demonstrates, organised society has its roots in a recognition that the occasional infliction of individual pain is offset by the advantages which the resulting social system makes available for all. The principle of non-arbitrariness proceeds from an equivalent insight – the willingness of the individual to accept the sporadic but inevitable injury of unfavourable public actions in exchange for an expected overall long-term gain. It thus matches the intuitive criteria outlined above. The fact that the theory rests on so logical an assumption confirms the model's foundational view of the individual citizen as a rationally autonomous agent. Its promise of protection against partial public conduct again reiterates the importance of the individual. Furthermore, its ancillary requirement of legislative rationality secures the citizen's capacity to consciously interact with the organs of the state, accepting their decisions and orienting his conduct accordingly. This commitment to rationality fosters

[71] Given this seems to be the intuitive understanding of social justice upon which our system is based.

the consistency and predictability necessary for the individual to autonomously attempt to position himself in such a way that he takes advantages of the possible benefits of social co-ordination.

The notion of non-arbitrariness thus organises society in such a way that the individual is normatively acknowledged, structurally advantaged, and institutionally protected. It should thus serve as the principled foundation of this chapter's attempt to elaborate a theory of institutional justice for the administrative state.

IV. NON-ARBITRARINESS AND THE ADMINISTRATIVE STATE

A. Administrative discretion and non-arbitrariness

(i) The transmission belt theory

The leading doctrines of traditional constitutional thought were, as Bressman noted, largely animated by a concern to ensure the non-arbitrary character of all exercises of public power. The chief objection to the development of a more *dirigiste* state was, as Chapter 3 commented, its inherent reliance on administrative discretion. In its unpredictable lack of consistent principles or standards, this decision-making discretion carried with it an enduring risk of arbitrary rule. The liberal and Diceyan denunciations of discretion were both motivated by a belief in the law – in either its constitutionalist or rule of law form – as a bulwark against arbitrary governance. Discretion, as Davies demonstrated, was understood as both a practical and symbolic threat to the position of the individual, allowing government agencies an unfettered creative freedom which could potentially be employed in an individual-adverse fashion.

The transmission belt theory of administrative bodies was conceived as a way of addressing the risk of partial or arbitrary rule. The court's insistence on a statutory basis for any delegation of administrative power was designed to link these bodies to the

consent-based legitimacy of the elected organ, and also ensure that the powers ultimately exercised were dealt with by reference to clear statutory instructions. This, it was hoped, would avoid the dangers of uncertainty and partiality inevitably involved in discretionary decisions. The rationale for the non-delegation rule thus rested on the expectation that 'the requirement that agencies conform to specific legislative directives ... [would] cur[b] official's exploitation of the governmental apparatus to give vent to private prejudice or passion'[72]. In addition, by placing its faith in the innate predictability of publicised statutory standards, the transmission belt model further affirmed the liberal conception of the citizen as an autonomous actor within an orienting legal framework.

> Private autonomy is secured in two ways by this [model]. First, it promotes formal justice by ensuring that the governmental sanctions faced by an individual are rule-governed, which facilitates private avoidance of sanctions and allows interaction with the government on terms most advantageous to the individual. Second ... the requirement [of statutory direction] ensures that sanctions have been validated by a governmental authority to which the individual has consented and therefore the restraints imposed ... may be viewed as self-imposed.[73]

The transmission belt theory can therefore be firmly located in the liberal philosophical tradition which treats the individual as the normative foundation of all public power – the very idea which, this chapter has argued, continues to inform our intuitive understanding of the state. Its commitment to counteracting any risk of arbitrary governance is thus unsurprising. By focusing its efforts on an attempt to 'reduce opportunities for arbitrariness'[74], this model of administrative governance supports the assertion that 'the concern for arbitrariness can be seen as one of the primary evils at which [the] traditional checks and balances are aimed'[75].

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[72] Stewart, *loc. cit.*, at 1673.
[73] Stewart, *loc. cit.*, at 1673.
[74] Bressman, *loc. cit.*, at 470.
[75] Bressman, *loc. cit.*, at 468.

Although it continues to feature prominently in the Irish approach to the issue of administrative delegation,[76] the transmission belt theory has long been abandoned by American constitutionalists. '[A]dequate in theory [but] ... inadequate in practice'[77], it bore little resemblance to the reality of administrative operations. Transmission belt theorists had sought to deny the very existence in the system of any sort of creative discretion. The emerging administrative state was, however, chiefly characterised by its willingness to adopt such discretionary procedures. Advocates of the progressive approach did not apologise for, but in fact celebrated discretion. In this situation, it would obviously be impractical and absurd for the courts to impose a constitutional requirement of statutory specificity.

> [M]odern administrative realities are so complex and governmental institutions so dependent on broad authorisations that it is highly unrealistic, if not also likely to be counterproductive, to seek to achieve a regime of narrow delegations.[78]

(ii) Discretion as expertise

A second rationale was thus suggested. This contended that the vesting of discretion in government agencies could be justified on the basis of the professional expertise of these bodies. Policy questions of particular technical complexity were argued to constitute 'precisely the sort of intricate, labour-intensive task for which delegation to an expert body [would be] especially appropriate'[79]. This specialisation analysis accepted the place of administrative discretion within the state's governing structures, but did so in a way which sought to deny the possibility of (normatively objectionable) arbitrary outcomes.

> '[E]xpertise' could plausibly be advocated as a solution to the problem of discretion if the agency's goal could be realised through the knowledge that comes from specialized experience. For in that case, the discretion is more apparent than real .... [P]ersons subject to the administrator's control are no more

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[76] *Cityview Press v. An Chomairle Oiliuna* [1980] IR 381.
[77] Bressman, *loc. cit.*, at 471.
[78] Sargenitch, *loc. cit.*, at 429.
[79] *Mistretta v United States* (1989) 488 US 361, at 376.

liable to his arbitrary will than are patients remitted to the care of a skilled doctor.[80]

This emphasis on expertise posited the idea that there existed an objectively correct conclusion, to which the specialist administrator would reflexively come. U.S. courts felt accordingly entitled to assert, with confidence, that these delegated powers could be 'expected to be exercised in the coldest neutrality'[81]. This addressed the enduring normative concern for non-arbitrariness by removing the risk of irrational or unpredictable decisions.

Echoes of this analysis appear intermittently in the Irish authorities on this issue. The conventional orthodoxy continues to regard the *Cityview Press* principle as the key criterion of constitutional legitimacy. The courts have, however, occasionally referred to the apparent expertise of subordinate agencies as an additional justification for an impugned delegation of discretionary power. Judges have repeatedly affirmed the appropriateness of delegating authority to government agencies when 'administrative, regulatory and technical matters'[82] are in question. This reflects an expertise-oriented belief that '[t]he evaluation of complex technical problems is better left to the implementing rules'[83], applied by these bodies. Thus, while the transmission belt theory continues to dominate Irish constitutional discourse on this issue, the asserted expertise of subordinate bodies provides a valuable ancillary support for the curial conviction that these delegations of discretion are, indeed, legitimate.

In the U.S., however, the expertise approach ultimately foundered on the reality of administrative operations. An increasingly sceptical public began to 'doubt the very existence of an ascertainable 'national welfare' as a meaningful guide to administrative

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[80] Stewart, *loc. cit.*, at 1678.
[81] *I.C.C. v. Chicago R.I. & P. Ry.* (1910) 218 U.S. 88, at 102, cited in Stewart, *loc. cit.*, at fn. 35.
[82] *Laurentiu v the Minister for Justice* [1999] 4 I.R. 26; *Dunne v. Minister for the Environment* [2004] IEHC 304.
[83] *Maher v. Minister for Agriculture* [2001] 2 IR 139, at 245, *per* Fennelly J.

decision[s]', thereby 'sapp[ing] faith in the existence of an objective basis for social choice'[84].

> [Supporters of delegation] concentrated on the notion that agencies, as experts would provide the best answers to social problems. No one paused to consider whether those technocrats also would provide the answers that the people wanted.[85]

Displaying a similar sense of world-weary scepticism, citizens also no longer trusted in a simple assertion of expertise; they demanded instead to be demonstrably convinced of the benefits of specialised governance. In the absence of a general social consensus on what constituted good government, this was obviously almost impossible to achieve. Furthermore, the complex nature of governmental operations inhibited the ability of administrators to present the sort of record of achievement necessary to sustain public faith in the system's acceptability. Doubts were accordingly expressed over the level of expertise of these administrators, creating a climate of uncertainty which was only exacerbated by the institutional tendency towards non-transparent procedures. Specialisation furthermore supported accusations of 'institutional capture' by those organised interests to which an agency was repeatedly exposed in its everyday actions.[86] The expertise which progressives had hailed as a panacea for public ills came thus to be regarded by many as an inegalitarian and inflexible force, wedded to inert and arrogantly misplaced convictions of objective expert 'fact'[87]. Like its transmission belt antecedent, the expertise approach to administrative discretion failed as a result of the reality that it 'described a government that, while perhaps legitimate, simply did not exist'[88]. Their mutual commitment to non-arbitrariness supplied the necessary normative foundations for these theories, but could not rescue them from their operational and descriptive inadequacies.

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[84] Stewart, *loc. cit.*, at 1683.
[85] Bressman, *loc. cit.*, at 479-480.
[86] Stewart, *loc. cit.*, at 1684-1687.
[87] See Mashaw, *Due Process in the Administrative State*, *op. cit.*, in Chapter 1, especially at 17-23.
[88] Bressman, *loc. cit.*, at 464.

(iii) Discretion as interest representation

Stewart's seminal article thus explained the American jurisprudence in terms of a move away from the transmission belt or expertise theories towards an approach which interpreted administrative discretion as a means of facilitating individual participation in the decision-making process.

> Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.[89]

This 'interest representation' analysis signified the first extended academic attempt to set out a theory of administrative legitimacy which recognised the decentralised reality of contemporary authority. Previous theories could not cope with the fragmented character of the existing system of discretionary governance. Delegation, by establishing scattered repositories of creative power, necessarily obstructed any attempt to justify state decisions by reference to objective or unitary notions of centralised, top-down legitimacy. On the contrary, the 'interest representation' thesis embraced this idea of dispersed power, depicting it as a way of enhancing rather than inhibiting the acceptability of government. The theory equated personal involvement with normative legitimacy. Individual participation was presented as a means of institutional legitimation. The citizen's direct access to the decision-making process acknowledged and affirmed the vital value of individual autonomy, 'respon[ding] to [the] deep strains of individualism and political egalitarianism'[90] in liberal democratic doctrine. Institutional justice was thus supplied by the systemic 'assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies'[91]. By '[s]uch a pluralist theory of legitimacy'[92] could the dual demands of individual respect and collective action both be satisfied.

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[89] Stewart, *loc. cit.*, at 1683.
[90] Mashaw, *Due Process in the Administrative State*, *op. cit.*,, at 23.
[91] Stewart, *loc. cit.*, at 1712.
[92] *Ibid.*

The attractions of this theory as a model of institutional justice were further enhanced by the way in which its belief in participation as a legitimising value appeared to reflect the public's intuitive conception of procedural fairness. The development of this theory coincided with Thibault & Walker's famous series of sociological studies. These indicated a direct correlation between personal participation in an institutional process and the individual's associated opinion of the procedure's justice.[93]

> [A] litigation model that assigns a high degree of control over the process to the disputing parties ... will be preferred and perceived as more fair .... [A]n adversary decision-making model enhances the perception of both procedural and distributive justice .... [They] are related by the element of actual participation in the decisionmaking experience.[94]

Their work thus 'tends to demonstrate that people seek to maximize their personal involvement in decisional processes and that they gauge the fairness of the process by the degree of that participation'[95]. Recognising the normative necessity for individual respect, responding to the reality of a decentralised decision-making process, and intuitively reflecting the public's psychological understanding of administrative fairness, this interest representation thesis thus put forward a highly persuasive case for its adoption as the preferred model of just institutional process.

Participation does not, however, of itself provide any guarantees in respect of the eventual outcome of the decision-making process. To define the normative entitlement to institutional fairness in terms of pure participation secures only a right to raise individual arguments before the relevant government agency. This does, of course, generate an expectation that the administrative body in question will acknowledge and reflect these arguments in its ultimate conclusions. There is no enforceable requirement, however, to ensure that this is the case.

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[93] Thibault & Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, 1975); Walker, Lind & Thibault, "The Relation between Procedural and Distributive Justice" (1979) 65 Va. L. Rev. 1401.
[94] Walker, Lind & Thibault, *loc. cit.*, at 1416.
[95] Mashaw, *Due Process in the Administrative State*, *op. cit.*,, at 162.

> [H[earing rights leave untouched the contemporary concern with … the unfairness and irrationality that seem to attend bureaucratic implementation of general rules.[96]

Unlike majoritarianism, the interest representation approach does acknowledge the normative importance of the individual citizen. Participation is, in itself, 'instrumental to the achievement of a moral purpose that is itself impossible to describe in instrumental terms, the purpose of treating a man not as a mere means but as an end in himself'[97]. A theory of institutional fairness must, however, be both just and effective. An approach to institutional justice which is premised on the provision of pure participation rights lacks the instrumental efficacy necessary to convincingly support its claims. Participation, like majoritarianism, looks to accountability instead of non-arbitrariness as its chief criterion of legitimacy. A bare entitlement to participate in an institutional process cannot supply the assurances of impartiality or rationality which a complete doctrine of institutional fairness would provide. The concentration on interest representation risks becoming 'so fixated on the concern for political accountability … that [it] overlook[s] an important obstacle to agency legitimacy: the concern for administrative arbitrariness'[98] which 'is not only a ubiquitous feature of the administrative state but of the constitutional structure'[99]. The interest representation model effectively repeats the mistakes of majoritarianism by relying on an overly formal technique of egalitarian legitimacy. Allowing individual participation certainly appears to acknowledge the entitlement of each citizen to institutional respect. Without more, however, this ostensible commitment to individual autonomy is logically insufficient. To offer a guarantee of input without

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[96] *Ibid.*, at 36.

[97] Pincoffs, "Due Process, Fraternity and a Kantian Injunction" in Pennock & Chapman eds., *Due Process* (1977), at 172, cited in Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 191. This analysis can also be criticised on the grounds of its excessive individualism. To define participation in so stridently individualistic terms raises an obvious issue in respect of competing participatory entitlements. Pincoffs does not supply any criteria for distinguishing the claims of citizens to participation – this thus overlooks the universality which, it was argued, is an essential feature of any operable theory of social or institutional justice.

[98] Bressman, *loc. cit.*, at 462-463.

[99] *Ibid.*, at 502.

influence is to effectively deny the dignitary values upon which the entitlement is allegedly founded. Walker, Lind and Thibault agree:

> We conclude that essential causal mechanisms [in the equation of fairness with participation] involve the participant's perception that he exercises some measure of control over the adversary process not only on the conduct of the proceedings *but also on its outcome*.[100]

Participation rights can obviously play an important part in the development of an appropriate process of institutional fairness. They do not, however, exhaust the full range of procedural values which a normatively legitimate system ought to secure.

(iv) Presidential control

This objection applies with equal force to Mashaw's proposed solution to the difficulties involved in the delegation of discretionary powers to the diverse agencies of administrative governance. Relying on the President's position at the apex of the administrative system, Mashaw argues that 'vague delegations to administrative agencies' could be plausibly construed 'as a device for facilitating responsiveness to voter preferences expressed in presidential elections'[101]. Freed of the pork-barrel politics of locally-organised legislative elections, Mashaw regards the presidential election as an opportunity for the citizen to put forward a more nationally-oriented conception of good government.[102] 'Citizens', after all 'vote for a president almost wholly on the perception of the difference that one ... candidate might make to general government policies'[103]. Furthermore, this identification of the Presidency with the actions and operations of central government ensures the continued responsiveness of the incumbent office-holder to the demands of the public.

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[100] Walker, Lind & Thibault, *loc. cit.*, at 1417. Emphasis added.
[101] Mashaw, *Greed, Chaos, and Governance*, *op. cit*, at 152.
[102] This model sees an effective system of representation as a means of avoiding the dangers of arbitrary government. In this, it takes its lead from the ideas of Harrington and Madison set out in Chapter 5.
[103] Mashaw, *Greed, Chaos, and Governance*, *op. cit.*, at 152.

Obviously, the preliminary problem with this theory of 'presidential control' is its inapplicability to the Westminster model of cabinet government. There is no equivalent direct election of an administrative or executive figurehead in the Irish or British systems of government.

It might be possible to construct an argument which approximates the doctrine of ministerial accountability to the idea of presidential control. Mashaw's model allows the individual voter distinct opportunities to separately express a local and national electoral preference. The fact that the Irish system conflates these choices into a single ballot could be characterised as a way of assessing the relative intensity of rival these discrete issues of local or national interest. Aware that they are being asked to elect an executive as well as a legislature, individual voters can act in accordance with the comparative strength of their concern for local representation or national administration.

Nonetheless, even if Mashaw's model of presidential control can be so revised for the Irish electoral environment, it remains, however, normatively unacceptable. Mashaw's understanding of the administration simply replaces one form of accountability with another, on the basis of the latter's allegedly superior efficacy. It once again trusts to popular accountability as the touchstone of administrative legitimacy, thereby overlooking the normative importance of the non-arbitrary principle. In reality, it offers little more than a form of modified majoritarianism. As the previous section on participation showed, the process values of an institutionally fair system must extend beyond the provision of a bare individual entitlement to express an opinion.

B. Non-arbitrariness in the courts

(i)A concern for non-arbitrariness

The academic emphasis on popular accountability as a legitimating force is also not reflected in the caselaw of the courts on agency actions. Chapter 3 described, in some detail, the increasing curial insistence on an administrative adherence to the dictates of procedural justice. It is widely accepted across the common law world that 'all areas of administration are now, in principle, subject to the requirements of procedural

fairness'[104]. The aim of the *Nicholson-Baldwin-McDonald* line of authority is to secure an improvement in the quality of administrative decision-making through the development of advanced procedural provisions. These judicial demands are inspired, therefore, by an enduring concern for non-arbitrariness rather than accountability. The doctrine of procedural fairness may provide the individual with increased opportunities to participate in the decision-making process but these are intended, not as an interactive acknowledgment of the citizen's autonomy, but as a means of enhancing the decision-making capacity of the administrative system. These process improvements do not, of course, provide a guarantee that the appropriate outcome will be reached in every individual case.[105] They should, however, generate the sort of system-wide enhancement that would support the state's assertion of institutional justice. Principles of good governance are instead judicially conceived and assessed in terms of their probable impact on the risk of arbitrary rule. Accountability is a subordinate concern.

Does this judicial process of proceduralisation adequately protect the individual from arbitrary exercises of public power? The development in cases like *Re H.K.*[106] and *Schmidt*[107] of a general duty to act fairly, freed from the traditional fetters of the classificatory approach[108], certainly seemed to indicate that this would, in time, be the case. Mullan thus welcomed the doctrine as an important institutional development.

> [F]airness, if developed properly by the courts, will lead to a highly desirable simplifying of the theoretical underpinnings of the law in this area. It will ... lead to a situation where the right question is at long last being asked: what procedural protections, if any, are necessary for this particular decision-making process.[109]

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[104] Galligan, *Due Process and Fair Procedures* (Oxford University Press, 1996), at 330.
[105] To provide such a guarantee of absolute veracity would obviously require the courts to effectively act as the decision-making body in every case. This would protect the interests of the individual in personal protection at the expense of his interest in collective social action.
[106] [1967] 2 Q.B. 617.
[107] *Schmidt v. Secretary of State for Home Affairs* [1967] 2 Ch. 149.
[108] According to this approach (as discussed in earlier chapters) the obligations imposed on a body were determined by the court's classification of it as a judicial, or non-judicial matter.
[109] Mullan, "Fairness: The New Natural Justice" (1975) 25 U. Toronto. L.J. 281, at 315.

This confidence, however, proved to be misplaced. The potential of the doctrine of procedural fairness has in practice been hampered by a 'deeply fundamental and conceptually flawed reliance on separation of powers anachronisms'[110].

(ii) The influence of the separation of powers

The inactive formalism of the traditional approach had historically allowed the courts to involve themselves only in matters which were regarded as judicial (or, subsequently, quasi-judicial) in nature. Such 'procedural review proceeded from the assumption that the role of the courts could be limited to preserving the integrity of the judicial process'[111]. The risk of arbitrary action in areas formally defined as non-judicial was regarded as a matter occurring outside the presumed parameters of legitimate judicial action. The interests of the individual in whole areas of government action were thus abandoned to the unacceptably bare accountability mechanisms of the electoral process.

The development of a general duty of fairness appeared to present the prospect of a more sophisticated and contextual approach to the issue of arbitrariness. The doctrine's utility has, however, been constrained by the effective re-introduction of formal institutional classifications. Motivated by the combined effects of the Diceyan distinction between law and politics, and, on the other hand, the institutional paradigms perpetuated by the tripartite separation of powers, the courts have proved unwilling to apply the doctrine to those matters of 'policy' which were traditionally reserved for legislative consideration.[112] Procedural fairness developed as a reaction to the restrictive futility of these institutional classifications. Abstractly separable but indistinguishable in action, the tripartite notion of definable legislative, executive and judicial functions could not be satisfactorily employed in practice. Yet the courts continue to resile from the active supervision of 'legislative' procedures. Decisions like *Inuit*, *T.D.*, and *Hammersmith LBC* demonstrate a clear judicial reluctance to involve themselves in those policy-making procedures from which they were historically excluded. This is based chiefly on a

[110] Edley, *loc. cit.*, at 562.

[111] Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?", *loc. cit.*, at 222.

[112] Obviously the Diceyan notion has been more influential in the U.K. and Canada, while the separation of powers has had more impact in the U.S. The Irish caselaw has been affected by both ideas.

characterisation of these questions as legislative concerns. It thus essentially re-asserts the discredited rationale of the earlier caselaw, reiterating the idea that certain governmental functions, by virtue of their innate characteristics, can only be exercised by the relevant state institution. This approach perpetuates the failed institutional trichotomy – what Edley describes as the crude paradigms of judge as adjudicator, official as expert, and legislator as politician – upon which the separation of powers depends, thereby overlooking the lessons of earlier chapters that:

> [s]cholarship attempting to divine clear doctrinal guidance from these separation of powers nostrums will, like similarly reasoned judicial opinions, fail to persuade because the boundary problems of the trichotomy require that in interesting cases, we will be unable to disentangle the three paradigms.[113]

The courts, on this analysis, are restrictively conceived as capable of acting only when issues of adjudicatory fairness arise. This is reflected, for example, in the way in which the availability of judicial review was defined in *Datafin* in terms of the consequences for the citizen of the decision in question. The review process was thus restricted to the correction of those institutional wrongs which have actually impacted on an individual. Judges will intervene where an individual alleges that he has been unfairly treated in the application or enforcement of a particular policy. They will not, however, examine the procedure by which a policy was initially formulated, believing this to be outside their area of competence. Enquiries are not conducted into allegations of arbitrary action at the policy making stage. This implicitly confines the scope of permissible court action to those administrative procedures capable of being approximated to the traditional judicial function.

> In other words, their involvement in the enlargement of the field of application of procedural fairness amounted to a recognition of the legitimacy of the administrative state, of the fact that, even though administrative decision makers take decisions based on policy, they exercise their powers in a sphere governed by

[113] Edley, *loc. cit.*, at 574-575.

> legal principles and, notably, procedural fairness .... This evolution in the attitude of the courts ... did not have its equivalent in the field of ... decisions of a general nature and based on policy considerations. In regard to this kind of decision, the courts persisted in viewing their roles as preserving the integrity of the legislative process, which they did precisely by refraining from intervening, in procedure, as well as in substance.[114]

The courts' conception of procedural fairness thus appears limited to the enforcement of individualised justice in adjudicatory proceedings. The obligation of government to act fairly in the exercise of public power does not, on the basis of this caselaw, extend to the way in which general principles are institutionally elaborated.

(iii) The risk of arbitrariness in non-judicial areas

Is this limited procedural protection sufficient to satisfy the putative principle of institutional non-arbitrariness? This concept was, it should be recalled, argued to constitute a general legitimating value of good governance. Procedural fairness, in its present limited form, thus appears somewhat inadequate. The extension of the doctrine of fairness to administrative agencies was based, in part, on judicial recognition of the fact that these bodies now exercised extensive decision-making powers. It would thus have been remiss of the courts to abdicate their responsibilities in this area. The delegation of discretionary powers to subordinate bodies has not, however, been restricted to issues of an adjudicatory nature. These bodies typically wield a broad range of public powers, drawn from across the traditional trichotomy's range of institutional functions. Why then should judicial supervision occur in cases where policies are applied, but not where they are developed? The creative power of administrative bodies is currently justified by reference to the idea of ministerial accountability. However, as previous section have shown, accountability, of itself, is insufficient to secure the interests of the individual citizen. This is especially the case in a situation where such electoral accountability is more hypothetical than real.

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[114] Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?", *loc. cit.*, at 237.

Furthermore, to restrictively constrain the development of process values by reference to the theory of the separation of powers betrays a lack of appreciation of the normative origins of the tripartite theory.

> Procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals.[115]

A doctrine of procedural fairness taken seriously should attempt to ensure non-arbitrariness in the discretionary exercise of *all* administrative powers. The failure of the courts to enforce this doctrine is thus disappointing.

> When the court rejects a claim because it concerns a field of public responsibility, or department of government, which is inherently immune from legal control, it acts arbitrarily – failing to apply ordinary legal principles to the circumstances of the particular case.[116]

To confine the institutional assurance of non-arbitrariness to cases where policy is administratively applied does not reflect its asserted status as the central principle of procedural justice. This excludes the individual from the stage at which policy is actually established – which is, therefore, also the point at which appropriate procedural involvement would have the most impact.

> [O]ur self-respect is called into question not only when our rights are affected by procedures to which we are not admitted, but also when we are excluded from a process of social decision making that defines or elaborates the set of rights we all hold.[117]

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[115] Brown, *loc. cit.*, at 1556.
[116] Allan, *Law, Liberty and Justice, op. cit.*, at 212.
[117] Mashaw, *Due Process in the Administrative State*, *op. cit.*, at 178.

In an era of decentralised administrative authority, a continued adherence to the simple tripartite conception of institutional operations is unacceptable and inappropriate. The functional paradigms upon which the separation of powers is predicated bear little resemblance to the realities of an administrative state in which a bewildering array of government agencies exercise a broad range of discretionary powers. In this organisational context, a three-sizes-fit-all approach – which was always problematic to apply – is simply unsustainable. Contemporary governance, if it is to be legitimate, must insist on the contextual enforcement of the principle of non-arbitrariness across the spectrum of administrative activity.

> If the justification for judicial review is the need for independent appraisal of administrative action, inspecting its impact on the persons most closely affected, the court's approach must be sensitive to all the circumstances.[118]

To absolutely exclude the possibility of raising allegations of arbitrary action in certain contexts is thus impermissible.

> The application of a principle of justice or fairness in all the circumstances inevitably circumvents, and ultimately eliminates, narrower rules which unduly circumscribe the court's jurisdiction.[119]

The separation of powers, with its *a priorii* insistence on legislative primacy (and, indeed, exclusivity) in particular affairs, thus represents a debilitating force in the prevailing institutional structure. The tripartite theory inculcates a judicial reluctance to scrutinise the administrative exercise of creative powers which is normatively unjustifiable.

> Administrative law doctrine therefore goes astray when it assumes (or pretends) that judicial deference is equivalent to political neutrality .... [B]road deference to the agency amounts to an alliance by the judiciary with the executive, which

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[118] *Ibid.*, at 185.
[119] *Ibid.*, at 196.

> disservices the system of checks and balances; it abdicates any direct judicial responsibility for the quality of governmental actions.[120]

That the principle of non-arbitrariness is *prima facie* unenforceable in such significant areas of administrative activity fatally undermines the current system's claims of institutional justice. The next, and final section, will thus attempt to imagine how this vital legitimising value, freed of the functional limitations of the separation of powers, can be adequately enforced in the contemporary state.

V. A New Model of Non-Arbitrariness

A. Legitimate governance and arbitrary rule

The chapter thus far has concluded that an intuitively appropriate theory of institutional justice should be founded on a principle of non-arbitrariness. The 18th century conception of the state can, for example, be so understood. Consent and generality, as the traditional techniques of liberal legitimacy, derive their normative force from an underlying commitment to the defence of the individual against the arbitrary actions of the collective. Premised on the historical assumption that state power would only be exercised by means of public rules, this idealised procedure was perceived as a process of rule creation and rule application. The institutional insistence on the consistent application of general rules was obviously animated by a concern for non-arbitrariness. Generality removed the risk that rules could be unfairly targeted at particular groups. A guarantee of generality provided the universality necessary to properly protect the individual's autonomy.

Such universality was, however, more difficult to secure at the legislative stage. At the moment of rule creation, the relevant body would obviously choose from a range of available options, most of which would adversely impact on particular groups. The

[120] Edley, *loc. cit.*, at 600.

danger of arbitrariness at this stage was thus addressed by the involvement of the individual in electing the relevant legislative institution. This direct input removed the threat that arbitrary provisions would be imperialistically imposed without reference to the desires or demands of individual citizens. Participation supplied the level of consent necessary to justify the possibility that the individual, or group, might be disproportionately affected by particular rules. Specific rules might impact on individuals but they would be rationally motivated by the proclaimed public interest rather than arbitrarily adopted by an unrepresentative elite. The possibility of legislative pain was accordingly accepted and shared on a rational and non-arbitrary basis. Consent and generality thus combined to ensure the non-arbitrariness of the historical conception of the institutional state.

(i) The problem of administrative discretion

Legitimacy, from a liberal perspective, requires, therefore, that the state be structured so as to minimise the risk of arbitrary rule. The nature of the administrative state is such, however, that the traditional techniques of generality and consent no longer suffice. The central problem for contemporary institutional structures has been the proliferation of sub-governmental bodies with extensive discretionary powers. Statutory delegations to administrative entities have been expressed with such elasticity that it is impossible to claim with any conviction that the individual voter has consented to the exercise of these powers. Similarly, bureaucratic government has become so specialised and broadly dispersed that it is impossible to ensure generality across the system. The discretionary nature of most administrative powers has only served to further exacerbate this issue. Inured against complaint by their assertion of expertise, these bodies tend to operate in an effectively rule-free environment, on a largely autonomous basis – thereby generating an obvious danger that individual administrators will adopt and enforce positions of unacceptable arbitrariness.

How then can these difficulties of discretion be addressed? The earliest attempts to do so sought, as this chapter has seen, to deny the reality of administrative discretion. In a

system of such extensively-devolved decision-making powers, such an approach was inevitably doomed. Discretion is an inescapable element of the administrative state.

> Squeezing discretion out of a statutory-administrative system is indeed so difficult that one is tempted to posit a 'Law of Conservation of Administrative Discretion'. According to that law, the amount of discretion in an administrative system is always constant. Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.[121]

The acknowledgment of this institutional inevitability leaves the analyst with two choices: to accept the impossibility of elaborating a unified model of legitimacy for the administrative state; or, to attempt to construct a theory of legitimacy which accepts, embraces and, perhaps, even builds upon this administrative discretion.

(ii)Procedural justice as a response to discretion

The judicial development of a doctrine of procedural justice pursues the latter course. This approach acknowledges the existence of a rule-free void of administrative discretion, and attempts to fill it up with procedural principles. Procedural justice is employed as an attempt to structure the exercise of administrative discretion in such a way that the risk of arbitrary decisions is thereby reduced.

The doctrine in its current incarnation is constrained, however, by the continued reluctance of the judiciary to involve themselves in presumptively 'legislative' issues of policy creation. The institutional paradigms at the heart of the tripartite separation of powers have conditioned the courts to restrict the doctrine's application to the administrative areas whose activities approximate to the adjudicatory individualism which typified traditional court action. Non-arbitrariness is thus effectively enforced only in particular parts of the administrative system, exerting a limited level of influence which does not reflect its putative position as the foundational principle of institutional legitimacy. The solution, it would seem, is thus to extend the doctrine of procedural

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[121] Mashaw, *Greed, Chaos and Governance, op. cit.,*, at 154.

fairness to encompass all the administrative machinery of the state. The judicial imposition of process values across the administrative spectrum would address the danger of arbitrary action wherever it might arise. The abandonment of separation of powers notions of inherent institutional restraints would allow the courts to take seriously their task of securing the freedom of the individual from the risk of arbitrary rule.

This type of approach would, if taken to its logical conclusion, imply the existence of an unfettered curial power to enforce non-arbitrariness wherever judges see fit. The proceduralist project would expose all areas of administrative – indeed, governmental – action to the intensive scrutiny of the courts. Judicial insistence on enhanced procedural provisions would, it is argued, protect the citizenry from arbitrary (and thus illegitimate) government action. Separation of powers advocates would, however, oppose this development on the grounds that the courts are functionally ill-equipped to exercise such an extensive and interventionist power. The separation of powers theory is, in its most abstract form, predicated on an assumption that governance requires the input of different types of institution. Chapter 2 has already outlined the limitations of the tripartite theory's particular conception of the functional capacities of existing institutions. The distinctions this specific model draws in the abstract cannot be so easily enforced in practice. However, there would appear to be some merit in the theory's more abstract insight into the organisation of government. The courts, in their institutional operations, have frailties as well as force.

> [Judicial intervention] is praised for its neutrality, concern for consistency and attention to reasoned elaboration. However, this is accompanied by a set of companion vices: the method tends to be expensive, removed from political accountability, proceduralistic, stylistic, arcane, conservative and past-focused.[122]

Unrestrained proceduralism, by establishing an effective judicial hegemony over all decision-making processes, would thus be likely to result in a situation of institutional sclerosis. The theory of the separation of powers, with its model of discrete

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[122] Edley, *loc. cit.*, at 570.

organisational structures, recognises the operational importance of ensuring the existence of alternative methods of institutional action. The absolute dominance of a single institutional ideal (like the adjudicative fairness of the courts) would institutionalise in the system a series of debilitating weakness alongside the intended normative strengths – a problematic situation which the separation of powers seeks to preclude.

B. Alternative institutions and the allocation of power

A theory of separation can therefore be presented as a response to the structural necessity for a selection of institutional forms. The tripartite theory of the separation of powers thus seems to be based on relatively sound organisational instincts. The difficulty with any model of separated powers, however, is that it must also provide determinate criteria for the distribution of decision-making authority between the distinct institutional organs which it has established. A simple demand for structural separation in any form is normatively insufficient. Clear instructions for the assembly and operation of the system are necessary if the aspiring institutional architect is to have any hope of constructing a workable model of governance from the separate constituent elements supplied. A theory of separation must therefore provide normative justification for the particular power allocation it prescribes. It is not enough to propose a scheme of separation for separation's sake – the model must describe, explain and, thereby, help to predict the vesting of particular powers in individual institutions.

(i) Functional utility

As outlined in Chapter 3, the modern theory of the separation of powers tends to organise institutional competences by a process of functional classification. Administrative tasks are distributed in accordance with an initial identification of them as legislative, executive, or judicial in nature. Power is allocated on the basis of an analytical estimation that it 'belongs' to a particular body – that is, that it conforms to the institutional archetype according to which the body's inherent competence has been defined. The theory of the separation of powers describes and depicts the organs of government in terms of the decisional processes with which they are traditionally identified.

> [This] trichotomy of paradigmatic decisionmaking methods ... represent[s] different forms of reasoning which we might expect to be used by those who wield the state's power: adjudicatory fairness, science and politics. They are rooted in the crude images of the judge, the faceless technocratic expert and the politician.[123]

These institutional paradigms are taken to characterise the essence of each institution's function. The entitlement of an institution to exercise power is thus determined by reference to these set conceptions of the type of power typically vested in that institution.[124] The particular design of the overall system of power distribution is clearly premised on an overarching conviction that specific organs of government (or, more abstractly, the institutional paradigms which these organs represent) should be entrusted with particular powers and responsibilities. The system, as currently constituted, thus depends, in its operations, on the existence of a determinate model of government in which function can be matched with institutional form.

The first problem with this approach is, obviously, that is has proved inoperable in practice. Chapter 2 detailed at some length the indeterminacy inherent in the tripartite understanding of institutional functions. In many cases, it is impossible to convincingly claim that a particular power can only be identified with a single organ of government. The procedural paradigms which define each function are practically imprecise, often failing to provide a clear answer to questions of institutional competence.

> Although the decisionmaking paradigms are arguably distinct in the abstract, in practice they are commingled and inseparable except where subjected to artificial and distorted conceptual violence .... Where one paradigm ends and another begins is a matter of arbitrary perceptions or skilful advocacy.[125]

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[123] *Ibid.*, at 568.
[124] For a discussion of the Irish and American caselaw in which this approach is evident, *see* Chapter 2.
[125] Edley, *loc. cit.*, at 570-571.

There is, however, a more foundational difficulty with this type of functional approach. Contemporary governance assumes that jurisdictional powers properly belong to those institutions with which they are formally identified. How do such ideas of institutional ownership arise? Chapter 2 has already identified the artificiality inherent in adhering to a formal understanding of government for the sake of form alone. Governance is a matter of administration, not art. The model of the 'separation of powers is not', after all 'an end in itself'[126]. A theory of government does not exist in the abstract – it is adopted on the basis of a belief that it will, in practice, prove effective. Thus, the process by which a power is allocated to a particular organ must be based on a belief that that body is especially suited to undertaking that task. Scrutiny of such allocations over time can, of course, allow careful observers to accurately predict the pattern of future power-distributions. This is, however, a purely empirical approach. This type of analysis overlooks the casual origins of the institutional arrangement. It describes, but does not properly explain, why power is vested in an individual entity.

The formalistic approach to the separation of powers, which presently predominates, dictates, for example, that legislative tasks are those entrusted to the legislature. It does not seek to rationalise this occurrence, or to account for the way in which the idea or model of legislative tasks came to develop. Given the concern of any institutional theory to ensure operational efficacy, the model's initial determination of duties could only have been based on an assessment of institutional suitability. These bodies are, however, the individual incarnations of a generalised trinity of institutional paradigms. Such an assessment of suitability must therefore be based on a conviction that the strengths of a particular institutional paradigm are especially appropriate for the exercise of the power at issue. The institutional or procedural characteristics of the legislature, for example, must have been regarded as rendering it the appropriate organ in which to vest those powers which would thereby come to be known as legislative tasks. The system thus depends on a model in which a body's functional qualities determine the institutional form, which, subsequently, determines and justifies its jurisdiction over particular functions.

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[126] Brown, *loc. cit.*, at 1516.

If, however, the respective government body's functional or procedural characteristics decisively influenced the system's initial allocations of power, an obvious difficulty arises. Institutional or procedural characteristics are generally designed to perform a particular purpose. They do not spring fully-formed from the brow of their constitutional creators. Rather, they are developed to address a particular need, or to advance an individual objective. A procedure is an inherently instrumental mechanism, established with a specific purpose, or purposes, in mind. Thus, once again, questions of casual circularity arise. To return to the example of the legislature, this analysis does not advance our understanding of the system's foundations. If the system is to define legislative powers as those vesting in the legislature, a problem is thereby posed as to the conceptual origins of the initial notion of legislative competence. It was argued in the previous paragraph that the vesting of powers in the legislature could only have been justified by a belief that it was best suited to exercise those particular powers. This opinion must have proceeded from an assessment that the legislature's particular characteristics made it the most suitable body in which to vest 'legislative' functions. However, these institutional characteristics could only have been elaborated on the basis of an *a priorii* understanding of the legislature's competence. According to this explanation, institutional functions were defined by reference to a conception of institutional appropriateness which was, itself, determined on the basis of the qualities and characteristics which that institution established to allow it to fulfil its function.[127] On this analysis, a particular procedural or decision-making paradigm is adopted to allow an institution to perform its function, the success of which is then argued to justify future allocations of functions. This logic is obviously unacceptably circular. Procedural

[127] This circularity can, perhaps, be demonstrated by way of the following exchange:
Q. What is the nature of this function?
A. It is a legislative function.
Q. Why is it a legislative function?
A. Because it belongs to the legislature.
Q. Why does it belong to the legislature?
A. Because the legislature is best equipped to exercise this power.
Q. Why is the legislature best-equipped?
A. Because it has developed the institutional characteristics and procedures which allow it to fulfil this function.
Q. Why did it do this?
A. Because it is charged with the exercise of legislative functions.

characteristics, it would seem, could not have served as the original foundation for the system's specific model of institutional design.

The contemporary approach to the separation and distribution of powers is thus confused by its focus on a reciprocal relationship between institutional capacity, function and form. The prevailing judicial approach to the identification of functions seems to depend upon a capacity-oriented model of institutional forms. However, the ability of a government body to effectively perform a particular function should properly be understood as a response to, rather than a reason for, the allocation to it of such powers. Questions of procedural capacity and institutional competence are inextricably linked. Neither is, of themselves, determinative of the issue at hand. Institutional paradigms do not exist for their own sake – they represent a particular approach, the suitability of which can only be assessed in the context of the exercise of an individual government power. Capacity and function can only properly be examined where they coincide. They must therefore be regarded as the product of some deeper conception of appropriate governance. The contemporary rationalisation of particular tasks as legislative, executive or judicial on the basis of a belief that these institutions, designed so as to fulfil such functions, are thereby best-equipped to undertake these tasks is an example of wholly inadequate *ex post facto* reasoning. It is but an empirical shorthand for the allocation of institutional responsibilities. Inspired by concerns of convenience rather than analysis, it offers guidance without enlightenment. The court's concentration on the elided issues of capacity, function and form thus obscures the more foundational premises from which these organisational and institutional paradigms must have been developed.

(ii) Decision-making processes as normative 'good's?

An alternative explanation for allocating institutional competences in accordance with this decisional trichotomy might propose each procedure, in itself, represents an objectively 'good' way of exercising public power. This rationale suggests that the procedures have, in themselves, certain normative advantages which thereby legitimise their usage. This argument seeks to escape from the circularity of a function-oriented approach by offering an ontological rather than an instrumental justification for the

techniques' institutional employment. The originating impulse for the tripartite theory is thus explained as an acknowledgment of the inherent merits of these three-fold decision-making methods, rather than as a response to an impossibly *a priorii* idea of institutional function. Adjudicatory fairness, science and politics all, it could be argued, have some intrinsic value, and thus deserve – if not require – institutional representation in any eventual organisational structure. Construction of an institutional model begins, on this analysis, with the decision-making paradigms, proceeding to allocate institutional tasks on the basis of the system's assessment of which approach is more appropriate. This therefore resembles the contemporary curial approach, differing from the dominant conception of the separation of powers only in the way in which it explains the origins of the tripartite model of institutional organisation.

This analysis would obviously encounter the same difficulties of indeterminate functional identification which have afflicted the traditional approach. Again, however, there is a broader objection to the idea that the existing system of separation derives from an institutional trichotomy of 'good' decisional procedures. As Edley points out, the merits of a particular institutional paradigm depend entirely on the perspective from which they are assessed. To justify an individual allocation of administrative competence on the basis of the operational virtues of the institution in question is to overlook the fact that this qualitative calculation is entirely contextual. Any assertion of institutional suitability is necessarily affected by this 'notion of normative or attributive duality'.

> Each decision-making paradigm has associated with it a collection of positive and negative attributes, or normative associations – a kind of Jekyll-and-Hyde dualism that, in a given situation, may make it debatable as to which paradigm applies.[128]

The Janusian merits of the judicial process have, for example, been outlined above. Such normative indeterminacy poses obvious practical problems.

[128] Edley, *loc. cit.*, at 570.

> These dualities permit advocates or judges, in particular cases, to emphasise selectively one side or the other to support a particular claim .... The observer is often left confused and wondering what principle causes one side of the duality to prevail.[129]

More profoundly, however, this attributive duality undermines any suggestion that the processes can be normatively interpreted as inherently good. There is no objective criterion of decisional value which would support an assertion of intrinsic institutional utility. This is especially problematic in light of the fact that the very procedural quality which is argued to constitute a good is often simultaneously the source of opponents' objections to its use. Thus, for example, the 'politics paradigm promises participation, democracy, responsiveness and accountability' but 'carries with it the negative attributes of subjectivity, wilfulness, majority tyranny ... and even irrationality'[130]. In the absence of an authoritative yardstick of institutional utility, these decision-making processes cannot be confidently proclaimed as normative goods. They thus, similarly, cannot serve as the foundations of legitimate institutional action.

(iii) A duality of interests?

Casting doubt on the possibility of any determinate estimation of institutional efficacy or value, this attributive duality raises considerable problems. As already detailed, the traditional approach seeks to address this duality by way of functional classification. The preliminary step of identifying the impugned function establishes a presumptive position on the advantages, or otherwise, of the institution in question. This indeterminate duality is refracted through the prism of asserted functional appropriateness. Thus, if it is decided that a power is legislative in nature, the court's preference for adjudicative proceduralism is interpreted as excessively inefficient, instead of suitably protective. However, it has been well established by this point that the initial stage in this analytical process is unacceptably imprecise. The identification of a specific function depends on a tripartite model of institutional paradigms which are, in practice, impossible to distinguish, and

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[129] *Ibid.*, at 570.
[130] *Ibid.*, at 570.

thus employ. Any identification of the function depends on a necessarily circular analysis of institutional capacity and functional competence. Furthermore, an institutional process cannot be characterised as inherently good or bad on the basis of a particular functional perspective because that functional perspective cannot be authoritatively established.

This focus on function errs in attempting to avoid the effects of attributive duality, rather than to understand its origins. The traditional approach posits the existence of a trinity of procedural paradigms, thereby seeking to replace the indeterminate duality of values with a determinate, and thus operable, trichotomy of institutional images. The problem of these central case procedures appearing to be simultaneously good and bad is thus submerged by the introduction of an external frame of institutional reference. In the absence of an objective notion of institutional value, the asserted model becomes, in itself, a good. The utility of this approach has obviously been crippled by the fatal indeterminacy of the initial assessment of function. More seriously, however, a concentration on questions of functional identification has befuddled the courts, imposing a layer of conceptual confusion which directs attention away from the tripartite model's failure to engage with this normative duality. The model cannot claim legitimacy if it is unclear as to the merits or otherwise of its paradigmatic institutional processes.

There is a need, therefore, for a theory of institutional separation to examine and embrace this normative duality. Perceptions of institutional utility are, it was argued, entirely dependent on the point of view from which they are assessed. The key, therefore, is to contemplate the possible perspectives from which the value of particular institutional procedures might be considered.

That there is this conceptual duality suggests that the viewpoints at issue are two-fold – a dichotomy of interests which might reasonably approximate to society's twin objectives. The individual citizen's relationship with the state, an earlier section argued, is characterised by his opposing interests in successful collective conduct. On the one hand, the entire purpose of the organised state is to allow individuals to achieve together that which they could not apart. However, the individual will also seek to ensure that this

collective action does not impinge upon his own position. The advantages – from the citizen's point of view – of a specific institutional procedure thus depend on the individual interest being advanced at that particular time. This duality derives from the duopoly of individual interests at the heart of all societal action – the desire of the individual in the pre-legal position to obtain the benefits of associational activity while defending his own interests.

The attributive duality of the institutional paradigms can reasonably be so construed. If a procedure is intended to promote the individual's interest in effective collective action, any intervention on the part of the courts will be received with considerable scepticism. On the contrary, the individual is likely to crave the protection of the courts' adjudicative proceduralism when his interests are under attack. Therefore, the objection to judicial involvement in 'legislative' affairs is not motivated by issues of functional capacity. Rather, it is a reaction to the excessive individualism which would result from a system-wide insistence on adherence to adjudicative procedures. In a similar way, the exclusion of the courts from whole areas of administrative action represents the unacceptable prioritisation of the individual's interest in effective social action over that in personalised protection.

Of course, these interests tend to coincide in any administrative action. The government is forced at all times to attempt to balance the normative force of these opposing impulses. The systemic adoption of a single institutional process – such as the court's concept of procedural fairness – would thus be objectionable on the basis that it pursues only one of these foundational social objectives. Alternative institutional forms are required so that this duality of interests can be adequately catered for.

C. Addressing the duality of individual interests

The separation of powers attempted to achieve this by presumptively allocating particular functions to a series of institutional paradigms in which the relative importance of these two interests was appropriately and consistently calibrated. The utility of this approach

has, however, been crippled by the fatal indeterminacy of its initial assessment of function.

The obvious solution would thus appear to be to classify institutions by constituency instead of by function. This type of approach has, of course, been employed in the past. The mixed theory of government – from which the contemporary concept of separation of powers in part evolved – rested on the idea of deriving socially appropriate actions from the intermingling of opposing interests.

> Like ... distinct powers in mechanics the [different constituencies] jointly impel the machine of government in a direction different from what either acting by itself, would have done; but, at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of liberty and happiness of the community. [131]

The logic of the proposed approach is identical – only the identity of the constituent social elements differs.

This constituency-oriented technique directly addresses and resolves the central issue of attributive duality. If an institution is defined as attempting to further a particular interest, a clear view of its strengths and weakness can be authoritatively adopted. The normative basis for its actions is accordingly clarified, thereby allowing the appropriateness of its involvement in particular issues to be adequately and consistently assessed. This avoids the indeterminacy inherent in the functional approach, supplying the analytical precision necessary to assist efforts at striking an appropriate balance between the opposing impulses at the heart of the administrative state. The exaltation of one interest at the expense of the other can be prevented by involving institutions which represent each position in any process of exercising power. In this way, the traditional all-or-nothing

[131] Jones, *Selections from Blackstone's Commentaries on the Laws of England* (1973, Macmillan Press), at 66.

arguments about matching functional capacity with institutional form can be avoided entirely.

D. A constituency-inspired analysis of the institutional structure

How might this type of institutional arrangement operate? The sole constituency in this appropriately liberal regime is, of course, the individual citizen in the pre-legal position. However, the conflicting nature of his central concerns for collective conduct and individual defence allows the system to treat each as a distinct constituent interest. These interests can be identified with existing institutional organs with relative ease.

(i) The courts

The seriousness of the citizen's disquiet at any potential impingement on his personal affairs ensures that this interest should be committed to the courts. The rational individual does not, it should be remembered, object to the bare fact of an adverse exercise of power. The prospect of individual pain is one which all citizens in the original position would accept. The demand for robust defence of an individual's entitlements only arises in respect of those matters regarded as especially important – those rights or freedoms upon which the collective cannot blithely encroach. The judicial commitment to an adjudicative approach which concentrates on issues of individual fairness provides the sort of heightened guarantee of institutional non-arbitrariness which is commensurate with the protection of this type of interest.

(ii) The government

On the other hand, the electoral organs of government can be easily characterised as advancing the individual's interest in effective associational action. The citizen will not be advantaged by every exercise of such public power. The rational calculation of the pre-constitutional citizen is that this collective conduct will, as a whole, improve the position of all in society. The necessarily opposing nature of many individual's interests ensures, however, that each action will generally produce an adverse impact on some citizen. Non-arbitrariness thus demands a much lower level of procedural protection in this context. Assuming that the individual's most important interests are secured by the

courts, non-arbitrariness dictates that the citizen need only be assured that the political decisions of those organs charged with improving the position of the collective are rationally motivated as responding to a perceived public need or demand. The electoral institutions of the state are obviously best placed to perform this task. The existence of an electoral mandate, which all individuals had an equal opportunity to influence, allows these bodies to be persuasively portrayed as acting in the public interest. Furthermore, the provisional nature of electoral hegemony obliges those elected to continue to monitor, and, indeed, to react to the demands of the citizenry. The key normative concern for non-arbitrariness is thus satisfied by the democratic origins of collective institutional authority. Elections allow for the expression and aggregation of individual preferences, thus supplying, not only an important acknowledgment of the decision-making autonomy of the individual, but also a rational foundation for all public action.[132]

It is important to note at this point that the model under examination here proposes, from the point of view of constituency-representation, to treat all electoral organs as one. This is especially appropriate in the Irish or English scenario of an effectively-fused legislature and executive. In contemporary politics, the cabinet government is generally regarded as controlling both the executive and legislative organs of the state. These cabinet members are almost always in a position to effectively dictate the measures enacted by the legislative chamber(s). In return, the electorate tends to assess individual members of the assembly largely on the basis of the adjudged achievements of the cabinet members with whom they are aligned.[133] The government (meaning here the combined members of the legislative assembly – or at least the controlling majority of it – and cabinet) is responsible for dictating collective policy, and therefore for the creation and enactment of measures to achieve such selected ends. That is not to say, of course, that there should be

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[132] Non-arbitrariness can also be argued to require that the actions of these institutions – specifically their motivations – be made to meet some threshold of demonstrable public regard. This argument tends to follow from the criticisms of public choice theory, which suggest a combined lack of confidence in the accuracy of the electoral system, and the extent to which those elected actually respond to the needs of all citizens. *See* Mashaw, "Chapter 3: Public Choice and Rationality Review" in *Greed, Chaos & Governance*, *op. cit.*

[133] For an example of the practical effects of this tendency for individual legislators to be judged by reference to the achievements (or otherwise) of cabinet members, *see* Whelan, "FF backbenchers lot is not a happy one", *The Irish Times*, 1 July 2006.

no separation between what, up to now, have been termed the legislative and executive organs. On the contrary, such separation can be argued to provide a useful guarantee of legislative generality, thereby supporting the vital value of public reason, as outlined above. However, in the context of the discussion of institutional non-arbitrariness at hand (which, it must be remembered, is argued to constitute the system's foundational norm), these electoral organs are regarded as singly representing the citizen's interest in collective action.

On this model, the courts and the government thus serve as the twin pillars of decision-making authority, each representing a constituent social interest in an appropriately non-arbitrary way. This raises an obvious question in relation to the administrative organs of government. Any contemporary theory of governmental arrangement must address the issue of administrative power, prescribing some way in which these bureaucratic bodies can be incorporated into its institutional vision.

Practically speaking, the constituency-oriented understanding of institutional separation operates in a top-down manner. Although the normative authority of the two institutions is based on the extent to which they serve the dual interests of the individual, they effectively serve as the high repositories of legitimate power. Legitimacy, on this understanding of the state, derives from the normative mandates upon which these institutions act. This echoes the transmission belt theory of governance, under which authority was centrally vested in specific, normatively superior organs of the state. Like that theory, it would seem, therefore, that exercises of power in this structural scheme ought – if they are to be legitimate – to be linked back to either the government or the courts. As already noted, however, the discretionary nature of administrative powers confers an effective decision-making autonomy on such bodies, thereby imperiling the ability of this two-institution approach to describe, explain or legitimise the everyday operations of government. In this way, the problems traditionally posed by the administration re-emerge.

(iii) The administration

The challenge, therefore, is to portray the administration as a structural support for the suggested system, instead of an obstacle to its operation. The previous paragraph highlighted a potential problem with the proposed model – the way in which it, in keeping with traditional notions of government, conceives of authority in a centralised, top-down fashion. As Chapter 3 concluded, this type of idea is increasingly anachronistic in an era of dispersed, discretionary powers. Discretion has undermined the notions of unitary governance upon which the system has traditionally depended, thereby calling into question its general legitimacy. However, the scope for individual involvement – and thus decisional re-adjustment – which such discretion provides should, arguably, be treated not as a problem for the system, but rather as an institutional opportunity. The existence of discretionary administrative organs of government arguably allows for a sort of institutional re-orientation which would emphasise the bottom-up nature of all state authority. Power – from the liberal perspective – comes ultimately from the individual. Even the actions of the elected bodies acting on behalf of the collective are theoretically animated by a residual commitment to the advancement of each citizen. Administrative discretion acknowledges and affirms this vital normative value by proffering an avenue of institutional participation for citizens affected by a decision-making process. In this way, the individual's status as the basic source of institutional sovereignty, and thus the enduring focus of its exercise, is confirmed.

This analysis embraces discretion as part of the system's family of structural values, rather than ignoring or concealing it like some sort of embarrassing institutional kinsman. In its celebration of discretion, this model thus echoes the theory of interest representation. Discretion here, however, encompasses more than the provision of mere participation rights. It is instead interpreted as a type of institutional refinement to the decision-making process. Accuracy rather than involvement is the relevant concern in this case. Individuals are not afforded the opportunity to express their views simply as a way of affirming their autonomy. They are instead conceived as actors in the institutional process of producing appropriate state actions. This echoes Cartier's attempt to justify discretion as 'a dialogue between the decision maker and the individual affected by the

decision'[134]. The idea here is that citizens with relevant complaints (a concept to be considered at a later point) can, at this discretionary stage, register their objections to a proposed course of action. Thereby better informed about the probable actual impact of general provisions on specific individuals or groups, the administrative official can amend his decision accordingly. The administration, with its discretionary procedures, is here depicted as a means of securing norm-appropriate outcomes at a micro level.

> When discretion is delegated, a margin of manoeuvre is conferred on the decision-maker, a margin that must be viewed as a space for deliberation, allowing individuals to participate in norm creation and value articulation.[135]

This administrative freedom offers an opportunity to affirm the autonomy of the individual as a rational moral agent, whilst ensuring an improvement in the decision-making process. Administrative discretion is accordingly conceived as a type of second-order decisional process, providing a second-stage auxiliary mechanism to ensure that the state does indeed exercise power in a suitably non-arbitrary way.

This notion of co-ordinated chambers of decision-making power seems peculiar when judged against the traditional concept of law as unitary command. The continuing court references in Ireland to, for example, the transmission belt theory are testament to the strong residual influence of this *imperium* image of power. As Chapter 3 explained, however, the idea of a single sovereign organ exercising authority is increasingly unsustainable. The model under examination here appears to chime more closely with the contemporary reality of overlapping public powers. The image here is one of inter-institutional dialogue, according to which power is exercised by means of a co-ordinated and communicative process. Understood to represent distinct but essential social interests, institutions are guaranteed an input into the decision-making process. Government bodies are no longer regarded as exclusively entitled to exercise particular powers. Such unilateral action is, on the contrary, prohibited, as befits bodies charged

[134] Cartier, "Willis and the Contemporary Administrative State: Administrative Discretion as Dialogue", *loc. cit.*, at 644.
[135] *Ibid.*, at 645.

with the inevitably partial task of interest representation. The prescribed institutional structure thus operates by inter-organ mingling instead of separation. Individual decisions are delivered at the end of a multi-institutional process, the central concern of which is to organise, structure, manage – and, crucially, ensure – the input of all relevant institutional interests.

The government and the courts are thus presented as providing an orienting framework within which administrative decision-making will occur. These first-order organs function at the level of macro-social organisation, adopting general measures which are expected to advance their constituent social interest. The government specifies the actions it feels are required (or requested) to enhance the position of the collective. The courts, for their part, insist on the process precautions necessary to secure individual protection. Issues of informational efficacy and non-arbitrariness combine to ensure, however, that these provisions are not particularised. Even the court, with its procedural emphasis on individualism, relies in its operations on general principles rather than shifting case-specific decisions.

These institutions thus allow administrative bodies a margin of decision-making discretion, within which there exists a range of possible and appropriate outcomes. Such scope for decisional freedom provides an opportunity for the administrative organ to consider the situation of those specifically subject to the exercise of the power in question. Individuals can put forward their claims directly at this final stage of decentralised decision-making. Thereby informed about the actual impact of a proposed action, the administrator can react accordingly, refining, if necessary, the crudely-drawn general judgments of the other institutions.

In a system of scattered powers, this is a more manageable and effective institutional safeguard. Informational difficulties will inevitably affect any attempt to centrally govern our interventionist state. An elected government cannot hope to inform itself about the way in which the bewildering array of administrative powers might impact on particular citizens. Embracing discretion as a means of individualised impact-adjustment reduces

this complexity, allowing those bodies in actual contact with affected individuals the autonomy to undertake this task. This provides an additional layer of normative protection, ensuring the existence of several stages at which the arbitrary treatment of individuals might be identified and redressed. This model thus, not only recognises the reality of administrative discretion, but seeks to embrace and employ it as a key institutional process.

Issues of efficacy aside, this model must also support the asserted normative merits of the suggested system. Non-arbitrariness, it was argued, is secured at the general level of courts and government by the particular procedures which they apply. Discretion has, however, traditionally been interpreted as presenting a risk of arbitrary rule. It is important, therefore, to re-emphasise the constraints this system imposes on administrative discretion. The twin organs of central government provide, it will be remembered, the orienting framework for administrative action. Any decisions taken within the parameters those organs provide cannot be challenged by an unhappy individual. The autonomy of the administration within its own area must be respected as a vital institutional process, but there must also be the facility to identify and correct cases where that body has strayed outside the range of permissible outcomes.

> Since dialogue [between the individual and the discretionary decision-maker] is shaped by … [the dictates of other institutions], the requirement that the decision be an authentic reflection of that dialogue does not prevent the decision maker from making a determination that does not satisfy the demands of the individual. Rather it imposes on the decision maker a burden of justification in the light of the dialogue.[136]

Normative appropriateness is, in that way, secured by the ongoing supervisory involvement of both the government and the courts. The exercise of public power on this model is, after all, an evolving process of inter-institutional dialogue. No single body has

[136] Cartier, "Willis and the Contemporary Administrative State: Administrative Discretion as Dialogue", *loc. cit.*, at 646-647.

unfettered or absolute power. Each represents a specific social interest, deserving of attention but not exaltation. Each is accordingly entitled to ensure that its central dictates are observed. Decisions are based on the cumulative wisdom of each organ, rather than any image of institutional primacy. Administrative conduct will thus be reviewable where it is argued to go outside the margin of permissible action, thereby preserving the necessarily co-ordinated and co-extensive nature of inter-institutional authority.

This analysis of the relationship between these institutions reiterates the extent to which this model allows for the representation of all key social interests. This section has already shown how the courts and government can be seen to act on behalf of the abstract individual's interest in personal protection and collective conduct, respectively. The representation of such abstract interests will inevitably result in a type of top-down institutional process. The citizen under the conditions of the original agreement – our analytical prototype – was instrumentally useful precisely because of the absence of distortive individual characteristics. Similarly, the institutions which represent this type of abstract interest must be removed, to some extent, from the situation of ordinary citizens if they are to properly assess the requirements of their conjectural constituency. The model under examination allows, however, for the development of an inclusive approach, which combines the top-down perspective of the notional citizen with a bottom-up acknowledgment of the actual individual.

This process has several advantages. In the first place, it obviously corresponds with the reality of a governmental system in which centralised institutions disseminate decision-making power. Secondly, the provision of a bottom-up mechanism of citizen involvement provides a tangible affirmation of the normative importance of individual autonomy. Most significantly, however, this double methodology neatly bridges the operational gap between theory and practice, ensuring that the system is motivated by suitably abstract and non-arbitrary objectives, but is also concerned to assess the actual impact of these actions. The individual, therefore, can be said to have a trichotomy of interests in the establishment of the state: the abstract pre-social interest in successful collective action; the abstract pre-social concern for individual protection; and, additionally, a partial desire

for the concrete advancement of his particular real-life position. In this way, the ordinary citizen's more pressing aspirations are institutionally acknowledged alongside the more traditional contractarian foundations of social action. The system proposed thus strives to attempts to involve all interests, rational and universal, mercenary and specific, in the decision-making process, thereby striving to ensure more accurate and norm-appropriate institutional outcomes.

VI. Conclusion

The analytical efforts of this chapter – indeed this work thus far – seem to offer support for a constituency-oriented scheme of institutional separation. This model, it has been argued, has several asserted attractions. Normatively, it acknowledges and reflects the autonomy of the individual citizen as the system's foundational value. It thus rejects majoritarianism, recasting the institutional understanding of democracy in an appropriately individualistic form. As part of this process of organisational reform, the model identifies the citizen's divergent interests in associational activity, thereby allowing for the establishment of a dispersed institutional structure which accurately echoes our intuitive conception of the citizen-state relationship. Collective action is thus encouraged rather than restricted by the system's emphasis on the interests of the individual. Furthermore, in its intuitive attractiveness, the theory attempts to avoid the conceptual confusion of the dominant functionalist paradigm, re-defining the system so as to properly reflect the conflict of values with which all public – and thus institutional – activity must engage. This amended understanding of institutional competence thereby introduces some welcome conceptual and analytical precision into an area of the law that has been dogged by indeterminacy.

Intuitively attractive in the abstract, the theory, crucially, also seems concerned, in its practical applications, to conform to the defining features of contemporary governance. In its operations, it seems to reflect Chapter 3's discussion of the ways in which the administrative state is increasingly removed from the strict logic of the traditional *imperium* theory of government. The system, for example, not only accepts the reality of

administrative discretion, but actively attempts to employ it to enhance its decision-making structures. This occurs as part of its general recognition of the reality of the interventionist state. The model also rejects the traditional idea of law as command, preferring to present the exercise of public power as the result of a multi-institutional process. Similarly, the suggested theory avoids the issue of executive dominance by treating all electoral organs as one for the purposes of power allocation. This ensures that authority is dispersed amongst properly independent entities, rather than entrusted to formally distinct institutions whose autonomy of action is more theoretical than real. In this pursuit of 'the Madisonian goal of avoiding tyranny through the preservation of separated powers'[137], as in its emphasis on institutional blending instead of separation, the constituency-oriented model seems to return to the type of checks and balances concern which animated the original tripartite theory of separation.[138]

Furthermore, the idea under examination here would arguably seem to support and explain a number of the more recent judicial developments which, it was noted in Chapter 3, cannot be justified by reference to any existing theory of the state. The system-wide concern for non-arbitrariness would, for example, require the involvement of the courts – newly charged with the defence of the individual from arbitrary attacks wherever they arise – in areas beyond their traditional role. The model would thus support, for example, the move away from the formal public-private distinction of former times. Similarly, the entitlement of the individual to ensure that power has not been exercised in an arbitrary way at any stage of the institutional process would require, in certain circumstances, the type of relaxation of the standing rules which has, in part, already occurred. An individual ought not to be denied a remedy against arbitrary rule simply because of the absence of any substantive legal entitlement. Securing non-arbitrariness in a scattered interventionist state requires the abandonment of all such artificially formal classifications, necessitating instead the adoption of a more fluid and contextually-oriented approach which is capable of applying across the governmental and administrative spectrum. This has, of course, occurred in part with the development of a

[137] Brown, *loc. cit.*, at 1515.
[138] *See* Magill, *loc. cit.*; Brown, *loc. cit.*

doctrine of procedural fairness, which the courts have elaborated and enforced on cumulative, case-by-case basis.

The parallels between existing institutional practice and this proposed model should not be overstated. As Chapter 3 admitted, the doctrine of procedural fairness, although revolutionary in its impulses, is constrained in its effects by the continuing influence of traditional notions of function, capacity and form. The institutional trichotomy which this theory eschews continues to occupy a position of practical and analytical importance. The challenge, therefore, for the remainder of this work is to attempt to assess the extent to which this constituency-oriented structure either might, or already does, operate successfully in practice.

Chapter 5

INSTITUTIONAL SEPARATION AND REPUBLICAN THOUGHT

I. A SEARCH FOR HISTORICAL INSIGHT

Having so far attempted to establish and explain an alternative conception of our system of institutional action, this work must seek to situate its model in some sort of historical context. The identification of an idea with an established body of academic opinion can allow for the development of a fuller understanding of both its conceptual origins and its practical implications. To position a proposal within a particular scholastic tradition is to recognise, and thus publicly reveal, a shared preoccupation with the same questions and concerns which have always occupied those operating in that area. It must be remembered that absolute originality is, in jurisprudential terms, something of a chimera. Both the issues and the answers which tend to arise in today's academic discourse appear, in reality, often no more than the re-contextualised echoes of age-old quarrels. The modern humanities academic spends less time standing on the shoulders of giants than re-packaging their thoughts for contemporary times. That is not to say, however, that this system of scholarly recycling is without its merits. If the origins of the ideas are familiar, so too will be the analytical issues which they are likely to encounter. A modern update of an old idea is likely to encounter the same enduring difficulties that have historically dogged those working in that field. Informed by an appreciation of a theory's ideological pedigree, contemporary discourse is, therefore, arguably better equipped than its forebears to identify the strengths and weakness of a doctrine, and, hopefully, accordingly readjust its design.

A. Pluralism

How then should the model set out in Chapter 4 be described? The theory's concern with the institutional representation of diverse interests in government has obvious overtones of politically pluralist thought. This interpretation of the theory would see in its particular

institutional arrangement an attempt to foster interest competition through factional separation. To present the model as a primarily pluralist framework is, however, to overlook both its commitment to rational non-arbitrariness, and its insistence on the presence in society of distinct and identifiable constituent interests.

Pluralism is predicated on a refusal to accept the existence of an objective public interest. It finds its values rather in the broadly participatory articulation by discrete interests groups of their subjective desires.[1] Pluralism privatises the notion of public interest, identifying the interests of society with whichever values eventually prevail in its competitive institutional process. Its focus is primarily on ensuring that there is an extensive array of inputs into this process. External conceptions of the common good do not intrude. The rationality or morality of the system's institutional outputs are not of its concern. The system's implicit assumption that the subjective preferences of individuals and groups are morally equal necessarily refutes the idea that there exists an objectively identifiable public or social interest. The theory described in Chapter 4 rests its claims to legitimacy, it should be remembered, on its commitment to its assertedly universal value of non-arbitrariness. In its dependence on an externally justified notion of objective good, it cannot therefore be convincingly classified as a pluralist theory.

This conclusion is further supported by the way in which the theory seeks to organise its allocation of institutional power in accordance with its understanding of society's constituent elements. Pluralism, on the other hand, does not envision society in such terms. Groups, in pluralist theory, are formed from a convenient confluence of individual desires. They are thereby also so defined. The nature and membership of such groups can thus alter and evolve as the demands of individual citizens change. For the pluralist, there is no fixed conception of society, no balance of constituent interest. There is only the partial accommodation of shifting popular personal (and thus group) preferences.

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[1] In this, it differs from the analysis of Chapter 1. That chapter used Schmitt's suggestion of the inevitability of political conflict to explain the need for the creation of an ostensibly authoritative social consensus. Although it denied the possibility that this consensus could ever be universally acceptable for all time, Chapter 1's discussion of the constitution allowed for – in fact, depended upon – its ability to persuasively adopt such putatively objective ideas of the good. Where Chapter 1 responded to the probability of discord, pluralism, on the contrary, embraces it.

B. The republican tradition

In its attempt to strike an institutional balance between objectively identifiable constituent interests, the model put forward in Chapter 4 in fact appears to owe more to the mixed theory of government. Part of a long-standing traditional of balanced constitutional republicanism, the mixed theory, like its pluralist counterparts, relied on a system of institutional separation. Its separation was not, however, organised along arbitrarily bureaucratic lines. It sought instead to reflect the perceived divisions in society as a whole. The mixed theory understood the state as a construct of conflicting but co-operative constituent groups. In its desire to ensure the representation of these distinct interests in government, it therefore echoes the logic of the dual division described in Chapter 4. The model's animating ambition to generate and ensure morally appropriate outcomes (i.e. non-arbitrary ones) further demonstrates the commitment to a specific conception of the common good which has habitually characterised republican thought. It is thus, to this tradition, which the next section will look for historical kinship, and thus, comparative guidance.

A proper analysis of the conceptual origins of this mixed theory of government, and, indeed, of the underlying reasons for its apparent contemporary irrelevance must necessarily examine it, however, in the context of republican theory as a whole. Mixed models of institutional arrangement have always been understood as ancillary elements of a broader republican scheme. Consistently committed to the social and political pursuit objective and universal values, republicans have generally regarded mixed government as a means of achieving this end. Changes in the overall republican outlook have thus historically affected the way in which the mixed theory of government developed. The initial emergence, the increasing attractiveness, and the ultimate abandonment of the mixed theory are all, at least in part, attributable to significant shifts in the social and political paradigms of republican thinkers. The next section of this chapter will therefore trace the impact of republicanism's ideological evolution on the mixed theory of government. This section will first provide an overview of the way in which the republican belief in universal values has altered over time. It will concentrate, in

particular, on that process of political and constitutional secularisation which fostered and encouraged republican interest in institutional design as an avenue towards universality. The focus will then switch to the part played by mixed theories of government in the pursuit of this goal, and on those modern-day difficulties which ultimately cast doubt on the doctrine's contemporary utility.

II. Republicanism and the Pursuit of Universal Values

A. Universality through association – the Aristotelian view

As with so much in Western philosophy, Aristotle looms large as an ancient and original articulator of republican government. Reflecting his understanding of man as a value-oriented and associative being, his political theory sought to construct a perfect polity out of the active participatory interaction of a diverse citizenry. Seeing perfection in the attainment of the universal, Aristotle attempted to design a republic in which all individuals could achieve their particular ends.[2] Perfection, he felt, would be found be found in such a universality of ends. Of course, the vastly varying nature of these individual ends precluded the adoption of any single prescription for civic action.[3] The satisfaction of all depended upon the recognition of the differences of each, and on each person's entitlement to a different end. Aristotle therefore devised a model of mixed government in which the different categories of citizen would all be represented. He distinguished these categories – the one, the few and the many – on the basis of the qualities of the citizen in each. The active interdependence of these constituent elements would, if properly balanced, successfully create the timeless and universal from the temporal and particular. This was to be the challenge which would recur across history as a central republican theme.

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[2] Aristotle, *The Politics*.

[3] He did make an exception to this in the case of the philosopher-king, whose intelligence would be as far above men, as man's was above beasts. Until such a man emerged, however, the republic would have to be rules by those laws created by the participation of the different groups, with their different qualities, in government.

> The formal dilemma of the ... republic [was] that it was an attempt to realize [sic] a universality of values within a particular, and therefore finite and moral, political structure.[4]

As this passage by Pocock makes clear, the dedication of the state to the pursuit of universal values has been an enduring objective of republican thought. In Aristotle's era, the search for the universal had been understood as an attempt to escape the temporal weaknesses of human existence, to move from Plato's cave of shadows into the dazzling sunlight of the ideal world. Plato, it will be remembered, had hypothesised the existence of perfect Ideas or Forms, of which all facets of human existence were but a copy. Human knowledge was, therefore, imperfect and contingent. However, man could seek to improve his knowledge by a process of extracting general principles from human experience. Knowledge of such generality was closer to the Forms and thus of a higher value than knowledge of the specific. This instinct towards generalisation thus lay at the heart of the attempt by men to create a government of laws.[5] The quest for universal values was a quest for perfection, to achieve timelessness out of the random vicissitudes of the imperfect temporal life.

B. Universality and action – the impact of early Christianity

The emergence of the Augustinian Church, however, discouraged such efforts for a significant period of time. Christianity replaced the Greco-Roman view of history as an irrational series of imperfect events with a more instrumentalist interpretation. Existence was part of a sacred process, a journey from the fall of Adam and Eve back towards eventual redemption and salvation. Augustine, however, had insisted on the total separation of human history from the timeless ordering of the divine universe. This divorce of history and eschatology[6] condemned the individual to a temporal and

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[4] Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (2nd ed., Princeton University Press, 2003), at 84.

[5] Of course, abstract universals could only logically lead to further abstract universals, thereby creating the problem of how to apply them to particular cases. Aristotle felt that this would be assessed on the basis of the people's experience of government over time, or, in the more short term, on the co-operative pooling of individual's judgments from their own particular experiences.

[6] The doctrine of the Church which related to the end of time.

unintelligible existence. Time, and the individual's life, occurred in a moment which acquired meaning, and thus could be understood, as a result of its relationship with salvation and the end of time. As, however, the meaning of that moment was part of a divine process outside contingent time, this understanding was denied to the individual located in that moment. For him, 'the problem of living in the present is the problem of living with an unrevealed eschatology'[7].

The Church, further, was consistently clear that the actions of individuals or societies in human history could have no impact or influence on the serene progress of God's plan. The universe was divinely organised as God intended, and all were expected to occupy their place in the ordained hierarchy of existence. For such a belief system, suggestions of political reform in pursuit of universal values simply did not arise. History was predetermined and, for the temporal individual unaware of God's timeless plan, impossible to understand or to assess. The universal was forever beyond the reach of the time-bound individual. Salvation lay in communion with God and the eternal order rather than in contingent action in human history, no matter how well-intentioned that might be.

The difficulty with so dehumanising a doctrine was that it deprived the individual of the incentive to act as a virtuous man. The stark Augustinian insistence on the separation of the secular and the divine condemned even the virtuous man to an existence in which he was continuously exposed to irrational, and often apparently unfair, events. For the medieval mind, this irrationality was encapsulated by the idea of Fortune, an unreasonable force for chaos and disorder in the world.

> Fortune is ... the circumstantial insecurity of political life. Her symbol is the wheel, by which men are raised to power and fame and then suddenly cast down by changes they cannot predict or control.[8]

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[7] Pocock, *op. cit.*, at 36.
[8] *Ibid.*, at 38.

Some questioned, however, how God could allow a good man to fall foul of Fortune. Isolated from the eternal order by its innate unintelligibility, man could only act in the temporal world. In this, he was urged to be virtuous, to do good. Ancient philosophy, from which the Church had not deferred, had taught that a man of virtue should partake of public life so that he might demonstrate virtue to others, thereby encouraging them to so act themselves. Yet, by so doing, the virtuous man automatically exposed himself to the very real dangers which the public life of both ancient and medieval times was inclined to involve. Fortune was an ever-present threat, liable to impinge upon his person at any time. Yet, if this public man has been virtuous in his actions, and has thus encouraged virtue in others, how can a God who is perfect virtue, allow Fortune to prevail?

C. The return of universality as a secular and political phenomenon

(i) Boethius, virtue and the political life

Prominent amongst those who wrestled with this issue was Boethius, whose *De Consolatione Philosophaie*[9] became 'one of the most-read books of Western history'[10]. A Roman aristocrat who served under a Gothic king, Boethius was ultimately executed after a fall from power. He thus had a very personal interest in this question of how a man who has sought to use the powers he has attained in the secular world (which is, of course, the only place in which he can do so) for good could be so susceptible to Fortune.

Boethius sought to rationalise Fortune as the imperfect individual experience of Providence, which was God's eschatological design in action on earth. As the instantiation of God's divine scheme, Providence was unintelligible as such to an affected individual. This apparent irrationality, however, allowed the individual to demonstrate his faith in the existence of Providence, and thus of that divine creator from whom all was ordered. Public action thus provided the opportunity for the virtuous individual to show his Christian faith. Virtue was identified with the faithful facing of the daily trials of what would appear to the non-virtuous or faithless man as irrational Fortune. Civic virtue thus

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[9] Boethius, *De Consolatione Philosophaie* (Walton trans., Oxford University Press, 1927.)
[10] Pocock, *op. cit.*, at 38.

lay in the public exposure of oneself to these trials, thereby exhibiting to others the strength of one's faith in God's Providential plan.

Boethius' theory exerted a secularising influence in two key ways. In the first place, his emphasis on the civic value of public performances of faith provided a quasi-spiritual role for associative actions. Boethius himself had not denied the Augustinian doctrine of social and eschatological separation. He had simply sought to rationalise the place of human virtue in an imperfect world. Augustine's idea of virtue had, however, centred on the faithful maintenance of one's place in the eternal communion. It thereby implicitly prioritised the contemplative life, spent in the study of God's perfection. Boethius, however, found virtue in the active, associative – and thus political – life. If individuals could be virtuous by showing faith in the face of Fortune, so too could societies as a whole.

> [T]he possibility was [thus] entertained ... that kingdoms and commonwealths, governed by Christians under Christian laws, might achieve a measure of earthly justice, practice of which, at a level sufficiently public ... might be positively related to one's redemption through grace .... [This] logically entailed the reunion of political history with eschatology.[11]

Society – and thus the political order – thereby acquired a virtuous role which the Church had always, to that point, denied it.

Furthermore, Boethius' development of the idea of Providence introduced a secular dimension to the eschatological order. The Church, we have seen, had always insisted on the separation of the human and the divine. Providence, however, established a relationship between the earthly and heavenly realms. Eschatological events occurred within human time. Even though they were unintelligible as such, such human happenings were thus distinct and identifiable incidents in the operation of God's timeless plan. This was particularly noticeable on those occasions when earthly events

[11] *Ibid.*, at 43.

mirrored particular religious prophecies. Dramatic political or military developments, like those detailed in the Old Testament, were concrete examples of God's wishes in action. At these times, a rare intelligibility lay within the individual's grasp as the eschatological order was revealed. Boethius' discussion of Providence thus blended with the millennial tradition of apocalyptic prophecy to connect secular society with the kingdom of God.

> Prophetic history thus served as a means of ... re-sacralizing politics .... Apocalyptic, in fact, was a powerful instrument of secularization, [sic] a means of drawing the redemptive process back into that dimension of social time from which Augustine had sought to separate it, and depicting it as the extension of the transformation of existing secular processes.[12]

Political action has thus become not only a means of showing virtue, but also, in its more radical moments, of potentially touching the divine. The seeds of secularisation had been sewn.

(ii) The republic as virtue

That this identification of the political with the spiritual could ultimately lead to the subordination of the idea of virtue to political ends was evidenced by the actions of Salutati in the 14th century. Authority, to this point, had been conceived in terms of its place within the universal empire of Christ. Even in Dante's Florentine republic, 'human perfection, both personal and political [was] to be found in occupying one's place in an eternal order'[13]. Baron has argued, however, that the rise of an imperialist Milanese power under Giangaleazzo Visconti encouraged the Florentine Salutati, in the service of his city, to pen a refutation of the idea of authoritarian salvation.[14] Rejecting the Caesarean stylings of Visconti, Salutati attached the imperial tradition, opting instead to portray the republic (and thus a defiant Florence) as the apotheosis of civic virtue.

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[12] *Ibid.*, at 44-46.
[13] *Ibid.*, at 50.
[14] *See* Baron, *The Crisis of the Early Italian Renaissance* (2nd ed., Princeton University Press, 1966); *From Petrarch to Leonardo Bruni: Studies in Humanistic and Political Literature* (Chicago University Press, 1968).

That such a rhetorical reversal of tradition was at all plausible can be attributed to the contemporaneous discussions of citizenship, which formed the ideological backdrop to Salutati's thesis. As already noted, the emphasis traditionally attached to the individual's place in a universal and hierarchical order had inspired the Church's celebration of the value of contemplative life. Boethius' defence of political action as a means of exhibiting virtue had led, however, to a renewed awareness of the value of active citizenship. Petrarch had presented the active and contemplative lives as dialectic, but equally viable, options. The virtuous character of the active life encouraged an increasing interest in participatory forms of reasoning. Where the medieval mind had previously equated knowledge with the practice of formal contemplative deduction, philology – the study of the actual meaning of an original writer – now became increasingly prized. Formal logic rested on an assumption of knowledge as a series of timeless and universal truths. Philology, on the other hand, emphasised the notion of the idea in its original time, thereby exhibiting a belief in the enduring value of contingent and temporal thoughts. The analysis of the ideas and intentions of early writers and thinkers was understood as a cross-temporal conversation in which knowledge was discovered through communication.

The concept of civic humanism was developed, arguing that the universal was not a matter of external deduction but was, in fact, immanent in man. Universal principles emerged from within, to be elaborated, identified and thus understood by a consideration of particular examples. Human actions were an attempt to demonstrate universal values, the universality of which would be recognised and developed by other participants in this secular humanist conversation. 'The active man asserted with the total engagement of his personality what the contemplative man could only know'[15]. To such theorists, dialogue, communication and conversation were valued as the means to universal knowledge.

> Truth itself became less a system of [abstract] propositions than a system of relationships to which the inquiring spirit became party by its inquiry. In consequence, participation in the humanist conversation ... became in itself the

[15] Pocock, *op. cit.*, at 65.

> mode of relation to the universal, and the universal could be known by perpetual engagement in the conversation with particulars .... Contemplation had itself become social.[16]

In this context, the republic – a polity characterised by the discursive interaction of its citizenry – could validly be portrayed as the noblest political instrument of human virtue. 'In action', the humanists believed 'the life of man rose to the stature of those universal values which were immanent in it'[17] – and none were more active than the citizens of a republic.

Salutati's celebration of the active citizenship and republican values thus had the effect of binding the virtue of the individual to the fate of his state. If association was a form of virtue – and for humanists, as it had been for Aristotle, political association was the highest form – then the virtue of the citizen depended on his continued ability to associate with others. As the republic constituted the best mode of such association, the virtue of the citizens thus depended on the survival of the republic. The political utility of Salutati's thesis at a time of external, authoritarian threat is obvious.

(iii) The republic as divine polity – the influence of Savonarola

This identification of the virtue of the individual with the political character of the polity was underpinned by the emergence of Savonarola as a key figure in Florentine reform. Attacking the Roman Church as a human, and thus temporal, institution in need of occasional renewal, Savonarola regarded his city as divinely ordained to presage this process. The reform of Florence, he prophesied, would inaugurate a moment of eschatological restoration. Predicting the fall of the city and the subsequent rise of a new Florence through which the earth would be purified, Savonarola thereby not only connected the virtue of the individual with Florentine politics, but actually presented political reform as a way of engendering a prophesied moment of eschatological intelligibility, in which the city would escape time and ascend to the universal. Like

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[16] *Ibid.*, at 63.
[17] *Ibid.*, at 65.

Moses on Mount Sinai, Florence would be the vessel through which God would transform the world, thereby transcending its temporal limitations to become part of the eternal eschatological order.

When the Medici fell in 1494, the enactment of a mixed republican constitution could thus be represented as an occasion of universal significance. In Augustinian thought, the state would become timeless only by the grace of God. Savonarola thus portrayed this new timeless republic as a kingdom of grace. Monarchy was no longer seen in Florence as the archetype of the universal order. Instead the republic became a theocracy in which the active political pursuit of the universal value of the common good was identified with God.

The fall of Savonarola, and his confession to false prophecy deprived the Florentines of their transcendent moment of eschatological grace.

> Florence has been expecting a new Jerusalem, from which would issue just laws and splendour, and an example of righteous life, and to see the renovation of the church, the conversion of unbelievers and the consolation of the righteous.[18]

The collapse of such hopes did not, however, detract from the dramatic popularisation of the republic as the perfection of civic virtue. As the next section shall discuss, the correlation between individual virtue and the survival of the republic had encouraged considerable interest in theories of the stability of the state. These theories had, however, tended to discuss the formation of the perfect republican polity in terms of a single moment of super-human constitutionalisation – an act of such exceptional wisdom that it could easily be regarded as divine. As alluded to above, the timeless polity was allowed its universality by the grace of God. Thus the act of constitutional creation was a single moment of grace in action. Lycurgus' single-day establishment of the Spartan constitution figured prominently in the political discourses of the era as an historical example of so unusual an occurrence. This was also how its supporters had understood

[18] Landucci, *A Florentine Diary from 1450 to 1516* (Dutton, 1927), cited in Pocock, *op. cit.*, at 115.

the Savonarolan republic. Constitutional reform was not an ongoing process but a solitary act.

(iv) The republic as the product of human contrivance

It was to be Machiavelli's contribution to the study of this topic which eventually resulted in the radical secularisation of the political process. In contrast to the ideal single-act republic of Sparta and Venice which had, to that point, dominated the debate, Machiavelli looked to Rome as an example of republican perfection. Critically, he described the development of the Roman republic as the cumulative result of a series of imperfect, temporal acts. Furthermore, he attribute this impulse towards perfection to the internal discord which had characterised the politics of that state. This was, 'shocking and incredible to [that medieval] mind[set] which identified union with stability and virtue, [and] conflict with innovation and decay'[19].

The search for the stable and timeless polity had thus far been conducted in terms of the gradual secularisation of the idea of grace. Perfect polities were explained in terms of the extent to which they mirrored the grace of God. Machiavelli did not dissent from this theology. He did, however, drastically politicise the pursuit of grace. What had originally been a divine process, and had later become an individual moment of quasi-divine inspiration was now depicted as the result of a series of imperfect, incremental, and resolutely secular, actions. Furthermore, this process had occurred over the course of several generations of Romans. The polity had thus escaped its limitations not by way of a lone instant of transcendent timelessness but by a sequence of purely human processes. This thereby implied that the conduct of human political affairs over a long period of time could perhaps again achieve such perfection. Machiavelli thus reduced the pursuit of the universal to attainable particularist means.

Machiavelli's key influence was to present the republic in strictly secular terms. He even, for example, subordinated religion to political success, arguing that it played an important role in encouraging the support of the citizenry for civic acts. Virtue was similarly

[19] Pocock, *op. cit.*, at 194.

secularly conceived. For Machiavelli, the highpoint of virtue was the active participation of the citizen in the armed defence of his republic. The bearing of arms rather than religious faith thus lay at the heart of the citizen's political personality. Even the threat to the republic which, to that point had traditionally been characterised as external Fortune, was secularly explained. Machiavelli's Roman republic – and thus the civic virtue of its citizens – was imperilled not by Fortune but by corruption. Rome, in his opinion, had collapsed because of the corrosive process by which factions emerged, attracting that support which citizens rightly owed to the republic itself.

All aspects of republican rule – its establishment, its governance, and even its eventual fall – were thus explained as the result of entirely human actions. Detached from divine grace, the republic was once again a temporal polity. Now, however, this temporality no longer precluded the pursuit of universal values. The perfection of the republican polity – and thus the security of civic virtue – was rendered as a human process. Both the republic and the threat to its stability were portrayed as the products of human contrivance – it was thus within the capacity of man to attempt to address that threat and thus to establish it as a timeless and universal entity. It was in this context that the mixed theory of government was to emerge as a popular prescription for the pursuit of universal values.

III. Constitutional Universality and the Mixed Theory of Government

A. Mixed government and the Venetian model

As the previous section had shown, the medieval mindset had evinced an increasing belief in the interdependence of individual virtue with the survival of the state even in advance of Machiavelli's moment of strident secularity. Although any stable states were still publicly presented as an example of God's grace in action (at least before Machiavelli's work) there had been a predictable upsurge of interest in the study of

political stability. Political analysts had increasingly come to regard stable polities as examples to be scrutinised and, if possible aped – even where they continued to concur in the quasi-religious explanation of that stability as eschatologically indulged. An enduring polity might be divinely inspired but, for the 16th century Florentine, its design was strictly human. Considerable attention had thus been devoted to the particular institutional arrangement of those polities which had endured for an extensive period of time.

In this context, the myth of Venice was enormously influential in the re-popularisation of mixed models of government. Developed, in part by the Florentines, this myth hailed the Venetian experience as a lesson to their city of the value of a mixed constitution. A city whose centuries-old stability had come to characterise it as *la Serenissima*, its division of duties between Doge, Senate and Consiglio Maggiore was interpreted by many as the medieval incarnation of Aristotle's harmonious interaction of one, few and many.

> The image of Venice was ... the vehicle through which [republican writers] conveyed once more the categories of Aristotelian politics. Yet Venice became a myth, a paradigm exercising compulsive force on the imagination; and ... the force of the symbol surely lay in its perfection: in the vision it conveyed of a polity in which all particulars were harmonized and whose stability was consequently immortal.[20]

It was thus to Venice that the Florentine's turned for inspiration after the fall of the Medicis in 1494. The introduction of a so-called Venetian constitution was a conscious attempt to establish such this idealised institutional order in the city of Florence., illustrating quite clearly the extent to which ideas of mixed constitutionalism had obtained a popular potency.

This Venetian constitution ensured that the mixed theory of government was dominated the political and constitutional discourse of this consciously radical age. The mixed

[20] *Ibid.*, at 102.

theory emerged as the philosophical starting point for all political analysis and debate. Aristotle's categorical subdivision of the state's citizenry exerted considerable influence, as did Polybius' description of a stable state as one in which the ideal (and unattainable) forms of government – democracy, aristocracy and oligarchy – existed in interdependent harmony.

Even those, like Guicciardini, who rejected the newly Venetian republic couched their opposition in the language of Aristotelian-Polybian balance. A member of the city's optimate class, he felt that the system established in 1494 allowed excessive civic influence to the many. He accordingly argued for a re-division of power which would entrust the talented few with the more skilled duties of statecraft. This obviously accepted, however, the inherent veracity of a system of class-based balance. Opponents disagreed with the mechanics of mixed constitutionalism but not with it as a notion. Critical comment concentrated on the details of the design at hand rather than on the theory underlying it. This focus on specifics indicated the extent to which Florentine intellectuals had embraced the mixed theory's most basic assumption – that a stable and timeless polity could be constructed through the interdependent distribution of powers between its constituent classes.

> It offered ... a means of associating the particular virtues of men composing the political society in such a way that they would not be corrupted by their particularity but would become parts of a common pursuit of universal good; and in consequence it offered powerful incentives to consideration both of what types and categories of men, displaying what characteristic virtues and limitations, made up the political society, and of the means by which it was proposed to associate them in common pursuit.[21]

The search for stability had thus given birth to a form of political science, in which analysts were primarily pre-occupied with identifying the correct constituent classes, and then devising an appropriate system of harmonious interaction. God may still have

[21] *Ibid.*, at 115.

appeared as a distant agent in many of these works but, effectively, the pursuit of the universal had been humanised. Guicciardini, Machiavelli and Giannotti all treated stability as a science of virtue rather than a product of Providence, thereby depicting the mixed constitution as a (in Machiavelli's case avowedly) secular means of perpetuating the republic.

B. The Problem of Constituency

The secularisation of the search for universality outlined in Section II represented an effective return to the Aristotelian project of constructing a universal order from its individual elements. Republican faith in the capacity of the temporal state to erect a governmental structure in which universal values were secured had been restored. This raised, however, the subject of political and institutional specifics. A balance of particulars could potentially give rise to the universal but the success of any such attempt was entirely dependent on the individual characteristics of the design in question. As the previous paragraph has noted, the political discourse of 16th century Florence thus concentrated on identifying the constituent classes of the state, and, more significantly, on erecting an institutional architecture capable of appropriately blending their influence and abilities. Questions of constituency had supplanted those of temporal universality as the primary concern of the aspiring constitutionalist.

The political analysts of the day tended to proceed from an acceptance of society as comprised of a basic union of the one, the few and the many. This was in part due to the influence of Aristotle's tripartite classificatory conception, as popularised by its contemporary incarnation in Venice. However, the image of the few and many as distinct constituent classes was also familiar to any observer of recent Florentine history. The politics of the city had long been dominated by conflict between the well-born *ottimati* and the common *popolo*. The revolutionary convulsions of the 15th century were largely the result of attempts by one of these two classes to increase their influence at the expense of the other. The city, therefore, was regarded by its writers as bearing witness to the veracity of the mixed theory's most basic assumption – that there existed in any society a distinct number of constituent classes, the rival interests of which would have to

be accommodated in any successful institutional order. That this seemed, for Florentines, so self-evident encouraged the emergence of the mixed theory as the dominant political paradigm, and focused attention almost entirely on the more complex and sophisticated task of striking the appropriate constitutional balance between these discrete groupings.

Machiavelli, returning to the example of the Roman republic, favoured a system of class-specific institutions which would represent the particular interests of their members in government.[22] Construing the ambition of the oligarchic few as the most significant threat to the balance (and thus virtue) of the republic, he required the establishment of common plebeian institutions capable of keeping the corrosive impulses of the *ottimati* in check. Despite his faith in the beneficial influence of the common people, it is notable that Machiavelli continued to adhere to the ancient tradition of vesting the actual exercise of power in the able and ambitious few. The people, he felt, were inherently ill-equipped to successfully rule the state. Furthermore, a system of democratic elections would tend to favour the wealthy and better-educated few. The mixed theory therefore required an institutional dispersal of power between these classes. The *popolo* would be automatically excluded from skilled political office. In this way, 'common citizens [would] no longer suffer from the delusion that they are effectually eligible for higher offices that they actually seldom attain and, if they do, within which they are marginalized',[23] but would rather be encouraged to properly scrutinise and check the actions of an oligarchic body instinctively opposed to their interests. 'Machiavellian popular government clearly requires class-specific institutions that both raise the class-consciousness of common citizens and enable them to patrol more exalted citizens with a vigor that elections alone do not provide.'[24]

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[22] Machiavelli, *Discourses on Livy* [c. 1513-19], trans HC Mansfield and N Tarcov (Chicago, 1997).
[23] McCormick, "People and Elites in Republican Constitutions, Traditional and Modern", delivered at a workshop on 'Constituent Power and Constitutional Reform' in Florence on March 24th, 2006, and kindly provided to the author by e-mail. The paper will be included in the forthcoming publication, Walker and Loughlin eds.., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).
[24] *Ibid.*

Guicciardini, on the other hand, proposed a Venetian-inspired system of broadly uninhibited elections.[25] He rejected the idea of class-specific institutions, suggesting instead a tripartite institutional division in which particular functions of the state would be allocated to different bodies. There are obvious parallels therefore between this model, and the dominant contemporary understanding of the separation of powers. It is crucial, however, to bear in mind that Guicciardini (unlike modern constitutionalists) had not rejected the mixed theory's image of society as a partnership of discrete social classes. Rather, he regarded free elections as a means of securing the political pre-eminence of the ottimati. His model reflected the fact that he 'did not trust elite citizens ... to distribute offices amongst themselves, but [that] he [also] resented and feared the demands of Florence's "jealous" and "ignorant" common citizens to hold the republic's highest offices'[26]. Guicciardini thus accepted the basic suppositions of the mixed theory but sought to employ them in a novel and – from the point of view of modern political theory – very perceptive fashion.

> Guicciardini developed a framework where a sociologically anonymous citizenry elevates to positions of prominence those who already hold privileged positions through the formally class-blind but informally wealth-enabling method of election.[27]

His model can thus be regarded not as a modern-type abandonment of the mixed theory but as a re-invention of it in an unusual form. Ostensibly unitary in its image of society, Guicciardini's theory entirely depends on the veracity of its belief in the inherent existence in society of a many and a few. Superficially class-blind, it is, in fact, inescapably class-oriented.

These alternative institutional models demonstrate quite clearly the extent to which the question of constituent power dominated 16th century republican thought. Both

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[25] *See* Guicciardini, *Dialogue on the Government of Florence* [c. 1521-24], trans. A Brown (Cambridge University Press, 1994); and Guicciardini, *Discorso di Logrogno (On Bringing Order to Popular Government)* [1512], trans A Moulakis (Lanham, 1998).
[26] McCormick, citing Guicciardini, *Maxims and Reflections*, trans. M Domandi (Philadelphia, 1965).
[27] *Ibid.*

Machiavelli and Guicciardini felt that there were natural constituencies in society. Machiavelli sought to institutionally enshrine them in the architecture of government in keeping with the traditional Aristotelian approach to the question of harmonious balance. Guicciardini, on the other hand, advanced an unconventional constituency-neutral scheme. Although he did so on the basis of his estimation that the naturally-dominant few would prevail, his egalitarian approach foreshadowed the way in which questions of constituency specificity, as against unitary neutrality, would recur in the constitutional discourse of England and America. Commenting on this contrast, McCormick has remarked that:

> Machiavelli's writings can be read as the most radical summation, if last gasp, of traditional republican constitutionalism. On the contrary, Guicciardini is the largely unacknowledged father of modern mass democracy understood as elective oligarchy.[28]

Inspired by mixed theories of the state, Guicciardini had, perhaps unwittingly, anticipated developments which would, in time, pose serious problems for mixed theories of republican rule, calling into question the whole idea of distinct constituent classes. It is thus to the English and American experiences of these difficulties that attention will now turn.

C. English republicanism

(i) The mixed theory in the English tradition

Mixed theories of government, with their implicit commitment to a constructivist polity, have limited relevance to a monarchical system. The Augustinian Church, it has been mentioned, had characterised authority, both political and spiritual, as an emanation of God's universal order. The individual, it will be remembered, was expected to unquestioningly occupy their place in the holy eschatological communion.

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[28] *Ibid.*

> The practitioner of the *viva contemplative* might elect to contemplate the unchanging hierarchies of being and to find his place in an eternal order under a monarch who played in microcosm God's role as guarantor of that order; but the exponent of the *vivere civile* was committed to participation and action in a social structure which made such conduct by the individual possible.[29]

The medieval English theories of divine right echoed this view:

> Kings are justly called Gods, for that they exercise a manner or resemblance of Divine power upon Earth: For if you will consider the attributes of God, you will see how they agree in the person of a King. God hath the power to create or destroy, make or unmake at his pleasure, to give life, to send death, to judge all, and to be judge nor accomptable to none. To raise low things high, and to make high things low at his pleasure, and to God are both body and soul due. And the like power have Kings.[30]

The traditional Tudor conception of the state, its organs and its people as immanent offshoots of the King thus could not countenance the idea of constituent social classes, each with an ascending entitlement to governmental input, let alone authority. Mixed republicanism thus had a limited initial impact on English rule.

Charles I's 1642 statement, *His Majesty's Answer to the Nineteen Propositions of Both Houses of Parliament*, radically altered this situation, however, placing mixed theories of social and institutional balance at the very heart of that period's dramatic constitutional upheavals. An attempt by Charles I to forestall impending civil war, the declaration advanced an understanding of the state in which the King, the Lords and the Commons shared power. Pamphleteers, such as Pym, had previously characterised the government of England as a partnership of distinct components of the single social order, but had generally stopped short of treasonously including the King as a sub-social element. Here,

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[29] Pocock, *op. cit.*, at 56.

[30] James I, Speech to the Lords and Commons of the Parliament at Whitehall, March 21st, 1609, in Somerville ed., *James VI and I: Political Writings* (Cambridge University Press, 1994), at 181.

however, the King had freely and openly proclaimed that to be the case. The statement thus cast down the monarch from his elevated imperialistic position in God's universal order, to the lowly status of an ancillary actor in a multi-constituent state. It was, unsurprisingly, a 'disastrous tactical error in royalist polemic'[31]. From the point of view of the issue at hand, however, it established the mixed theory of government as the paradigmatic model of English political discourse, through which the constitutional convulsions of this revolutionary era would be interpreted and expressed.

(ii) Constituencies and power in Civil War England

Debate thus initially focused on the identification of these constituent social classes. Parker, arguing on behalf of the Parliament, suggested that the people should be regarded as the constituent power of the State, and that Parliament – as the representative of these people – should thus be invested with absolute authority.

> The judgment of the major part in Parliament is the sense of the whole Parliament, and that which is the sense of the whole Parliament is the judgment of the whole Kingdom; and that which is the judgment of the whole Kingdom is more vigorous, and sacred, and unquestionable, and further beyond all appeal, than that which is the judgment of the King alone.[32]

In this logic, early portents of the doctrine of parliamentary sovereignty are obvious. However, as Loughlin has noted, this assertion of parliamentary authority in the name of the people was actually 'the means by which a small elite (the gentry in the commons) justified to themselves the arrogation of governmental power'.[33]

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[31] Pocock, *op. cit.*, at 361.

[32] Parker, "Some Observations upon his Majesty's Late Answers to the Declaration of Remonstration of the Lords and Commons, May 23, 1642" in Thomason, *Jus Populi* [1644].

[33] This is taken *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice* , which was delivered at a workshop on 'Constituent Power and Constitutional Reform' in Florence on March 24th, 2006, and kindly provided to the author by e-mail. The paper will be included in the forthcoming publication, Walker and Loughlin eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).

As in Florence, therefore, political and constitutional debates were concerned with the relative influence of constituent social classes – the King, the few and the people. In the climate of constitutional renewal which surrounded the Civil War, questions of constituency were to the fore. '[R]adical views ... were expressed not only on constitutional arrangements but also on social formation.'[34] The Levellers, for example, sought to establish an institutional system in which the power of the people would be balanced against that of their ostensible representatives in Parliament. Power would be vested in King and Parliament on the basis of an agreed and enacted text dictating the relationship between People and Government.[35] Authority was held in trust for the People, to be exercised for their benefit along designated lines. Here again, is the familiar social and institutional dynamic between many and few.

(iii) Harrington and the idea of the natural elite

The question of the appropriate institutional divisions for the mixed theory thus recurred in 17th century revolutionary England. The state was now conceived as a republic of constituent classes rather than as a unitary reflection of monarchical authority. Once again, however, the issue of the identification and empowerment of the elite was to raise its head. It has already been noted how Parker's notion of People-in-Parliament was effectively an attempt by the existing elite to obtain power for themselves. This echoed Guicciardini's model of elite power through ostensibly egalitarian means.[36] As the subsequent Civil War debates showed, however, there were many who were unhappy with this notion of a dominant and entrenched elite. Prominent amongst these was James Harrington whose *Oceana* represented a radical and innovative reappraisal of republican politics.[37]

Like his Florentine forebears, Harrington founded his republic upon the idea of active citizenship, equating this with the virtue and stability of the state. Similarly, he

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[34] 'These included the Fifth Monarchists who, following the Book of Revelations, argued the necessity of establishing a system of theocratic rule by 'the saints' pending the arrival of Christ's Kingdom on earth; the Ranters who advocated individual liberation through the discovery of the godhead within them; and the Diggers ... who called for an end to private property and advocating community control over land.' *Ibid.*

[35] This was set out in 1647 in their 'Agreement of the People'.

[36] See McCormick, *supra.*

[37] Harrington, *The Commonwealth of Oceana* (1656).

understood the threat to the republic as one of internal corruption rather than external force. He felt that the individual's ownership of property distinguished his decision to bear arms – Machiavelli's own basis for civic virtue – as that of active citizen rather than as an obedient vassal. He therefore conceived of corruption as a distribution of power which did not reflect the republic's distribution of property.

Turning his analytical attention to the English order, he depicted the rise of the land-owning commoner class as the source of an irreversible movement towards constitutional reform. Previously, the traditional Gothic constitution had depended upon an unstable 'wrestling match' between the two existing proprietary classes of King and Lords – Aristotle's one and few. This relationship, in his view, had been characterised by 'an instability rendered persistent by the circumstance that neither party could either adjust to the other's power nor become independent of it'[38]. The introduction to this constitutional matrix of a third fore, the newly landed Commons, had forever destroyed this dualist structure, and allowed the opportunity to establish an immortal English republic.

Harrington's understanding of both citizenship and corruption in terms of a concrete tangible had, however, an inescapably democratising effect.

> The political individual depicted in Harrington's scheme is still the exponent of civic virtue presupposed – however sceptically – in all Florentine schemes of civic humanism, but ... Harrington emphasis less the moral than the material bases of his personality.

This eclipse of the moral by the material undermined, however, the conventional categorisation of society's constituent classes. Mixed theories from Aristotle to Machiavelli had always assumed the existence of the few and one to whom the many would entrust the more active and onerous tasks of citizenship. Even Guicciardini's constituency-neutral system had still been justified on the basis of its allocation of power to the pre-existing elite. These classes were based on inherent qualitative differences of

[38] Pocock, *op. cit.*, at 388.

civic virtue and skill. To base political citizenship upon property, however, was to treat all landed individuals as equal.

Harrington therefore sought his one and few in the meritocratic emergence of a natural elite. 'The many', he felt could 'be trusted to know the talented few when they see them'.[39] As his Florentine antecedents had argued, Harrington found virtue in the mutual recognition and respect of these qualitative classes. The many were thus charged with the identification and acclamation of those citizens best suited to the actual exercise of power.

> [The] role of [Harrington's thesis] in Atlantic thought was to argue that the relations of aristocracy to democracy, crucial in any theory of mixed government, took shape best in a society of relative freedom, mobility, and outspokenness: that aristocracy, although a function of property as well as personality, was a natural rather than an institutional phenomenon, which worked best when it was not entrenched but left to the recognition of the many.[40]

Furthermore, Harrington felt that, once identified, power should be vested in this natural aristocracy on a rotational basis. They did not need to constitute a defined class with its own interests. Rather they were to act as a reservoir of talent upon which the republic could draw. They would emerge from the many, and be returned to the many, regardless of the popularity of their actions in office. This avoided the oligarchic effects of election, upon which Guicciardini's system had been based. This, he suggested, would ensure that they remained truly representative, and thus free from corruption. Regular rotation would be the means of renewing the republic.

(iv) The traditional constituent classes re-emerge

Given his refutation of the notion of an established, aristocracy, it is ironic that his work came to be employed as part of a campaign to secure the position of the hereditary House

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[39] *Ibid.*, at 394.
[40] *Ibid.*

of Lords in the constitution's institutional structure. The so-called neo-Harringtonians relied on his insistence that representatives act on behalf of their constituent peoples to portray the increasing patronage of the King in Parliament as an insidious form of debilitating corruption. The practice of members of the Commons becoming place-holders for the King was argued to constitute a serious threat to Harrington's central values of freedom and virtue. The neo-Harringtonians thus demanded not only the separation of King and Commons[41] but the retention of the Lords as a bulwark against the co-operative corruption of the patronage system. The aristocracy whom Harrington had attacked were presented as an institutional assurance of republican rule. A mixed constitution of identifiable social classes was thus argued to protect the values which had inspired Harrington's more unitary understanding of the republic. Oceana and the ancient constitution of King, Lords and Commons had been reconciled. Harmony was again assured by a system of constituent balance.

This neo-Harringtonian doctrine effectively restated the traditional tenets of mixed republican government. In its idea of three representative institutions, sharing power along inherent (and enduring) constituency lines, it echoes the models of both Aristotelian and Machiavellian rule. The English system could thus comfortably be accommodated within the parameters of conventional mixed republicanism. Harrington's own work, however, remained as a challenge to traditional notions of constituent power. Oceana went further than Guicciardini's *Dialogue* by suggesting not only that the system should be formally equal, but that such formal political equality was in fact real, representing a necessary characteristic of modern republican democracy. The question had, however, been avoided rather than answered. With the re-emergence of Harringtonian theories in America, constitutionalists were forced, once again, to grapple with the difficulty of establishing a mixed system of government in an ostensibly unitary polity.

D. Republicanism under threat – experiences in America

[41] It should be noted that the call for institutional separation here is motivated by ethics rather than functional efficiency.

(i) Commerce, virtue and citizenship

Before considering the specific issue of constituent classes, a short overview of general developments in republican doctrine is apposite. Republican theory, as outlined by Harrington, had portrayed political virtue in proprietary and essentially agrarian terms. The possession of property secured that liberty of the individual from domination by another which was at the heart of republican virtue. The growth of commerce in the 18th century thus constituted a serious threat to the English republic. Inheritance had been explained by Harrington as the means by which the natural order of the republic was maintained. Trade, by facilitating and, indeed, normalising the wealth-driven transfer of personal property *inter vivos*, thus represented a disruptive force. Furthermore, the naked greed which animated such transactions called into question the virtuous nature of the individual's active citizenship. Rousseau rejected the staple republican belief in civic virtue as an unrealistic ideal.[42] Participatory association, in his view, was the occasion of both man's civilisation, and his distraction from civic ideals. 'The entire social enterprise was, by its nature, necessary and self-defeating.'[43]

The 'Court' party in England accepted this interpretation of the individual as animated by personal preferences rather than high-minded virtue, arguing accordingly for a strong executive capable of directing and governing the newly non-virtuous polity. Some of these, like Hume, even sought to renovate and rehabilitate the concept of self-interested passion, depicting it as the dynamic driver of associative and thus civic action.

This more cynical understanding of citizenship and governance was rejected by the Harringtonian 'Country' party, who continued to stigmatise commerce as a corrosive force. This attitude was particularly prevalent in the more agrarian American colonies, where Harrington's theories were very influential. It was no coincidence that a lack of representation – Harrington's guard against corruption in public life – was a key American complaint.

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[42] Rousseau, *Du contrat social* (1762).
[43] Pocock, *op. cit.*, at 504.

Gradually, a belief developed that the Court-dominated English polity was corrupt and degenerate, and that America, as the New World, had an apocalyptic-utopian role to play in the redemption of mankind, restoring a virtuous natural order in the Harringtonian image. As the Florentine experience of Savonarola showed, such visions of a people as a chosen race of virtuous redeemers exert a politically potent appeal. The drive for American independence was thus at least in part an effort to sever ties with the commercially-corroded entity that was the European continent, so that a republican new Jerusalem could be established in the states.

(ii) The mixed theory undermined

The early constitutional efforts of the independent states were thus predictably predicated on Harringtonian doctrines. That these experiments failed within a few short years dealt a devastating blow to the utopian idealism of the Americans. Harrington's rejection of the idea of a hereditary aristocracy reflected his faith in the ultimate emergence of a natural elite, who could thereby occupy the important place of the few in the mixed theory of government. In fact, the absence of a pre-existing nobility in the colonial states, ought to have made the identification of these talented few an even simpler matter. The predicted elite failed, however, to appear.

This called into question the whole notion of the naturally differentiated class, in whom authority should vest. This impugned the entire republican project. Since Aristotle, the republican system had centred on the existence in society of inherently distinguishable classes. Civic virtue itself was manifested in the act of recognising and respecting the entitlements of a different class, thereby demonstrating confidence in the project of constructing the universal from a balance of the particulars. Traditionally, these differences had been conceived of in terms of existing social structures. Harrington had freed republicanism from its reliance on entrenched inequalities, but had done so on the basis of an assumption as to the existence in society of a natural elite. This elite would fulfil the constitutionally essential role of the few.

Republicanism had always believed that a balance of particular elements would secure appropriately universal values. The American experiments, however, cast doubt on the existence of these particular elements, and therefore of the ability to strike a balance between them. That the attempt to fashion such structures foundered in the ostensibly fertile environment of the New World thus undermined some of the most central tenets of traditional republican thought.

(iii) Republicanism abandoned?

Furthermore, the increasing commercialisation of the former colonial states had raised again the spectre of citizen as a self-interested rather than a civic actor. Within a few years, faith in the virtue of the individual, and thus of the state, and in the qualitative categories of citizenship, had seriously been challenged. It was in this period of republican dismay and disillusionment that the drafters of the Constitution undertook their task. It was notable, therefore, that these 'late- and post-eighteenth century republicans abandon[ed] conceptual and institutional class-specificity while drafting their constitutions'[44]. In this increasingly cynical context, a pluralist interpretation of their intentions, and thus of the institutional structure which their text establishes, must appear eminently plausible.

(iv) Republicanism renewed?

As Craig has argued, however, to view the Madisonian constitution as motivated by a fatalistic concession to the inevitably corrosive effects of self-interested action may be misguided.[45] Certainly, the apparent absence of a natural elite posed serious problems for a republican advocate. Republicanism had been inextricably associated with the Aristotelian belief in a mixed government of qualitatively different classes for centuries. Relying on this fact, Wood famously went so far as to label the American acceptance of the citizen as a non-virtuous actor as 'the end of classical politics'[46].

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[44] McCormick, "People and Elites in Republican Constitutions, Traditional and Modern", delivered at a workshop on 'Constituent Power and Constitutional Reform' in Florence on March 24th, 2006, and kindly provided to the author by e-mail. The paper will be included in a forthcoming book on this topic.

[45] Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990).

[46] Wood, *The Creation of the American Republic* (University of North Carolina Press, 1969), at 562.

Arguably, however, Madison's constitution actually constituted an attempt to apply republican teachings to this new scenario. Rousseau had insisted that corruption was an inherently human phenomenon. The desire of the individual to advance his interest would inevitably give rise to the growth of factionalism in a particular polity, as citizens identified, not with the common good, but with those in power who best reflected their particular interests. Madison openly admitted as much in Book 10 of the Federalist Papers. However, he also contended in that chapter that such factional politics could be contained by the development of a dispersed system of institutional authority. His model of the separation of powers was thus inspired not by the objective of maximising the number of discrete inputs into any exercise of power, but by his desire to construct a republican balance out of the self-interested actions of individual groups.

Drawing on the Harringtonian trust in representation, Madison attempted to create a representative government in which elected officials, removed from the corrupting pressure of local interests, and checked by a compulsory co-existence with other powerful organs, would be encouraged to deliberate on, and pursue, objective values of public good. Madison, on this analysis, continued his commitment to the ideals of public interest and the common good which had always inhered in republican doctrine. He did not abandon his utopian objectives, but refurbished them for a modern era in which the historical mainstays of individual virtue and an aristocratic class were conspicuously lacking.

This interpretation is supported by Pocock's discussion of the later American attitude to the degenerative influence of commercial activity. As already outlined, the experiences of early independence had not supported the revolutionaries' hopes of an agrarian restoration. Rather than abandoning their belief in America's apocalyptic role of universal renewal, some theorists sought to develop an amended understanding of American commerce, in which it would not engender corruption or endanger virtue. These theorists emphasised Harrington's conviction that corruption would not occur as a result of commercial conduct until such time as it disrupted the proprietary basis of the

citizen class. As with Machiavelli's Rome, therefore, it was argued that America could secure its internal virtue by a process of external expansion. The vast uninhabited areas to the West proffered the prospect of a territorial counterweight to the corrosive effects of commerce and trade.

> An infinite supply of land, ready for occupation by an armed and self-directing yeomanry, meant an infinite supply of virtue: ... the safety valve was open, and all pressures making for dependence and corruption would right themselves.[47]

That Jefferson and Webster, amongst others, openly expounded this view demonstrates quite clearly that the enduring aims of the republican ideology had not been universally abandoned at the moment of constitutional enactment.[48]

E. No new frontiers – the end of mixed republican theories?

Whatever the mindset of the constitutional framers, however, the fact remains that Jefferson and Webster's frontier ideals of civic virtue cannot rescue the contemporary theorist from the difficulties identified by Wood. Even in the West, land could not remain abundant and uninhabited forever. Today's citizenry continue to be characterised by their self-interested commercialism. Mixed rule, for so long the defining feature of republican schemes of government, seems impossible to achieve in an age of qualitative equality. '[T]he constitutions of modern republics almost invariably treat the people as a homogeneous unit: the people are a unitary and socio-economically anonymous collection of individual citizens, formally equal under the law.'[49] Without constituent social classes, how then can an interdependent polity be erected? The inescapable featurelessness of the democratic class presents the aspiring republican with the unsatisfactory (and quasi-pluralist) option of institutional separation for separation's sake. How can a balance be constructed from a confluence of constituent interests when those interests cannot be identified? That the courts continue to cling to indeterminate notions

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[47] Pocock, *op. cit.*, at 535.
[48] See, for example, Jefferson, *Notes on the State of Virginia* (1781); Webster, *Examination of the Leading Principles of the Federal Constitution* (1787).
[49] McCormick., *supra.*

of some sort of functional division demonstrates both the attractions and impossibilities of attempting to generate civic good from separate constituencies. Mixed government – to which this model appears to approximate – seems an anachronistic relic of a more innocent age, condemned to contemporary obsolescence by its inability to adapt to modern ideas of democratic self-interested citizenship.

At the same time, however, the limitations of contemporary systems of democratic equality arguably underline the need for a renewal of republican politics. The modern commitment to pluralist equality does present considerable problems for any attempt to establish a mixed form of government. However, as McCormick has commented, these egalitarian systems are not without their problems.

> [U]nlike their earlier counterparts, the constitutions of modern republics never explicitly forefend the likelihood that, for instance, wealthier citizens will fill the ranks of public officials disproportionately, or the possibility that they will use their greater economic resources to affect in a decisive fashion the behavior of less-wealthy citizens who do manage to gain office .... [M]odern, class-anonymous constitutions are [therefore] less adept at facilitating popular containment and constraint of elite citizens and office-holders – eternal threats to the liberty of common citizens within republics – than were their class-specific antecedents.[50]

It seems, therefore, that there may be a contemporary need for the type of rehabilitated republican theory which this thesis has sought to suggest. As this section has shown, however, the attempt to reconcile mixed republicanism with democratic equality is likely to encounter formidable difficulties. In the context of modern society's abandonment of the idea of an entrenched few or a natural elite, can a mixed system of government be successfully established?

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[50] McCormick, *supra.*

IV. THE PROBLEM OF CONSTITUENCY I: FEDERALISM

Some examples of the multi-constituent polity – that prerequisite for a properly balanced mixed government – have, however, survived into the modern era. The phenomenon of fragmented structures of power, organised along constituency lines, is, for example, commonly found in federal systems of government.[51] Like the mixed theory under examination in this chapter, the institutional arrangement of these states seeks to include a range of objectively identifiable interests in the operations of government. In the way in which these models strive to create harmony from inherent divisions, they could, therefore, be taken to show the latent viability of the mixed theory of government. An overview of the ways in which federal states function may thus prove instructive at this point.

The specific details of a federal system's institutional structure tend to be influenced by the particular political and cultural character of that state. Canada, for example, has had to attempt to achieve a stable balance between the diverse influences of its French and British past. It has thus addressed the disruptive effects of Quebec's disputed status by entrusting its provinces with considerable political independence.

Belgium too has reacted to its social and linguistic divisions by devolving full legislative and executive authority on certain issues to the Flemish, Walloon and (to a lesser extent) Brussels-Capital Regions. Here again, the separation of competences between federation and state appears to proceed chiefly from a desire to accommodate the state's distinct constituent interests in the exercise of state power. The balance struck in each federal system seems to reflect the extent to which it is necessary to structurally accommodate the centripetal and centrifugal forces at work within that state. The potency of such pressures obviously varies from federation to federation, thereby ensuring a differing distribution of functions and powers in each instance.

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[51] The examples used in the following discussion are drawn largely from Lenaerts' discussion of federal systems. *See* Lenaerts, "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL 205.

Integrative federalism, for example, tends to occur in those situations where the constituent elements are generally supportive of a strong and effective central government, coming together to devise a structure which is, at the same time, 'fully capable of acknowledging the existence of societal pluralism from one component entity to another'[52].

Lenaerts regards Switzerland as an example of this type of approach. The geographically-isolated nature of many of the country's cantons fostered a desire to integrate and enhance commercial co-operation, while simultaneously reassuring each area of its residual capacity to preserve its social and cultural autonomy. The cantons were content, when the constitution was being established, to allow the central government to wield considerable power. It is thus entitled, for example, to overrule cantonal law even in situations where the Federal Assembly is subsequently found to have acted unconstitutionally. Nonetheless, 'the lack of judicial review of national legislation and the ensuing threat to the integrity of the powers of the Cantons are compensated by the prominent presence of the Cantons inside the political decision-making of the Confederation'.[53] The balance is thus preserved by other means. The Cantons exercise, in practice, a majority-based veto on all legislative acts, a position reinforced by the relative ease with which the country's referendum machinery can be invoked. Political and popular supervision replace the more rigid division of functions typical of the formal separation of powers approach.

On the other hand, those states in which central government finds itself subjected to demands for a greater degree of regional autonomy tend to favour a devolutionary federalist approach which seeks 'to organise diversity in unity'[54]. The centre usually attempts to forestall such claims by constructing a distribution of competences capable of pre-emptively countering the stronger centrifugal forces. The Spanish government, for example, has experienced this type of pressure from its provinces, ranging from the independence-orientated distrust of the *Madridista* centre characteristic of the Basque and

[52] *Ibid.*, at 206.
[53] *Ibid.*, at 235.
[54] *Ibid.*, at 206.

Catalan peoples to the more mildly assertive demands of the Andalucians. The Spanish constitution thus allows the individual areas to themselves augment their autonomy of action by deciding to constitute their region as a distinct *Comunidad.* Under this process, the regions select the powers which they intend to exercise from those prescribed in A. 148. (1). Thus, each *Comunidad* is in a position to itself respond to the political and cultural influences operating within its borders, determining at the moment of self-constitution the precise extent of the political independence it desires. The ultimate institutional balance is very much the product of the particular cultural matrix from which the division of powers has emerged.

This has been most recently evident in the case of Catalonia's proposed new constitution. The fall of the nationalist Popular Party in the aftermath of the Madrid bombings encouraged the Catalans to seek a new governing charter for their region. That the initiative for this process could come from the region itself, rather than from the centre underlines the extent to which the Spanish system decentralises constitutional power to its component entities. At the same time, however, the centre retains strong residual control. It was notable in Catalonia's case that the text which was put to its people on the June 18th referendum was an amended version of that approved in 2005 by 90% of its parliament. The central *Constitucional del Congreso* (constitutional commission in congress) changed several provisions which they felt would be incompatible with the Spanish constitution's commitment to the state's territorial integrity. The parliament, or *Cortes*, also made a number of alterations to the text.[55] The Catalan experience is thus an excellent example of that deliberative relationship between constituent entity and state which is at the heart of the mixed federal system.

That the strength of the centrifugal forces dictates – to a large extent – the ultimate allocation of competences is also illustrated by the asymmetrical nature of the devolution reforms undertaken in the ostensibly unitary entity that is the United Kingdom. Scotland, Wales and Northern Ireland all received varying levels of legislative and executive

[55] For a discussion of developments in relation to the Catalonian constitution, *see* Struke, "Catalan Conundrum", *The Guardian*, June 7, 2006.

autonomy from Westminster, reflecting the differing demands for political independence in each area. Thus the Scottish Parliament was given primary legislative powers in a number of areas, with other matters reserved to Westminster. Disputes over institutional competence could be referred to the House of Lords. The Welsh Assembly, on the other hand, was entrusted with responsibility for the distribution of the government budget for the region. This reflected the lower level of demand for regional autonomy in Wales. The specific design of U.K. devolution was very much inspired by the cultural and political particularities of each state.[56]

It is thus obvious that, despite their unity in deploying some form of separation of institutional power, 'each federal system has a constitutional equilibrium of its own'[57]. Further, each individual balance seems dictated largely by the particular potency of the political pressures it aims to assuage. The distribution of competences reflects a concern, not that power be divided for the sake of the division *per se*, but instead that the power-ordering structures of the state reflect the distinct and identifiable constituent elements of the overall organisational entity. In this, traces of the influence of some theory of mixed constitutionalism are clear.

From the point of view of the problems posed for republicanism by the modern conception of politics as the self-interested action of groups bound by a coincidence of personal passion rather than the commonality of their inherent qualities, the example of successful federal structures provides little assistance. Although their everyday operations do provide contemporary evidence of the potential viability of a successful system of constituent balancing, these federal systems do not address the key constitutional challenge of the unitary state – how to identify and organise constituent interests in a polity without clear social cleavages. The identifiably territorial entities which together comprise a federal state automatically offer a readily available criterion of classification. Geography supplants Aristotle's qualitative classes, providing the basic determinacy of

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[56] For a more extensive discussion of devolution, and its impact on the English constitutional order, see Day O'Connor, "Altered States: Federalism and Devolution at the Turn of the 'Real' Millennium" (2001) 60 *CLJ* 493; Elliott,, "Sovereignty and the New Constitutional Settlement: Legislative Freedom, Political Reality and Convention" (2002) 22 *Legal Studies* 340.

[57] Lenaerts, *loc. cit.*, at 235.

distinctness upon which ideas of mixed governmental balance have always depended. Democratic egalitarianism deprives the unitary state of any similar social yardstick. Federal states, as the previous section shows, arrange their instititutions in accordance with their own innate calibration of constituencies. The Swiss model, for example, would not operate effectively in Spain. The uniqueness of their sub-federal units thus both supplies the solution to the problem of constituency, and constrains the general utility of the particular paradigm thereby adopted. Without any transferable images of institutional arrangement, the experience of federal states can, at the very most, offer only moral support to the project at hand.

V. The Problem of Constituency II: The European Union

As a novel experiment in quasi-federal co-operation, an examination of the institutional structures of the European Union may deliver more relevant insights. The complexity of the EU's institutional order is well known and much lamented. Defying simply analysis along traditional parliamentary or separation of powers lines, the EU employs a diverse array of differing institutional processes. The polity's most important bureaucratic actors – the Commission, Council, Court, Parliament and Member States – are afforded varying levels of influence in any exercise of power, in accordance with the provisions of the Union's governing Treaties. The procedure adopted in an individual case is determined by reference to the Treaty article from which the Union's competence to act in the area in question has been derived. That the applicability of these legal bases is often contested and unclear – witness the range of cases in which the European Court of Justice has been called to adjudicate on such matters[58] – only adds to the impression abroad of a bewilderingly impenetrable, perhaps even arbitrarily *ad hoc*, institutional process.

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[58] See, for example, *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867; *Commission* v *Council (Waste Directive)* [1993] ECR I-939; *United Kingdom v. Council (Working Time Directive)* [1996] ECR-I 5755; *Germany v. Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

A. Institutional balance in the EU

In spite of this organisational complexity, there does exist, in the legal language of the Union, a constitutionally-central concept of institutional balance. A recurring theme in the rhetoric of the EU's institutional organs, de Burca has commented on how this 'carefully constructed framework in which the ... key institutions ... interact in a variety of ways' appears to have 'take[n] the place of the notion of separation of powers ... as a legitimizing constitutional concept'[59]. The importance of this idea to the Union's self-image as a legitimate entity was underlined by the way in which 'the desire to preserve some form of institutional balance ... [was] apparent throughout the Report of the Reflection Group and those of the major institutions'[60] in the run-up to the Union's 1996 inter-governmental conference on constitutional affairs. This analysis of the Union's specific institutional arrangements was reiterated by the European Court of Human Rights which, after acknowledging that the EU 'does not follow ... the pattern common to many States of a more or less strict division of powers between the executive and the legislature', instead sought to characterise its processes as a form of 'multi-institutional participation'.[61] The European Union rests at least part of its assertion of normative legitimacy on the claim that it has formed an ordered balance out of the ostensibly chaotic interaction of its institutional actors.

Geography could, again, be argued to play a defining role in the constitutional construction of this international entity. The range and diversity of the Union's institutional processes suggests, however, that additional, more nuanced factors could have impacted on the particularities of its organisational architecture. What might these be? Academics, as is their wont, have sought to impose analytical order on the unruly and multi-faceted mode of governance. Lenaerts, for example, interprets the institutional balance as a model of functional separation, in which the nature of the task at hand, rather than the identity of the institutional actor, supplies the determinate criteria of classification.

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[59] de Burca, "The Institutional Development of the EU: A Constitutional Analysis" in Craig & de Burca ed., *The Evolution of EU Law* (Oxford University Press, 1999), at 58.
[60] Craig, "Democracy and Rule-Making Within the EC: An Empirical and Normative Assessment" (1997) 3 ELJ 105, at 107.
[61] *Matthews v. U.K.* (1999) 28 EHRR 361, at 400.

> [T]racing the separation of powers in the Community is a somewhat more subtle undertaking than the mere identification of the three basic organs of public authority .... The inquiry first relates to the definition of the legislative, executive and judicial functions of government. In a second stage only, it looks into the identity of the different organic inputs in the performance of each one of these functions and makes a critical assessment of these inputs in terms of the operation of the Community's system of 'checks and balances'.[62]

This reflects the fact that it is:

> [I]mpossible to characterize the several Community institutions as holders of one or of the other power since a close analysis of their prerogatives certainly does not indicate a clear-cut line between the legislative and executive branches of the Community government .[63]

As an analytical approach, this functional analysis had much in common with the attitudes to separation of powers outlined in Chapter 2. It thus suffers from a similar susceptibility to subjective *ex post facto* reasoning, and the unpredictability which this inevitably involves.

Dehousse, on the other hand, portrays the Union as a species of regulatory governance. Eschewing any attempt to understand its structures in terms of traditional ideals of parliamentary democracy, he depicts its arrangement instead as 'clearly evocative'[64] of regulatory rule. He argues that elements of the Treaty, such as the development of risk regulation, and the increasing emphasis on accountability, transparency and subsidiarity in the operation of the EU's bureaucratic agencies, reflect a move away from the parliamentary model's position as the dominant paradigm in constitutional discourse

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[62] Lenaerts, "Some Reflections on the Separation of Powers in the European Community" (1991) 28 *CML Rev.* 11, at 13.
[63] *Ibid.*
[64] Dehousse, "European Institutional Architecture after Amsterdam: Parliamentary system or regulatory structure?" (1998) 35 CML Rev 595, at 612.

towards a regulatory model which locates its legitimacy in functional rather than democratic concerns. Any institutional balance, on this view, is a matter of managerial technique rather than a consciously constitutionalising act.

Weiler's interpretation of the institutional balance echoes the Polybian tradition in the way in which he conceives of the Union as an amalgamation of differing ideas of authority. Where Polybius found balance in the tripartite union of monarchy, democracy and aristocracy, Weiler instead deploys more sophisticated conceptions of institutional governance. He argues that the EU can best be understood as a combination of alternative power-ordering techniques, each operating at one of the Union's different levels of governance. For him, intergovernmental action is an example of consociational government; supranational activity can be characterised as a Schumpeterian theory of elite democracy in action; while the Union's infranational committees constitute a neo-corporatist structure. Weiler's attempt to rationalise the Union's architecture is, in many ways, highly persuasive. Based as it is on his observation of the institutional processes in action, his political conceptions of each strand of EU authority chime closely with the way in which these bodies actually function on an everyday basis. As Hart famously noted, however, such an external scrutiny of institutional phenomena can neglect that internal understanding which often constitutes an influential factor in the system's operations. Craig has thus argued that to interpret the supranational conduct of the EU's institutions as an example of Schumpeterian elitism is to overlook their oft-stated commitment to non-elite ideals of participatory democracy.

> The very concern for both democratic and social legitimacy which permeates all the documents [published as part of the 1996 IGC debate] makes little sense in terms of elite theory. If a top-down elite theory of democracy really informs the thinking of Member States individually and collectively, then it is not apparent in the reports of [any of the relevant bodies] .... If one truly believes in a Schumpeterian elite model, then th[e] issues [discussed in these reports] largely cease to be of democratic concern.[65]

[65] Craig, *loc. cit.*, at 128.

The institutions themselves thus retain a very different perception of the EU's institutional balance, one which, if taken seriously, can be argued to engender an interestingly esoteric image of a harmonious multi-constituent arrangement.

B. The institutional balance as a republican model

(i) An EU commitment to universal values?

Craig proposes an interpretation of the EU in which its institutional separation is founded upon an acknowledgment of 'the necessity to create a stable form of political ordering for a [polity] within which there are different interests or constituencies' – an objective which 'strikes a direct chord with the historical application of republicanism' already outlined.[66] The EU, in Craig's view, demonstrates a continued commitment to those notions of mixed constitutionalism and an objective public interest which constituted 'central elements in the republican conception of democratic ordering'[67]. The Union's insistence on both institutional separation and subsequent interaction is regarded as evidence of a belief in the ability of distinct interests to transcend their private passions and arrive at an agreed conception of the common good by means of a rational and deliberative process.

The focus of Craig's piece, however, is on the identification of the republican undertones implicit in the Union's institutional order. These traces of the mixed theory of government indicate, to his mind, the pervasive presence of an internal understanding of the Union as an association of discrete constituencies, committed to the pursuit of a common goal. He does not, however, clarify the particular identity of these constituent elements. His reference to a diversity of institutional actors – the Commission, the Council, the Court, the Parliament, Member States and national parliaments – does not specify the nature or source of their entitlement to input or power. For example, are they categorised, as Lenaerts would suggest, by function? Do they exercise authority on the basis of their individual institutional attributes? Is the whole multi-institutional

[66] *Ibid.*, at 116.
[67] *Ibid.*, at 113.

arrangement inspired by the simply assumption that the emergence of a bureaucratic identity in each organ will encourage inter-agency competition, and thus eventually create some sort of balance? Does the EU successfully escape the enduring difficulty created by an absence of identifiable qualitative constituencies, or does it, like other contemporary theories of separated power, simply rely on an institutional separation for separation's sake?

(ii) The institutional balance as a union of constituent interests?

It is submitted here that the EU can arguably best be understood as a mixed amalgamation not of its constituent classes, but of the abstract and dialectical interests which underpinned its establishment. According to this logic:

> The full complexity of the Community structure may only be understood if the institutional balance of powers is defined widely ... [to] include[e] the balance between the Community and the Member States.[68]

In this, there are obvious parallels with the theory of separation elaborated in Chapter 4. Like the modern associative state, the EU rests on a basic duality of desires – the ambition of establishing an integrated and effective European polity, and the contradictory aim of preserving national power. The Union is animated by the conflicting forces of intergovernmentalism and, on the other hand, supranationalism. The next section will thus consider the extent to which the EU's institutional balance can be explained as the product of a deliberative interdependence of opposing interests. This image of the Union draws directly on the dual tensions at the centre of the European project, depicting individual institutions as the representative organs of discrete constituent interests. Charged with both the advancement and the defence of their abstract constituency, the institutions are presented as participants in a communicative, cross-institutional attempt to accommodate the interests of all in the actions of the unified entity – thereby seeking that Aristotelian universality of values which, as section 1 has shown, has inhered in republican thinking throughout history. If accurate, this explanation would

[68] Vos, "The Rise of Committees" (1997) 3 ELJ 210, at 223.

therefore not only support Craig's claims of a republican Union, but would also echo the contractarian analysis of the contemporary state upon which this thesis' theory depends.

To visualise the European Union as a balance of intergovernmental and supranational impulses is to identify individual institutions with a specific interest.

> Since each of the institutions, in theory at least, represents a different constituency, the notion of institutional balance can be presented as a way of ensuring the adequate participation and representation of different constituencies within the EU process.[69]

Any bodies in which the Member States exercise predominant power (the Council) should be understood as intergovernmental in their instinctive orientation. Similarly, any institution devoted to the advancement of the pan-European project (the Commission) should be clearly conceived of as a determinedly supranational force. Their respective levels of involvement in particular Union procedures can be explained in terms of the extent to which the actions in question might impact upon the interests of the relevant institution. These bodies, therefore, are argued to constitute the paradigmatic representations of the Union's constituent interests, serving as the European equivalents of Chapter 4's court and government.

C. The republican model re-examined

Is this a convincing description of the EU's institutional order? An analysis of the recent constitutional development of the Union would seem to provide support for this case. Many of the key structural features of the Union's institutional arrangement can apparently be so explained. In fact, as the next section will show, the explanatory power of this image may even offer some insights into the debates about institutional reform which have occurred in recent years, and to some of the changes undertaken on foot of these discussions.

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[69] de Burca, *loc. cit.*, in Craig and De Burca ed., *op. cit.*, at 60.

(i) The legislative monopoly of the Commission

The monopoly of the Commission on the Union's power of legislative initiative is one example of the putative veracity of this asserted analysis. It has long been the case that the Commission is the only body with the capacity to introduce proposed new legislation. This power has been described by observers as 'a fundamental aspect of the institutional balance of the Community'[70]. According to the model outlined above, the vesting of this power in this particular body should be explicable by its identification with the forces of supranationalism. This is a relatively straightforward case to make. The supranationlist objective, in European terms, requires the advancement of the interests of the Union as a whole. It therefore has an obvious concern with ensuring that the actions of the Union are motivated by considerations of general, Union-wide welfare rather than the privatist demands of individual Member States' domestic agendas. The Commission's monopoly on legislative initiative can thus be argued to assuage such concerns. It can clearly (and convincingly) be characterised as a way of copperfastening the supranational nature of potential Union actions. Of course, the Member States will have an opportunity, most notably through the Council, to strike down such proposals as excessively supranational. This is only to be expected given the deliberative nature of such multi-institutional processes. The guarantee of legislative initiative provides an important supranational counterpoint against the considerable power of the agencies of intergovernmentalism. The Commission cannot, quite rightly, be confident that it will always get its way. What it can ensure, however, is that those actions of the Union which eventually pass through its complicated legislative process will have been originally inspired by the supranational commitment to a pan-European conception of the Union's common good.

(ii) The role of the European Parliament

This constituent interpretation of the institutional balance might also explain the historically confused position of the European Parliament. A clear force for neither supranational nor intergovernmental interests, it has frequently been relegated to the sidelines of the debates over institutional reform. Constitutionalists have preferred to concentrate their efforts on the more important relationship between the two dominant

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[70] *Report of the Reflection Review Group* (1996), at para. 109, cited in Craig, *loc. cit.*, at 109.

forces within the European project. Originally an appointed assembly, direct elections to the Parliament did not take place until 1979. Even when this occurred however, the Parliament was for a long time confined to a limited range of functions – primarily the approval of the membership of the Commission *en masse*, and the confirmation of the Community's annual budget. In terms of legislative activity, the Parliament's role was generally one of consultation only. In terms of the model being used here, this was a perfectly sensible situation. The Parliament was, effectively, an auxiliary institution. Identified with neither of the Union's underlying impulses, it lacked a clearly defined role.

In more recent times, the Parliament has been entrusted with more significant political powers. Under the Single European Act, a co-operation procedure was introduced, under which proposals from the Commission were forwarded to the Parliament for its comments. Its authority has further been enhanced by the emergence of the co-decision procedure as the dominant institutional process in the Union. Under this approach, the Parliament has the effective ability to veto proposed measures. This only occurs after an extensive process of attempted inter-institutional conciliation but it nonetheless equips the Parliament with the capacity to make a significant input into the legislative process.[71]

Despite its increased authority, however, the Parliament still occupies a position of relative political impotence. It has neither the power to initiate legislation, nor to positively adjudicate upon its acceptance. It instead fulfils the function of an additional institutional clearing-house for proposed acts of the Union. Given the apparent commitment of the Union to deliberative rationality as an organising institutional value, the inclusion of an extra layer of deliberation ought not to seem surprising. It may not be a strict requirement of the constituency model, but this placement of secondary power in the Parliament certainly does not constitute a challenge to its central tenets.

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[71] For a general discussion of these developments, *see* Craig & de Burca, *EU Law: Texts, Cases and Materials* (3rd ed., Oxford University Press, 2003).

What is more surprising, in fact, is that the Parliament, as a directly-elected body has not obtained more power at a time in which the EU as a whole has expressed consistent concern about the level of democratic disconnect between the Union and its peoples. The residual reluctance on the part of the EU's official actors to invest more power in the Parliament is an eloquent testament to that body's continuing crisis of constituent identity. The Union's legislative process is still dominated by the Commission and the Council. Although it does retain the directly-elected quality common to most legislative bodies, attempts to portray the Parliament's newly-earned power of veto over the Commission, for example, as a reconstitution of the legislative-executive relationship of the Union[72] do not really ring true. That the Union provides structured inputs into its legislative process to an increasing range of bodies[73], including the Parliament, can arguably be understood as an effort to improve the quality of its eventual outputs. Ultimate control, however, still rests with those organs which most clearly represent the basic constituent interests of the Union.

(iii) The committee system

The proliferating power of committees at a sub-institutional level can also be accounted for by the model under examination in this section. The controversial, and initially informal emergence of these bodies was seen by the Union's existing institutional actors – in particular the Parliament – as a threat to their particular prerogatives. Under this system, the Council established a number of committees capable of supervising those executive actions which it delegated to the Commission. This was argued, however, 'to give rise to general questions about the overall legitimacy and transparency of the Community decision-making process'[74]. Given the considerable powers of some of these committees – the regulatory type, for example, exercised an effective veto over the Commission's acts – they were argued to undermine the allocation of functions outlined in the Treaties. They not only created the possibility, in certain cases, of the Council acting as both legislative and executive organ on an individual measure, but also

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[72] Dehousse, *loc. cit.*

[73] The subsidiarity principle has been invoked in support of a role for national parliaments, for example.

[74] Vos, *loc. cit.*, at 214.

effectively circumvented the co-decision procedure by excluding Parliament's supervision of the other institutions' actions.

This so enraged the European Parliament that it embarked on a number of ill-fated legal challenges to the comitology system.[75] It also initiated a political campaign which culminated in the largely cosmetic concessions secured in the Plumb-Delors and Klepsch-Milan agreements. Further parliamentary obstructionism led ultimately to the negotiation of the *Modus Vivendi* pact. This allowed the EP a greater role in the comitology process, a position copperfastened by the Council's Second Comitology decision providing for greater participation in, and information on, the operation of the committee-based system.

The much-maligned comitology procedure can, however, be presented as a further refinement of the ever-evolving institutional balance which aims to preserve the involvement of Member States in the executive actions of the Union. This committee-based implementation of EU measures can therefore be construed as 'an attempt to restore the institutional balance between the Member States and Community, compensating for the shift in favour of the Commission'[76] and constituting a valuable 'bridge between the Community and the national level'[77]. In this way, the phenomenon is portrayed as a reactive re-orientation of the relative influence of the supranational and intergovernmental forces. The Council, it should be remembered, is charged with the defence of the interests of the Member States. The delegation by it of its powers to the Commission would thus have represented an unacceptable increase in the power of that supranational institution. Committees, chiefly comprised of national officials, can thus be taken to supply the necessary level of intergovernmental input. In this way:

> [T]he committee procedure institutionalizes certain ... checks and balances within the decision-making procedures established by the Treaties, thus enhancing rather

[75] *Parliament v. Council* [1998] ECR 5615; *Parliament v. Council* [1995] ECR-I 1185; *Parliament v. Council* [1997] ECR-I 5303.
[76] Vos, *loc. cit.*, at 223.
[77] *Ibid*, at 227.

> than merely undermining the institutional balance .... As an institutional response to the tension between the tasks confronting the EC on the one hand and its dual supranational/intergovernmental structure on the other, the committee system offers a different way of addressing and mediating conflicting interests and aims.[78]

Comitology, therefore, actually serves to reinforce the constituency representation model. It can thereby be neatly incorporated within our proposed conceptual paradigm.

D. EU committees and administrative power

(i) An analytical overlap?

In fact, in the way in which the comitology system employs a dispersed network of decentralised power-exercising agencies to re-adjust and refine a more abstractly-conceived institutional balance, it arguably approximates to the position of the administration in the Chapter 4 model. In comparison with the national administrative state, the extensive powers and bureaucratic complexity of the European Union arguably only increases the necessity to make delegations of authority to sub-constitutional organs. As with national systems of government, it would be impossible to channel all of the actions of the Union through its two dominant representative institutions. Efficacy thus demands delegation.

However, if the Union is to hold fast to its assertedly republican roots, there must continue to be some assurance that the relevant constituencies will be adequately represented. The committee system, like the administrative structures of the Irish state, cannot be conceived of as a means of mere interest group representation. Such an effectively pluralist analysis would necessarily controvert the notion of innate constituent classes, upon which the whole institutional balance is based. For the committee system to support the republican analysis of the Union, it must therefore be possible to regard it as an ancillary element of the mixed, and thereby balanced, constitution, advancing the goal of securing normatively appropriate outputs (i.e. measures which are motivated by a

[78] de Burca, *loc. cit.*, in Craig & de Burca ed., *op. cit.*, at 75.

concern for an objective common good) from the institutional process. Vos' view that it 'provide[s] the Member States with a means of ensuring their continuing influence over EC decision-making'[79] so characterises it as a part of a 'framework for co-operative and deliberative multi-level policy-making'[80].

(ii) Committees as a forum for deliberative rational reasoning

This, too, is the role which the Chapter 4 model envisages for the administrative organs of government. Joerges and Neyer's analysis of the utility of the committee structure provides, therefore, instructive parallels for any assessment of the way in which domestic administrative agencies ought to function.[81] Examining the committee system's impact upon the EU's actions in the area of risk regulation, their work rejects the idea of these bodies as merely expert agencies, to whom authority has been delegated. This idea, it will be remembered, resembles the American argument, popular in the 1930's, that administrative bodies derived legitimacy from their specialist expertise.

On the contrary, they regard the committee system of the European Union as a type of representative and deliberatively rational process in which the constituent interests of the Union are mediated in accordance with an evidentially analytical process. Such a decentralised administrative system implies a mutual respect between the basic supranational and intergovernmental impulses which inhere in the constituted character of the Union. Each submit their demands to the scrutiny of an administrative procedure which is determinedly rational in its design. They thus not only accept the entitlement of the other body to articulate its concerns, but further subject their own interest to the overarching republican objective of ensuring that the eventual outcome of the process is not the satisfaction of self-interest, but the reaching of an objectively correct conclusion.

Taking risk assessment (which was traditionally seen as a matter for Member States) as their example, Joerges and Neyer remark that:

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[79] Vos, *loc. cit.*, at 210.
[80] *Ibid.*, at 229.
[81] Joerges & Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" (1997) 3 ELJ 273.

> [O]nce it is acknowledged that constitutional nation-states are not entitled to treat their preferences as 'given' ... one must be ready to relativise the decisional autonomy of national societies, to accept supranational intervention even into the normative realm of risk assessment .... Once the indispensability of delegating regulatory issues to representative but specialized arenas is recognised, Europeanisation processes can be perceived as a chance rather than a threat.[82]

The committee system, in their view, is required to be both rational and representative. This echoes the understanding of the administrative elements of national government outlined in Chapter 4, where it was argued that the discretionary nature of delegated power was, in fact, an opportunity to reconcile the interests of the individual and the state (as expressed by courts and government) in a rationally-oriented process.

This identification of the administrative structure of the state with the committee system of the European Union suggests that there may be valuable lessons to be learned from the extensive academic analysis of the comitology process. In particular, the divergence of views between Weiler and Curtin on the operational characteristics of the committee process both echoes and anticipates an important line of argument in relation to the proper role of domestic administrative agencies.[83]

(iii) Neo-corporatism v. deliberative democracy

Weiler, it was already noted, regards the infranational committee level of Union decision-making as an example of a neo-corporatist political philosophy.[84] Neo-corporatism has traditionally been understood as a technocratic and managerial conception of governance in which solutions are achieved by the accommodation of the opinions of organised interests. This quasi-pluralist conception of the committee structure has several similarities with the American idea of the administrative process as a system of interest

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[82] *Ibid.*, at 297.

[83] *Infra.*

[84] It should also be noted that Weiler is not arguing in favour of this model. In fact, he identifies a number of its key deficiencies. His work attempts simply to understand what is the dominant political paradigm in each area of EU operations.

group representation. Both of these models locate their legitimacy in the way in which they produce an agreed solution from the input of interested actors. Both also, therefore:

> Ha[ve] a strong push towards representational monopolies and the creation of structures which will channel organized functional interests into the policy-making and management procedures .... Participation in the process is limited to those privileged by the process; fragmented and diffuse interests, and other public voices, are often included.[85]

This understanding of the administrative system would be fundamentally incompatible with the proposed model's foundational commitment, considered in Chapters 3 and 4, to a republican universality of values, and to the non-arbitrariness of all government acts. As Weiler comments, neo-corporatism 'is both an expression of, and instrumental in, the decline of the State and its main organs as the principal vehicle for vindicating [the public] interest'[86].

Curtin, on the other hand, depicts the committee process as an auxiliary administrative channel of representation and deliberative rationality. She argues that the European Union's institutional structure can be understood in terms of the republican-type tenets of deliberative democracy. Necessarily assuming 'a person's [or representative institution's] capacity to be swayed by rational arguments and to lay aside particular interests and opinions in deference to overall fairness and the common interest of the collectivity',[87] this would support an understanding of the administrative process which would fit within the model set out in Chapter 4. Crucially, this conception of the committee system adheres to the republican belief in objective goods rather than subjective interests. It sees the 'common good [as] categorically different from an accommodation of private individual preferences'[88]. This is the fundamental normative difference between the neo-

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[85] Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays in European Integration* (Cambridge University Press, 1999), at 284.
[86] Weiler, *op. cit.*, at 284.
[87] Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer, 1997), at 54.
[88] Curtin, *op. cit.*, at 54.

corporatist and the deliberative understandings of the committee system. Similarly, it distinguishes the interest representation model of the administrative process from the more republican proposal canvassed in this piece. Curtin's analysis of the Union perceives it as animated by a commitment to the pursuit of universal good. This therefore demands the imposition of procedural requirements inspired by considerations of deliberative rationality rather than simple pluralist representation on the comitology process. Although these can sometimes incline in a similar direction, the implications of these administrative approaches differ quite considerably.

> Deliberation has not only a procedural but also a substantive connotation. Constraints are placed upon both the inputs to the dialogue and the outcomes to be tolerated. The requirement of deliberation thus embodies 'substantive limitations that in some settings lead to uniquely correct outcomes'.[89]

In this, it echoes the normative foundations of the administrative system for which this thesis argues. The deliberative conception of the committee system can thus be regarded as the European analogue of our administrative model. The academic treatment of this deliberative analysis will thus have obvious and useful implications for any future domestic debate.

VI. Conclusion

In summary, therefore, the image of the European Union as a mixed government of constituent interests provides a close parallel for this work's understanding of the contemporary administrative state. In both systems, it is argued, the structural separation between macro-institutional organs is motivated by a desire to ensure the representation of society's constituent interests in the state's decision-making processes. Institutions are identified with an abstract but foundational interest. In their actions, they are expected to

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[89] Craig, *Public Law and Democracy in the UK and the USA* (Oxford University Press, 1990), at 334, citing Sunstein, "Beyond the Republican Revival" (1988) Yale L.J. 1539, at 1550-1551.

articulate and advance the requirements of that interest. The polity's republican commitment to universality, however, ensures that they do not exercise unilateral power. Rather, the state is structured so that government becomes a participatory, deliberative process. This model of separation ensures that neither the government nor the courts can exercise power unchecked. They must rather recognise the other institutions' entitlement to represent its interest, and seek to come to some sort of accommodation between the two. This is an ongoing process in which the actions of one body are adjusted to reflect the expressed concerns of the other.

If all issues were to be resolved at this abstract level, this would, of course, constitute a sclerotically inefficient process. Delegation to administrative agencies, or a network of committees, is thus required in both systems. However, in both systems, this should properly be understood as an opportunity to enhance the quality and legitimacy of the state's decision-making process. This can be achieved as a result of these bodies' ability to operate at the micro-institutional level, refining the way in which state power is exercised to reflect the actual impact of its policies upon the citizens. The administration is thus, effectively, a form of institutional mediation between the bottom-up demands of individual citizens and the competing top-down commands of the constituency-representing organs.

This explanation of the EU's institutional process also suggests that a republican theory of the state can be constructed in a polity without geographical or qualitative classes. The popularity of the mixed theory of government was argued in Section 1 to have declined as a result of its inability to adapt to the self-interested egalitarianism of contemporary times. However, in terms of its status as an ethical theory of institutional organisation it has arguably never satisfactorily been replaced.

Pluralist conceptions of government are predicated on their pragmatic concession to a cynical understanding of human, and thus governmental, conduct. They thus necessarily reject the republican belief in the existence of objective values, submitting instead to a *fin*

de siecle acceptance of all ideas as morally relative. Human values, just as in Augustinian times, are contingent rather than universal.

The modern understanding of the separation of powers, meanwhile, has moved far from its ethical foundations. In the hands of the formalists, such as the Irish Supreme Court, it has arguably served to actually undermine the values of balance and virtue upon which it was originally based. Its use as a harbinger of majoritarian theories of democracy belies its origins as an attempt to construct social harmony out of the mature and mutual respect of society's competing constituent interests. It is worth noting that Aristotle's mixed theory, from which the separation of powers subsequently developed, arose in part as a result of his distaste for an absolutely democratic system in which power was 'despotically exercised'. Pure democracy, to him, was:

> A system in which power was exercised by mechanical, numerical majorities ... Such would be a tyranny of numbers and a tyranny of equality, in which the development of individuality was divorced from the exercise of power.[90]

To portray the separation of powers as an essentially majoritarian doctrine is thus to overlook its basic ideological origins.

Functionalists, meanwhile, have continued to portray the theory as a means of precluding the evils of tyranny and corruption. The specifics of their model of separation lacks, however, a sufficiently determinate conception of society as a constituency of interests to properly fulfill its republican role. The mixed theory of government did not simply depend upon a system of separation. It also required that the separation be organised along constituency lines so that the interaction of the institutions of the state would produce a public-interest-oriented balance. There were thus two essential elements of an appropriately republican balance.

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[90] Pocock, *op. cit.*, at 72.

> In negative terms, the existence of the proper institutional balance would serve to prevent tyranny, in itself an extreme manifestation of sectional self-interest. In positive terms, such a balance would help to ensure a deliberative democracy within which the differing constituencies which made up civil society would be encouraged to treat their preferences not simply as givens but rather as choices which were open to debate and alteration.[91]

Contemporary theories of separation are not founded upon this necessary image of the state as a construct of distinct and identifiable entities. Separation is arbitrarily organised in accordance with ideas of competence, function or power. The aim of these functionalists is effectively to ensure some form of institutional separation. This is a commendably ethical aim, which does reflect the instincts which originally underpinned the theory. It concentrates, however, only on the negative task of preventing tyranny. Devoid of any external idea of societal balance, it is unable to perform the critical second republican function.

This thesis attempts therefore to adapt the theory of mixed constitutionalism to modern times. Its key insight is arguably to advance an understanding of the state as a construct of constituent interests. This allows it to draw on the central tenets of republican thought, arguing that a universality of values can be achieved by the proper pooling of particular interests. That these interests are clearly identified allows the theory to avoid the indeterminacy which has plagued classical republicanism since the age of the American colonies. Furthermore, the fact that they mirror the constituent foundations of the state allows the theory to put forward a reasonable claim that the separation it proposes will produce balanced outcomes which advance the objective interests of the state.

As the discussion of the EU's committee system shows, however, it is therefore vitally important that this discretionary process of ongoing adjustment is regarded as a way of enhancing the system's rationality (and thus non-arbitrariness) rather than its level of

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[91] Craig, "Democracy and Rule-Making Within the EC: An Empirical and Normative Assessment", *loc. cit.*, at 114.

interest representation. Representation reflects a pluralist conception of the state which would not be compatible with the normative foundations of the model in Chapter 4. That theory of the separation of powers, and of the administration was based on a desire to generate norm-appropriate outcomes from the dialectical foundations of the modern state. It is required, therefore, to remain committed to those republican values of objective public interest and constituent representation which have always characterised conceptions of mixed constitutionalism. Furthermore, the EU debate demonstrates quite clearly the very different implications for administrative agencies of adopting a deliberative rather than a representative interpretation of their role. Procedural efforts to enhance the representation of organised interests are of a very different order to those designed to improve the rationality of the administrative process. As Joerges and Neyer note, a rationality-oriented view could result in:

> The establishment of fora where the views of all concerned societies can be included; legal principles and rules civilizing the decision-making process and providing an institutional context for practical reasoning; to ensure the potential of the system to manage tensions between output rationality (high standards [of review]), procedural transparency and fairness; … to promote the generation and dissemination of knowledge.[92]

As the concluding sections of this piece will contend, such developments in the administrative process are not only plausible but can arguably already be discerned in the recent caselaw of the courts.

[92] Joerges & Neyer, *loc. cit.*, at 299.

Chapter 6

THE THEORY IN ACTION:

IMPLICATIONS, CONSEQUENCES AND CONCLUSIONS

Introduction

As the preceding chapters have repeatedly emphasised, our legal rules and institutions are operational phenomena of a stridently social nature. Constitutional structures do not exist in an asocial void. The law, in its actions and implications, cannot be confined to the cloistered ivory towers of academia. On the contrary, it maintains an essentially symbiotic relationship with society and its citizenry, exerting an orienting effect upon the actions of individuals[1] just as it simultaneously seeks to identify itself with existing social norms.[2] Abstract analyses of universal values can therefore only carry a theory so far. Some assessment of the model's operational implications is required for this amended theory of institutional arrangement to be properly articulated.

The challenge, therefore, for the remainder of this work is to assess the practical implications of this thesis. This is an exercise in both description and prediction. Constraints of space preclude any comprehensive consideration of all of the areas upon which this model might impact. That is an enquiry deserving of extensive study in its own right. Nonetheless, this final chapter will attempt to examine specific legal issues in light of this thesis' outlined approach – asking, in the first place, whether the courts can conceivably be regarded as moving towards the adoption of this idea; and, subsequently, what the potential consequences of any more whole-scale adoption of this model might be.

Some overlap with previous chapters is inevitable. Following Unger's focus on the existence of counter-exceptions to traditional thought, the theory set out in Chapter 4 was in part extrapolated from the discrete areas of doctrinal inconsistency identified in

[1] *See* the discussion of Hart in Chapter 1.
[2] *See* the discussion of Schmitt and Allan in Chapter 1.

Chapter 3. These issues were, it will be remembered, taken as a template for theoretical reform. Argued to indicate the outlines of an emerging alternative approach, they provided the practical parameters within which Chapter 4's model of constituency-based arrangement was elaborated. There is obviously an element of circularity in evaluating a model in terms of existing caselaw upon which its conceptual origins in part depend. It is arguable, however, that this remains a worthwhile exercise. Chapter 3's discussion of particular topics was descriptive rather than doctrinal. The caselaw at issue was interpreted as evidence of a greater willingness on the part of the courts to subject the actions of administrative bodies to broader and more intensive scrutiny on non-statutory grounds. Very little attention was, however, paid to the jurisprudential justification offered for these developments. They were treated as externally-observed phenomena in need of rationalisation, rather than the internally explicable products of a particular judicial approach. Chapter 3 established the need for reform, but did not offer a solution. Chapter 4 focused primarily on first principles, advancing a theory of constituency-oriented institutions and non-arbitrary government without reference to the doctrines of administrative law outlined in Chapter 3. It is necessary, therefore, to return to this caselaw in order to assess the conceptual compatibility of this new model. As Chapter 1, considering Dworkin's theory of interpretative integrity explained:

> The notion of 'integrity' draws attention to the way in which the system attempts to seamlessly evolve to embrace any reflect any shifting social mores. Changes are publicly justified by reference to principles and values whose authority has been confirmed by consistent public repetition over time .... The state's institution publicly invoke these tenets to justify any changes they adjudge to be necessary, thereby investing these 'new' social understandings with the authoritative reputation cultivated by the public use and repetition of the 'old'.[3]

This chapter will therefore consider the extent to which this thesis' proposed model, with its commitment to non-arbitrariness and abstract institutional separation, can

[3] *See* Chapter 1, at page 18.

convincingly accommodate contemporary doctrines of constitutional and administrative law.

I. Of *Vires* and Values: An Examination of the Basis of Judicial Review

A. Competing conceptions of administrative action

Consistently portrayed as a required response to the emergence of an administrative state, it is perhaps unsurprising that the focus of this analysis will fall on the courts' attitude towards administrative organs. It has been argued that it was the creation and proliferation of these agencies which undermined existing legal doctrines. Thus the ability of an alternative theory to acknowledge, explain and embrace these bodies should provide some indications of its contemporary utility as an applicable model of institutional arrangement.

There is, of course, a degree of external correspondence between the current system's effective acceptance of administrative power as a political fact, and the proposed model's justification of it as an institutional means of securing norm-appropriate outcomes. From the point of view of the system's internal account of administrative action, however, there are clear discrepancies. A necessary evil for traditional theory, these bodies are contrarily characterised by this thesis as an instrumentally valuable process. This necessarily influences the way in which the judicial review of administrative acts is understood. Presumptively illegitimate on the analysis of one theory, administrative bodies are, in fact, depicted in a positive light by the other. On the first view, the courts are likely to regard these organs with suspicion, seeking to restrictively interpret their competences and abilities. On the second, more positive, model, judicial review is regarded as a means of ensuring that these bodies properly fulfil their institutionally legitimate function. An analysis of the courts' conception of the proper basis for judicial review should thus

provide some valuable insight into the relative contemporary relevance of these rival theories.

As Chapter 3 noted, the law has historically been conceived in terms of its connection to an authoritative sovereign entity, from which all power emanates. This manifested itself in a reluctance on the part of courts and commentators to recognise the legitimacy of decentralised and discretionary exercises of administrative power. The increasing acceptance of administrative authority as a political and social reality[4] has however encouraged the elaboration of legal doctrines which seek to reconcile these developments with the dictates of traditional theory. The continued attachment to the historical concept of a hierarchical sovereign power has, however, prevented any acceptance of the basic validity of administrative acts. These bodies are denied any claim on their own behalf to substantive legitimacy. Their conduct cannot be authorised by reference to any independent values of institutional action. On the contrary, conventional wisdom insists on the parasitic justification of exercises of power on the basis of their connection to the ultimate sovereign agent. It is this attitude which underpins the traditionally dominant *ultra vires* theory of review.

B. Ultra vires and the administration

The *ultra vires* approach tolerates the vesting of public power in subordinate bodies, but requires that any exercise of authority remain within the limits prescribed by the parent organ. The theory thus conforms to the courts traditional insistence on the existence of a supreme and sovereign power, to which all authority must ultimately be attributable. Given the way in which the Diceyan doctrine of parliamentary supremacy has historically been treated as '[t]he bedrock of the British constitution'[5], it is unsurprising that the *ultra vires* theory, with its shared commitment to the concept of a supreme sovereign power, has traditionally dominated administrative and constitutional discourse in the United Kingdom. Courts, in their supervision of administrative bodies, have thus been tasked with ensuring the ongoing fidelity of these agencies to the intentions of Parliament

[4] See, for example, *Leontjava v. D.P.P.* [2004] 1 IR 591; *Maher v. Minister for Agriculture* [2001] 2 IR 139.

[5] *R (Jackson) v. A.G.* [2006] 1 A.C. 262; [2005] UKHL 56, at para. 9, *per* Lord Hope.

expressed in statute. Legitimacy is equated with declared parliamentary approval. External values ought not to intrude upon the review process. As Blackstone commented, 'if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it'.[6]

The supervisory jurisdiction of the courts was thus confined to mere questions of statutory competence within which considerations of external values could have no place. Without an error going to jurisdiction, no review could occur.[7] This was repeatedly emphasised by the courts. Lord Sumner, for example, conceived the courts as fulfilling a very restricted function:

> [The court's] jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined.[8]

Brightman J.'s similar insistence in *Evans* that 'judicial review is concerned not with the decision but with the decision-making process' has been consistently incanted as an affirmation of the fact that the courts cannot question the outcome of the administrative process. Their concern is to ensure that the power at issue has been exercised in accordance with the instructions set out in statute. 'Judicial review is not an appeal from a decision but a review of the manner in which the decision was made'.[9] As the Australian courts explained in *Peko-Wallsend*[10], the courts' role is solely to patrol the parameters of the statutory power in question. Once the subordinate body remains within the 'four corners'[11] of its competence, the autonomous actions of the relevant authority cannot be impugned.

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[6] Blackstone Commentaries on the Laws of England (1765), cited in Loveland, *Constitutional Law, Administrative Law and Human Rights* (Oxford University Press, 2006), at 32.
[7] See, for example, *R (Martin) v. Mahony* [1910] 2 I.R. 695; *R. (de Vesci) v. Queen's County JJ* [1908] 2 I.R. 285; *R.. v. Governor of Brixton Prison, ex parte Armah* [1968] A.C. 192.
[8] *R. v. Nat Bell Liquors Ltd* [1922] 2 A.C. 128, at 156.
[9] *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155, at 1173-1174.
[10] *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* (1986) 162 C.L.R. 24.
[11] *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223, at 228.

Despite the absence in Ireland of any equivalent conception of parliamentary sovereignty, judicial review of administrative action has often been interpreted in light of the *ultra vires* theory.[12] Given the Constitution's express entrenchment of the sort of independent norms which should logically lead to more substantive notions of judicial review, this is somewhat surprising. Nevertheless, the doctrine of jurisdictional error, as set out in *R (Martin) v. Mahoney*,[13] 'seems to have almost hypnotised successive generations of judges'[14] who continued to insist on some form of 'jurisdictional frailty'[15] as an essential prerequisite for review.

C. Ultra vires under strain

Over time, however, the judicial inclination to justify intervention by reference to specific legislative instructions became increasingly unsustainable. The courts instead began to develop the idea of an implied parliamentary intent. Administrative actions could thus be reviewed on the basis of the extent to which they complied with independent ideas of legality which, the courts assumed, Parliament would have expected them to observe. As the decision in *Anisminic*[16] demonstrated, this approach effectively provided for the use of external criteria of judicial evaluation. The Lords in that case employed the concept of a putative parliamentary intention to overturn the clear intention of the Commons, as set out in statute, to exclude the jurisdiction of the courts.

> [T]he reality [of *Anisminic*] is that the courts were reaching their decision by drawing upon a constitutional principles independent of Parliamentary intent.[17]

This decision thus indicated quite starkly that this doctrine of fictional intent in practice actually operates as an independent repository of supervisory values.

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[12] See, for example, *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297; *State (Kenny) v Minister for Social Welfare* [1986] I.R. 693; *Doyle v. An Taoiseach* [1986] ILRM 693.
[13] [1910] 2 I.R. 695.
[14] Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Round Hall, 1998), at 413.
[15] *Lancefort v. An Bord Pleanala (no.2)* [1999] 2 I.R. 270, at 310, *per* Keane J.
[16] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.
[17] Craig "Ultra Vires and the Foundations of Judicial Review" (1998) 57 C.L.J. 63, reproduced in Forsyth ed., *Judicial Review and the Constitution* (Hart, 2000), at 52.

(i) Wednesbury review

Developments in the English courts have continued this move away from the *ultra vires* theory's insistence on a specific legislative intent. The introduction of *Wednesbury* unreasonableness as a legitimate ground of review concentrated the attention of the court on the outcome of the exercise of administrative power, rather than on the way in which it was used. This required the courts to consider the merits of a decision by reference to residual values of rationality, rather than simply asking themselves whether the procedures adopted were within the scope of the body's delegated powers.

Rhetorically, of course, this jurisdiction was justified in orthodox *ultra vires* terms. A decision would only be struck down if it was 'so unreasonable as to go beyond anything that Parliament can have intended'[18]. The courts, wary of intruding in areas outside their competence, set the threshold of unreasonableness at a very high level. Thus Diplock L.J. in *Mixnam* held that unreasonableness would only be found where there was:

> [S]uch manifest arbitrariness, injustice or partiality that a court would say "Parliament would never have intended to give authority to make such rules; they are unreasonable and *ultra vires*".[19]

This Parliament-oriented formulation of the proper approach to judicial review was expressly affirmed as the 'correct test' in Ireland by Henchy J. in *Cassidy*[20]. Decrying the failure of the Minister's price control regime to distinguish between lounge and public bars, Henchy J. concluded that 'Parliament could not have intended that licensees of lounge bars would be treated so oppressively and unfairly'[21].

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[18] *Hall & Co. v. Shoreham-by-Sea UDC* [1964] 1 All E.R. 1.
[19] *Mixnam Properties Ltd. v. Chertsey UDC* [1964] 1 Q.B. 214, at 237-238.
[20] *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297. This case was cited with approval in *State (Kenny) v Minister for Social Welfare* [1986] I.R. 693; *Doyle v. An Taoiseach* [1986] ILRM 693; *Purcell* v. *Attorney General* [1995] 3 I.R. 287; [1996] 2 ILRM 153.
[21] [1978] I.R. 297, at 311.

In its reluctance to generally involve itself in administrative matters, and in its invocation of the putative intention of Parliament that '[delegated] power ... should be exercised reasonably',[22] the *Wednesbury* doctrine evidently aimed to remain within the boundaries of the *ultra vires* theory. In reality, however, a jurisdiction which allowed for the review of the substance of an administrative decision was fundamentally incompatible with an adherence to the orthodox requirement that judicial scrutiny proceed from a specific and evident parliamentary intent. '[T]he more contrived the search for the legitimation of legislative intent, the more strained and implausible does the whole doctrine of *ultra vires* become.'[23] An implied intention on the part of Parliament to ensure reasonableness in all administrative acts effectively creates an independent ground of challenge.

It is thus notable that Lord Diplock's later decision in *GCHQ* described the standard of reasonableness without reference to the legislature's fictional will. Furthermore, the ability of the court to intervene did not, in his view, have to be justified on the basis of the inferred assumption that an unidentified legal error had occurred. Irrationality rather constituted an autonomous head of review in its own right, drawing on external ideas of rationality and morality to invalidate any decision which was 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'[24].

Traces of this type of judicial acceptance of the review process as autonomously-inspired are also evident in the Irish decisions of this era. Lord Diplock's judgment in *GCHQ* was examined at some length by the Supreme Court in *State (Keegan) v. Stardust Compensation Tribunal*[25]. Henchy J. strongly rejected Lord Diplock's reliance on logic and morality, criticising the former as an excessively narrow ground of review, and the latter as an indeterminate invocation of a 'vague, elusive and changing body of standards

[22] [1978] I.R. 297, at 310.
[23] Craig, *loc. cit.*, in Forsyth ed., *op. cit.*, at 53.
[24] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.
[25] [1986] I.R. 642.

which in a pluralist society is sometimes difficult to ascertain and is sometimes inappropriate or irrelevant to the decision in question'[26].

His own restatement of the appropriate standard of review was expressed, however, in similarly independent terms. Henchy J. felt that:

> The test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied *constitutional* limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.[27]

This consideration of the courts' attitude to the review process is doubly interesting. In the first place, ideas of 'fundamental reason' and 'common sense', like Lord Diplock's discussion of logic and morality, clearly indicate a reliance, on the part of the courts, on residual values outside the particular intention of Parliament. Secondly, Henchy J. here describes the notion of *ultra vires* in notably non-statutory terms, deriving it, not from any doctrine of parliamentary supremacy, but from the tenets of the constitutional text.

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[26] [1986] I.R. 642, at 658. This was approved by Griffin J. in his judgment.

[27] [1986] I.R. 642, at 658. The Irish approach to reasonableness was confused by the later decisions of the Supreme Court in *P. & F. Sharpe Ltd. v. Dublin City and County Manager* [1989] I. R. 701 and *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39. Although Finlay C.J. approved Henchy J.'s formulation of the test in Keegan, he also went on to state that an applicant seeking to establish unreasonable conduct must show 'that the decision-making authority had before it no relevant material which would support its decision'. [1993] 1 I.R. 39, at 72. As Hogan & Morgan have argued, however, this stricter approach effectively elides two distinct conceptual issues, confusing reasonableness review with scrutiny based on actual legal or factual errors. See Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Round Hall, 1998), at 647-649. Although this disparity has not been resolved, it is notable that several subsequent cases have continued to use the *Keegan* formula. See, for example, *Matthews v. Irish Coursing Club* [1993] 1 I.R. 346; *E.H. v. Information Commissioner* [2001] 2 I.R. 463. Furthermore, Carney J. in the High Court in *Gorman v. Minister for the Environment* [2001] 2 I.R. 414 relied, in his discussion of reasonableness, on both authorities. He omitted to refer, however, to the passage from *O'Keeffe* outlined above, citing it merely as an example of the conventional *Wednesbury* principle that a court cannot intervene on the basis that it would have reached a different conclusion on the facts of the case. O'Neill J. similarly allowed for the possibility of review for 'an error of law' where 'there would have to be either no evidence at all to support the conclusion ... or alternatively that the decision must be one which on the basis of the facts, flies in the face of reason and common sense'. [2001] 2 I.R. 463, at 488.

As this chapter's subsequent survey of the Irish concept of constitutional justice will show, to disconnect the *ultra vires* theory from a model predicated on the normative supremacy of Parliament's intent is to deprive it of both its logical basis, and any significant operational utility.

(ii) Procedural fairness

This tendency on the part of the courts to assess administrative activity by reference to non-statutory values is also evident in the development of the doctrine of natural justice which has latterly evolved into a more general duty of procedural fairness.[28] This caselaw was discussed to some extent in Chapter 3. The key point here, however, is that the decision of the court in *Ridge v. Baldwin*[29] to subject the decisions of non-judicial subordinate bodies to the requirements of natural justice has produced a situation in which the courts consistently impose procedural obligations on administrative actors which are not to be found in the relevant statutory scheme. As Forsyth has accepted, it 'cannot be plausibly asserted that the implied intent of the legislature provides any significant guidance to the reach of the rules of natural justice'[30].

This again reiterates the capacity of the courts to examine administrative actions on external grounds. Statutes, it would seem, have become increasingly unimportant to the review process. Where the courts once could only act by reference to an express statutory term, they are now entitled to rely on autonomous values posing as an implied parliamentary intent. According to this constitutional vision, the courts are not bound simply to blindly apply the instructions of Parliament but in fact constitute, in reality, an independent check on government power. As Lord Diplock explained:

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament' but what *this metaphor*, though convenient, omits to take

[28] *Re H.K. (an infant)* [1967] 1 All E.R. 226.
[29] [1964] A.C. 40.
[30] Forsyth, "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 C.L.J. 122, reproduced in Forsyth ed., *op. cit.*, at 40.

> into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen.[31]

That Lord Diplock went on to require the state to observe the principles of 'elementary justice' in its acts illustrates the extent to which the courts have evidently adopted a role beyond that of reflexively following express statutory instructions.

(iii) Human rights

The enactment of the Human Rights Act 1998 allowed for the creation of a review jurisdiction dedicated to the enforcement of independent values within the parameters of traditional theory. The ability of the courts to invoke substantive human rights in their scrutiny of government acts could be constitutionally justified by reference to the fact that these limitations were effectively self-imposed by Parliament. It has thus become common for the English courts to attribute their human rights competence to the provisions of this Act.

This overlooks, however, the pre-HRA development of a human rights regime which rested on the judicial assertion of inherent common law values. In *Derbyshire County Council*[32], for example, Lord Keith insisted that the common law of England had long protected an independent value of free speech. He thus dismissed the attempts by the council in question to bring defamation proceedings as 'an undesirable fetter on freedom of speech' – a position which, he was at pains to indicated, he 'reached [based] ... upon the common law of England without finding any need to rely upon the European Convention'[33].

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[31] *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, at 279. Emphasis added.
[32] *Derbyshire County Council v. Times Newspapers* [1993] A.C. 534.
[33] [1993] A.C. 534, at 551.

Similar decisions were made in relation to the right of access to the courts, and the right to an appeal. The court's decision in the latter instance was particularly clear in its interpretation of judicial review as resting on independent substantive values.

> The [challenged measure] necessarily contemplate for some a life to destitute that, to my mind, no civilized nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the [principles of the Convention] .... Nearly 200 years ago, Lord Ellenborough C.J. ... said 'As to there being no obligation for maintaining poor foreigners ... the law of humanity which is anterior to all positive law, obliges us to afford them relief'.[34]

Thus, even in advance of the Human Rights Act 1998, a number of English judges had already begun to explain their powers in stridently autonomous terms. It is thus arguable that the notion of the existence in English law of a body of enduring values, against which the acceptability of all government acts falls ultimately to be assessed, did not emerge as a result of the incorporation of the Convention. The basis of this jurisdiction had long been established. As Laws has noted, '[t]he development of judicial review since the seminal cases of the 1960's ... [had already] vouchsafed the submission of [government] to the rule of law'[35].

(iv) Non-statutory review

The increasingly astatutory character of contemporary curial review has also been reflected in other areas of the law. Judicial scrutiny is, for example, no longer confined to statutory powers. *GCHQ*, for example, subjected the exercise of the prerogative powers of government – for which there is obviously no direct statutory instructions – to the scrutiny of the courts.[36] *Datafin* similarly extended the scope of review to non-statutory bodies.[37] Judicial review has clearly become a more general jurisdiction, requiring a broad range of governmental bodies to observe the substantive limitations imposed by the

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[34] *R. v. Secretary of State for Social Security, ex. P. Joint Council for the Welfare of Immigrants* [1996] 4 All E.R. 385, at 400.
[35] Laws, "Judicial Review and the Meaning of Law" in Forsyth ed., *op. cit.*, at 185.
[36] [1985] A.C. 374.
[37] *R. v Panel on Take-overs and Mergers ex parte. Datafin* [1987] QB 815.

courts in the name of Parliament. With references to the specific instructions of Parliament thus conspicuous by their habitual absence from the review process, the continuing relevance of the traditional *ultra vires* model must be called into question.

D. Academic criticism

So it has been that the theory has come under sustained academic attack in the U.K., being variously disparaged as 'indeterminate, unrealistic, beset by internal tension, and ... [unable] to explain all instances where the judiciary has applied public law principles'[38]. Whereas the courts' historical invocation of a directly didactic Parliament once provided jurisdictional content *and* legitimacy, the latter-day doctrine of implied legislative intent offers only bare legitimacy.

Supporters of the *ultra vires* theory have acknowledged its irrelevance to the actual deliberations of contemporary courts. As Elliott – who favours the retention of the notion of Parliamentary intention in some sort of constitutional role – has commented, '[a]ll modern writers recognize the necessity of moving beyond the unconvincing dogma of the orthodox ultra vires principle'[39]. Forsyth has instead attempted to portray the theory as a fictional but necessary 'fig-leaf'[40], continued adherence to which is required in order to 'preserve the decencies' of a 'constitutional order in which myth but not deceit plays so important a role and where form and function often differ'[41]. He has thus set out a modified form of the theory which, he feels, is capable of fulfilling this legitimating role. His model argues that Parliament's failure to prevent the courts' expansion of the nature and scope of judicial review can be construed as constituting a tacit assent to that process. Elliot, similarly, argues that the courts' creation of autonomous rules of administrative review is based on a 'constitutional warrant, granted by Parliament'[42]. This amended

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[38] Craig, *loc. cit.*, in Forsyth ed., *op. cit.*, at 47.
[39] Elliott, "Legislative Intention versus Judicial Creativity? Administrative Law as a Co-operative Endeavour" in Forsyth ed., *op. cit,* at 368.
[40] This term first appeared in Laws, "Illegality: the problem of jurisdiction" in Supperstone & Goudie eds., *Judicial Review* (1992) but has since been used by many contributors to this debate, most notably Christopher Forsyth.
[41] Forsyth, *op. cit.*, at 42.
[42] Elliott, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principles of Judicial Review" (1998) 57 C.L.J. 63, reproduced in Forsyth ed., *op. cit,* at 96.

interpretation of *ultra vires* 'sees general legislative intent merely as a key to unlocking the door to allow the courts to decide on the ambit of judicial review in accordance with the rule of law'[43].

This imputation of an indirect relationship between legislative intent and judicial scrutiny is, however, only 'an elegant but doomed attempt to dress a fiction in the garb of reality'[44]. It cannot conceal the fact that the criteria of review employed by the courts have been autonomously elaborated by the judiciary without reference to the specific intentions of Parliament. The supervisory involvement of the courts is – as the theory set out in this thesis suggests it should be – guided by external and objective values. *Ultra vires* offers only an *ex past facto* (and unconvincing) justification of a review process conducted on entirely different grounds. '[L]egislative intent set at such a general level will not in any sense be determinative of what rights an individual should receive in court'[45]. As Craig, considering Forsyth's redefined model, remarked:

> The flexibility of the *ultra vires* principle can preserve the veneer that the courts are simply obeying the legislative mandate, but it is this very flexibility which ultimately robs the reasoning of any conviction. It is precisely because legislative intent can be used to legitimate almost all types of control that it loses its potency to legitimate any particular one.[46]

It is clear, therefore, that there is a considerable divergence between the rhetoric and the reality of *ultra vires* review. Constitutional orthodoxy continues, of course, to justify this jurisdiction as the judicial vindication of Parliament's intent. The caselaw shows, however, that the courts, in their use of their actual powers of review, effectively rely on external notions of legitimacy. This necessarily suggests, however, that these values are logically prior to the doctrine of parliamentary supremacy, upon which the *ultra vires* theory has traditionally been based. That the courts can assess the actions of

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[43] Craig, "Competing Models of Judicial Review" [1999] PL 428, reproduced in Forsyth ed., *op. cit.*, at 376.
[44] Laws, in Forsyth ed., *op. cit.*, at 76.
[45] Craig, "Competing Models of Judicial Review" in Forsyth ed., *op. cit.*, at 377.
[46] Craig "Ultra Vires and the Foundations of Judicial Review" in Forsyth, ed., at 50.

administrative bodies in terms of their compliance with external norms implicitly constitutes those values as independent criteria of governmental legality.

There has therefore been an increasing academic tendency, beginning with Oliver's seminal attempt to connect judicial review with the objective of preventing abuses of public power,[47] to rest the competence of the courts on common law principles, or on the rule of law.[48] Common law models of review, under which the courts exercise independent supervisory powers, have in fact now assumed a position of academic dominance in the U.K. on this issue.[49]

On this analysis, *ultra vires* theory is subordinated to superior values. Even the courts' continued reliance on traditional rhetoric presents no obstacle to an understanding of the British constitution as resting on some sort of residual norms. Woolf thus declared 'that there are ... limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold'[50], a contention echoed by Laws' professed opinion that 'a higher order law confers primacy on the doctrine of parliamentary supremacy ... and must of necessity limit it'[51]. Craig, Allan, Oliver and Jowell are amongst the prominent constitutional commentators who have accepted the existence of such antecedent limitations on the power of Parliament. Contemporary academic discourse thus tends to agree that '[l]egislative authority is derived from, and must therefore be limited by, a collection of norms found in the rule of law'.[52]

It is important to note that the contributions of both Laws and Woolf to this issue which were outlined above were made in an extra-judicial capacity. Both were careful to ensure that their judicial pronouncements conformed to accepted constitutional orthodoxy. Their

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[47] Oliver, "Is the Ultra Vires rule the basis of Judicial Review?" [1987] PL 543.
[48] Often treated as the same.
[49] Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 (3) O.J.L.S. 435, at 438.
[50] Woolf, "Droit Public – English Style" [1995] PL 57, at 69.
[51] Laws, "Law and Democracy" [1995] PL 72, at 81.
[52] *See* further Allan, "The Rule of Law as the Foundation of Judicial Review" in Forsyth, ed, op. cit.,; "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 C.L.J. 111.

concerns were, however, clear. As Woolf later put it, when considering government attempts to exclude the courts from the asylum appeals process:

> I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution.[53]

If faced with the choice between preserving parliamentary sovereignty and, on the other hand upholding fundamental normative values, the instincts of the judiciary evidently inclined towards the latter. It is in this context that the Lords' most recent input into this debate should thus be understood.

E. Changes in the courts – the decision in Jackson

The decision *R (Jackson) v. A.G.*[54] concerned the enactment of the Hunting Act 2004, which criminalised the hunting of wild animals with dogs, except in limited circumstances. The challenge to the Act was based not on its content, but on the way in which it had been passed by Parliament. The Act was introduced by way of a 1949 statute which allowed for the circumvention of the constitutional veto of the House of Lords, thereby permitting the Labour government to avoid the long-standing opposition of that chamber to the adoption of such anti-hunting measures.

The Parliament Act 1949, on which the government had relied, was itself an amendment of the Parliament Act 1911. This had been introduced by the government of the day in response to entrenched Conservative opposition in the Lords to many of the Liberal Party's reforming measures. Despite the electoral success of the Liberals, the Lords had refused to allow the enactment of a number of important Bills – most notably the 1893 Home Rule Bill, and the 1909 Finance Bill.

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[53] Comments made by Woolf LCJ in a speech, delivered to mark the centenary of the Squire Law Library, University of Cambridge on March 3rd, 2004.
[54] [2006] 1 A.C. 262; [2005] UKHL 56.

Section 2 of the 1911 Act thus provided that a Bill could be declared to have passed Parliament if it had been approved by the House of Commons in three successive sessions, and rejected by the Lords in each of those sessions, provided that at least two years had elapsed from the introduction of the Bill, and its adoption by the Commons for the third time. The Act also excluded Money Bills and 'any provision to extend the maximum duration of Parliament beyond five years' from the scope of section 2.

The 1949 Act qualified the 1911 legislation by easing the original restrictions on the use of this process. It required only that a Bill be approved in two successive sessions of the Commons. Furthermore, the two-year time limit was reduced to one.

It was argued in *Jackson* that these 1949 reforms were, however, unlawful. The case for the applicants effectively turned on their submission that the 1949 Act was a species of sub-primary legislation, which could not be used to amend the parent Act. The 1911 Act had, however, declared that 'any' public Bill passed by means of the procedure which it set out would 'become an Act of Parliament'. The Lords therefore concluded that the applicant's challenge should fail.

The central focus of this case, relating as it does to the details of a particular parliamentary procedure, is obviously of limited general relevance. Of more interest, however, were the *obiter* responses of the Lords to the Attorney General's contention that the 1949 Act could, in principle, be used to introduce significant constitutional changes. Counsel for the applicants had argued that a decision to uphold the 1949 Act would logically allow the Commons, for example, to amend section 2 of the 1911 Act so as to indefinitely extend its own lifetime. Relying on the doctrine of parliamentary supremacy, the Attorney General concurred that this was the case.

Based on the 'strict legalism'[55] of traditional *ultra vires* theory, this is, of course, correct. Remarkably, however, the majority of the judges seemed to suggest the existence of some inherent limitations on the legislative power of this ostensibly supreme organ. As

[55] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 101.

Lord Bingham's acceptance of the Commons as an 'ultimately unconstrained power'[56] showed, this position was by no means unanimous. Furthermore, it should also be noted that, without fuller argument on this hypothetical point, the judges professed themselves only 'inclin[ed] very tentatively to the view that [the] instinct may be right ... that there may be a limit somewhere to the powers [of the Commons]'[57]. Allowing for these caveats, however, the fact remains that, as Lord Brown commented:

> [I]n common ... I think, with the majority of your Lordships I am not prepared to give such a ruling as would sanction in advance the use of the 1911 Act for all purposes, for example, to abolish the House of Lords ... or to prolong the life of Parliament, two of the extreme ends to which theoretically this procedure could be put.[58]

Limited though it might be, this instinct towards restriction does not conform to the system's traditional conception of an absolutely unfettered Parliament.

The judgments of Lords Steyn and Hope went further, however, to expressly impugn the idea of parliamentary sovereignty. Lord Hope dismissed the concept of Parliament as an unconstrained organ.

> [P]arliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled .... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.[59]

Lord Steyn, for his part, opined that:

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[56] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 41.
[57] [2006] 1 A.C. 262; [2005] UKHL 56, at para.178.
[58] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 194.
[59] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 104.

> We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts .... The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place.[60]

Crucially, he then went on to suggest that – as the academics outlined above have argued – there may be some constitutional principles to which the sovereignty of Parliament is ultimately subject.

> The judges created this principle [of Parliamentary supremacy]. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances ... the House of Lords ... may have to consider whether [a proposed change affects] a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[61]

It is obviously important not to overstate the significance of what remain only the *obiter* comments of individual judges. Nonetheless, the fact that several members of the United Kingdom's highest court offered at least intuitive support for the idea of independent constraints on parliamentary power indicates the extent to which rule of law conceptions of the constitutional order have supplanted those based on parliamentary supremacy and *ultra vires* review. Already firmly established in the academic sphere, the decision in *Jackson* suggests that the theory that there are inherent substantive limitations on the exercise of public power is gaining ground amongst the more orthodox judiciary.

F. Judicial review as an independent jurisdiction

The implications of such a development for the model outlined in this thesis are clear. Traditional *ultra vires* theory, with its emphasis on a hierarchical and unfettered

[60] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 102.
[61] [2006] 1 A.C. 262; [2005] UKHL 56, at para. 102-103. Lord Steyn used the examples of 'an attempt to abolish judicial review, or the ordinary role of the courts' to illustrate his point.

sovereign power, could not accept the way in which this work's suggested model equates the legitimacy of public actions with the extent to which they reflect particular substantive values. This necessarily implies that any exercise of power which contravenes these values will be unlawful. The identity of the institution in question is irrelevant. The body charged with ensuring the observance of this value (in this case, the court) is entitled to intervene as it sees fit, on the basis of its overarching obligation to enforce the system's foundational norms. That judicial review seems, increasingly, to be understood in the U.K. as an independent process of value-oriented review thus supports the claim of this thesis that the system can be (and, indeed, arguably is) founded upon its protection of certain fundamental principles. The marginalisation of the *ultra vires* theory, and of the doctrine of parliamentary supremacy to which it adhered, thus removes one of the most obvious objections to the constitutional vision set out in this work.

This analysis is even more apposite in Ireland. As an earlier section of this chapter has commented, the continued Irish references to aspects of the *ultra vires* theory have been somewhat surprising. The existence of an entrenched constitutional commitment to secure denominated substantive values should arguably have rendered the courts' jurisdictional reliance on a putative parliamentary intent obsolete.

This is particularly so given the elaboration by the courts of a doctrine of constitutional justice in administrative affairs. First set out by Walsh J. in *McDonald v. Bord na gCon*[62], it was explained by the courts in orthodox *ultra vires* terms. Echoing the U.K. courts' contention that Parliament required that basic precepts of legality would be observed, the Oireachtas was assumed to intend that the principles of constitutional justice would be secured:

> [T]he presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by

[62] [1965] I.R. 217.

> an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice.[63]

That these values were, in reality, independent grounds of challenge was, however, evidenced by Walsh J.'s immediate concession that '[i]n such a case any departure from those principles would be restrained and corrected by the Courts'.

This power of the courts to demand administrative compliance with extra-statutory conditions was set on a firmly constitutional footing in *Re Haughey* when the Supreme Court identified an independent Article 40.3. right to fair procedures.

> Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen.[64]

The courts were thus obliged:

> not [to] deny to the citizens the shield against injustice which th[e] guarantee [of fair procedures is] intended to provide[65].

As has been the case in Britain, there has been a divergence between judicial invocations of *ultra vires* and the reality of the judicially permitted heads of review. In common with their English counterparts, for example, the Irish courts have allowed the use of *Wednesbury* unreasonableness as a ground of challenge. As the preceding sections have shown, such reasonableness review necessarily requires the courts to move beyond the constrained strictures of statute. 'No amount of judicial endorsement of Lord Brightman's dictum in Evans can disguise [the] essential legal reality' that 'when the court quashes a

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[63] *East Donegal Co-op v. A.G.* [1970] I.R. 317, at 341.
[64] [1971] I.R. 217, at 264, *per* O'Dalaigh C.J.
[65] *Garvey v. Ireland* [1981] I.R. 75, at 100, *per* Henchy J.

decision on grounds of unreasonableness, it is in effect saying that the merits of the decision are so plainly flawed ... that the courts will not stand over [it]'[66].

In terms of procedural fairness, however, Irish judges have drifted much further from the *ultra vires* theory's traditional moorings. As the citations above make clear, the ability of the Irish courts to intervene is expressly justified by reference to external notions of justice and fairness.[67] In this context, the continued use of the language of *ultra vires* is very unconvincing. In Irish terms, it can only realistically be explained as some sort of instructional metaphor. Although incompatible with the justice-based competence of the courts, it does offer a colourful reminder of the importance of judicial deference in administrative matters. Employed for reasons of convenience rather than ideological clarity, its relevance to the Ireland is, at best, questionable. Certainly, it should not pose problems for any attempt to apply this thesis' theory to the Irish constitutional order.

II. The Search for Substantive Values

The preceding section has thus traced the gradual emergence in both Ireland and England of a judicial willingness to examine administrative acts on independent grounds. In this, it supports the argument, set out in Chapter 3, that a commitment to certain key autonomous values permeates the institutional order of the state. Justice, fairness and the rule of law have all been invoked as objective criteria of governmental legitimacy. Thus far, however, this chapter has not considered the particular content of these principles. What does justice or fairness actually entail? The assumption by the courts of independent powers of review echoes the general republican thrust of this thesis. It does not, however, automatically ensure that the substantive details of our existing system coincide with those described in Chapter 4. This section will therefore assess the extent to which recent developments in the caselaw of the courts can be said to sustain the

[66] Hogan, "Judicial Review, the Doctrine of Reasonableness and the Immigration Process" (2001) 6 *Bar Review* 329.
[67] See also the earlier discussion of the decision in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642.

suggested status of non-arbitrariness as the underlying value of our constitutional structures.

A. The doctrine of legitimate expectations:

(i) The duty to act fairly

One area of the law in which judicial references to fairness have consistently recurred is in cases concerning the relatively recent doctrine of legitimate expectations. In *GCHQ*[68], Lord Fraser explicitly connected the entitlement of an individual to receive a benefit or privilege to which they had a legitimate expectation with the general obligation on government agencies to conduct themselves fairly when interacting with the state's citizens. Taylor J. agreed in *Ruddock* that 'the doctrine of legitimate expectations in essence imposes a duty to act fairly'[69], a sentiment evidenced also in the judgments of Laws J. in *Richmond LBC*[70], O'Hanlon J. in *Fakih*[71] and Taylor J. in *US Tobacco*[72]. That the courts' ability to enforce such benefits is founded upon its desire to ensure observance of this value was most strongly stated in *Hamble Fisheries*[73] and in *Coughlan*[74], where the relative fairness of the acts impugned was regarded as the determinant touchstone of their ultimate legality.

United in their invocation of a general notion of fairness, the authorities do not, however, advance a single understanding of the specific content of this value. Craig has correctly identified the way in which this jurisdiction can be justified on various differing grounds.

> Th[e] [instrumental] rationale emphasises the connection between procedural due process and the substantive justice of the final outcome .... [T]he procedural rights perform an instrumental role in the sense of rendering it more likely that there will be an accurate decision on the substance of the case .... Other [non-

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[68] [1985] A.C. 374.
[69] *R. v. Secretary of State for the Home Department, ex. p. Ruddock* [1987] 1 W.L.R. 1482.
[70] *R. v. Secretary of State for Transport, ex. p. Richmond upon Thames London Borough Council* [1994] 1 W.L.R. 74.
[71] *Fakih v. Minister for Justice* [1994] 2 I.R. 406.
[72] *R. v. Secretary of State for Health, ex. p. US Tobacco Int'l Inc.* [1992] 1 Q.B. 353.
[73] *R. v. Minister of Agriculture, Fisheries and Food, ex. p. Hamble Fisheries* [1995] 2 All E.R. 714.
[74] *R. v. N. & E. Devon Health Authority, ex. p. Coughlan* [2000] 2 W.L.R. 622.

> instrumental] justifications ... focus on formal justice and the rule of law ... [and] are also seen as protecting human dignity by ensuring that the individual is told why he is being treated unfavourably, and by enabling him to take part in the decision.[75]

There is the possibility, therefore, of some divergence between those, on the one hand, who equate this doctrine with an instrumental commitment to good administration, and, on the other hand, those who deontologically envisage it as a jurisdiction founded upon a protection of important values.

Instinctively, these objectives incline in somewhat different directions. A focus on individual's rights would require, for example, the actual infringement of some protected value as a prerequisite for judicial action. This is evident in the insistence of some judges on some sort of detrimental reliance on the part of the particular claimant.[76] Alternatively, a desire to secure compliance with the principles of good administration could be satisfied by the simple provision of a procedural rather than a substantive remedy. This question too has divided the courts.[77]

From the point of view of the theory at hand, however, non-arbitrariness can be taken to elide these instincts. In terms of its implications for the actions of administrative bodies, non-arbitrariness is obviously generally directed towards the quality of their decision-making procedures. An observance of the principles of good administration will generally preclude any challenge on this ground. However, the justification for its use is firmly rooted in its relationship with the individual's right to have his status as an autonomous agent acknowledged and affirmed. The principle's commitment to improved procedures is thus animated, not by a desire to ensure that all administrative decisions are always

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[75] Craig, "Legitimate Expectations: A Conceptual Analysis" (1992) 108 L.Q.R. 79, at 85-86.
[76] *Garda Representative Association v. Ireland* [1989] I.R. 193; *Cosgrove v. Legal Aid Board* [1991] 2 I.R. 43.
[77] See the discussion of *R. v. Minister of Agriculture, Fisheries and Food, ex. p. Hamble Fisheries* [1995] 2 All E.R. 714; *R. v. Secretary of State for the Home Department ex. p. Hargreaves* [1997] 1 W.L.R. 906; *R. v. N. & E. Devon Health Authority, ex. p. Coughlan* [2000] 2 W.L.R. 622, *infra.*

correct, but by a belief in the value of the individual autonomy. Its impact may often be procedural but there is no innate reason why it should be so contained.

This understanding of fairness would require a contextual assessment of the extent to which an administrative body took due account of the interests of relevant individuals in embarking upon its designated course of action. Significantly, the principle's emphasis on the importance of the citizen's autonomy ought not to inhibit its acceptance of the ability of the state to produce individually-adverse outcomes. It demands not that the desires of the individual are always secured but rather that his interests – considered in the context of the power in question – have been appropriately acknowledged. As the following paragraphs will argue, it can be submitted that this approach in fact underlies the development of the legitimate expectation doctrine.

(ii) The judicial enforcement of substantive entitlements

As an 'evolving [jurisdiction] whose parameters have not yet been defined and whose scope has not yet been established'[78], it is important to bear in mind that there are a number of outstanding issues in this area which continue to await a definitive resolution. Many of these questions arise as a result of the dysfunctional relationship between traditional *ultra vires* ideas and the emerging doctrine of legitimate expectations. The doctrine undermines the *ultra vires* theory in two main ways. In the first place, it casts doubt on the orthodox rule that a delegatee body is unable to confer on itself the power to act outside its stated jurisdiction.[79] Secondly, the enforcement of an expectation on the basis of a body's making of a previous representation has been argued to unduly fetter that body's discretionary powers. In *Amphitrite*, for example, the House of Lords was clear that it could not constrain a body's discretion by reference to its previous promise not to detain a neutral ship in port.[80]

As the previous section has shown, however, the influence of the *ultra vires* theory is gradually waning in the face of the courts' enforcement of external values. Legitimate

[78] *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20, at 31.
[79] *Re Green Building Co.* [1977] I.R. 256; *Re Parke Davis & Co. TM Application* [1976] F.S.R. 195.
[80] *Redereiaktiebolaget Amphitrite v. The King* [1921] 3 K.B. 300.

expectations, with its fairness-oriented implementation of extra-statutory promises, can clearly be regarded as part of this process. Nonetheless, much of the confusion in the caselaw can be attributed to the residual influence of this theory. This section will therefore consider the recent caselaw in these areas of concern, in the hope that it will demonstrate a doctrine based on values of rational non-arbitrariness has increasingly emerged from the fetters of its *ultra vires* past.

Academic and judicial attention has chiefly concentrated, in recent times, on the question of whether a legitimate expectation on the part of an individual claimant gives rise to a procedural or a substantive entitlement. In its initial formulation, the duty to act fairly, upon which judicial intervention was founded, was held to allow the enforcement of a 'benefit or advantage'[81] to which an individual was due. Several judges subsequently, however, restricted the scope of such entitlements to procedural guarantees. In *Fakih*, for example, O'Hanlon J. confined the applicants' claim to a right to have their cases determined in accordance with fair procedures. Costello J. in *Tara Prospecting*[82] similarly equated the concept of legitimate expectations with the right to be heard. Relying heavily on the Australian opinion of Brennan J. in *Quin*[83], Costello J. argued that this right to a hearing, as an essentially procedural entitlement, could not be employed to compel an administrative body to act in contravention of its statutory duties or prerogative powers.

These cases were echoed in England by the opinion of Laws J. in *Richmond LBC*[84], and Hirst L.J. in *Hargreaves*. Laws J. advanced a procedural conception of the duty to act fairly, arguing that the observance of principle of good administration would sufficiently address an asserted expectation. The enforcement of substantive benefits beyond the parameters of a body's particular powers was a constitutional 'heresy'[85], which the courts could not allow.

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[81] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, at 408.
[82] *Tara Prospecting Ltd. v. Minister for Energy* [1993] ILRM 771.
[83] *A.G. for New South Wales v. Quin* (1990) 170 C.L.R. 1.
[84] [1994] 1 W.L.R. 74.
[85] *R. v. Secretary of State for the Home Department ex parte Hargreaves* [1997] 1 W.L.R. 906, at 921.

On the contrary, however, there are a number of cases which appear to eschew such *ultra-vires*-inspired restrictions on this emergent jurisdiction. In *Ruddock*, for example, Taylor J. had expressed the view that '[w]hile most of the cases are concerned with ... with a right to be heard, I do not think that the doctrine is so confined'[86]. This idea of a more general jurisdiction to enforce administrative fairness was reiterated, and indeed, expanded in the judgment of Sedley J. in *Hamble Fisheries*. His extensive analysis of this nascent legal doctrine led him to conclude that the courts' capacity to act was founded upon their protection of the individual from unfair exercises of public power. Given the general nature of this commitment, Sedley J. felt that it would unacceptable to restrict such protection to procedural affairs.

> It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decided to take a particular step.[87]

In the judge's view, 'principle, as well as precedent, points to these conclusions'[88].

Doubted in *Hargreaves*[89], Sedley J.'s judgment was subsequently approved by the Court of Appeal in *Coughlan*[90]. Here again, the Court suggested a test in which the conduct of the authority in question would be examined in order to see if it was so unfair as to amount to an abuse of power. Like *Hamble Fisheries*, *Coughlan* thus treated the fairness of the impugned act, from the point of view of the individual, as the determining criterion of its validity. Crucially, however, the Court of Appeal interpreted fairness in an expansive fashion, maintaining that '[f]airness ... if it is to mean anything, must ... include fairness of outcome'[91]. The courts were thus required to move beyond the *Wednesbury* formulation to which the court in *Hargreaves* had insisted they adhere.

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[86] *R v Secretary of State for the Home Department ex parte Ruddock* [1987] 2 All ER 518, at 531.
[87] [1995] 2 All E.R. 714, at 724.
[88] [1995] 2 All E.R. 714, at 724.
[89] [1997] 1 W.L.R. 906.
[90] *R. v. N. & E. Devon Health Authority, ex. p. Coughlan* [2000] 2 W.L.R. 622.
[91] [2000] 2 W.L.R. 622, at para 71.

Fairness, in the context of this case, required more than the raised rationality test that entailed – on the contrary, the actions of the body in this instance could 'only be justified if [required by] an overriding public interest'[92].

(iii) Collective v. individual interest – a model of institutional balance?

In its move away from a rigidly categorical approach towards one based on the contextualised assessment of the fairness of the acts in question, the *Coughlan* conception of legitimate expectations supports the idea of a general, uninhibited judicial jurisdiction to secure external ideas of fairness. Significantly, however, the Court of Appeal in *Coughlan* was clear in its acknowledgment of the need to balance the interests of the individual against the power-exercising primacy of the state. The caselaw has, like this thesis' dual model of constituent interests, consistently affirmed the importance of this latter aim. *Ruddock* noted that promises could 'obviously' not be upheld where to do so would conflict with statutory duties. McCracken J. in *Abrahamson* agreed that legitimate expectations could only be secured where to do would be 'lawful'. In *Hamble*, Sedley J. insisted that the executive could be kept to its promises, but accepted that this could not restrict the liberty of government bodies to act within the scope of their discretion.[93]

Lord Woolf MR was thus at pains to point out in *Coughlan* that the recognition of legitimate expectations as a substantive guarantee did not unduly trammel the executive or legislative functions. He rather adopted the position in *Preston*[94] that a power abused is one unlawfully exercised, and set the threshold of invalidity accordingly. The requirement that an act be so unfair that it constituted an abuse of power appeared intended to supply the appropriate level of judicial restraint. Intervention is justified as restraining illegality rather than restricting discretionary powers.

The elevated nature of this threshold seems thus designed to guard against undue judicial interference on insignificant grounds. Lord Woolf M.R. further required the courts to

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[92] [2000] 2 W.L.R. 622, at para 76.

[93] [1995] 2 All E.R. 714. The importance of securing the discretionary freedom of administrative bodies was also emphasised in, for example, *Wiley v. Revenue Commissioners* [1989] I.R. 350; *Gilheaney v. Revenue Commissioners* [1996] E.L.R. 25.

[94] *Re Preston* [1985] AC 835.

accept an authority's suggested justification of its policy changes without equivocation. This constitutes a clear acceptance of the importance of allowing unfettered administrative action. Legitimate expectations should not be regarded as elevating the interests of the individual above those of the collective. Rather, it follows the approach of this thesis in resting institutional prerogatives upon a recognition of the basic duality in the exercise of public powers.

> The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise.[95]

The Court in *Coughlan* clearly sought to balance the courts' jurisdiction to defend the individual against the inherent capacity of the government to exercise power in the public interest. As Lord Woolf MR himself commented, its approach:

> [R]ecognises the primacy of the public authority both in administration and in policy development but it insists, where these functions come into tension, upon the adjudicative role of the court to ensure fairness to the individual.[96]

(iv) Balance, justification and non-arbitrariness

The acknowledgment of the inherent validity of these dual interests logically requires that an attempt is made at mediating their claims in the individual context of each case. As this thesis argued in Chapter 4, non-arbitrariness supplies just such a means of meditation. As a principle, it recognises the mutual veracity of opposing interests. It accordingly seeks to structure their interaction in a way which provides for the appropriate contextual reconciliation of competing impulses. This is achieved by concentrating on the reasons offered as justification for the exercise of an impugned power. Non-arbitrariness does not prevent the use of governmental power *per se* – it

[95] [2000] 2 W.L.R. 622, at para. 65.
[96] [2000] 2 W.L.R. 622, at para. 70.

rather ties its legitimacy to the extent to which a particular decision can be shown to be the product of a contextually appropriate weighing of an individual's contrary interests.

In this, it matches closely the *Coughlan* approach to legitimate expectations. It is noticeable that the courts have consistently deferred to the decisional primacy of the challenged organ where they have been satisfied that there were objective grounds for the change in policy. National security,[97] the public interest,[98] prior decisions of the courts,[99] reasonable employment objectives[100] and the existence of a compelling statutory obligation[101] have all been accepted by the courts as valid reasons for resiling from an applicant's expectation. Sedley J. expressly tied the fairness of a proposed administrative change to the authority's reasons for undertaking it,[102] while Taylor J. in *US Tobacco* accepted that the Minister's freedom to depart from a previous representation was limited by the obligation that the decision be rationally based on objectively justifiable grounds.[103]

As the Court of Appeal in *Coughlan* declared, however, this emphasis on the acceptability of administrative reasons does not denote a basic rationality standard of review.

> It is when one examines the implications for a case like the present of the proposition that so long as the decision-making process has been lawful, the court's only ground of intervention is the intrinsic rationality of the decision, that the problem becomes apparent. Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an

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[97] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.
[98] *Tara Prospecting Ltd. v. Minister for Energy* [1993] ILRM 771.
[99] *Abrahamson v. Law Society* [1996] 4 I.R. 403, based on the decision in *Bloomer v. Law Society of Ireland* [1995] 3 I.R. 14.
[100] *Eogan v. University College Dublin* [1996] 2 I.L.R.M. 302.
[101] *Wiley v. Revenue Commissioners* [1989] I.R. 350.
[102] [1995] 2 All E.R. 714.
[103] [1992] 1 Q.B. 353.

> irrelevant factor). The present decision may well pass a rationality test; the health authority knew of the promise and its seriousness; it was aware of its new policies and the reasons for them; it knew that one had to yield, and it made a choice which, whatever else can be said of it, may not easily be challenged as irrational ... But to limit the court's power of supervision to this is to exclude from consideration another aspect of the decision (fairness) which is equally the concern of the law.[104]

The simple search for the presence of some sort of rational and legitimate objective would not, therefore, properly protect the state's citizens.

> [A] bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair.[105]

Woolf MR thus effectively imposed a standard of non-arbitrariness in this area, echoing Elliott's equation of the 'rule of law' with 'the exercise of public power in a manner which is fair and rational'[106]. Administrative decision-making, which the courts accepted as valid in its own right, can be challenged if it fails to take appropriate account of the interests of affected individuals. The status of these citizens as autonomous agents necessitates, however, that the courts require more than a mere rationality of objectives. Reasons mean much more than a simple justifiability of objectives. They must be reasons which also justify the taking of a decision which will adversely impact upon the expectations of individuals. An action will be adjudged appropriate where it shows sufficient concern to protect affected individuals from arbitrary acts. The individual's fundamental entitlement to protection from arbitrary rule thereby provides the 'legal alchemy'[107] necessary to render an expectation legitimate, and thus enforceable.

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[104] [2000] 2 W.L.R. 622, at para. 65.
[105] [2000] 2 W.L.R. 622, at para. 66.
[106] Elliott, *loc. cit.*, in Forsyth ed., *op. cit.*, at 95.
[107] [1995] 2 All E.R. 714, at 728.

Context here is all important. Administrative bodies are, the courts accept, generally entitled to exercise their own policy choices. An individual who simply objects to such a decision will be unable to sustain a successful challenge outside the parameters of traditional *Wednesbury* review. Where, however, an individual has an expectation that the body in question will exercise its powers in a particular way, greater scrutiny of a change of policy will be required. In particular, the courts will have to assess whether, in deciding to undertake this change, the body gave due regard to the position of such expectant individuals. In this way, the doctrine of legitimate expectations 'operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices'[108].

The emphasis in subsequent decisions of the courts on detrimental reliance demonstrates the importance of the particular facts of a case quite clearly. Peter Gibson L.J. observed in *Begbie* that '[i]t is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation'[109]. Schiemann L.J. agreed in *Bibi*, but accepted the possibility that a successful claim could be mounted in the absence of such detriment.[110] This made it clear that detrimental reliance was only a useful indicator of the possible presence of that arbitrary unfairness which will trigger the court's enforcement of a legitimate expectation. As Laws J. noted in *Nadarajah*[111], the questions in these cases centre on the balance struck between the position of the individual and the collective action of the administrative body. A simple departure from previous policy will not suffice to support a claim. Laws J., accepting that something more was needed to adjust the balance in favour of the individual, thus depicted detriment as a common but no means essential ingredient of successful case. Rather then applying fixed criteria of illegality, the courts instead conduct a flexible and overall assessment of the fairness of the impugned act, interpreted in light of all the circumstances of the case.

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[108] [2000] 2 W.L.R. 622, at 71.
[109] *R v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, at 1124.
[110] *R (Bibi) v Newham London Borough Council*[2001] EWCA Civ 607, [2002] 1 WLR 237, at para.s 29-30.
[111] *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

The jurisdiction in question is thus focused on the contextual enforcement of administrative fairness. The decisions of the impugned organ, in pursuing rational objectives, must ensure that they do not arbitrarily impact on individuals. In many cases, as the authorities show, the provision of a hearing will suffice to satisfy such concerns. In certain situations, however, the entitlement of a citizen to protection from arbitrary rule may require the judicial enforcement of substantive benefits. As an overarching value, non-arbitrariness cannot be subjected to artificial *ultra vires* restrictions. Although it may conventionally require only the observance of particular procedural safeguards, it is clear, therefore, that the doctrine of legitimate expectations, as an expression of the system's concern for non-arbitrariness, can impose 'substantive limitations that in some settings lead to uniquely correct outcomes'.[112]

This analysis is supported by the most recent judgment of Laws L.J. in *Nadarajah*.[113] Given his previous insistence on a purely procedural enforcement in *Richmond LBC*[114], his endorsement of legitimate expectations as a generalised jurisdiction, capable of securing substantive benefits in an appropriate case, is significant. Furthermore, his exploration of the constitutional foundations of the doctrine effectively reiterates the normative importance of non-arbitrariness.

> Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public .... Accordingly a public body's promise or practice as to future conduct may only be

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[112] Craig, *Public Law and Democracy in the UK and the USA* (Oxford University Press, 1990), at 334, citing Sunstein, "Beyond the Republican Revival" (1988) Yale L.J. 1539, at 1550-1551. This passage was discussing the idea of deliberative rationality which, Chapter 4 showed, is closely related to the ideal of non-arbitrariness.

[113] [2005] EWCA Civ 1363.

[114] [1994] 1 W.L.R. 74.

> denied ... in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, *a proportionate response* (of which the court is the judge, or the last judge) *having regard to a legitimate aim pursued by the public body in the public interest.*[115]

This echoes the analysis advanced in the preceding paragraphs. Like Lord Woolf MR before him (and as the theory in Chapter 4 suggested) Laws L.J. regards the essential dilemma posed by the law of legitimate expectation as that of striking a 'balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest'[116]. He also similarly sees the solution to this balance in a system of effective non-arbitrariness, in which the relative demands of the collective interest and the affected individual are rationally reconciled. His invocation of proportionality illustrates this quite clearly – as a later section will show, this value's contextual connection of a decision's relative aim and impact offers considerable support for an analysis predicated on non-arbitrariness.

(v) A dual constituency model in action?

The institutional template set out in Chapter 4 thus seems perfectly capable of descriptively accommodating the development of a doctrine of legitimate expectations. Like the model described therein, the approach of the courts in *Coughlan* and *Nadarajah* is premised on an acceptance of the need to balance the collective conduct of government bodies with the state's defence of the individual's rights.

Furthermore, the suggested system's commitment to non-arbitrariness as an overarching institutional value seems to be reflected in the courts' contextualised approach to the enforcement of legitimate expectations. To accept non-arbitrariness as a general institutional norm is to require that the actions of state organs are capable of rational justification on the facts of each individual case. As the caselaw on legitimate expectations shows, however, the courts are increasingly insisting on this type of focused

[115] [2005] EWCA Civ 1363, at para. 68. Emphasis added.
[116] [2005] EWCA Civ 1363, at para. 69.

justification. Traditional *Wednesbury* review, appropriate to situations where no protected individual interest is at stake, is insufficiently vigorous when applied to cases of potential interest infringement. The concentration of the courts in this area on reconciling the reasons for administrative action with their adverse impact on affected individuals thus offers clear support for this thesis' suggested analysis of judicial intervention. Legitimacy is equated with more than mere rationality. Administrative bodies must rather show that their policy objectives are not only valid, but are also adequate to justify the practical implications of that action. The emphasis on individual context moves beyond objective rationality towards ideas of non-arbitrariness, imposing additional obligations on the basis of the particular situation of the individual citizen. Laws L.J. expressly links the giving of reasons for action with the consequences of that conduct for the citizen, requiring the presence of a proportionate relationship between the two. Objective and outcome are thus intertwined, thereby emphasising the status of non-arbitrariness as the underlying justification for judicial action.

In addition, the involvement of the courts can convincingly be construed as the deliberative supervision of administrative organs, charged with the mediation of collective and individual needs, by a body committed to the defence of abstract individual values. *Coughlan* and *Hamble*, like the Irish authorities, have been clear that bureaucratic bodies are generally free to balance these interests as they saw fit.[117] Operating at a micro-organisational level, the capacity to exercise autonomous discretionary powers has been consistently affirmed. It is only when their decisions fail to show appropriate respect for the individual's universal entitlement to non-arbitrary treatment that the courts will intervene. It is thus, like *Wednesbury* unreasonableness, a corrective jurisdiction, which – as the Chapter 4 model proposes – should be interpreted as but one element of the deliberatively participatory inter-institutional process of exercising state power.

[117] Sedley J. for example, accepted that 'the balance [between expectation and policy] must in the first place be for the policy-maker to strike'. [1995] 2 All E.R. 714, at 731.

B. The doctrine of proportionality

This emphasis on contextual justification also appears in the caselaw of the courts on the proportionality doctrine. Here again, the image of the constitutional structure as animated by concerns of circumstantial non-arbitrariness and a duality of constituent social interest recurs. Thus, it is submitted that an examination of these authorities offers further support for the suggested model which has been set out in this thesis.

In Irish terms, the proportionality doctrine was most authoritatively explained by Costello J. in *Heaney*.[118] Relying on the Canadian case of *Chaulk v. R.*[119], he required that the Oireachtas' asserted infringement of the A. 38. 1 right to silence:

> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective.

This approach has since been widely approved of, and applied by the Irish courts when considering alleged infringements of constitutional rights.[120] Furthermore, the influence of the doctrine can also be discerned in a number of purely administrative law decisions, in which the courts have weighed the consequences of the measure in question against its impact on the individual applicant. Walsh J. in *Fajujonu* thus allowed the Minister to deport a family only where he was:

> [S]atisfied, for stated reasons, that the interests of the common good ... are so predominant and so overwhelming in the circumstances of the case that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable.[121]

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[118] *Heaney v. Ireland* [1994] 3 I.R. 593, at 607.
[119] 1990] 3 S.C.R. 1303.
[120] See, for example, *Daly v The Revenue Commissioners* [1995] 3 IR 1; *Iarnrod Eireann v Ireland* [1996] 3 IR 321; *In re Article 26 and Part V of the Planning and Development Bill* [2000] 2 IR 321; [2001] 1 ILRM 81.
[121] *Fajujonu v. Minister for Justice* [1990] 1 ILRM 234, at 242.

From the point of view of English law, proportionality was first proposed as a ground of substantive review of discretionary powers by Lord Diplock in *GCHQ*. It has, however, only been widely embraced as an independent ground of challenge since the enactment of the Human Rights Act, 1998. The English courts now apply it in cases in which the violation of a protected Convention right is claimed. The House of Lords has therefore found, for example, that the indefinite detention of foreign terrorist suspects was unlawful as a disproportionate infringement of the right to liberty.[122] As Lord Bingham noted in that case, the standard formulation of the test in England is generally accepted as that set out by the Privy Council in *de Freitas*[123]. In determining whether a limitation is arbitrary or excessive, the Privy Council stated that a court must ask itself:

> [W]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The discussion by various English judges of the nature of this proportionality jurisdiction is instructive, providing considerable implicit support for this work's attempt to portray it as a species of contextual non-arbitrariness. The significance of a case's context was underlined by Lord Steyn in his leading discussion of this question in *Daly*[124]. Citing Laws J.'s observation in *Mahmood* that '[i]n law context is everything'[125], the judge explained the difference between *Wednesbury* and proportionality review. Sharing a common concern to ensure that the actions of public bodies are properly justified, he accepted that 'there is [obviously] an overlap between the traditional grounds of review and the approach of proportionality'[126]. Where these jurisdictions diverge, however, is, in

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[122] *A. v. Secretary of State for the Home Department* [2005] 2 W.L.R. 87. This applied even though the government had sought a derogation from Article 5 of the Convention.
[123] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80.
[124] *R. v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26; [2001] 3 All ER 433; [2001] 2 WLR 1622.
[125] *R (Mahmood) v Secretary of State for the Home* Department [2001] 1 WLR 840, at 847.
[126] [2001] UKHL 26, at para. 27.

his view, in the relative weighting to be attributed by the court to the interests at issue in an individual case.

In a traditional *Wednesbury* case, the challenge rests on an assertion of irrationality in the actions of the authority in question. The applicant, therefore, is typically unable to point to any specific individual interest which has been infringed. He may disapprove of the body's policy, or may fear that it will adversely impact upon his personal preferences. Crucially, however, he cannot rest his claim on a potential violation of a constitutional or Convention right, or on an expectation based on a previous policy or representation, or – more generally – to a failure to have due regard to his particular circumstances. As this work has repeatedly emphasised, the fact that society has been constructed from two opposing interests dictates that individual misfortune is perfectly acceptable once it has not been arbitrarily secured. Classical *Wednesbury* review thus constitutes a very basic protection against arbitrary rule, applying to those situations in which no accusation is raised of a failure on the part of the collective to take account of an entrenched individual interest. This jurisdiction is, of course, still motivated by the system's overarching commitment to non-arbitrariness. As Ryan J. remarked, the essential 'rationality of decision making' still requires that 'the reason or reasons on which the decision is founded must be logically connected to the power or discretion being exercised'[127]. Without a countervailing affected entitlement, however, this abstract rationality constitutes the sole criteria of review. In such cases, the search for justification is therefore confined to a judicial examination of the legitimacy of the objective in question.

Proportionality, on the contrary, involves precisely those types of cases in which the applicant relies on his individual circumstances to claim that a government action is unjustified. Non-arbitrariness thereby requires a more sophisticated examination of the justification advanced in support of the impugned action. This necessarily requires the court to consider the way in which the dual social interests – the need for collective action, and the entitlement of the individual to protection from arbitrary governance – have been reconciled. As Lord Steyn commented in *Daly*, the 'doctrine of proportionality

[127] *Fitzpatrick v. Minister for Justice, Equality and Law Reform* [2005] IEHC 9.

require[s] the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions'[128]. The issue is not one of bare rationality. Rather, proportionality 'require[s] attention to be directed to the relative weight accorded to [the] interests and considerations'[129] at issue.

The court in these cases thus embarks on a flexible and contextualised assessment of whether a measure was justified in the circumstances of the case. 'The depth of judicial review and the deference due to administrative discretion vary with the subject matter.'[130] Where an individual is able to point to the infringement of some protected value, the courts will adopt an analytical approach in which, compared to the *Wednesbury* test, 'the intensity of review is somewhat greater'[131]. The doctrine of proportionality – like the earlier caselaw on the existence of a varying standard of review[132] – thus effectively seeks to mediate between the competing claims of the collective will and individual interest. As Dyson L.J. observed, '[i]t is important to emphasise that the striking of a fair balance lies at the heart of proportionality', a balance he defined as 'comparing the weight to be given to the wider interests of the community with the weight to be given to an individual's ... rights'[133].

The English courts' discussions of these substantive grounds of review thus illustrate the growing influence, in practice, of a conception of judicial review as a form of independent assessment of the balance struck between the interests of the citizen and those of the state. The judiciary's increasing concentration on examining any asserted disparity between the impact of an administrative measure and its stated public objective demonstrates this quite clearly. Tellingly however, the Court of Appeal has recently described even the more restrained types of rationality review in similarly interest-balancing terms.

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[128] [2001] UKHL 26, at para. 27.
[129] [2001] UKHL 26, at para. 27.
[130] [2001] UKHL 26, at para. 32, *per* Lord Cooke.
[131] [2001] UKHL 26, at para. 27.
[132] See, for example, *Bugdaycay v. Secretary of State for the Home Department* [1987] A.C. 514; *R. v Ministry of Defence, ex parte Smith* [1996] QB 517; *R. v. Lord Saville, ex parte A* [2000] 1 W.L.R. 1855.
[133] *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, at para. 26-28.

> [W]here policy is the subject matter in hand, principle and practicality alike militate in favour of an approach in which the court's role is closer to review than appeal: where a degree of deference does no more than respect the balance to be struck between the claims of democratic power and the claims of individual rights.[134]

It is submitted, therefore, that the emergence in both Ireland and England of a proportionality doctrine indicates the intuitive veracity of this thesis' model of constituency-based institutional arrangement. The courts have clearly begun to portray ideas of proportionality, reasonableness and legitimate expectations as an attempt to structurally reconcile the competing interests of the public, on one hand, and the individual on the other. The strength of an applicant's challenge in all these areas rests on the extent to which they can show an infringement of a protected interest. The intensity with which a measure is reviewed is directly related to the extent of its impact on individuals. The more important the interest in question, the more intensively will the court examine the suitability of the government's suggested justification for their act. This direct correlation underlines the balance which exists at the centre of all types of state action. On this analysis, judicial scrutiny fulfils its suggested role as one of the institutional order's key self-operating safeguards by reviewing the balance to ensure its non-arbitrariness.

Furthermore, the character of the proportionality jurisdiction also supports the inter-institutional model of participatory decision-making outlined in this thesis. Recognising the entitlement of government and administrative agencies to justifiably impinge upon the interests of the individual, the proportionality doctrine casts the courts in the residual supervisory role of reviewing the balance struck by these bodies. Courts, government and agencies engage in a constitutional conversation in which all contribute to a non-arbitrary outcome which suitably respects the interests at stake.

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[134] *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105; [2006] Q.B. 1, at para. 53.

This understanding of the doctrine has been echoed by Rivers' recent attempt to present proportionality as 'a rational device for the optimisation of interests'[135]. His very detailed account of the way in which the European conception of proportionality operates fits neatly within the more general model set out in this thesis. 'A structured approach to balancing fundamental rights with other rights and interests in the best possible way', Rivers argues in favour of a proportionality test which variously involves:

> A very crude balancing exercise between the rights and public interests at the highest level of generality, ... [considering whether there is] a chain of justification from the decision back to the ... general public interest identified, ... [and] assess[ing] whether the degree of attainment of the legitimate aim balances the limitation of interests necessarily caused by the act in question.[136]

This tallies closely with the model of institutional interaction described in Chapter 4. At the first stage, Parliament and the courts collude in balancing the abstract interests of the collective against those of the individual. The focus of review then falls on the particular attempts of the state to implement this arrangement. Such specific measures must be connected to the objective in question, and so justified in its effects. Significantly, however, the courts exercise restraint in their review of such administrative measures, accepting the discretionary nature of their acts. 'This discretion is important because it recognises the contribution legislative and executive bodies make to the specification of the public interest.'[137] Government action thus constitutes a co-operative endeavour into which these diverse institutions, with their distinct competences and constituencies, all have an input.

This emphasis on the respective roles of each body perhaps explains the reluctance of some courts, most notably the Supreme Court in *Murphy v. IRTC*[138], to rigorously enforce the 'minimum infringement' limb of the proportionality test. In this case, Murphy was

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[135] Rivers, "Proportionality and Variable Intensity of Review" (2006) 65 C.L.J. 174, at 207.
[136] *Ibid.*, at 196-200.
[137] *Ibid.*, at 197.
[138] [1999] 1 I.R. 12.

challenging a blanket ban on religious advertising on radio. Counsel for the applicant argued that the admittedly legitimate aim of avoiding religious tension could have been addressed by the creation of a panel to review (and, if necessary, exclude) proposed advertisements on such grounds. The Court accepted that this was the case but nonetheless upheld the Oireachtas' designated arrangement, declaring that:

> [O]nce the Statute is broadly within the area of the competence of the Oireachtas and the Oireachtas has respected the principle of proportionality, it is not for this Court to interfere simply because it might have made a different decision.[139]

This arguably reflects the fact that:

> [t]he doctrine of proportionality needs structuring in such a way that, although applied by the judiciary, it is sensitive to the proper contribution of the other branches of government.[140]

Aiming to ensure the contextual justifiability of state acts, the judicial role under a proportionality approach 'risks treating the courts as the constitutional guarantors of the rationality of the entire state process'[141] unless appropriate institutional restraint is shown. Rivers has thus emphasised the importance for the proportionality doctrine of an overarching model of institutional separation in which the role of each body is acknowledged and defined. The courts are but a single (albeit vital) element in the participatory decision-making processes of the state.

The *IRTC* treatment of the 'minimum infringement' test arguably supports this point. Given the suggested position of the courts as the guardians, but not the supreme arbiters, of the proportionality of state acts, it may be more convincingly construed as a necessity-type threshold, in which some deference is shown to the instant decision-maker's

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[139] [1999] 1 I.R. 12, at 27.
[140] Rivers, *loc. cit.*, at 176.
[141] Rivers, *loc. cit.*, at 181.

entitlement to select what he regards as the most effective, and thus necessary, way of achieving the objective at issue.

Arguably, therefore, the courts are already playing the part outlined for them in Chapter 4 – of ensuring that, in the context of the enduring social balance between citizen and state, the individual is not exposed to arbitrary exercises of power in which his *relevant* interests are not taken into account.[142]

C. The duty to give reasons

The suggested emergence of a justification-oriented conception of judicial review would necessarily focus the attention of the courts on the reasons put forward by a body to explain its actions. Arguably, therefore, it is no coincidence that the issue of the existence, or otherwise, of an obligation to offer reasons has featured prominently in the recent caselaw of both the English and Irish courts. Furthermore, the way in which the judges have depicted the provision of reasons as a prerequisite for the review process again reinforces the claim that judicial review effectively involves a non-arbitrariness-inspired search for contextual justification.

It should be noted that the courts continue to insist on the absence of a general duty to give reasons. Sedley J. was clear in *Institute of Dental Surgery* that the administrative inconvenience which would be caused by the development of a universal obligation demanded that some limitations be placed on its scope. Nonetheless, as Lord Clyde observed in *Stefan*:

> The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration. But the trend is proceeding on a case-by-case basis … and has

[142] Obviously, the issue of which interests are relevant is an important one. Space precludes an extensive discussion of this question here. As Chapter 4 indicated however, non-arbitrariness is the key criteria of such relevance. In cases where no entrenched right is in question, an individual would have to demonstrate a failure on the part of the administrative body to have due regard to his situation to demand anymore than general rationality review.

> not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers .... [but] [t]here is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions.[143]

It is clear, therefore, that 'the trend of the law has been towards an increasing recognition of a duty upon decision-makers of many kinds to give reasons'[144].

This inclination has been attributed in England to a desire on the part of the courts to strengthen and improve the decision-making process, and also to increase the protection available to affected individuals. This latter objective, which echoes the analysis of the court's jurisdiction set out in the previous section, has been at the heart of decisions to extend the duty to give reasons to cases where there are, for example, unexplained errors,[145] a departure from previous policy,[146] or a result giving rise to an inference that incorrect reasons have been applied.[147]

It has also been recurring element of the Irish caselaw on this issue. The courts here have repeatedly discussed the duty to give reasons as the product of the required availability of review. Barron J. in the Irish decision of *Daly* described the court's competence in precisely these terms:

> The court must ensure that the material upon which the Minister acted is capable of supporting his decision. Since the Minister has failed to disclose the material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision.[148]

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[143] *Stefan v. General Medical Council* [1999] 1 WLR 1293, at 1300.
[144] *Mecca Bingo v. Glasgow Licensing Board* [2005] LLR 454, at para. 14, *per* Lord Clarke.
[145] *R. v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310.
[146] *Fisher v National Greyhound Racing Club Ltd*, Court of Appeal, July 31st, 1985.
[147] *R. v Secretary of State for Trade and Industry ex parte Lonrho plc* [1989] 1 WLR 525.
[148] *State (Daly) v. Minister for Agriculture* [1987] I.R. 165, at 172.

Blayney J. in *International Fishing Ltd* agreed that 'in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right [to obtain review]'[149].

Costello P.'s decision in *McCormack*[150] has generally been construed as a more restrictive analysis of the question of the existence, or otherwise, of an obligation to offer reasons for an administrative decision. Stressing that '[i]t is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions'[151], the President of the High Court held that the failure of the relevant body to account for its decision not to discipline an officer against whom the applicant had lodged a complaint was not unlawful or unfair. In his judgment, he repeatedly sought to underline the contextual nature of such claims. Previous precedents were therefore, in his view, of little assistance.

Costello P. described the court's intervention in this area in firmly individualistic terms. In general, he concluded, cases concerning:

> [This] issue can largely be determined by considering whether some detriment is suffered by the applicant by the failure of the [body] to give reasons for the opinion which it reached because if no detriment is suffered then no unfairness can be said to exist.

This insistence on the existence of individual detriment could, on the one hand, be argued to evince a lack of concern for the rationality or non-arbitrariness of government actions. This would, of course, incline against an acceptance of the analysis set out in this piece.

It must, however, be remembered that non-arbitrariness is proposed as an underlying institutional principle in this piece precisely because of its ability to mediate between the

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[149] *International Fishing Ltd. v. Minister for the Marine* [1989] I.R. 149, at 155.
[150] *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489.
[151] [1997] 2 I.R. 489, at 500.

opposing interests of the individual and the collective, thereby ensuring an institutional (and, by extension, constituent) balance. Costello P.'s conclusion was in large part inspired by his belief that 'a person aggrieved by a decision has no right to obtain reasons for it merely for the purpose of seeing whether or not the decision-maker had erred'[152]. By opposing the sort of fishing expeditions which would constitute the courts as a default avenue of effective appeal, his judgment can thus be regarded as an acceptance on his part of the essentiality of such balance. As the discussion of proportionality above emphasised, the model set out in this thesis requires some restraint on the part of the courts when participating in its inter-institutional decision-making process. The system's insistence on contextual justifiability certainly attaches considerable importance to the giving of reasons in many cases. Costello P. himself acknowledged as much, noting that the absence of reasons in this instance did not preclude the applicant from seeking a remedy via judicial review. It does not however require the detailed rationalisation of even the most ordinary administrative actions.

Furthermore, it should be borne in mind that non-arbitrariness, as a value, is really only determinate in the specific context of an individual case. Thus, the failure to provide reasons for a decision which seems objectively justifiable (which Costello P. clearly felt was the situation in *McCormack*) does not indicate the presence of unacceptable arbitrariness. It is only when the facts of a particular situation suggest the existence of some species of administrative unfairness that the courts will intervene to review the act in question. In the context of that contextual assessment of the justifiability of the impugned act, the giving of reasons will almost invariably be required. *McCormack's* emphasis on the necessity of individual detriment accords with this analysis. It should be noted that, as with the doctrine of legitimate expectations, detriment should be treated as a probable, but not obligatory, indicator of the need for judicial review. With this in mind, *McCormack* should, it is submitted, be treated as a fact-based affirmation of the individualistic nature of the court's jurisdiction in this area. Concerned that administrative procedures take due account of individual citizens, the courts must nonetheless ensure that they do not second guess even apparently acceptable decisions.

[152] [1997] 2 I.R. 489, at 502.

Charged with the defence of individual interests, some suggestion of arbitrariness should be required before the judges intervene.

This analysis is further supported by those Irish cases in which a duty to give reasons has been denied. The courts have tended to explain such denials in terms of the interests of the affected individual, generally justifying their decisions by reference to the absence of any possibility of review. This reiterates the concern for individual non-arbitrariness rather than absolute administrative accuracy. O'Flaherty J., noting the general immunity of decisions of the D.P.P. from challenge, refused, for example, to require him to explain why a particular prosecution had not been brought.

> [A]s the duty to give reasons stems from the need to facilitate full judicial review, the limited intervention available in the context of the D.P.P.'s decisions obviates the necessity to disclose reasons.[153]

However, as Keane C.J. subsequently noted in *Eviston*[154], this did not forever exempt the D.P.P. from an obligation to offer reasons for his acts. Examining the earlier caselaw, he remarked that:

> The decisions … go no further than saying that the Court will not interfere with the decision of the respondent ... where:
> (a) No *prima facie* case of *mala fides* has been made out against the respondent;
> (b) There is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated and
> (c) The facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent.... [155]

The Supreme Court therefore seemed to implicitly accept the possibility that a duty to give reasons could arise where there was some evidence of administrative impropriety on

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[153] *H. v. D.P.P.* [1994] 2 I.R. 589, at 603.
[154] *Eviston v. Director of Public Prosecutions* [2002] 3 IR 260.
[155] [2002] 3 IR 260, at 294.

the part of the D.P.P. That an office so historically removed from scrutiny can hypothetically be obliged to explain its actions, albeit only in 'very limited circumstances'[156], illustrates the extent to which the courts seem to increasingly regard the provision of reasons as an essential element of their review powers.

This underscores the way in which reasons have become inextricably linked with the mechanics of the review calculus. Reasons are an essential prerequisite to any assessment of a measure's contextual justifiability. Without some statement of reasons, the courts are unable to ensure that the body in question has taken appropriate account of the individual's position. As the dissenting judges in *A.O.* observed, to allow a decision-maker to offer only a generalised reason as justification for his acts renders his decisions 'virtually immune from review'[157]. In their opinion, more recently echoed by Laffoy J. in *Gritto*[158], some contextually-attuned reasons must be offered if the interests of the individual are to be adequately protected in a proper review process. In the absence of reasons, the courts are analytically impotent.

III. CONCLUSION

Like the approach of the courts to legitimate expectations and proportionality, the caselaw on the duty to give reasons is argued to proffer persuasive support for the organisational model prescribed in this thesis. As this chapter has repeatedly emphasised, the adoption by the courts, in exercising their powers of judicial review, of a contextual and reason-oriented balancing approach matches Chapter 4's characterisation of our institutional order as a mixed system in which an overarching commitment to non-arbitrariness is employed as a way of reconciling the constituent interests of the individual and the collective. Traditionally confined to ensuring that the actions of individual bodies were *intra vires* their statutory orders, the courts are now increasingly

[156] *Dunphy (A Minor) v. D.P.P.* [2005] IESC 75.
[157] *A.O. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 203.
[158] *Gritto v. Minister for Justice, Equality and Law Reform* [2005] IEHC 75.

subjecting individual exercises of public power to a form of scrutiny in which the objective sought to be achieved is weighed against its likely impact on the interests of individuals. As befits a system assertedly resting on non-arbitrariness, rational justification is always required. Just what passes for justification, however, falls to be determined in accordance with the contextual relevance of the interests in question. Judicial deference to the creative primacy of the collective organs will increase as the interests of the individual disappear from the process of review in a particular case.

Judicial review thus represents, in microcosm, that balancing exercise upon which, it is argued, our political and constitutional structures depend. There are, of course, many additional areas of the law which a fuller examination of the implications of this thesis would have to explore. The topics considered above, however, provide some indication of the extent to which emerging judicial doctrines – those which arguably stray furthest from traditional notions of *imperium* or *ultra vires* – can be neatly accommodated within the theory proposed in this piece. In general – as the caselaw considered above shows – the task of contextually reconciling these opposing impulses falls to subordinate administrative bodies. Operating within the parameters set out by both collectivistic statutes and individualistic legal principles, these agencies, in the exercise of their discretion, tailor the use of public powers to the facts of particular cases. Where their decisions contravene collective principles, they are liable to correction through statutory reform or ministerial diktat. Similarly, where a decision fails to demonstrate due regard for the interests of an individual, it is for the courts to intervene. As the survey of emerging trends in judicial review shows, however, such intervention is guided by an awareness of the importance of accommodating both constituent interests. The courts do not insist on the triumph of the individual over the collective, but confine themselves to ensuring that the actions impugned have taken due account of the constituency they represent. Recognising the respect owed to the government in its pursuit of collective values, the courts require only an equivalent respect on its part.

Individual exercises of public power are thus presented as the product of a multi-stage process in which opposing values are abstractly stated, contextually reconciled, and,

finally, secondarily scrutinised. In the way in which this analysis more accurately reflects the reality of the administrative state, and in the way in which it connects the direction and content of institutional actions with the foundational values of modern society, it is thus submitted that the theory outlined in Chapter 4 represents a more appropriate model of contemporary institutional arrangement than the pluralist or tripartite notions to which much of our constitutional discourse remains attached.

CONCLUSION

(i) The myth of the separation of powers

For a discipline so firmly grounded in the everyday conduct of human affairs, the law is surprisingly susceptible to the beguiling mythologisation of traditional orthodoxies. A professional attachment to precedent ensures that theories are received and re-applied with such frequency that they ultimately acquire totemic status as ideological pillars of the established order. So it has been with the separation of powers. Over two centuries of uninterrupted usage have secured it a position of prominence in the liberal pantheon of constitutional principles. Its popularity should, furthermore, certainly not be dismissed as a matter of accidental acclaim. The tripartite theory combines conceptual simplicity with an impeccable academic pedigree. Invested with the weighty authority of Montesquieu, Madison and Locke, the doctrine is nonetheless easy enough for the student to understand. That it has become a constitutional staple of recurring significance is, at least in part, attributable to these favourable qualities.

The theory is not, however, without its flaws. Despite its paradigmatic status, the doctrine has failed to justify or explain the emergence of an interventionist administrative state, in which public power is exercised on a decentralised and largely discretionary basis. The effect of this is that the dominant institutional theory of the day is conspicuously unable to account for a significant *tranche* of government activity. This is evidently unacceptable.

(ii) The problems of the separation of powers

This thesis began, therefore, as an attempt to address this descriptive inadequacy. As Chapter 2 demonstrated, however, the doctrine's difficulties are more than merely contextual. Closer analysis revealed that the theory is, in fact, internally incoherent. This manifests itself in a number of ways. Where an allocation of powers is in question, for example, the doctrine can be argued to instinctively favour both institutional separation and blending. Aspirationally, the theory is similarly unfocused. Does it protect liberty or efficiency? Is it confined to the defence of the individual, or should the separation strive

to promote the public interest? From an operational perspective, the caselaw further indicates that the trinity of functions upon which the doctrine is predicated in the abstract, is actually impossible to identify in practice. Uncertain in its objectives and imprecise in its application, the separation of powers doctrine is thus hopelessly indeterminate.

This poses clear problems for any attempt to invoke the theory as a directive principle of institutional separation. Of itself, the doctrine is devoid of determinate details. The theory can only provide guidance on issues of power allocation if it is allied to some broader political conception of the state. This explains the doctrine's frequent appearances on opposing sides of the same argument. The theory's central vagueness means that it effectively functions as a rhetorical cover for discrete political judgments made on other independent grounds. In this way, the doctrine serves only to obfuscate and distort political and constitutional discourse.

Taking these criticisms into account, why then is the theory so enduringly popular? In part, this is undoubtedly due to a combination of its simplicity and malleability. It is also likely that its invocation reflects, to some degree, a certain nostalgia for the glory days of 18th century constitutionalism. Reliance on the tripartite model seems, in part, a romanticised reification of Enlightenment ideals, connecting our courts to the celebrated insights of that era's intellectual heavyweights.

In this context, Brown's critical overview of U.S. caselaw is very relevant.[1] She demonstrates quite clearly that the American courts, like their Irish counterparts, tend to mechanically employ the doctrine without any consideration of the libertarian values which originally inspired its elaboration. Detached from the fundamental principles which animated its adoption, the model has, for many judges, itself become 'a high constitutional value'[2]. This focus on the interests of state institutions creates the possibility, however, that the doctrine might be used, in certain situations, to frustrate those individualist values which it originally espoused.

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[1] Brown, "Separated Powers and Ordered Liberty" (1990) 139 U. Pa. L. Rev. 1513.
[2] *T.D. v. Minister for Education* [2001] 4 IR 259, at 362 *per* Hardiman J.

An institutional theory does not develop in a vacuum. It is intended to operate in a particular social and political environment. Its design is entirely contextual. Where the political or constitutional context changes, so, therefore, should the specifics of the theory. To hold fast to the details of an outdated model risks allowing it to become a perversion of its original ideals. So it has proved with the separation of powers.

(iii) The theory and the administrative state

What are the implications of this analysis for the institutional architecture of the administrative state? That the preferred model of institutional arrangement effectively ignores the presence in the system of extensive bureaucratic powers must be unacceptable. From the point of view of the average individual, administrative agencies wield enormous influence.

> [W]hile the press reports endlessly on the machinations of national ... politicians, citizens mostly encounter administrators .... These are the 'devoted public servants' who lead us through the labyrinthian requirements of modern law, or the 'pointy-headed bureaucrats' who make our lives miserable.[3]

Administrative law constitutes the practical everyday expression of constitutional principle. It should therefore be incorporated into any developed model of institutional interaction. Chapters 2 and 3 clearly demonstrated that the separation of powers is obviously incapable of fulfilling this role.

The experience of the separation of powers also underlined, however, the importance of an institutional theory's background conception of the state. The doctrine only becomes determinate (and thus employable) when interpreted from the perspective of a particular political theory. This obviously introduces an element of arbitrariness into what is an ostensibly apolitical model.

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[3] Mashaw, *Greed, Chaos & Governance* (Yale University Press, 1997), at 106-107.

More significantly, however, it leads to a situation in which the continuing utility of the separation of powers doctrine depends upon the extent to which its background theory remains apposite. Locke, it will be remembered, envisaged government in very restricted terms.

> And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people; [and] by indifferent and upright judges, who are to decide controversies by those laws.[4]

Such a limited, statute-oriented conception of the state is clearly anachronistic in an age of dispersed and discretionary governance. It is unsurprising, therefore, that the tripartite theory – extrapolated as it was from this idea of state action – has proved similarly unable to adapt to contemporary times.

(iv) A new theory for an administrative state

From the point of view of this thesis, there were two lessons to be learned from this. The first is that an institutional model is necessarily subordinate to a broader theory of the state. Any attempt to establish or develop a new institutional theory must therefore also consider the background doctrines upon which it will be based. Secondly, it is imperative that these theories reflect the reality of contemporary governance. A model must be both practically and normatively coherent if it is to operate effectively.

The challenge for this thesis thus became one of developing a theory of institutional separation for the 21st century state. In comparison with Locke and Montesquieu's 17th century ideas, much has changed. The character, function, organisation and powers of the state have all been radically altered. As Chapter 3 indicated, the state is now *dirigiste*, discretionary and broadly dispersed. These are the operational characteristics which any aspiring model of institutional arrangement must take into account.

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[4] Shapiro ed. *Locke: Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003), at 156.

Normatively, however, much has remained the same. The contractarian understanding of the state which informed the theories of the 17th and 18th century retains a certain contemporary resonance. The political and constitutional controversies which tend to arise still involve, at their simplest, attempts to balance the interests of the collective against those of the individual. The state still strives to serve the good of all through the co-ordination of each. Even at a time of increasing majoritarianism, the constitutional caselaw of the courts exhibits an ongoing concern for the interests of the individual.

> It was … to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers.[5]

Chapter 4 has argued – and Chapter 3 has shown – that this desire is still relevant today. Non-arbitrariness was thus proposed as the foundational value upon which this thesis should be premised. As an institutional principle, it accepts the possibility of individual-adverse outcomes in the exercise of public powers but requires that they be capable of rational justification, taking into account all of the circumstances of the case. As Chapter 5 noted, this strikes a chord with the efforts of republicans throughout the ages to rationally balance the interests of the individual against those of the state. The underlying values of this thesis can be located firmly within the mainstream currents of constitutional thought. Only the contextual organisation and expression of these principles has changed.

(v) Constituency and separation

In reality, therefore, this thesis should be regarded as no more than an attempt to update the separation of powers theory for contemporary times. Montesquieu's tripartite theory was very much a product of its day. Power tended to be exercised in only one way. The 17th century theorist was accustomed to, and thus predicated his analysis upon, a single process of power application – the exercise, by a limited central sovereign, of its authority by way of generalised rules. The Montesquian model of governmental functions

[5] *INS v. Chadha* 462 US 919 (1983), at 963.

makes sense in the context of such a singular and straightforward model. The identification of the necessarily distinct stages of creation, interpretation and implementation is a relatively simple affair where purely statutory processes are involved.

Whatever its merits in the past, this idealised model of rule-based governance is grossly unsuitable for the administrative state. Government today acts in a bewildering variety of very different ways. The state is inclined to entrust its tasks to quasi-private bodies, even as it assumes to itself the ability to act in ever-broader areas of social conduct. Created with a particular purpose in mind, these *ad hoc* bodies defy simply analysis, or clear-cut categorisation. The basic tripartite theory is evidently unable to explain these developments. Power is diffused across a range of agencies, appearing in vastly varying forms in each. It is impossible for the analyst to reduce this broadly dispersed system to a three-way institutional model. The assorted administrative bodies of today's state are just too diverse to be convincingly corralled within Montesquieu's original trinity of functions.

There is a need, therefore, for a different sort of separation. In this regard, this thesis has argued in favour of a constituency model, in which the institutions of the state are identified with specific social interests. From the perspective of traditional theory, this constitutes a significant shift in analytical emphasis. In an age of egalitarian democracy, it is generally expected that public bodies ought to be animated by objective notions of public interest instead of sectional concern. As an area of the law, institutional separation, has thus concentrated, in recent centuries on questions of power, competence and function. As the previous paragraph has noted, however, the likelihood is that the current system of public governance is so complicated that it cannot be considered solely in such terms. Power is no longer exercised by statute alone. Without this single central case of institutional action, it is difficult, if not impossible, to defend a function-oriented approach to issues of power exercise or allocation. Any system which is based upon a particular idea of institutional power, function, or competence will fail to account for a significant area of governmental activity. In the face of such unmanageable complexity,

the theorist can only turn to more general ideas. Hence the move in this thesis from operational details to abstract aims.

Charged with the advancement of a particular point of view, it is argued that the role of each organ is capable of being clearly defined. The actions of an institution in a particular case can be explained by reference to the interest it consistently represents across all contexts. There is no need to consider which one of its many multitude of tasks is actually at issue. In its comparative simplicity, this model therefore attempts to address the indeterminacy and uncertainty associated with the existing system of separation of powers.

(vi) The character of the state and its constituencies

In its details, the suggested model takes its cue from contractarian theories of the state. In proposing an institutional alignment premised on a dichotomy of individual and collective interests, the thesis identifies itself with this established ideological tradition. It also draws upon the increasing contemporary tendency to consider legal and constitutional issues in such dualist terms. Sedley's model of bi-polar sovereignty is, perhaps, the most demonstrably similar example of this thinking in a British context.[6] Traces of this notion have, however, also been evident in certain recent decisions of the UK courts. These were considered in Chapter 6. It is thus evident that the institutional design for which this thesis has argued – one in which power is allocated between the collectivist government and the individualist courts – ought not to be regarded as a radically alien innovation in either historical or operational terms.

Of arguably greater novelty is the model's attempt to deal with the flexibly non-rule-based character of the administrative branch. Wedded to a top-down, imperialistic understanding of the state, traditional doctrine has been inclined to ignore, excuse or conceal the shamefully discretionary nature of administrative activity. In reality, of course, the courts have long accepted this as an inevitable feature of modern governance. This thesis has sought to embrace the administrative branch, employing it as a positive

[6] Sedley, "Human Rights-a Twenty First Century Agenda" [1995] PL 386.

means of enhancing the system's institutional protections. In contrast to the efforts of traditional doctrine to explain away the many 'incongruous' aspects of the modern state, this thesis has tried to ground itself upon the everyday realities of contemporary governance. It may, of course, be the case that the model is overly optimistic, seeing in its rationalisation of the state a series of cross-institutional safeguards capable of ensuring the non-arbitrariness, and thus legitimacy, of government acts. At least, however, it describes a system of government which actually exists. In this, it represents a considerable advance on the theory of the separation of powers.

In its details, therefore, the model is motivated by a contractarian conception of administrative government. In its instincts, meanwhile, the thesis reflects the influence of republican ideals. The traditional doctrine of the separation of powers assumed, to a certain extent, the dominance of each institution within its own specific sphere. This was a result of the fact that power was conventionally allocated on a formal or functional analysis of institutional competence. Each organ was entrusted with its tasks on the basis of its superior suitability, rather than because it represented a particular interest or value. Technical ability was the touchstone of power distribution.

This had two consequences. In the first place, if a body's competence derives from the fact that it is best-equipped to undertake that task, it cannot sensibly be suggested that its use of the power should subsequently be questioned by organs which are, by definition, less equipped to do so. This necessarily encourages unsupervised institutional conduct. Secondly, this system of capacity-oriented allocation denied the presence in society of discrete competing constituencies. The distribution of institutional power was an objective question of technical expertise, rather than a subjective exercise in interest representation. There was no suggestion that a different allocation would produce aspirationally different outcomes. Any changes which would flow from an alternative arrangement would arise as the result of the system's use of less skilful organs, rather than from any change of emphasis on their parts. Each body was thus clearly assumed to serve the same, single overarching public interest. It was only in their abilities, rather than in their aims, that there might be some discrepancies.

In contrast, the model considered in this thesis rejects the idea of public interest as a monolithic notion. In its contractarian origins, it accepts the possibility that there may (and usually will) be divergent views of any social actions. Institutions, on this amended model, are expected to represent these disparate specific social interests. The thesis thus seeks unity from division, aiming to secure objectively beneficial outcomes for all from a rational amalgamation of the aims of each. In this, it constitutes an effective updating of the age-old republican idea, that the creation of a proper social balance will ensure the achievement of appropriately universal goods.

The system's acknowledgment of the existence of distinct constituencies of interest necessarily implies that each cannot, of itself, be absolute. No one constituency can have a monopoly on the notion of public interest. If the public good is served by the co-ordination of these interests, each must be guaranteed representation. Each must also, however, be denied automatic or unqualified success. Thus, the institutions which purport to represent each interest cannot be regarded – as under the separation of powers theory – as absolutely dominant within any individual area. On this analysis, power is vested in a particular organ so that the interest which it represents can be assured of input into the participatory process of exercising public power. The competence of the body is based on the interests it advances, rather than on its particular abilities. It cannot therefore claim any inherent functional superiority. In a positive sense, the constituency system produces co-operative institutional co-ordination. Negatively, it acts to inhibit unchecked unilateral action. In this, it chimes closely with the objectives of the separation of powers theory as they have been traditionally understood. Tied to an outdated institutional trinity, that doctrine has, as Brown has noted, ceased to have such effects. Inspired by similarly republican notions of objective good and public interest, but based, crucially, on the actual nature of today's institutional activity, it is submitted that the adoption of this thesis' amended model could inaugurate a constitutional return to the values of the original theory.

(vii) Discretionary power and institutional interaction

In pursuit of such hopes, this thesis places its faith in the efficacy of rational inter-institutional discourse. It necessarily assumes that these distinct institutional bodies, with their particular bureaucratic prerogatives, will be able to organise their actions in a co-ordinated and participatory process. Taking institutional identities and professional jealousies into account, this may seem unduly optimistic. However, the multi-faceted character of today's institutional system – which undermined, in part, the contemporary utility of the theory of separation of powers – may actually rescue the constituency model from the effects of such inter-institutional rivalries.

In this administrative era of delegated, decentralised and discretionary powers, government is an ever-evolving process. Policies are regularly updated or reversed. Decisions are adjusted to take account of new circumstances. New interpretations are applied to existing conventions. With discretionary power comes transient governance.

In a system of purely statutory rules, government is fixed and inflexible. In a multi-constituent model, this would allow for the possibility of a victorious actor emerging from the inter-institutional process. This would discourage compromise, undermining the system's central reliance upon rational discourse as an institutional value.

The discretionary character of the administrative state operates, however, to reduce the likelihood of the institutional process producing such fixed and unyielding outcomes. Administrative governance is, effectively, an adjustable issue of ever-ongoing concern. Without permanent rules there can be no permanent victors. Institutional actors may thus participate with confidence in the participatory process of exercising power.

Of course, the system may not, in reality, operate in such a civic-minded fashion. The experience of the American republicans belies such faith. It is probably more likely that the constituent organs will conduct their discourse through unilaterally amending the expressed earlier positions of other organs. The rules and principles set out by government and by the courts are likely to be adjusted in response to the way in which

they are dealt with by administrative bodies. By such a system of reaction and retort should the quality of government actions improve overall. This may not be as maturely reflective a process as the pristine academic model might suggest, but – in its effectively co-operative outcomes – it is arguably apt, nonetheless. In such ever-decreasing circles of responsive interaction should an appropriate system of institutional governance emerge.

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