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Introduction

Concepts and methodology

Control regimes and systems of government

How might we explain the fact that under US administrative law, judges may be required to 'defer' to administrators' interpretations of statutes, whereas in both English and Australian law they must never do so? Or that the starting point of the US law of government liability is sovereign immunity whereas the starting point of Australian law is sovereign non-immunity? Or that administrative rule-making is subject to much more formal control in the United States than in either England or Australia? Or that there is no equivalent in the US of the Parliamentary Ombudsman in England or the Commonwealth Ombudsman in Australia? More generally, why do the legal regimes for controlling administrative power ('control regimes') in England and Australia both differ much more from that in the US than they differ from each other? On the other hand, how might we explain the fact that the freedom of information regimes in all three jurisdictions are essentially similar when those regimes differ so markedly in other areas? Or that Australian courts have rejected certain recent developments in English administrative law (such as review on proportionality grounds) when the two systems are essentially similar in many other respects. These are some of the puzzling questions with which I began the research reported in this book and which I attempt to answer in the pages that follow.

A typical lawyer's answer to such questions might be that US judges and law-makers on the one hand, and English and Australian judges and law-makers on the other, hold different normative views, based on different values, about the proper relationship between the executive and other governmental institutions, and about how best to control administrative decision-making. From this 'ideological' perspective, constitutional and public law theory tend to be understood as branches of, or grounded in, (normative) political theory[1] in much the way that private law theory

[1] See e.g., T.R.S. Allan, *The Sovereignty of Law* (Oxford: Oxford University Press, 2013).

or criminal law theory may be understood as species of, or based on, moral theory. Putting the point crudely, in this way of thinking, the best explanation, for why the law is as it is, is that law-makers think that this is the way it ought to be.

In this book, I approach these and various other related questions in a quite different way, which might perhaps be called 'structural'. The hypothesis I set out to test is that similarities and differences between the control regimes in England,[2] the United States and Australia are partly explicable in terms of similarities and differences amongst the broader 'systems of government' in which the control regimes are respectively embedded and of which, as I understand them, they are sub-systems.

A control regime may be understood as having three main components: a set of institutions, a set of norms and a set of practices. Institutions of control include courts and parliaments.[3] Control norms may be legal in a strict sense ('hard law') or in a broader sense ('soft law'). Hard control norms include the grounds of judicial review of administrative decision-making. Exemplary of soft control norms are 'principles of good administration' that ombudsmen develop in elaboration of the concept of 'maladministration', allegation of which triggers the power of many ombudsmen to make recommendations for remedial action. The concept of 'control practices' refers generally to non-normative patterns of behaviour or, in other words, the way control institutions in fact perform their controlling functions, and the ways they interact with each other and with the administrative officials and agencies they can control.

A system of government may be understood as a pattern of distribution of public power; and, like a control regime, as having three main components: a set of institutions (such as a legislature and administrative agencies), a set of norms (both hard and soft) and a set of practices around, for instance, interactions between the legislature and the executive. In providing an account of a system of government it is necessary to take account not only of hard legal norms governing the distribution and exercise of public power but also of 'conventions' and non-normative

[2] See further Chapter 2, Introduction.

[3] In addition to controlling the exercise of administrative power, parliaments also legislate, of course. Typically, as legislatures, parliaments are differently constituted than when exercising their control function. The analysis in this book focuses on the control regimes of England, the US and Australia. In England and Australia, Parliament as legislature is constituted by the Queen-in-Parliament. In the US it is constituted by the President-and-Congress.

practices affecting its distribution and exercise. Conventions (often called 'constitutional conventions') may be understood as 'soft-legal' or 'political' norms regulating the distribution and exercise of public power. For instance, in the English system of government the Monarch has a legal power to veto ('refuse assent to') legislation; but by convention that power is never exercised.[4] Again, in the US system, there is probably a convention 'that the Supreme Court's size . . . shall be permanently fixed at nine and certainly . . . that the Court's size cannot be changed simply to change the results expected from the Court'.[5]

The distinction between legal and conventional norms marks the limits of the ability or willingness[6] of courts to regulate the distribution and exercise of public power. Practices may be understood as non-normative patterns of behaviour relevant to the distribution and exercise of public power. For instance, apart from a convention that the Australian Prime Minister should attend the House of Representatives regularly to answer questions, there are no legal norms, and there appear to be no conventions, regulating the frequency or duration of the Prime Minister's attendance in Parliament.[7] Or consider the Constitutional power of the US President to veto Congressional legislation: although the legal power to veto is relatively rarely exercised and there appear to be few, if any, conventions regulating its exercise, it casts a long shadow over the practical conduct of inter-branch relations and over bargaining between the White House and Capitol Hill.[8]

The framework of a system of government is a constitution. A constitution performs two main functions: positively, it establishes and maintains a system of public power, and negatively it regulates and controls public

[4] For more detailed discussion and speculation about circumstances in which the royal veto might be exercised see R. Brazier, 'Royal Assent to Legislation' (2013) 126 *Law Quarterly Review* 184.

[5] M. Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Oxford: Hart Publishing, 2009), p. 144; see also pp. 146 and 147. See also A. Vermeule, 'Conventions of Agency Independence' (2013) 113 *Columbia Law Review* 1163.

[6] The line between constitutional law and constitutional convention is much less clear in England than in the US. As a result, English courts can to some extent manipulate the distinction and in that way control the limits of their own power.

[7] For a review of practice in England see M. Rush, 'Engaging with the Enemy: The Parliamentary Participation of Party Leaders, 1945–2010' (2014) 67 *Parliamentary Affairs* 751.

[8] For a review of research see C.M. Cameron, 'The Presidential Veto' in G.C. Edwards III and W.G. Howell, *The Oxford Handbook of the American Presidency* (Oxford: Oxford University Press, 2009).

power, including administrative power, by imposing on it boundaries and limits. These functions may be viewed as two sides of the one coin, in that the boundaries and limits of power may be interpreted as part of its definition.[9] So, for instance, the High Court of Australia once interpreted a statutory provision ousting judicial review of an administrative decision as an aspect of the definition of the scope of the administrator's power rather than as a limitation on judicial power to control the executive.[10] However, if only because 'power corrupts and absolute power corrupts absolutely', it is theoretically and practically important to distinguish the negative function of a constitution from its positive function and to recognise boundaries and limits as ultimately enforceable constraints on power. Of course, when I speak of 'controlling power' I refer to the existence and nature of control mechanisms rather than their effectiveness.[11]

Fundamental to the analysis that follows of systems of government, control regimes and the relationship between them are two distinctions: the first contrasts two models of distribution of public power (including administrative power) within a system of government; and the second contrasts two modes of control of public power, including administrative power. The two models of power distribution will be referred to respectively as 'diffusion' and 'concentration'. The two modes of control of power will be referred to respectively as 'checks-and-balances' and 'accountability'.

Diffusion and concentration

Diffusion involves dividing power between various institutions by giving each institution a share in the exercise of the power – 'separated institutions sharing power' in Richard Neustadt's influential phrase.[12] A good example of diffusion of power is the US Constitutional requirement of 'presentment', which refers to the power of the President to veto Congressional legislation (subject to the power of Congress to override a

[9] E.g. C. Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge: Cambridge University Press, 2011), pp. 218–19 (constitutional rights 'deeply formative . . . of independent state power').

[10] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. On this topic see further Chapter 13.

[11] There is more on this issue in Chapter 14.

[12] R.E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1990), p. 34. Harold Bruff borrows Woodrow Wilson's phrase 'balance of forces': H.H. Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (Durham, NC: Carolina Academic Press, 2006), p. xiii.

Presidential veto). Under this arrangement, legislative power is shared between Congress and the President. In abstract terms, the hoped-for effect of diffusion is to reduce the power of government by putting barriers in the way of government action in general and policy-making in particular, and by requiring various institutions to cooperate and collaborate in the exercise of power.[13] By contrast with diffusion, concentration involves dividing power between institutions in such a way that each can exercise its power unilaterally without the need to gain the consent or cooperation of the other institution(s): separated institutions exercising separated powers, to adapt Neustadt's phrase. In theory at least, concentration facilitates policy-making and other government action, and 'strengthens' government.[14]

A fundamental difference between diffusion and concentration is that under diffusion, the various empowered institutions are separately and distinctly authorised to exercise whatever powers they have been given, and are in that sense 'coordinate'. By contrast, under concentration, authority is ultimately derived from a single 'sovereign' institution to which all other institutions are in some sense subordinate. For instance (as we will see in much more detail later), in the US system the three traditional branches of government – legislature, executive and judiciary – are each understood to exercise power delegated to them directly by 'the People', in whom 'sovereignty' is said to reside. By contrast, in the English system (in theory at least) 'sovereignty' resides in the Queen-in-Parliament, and the authority of the executive and the judiciary is ultimately subject to that sovereignty.

Three further points should be made about the distinction between diffusion and concentration. First, I have deliberately not described them in the language of 'separation of powers', the meaning and significance of which are uncertain and contested, which comes with a great deal of historical and political baggage, and which fails to capture precisely enough

[13] W.J. Novak adopts Michael Mann's distinction between 'despotic power' and 'infrastructural power'. The former refers to the power of state institutions to govern unchecked by other institutions. The latter refers to the power of the state as a whole to implement policies throughout its territory. Novak argues that the US federal state is despotically weak but infrastructurally strong: 'The Myth of the "Weak" American State' (2008) 113 *American Historical Review* 752. In terms of this distinction, diffusion is a protection against despotic power, not infrastructural power.

[14] In the sense of 'despotic' strength. There is no direct or necessary correlation between despotic and infrastructural strength just as there is no direct or necessary correlation between despotic and infrastructural weakness.

the distinction I wish to draw between the two models of distributing power.[15] Secondly, I have deliberately not used the terms 'concentration' and 'diffusion' to refer to systems of government as such. This is because, I would argue, any system of government may (or, perhaps, every system will) be found, on examination, to contain elements of both techniques. Indeed, it is possible to interpret the Australian federal system (for instance) as a conscious combination of elements of concentration and diffusion. Again, it is widely agreed that in the United States, power is much less diffused (much more concentrated in the Presidency) in the field of foreign policy than it is in domestic policy. The two constitutional techniques are better envisaged as two coordinates of a field in which various systems of government can be located according to the particular combinations of the two techniques that they display.

Thirdly, and more particularly, I have deliberately avoided associating the distinction between concentration and diffusion with the widely adopted contrast between parliamentarism (of which the English system of government is typically cited as exemplary) and presidentialism (of which the US system of government is typically treated as the exemplar).[16] One reason is that England and Australia are both parliamentary systems but differ significantly in terms of diffusion and concentration of power. Secondly, both 'parliamentarism' and 'presidentialism' are too narrow because they refer primarily to the relationship between the political executive and the legislature. Concentration and diffusion refer more generally to the distribution of power and relationships between organs of government including, for instance, the non-political executive ('the bureaucracy'). For example, the highly decentralised internal structure of public administration in the US is one of the most significant points of distinction between that system of government, and the English and Australian systems. Incidentally, this example also illustrates the shortcomings of the traditional theory of tripartite 'separation of powers' (between legislative, executive and judicial) and 'separation of institutions'

[15] Separation of powers is typically treated as a normative principle whereas my concerns are descriptive and explanatory, not evaluative. Thus, I will not address questions such as whether concentration or diffusion provide 'better' governance in some sense. See e.g., J. Gerring, S.C. Thacker and C. Moreno, 'Are Parliamentary Systems Better?' (2009) 42 *Comparative Political Studies* 327. The separation-of-powers principle also conflates various different ideas: J. Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433 is a valuable discussion.

[16] See e.g., H. Fix-Fierro and P. Salazar-Ugarte, 'Presidentialism' and A.W. Bradley and C. Pinelli, 'Parliamentarism', both in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

(legislature, executive and judiciary) as a theoretical framework for the present study: the internal structure of the executive branch and the distribution of power within that branch between its elected and appointed elements are central features of any system of government. The theory of separation of powers fails to address this feature of governance because it was developed before the growth of the administrative state, and it has not been radically updated since then, perhaps because it has been frozen in written constitutions, especially the US Constitution. As a result, the administrative state has had to be 'retro-fitted'[17] into a constitutional structure that was not designed to accommodate it.

In order fully to appreciate the distinction between concentration and diffusion, it is necessary to contrast diffusion, which involves division and sharing of power, with what I shall call 'fragmentation' (or 'disaggregation'). For instance, in the English system of government, as a matter of constitutional law and convention, legislative power is (in terms of these distinctions) fragmented between the political executive, the two Houses of Parliament (Commons and Lords) and the Monarch, in the sense that the consent of each of these institutions is required for enactment of a statute. By a mixture of convention and practice, however, effective control of the legislative process is more-or-less concentrated in one of these institutions – the political executive – because none of the other institutions has an effective veto over legislation. In other words, fragmentation of power is consistent with concentration. By contrast, in the US system, primary legislative power is shared amongst the President, the House of Representatives and the Senate because each has a more-or-less effective veto over proposals for legislation. In other words, in the terms used here, power is not fragmented but diffused. A possibly helpful way of thinking about the distinction between fragmentation and diffusion of power may be to analogise fragmentation to division of *labour* and diffusion to division (and sharing) of *power*. Alternatively, we may say that power that is legally or theoretically fragmented may be effectively or practically concentrated. The importance of the distinction will become clearer when, in Chapter 2, we consider various changes in the English system of government over the past forty years or so. It will be necessary to consider whether these changes have introduced elements of diffusion into the English system or have merely fragmented public power.

[17] This is David Rosenbloom's term. See e.g., 'Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's 20th-Century Progress' (2000) 60 *Public Administration Review* 39.

On the other hand, it is also important to distinguish between concentration and what we might call 'coordination'. A danger inherent in diffusion (division and sharing) of power between institutions that have independent authority, and must negotiate and cooperate to achieve their respective policy objectives, is loss of efficiency, effectiveness and 'energy' (to use a Madisonian term) in the conduct of government. When powers are shared, disagreement about how they should be exercised may cause delay or prevent action. The so-called 'fiscal cliff' is a graphic example in the US system of the dangers of diffusion. Coordination, as understood here, is a means of preventing diffusion of power becoming dysfunctional by effectively concentrating power that is formally diffused and shared.[18] Thus, for example, Congress and the President have various techniques at their disposal for preventing the US Supreme Court departing too far or for too long from policies they favour.[19] The concept of coordination will play a significant role in the analysis of the development of the US system of government in Chapter 3.

Checks-and-balances and accountability

Each of these models of power-distribution is associated with a distinctive mode of controlling power. In traditional terms, the mode of control characteristic of diffusion is 'checks-and-balances'. So, for instance, the qualified Presidential veto in the US system establishes a 'balance of power' between the executive and the legislature by dividing legislative power between Congress and the President.[20] Sharing power between institutions enables each to 'check' the other. 'Checking' has two connotations: one is stopping or delaying, as in 'checking someone's progress'. The

[18] It is important not to confuse the concept of coordination with the idea that the three branches of government are 'coordinate'. It is precisely the fact that they are coordinate or semi-autonomous that creates the need for tools to coordinate their policy-making. In other words, the fact that the branches are theoretically coordinate does not mean that they are practically coordinated.

[19] Tushnet, *The Constitution of the United States*, n. 5 above, 140–7.

[20] The combination of the two modes of control within the one, diffused, system may raise very complex issues of institutional design. For instance, S.A. Shapiro and R.W. Murphy ('Eight Things Americans Can't Figure Out About Controlling Administrative Power' (2009) 61 *Administrative Law Review* (Special Issue) 5, 11–12) and E.A. Young ('Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States' in P. Craig and A. Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006), pp. 163–4) argue that the Supreme Court's vacillation between formalist and functionalist approaches to separation of powers reflects the distinction between 'separation' (division) and 'balance' (sharing) of power.

other is supervising, as in 'checking up on' someone or 'keeping an eye' on them.[21] The mode of control characteristic of concentration is referred to here as 'accountability'.[22] The classic example of this mode of control is ministerial responsibility to Parliament in the English system of government. Ministerial responsibility is the price that governments pay in parliamentary systems for the large amounts of unilateral power they enjoy.

A spatial metaphor may help to illuminate the difference between accountability and checks-and-balances. In the former case, the institution required to give account and the institution to which account must be given can be pictured as being in a vertical relationship. By contrast, institutions between which power is divided and shared can be pictured as being in horizontal relationships. So, for instance, in the English system, ministers are responsible to Parliament and are, in this sense, subject to it. In the US system, by contrast, the President is not responsible to Congress. Nevertheless, 'oversight' of the executive is one of the core functions of Congress. Another way of thinking about the difference between the two modes of control is in terms of a distinction between bipolarity and multipolarity. A relationship of accountability can be pictured as bipolar (or 'bilateral'), between an institution required to give account and an institution empowered to receive an account. By contrast, neither oversight nor checking carries any implication of bipolarity because power may be divided or shared amongst more than two institutions. It does not follow, of course, that an institution may not (in theory at least) be accountable to more than one other institution. However, each of those relationships will be best understood as discrete and bipolar. By contrast, an institution

[21] See e.g., J.D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, DC: The Brookings Institution, 1990).

[22] I am using the term 'accountability' in a narrow sense. It is often used in a broader sense that would encompass checks-and-balances: e.g. R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (London: Palgrave Macmillan, 2003), pp. 30–1, 105–6, 108, 188, 221–2, 223, 227. On accountability generally see M. Bovens, R.E. Goodin and T. Schillemans, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014). According to Mark Bovens ('Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946, 947–8), 'accountability' is typically used in US discourse not in an institutional sense but normatively: to say that a civil servant is 'accountable' is to approve of their conduct in terms of bureaucratic or other values. This is accountability as a virtue as opposed to accountability as a mechanism. There is a similar distinction between uses of the word 'responsible'. The narrow sense of accountability used in this book refers to accountability as a mechanism. If I am right that the typical method of control associated with diffusion is checks-and-balances, it is not surprising that US discourse uses the term 'accountability' in the normative rather than the institutional sense.

may be subject to oversight by (say) two institutions without being accountable to either in any formal sense. For instance, the US Presidency is subject to oversight by both Congress and the Supreme Court, but is not 'responsible' to either.

A third way of thinking about the modes of control is in terms of whether or not the institutions involved are 'coordinate' to one another. In an accountability relationship, the institution empowered to receive an account has 'authority' over the institution required to give account. In that sense, the latter institution is 'subordinate' to the former. By contrast, where power is shared between institutions, none has 'authority' over the other(s) in the sense involved in a relationship of accountability: authority in that sense is incompatible with maintaining a balance of power. Similarly, division of power as a basis for the checking of one institution by another assumes that each has an autonomous source of authority and that neither has authority over the other. Fourthly, the two modes of control (checks-and-balances and accountability) differ in their basic temporal orientation. As controls on the exercise of public power, checks-and-balances are essentially prospective[23] in operation: they are designed to make it harder for government to get things done. By contrast, responsibility and accountability are essentially retrospective in operation: restorative and reparative rather than preventive. Retrospectivity of control increases the strength that government derives from concentration of power. A clear example is provided by the rule of English law that the validity of delegated legislation may be challenged in court only after it has been implemented. Contrast the rule of US federal law allowing the validity of administrative rules to be challenged before they have been promulgated.[24] The US rule has been identified as one of the prime causes of the 'ossification' of the US administrative rule-making process.[25]

Testing the hypothesis

The distinctions between models of distribution of public power and their associated modes of controlling public power provide the theoretical

[23] Or, perhaps, 'continuous': Gerring, Thacker and Moreno, 'Are Parliamentary Systems Better?', n. 15 above, 332.
[24] *Abbott Laboratories v Gardner* 387 US 136 (1967). See further Chapter 8, n. 115 and text.
[25] J.L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, CT: Yale University Press, 1997), p. 181.