

INDEX

- accountability
 - and administrative rules, 273
 - and authority, 10
 - bipolarity, 9–10
 - and checks-and-balances, 8–10
 - and concentration of power, 8–9
 - concept of, 4
 - and coordination, 10
 - New Public Management, 438–9, 462–4
 - retrospectivity, 10
 - and separation of powers, 22
- Adams, John, 96
- adjudication
 - comparative summary, 341–4
 - and decisions, 325
 - formal, 326
 - and implementation, 326–7, 344
 - informal, 326
 - meaning of, 283, 325
 - and rulemaking, 317, 517
 - use of term, 326
- administration
 - politics distinguished, 313
 - public *see* public administration
- administrative adjudication *see* adjudication
- administrative fact-finding and policy-making
 - distinction between ‘law’, ‘fact’ and ‘policy’, 238–41
 - judicial deference to executive, 238
 - jurisdictional differences explained, 261–8
 - standards of review, 238, 242–3
- administrative interpretation *see* statutory and regulatory interpretation
- administrative law
 - differences between national laws, question of, 1–2
 - public/private relationship, 516–18
 - regulation and, 516–17
- administrative power
 - and growth of control regimes, 16
 - justifications for controlling, 513
 - models of distribution, 4
 - types of control, 146–7
- administrative rules
 - and accountability, 273
 - ‘adjudication’ and ‘decision-making’ distinguished, 283
 - adjudication and rule-making, 317, 517
 - application of ‘soft’ rules, 271–2
 - ‘capture theory’, 317–18
 - and checks-and-balances, 273
 - comparative summary, 310
 - control regimes, 289–309
 - discretionary approach to governance, 273
 - distinction between primary and secondary legislation, 274
 - ‘hard’ rules, 269–71, 273–4
 - historical development, 274–89
 - jurisdictional differences explained, 310–24
 - ‘pluralistic’ theorizing, 317
 - ‘rule’, meaning of, 325
 - rule-based approach to governance, 273

- shift from adjudication to rulemaking, 317
 - 'soft' rules, 269–73
 - types of, 269–74
- administrative state *see* public administration
- agencification and New Public Management, 466–9
- agency 'independence', 88–9
- Allison, John, 509–10
- Amar, Akhil Reed, 70
- Aronson, Mark, 497–8
- auditing as bureaucratic control mechanism, 502
- Australia
 - adjudication
 - decision-making procedure, 356–60
 - institutional framework, 338–9
 - tribunal decisions, juridical status of, 340
 - tribunals' role, 339–40
 - 'adjudication', meaning of, 283
 - administrative fact-finding and policy-making
 - distinction between 'law', 'fact' and 'policy', 241
 - mixed questions of law and fact, 240
 - reason-giving, 258–9, 267
 - record of decisions, 257
 - review of administrative fact-finding, 260–1
 - standards of review, 242–3
- administrative interpretation *see below* statutory and regulatory interpretation
- administrative rules
 - 'adjudication' and 'decision-making' distinguished, 283
 - conceptual approach to, 271, 272
 - control regime, 305–9
 - delegation doctrine, 281–2, 284–9
 - discretionary approach to governance, 273
 - distinction between 'hard' and 'soft' rules, 270–1
 - 'hard' rules, 270
 - historical development, 284–9
 - institutional framework, 310–11
 - judicial control, 317–24
 - judicial review, 308–9
 - Parliamentary scrutiny, 307–8
 - 'policy-making', meaning of, 280–1
 - post-enactment publication, 308
 - power to make 'hard' rules, 273–4
 - pre-legislative publicity and consultation, 306–7
 - 'rule-making', meaning of, 280–1
 - separation of powers, 286–7
 - 'soft' rules, 270
- administrative 'tribunals', 134
- auditing, public sector, 198–9
- Australia Acts 1986, 120–1, 145
- Bill of Rights, 141–2
- bureaucracy *see below* civil service
- bureaucratic control, 198–201
- as case study, 11–13
- civil service
 - auditing, 198–9
 - executive control, 228–9, 267–8, 310–16
 - internal complaint and review, 200–1
 - New Public Management (NPM), 131–2, 133
 - ombudsmen, 199–200
 - policy making *see above*
 - administrative fact-finding and policy-making
 - separation of powers, 133–4
 - source of legitimacy, 267–8
 - system, 131–5
- colonial legislatures, 114–18
- colonial period, 113–20
- common law
 - distinctiveness from US, 518–19
 - heritage, 13
- Commonwealth, establishment of, 118–20

Australia (*cont.*)

Commonwealth of Australia

Constitution Act 1900, 119–20

concentration of power, 105–6, 107,
123–4, 131, 132, 140–1, 145,
310

Constitution

Australia Acts 1986, 120–1, 145

Bill of Rights, 141–2

Commonwealth of Australia

Constitution Act 1900, 119–20

continuity with British

constitution, 508

flexibility, 513–16

functions, 3–4

New South Wales Constitution

Act 1855, 115–16

separation of powers, 218

sovereignty, 120

status, 120–4

Statute of Westminster 1931, 120

UK derivation, 120–2

US Constitution influence, 119–20

constitutional conventions, 3

constitutional monarchy, 112

contractual liability, 404–5

courts

administrative ‘tribunals’, 134

colonial period, 114–15, 118

control of administrative

rule-making, 317–24

distinction between judicial and
non-judicial power, 259, 286–7

‘federal jurisdiction’, 137–8

future of constitutional role,
231–5High Court *see below* High Court

independence, 114, 267

judicial appointments, 136

judicial deference to executive, 230

judicial review, 308–9

‘law’, ‘fact’ and ‘policy’ *see above*

administrative fact-finding and

policy-making

law-making power, 205

‘political considerations’ doctrine,
137

reason-giving, 258–9, 267

separation of judicial power,

103–4, 133–5, 136, 137, 139–40,
143, 221–2, 223–4, 225, 267

statutory and regulatory

interpretation *see below*

statutory and regulatory

interpretation

subordinate judiciary (SJ) model,

221–2, 225

system, 135–40

Crown immunity, 388–92

‘decision-making’, meaning of, 283

delegation doctrine, 281–2

differences with other national laws,

question of, 1–2

diffusion of power, 123–4, 125, 127,

133, 137, 141, 145, 267–8

‘division of labour’ within

bureaucracy, 133

executive

and administrative law, 518

Constitution, 123

‘executive power’, 129–31

Governor-General, 112, 124, 126,

127–9, 136

institutional framework, 310–11

‘executive power’, 129–31

federal government

Commonwealth, establishment of,
118–20

state systems contrasted, 12

system, 112, 127–31

freedom of information, 427–30

Governor-General, 112, 124, 126,

127–9, 136

High Court

Constitution, 120–1

distinction between judicial and
non-judicial power, 259, 286–7

judicial review as statutory

interpretation, 259

judicial review of administrative
decisions, 258, 260

jurisdiction, 137–40

new theory of authority, 231–5

Parliament and, 126–7

reinterpretation of executive
powers, 131, 273–4

- and rights protection, 143–4
- separation of powers, 133–4, 143, 196–7, 286–7
- as supreme interpreter, 207, 235–6
- and UK Privy Council, 119–20, 135
- as hybrid concentrated/diffused system, 13
- internal complaint and review, 200–1
- legal control, 194–7
- legislature *see below* Parliament
- New Public Management (NPM), 131–2, 133, 455–8
- New South Wales Constitution Act 1855, 115–16, 285
- ombudsmen, 199–200
- Parliament
 - administrative rules, 307–8
 - colonial legislatures, 114–18
 - efficiency as legislator, 228–9
 - system, 124–7
- ‘policy-making’, meaning of, 280–1
- ‘political considerations’ doctrine, 137
- political control, 191–4
- political party system, 140–1
- public contracts, liability, 404–5
- public/private relationship, 516–18
- rights, system of, 141–4
- ‘rule-making’, meaning of, 280–1
- separation of powers 114, 123, 133–5, 136, 137–8, 139–40, 142, 143, 196–7, 221–2, 223–4, 286–7, 319, 356–7
- accountability principle, 505–6
- administrative adjudication, 499–501
- control by courts and tribunals, 496
- hierarchical relationships, 505–6
- internal complaint and review, 504–5
- justiciability, 497
- ministerial control, 483
- ombudsmen, 502–4
- ouster, 497–8
- Parliamentary control, 482–3
- standing, rules of, 496–7
- state and federal government
 - systems contrasted, 12
- Statute of Westminster 1931, 120
- statutory and regulatory interpretation
 - administrative interpretation, 215–18, 236–7
 - future development, 231–5
- High Court as supreme interpreter, 207, 235–6
- judicial function, 218
- judicial review as, 259
- separation of powers, 218
- system of government
 - constitutional monarchy, 112
 - dependence on/independence from English law, 511–12
 - Federal Commonwealth, establishment of, 118–20
 - federal system, 112
 - as hybrid concentrated/diffused system, 13
 - as mix of ‘parliamentary’ and ‘presidential’, 510–11
 - uniqueness, 145
- tort liability
 - Crown immunity, 388–92
 - historical development, 378–9
- tribunals
 - decisions, juridical status of, 340
 - institutional framework, 338–9
 - role, 339–40
- authority
 - and accountability, 10
 - and checks-and-balances, 10
 - and division of power, 10
 - and power sharing, 10
- Bagley, Nicholas, 490–1
- Bailey, Kenneth, 287–8
- ‘balance of power’ *see* checks-and-balances
- Beermann, Jack, 170–3
- bipolarity of accountability, 9–10
- Birkinshaw, Patrick, 432
- Blackstone, William, 36, 61, 219
- Blair, Tony, 431
- Bruff, Harold, 477

- bureaucracy
 - and administrative law, 518
 - control by, 504–5
 - and executive, 518
 - New Public Management *see* New Public Management (NPM)
 - and separation of powers, 6–7, 518
- bureaucratic control
 - economy, efficiency and effectiveness ('three Es'), 146–7
 - purpose, 146–7
- Burke, Edmund, 108
- Bush, George W, 82, 106
- Carter, Jimmy, 452
- central government, focus of study on, 11–12
- Charles I, King, 30–1
- Chase, Samuel, 96, 101
- checks-and-balances
 - and accountability, 8–10
 - and administrative rules, 273
 - and authority, 10
 - concept of, 4
 - as delay or stop, 8–9
 - and diffusion of power, 8–9
 - multi-polarity, 9–10
 - New Public Management, 438–9, 462–4
 - and power sharing, 8–9
 - prospectivity, 10
 - as supervision, 8–9
- Chemerinsky, Erwin, 375
- Chester, Sir Norman, 39–40
- Clinton, Bill, 170, 451–2
- Coke, Edward, Lord, 29–30, 32, 328
- collective ministerial responsibility (CMR), concept of, 131–2
- common law
 - jurisdictional differences explained, 518–19
 - legislation in relation, 33–4, 63–4
- comparative approach to study, 17–18
- concentration of power 413–14
 - and accountability, 8–9
 - and coordination, 8–9
 - definition, 4–5
 - diffusion distinguished, 5–7, 46–7
 - examples, 5, 7
 - executive branch, 289
 - and fragmentation of power, 7, 46–7
 - New Public Management, 438–9, 458–62
 - and parliamentarism/presidentialism distinction, 6–7
 - rationality and, 266–7
 - and 'separation of powers', 5–7
 - tort liability and, 396–7
 - 'constitutional conventions', definition, 2–3
- constitutional law
 - as 'higher' law, 204
 - and normative political theory, 1–2
- constitutions
 - 'controlling power', 3–4
 - flexibility, 513–16
 - functions, 3–4
- contract law
 - nature of, 399–401
 - outsourcing contracts, 399
 - power of, 368
 - as private law, 368
 - procurement contracts, 399
 - public contracts, 399
 - 'retrofitting' of administrative law into, 517–18
 - and tort liability, 401–2
- control deficit and New Public Management, 438–9, 463–4
- control institutions
 - control practices, 2
 - examples, 2
- control norms
 - fundamental, 203
 - hard and soft, 2, 203–4
- control of power *see* accountability; checks-and-balances
- control practices, concept of, 2
- control regimes
 - components of, 2
 - definition, 146, 203
 - differences between national laws, question of, 1–2
 - 'hard' and 'soft' law norms, 2
 - historical origin, 16

- hypothesis
 - statement of, 2
 - testing of, 10–13, 511
- justifications for, 513
- normative content of, summary of
 - analysis of, 436
- and public/private relationship, 516–18
- ‘structural’ analytical approach, 1–2
- study *see* research methodology
- as subsystems of legal systems, 508
- controlling power
 - control of *see* separation of powers
 - definition of, 3–4
- conventions *see* constitutional conventions
- coordination
 - and accountability, 10
 - and concentration of power, 8–9
 - of institutions, 10
- courts
 - as control institutions, 2
 - coordinate judiciary (CJ) model, 218, 240
 - interpretation by *see* statutory and regulatory interpretation
 - judicial review
 - as ‘hard law’ control norm, 2
 - ‘unreasonableness’ (‘irrationality’) as ground, 254–6
 - separation of judicial power, separation of powers and, 224–5
 - standards of review, 238
 - subordinate judiciary (SJ) model, 218, 220–1, 222, 240
- Crown immunity *see* tort liability
- decision-making
 - meaning of, 283
 - procedure *see* implementation
- decisions
 - and adjudication, 325
 - appellate, 325
 - examples, 325
 - initial, 325
 - and orders, 325
- devolution, ‘asymmetrical’ model of, 12
- Dicey, A V, 36, 44, 142, 219, 266, 351–2, 402, 461–2, 516
- diffusion of power
 - and checks-and-balances, 8–9
 - concentration distinguished, 5–7, 46–7
 - definition, 4–5
 - and division of power, 7
 - efficiency, effectiveness and ‘energy’, loss of, 8–9
 - examples, 4–5, 7
 - ‘fragmentation’ (‘disaggregation’) distinguished, 7, 46–8
 - horizontal diffusion, 12
 - institutional cooperation as product of, 12
 - New Public Management, 438–9, 458–62
 - and parliamentarism/presidentialism distinction, 6–7
 - and power sharing, 7
 - protection of individual liberty, 516–17
 - and ‘separation of powers’, 5–7
 - tort liability and, 396
 - vertical diffusion, 12
- Diplock, Lord, 46
- ‘disaggregation’ *see* fragmentation of power
- distribution of power *see* concentration of power; diffusion of power
- division of labour, analogy with fragmentation of power, 7
- division of power
 - authority and, 10
 - and diffusion of power, 7
 - and separation of powers, 5–7
- Dixon, Sir Owen, 221
- Doi, Herman S, 188
- Donoughmore, Lord, 278
- due process and separation of powers, 351–2, 356–7
- Edlin, Douglas, 491
- Edward I, King, 25–6, 149, 274
- Edward III, King, 26–7

- England, 2
 accountability, 9
 Act of Settlement 1701, 31, 44
 adjudication
 decision-making procedure, 344–50
 institutional framework, 327–32
 tribunal decisions, juridical status of, 333–4
 tribunals' role, 332–3
 'adjudication', meaning of, 283
 administrative fact-finding and policy-making
 distinction between 'law', 'fact' and 'policy', 241
 mixed questions of law and fact, 238–9, 240
 reasonableness/unreasonableness, 254–6, 260, 265–7
 reason-giving, 253–4, 258, 265–7
 record of decisions, 249–53
 review of administrative fact-finding, 256–7
 standards of review, 242–3
 administrative interpretation *see below* statutory and regulatory interpretation
 administrative rules
 'adjudication' and 'decision-making' distinguished, 283
 application of 'soft' rules, 272
 conceptual approach to, 271
 control regime, 289–97
 'delegated' ('secondary') legislation, 270
 delegation doctrine, 281–2
 discretionary approach to governance, 273
 distinction between 'hard' and 'soft' rules, 270–1
 'hard' rules, 270
 historical development, 274–80
 institutional framework, 310–11
 judicial control, 317–24
 judicial review, 296–7
 Parliamentary scrutiny, 292–5
 'policy-making', meaning of, 280–1
 post-enactment publication, 296
 power to make 'hard' rules, 273–4
 pre-legislative publicity and consultation, 289–92
 'rule-making', meaning of, 280–1
 'soft' rules, 270
 'administrative state', development of, 11
 administrative tribunals, 53–4
 auditing, public sector, 162–4
 bureaucracy *see below* civil service;
 below public administration
 bureaucratic control, 162–6
 canonical law, 206
 as case study, 11–13
 civil service
 development, 38–9, 44–6
 executive agencies, 56
 executive control, 45, 228–9, 265, 268, 310–16
 policy making *see above*
 administrative fact-finding and policy-making
 common law
 distinctiveness from US, 518–19
 heritage, 13
 legislation in relation, 33–4, 206, 220
 residuality, 62
 concentration of power, 5, 7, 8–9, 13, 25–6, 28, 39–40, 41–2, 44–6, 57, 105–6, 107, 264–7, 310
 constitution *see below* system of government
 constitutional conventions, 2–3
 constitutional law as 'higher' law, 204
 contractual liability, 402–4
 court-made law and Parliament-made law in relation, 31–5
 courts
 contemporary period, 48–50, 52–4
 control of administrative rule-making, 317–24

- coordinate judiciary (CJ) model, 221
- historical development, 218–21
- independence, 35–6, 64, 219, 221, 264–5
- judicial appointments, 136
- judicial review, 210–11, 296–7
- ‘law’, ‘fact’ and ‘policy’ *see above*
 - administrative fact-finding and policy-making
- law-making power, 205, 206
- medieval period, 27
- modern period, 46
- Privy Council, 11, 28–9, 36–7, 38–40, 135, 218–19
- separation of judicial power, 31, 34–5, 36, 52–4, 103–4, 136, 219
- statutory and regulatory
 - interpretation *see below*
 - statutory and regulatory interpretation
- subordinate judiciary (SJ) model, 221, 222
- Supreme Court *see below* Supreme Court
 - transitional period, 29–36, 42
- Crown immunity, 392–6
- Curia Regis*, 25
- ‘decision-making’, meaning of, 283
- definition, 11
- delegation doctrine, 281–2
- devolution, 24–5, 47–8
- differences with other national laws, question of, 1–2
- diffusion of power, 39–40, 41–2, 47–8, 49–50, 55, 56, 91, 105–6, 111
- European Convention on Human Rights, 48–50, 52–3
- European Union, 47
- executive
 - and administrative law, 518
 - contemporary period, 51
 - despotic power, 57
 - institutional framework, 310–11
 - medieval period, 25–6, 28
 - modern period, 44–6
 - transitional period, 36–40
- executive agencies, 56
- fragmentation of power, 7, 47–8, 55, 56, 91
- freedom of information, 430
- ‘higher’ law, constitutional law as, 204
- House of Lords, 25–6, 42–4, 50–1, 52–3, 97
- Human Rights Act (HRA) 1998, 49, 52–3
- individual ministerial responsibility (IMR), 39–40, 131–2
- internal complaint and review, 165–6
- Justices of the Peace, 26–7, 29–30, 40, 53
- legal control, 157–62
- legislation and common law in relation, 33–4, 206, 220
- local government
 - contemporary period, 48
 - Justices of the Peace, 26–7, 29–30, 40, 53
 - medieval period, 26–7, 29–30
 - transitional period, 29–30, 40–1
- Lord Chancellor, 44, 52–3
- Magna Carta (1215), 28–9
- Magnum Concilium* (Great Council), 25–6
- monarchy
 - administrative rules, 274–5
 - appointment of judges, 35
 - ‘constitutionalisation’, 46
 - loss of power, 30–1, 36–40
 - political control, 147
 - sovereignty, 5, 28
 - system of government, 25–6, 28
- National Health Service (NHS)
 - reform, 56
- New Public Management (NPM), 54–6, 131–2, 439–46
- ombudsmen, 164–5
- Parliament
 - administrative rules, 275–7, 292–5
 - contemporary period, 50–1

- England (*cont.*)
 efficiency as legislator, 228–9
 Fixed Term Parliaments Act 2011, 124
 House of Lords, 25–6, 42–4, 50–1, 52–3, 97, 141
 Lord Chancellor, 44, 52–3
 medieval period, 25–6, 28–9
 modern period, 42–4
 Parliament Acts, 43
 political control, 149–57
 separation of powers, 25–6, 34–5
 source of legitimacy, 266–7
 supremacy, 30–7, 50, 219
 transitional period, 30–42
 parliamentarism, 6–7
 Parliament-made law and
 court-made law in relation, 31–5
 ‘policy-making’, meaning of, 280–1
 political control
 courts, 147–9
 King’s Council, 148
 medieval period, 147–50
 modern period, 151–7
 monarchy, 147
 Parliament, 149–57
 transitional period, 150–1
 political parties
 contemporary period, 51
 modern period, 43
 transitional period, 37–8
 Privy Council, 11, 28–9, 36–7, 38–40, 135, 286
 public administration
 auditing, 162–4
 contemporary period, 54–6
 internal complaint and review, 165–6
 medieval period, 27
 modern period, 44–6
 National Health Service (NHS) reform, 56
 New Public Management (NPM), 54–6, 131–2
 ombudsmen, 164–5
 transitional period, 39–40
 public contracts, liability, 402–4
 public/private relationship, 516–18
 retrospectivity, 10
 ‘rule-making’, meaning of, 280–1
 separation of powers
 accountability principle, 505–6
 administrative adjudication, 501–2
 control by courts and tribunals, 492–6
 courts as ‘political actors’, 103
 devolution, 24–5
 hierarchical relationships, 505–6
 internal complaint and review, 504–5
 judicial power, 25–6, 31, 34–5, 36, 52–4, 136
 medieval period, 28
 ministerial control, 483
 non-justiciability, 493–5
 ombudsmen, 502–4
 ouster, 495–6
 Parliamentary control, 480–2
 standing, rules of, 492–3
 statutory and regulatory interpretation, 218
 transitional period, 41
 sovereignty, 5, 28, 57, 264
 statute law and common law in relation, 33–4
 statutory and regulatory interpretation
 administrative interpretation, 236–7
 courts’ role, 34–5
 errors of law, 209–11
 historical development, 218–21
 judicial function, 218, 222, 225
 judicial review, 210–11
 questions of law, 209–10
 separation of powers, 218
 Supreme Court as supreme interpreter, 207, 209, 235–6
 Supreme Court
 ‘coordinate’ role, 221
 devolution and, 47–8
 and European Convention on Human Rights, 49

- as final court of appeal, 52–3
- as supreme interpreter, 207, 209, 235–6
- system of government
 - contemporary period (post-1970), 46–56
 - despotic power, 57
 - flexibility, 513–16
 - historical analysis, 24–5, 57
 - historical overview, 41–2
 - medieval period (11th–16th centuries), 25–9
 - modern period (1900–1970), 42–6
 - monarchical system, 25, 28–9
 - separation from other parts of UK, 24–5
 - sovereignty, 5, 28, 57, 264
 - transitional period (17th–19th centuries), 29–42
- tort liability
 - Crown immunity, 392–6
 - historical development, 371–4
- tribunals
 - decisions, juridical status of, 333–4
 - institutional framework, 327–32
 - role, 332–3
- see also* United Kingdom
- European Convention on Human Rights (ECHR)
 - United Kingdom and, 48–50, 52–3
 - US Bill of Rights and, 70–2
- European Union (EU), United Kingdom and, 47–8
- Evatt, H V, 287
- executive
 - agency model, 483–4
 - application of canonical law, 206–7
 - bureaucracy and, 518
 - concentration of power, 289
 - growth of, 366–7
 - information *see* freedom of information
 - relationship between elected and nonelected members, 483
 - and separation of powers theory, 6–7
 - service model, 483–4
 - see also* public administration
- fact
 - evidence requirement, 240–1
 - law and, 238–9, 240
 - policy and, 240–1
 - relevance requirement, 241
- Fallon Jr, Richard, 71
- federal government
 - focus of study on, 11–12
 - vertical diffusion of power, 12
 - see also* Australia; United States
- ‘fiscal cliff’, 8–9
- Foote, Elizabeth, 241
- ‘formal-legal’ approach *see* research methodology
- ‘fragmentation’ (‘disaggregation’) of power
 - and concentration of power, 7, 46–7
 - diffusion distinguished, 7, 46–8
 - division of labour, analogy with, 7
- freedom of information (FOI) 417–18
 - and concentration of power, 418
 - and diffusion of power, 418
 - distinction from openness of administrative decision-making processes, 416–17
- executive-held information, 417
- FOI regimes compared, 415–16
- historical development, 426–36
- information flows
 - executive to courts, 418, 423–4
 - executive to legislature, 416–23
 - within government, 416–24
 - government to public, 418, 425–6
 - types of, 417, 418
- jurisdictional differences explained, 432–6
- primary focus of, 417–18
- related legal regimes, 417–18
- Friedmann, Wolfgang, 288
- Friendly, Henry, 365
- Gaebler, Ted, 516–17
- Galligan, Denis, 364
- Galnoor, Itzhak, 435
- George I, King, 37–8
- George II, King, 37–8
- George III, King, 37–8, 59
- George V, King, 43

- Gore, Al, 451–2
 government-held information *see*
 freedom of information
 Groves, Matthew, 497–8
- Hailsham, Lord, 42
 Hamilton, Alexander, 34, 75–6, 83,
 100, 382, 405–6
 ‘hard law’
 categories, 203–4
 control norms, 2
 law and policy, 239
 ‘hard rules’ *see* administrative rules
 Henderson, Edith, 148
 Henry VII, King, 28
 Henry VIII, King, 28–9, 274
 Hewart, Lord, 277
 ‘higher’ law
 category of, 203–4
 constitutional law as, 203–4
 Hill, Larry, 188
 historical institutionalism
 as diachronic methodology, 15
 historical method of study, 16
 Holmes, Oliver Wendell, 508–9
 Horwitz, Morton, 63
 Howard, John, 428
- Ilbert, Sir Courtenay, 277
 implementation
 and adjudication, 326–7, 344
 comparative summary, 360–6
 openness of decision-making
 processes, freedom of
 information distinguished,
 416–17
 use of term, 326
 ‘independence’ of agencies, 88–9
 individual ministerial responsibility
 (IMR)
 doctrine of, 39–40, 131–2
 and New Public Management, 131–2
 information *see* freedom of
 information
 ‘institutional formalism’, 14–15
 ‘institutional realism’, 14–15
 institutions
 of control *see* control institutions
 cooperation between, 12
 diachronic methodology, 15
 historical institutionalism, 15
 ‘institution’ defined, 14
 synchronic methodology, 15
 instrumentalist conception of law, 398
 internal complaint and review as
 bureaucratic control
 mechanism, 504–5
 interpretation *see* statutory and
 regulatory interpretation
- Jackson, Andrew, 83, 105–6
 Jackson, Robert H, 80
 Jefferson, Thomas, 81–2, 95–6
 Johnson, Lyndon B, 427
 joined-up government and New Public
 Management, 472–4
 judicial independence *see* separation of
 judicial power
 judicial review *see* courts
 judiciary *see* courts
- Kagan, Elena, 170
 Kerr, Sir John, 338
 Kettl, Donald, 450
 Krent, Harold, 410–11
- law
 categorisation as ‘hard’ or ‘soft’,
 203–4
 continuity and change, 507–12
 and fact, 238–9, 240
 ‘higher’ law, 203–4
 instrumentalist and
 non-instrumentalist
 conceptions, 398
 interpretation *see* statutory and
 regulatory interpretation
 ‘mindfulness of time’, 511–12
 non-canonical, 205
 and policy, 239–40
 secondary legislation defined, 204
 layering of government, 437–9
 legal control, purpose of, 146–7
 ‘legal-formalism’ *see* research
 methodology
 legislation *see* law

- legislature *see* parliaments
 liberty, protection by diffusion of
 power, 516–17
 Lincoln, Abraham, 81–2, 106, 476
 Loughlin, Martin, 48
- Madison, James, 73–6, 475–6
 Maitland, F W, 509
 Major, John, 431
 maladministration, concept of, 2
 Manning, William, 64
 Marbury, William, 96
 Margaret Thatcher, 431, 459
 Marshall, John, 96, 101, 406
 Mashaw, Jerry, 362
 Merrill, Thomas, 406
 ministerial responsibility and
 responsible government, 131–2
 Montesquieu, Charles-Louis de
 Secondat, Baron de, 36, 41, 219
 Moran, Michael, 443
 multi-polarity of checks-and-balances,
 9–10
 Murray, Philip, 250
- Neely, Richard, 228
 Neustadt, Richard, 4–5, 223
 New Public Management (NPM)
 accountability, 438–9, 462–4
 agencification, 466–9
 author's analytical approach *see* New
 Public Management
 checks-and-balances, 438–9, 462–4
 components of, 54–6, 438–9
 concentration of power, 438–9,
 458–62
 control deficit, 438–9, 463–4
 diffusion of power, 438–9, 458–62
 downwards and upwards layering,
 437–8
 historical development, 439–58
 hypothesis as to, 462–3
 impact on control regimes, 474
 joined-up government, 472–4
 layers of government, 437–9
 new mechanisms of control, 463–4
 outsourcing, 469–71
 privatisation, 464–6
 third-party government, 437–8
 types of NPM measures, 463
 Nixon, Richard, 427
 non-canonical law, 205
 non-instrumentalist conception of law,
 398
- norms
 contrast with institutions/practices,
 508
 control *see* control norms
 ‘cultural evolution’ of, 507–8
 legal and conventional norms
 distinguished, 3
 normative content of control
 regimes, summary of analysis
 of, 436
 normative political theory,
 application of, 1–2
- ombudsmen
 as bureaucratic control mechanism,
 502
 ‘principles of good administration’, 2
 open government *see* freedom of
 information
- orders
 and decisions, 325
 meaning of ‘order’, 325
 Osborne, David, 516–17
 outsourcing and New Public
 Management, 469–71
 outsourcing contracts *see* contract law
- Page, Edward, 18
 Parkes, Henry, 119
 ‘parliamentarism’, non-use of term, 6–7
 parliaments
 as control institutions, 2
 interpretation by, 206–7
 Perot, Ross, 451–2
 Pildes, Richard, 14–15
- policy
 decision ‘on policy grounds’, 239
 definition, 239
 fact and, 240–1
 law and, 239–40
 statutory and regulatory
 interpretation, 239–40

- political control, purpose of, 146–7
- politics and administration
 - distinguished, 313
- Postema, Gerald, 508–9, 511
- Powell, Lewis, 489
- power sharing
 - and authority, 10
 - and checks-and-balances, 8–9
 - and diffusion of power, 7
- ‘practices’, definition of, 3
- ‘presidentialism’, non-use of term, 6–7
- ‘principles of good administration’ as
 - ‘soft law’ control norm, 2
- private law controls *see* contract law;
 - tort liability
- private sector, government
 - involvement in, 516–18
- privatisation and New Public Management, 464–6
- procurement contracts *see* contract law
- public administration
 - growth of, 366–7
 - involvement in private sector, 516–18
- New Public Management *see* New Public Management
- ‘retrofitting’ into constitution, 6–7, 366–7, 517–18
- and separation of powers theory, 6–7
- public administrative power *see* administrative power
- public contracts *see* contract law
- public law and normative political theory, 1–2

- Raso, Connor, 303–4
- Reagan, Ronald, 82, 170, 302, 451–2, 454
- reasonableness (rationality)
 - of administrative decisions, 254–6
 - and concentration of power, 266–7
- ‘reinventing government’ *see* New Public Management
- research methodology
 - aim of study, 11, 13
 - central government, focus on, 11–12
 - comparative approach, 17–18
 - content of study, 19–23
- ‘cultural evolution’, 507–8
- exceptionalist analyses, 510–11
- ‘formal-legal’ approach, 14, 507
- future applications of, 520
- historical comparative law, 512
- historical method, 16, 507–12
- hypothesis
 - statement of, 2
 - testing of, 10–13, 511
- inductive approach, 511
- limitations, 11–12, 16–17
- overview of, 13–19, 507–12
- structural approach, 507, 508
- themes of study
 - review of, 512–19
- responsible government
 - concentration of power, 164
 - concept of, 131–2
 - development of, 37–8, 44, 220, 221–2
 - establishment of, 113, 115, 118
 - features of, 115–16
 - and ministerial responsibility, 131–2
 - ombudsmen and, 188–9
 - political parties and, 139
 - principle of, 124
 - system of, 129–30, 139, 156–7, 166–7
- Rhodes, R A W, 14, 15
- Roberts, Owen, 447
- Robertson, K G, 434–5
- Roosevelt, Franklin D, 82, 97, 106, 376, 476
- Rosenbloom, David, 366, 384
- Rubin, Edward, 362
- rule of law, 351–2
- rules *see* administrative rules

- Sanders, Elizabeth, 13–14, 15
- Saunders, Cheryl, 135
- secondary legislation *see* law
- Seighart, Marguerite, 274
- self-aggrandisement and separation of powers, 475–6
- ‘separation of institutions’, non-use of term, 6–7
- separation of judicial power, separation of powers and, 224–5
- separation of powers
 - accountability and, 22

- administrative adjudication, 498–502
- author's analytical approach, 22
- and concentration and diffusion of power, 478
- control by bureaucracy
 - auditing, 502
 - internal complaint and review, 504–5
 - ombudsmen, 502–4
- control by courts and tribunals, 485–98
- control by elected executive, 483
- control by legislature, 478–83
- defence against self-aggrandisement, 475–6
- and division of power, 5–7
- law of, 476–8
- meaning of, 22
- and separation of judicial power, 224–5
- sharing of power *see* power sharing
- 'soft law'
 - control norms, 2
 - definition, 204
 - law and policy, 239
 - non-canonical nature, 205
- 'soft rules' *see* administrative rules
- sovereign immunity *see* tort liability
- statutory and regulatory interpretation
 - administrative interpretation, 206–7
 - judicial interpretation, 206–7
 - jurisdictional differences explained, 218–31
 - legislature, by, 206–7
 - standard of review, 238
- Stewart, Richard, 266
- Strauss, Peter, 355
- Strauss, Peter L, 239, 242
- systems of government
 - components of, 2–3
 - constitutional conventions, 2–3
 - constitutional framework, 3–4
 - definition, 2–3
 - differences between national laws, question of, 2
 - 'hard' and 'soft' law norms, 2–3
 - models of power distribution, 4, 5–6
 - and public/private relationship, 516–18
 - 'steering' or 'rowing', 516–17
- third-party government, 437–8
- time element
 - accountability and retrospectivity, 10
 - checks-and-balances and prospectivity, 10
 - continuity and change in law, 507–12
 - diachronic and synchronic methodologies, 15
 - law's 'mindfulness of time', 511–12
- Tony Prosser, 465
- tort as private law, 368
- tort liability
 - comparative summary, 379–80
 - concentration of power, 396–7
 - diffusion of power, 396
 - historical development, 370–9
 - instrumentalist and non-instrumentalist conceptions, 398
 - jurisdictional differences explained, 380–96
 - private law and public law models, 368–70, 398
 - 'retrofitting' of administrative law into, 517–18
 - and 'sovereign immunity', 368, 397–8
- United Kingdom
 - Australian Commonwealth, establishment of, 113–20
 - devolution
 - 'asymmetrical' model of, 12
 - division of power, 47–8
 - European Convention on Human Rights, 48–50
 - and European Union, 47–8
 - and US independence, 58–64
 - see also* England
- United States
 - accountability, 9–10
 - adjudication
 - administrative adjudications, juridical status of, 337–8

- United States (*cont.*)
 administrative adjudicators' role,
 337
 decision-making procedure, 350–6
 institutional framework, 334–7
 'adjudication', meaning of, 283
 administration and politics
 distinguished, 313
 administrative fact-finding and
 policy-making
 Administrative Procedure Act
 1946, 243–9
 diffusion of power, 261–4
 mixed questions of law and fact,
 238–9
 rationality, 247–9, 254–5, 256,
 261, 263–4
 reason-giving, 248–9, 253
 record of decisions, 244–7
 review of administrative
 fact-finding, 256–7
 standards of review, 242–3, 247–9
 Administrative Procedure Act 1946
 (APA)
 administrative fact-finding and
 policy-making, 243–9
 administrative rules, 282–3
 judge-made law, flexibility of, 515
 techniques of control, 90–1
 administrative rules
 'adjudication' and
 'decision-making'
 distinguished, 283
 administration and politics
 distinguished, 313
 Administrative Procedure Act
 1946, 282–3
 conceptual approach to, 270–1
 Congressional control, 303–5, 310
 control regime, 297–305
 delegation doctrine, 281–3
 distinction between 'hard' and
 'soft' rules, 270–1
 'hard' rules, 270
 historical development, 280
 institutional framework, 311
 judicial control, 298–302, 310,
 317–24
 'policy-making', meaning of,
 280–1
 power to make 'hard' rules,
 273–4
 Presidential control, 302
 'regulations' ('legislative rules'),
 270
 rule-based approach to
 governance, 273
 'rule-making', meaning of,
 280–1
 'soft' rules, 270
 auditing, public sector, 182–7
 Bill of Rights, 68–72
 bureaucracy *see below* civil service
 bureaucratic control, 182–91
 as case study, 11–13
 checks-and-balances, 8–9
 civil service
 and administrative law, 518
 auditing, 182–7
 autonomy, 91–4, 225–6, 262–3,
 265, 268
 control by Congress and
 Presidency, 228–9, 261–2, 265,
 310–16
 departments of state, 87–8
 'expert' administration, 262–3,
 268, 313
 Federal bureaucracy, 87–94
 as 'fourth branch' of government,
 90, 91, 94, 225–6, 262–3, 265
 independent regulatory agencies,
 88–90
 internal complaint and review,
 189–91
 New Public Management (NPM),
 91
 ombudsmen, 187–9
 policy making *see above*
 administrative fact-finding and
 policy-making
 power sharing, 262–3
 'public interest representation',
 263
 public servants in federal
 government, 12
 separation of powers, 261–2

United States (*cont.*)

Presidency

concentration of power, 87

Constitution, 65–7

control of civil service, 228–9,
310–16

Federalist Papers, 75–6

and growth of ‘big’ government,
80

national leadership, 79

power of, 476

power sharing, 223–4

staff, 86–7

system, 78–87

unilateral (‘direct’) action, powers
of, 80–6

presidentialism, 6–7

prospectivity, 10

public contracts, liability, 405–13

public/private relationship, 516–18

rights

Bill of Rights, 68–72, 102

‘rule-making’, meaning of, 280–1

separation of powers

administrative adjudication,

179–80, 334–5, 499

auditing, 184, 185–6, 499

checks-and-balances principle,

505–6

civil service, 87–8, 89–90, 134–5,

261–2, 447–8

and concentration of power, 478

Congressional control, 478–80

Constitutional principles, 222–3

control by courts and tribunals,

485–92

courts, 104–5

delegation doctrine, 281–2

and diffusion of power, 478

and due process, 351–2

Federalist Papers, 74

formalist and ‘functionalist

methodologies, 476–8

internal and external control

mechanisms, 190–1

internal complaint and review,

504–5

judicial control, 300

mutuality, relationships of, 505–6

non-reviewability, doctrine of,
490–2

ombudsmen, 503

‘political questions’ doctrine,
489–90

Presidential control, 483

ripeness, doctrine of, 490

and sovereign immunity, 410–11

standing, rules of, 487–9

sovereign immunity, 380–8

‘sovereign’ power

Constitution, 60–1, 64, 264

suspicion of, 59

statutory and regulatory

interpretation

Constitutional principles, 222–3

judicial deference to executive,

211–15, 218, 229–30, 235–6

separation of powers, 218, 222–3,
236–7

Supreme Court

accountability, 10

common law, 63–4

Congress, 95–6

Constitution, 67–8, 69, 499

coordination of power, 8–9

court system, 99–105

distinction between ‘law’, ‘fact’
and ‘policy’, 241

New Deal, 90

and President’s powers, 81, 86

size, 2–3

system of government

colonial origins, 58–64

despotic power, 111

development, 76–8

‘exceptionalism’ of, 510–11

‘judicial supremacy’ or ‘legislative
supremacy’?, 104–5

pluralistic political process, 94

power sharing, 223–4

‘sovereign’ power, 5

‘steering’ or ‘rowing’, 516–17

tort liability

historical development, 374–7

sovereign immunity, 380–8

tribunals *see above* adjudication

‘unreasonableness’ (‘irrationality’)	West, William F, 303–4
defined, 254–5	Wettenhall, Roger, 458
	Whitlam, Gough, 427
Warren, Kenneth, 433–4	Wilson, Woodrow, 313, 447
Washington, George, 81–2	
Weber, Max, 433–4	Zaring, David, 242