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Executive Primacy, Populism, and Public Law

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Abstract: As the articles in this Symposium suggest, populism and authoritarianism present ongoing challenges not only to liberal democracy but also to its legal underpinnings. Manipulation, avoidance, evasion, and outright rejection of the constitutional and legal frameworks of liberal democracy are features of populist authoritarianism. The basic argument of this article is that liberal-democratic public law and legal theory no longer satisfy human needs and desires because they were conceived in worlds that no longer exist, when the main pre-occupation was to secure liberty, not equality. The aim of the article is to explain the inherited structure of our public law and theory and the main events and developments that have produced this mismatch between public law and social aspiration.

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I. INTRODUCTION

Public law provides a "rule-based," or "normative," framework for the practice of politics by creating a concept of public, legal power and specifying how public power is to be allocated, exercised, and controlled.[1] In any given place and at any specified time, the fit between public law and political practice may be more or less tight depending on whether, and to what extent, factors other than "formal" law frame and shape the "informal" practice of politics.

In the Western tradition of public-law scholarship, the body of formal, public law is divided between three major categories: constitutional law, administrative law, and international law. In the "globalised" present, the last category is evolving to accommodate concepts such as "supranational" law and "transnational" law. In the common law strand of the Western legal tradition,[2] dividing the law into categories or "areas"—sometimes called

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[1] *See generally* CHRIS THORNHILL, A SOCIOLOGY OF CONSTITUTIONS (2011), for a sophisticated theory along these lines.

[2] *But see* JOHN HENRY, MERRYMAN & ROGELIO AND PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 91–101 (3d ed. 2007), (explaining the civil law strand).

"taxonomy"—is a relatively recent phenomenon. As a substantive category of law, constitutional law could be traced back to the American and French Revolutions in the late-eighteenth century. International law matured in the nineteenth century as the nation-state became the basic unit of political organisation in North America, Europe, and elsewhere. Administrative law is a product of the growth of bureaucracy from the latter half of the nineteenth century. The practices of politics have changed significantly since the time the formal conceptual structure of these areas of law was built. This article is about the fit between inherited paradigms of public law and two features of contemporary political practice that are the subject of this Symposium issue: "executive primacy" and "populism." The basic argument will be that classical public law theory and formal public law do not fit well with such phenomena. The article will focus on the United Kingdom and the United States, although the discussion may have wider resonance and relevance.[3]

The article has several parts. Part II provides definitions of "executive primacy" and "populism." Part III tells a story about the development of governance in Europe up to the end of the seventeenth century. Part IV describes the beginnings of the modern, Western, scholarly, public law tradition. Parts V to X outline significant changes in political practices since the foundations of public law scholarship. Part XI briefly describes some reactions to the resulting lack of fit between formal public law and informal political practice. Part XII concludes with a provocation.

II. EXECUTIVE PRIMACY AND POPULISM

What do "executive primacy" and "populism" mean? In this article, "executive primacy" refers to a situation in which the executive branch of the government[4] can exercise greater political control over the legislature and the judiciary than the legislature and judiciary, either separately or together, can exercise over the executive.[5] So, for instance, in the U.K. system, the

[3] *See, e.g.*, THE OXFORD HANDBOOK OF POPULISM (Cristobal Rovira Kaltwasser et al. eds., 2017) [hereinafter OXFORD HANDBOOK] (Part II Regions). It is well recognised in the literature that populism, for instance, may take different forms in different places and at different times. And, of course, public law differs from one jurisdiction to another.

[4] For instance, the President in the United States, or the Prime Minister and Cabinet in the United Kingdom.

[5] Professor Huang offers a compatible definition in his article in this Symposium: "By 'executive primacy,' I mean the leading and dominant role of the executive branch, especially the chief executives, either presidents or prime ministers, to control political agenda on policy issues or constitutional

executive government in power can normally control Parliament much more effectively than Parliament can control the executive. Furthermore, by virtue of its ability to control Parliament, the executive typically has the upper hand in contests between itself and the courts, whose decisions can be reversed by Parliamentary legislation (the production of which the executive can normally control). By contrast, in the United States, the relationships between the President, Congress, and the Supreme Court are more evenly balanced and, consequently, prone to instability as the various institutions compete with one another for the upper hand.[6]

The term "populism" is used in many different senses. Rovira Kaltwasser, Taggart, Ochoa Espejo, and Ostiguy identify three main political-science approaches to populism: a "political-strategic approach," a "socio-cultural approach," and an "ideational approach."[7] The political-strategic approach defines populism as a political strategy by which "a political actor captures the government and makes and enforces authoritative decisions . . . populism revolves around the opportunism of personalistic plebiscitarian leaders."[8] Under the socio-cultural approach, populism "is characterized by a particular form of political relationship between political leaders and a social basis [sic]" understood in terms of a contrast between "high" and "low." Populism is "the flaunting of the low."[9] In this high-low polarity, the high appeals to "formal, impersonal, legalistic, institutionally mediated models of authority" while the low appeals to "personalistic, strong (often male) models of authority . . . . The personalist pole generally claims to be much closer to 'the people' and to represent them better than those advocating a more impersonal, procedural, proper model of authority."[10]

Under the ideational approach, populism is understood as "an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, the 'pure people' and the 'corrupt elite,' and which

interpretation." Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 WASH. INT'L L.J. 395, 400 (2019).

[6] See PETER CANE, CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON 24–111 (2016), for detailed elaboration of this contrast.

[7] Critobal Rovira Kaltwasser et al., *Populism, An Overview of the Concept and the State of the Art*, *in* OXFORD HANDBOOK, *supra* note 3, at 14.

[8] Kurt Weyland, *Populism: A Political-Strategic Approach*, *in* OXFORD HANDBOOK, *supra* note 3, at 55. I take a "personalistic plebiscitarian leader" to be one who appeals to the electorate on the basis of the leader's personal character and aspirations rather than broad programs of action or concrete policies.

[9] Pierre Ostiguy, *Populism: A Socio-Cultural Approach*, *in* OXFORD HANDBOOK, *supra* note 3, at 73.

[10] *Id*. at 81–82.

argues that politics should be an expression of the . . . general will . . . of the people."[11] These various approaches identify what may be considered the three basic features of populism: political dominance; a particular relationship between the populist and "the people" (or "civil society" or "the governed"); and a particular set of relationships between the populist and other governmental institutions.

As these various approaches suggest, the term "populism" is often used negatively and pejoratively. But it may also be deployed positively and approvingly to express the idea that "the people" should, in some sense, ultimately control the government, rather than vice-versa. It is used in this way by U.S. legal scholars, Larry Kramer[12] and Frank Michelman,[13] who wrote about what might be called "popular" constitutionalism (good) as opposed to "populist" constitutionalism (bad).[14] In terms of this contrast, populist constitutionalism may be understood as a perversion or pathology of popular constitutionalism. This article is primarily concerned with populist constitutionalism (or simply "populism," in contrast to "popular constitutionalism") understood as a set of political ideas, behaviours, and strategies used by politicians to secure executive office and primacy. Populist constitutionalism is often associated with twentieth-century de-colonialisation, first of European empires (particularly in Africa and South America) and later (after 1989) of the Soviet Empire (particularly in Eastern Europe). So understood, populism represents a transitional political phenomenon in a journey (that may never be completed) to liberal democracy—"popular constitutionalism." However, populist practices have also been identified in well-established, stable, liberal-democratic states such as the United Kingdom and the United States, which are the focus of this article. The article is not about executive primacy and populism as such, but

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[11] Critobal Rovira Kaltwasser et al., *supra* note 7, *in* OXFORD HANDBOOK, *supra* note 3, at 29.

[12] STEPHEN KOTKIN & LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[13] Frank Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64–98 (Larry Alexander ed., 1998). According to Kaltwasser, Taggart, Espejo and Ostiguy, the great bulk of writing on populism since 1990, except in relation to the United States, has been by political scientists. *See* Critobal Rovira Kaltwasser et al., *supra* note 7, *in* OXFORD HANDBOOK, *supra* note 3, at 10–13. It is in this context that they cite Kramer and Michelman.

[14] We can take "constitutionalism" as referring to an idea that because "power corrupts and absolute power corrupts absolutely," public power must be limited in the interests of those subject to it. *See* Joseph Lowndes, *Populism in the United States*, *in* OXFORD HANDBOOK, *supra* note 3, at 232–46 (suggesting that the strong republican tradition of popular sovereignty in the United States blurs the line between the two forms of constitutionalism and affects the form that populism takes. The author also suggests that the diffusion of power characteristic of the U.S. system hinders certain populist strategies, such as concentration, in the populist's hands, of control over all governmental functions).

about the lack of fit between inherited paradigms of formal public law and contemporary political practices such as executive primacy and populism.

The first step is to sketch briefly a backstory to the development of the inherited paradigms of public law.

III. A BACKSTORY

Here is a very simplistic, stylised historical story about government. The purpose of the story is not to describe what actually happened in any particular place at any particular time. The aim, rather, is to suggest to the reader a historically informed way of thinking about, and making some sort of sense of, events that did happen. That said, there is good reason to think that every element of the story can be found in some form or other in many places and at various times.

The dominant form of political organisation in Europe from the late medieval period to the early modern period[15] was monarchy—one-person governance. In terms of the title of this article, monarchy is "executive primacy" in its strongest form, and "absolute" monarchy is that institution's strongest form. Today, we tend to conceptualize legislation as the most important legal tool of governance and, consequently, the legislature as the prime organ of government. However, a strong case can be made that the fundamental task of government in any polity is not only making general laws ("legislating"), but "running the country" (let us call this "administration"). In political theory, the "minimal" or "night-watch"[16] government keeps the peace internally, within the polity, and provides security from attack by external forces, but does little else.[17] Making general laws is an expensive, resource-intensive activity; typically, before governors start making general rules to mould the behaviour of the governed to fit their own "policy preferences" (to use modern jargon), they keep the peace by enforcing "customary law"—law that has developed in the course of, and as a result of, social practice, from the bottom up, rather than having been "made" and imposed *on* social practice, from the top down.[18] One tool of enforcement is

[15] Say, roughly, from the beginning of the twelfth century to the end of the seventeenth century.

[16] More commonly called the "night-watchman state."

[17] See generally ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974), for the classic, modern exposition of this basic idea.

[18] See generally 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY (2013) for a classic, theoretical exposition of this contrast between "spontaneous" law and "manufactured" law.

the use of coercive force against recalcitrant law-breakers. Another is resolution of disputes, about what the law is and how it applies to particular situations, backed up, if necessary, by coercive force. Adjudication—settlement by judges and courts of disputes about what the law is and how it applies in particular circumstances—begins as an aspect of administration, even before legislation is (much) used as a tool of governance.[19]

In a monarchy, the various tools of governance—including legislation and adjudication—are more-or-less effectively controlled by the monarch. The central task of the government is "administration." In very small political units, the "governor" may be able to undertake all administrative tasks personally. In monarchical polities of any size, however, in order to administer effectively, the monarch needs assistants to help run the polity. These assistants "execute" or "implement" royal policy. In a monarchy, the monarch effectively controls this "executive," which includes what we would now call ministers (or "secretaries") of state, bureaucrats, and judges. In a regime of one-person rule, if there is a body that we might now call a "legislature," typically it will effectively be part of the executive. Its basic task will be to help the monarch to run the country by, for instance, supplying resources the monarch needs to implement policy, approving general rules proposed by the ruler, and adjudicating disputes between the government and individual citizens (hearing "petitions" we might say) on the monarch's behalf.[20] In this monarchical world, all the various "powers" of the government are located in one person, and that person effectively controls all the officials and institutions that exercise those powers on the ruler's behalf and as the ruler's agents or delegates. The monarch (personally or through agents and delegates) can exercise all of these powers "unilaterally" without the need for the formal consent of or formal ratification by any other official or body.[21]

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[19] See generally R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988), for an account of the early growth of the English common law.

[20] CANE, *supra* note 6, at 380–88 (explaining that the First Amendment of the U.S. Constitution guarantees the right to petition for the redress of grievances. Until well into the twentieth century, the U.S. Congress entertained individual claims for compensation against the U.S. government). *See also* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538 (2018).

[21] The modern, post-Enlightenment, secular version of monarchy is dictatorship. Historically, monarchical power was often legitimised by appeals to divine authority. Today, we refer to regimes in which the leadership claims such divine support as "theocracies." S*ee, e.g.*, Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31 (2018); TAMIR MOUSTAFA, CONSTITUTING RELIGION: ISLAM, LIBERAL RIGHTS, AND THE MALAYSIAN STATE (2018). A dictator is a sole leader who claims no god-given authority.

In European history, monarchical government went through a long process of evolutionary and revolutionary development over the period we are talking about—and beyond. An early revolutionary change took place in England in the sixteenth century when Henry VIII declared that he, not the Pope in Rome, was head of the English Church, thus concentrating supreme, sacred, and secular power in the same hands and removing the Papacy as a political competitor.[22] This encouraged the Stuart monarchs, James I and Charles I, in the early seventeenth century, to claim not only that the monarch alone was the rightful "sovereign" ruler of the country, but also that the monarch governed by "Divine right" in the name of God.[23] Such bids for divinely-ordained power precipitated a Civil War, which ushered in a short-lived English republic without a monarch.[24] However, things did not go very well in the new republic, and after a few years (in 1660) the monarchy was "restored." James II, the brother of the restored Charles II, succeeded in 1685. Suspicion that James, a Roman Catholic, wanted to re-assert claims of sovereign rule by Divine right led to the so-called "Glorious Revolution" of 1688, involving a change of monarch and a radical re-adjustment of political power-relationships at the heart of government.[25]

IV. MONTESQUIEU AND LOCKE

This is a good point in the story to introduce Charles Secondat, the Baron Montesquieu (commonly called "Montesquieu"), a French aristocrat. He lived in England for about two years around 1730 at a time when the new political dispensation ushered in by the Glorious Revolution was bedding down. The roots of modern Western constitutionalism (in the Anglosphere, anyway) are often traced back to his work and ideas and to those of the seventeenth-century English philosopher, John Locke.[26] Here, we are particularly concerned with their theories about "separation of powers." All that need be said about Locke is that (in modern terms) he imagined two

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[22] The power over which Henry and the Pope initially fought was the power to dissolve a marriage—specifically, Henry's to Catherine of Aragon. However, this dispute became part of a larger project of strengthening the position of the English monarchy against the Papacy, asserting royal power over ecclesiastical courts and extending the dominance of English law over Canon law. The dispute was exploited by Protestant religious reformers who wanted the English church to break from the Roman church primarily for theological rather than secular reasons. Henry VIII was the first monarch to appoint non-clerics to the highest bureaucratic posts. Thomas Cromwell succeeded Cardinal Wolsey as Henry's right-hand man.

[23] C.R. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY 282–336 (1962).

[24] The "President" of the so-called English "Commonwealth" was Oliver Cromwell.

[25] LOVELL, *supra* note 23, at 361–414.

[26] *See generally* M.J.C VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998) (discussing Locke's ideas).

governmental powers: the legislative and the executive, the latter divided into two—one concerned with domestic affairs and the other with foreign affairs. He subsumed what we would now call the "judicial power" under executive power. This association of the executive and judicial powers reflected the fact that, after the Norman Conquest of England in 1066, the English courts were staffed by senior royal officials whose task was to assist the monarch in maintaining peace and consolidating power by resolving disputes between citizens and between citizens and the monarch.[27] Executive power and judicial power were both understood in terms of applying and enforcing law, either in aid of "running the country" or in the service of resolving individual disputes.

A. A Necessary Clarification

Before we go any further, it is necessary to point out a troublesome ambiguity in the use of the word "executive" to describe a governmental institution and a governmental function (or "power"). In one common usage, an "executive" implements policies and plans formulated by someone else (or, perhaps, by the executive acting in the distinct capacity of policy-maker). "Execution" in this sense is one function of "the executive branch of government," but by no means the only one. Another function is well-captured in the U.S. terminology of "the (Trump) Administration," as opposed to "the (Trump) Executive." This usage alerts us to two important facts. The first is that whatever we may say about adjudication and resolving individual disputes,[28] "running the country" according to law requires and allows exercise by the ruler of very considerable creativity and discretion.[29] It is not merely a matter of mechanically "implementing the (letter of the) law."

Secondly, in all governmental systems, it has been found necessary to give the person(s) responsible for running the country significant legal freedom to act "unilaterally" without the formal consent or prior approval of other governmental institutions. In English constitutional law, such power is

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[27] *See generally* VAN CAENEGEM, *supra* note 19.

[28] One of the longest-running theoretical debates in legal theory concerns the extent to which judges and courts are "bound" by law made by others and the extent to which, in deciding cases, they exercise "discretion" unbounded by law—in other words "make law." Perhaps the most famous modern work on this topic is R.M. DWORKIN, LAW'S EMPIRE (1998). As we will see, in Montesquieu's account, courts mechanically apply law made by others.

[29] There are some areas of activity, such as defence and foreign affairs, in which governments typically enjoy a very significant measure of discretion uncontrolled by legislatures or courts. The judicial "political questions" doctrine refers to such areas.

called "prerogative" because it originally belonged to the monarch.[30] In U.S. law, to the extent that they are consistent with the Constitution, "Presidential orders" of various sorts provide a method by which the President can legally act unilaterally.[31] Because the terminology is so deeply entrenched, it would be impossible in this article not to refer to one of the branches of government as "the executive." However, for the reasons just given, it is better to refer to the power and function characteristic of that branch more broadly, as "administrative," rather than more narrowly, as "executive." For present purposes, the idea of "administration" includes that of "execution," but not vice-versa.

B. Montesquieu and the Separation of Powers in England

1. What Montesquieu Saw

We can now go back to Montesquieu, who has a strong claim to be called the father (or, at least, the grandfather) of modern constitutional law and theory. His views were highly influential as soon as they were published, and they remain so today, not only in Anglo-American constitutional discourse, but more-or-less universally.[32] For this reason, we need to look at his work in some detail.

Montesquieu is most closely identified with the "doctrine" of "separation of powers," which is primarily concerned with relationships between governmental institutions. Montesquieu's theory of separation of powers is contained in Book XI, chapters 5 and 6, of *The Spirit of the Laws*, first published in 1748.[33] Montesquieu argued that, in every government, there are three sorts of power—legislative, executive, and judicial—and that there can be no liberty when the legislative and executive powers are united in the same person or in the same body of "magistrates,"[34] or if the judicial power is not separated from the legislative and executive powers. Montesquieu claimed that England was the one country in the world that had political liberty as the direct purpose of its constitution, although he left open the question of whether

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[30] *See* PETER CANE, ADMINISTRATIVE LAW 55–56 (5th ed. 2011).

[31] *See* Huang, *supra* note 5, at 424–25.

[32] *See* VILE, *supra* note 26, at Ch. 4; Heidi Klug, *The Constitution in Comparative Perspective*, *in* THE OXFORD HANDBOOK OF THE UNITED STATES CONSTITUTION (Mark Tushnet, et. al. eds., 2015).

[33] The edition cited in this article is MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne Cohler et al. eds., trans., 1989) [hereafter MONTESQUIEU 1989].

[34] By which Montesquieu meant public officials.

it achieved its objective.[35] Montesquieu identified two liberty-promoting characteristics of the English Constitution. The first was its "mixture" (or "sharing") of the power to legislate. The English legislature, he observed, had three elements: the Crown, the House of Lords, and the House of Commons. Each of these elements gave a voice to a different "estate" or "interest" or "constituency." The King or Queen ("the Crown") participated in the legislative process in his or her capacity as monarch, the aristocracy participated through the House of Lords, and the "ordinary" people through their representatives in the House of Commons. In this respect, England had a system of "mixed government" in which power was shared amongst various "socio-political" interests.

The second characteristic identified by Montesquieu was the way the English system "separated" legislative, executive, and judicial power from one another, and associated each with a different institution and set of public officials: the legislative with the monarch-in-Parliament,[36] the executive with the monarch, and the judicial with (independent) courts. In terms of Montesquieu's personal, ideological agenda—reform of the French system to maintain and strengthen the power of the aristocracy as a check on the monarchy[37]—he was more interested in the English Constitution's sharing of legislative power amongst three (socio-political) "estates of the realm" ("mixed government") than in its allocation of legislative, executive, and judicial functions respectively to separate institutions. Nevertheless, it is on his account of, and faith in, separation of powers as a guarantee of political liberty that his enduring influence rests.[38]

Montesquieu's account of the English system effectively captured the essence of the English ("Glorious") Revolution of 1688. In the medieval period, before the Revolution, all the levers of government—executive, judicial, and legislative—were, to a greater or lesser extent, in the hands of

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[35] *See* D.W. CARRITHERS, THE SPIRIT OF THE LAWS BY MONTESQUIEU 77 (1977) (explaining that Montesquieu's travel notes, written much earlier than *The Spirit of the Laws*, he paints a rather dark picture of English life).

[36] The monarch, the House of Lords and the House of Commons acting in concert.

[37] CARRITHERS, *supra* note 35, at 78.

[38] The distinction between socio-political distribution of power ("mixed government"), and institutional/functional distribution of power (separation of powers) has been effectively written out of the discourse of Western constitutionalism. As a result, some of the most radical critiques of Western constitutionalism (such as Marxist socialism) focus on the impact of governmental arrangements on the interests of various socio-political groups. In contemporary Western constitutionalist thought, "mixed government" is seen, at most, as an evolutionary step on the way to institutional/functional separation of powers. *See infra* Part VIII.

the monarch. In fact, no clear distinctions were drawn between the various powers and functions of government. Government bureaucrats were, literally, servants of the Crown. The judges of the "'common-law" courts[39] enjoyed a significant measure of day-to-day independence from royal control, but were appointed to, and sustained in, office at royal will and pleasure; summary dismissal of judges who incurred royal displeasure was by no means unknown.[40] Alongside adjudication in their own courts, common-law judges were integrally involved in both legislative and executive activities, advising both the monarch and the houses of Parliament. They also participated in the judicial affairs of the "conciliar" courts (most prominently, the Court of Star Chamber), which were much more closely controlled by the monarch than were the common-law courts: they were manifestations of the monarch's "Privy Council," not "independent" bodies. As for the legislature (the House of Commons and the House of Lords), in the ordinary course of things, when major war was not being waged, the personal and prerogative (official) wealth of the monarch was sufficient to finance the affairs of state without the need to ask Parliament for funds. In peacetime, the main role of the two Houses was to support the monarch in running the country by rubber-stamping royal policies and addressing citizens' grievances.

The effects of the 1688 Revolution on public law were dramatic. Parliament (more particularly the lower house of Parliament, the House of Commons) successfully established itself as "sovereign." Rather than continuing to provide executive support to the monarch, Parliament effectively became the monarch's boss; and the monarch, in turn, became Parliament's chief executive. Parliament held the purse-strings of government and decided who would be monarch. The monarch retained the power to veto ("refuse assent to") legislation that had been passed, in turn, by each of the House of Commons and the House of Lords (the upper house of Parliament); but this power was used for the last time in 1704 and gradually, thereafter, lost all political significance, even as a threat. As chief executive, the monarch retained the power to hire and fire the monarchy's most senior administrative assistants—ministers of state—and other bureaucrats. However, because the monarch could no longer participate in Parliament's daily proceedings, he or

[39] That is, the courts of King's/Queen's Bench, Common Pleas and Exchequer. The common-law courts were distinguished from other courts such as the Chancery Court, the Admiralty Court, ecclesiastical courts and (until 1641) conciliar courts. Conciliar courts were staffed by the monarch and members of the monarch's inner ("Privy") Council. Introduced by the Tudors in the sixteenth century, they were particularly involved in dealing with crimes against the state and misbehaviour by government officials.

[40] Most famously, perhaps, Sir Edward Coke was dismissed by James I from the post of Chief Justice of the Court of King's Bench in 1616.

she became increasingly dependent on his or her ministers of state to protect royal interests from attack in the newly-independent House of Commons. Over the course of the eighteenth century, this proto-"Cabinet" gradually became more and more independent of royal control to the point where, by the middle of the nineteenth century, it was effectively answerable to the House of Commons, not the monarch. At this time, the monarch ceased to have an effective choice about who would form the government.

As for the judiciary, the conciliar courts had been abolished as early as 1641, and the House of Lords (the upper house of the legislature) had taken over the domestic appellate jurisdiction formerly exercised by the monarch's Privy Council.[41] The Act of Settlement 1701 stripped the monarch of the power to dismiss judges of the common-law courts. The common law judges, once literally His or Her Majesty's Justices, integrally involved in most aspects of government, were now, in principle at least, marginal participants in the project of running the country, subordinate to the will of Parliament. In return for this change of status, they received guaranteed security of tenure (subject only to removal by Parliament for misconduct) and salary.[42]

Book XI, Chapter 6 of *The Spirit of the Laws* charts this transition from one system of government to another. In the pre-Revolutionary system, the legislature and judiciary were politically subordinate to the executive, and the legislative, executive, and judicial powers were not sharply distinguished from one another. After the Revolution, three distinct institutions—Crown, Parliament, and the courts—performed distinctively different characteristic functions (executive, legislative, and judicial, respectively) and were relatively independent of and, as a result, interdependent on, one another. Parliament, rather than the monarch, was now sovereign (politically dominant). National political power, formerly concentrated in the monarch, was diffused amongst the various institutions of government.

[41] The Privy Council retained jurisdiction over British colonies because establishing colonies was understood to be an exercise of the Royal Prerogative (to conduct external affairs) and so, appropriately the subject of royal prerogative jurisdiction. By the end of the nineteenth century, the "Judicial Committee of the Privy Council" was hearing hundreds of appeals a year from all corners of the British Empire (on which, at that time it was said, "the sun never set").

[42] *See* CANE, *supra* note 6, at 29–36.

2. What Montesquieu Missed

However, although Montesquieu gave a good account of what had changed, he did not understand how much had remained the same. First, contrary to what he seems to have thought, the monarch had not been reduced to a mere executor of Parliament's will. The monarchy retained its "prerogative" powers of unilateral action. Some of these (such as the power to make law without Parliamentary concurrence and the power to judge individual legal disputes) had been stripped away in the seventeenth century,[43] but many (such as the power to wage war) survived the Revolution.[44] It was now accepted that Parliament could abrogate or curtail those surviving prerogative powers, and that their existence and continuance depended on recognition by the judiciary. Subject to that, however, the monarch still had much room for discretionary action in major matters of state. For instance, establishing colonies was understood to be an exercise of the royal prerogative to conduct foreign affairs. The British Empire, in its various forms between the seventeenth and the mid-twentieth centuries, was—technically, if not actually—a royal, not a Parliamentary, project.

Secondly, Montesquieu failed to understand the role of the common law courts. He seems to have thought that judicial power was effectively exercised by citizen juries; the judicial function consisted merely of mechanically applying the law.[45] The reality was quite different. For one thing, until the nineteenth century, courts were a much more important source of law—both "ordinary" and "constitutional,"[46] private and public—than

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[43] *See Case of Proclamations*, [1611] 77 Eng. Rep. 1352; 12 Co. Rep. 74 (ending the monarchical legislation); *Case of Prohibitions*, [1607] 77 Eng. Rep. 1342; 12 Co. Rep. 63 (ending monarchical adjudication outside the conciliar courts, which were, in turn, abolished in 1641).

[44] This explains why the distinction between "execution" and "administration" is so important.

[45] Montesquieu was correct that, in England, unlike Europe, trial by jury was the default process in the common law courts (but not other courts). However, the precise task that the jury would perform in any particular case, and the precise questions it would be required to answer, were decided by a judge. By Montesquieu's day, the distinction between questions of law, for the judge to decide, and questions of fact, for the jury to decide, was well-established. According to this distinction, the judges' job was to say what the law was, and the jury's job was to apply it. However, in reality this did not mean that the job of the jury in relation to the law was purely mechanical. On the contrary, the distinction between law and fact was developed in order to reduce the discretion of juries to decide cases in the way they saw fit. In its origins, jury trial stood for jury discretion, and in Montesquieu's day, juries (in some areas of the law more than others) still had a great deal of effective discretion over law as well as fact. See SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1st ed. 1990), for jury discretion in the American colonies at this time.

[46] Montesquieu would have drawn no distinction between constitutional law and non-constitutional law. It was not until the end of the century that people started to think of a "constitution" as a document that codified (i.e., exhaustively stated) relations between governors and governed in positive legal form and that

Parliament. The large bulk of English law had been made over the centuries and had continued to be made in the eighteenth century by judges as a by-product of resolving individual disputes. In this respect, the only impact of the Revolution was to confirm[47] that in case of a conflict between judicially-made and Parliamentary law, the latter would prevail. This autonomous, inherent[48] judicial power to make law (subject only to reversal by Parliament) is the defining feature of a "common-law" legal system.

In addition, since the early sixteenth century, the common-law courts (as opposed to the conciliar courts, which also operated in this area) had been controlling local royal administration (undertaken predominantly by Justices of the Peace)[49] on behalf and in the name of the monarch (using "prerogative" writs or (in U.S. jargon) "extraordinary" remedies).[50] This jurisdiction was well-entrenched by Montesquieu's time. The basic function of the courts in this regard was to ensure that administrators acted "legally." Some of the relevant law they enforced came from Parliament, but a significant amount was judicially-made. These facts help to explain why William Blackstone, writing not long after Montesquieu, treated independence of the judiciary as the most important element of separation of powers in the English system.[51] Despite their change of status as a result of the Revolution, the common law courts were still important participants in central, as well as local, government, both as law-makers and controllers of the administration.

Thirdly, Montesquieu paid very little attention to the electoral system. He acknowledged that "in large states," the individual self-government essential to liberty had to be representative.[52] But England, at this time, was certainly not a democracy in the modern sense. Members of the House of

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was made in a different way than 'ordinary' law. To this day, England lacks a constitution in this sense. The sources of English constitutional law are the same as the sources of English tort law, for instance. See *infra* Part VII.

[47] This had been recognised in some way or another since at least the fifteenth century.

[48] Meaning, "not delegated."

[49] *See* S.B. CHRIMES, ENGLISH CONSTITUTIONAL HISTORY 137 (3d ed. 1965) (explaining that before the Conquest, and for some time after, the most important local official was the sheriff. However, in order to exert more control over local administration, Edward III (who reigned from 1327 to 1377) instituted the office of Justice of the Peace (JP). Under the Tudors in the sixteenth century, JPs "became the chief pillars of local government.").

[50] *See generally* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY (1963).

[51] J.W.F ALLISON, THE ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS 78–83 (Cambridge, 2007).

[52] MONTESQUIEU 1989 *supra* note 33, at 159.

Commons were elected by a very small proportion of the population qualified to vote by virtue of high status or wealth. In modern, populist terms, the typical member of Parliament belonged to the social elite. "Representation" was a paternalistic, not an egalitarian, concept. The electoral system was corrupt. Both the monarch, and the nobility (who collectively constituted the upper house of Parliament, the House of Lords), were able to buy votes and, in that way, get their cronies into the House of Commons.[53] This inevitably affected the way the legislative power—shared between the monarch, the nobility, and the elected representatives of "the people"—was exercised. Electoral corruption ("patronage") provided the monarch and the aristocracy with a tool that could be used to influence, if not control, the behaviour of the House of Commons.

C. Montesquieu and the Separation of Powers in America

Montesquieu's analysis influenced the drafting of the Constitution of the emergent United States of America. As is well known, in *The Federalist Papers*, James Madison expressed the opinion that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."[54] Despite the fact that the Founders deliberately set out to reject many aspects of their English constitutional heritage, the constitutional design of the U.S. system of government bears more than a passing resemblance to the English system as portrayed by Montesquieu. The U.S. Presidency, like the eighteenth-century English monarchy, and unlike the current U.K. executive, is constituted by a single person.[55] Members of the two Houses of Congress respectively were to be chosen by different methods and electorates, and these, in turn, differed from the method and electorate by which the President was chosen.[56] Senior government officials were to be dependent on the President, not Congress.

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[53] LOVELL, *supra* note 23, at 426–32.

[54] THE FEDERALIST NO. 47 (James Madison).

[55] In the United Kingdom today, the "government" consists of about 100 (elected) members of Parliament, some 25 of whom constitute the Cabinet.

[56] In Montesquieu's England, the monarch was chosen by the Houses of Parliament; membership of the House of Lords was initially by royal appointment and, thereafter, heredity; and membership of the House of Commons depended on election under a very limited franchise. In the United States, the President was to be chosen indirectly by the whole nation, Senators by State governments, and Members of Congress by a section of the population. By the mid-eighteenth century, the franchise was significantly wider in America than in Britain, making the electoral system (in theory, at least) less manipulatable. In the U.S. system, the English monarch, aristocracy and common people become, respectively, the nation, the states, and individual citizens qualified to vote. The development of political parties has transformed both schemes, *see infra* Part V.

The main function of the President would be to run the country in accordance with the laws made by Congress (subject only to a qualified presidential veto designed primarily to afford the president self-protection against Congressional attack). As in England, the independence of the judiciary in deciding individual cases was to be protected and promoted by security of tenure and salary.

We can summarize so far in this way: according to Montesquieu and the American Founders, liberty-protecting-and-enhancing government consisted of three "branches": a legislature, an executive, and a judiciary; each branch exercised a characteristic function: legislative, executive, and judicial, respectively. By reason of its representative element and its legislative power, the legislature was the most important branch. The executive's prime role was to run the administration in accordance with the legislature's will as expressed in statutes. The judiciary's role was to enforce the sovereign's will (whether that of the people expressed in the Constitution, or of Congress expressed in statutes) in individual cases.

The U.S. Constitution illustrates several significant aspects of Montesquieu's analysis and ideas. First, it appears to give little creative power to the executive or the judiciary and the lion's share to the legislature. The President's signature role is "to take Care that the Laws be faithfully executed."[57] The primary function of the Supreme Court is to enforce the will of the sovereign as expressed in the Constitution, Congressional statutes, and treaties. The legislature is constructed as the most powerful and, hence, in the view of the Founders, the most dangerous branch.[58] Unlike the English Parliament at the time (and today), it had exclusive power to initiate legislation, including financial legislation, and to organise the bureaucracy. From a modern perspective, the Constitution says very little about the nature, functions, powers, and control of the executive. This arguably reflects the fact that the monarchy had been cut down to size in 1688. In *Federalist* 69, Alexander Hamilton went to considerable lengths to reassure Americans that the U.S. presidency would be even weaker than the English monarchy.[59] The less said in the Constitution about the executive, the better!

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[57] U.S. CONST. art. II, § 3.
[58] THE FEDERALIST NO. 48 (James Madison).
[59] THE FEDERALIST NO. 69 (Alexander Hamilton).

Second, apart from specifying the role of popular voting in choosing various public officials, the Constitution says very little about elections. This is not surprising. In Montesquieu's eyes, England was not a democracy but something like an aristocratic republic. Even though the franchise in America at this time was wider than that in England,[60] the Founders intended to establish a republic, not a democracy.[61] Only the House of Representatives was to be directly elected by the people. Popular election of other public officials would come only later. As an entity, "the People" might be sovereign, but only a minority of them had a vote.

Third, apparently like Montesquieu, the Founders thought of courts as law-enforcers, not law-makers. As such, the judiciary was "the least dangerous" branch."[62] The prime function given to the U.S. Supreme Court by the Constitution is not to make law,[63] or even to resolve disputes,[64] but to enforce the Constitution, and statutes and treaties made under it.[65] The Constitution gives the Supreme Court very little jurisdiction to make law independently of applying, enforcing, and interpreting the Constitution, and Congressional statutes and treaties made in accordance with the Constitution.[66] This does not mean, of course, that federal courts do not play a creative role in interpreting and applying these various types of law. What it does mean, however, is that unlike English courts (for instance), U.S. federal courts have no autonomous, inherent power to make law under their own steam, as it were. Rather, it is the state courts that have inherited the inherent power of the English courts to make common law.[67]

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[60] In effect giving the vote to all white, male, free persons who owned property or paid taxes.

[61] "Madison and his Federalist allies in the 1780s regarded the Constitution as a republican effort to slow a democratic tide": Mark Tushnet, et.al., *Introduction*, *in* THE OXFORD HANDBOOK OF THE UNITED STATES CONSTITUTION, *supra* note 32, at 3.

[62] THE FEDERALIST NO. 78 (Alexander Hamilton).

[63] That is the characteristic job of Congress.

[64] Most of the Supreme Court's jurisdiction is appellate.

[65] Note that the Supremacy Clause does not mention court decisions as a source of law. *See* U.S. CONST. art. VI, cl. 2.

[66] CANE, *supra* note 6, at 62–64. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (Amy Gutmann ed., 1997) ("[I]n the federal courts . . . with a qualification so small it does not bear mentioning, there is no such thing as common law.").

[67] Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 2 (2015). In Swift v. Tyson, 41 U.S. 1 (1842), the Supreme Court decided that it, too, had a share in this power, but changed its mind in 1938, in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Ernest A. Young, *Erie As a Way of Life*, 52 AKRON L. REV. (forthcoming 2019), https://ssrn.com/abstract=3266857.

In certain respects, however, the U.S. Constitution represents a radical departure from Montesquieu's world-view. First, it embodies a very different concept of a constitution and of constitutional law than underpins *The Spirit of the Laws*. In Montesquieu's account, the word "constitution" of a polity referred to the "nature," or "shape" or "structure" or "make-up" of relations between the governors and the governed in that polity. For him, the "laws of the constitution" would have been the aspects of those relations that were "necessary . . . deriving from the nature of things."[68] He had no concept of a "constitution" as a document that codified (i.e., exhaustively stated) relations between governors and governed in positive legal form. Moreover, Montesquieu located sovereignty within the government machine whereas American republicanism fixed it outside government in "the People." The Constitution and its Amendments (including the Bill of Rights) were understood to be the embodiment and ultimate expression of the sovereignty of the People. These were probably the most fundamental, American departures from English constitutionalism.[69] In them, we find the seeds of the modern concept of constitutional law.

Secondly, the first ten Amendments to the Constitution, ratified in 1791, in time came to be thought of as a free-standing Bill of Rights. These rights were not initially conceived of as protections for individual interests but rather as limitations on federal legislative power.[70] The justiciability of constitutional rights was soon established[71] and came to be referred to as "judicial review of legislation" or "constitutional judicial review." In the British system at this time, the only "court" with the power to review legislation for incompatibility with law was the Privy Council, and its power was limited to legislation made by colonial legislatures which, by definition, were not sovereign.[72]

By this point, all the elements of what Stephen Gardbaum, 150 years on, called "the post-[World War Two] paradigm" of constitutional law, were in place: a codified, written constitution that establishes "the ground rules of

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[68] MONTESQUIEU 1989, *supra* note 33, at 3.

[69] Today, very few countries lack a codified, written Constitution. Remaining examples are the U.K., New Zealand, and Canada. Israel is in a category by itself. Iddo Porat, *The Platonic Conception of the Israeli Constitution*, *in* THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE 268–97 (Rosalind Dixon & Adrienne Stone eds., 2018).

[70] Peter Cane, *Two Conceptions of Constitutional Rights*, 8 INSIGHTS 2–8 (2015), https://www.dur.ac.uk/resources/ias/insights/Cane.pdf.

[71] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[72] F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 320, 462–64 (1st ed. 1961).

government" and protects certain rights, and which "sits at the apex of its legal system . . . [as] the supreme law of the land . . . authoritatively interpreted and applied by a high court with power to set aside conflicting non-constitutional law and legal acts."[73] Gardbaum recognised that there were "outliers" that did not fit the paradigm in one respect or another. Most notably for our purposes, the United Kingdom has no written, codified constitution. In fact, Gardbaum went on to argue that the paradigm may be dissolving before our eyes as scholars realise how many gaps there are in codified constitutions, especially those like the U.S. Constitution that are brief and now very old, and how much constitutional law, even in systems with written constitutions, is not to be found in the document itself.[74] Terms such as "constitutional silence"[75] and "the invisible constitution"[76] are increasingly commonplace.

Be that as it may, the effect of the passage of time on the nature of written constitutions is not the topic here. Rather, our concern is with its impact on the structure and operation of the main institutions of government. Although those institutions, both in England and the United States today, may be superficially similar to their mid-eighteenth-century predecessors, they and the ways they interact have changed dramatically. There is a wide gap between contemporary political practice and the late-eighteenth century model of constitutionalism and constitutional law, based on a codified Constitution which has not been changed in its fundamentals since 1789.

Six engines of change deserve some discussion: first, the development of mass electoral democracy and universal suffrage, and the use of popular election as the preferred way of choosing a significant proportion of public officials; secondly, the apparently irreversible growth of the maxi, super-sized, administrative state in all its various manifestations; thirdly, the spread of written constitutionalism; fourthly, rapid, transitional, non-organic nation-building; fifthly, the post-WWII rights revolution; and sixthly, what I shall call (for want of a better term) "globalisation," the meaning of which will be explained later.

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[73] Stephen Gardbaum, *The Place of Constitutional Law in the Legal System*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 169 (Michael Rosenfeld & András Sajó eds., 2012).

[74] *Id.* at 172–73.

[75] Richard Albert & David Kenny, *The Challenges of Constitutional Silence: Doctrine, Theory, and Applications*, 16 INT'L J. CONST. L. 880, 880–81 (2018).

[76] *See generally* Rosalind Dixon & Adrienne Stone, *The Invisible Constitution in Comparative Perspective*, *in* THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE, *supra* note 69.

V. FIRST ENGINE OF CHANGE: DEMOCRACY

A. Montesquieu and the American Founders

Dealing first with democracy, Montesquieu explicitly acknowledged (as already noted) that "in large states," the individual self-government essential to liberty had to be representative.[77] Such representatives, he thought, should be chosen by "all citizens . . . of each principal town . . . except those whose estate is so humble that they are deemed to have no will of their own."[78] However, Montesquieu certainly did not think of England as a democracy. He divided governmental regimes[79] into four types: republicanism, monarchy, despotism, and what we might, for convenience, call "liberalism."[80] He identified two forms of republicanism: aristocracy and democracy. In his view, each variety of government was based on a "principle" or, as we might say, a "value": republicanism on virtue, monarchy on honour, despotism on fear, and liberalism on "liberty."[81] Monarchy was government by one, aristocracy government by few, and democracy government by many (all or part of "the people").

Montesquieu understood despotism not in terms of the number of governors, but by drawing a contrast between it and "moderate" government. Any form of government, including democratic republicanism, might be despotic if its motor was fear. Conversely, he seems to have believed that any form of government could be moderate. He classified liberalism as moderate even though, in terms of his classification, he seems to have thought of England as a monarchy or an aristocratic republic, not a democracy. For him, liberty did not imply democracy but was, rather, the state of "having the power to do what one should want to do and in no way being constrained to do what one should not want to do . . . . Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have the same power": "freedom under law" we might say.[82] As we have seen, for Montesquieu, liberal government was characterised by division and sharing of power "functionally" among a legislature, an executive, and a judiciary, and of legislative power socio-politically among the one, the few, and the many.

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77 MONTESQUIEU 1989, *supra* 33, at 159.
78 *Id.* at 159–60.
79 Which he referred to as "varieties of relations between governors and governed."
80 Although Montesquieu did not attach the name "liberalism" to this type of regime.
81 MONTESQUIEU 1989, *supra* note 33, at Book 3.
82 *Id.* at 155.

Under liberalism, unlike despotism, citizens would not live in a state of fear of each other or the governors. In Montesquieu's mind, however, none of this implied or required popular democracy, which he did not envisage.

Nor did the American Founders think that democracy was necessary (or sufficient) for the protection of liberty. Indeed, it was James Madison's opinion that in a republic, an elected legislature presented the greatest risk of "overruling" the power of the other branches "by everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[83] In *Federalist* 49 and *Federalist* 50, Madison rejected the idea that "occasional" or even "periodical" "appeals to the people" would be suitable mechanisms for restraining invasion by the legislature of the provinces of the executive and judiciary—in other words, for "enforcing" the limits imposed by the Constitution on legislative power.[84] In the famous *Federalist* 51, Madison argued that "ambition must be made to counteract ambition"[85] by providing each department of government with means of "self-defence." Because—Madison asserts—the legislature must predominate in a republican system of government, its tendency to tyrannical behaviour must be countered by dividing it into two houses[86] and "render[ing] them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit";[87] and by giving the executive a qualified veto over legislation.

B. Mass Enfranchisement

Since 1789, gradual enfranchisement culminating (in the twentieth century) in universal adult suffrage, and extension of popular election as the preferred mode of selecting public officials, have fundamentally affected the way governments at all levels operate. In nineteenth-century England, for instance, it underpinned the "democratisation" of local government and the development of the principle that the government was responsible to the elected Parliament, not to the (hereditary) monarch ("responsible government"). It also led to the creation of extra-Parliamentary political parties as machines for mobilising the electorate as opposed to mechanisms

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[83] THE FEDERALIST NO. 48 (James Madison) (Madison cites experience in Virginia and Pennsylvania to support this opinion).

[84] THE FEDERALIST NOS. 49, 50 (James Madison).

[85] THE FEDERALIST NO. 51 (James Madison).

[86] The House of Representatives and the Senate.

[87] THE FEDERALIST NO. 51 (James Madison).

for organising the internal operations of Parliament. In the early years of the move to responsible government, before the advent of political parties, Parliament was able to flex its muscles and dismiss unpopular governments.[88] However, a system of responsible government coupled with strong political parties, and strong party discipline in the legislature, very greatly reduces the power of the legislature to "overrule" the executive. The history of legislatures in parliamentary systems of government in the twentieth century has been one of gradually declining power;[89] the stronger the discipline imposed on legislators by their parties, the less effective the control Parliament can exert over the executive. For Montesquieu, the English legislature was the centre of gravity of the governmental system, the sun around which the executive and the judiciary revolved. Now, it would be more accurate, and only slightly hyperbolic, to say that Parliament is a satellite of the government.

In the United States, too, the development of extra-Congressional political parties soon after the Founding brought about fundamental transformations of the make-up and functioning of governmental institutions, and major re-adjustments of relationships between them.[90] For instance, because the president was "the only political figure chosen, albeit indirectly, by the nation's entire electorate," the president could claim a unique "democratic mandate" and become the pivot around which the national political-party system revolved.[91] Again, in the Founder's scheme, the three elements of the legislature were to be chosen in different ways. The development of political parties created the possibility that control of the various elements might be divided between the parties. This was not too great a problem so long as the political parties were not strongly ideological. However, there is general agreement that, in the latter part of the twentieth century, the two main parties have become increasingly ideologically polarised,[92] and (perhaps partly as a result) divided government has become more common. Divided government and party polarisation aggravate the

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[88] A.H. BIRCH, REPRESENTATIVE AND RESPONSIBLE GOVERNMENT: AN ESSAY ON THE BRITISH CONSTITUTION 135–36 (1964) ("Between 1832 and 1867 no fewer than ten governments were brought to an end by adverse votes in the Commons . . . in these years not a single government lasted the entire life of a Parliament . . .").

[89] Except, perhaps, in the Nordic systems. *See* HELLE KRUNKE & BJÖRG THORARENSEN, THE NORDIC CONSTITUTIONS: A COMPARATIVE AND CONTEXTUAL STUDY (2018).

[90] For an early, perceptive comparative discussion, see W.F. Willoughby, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 227–67 (1919).

[91] MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS 78 (2d ed. 2015).

[92] See, *e.g.*, Marc J. Hetherington, *Review Article: Putting Polarization in Perspective*, 39 BRIT. J. POL. SCI. 413 (2009); Russell Muirhead & Nancy L. Rosenblum, *The Uneasy Place of Parties in the Constitutional Order', in* OXFORD HANDBOOK OF THE UNITED STATES CONSTITUTION, *supra* note 32, at 217.

inherent tendency in the system towards legislative inertia and gridlock, and this benefits the presidency which, over the past 200 years, has been given by Congress, and has taken for itself, significant powers of unilateral action. As a result, the president may be able to act without the cooperation of Congress, but Congress cannot act without the acquiescence of the president.

C. Elections and Voting Systems

Voting systems are critical to the practice of politics in democracies. Indeed, it is no exaggeration to say that they define much of what democracy means in any particular system.[93] In parliamentary systems, the dynamics of politics are greatly influenced by the choice between proportional and first-past-the-post voting arrangements. It is (for instance) harder for small (populist) political parties to gain a foothold in the legislature and the executive in first-past-the-post systems, such as that of the United Kingdom, than in systems of proportional voting, where it is easier for small parties to win seats and thus have a chance of participating in a coalition government.[94] In the United States, the primary system and the electoral college are significant features of presidential elections, as is the location of control of electoral boundaries.[95] The choices between centralised and diffused, and politicised and non-politicised, control of electoral boundaries have important implications for populist electoral strategies. The choice between compulsory voting[96] and free voting is also important. For instance, much may depend on the extent to which voting is viewed as a duty and a privilege, on the one hand, or as an invasion of autonomy and a waste of time on the other; and on whether it is seen as a thing to be encouraged or something that may be suppressed.

Although election law and the legal framework of popular democracy are foundational to the operation of democratic systems of government, in many democracies the law of elections and democracy is almost entirely statutory, not constitutional. Electoral law tends to be a very minor scholarly speciality outside the framework of constitutional law and theory. And yet the law of elections and democracy is central to understanding and regulating

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[93] I doubt the proposition that "many theories about how democratic governments function fit all democracies." BARBARA GEDDES, ET. AL, HOW DICTATORSHIPS WORK: POWER, PERSONALIZATION, AND COLLAPSE 3 (2018).

[94] *See generally supra* note 3.

[95] *See* TUSHNET, *supra* note 91, at 49–62.

[96] Compulsory voting for government officials is very rare but is practiced, for instance, in Australia.

executive primacy and populism.[97] Democracy has been a major factor in the strengthening of executives vis-à-vis legislatures in the past century. Manipulating and influencing the exercise of popular electoral power is a basic populist tactic in democratic systems.[98] As a form of public power, electoral power, as it operates in modern democracies, was invisible to Montesquieu and the American Founders and plays only a marginal role in the constitutional theory to which their ideas gave substance. The existence and importance of electoral power drives a wedge between classic constitutional law and theory and contemporary democracy (and its ills, of which populism is considered to be one).

D. Democracy and Liberty

The main concern of Montesquieu and the American Founders was how to design government in such a way as to secure individual liberty. They agreed that the separation of powers was an important part of the answer. The involvement of citizens in the selection of governors or *a fortiori* in government itself—electoral and participatory democracy, in modern terms—was not high on their agenda. Now, by contrast, democracy is the name of the game. Executive primacy and populism are widely viewed as pathologies of representative democracy that thrive when significant portions of the population feel neglected by their elected representatives.[99] Many understand liberty to be a by-product of democracy in much the same way as eighteenth-century theorists considered that it would follow from separation of powers.[100] However, rather than adopting democracy as a principle of constitutional design in the way that Montesquieu and the American Founders adopted separation of powers, "moderns" treat democracy, like "the ancients" treated

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[97] On the role of elections in dictatorships, see GEDDES, ET AL., *supra* note 93, at 129–50; and STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 5–8, 12–13 (2010).

[98] Controversy about this very practice roils around the Trump Administration.

[99] *See, e.g.*, Kenneth M. Roberts, *Populism, Political Mobilizations, and Crises of Political Representation*, *in* THE PROMISE AND PERILS OF POPULISM: GLOBAL PERSPECTIVES 140–58 (Carlos de la Torre ed., 2014); Kenneth M. Roberts, *Populism and Political Parties*, *in* OXFORD HANDBOOK, *supra* note 3, at 287–301; Kenneth M. Roberts, *Populism and Political Representation*, *in* THE OXFORD HANDBOOK OF THE POLITICS OF DEVELOPMENT 517–32 (Carol Lancaster & Nicolas van de Walle eds., 2018).

[100] Günter Frankenberg, *Democracy*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 73, at 252 ("[D]emocracy . . . has come to be globally understood as designating the basic institutions and procedures of a polity shaping the form and mode of government . . . democracy [has] established its reputation as being better suited than any rival form of political will-formation and decision-making to reconcile the discordant elements of self-interest and common weal, wealth and poverty, class and community, liberty and equality").

liberty, as the purpose of constitutionalism and constitutional design, not a means to an end. One result of doing this is that modern theorists tend to ignore the gap between modern political practice and the constitutional technology inherited from the eighteenth century.

To give one example, to which we shall return in Part VIII below, Montesquieu considered that in England, the judicial function was (as it should be) "invisible and null."[101] It was important for him that judges be "independent" of politicians, not because that would increase their power but precisely in order to ensure that all they did was to enforce the letter of the politicians' law without being able to alter it at the point of application. Similarly, the American Founders conceived of the judicial function as being to enforce law, not to make it. Now, many look to courts to protect individual human rights against political abuse and, even, to promote democracy.[102] At the same time, many feel distinctly uncomfortable with casting judges in such active roles because they are so different from the passive roles allocated to the judiciary in classical constitutional law and theory. Inherited theory does not fit modern practices and expectations. At one and the same time, party democracy has strengthened executives vis-à-vis legislatures and undermined courts as active controllers of administrative power.

VI. SECOND ENGINE OF CHANGE: THE MAXI-STATE

The development of democratic practices and norms in circumstances of rapid, technological innovation in the nineteenth and twentieth centuries produced social and political pressures that catalysed a second engine of change: the growth-and-growth of the maxi, super-sized, "administrative state." Popular need and demand, plus the exigencies of two World Wars and the Great Depression, allowed and encouraged greater and greater government participation in, and regulation of, the social and economic life of civil society. This led to massive growth in the size and functions of the bureaucracy, and the emergence of an important distinction between the elected and appointed elements of "the executive" (or, in other words, between the (elected) executive and the (appointed) bureaucracy).

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[101] MONTESQUIEU 1989, *supra* 33, at 158.

[102] *See, e.g.*, Aziz Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. 21 (2018).

This second engine of change is relevant, in particular, to understanding the dichotomy, within public law theory and thought, between constitutional law and administrative law.

A. Administration and Administrative Law

The idea of separate categories of administrative power and administrative law developed in Continental Europe before they appeared in the Anglo-American world. In 1903, Frank Goodnow wrote that he was effectively forced to study administrative law comparatively because of "the complete lack of any work in the English language on administrative law as a whole" contrasted with the "the richness of the literature of foreign administrative law."[103] This was not, of course, because there was no administrative law in the Anglosphere at the time. We have seen, for instance, that English courts had been reviewing local administrative action since the early-seventeenth century; and Jerry Mashaw has magisterially traced the development of U.S. administrative law in the nineteenth century.[104] Rather, it may be explained by an important difference of approach to control of administrative power in Europe compared with England and the United States. Put simplistically, the European (or, more specifically, German) *rechtsstaat* model of administrative law has two main elements: use of detailed rules to regulate administrative conduct in advance ("prospectively"), and a distinct set of administrative courts to settle disputes ("retrospectively") between citizen and government.[105] By contrast, the Anglo-American model relies less on prospective regulation of administrative conduct and more on retrospective control through the handling of disputes between citizen and government by the same courts that deal with disputes amongst citizens.

At the end of the nineteenth century, the Anglo-American model was theorised by Albert Venn Dicey in his concept of "the rule of law," under which the "ordinary" courts play the central role in ensuring that administrative activity is conducted according to law.[106] Significantly, Dicey constructed the rule of law as part of an account of constitutional law, not

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[103] *See* FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1903).

[104] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

[105] *See, e.g.*, Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171, 171–88 (2009).

[106] ROGER MICHENER & A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 119 (2013).

administrative law. Dicey understood "administrative law" in European *rechtsstaat* (not the English rule-of-law) terms.[107] Thus interpreted, he strongly opposed its introduction to England on the ground that it ran counter to the ideal of equality of governors and the governed before a single law, applicable to both without discrimination or difference, and applied and enforced by ordinary (not special administrative) courts. He wanted to prevent administrative law in the *rechtsstaat* mould crossing the English Channel. At the same time, in the face of democracy-induced weakness of Parliament to resist and regulate the executive, he promoted the judiciary to the very centre of his theory of limited government. Goodnow barely mentions Dicey and sidesteps debate about the two models of administrative law by devoting relatively few pages of his book to control of administrative power and focusing, instead, on the structure organisation and empowerment of the administration.[108]

In England, a set of what were, in effect, administrative courts (called "tribunals"), had begun to develop in the mid-nineteenth century alongside ordinary courts.[109] Tribunals were not understood to be part of the judiciary but, rather, an offshoot of the executive. Dicey ignored them. But, by the early twentieth century, the terms of the debate had shifted well beyond Dicey. The question was no longer whether there should be distinct administrative courts but whether, and the extent to which, decisions of such courts should be subject to judicial review by the ordinary courts. This debate about the degree of judicial control continues to the present day.[110]

In the United States, similarly, by the time of the New Deal, debates were revolving not so much around the relative benefits of, and the relationship between, administrative adjudication and adjudication by ordinary courts but around how much control the ordinary courts should

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[107] More particularly, he equated "administrative law" with the French *droit administrative*, which rests on a categorical distinction between public law and private law and an institutional distinction between "ordinary" and "administrative" courts. *Id.*

[108] *Cf.* TOM GINSBURG, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 59 (2008) ("In the Western legal tradition, administrative law concerns the rules for controlling government action"). There is an important distinction between "administrative law" in the sense of law *made by* the administration and in the sense of law *about* the administration. As used in this article, "administrative law" refers to the latter. Of course, law about the administration may be made by the administration, but that is not its only–or even, perhaps, its most important source.

[109] *See generally* CHANTAL STEBBINGS, LEGAL FOUNDATIONS OF TRIBUNALS IN NINETEENTH CENTURY ENGLAND (2006); WILLAM A. ROBSON, JUSTICE AND ADMINISTRATIVE LAW (3d ed. 1951).

[110] *See generally* PETER CANE, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION (2009).

exercise over administrative decision-making through judicial review. Pro-Diceyan American lawyers, such as John Dickinson[111] and Roscoe Pound,[112] argued for close judicial control whereas keen New Dealers, such as Felix Frankfurter,[113] favoured extensive administrative discretion and light judicial review. Frankfurter had a long-running debate with a German emigré legal scholar, Ernst Freund, about the merits of the *rechsstaat* model of administrative law, which Freund championed and to which the likes of Dickinson and Pound were deeply opposed for essentially the same reasons as Dicey.[114] For New Dealers like Frankfurter, however, the main concern was the intensity of control of administration, not the identity of the controller. A compromise over the scope and intensity of judicial review was embodied in the Administrative Procedure Act 1946. After WWII, administrative courts (staffed by Administrative Law Judges (ALJs) and Administrative Judges (AJs)) began to appear in areas of high-volume decision-making such as social security and immigration, operating under a presumption that their decisions were subject to judicial review in the ordinary courts.[115] The appearance of these bodies was associated with enormous growth in administrative rule-making in the 1960s and 1970s designed, in part, to regulate exercise of administrative power. In U.S. law today, judicial control of administrative rule-making is, if anything, more significant than judicial review of administrative adjudication.[116]

At all events, in the Anglo-American axis, it seems clear that as a separate legal category, administrative law is a product of increasing involvement of government in social and economic life and consequent growth in the bureaucracy, starting in the latter part of the nineteenth century. Dicey's constitutional, ordinary-court-focused, rule-of-law account of judicial control of administrative power was gradually replaced by a new administrative model. In this new model, judicial review by ordinary courts was retained as the ultimate guarantor of administrative legality. At the same time, space was created for elements of the European *rechtsstaat* model in the

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[111] *See generally* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927).

[112] Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 AM. B. ASS'N J. 133, 133–39 (1941).

[113] Felix Frankfurter, *Foreword*, 47 YALE L. J. 515–18b (1938).

[114] On this debate see generally Ernst, *supra* note 105; *See also* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 107–38 (2014).

[115] CANE, *supra* note 110, at 72–82.

[116] PETER CANE, *Review of Executive Action*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 146, 146–63 (2003).

form of administrative adjudication and (in the United States, anyway) much greater use of rules to regulate administrative activity prospectively.

For present purposes, the main point of these stories concerns the internal structure of public law. Classic, eighteenth-century, inherited constitutional theory is much concerned with executive dominance but finds the key to control of the executive in its relationship with the legislature: the balance of power in the system should favour the legislature at the expense of the executive. In this picture, courts are more-or-less irrelevant to controlling the executive. Perhaps the first observer of the English system to give significant emphasis to judicial control of executive action was the German scholar, Rudolph Gneist, who wrote about a century after Montesquieu in a period when the concept of administrative law was already established on the Continent.[117] Later, Dicey's aversion to the French version of the Continental model of administrative law played (I would argue) an important role in divorcing administrative law from constitutional law in the Anglo-American mind. One result has been to set up a contrast between constitutional and administrative strands of public law. Instead of being integrated with the constitutional strand to produce holistic public law and theory, administrative law and theory, and constitutional law and theory, run in more-or-less parallel streams. In my judgment, the constitutional strand of public law is understood to be concerned with big "architectural" issues of governmental design and with large concepts such as sovereignty, democracy, rule of law, and rights. By contrast, the administrative strand deals with the sub-constitutional, everyday affairs of government and utilizes "small," "engineering" concepts such as legality, rationality, and procedural fairness. Administrative law is concerned very largely with the relationship between judicial power and executive/administrative power; the relationship between executive/administrative power and legislative power is marginal to the preoccupations of many administrative lawyers.

Contemporary executive primacy and populism are both products of the administrative state (amongst other things). As such, they fall between the two stools of public law. They raise important issues of institutional design that classic constitutionalism and constitutional theory do not adequately address because of their relative neglect of executive/administrative power. On the other hand, because of their traditional sub-constitutional status, administrative law and theory lack the architectural concepts and imaginative

[117] RUDOLPH GNEIST, THE HISTORY OF THE ENGLISH CONSTITUTION 360, 360–72 (2d ed. 1889). Gneist started studying the English system in the 1850s.

frameworks for understanding these phenomena. One reaction to this situation is to constitutionalise administrative law. In Section XI.B below we will consider whether such moves address the issues that executive primacy and populism present.

B. Separation of Powers in the Maxi-State

Another reason why classical constitutional theory does not have much to say about phenomena such as executive primacy and populism is its weddedness to *tripartite* separation of powers. We have already discussed the importance of a "fourth" power, electoral power, in understanding modern government. But there is more to be said.

1. Bureaucratic Power

Perhaps the most obvious institutional characteristic of the administrative state is the size of the bureaucracy—the appointed element of the executive branch—relative to the size of the elected element, to which the word "executive" is traditionally applied and will be applied in this context. The relationship between the bureaucracy and the executive has changed dramatically since the mid-eighteenth century.[118] Then, national governments were mainly concerned with internal peace and order and external security. Ministers of state had very small staffs, the members of which were typically appointed on the basis of personal or political patronage rather than merit or capacity. The relationship between the minister and their staff was typically that of master and servant rather than principal and agent or delegator and delegate. As national governments assumed more and more functions in the course of the nineteenth and early twentieth centuries, not only the number of ministers and departments of state increased, but also the size of their bureaucratic staffs. Merit replaced political patronage as the basis for appointment to the bureaucracy, which, as a result, became increasingly professionalised and, because of its size, hierarchically organised.[119] Inevitably, the relationship between ministers and most members of their staffs became more remote.

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[118] *See also* Mayu Terada, *The Changing Nature of Bureaucracy and Governing Structure in Japan*, 28 WASH. INT'L L.J. 431 (2019); Anya Bernstein, *Interpenetration of Powers: Channels and Obstacles for Populist Impulses*, 28 WASH. INT'L L.J. 461 (2019).

[119] The classic theoretical account of this development is Max Weber's. *See* ROBERT F. DURANT, *A Heritage Made Our Own*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY (2010).

As a result of these developments, the bureaucracy started to look like a distinct governmental institution in its own right. This was particularly the case in the United States where a Congressional policy of limiting presidential control over the bureaucracy led to the creation of so-called "independent agencies" to perform certain governmental functions.[120] In turn, this policy of limiting presidential control over the bureaucracy generated a distinction between politics and administration, presidential control being identified with politics, and administration with the bureaucracy.[121] Administration came to be understood as a technical exercise of expertise in matching non-political means to political ends. In this understanding, the President and Congress were responsible for defining (politically determined) ends and the bureaucracy for developing the most appropriate (non-politically devised) means to those ends. This is one reason why the bureaucracy came to be thought of as a "fourth branch of government" alongside the traditional three branches, exercising a fourth public "bureaucratic" function in addition to the already-recognised three. Despite these theoretical and practical developments, constitutional law and theory continues to cling to its inherited, tripartite analysis of the structure of government. Yet, control of the relationship between executive and bureaucratic power is one of the keys to understanding executive primacy and populism.

2. Coercive Power

There is another type of power relevant to understanding executive primacy and populism, namely coercive power.[122] The typical repositories of coercive power are the armed forces and, to a greater or lesser extent, the police. Police power is particularly important for maintaining internal, domestic "law and order" and social stability. Domestic coercive power was invisible to Montesquieu, perhaps because he was writing before the advent of governmental police forces. He does not mention the monarch's prerogative power to control the armed forces, probably because armed force played no significant role in the day-to-day domestic life of the nation.

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[120] The Interstate Commerce Commission, established in 1887, was the first.

[121] The *locus classicus* is Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197–222 (1887). For a general discussion see Tansu Demir, *Politics and Administration: Three Schools, Three Approaches, Three Suggestions*, *in* 31 ADMINISTRATIVE THEORY AND PRAXIS 503, 503–32 (2009).

[122] On the role of coercive power in dictatorships see GEDDES, ET AL., HOW DICTATORSHIPS WORK, note 93, at 154–74.

The only issue about coercive power discussed (by Alexander Hamilton) in *The Federalist Papers* (in *Federalist* 29) is whether there ought to be a national militia or whether there should be only separate state militias.[123] Section 2[1] of Article II of the U.S. Constitution makes the president the Commander-in-Chief of the armed services when they are acting in "the actual Service of the United States,"[124] which could include (according to Article I, Section 8[14]) service "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[125] The assumption here seems to be that, in terms of Montesqueiu's tripartite functional classification, coercive power is a form of executive power. This view seems implicit in the idea, expounded in *Federalist* 78, that the judiciary is the least dangerous branch because it lacks both the rule-making power of the legislature and the coercive power of the executive.[126]

However, experience suggests a more nuanced understanding of the relationship between executive and coercive power. Armed forces may not be under the effective control of the civilian executive; in that case, the civilian executive may depend on the armed forces for its power, or the armed forces may themselves take executive power into their own hands. Military governments may or may not be populist, but the phenomenon certainly needs to be taken into account in analysing and explaining executive power. The topic generally receives little attention in its own right from public lawyers, whether of the constitutional or the administrative variety.

3. Vertical and Horizontal Separation of Powers

Montesquieu was concerned with what we might call "horizontal" separation of powers between the main governmental organs in a polity. A further complexity he did not have in mind is "vertical" separation of powers between large, central governmental institutions and smaller, more localised institutions. The U.S. Constitution was revolutionary partly because it created a vertical division of power between the federal and the state governments alongside the horizontal division of power at both of those levels of government. Analyses of executive primacy and populism typically focus on

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[123] THE FEDERALIST NO. 29 (Alexander Hamilton).

[124] U.S. CONST. art. II, § 2, cl. 1.

[125] U.S. CONST. art I, § 8, cl. 14.

[126] THE FEDERALIST NO. 78 (Alexander Hamilton) ("the judiciary, from the nature of its functions, will always be the least dangerous . . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society, and can take no active resolution whatever").

the national level of government at the expense of sub-national levels, without considering (for instance) whether and in what ways vertical separation of power might affect the exercise of national executive power or how executive primacy and populism might manifest themselves at sub-national levels.[127]

4. Separation of Powers in Public Law

We might conclude that while Montesquieu's tripartite analysis of government was a work of genius in the eighteenth century, it now hinders public lawyers from understanding and analysing modern government. Instead of three powers, we have identified at least six: electoral power; coercive power; executive power; bureaucratic power; legislative power; and judicial power. Legislative power might be further subdivided into Congressional and Parliamentary (primary) legislative power and secondary (executive and administrative) legislative power; and judicial power might be subdivided into judicial and administrative adjudicatory power. The distinction between execution and administration[128] also needs to be borne in mind. Understanding and explaining complex governmental and political phenomena such as executive primacy and populism (and modern governance more generally) would be much enhanced by factoring into public-law theory, where appropriate, all these types of power and their interactions. An understanding of public law in which one element (administrative law and theory) is associated with executive, administrative and bureaucratic power and the other element (constitutional law and theory) more-or-less ignores it, while also paying little or no attention to other relevant types of power and focusing on legislatures and courts, creates a yawning gap between formal law and theory and between formal law and political practice.

In short, public law theory and the structure of public law need updating. This is not the place to develop a strategy for doing so. Elsewhere, I have suggested that instead of analysing governmental and political "systems" (or "regimes") in Montesquieu's terms, we could adopt a two-step analysis.[129] The first step would be concerned with how public legal power is created, allocated, and distributed, and the second with how it is controlled. A

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[127] On this topic, see generally Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); and Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VIRGINIA L. REV. 953 (2016).

[128] *Supra* Section IV.A.

[129] PETER CANE, CONTROLLING ADMINISTRATIVE POWER, *supra* note 6, at 1–23. *See also* Peter Cane, *A Framework for Historical Comparison of Control of National, Supranational and Transnational Public Power*, *in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2d ed. 2017).

useful way of thinking about the first step, I suggest, would be in terms of a distinction between diffusion and concentration of power; a good way of thinking about the second, and its relationship to the first, would be in terms of a distinction between control by "checks and balances" and control by "accountability" mechanisms. Having applied this approach to explaining similarities and differences between the constitutional and administrative law systems of England, the United States, and Australia, I believe that it has significant potential as a way of understanding complex governmental and political phenomena such as executive primacy and populism.[130]

The approach does not rest on specifying three (or any other particular number) of governmental powers, and for this reason, it can accommodate even radical changes in political and governmental structure and practice. For instance, in the light of significant "privatisation" and "outsourcing" of the performance of public functions over the last thirty years, it might stimulate questions about whether or not it would be useful to think of practices of "third-party government" in terms of a distinct type of power—"non-governmental public power," perhaps, or a "commercial," or "entrepreneurial" function.[131] Similarly, it has been suggested that the proliferation of independent, non-judicial agencies to control the executive, which will be examined in Section XI.B below, is best understood in terms of the concept of an "integrity branch" of government and an "integrity function."[132]

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[130] The articles by Gábor Atilla Tóth and Mauro Hiane de Moura have relevant things to say on this topic. Gábor Attila Tóth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 WASH. INT'L L.J. 317 (2019); Mauro Hiane de Moura, *"Never Before in the History of This Country?": The Rise of Presidential Power in the Lula da Silva and Rousseff Administrations (2003-2016)*, 28 WASH. INT'L L.J. 349 (2019).

[131] Government entrepreneurial involvement in business enterprises was a significant feature of the growth of the administrative state although more in the United Kingdom than the United states. Once a business activity is transferred from the private to the public sector, it may be branded as "public" even if, and when, it is returned to the private sector by privatisation or outsourcing. So viewed, the effect of return to the private sector is to commit to non-governmental entities the performance of public functions. This approach suggests a distinction to be drawn between public functions that may be committed to private entities and those that may not. It is the former group that may be properly classified as entrepreneurial. Constitutions and constitutional law have very little to say about the distinction between entrepreneurial and non-entrepreneurial public power. *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006).

[132] *See, e.g.*, Wayne Martin, Whitmore Lecture, Forewarned and Four-Armed: Administrative Law Values and a Fourth Arm of Government (Aug. 1, 2013); Chris Wheeler, *Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia*, 88 AUSTL. L. J. 740, 753 (2014); AJ Brown, *The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?*, *in* MODERN ADMINISTRATIVE LAW IN AUSTRALIA (Matthew Groves ed., 2014).

Under my approach, the starting point for analysis is the idea that every political system strikes a balance between diffusion of power (to weaken government) and concentration of power (to strengthen government). Executive primacy and populism, for instance, may be understood as results of changing the balance between diffusion and concentration of power in favour of concentration. This way of looking at things breaks free from the grip of the classical, tripartite analysis of public power. Unfortunately, space does not permit an attempt to test such an approach in this context.

C. Popular Hunger for Government

Executive primacy and populism are typically treated as problems to be solved. However, it is, at least, worth observing that the development of the administrative state is a result not merely of rulers' love of power but also of citizen's demands and expectations that the state will step in to deal with social problems that can be tackled only by coordinated action at the social level. Classical constitutional law and theory were developed in the context of struggles against monarchical executive power. The English Revolution marked the triumph of a desire for "small, limited government." Montesquieu's political agenda was to control the absolutist French monarchy. The American Founders deliberately designed a federal government that would be firmly limited and relatively weak. The main aim of the Bill of Rights of 1791 was similarly to limit and weaken federal power vis-à-vis the powers of the states. The Founders appreciated the value of "energetic" administration,[133] but only within confined boundaries.

In general, to different degrees in various cultures, attitudes towards government and its appropriate functions have been transformed since the beginning of the nineteenth century. Compared with two hundred years ago, we now want and demand relatively large, unconstrained, energetic government. This may not affect our attitude towards populism, but it will surely influence the benchmark against which we measure executive overreaching and make judgments about the optimum degree of executive dominance. It is, we might say, largely a result of human wants, needs, demands, and rising expectations that the balance of power has shifted away from legislatures and towards executives and, to a much lesser extent, courts. Executives are typically much more efficient than legislatures and courts in doing many of the things that we want governments to do. This "modern" attitude towards government is very different from that which animated the

[133] THE FEDERALIST NO. 70 (Alexander Hamilton).

theoretical pioneers of the eighteenth century. Ironically, too, it is very different from Dicey's conservative liberalism that motivated his theory of the constitution, which was so important in establishing a bifurcated public law.

VII. THIRD ENGINE OF CHANGE: WRITTEN CONSTITUTIONALISM

The U.S. Constitution was amongst the first,[134] purposefully-drafted-and-adopted constitutional documents, at least in modern times. It provides the basis for the modern paradigm of a constitution, which takes the form of a written code embodying "higher law." Constitutional law is "higher" in the sense that, in case of conflict between constitutional law and non-constitutional law, constitutional law prevails, and also in the respect that constitutional law is more difficult to amend or repeal than non-constitutional law. Relative "rigidity" is an identifying feature of written, codified constitutionalism.[135] The relative difficulty of repealing or amending higher law may result in its enjoying greater longevity than non-constitutional law. For instance, the U.S. Constitution has been amended only twenty-seven times since 1789. More than a third of those amendments (the first ten: the Bill of Rights) were ratified together in 1791. On the other hand, the U.S. constitution is quite exceptional in its longevity.[136]

The constitution that Montesquieu observed and described was, of course, uncodified, ordinary law. No one ever sat down to write "the English Constitution," and it does not constitute higher law. Like the rest of English law, the Constitution is the product of the law-making activities of Parliament and the courts, in particular, and can be changed in the same way as it is made. We may hypothesise that the flexibility that characterizes such an uncodified, organic constitution makes large-scale or radical constitutional change easier in the medium-to-long term but more difficult in the short term, because organic change typically takes longer than manufactured change. If this is

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[134] The Corsican Constitution was drafted in 1755 but was in operation only until 1769.

[135] The classic exposition of the distinction between rigid and flexible constitutions is JAMES BRYCE, CONSTITUTIONS 3–94 (1901). A legal or constitutional "code" is a document that purports exhaustively to state all the law on a particular topic. All codes in this sense are written, but not all written laws are codes. Statutes are not codes. Nor, even, are all written constitutions. For instance, Australia has a written Constitution (modelled, in significant respects, on the U.S. Constitution), but it does not purport exhaustively to state all constitutional law. Rather, it represents a sort of statutory gloss (albeit with higher-law status) on a large body of judge-made constitutional "common" law inherited from the English system. By contrast, in the U.S. federal system, at least, there is no constitutional "common law." All judge-made constitutional law has the status of interpretation or elaboration of the Constitution. Put differently, whereas in Australia the Constitution is a gloss on the common law, in the United States the common law is a gloss on the Constitution.

[136] *See generally* ZACHARY ELKINS ET. AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

correct, rigid constitutional arrangements may, ironically, provide more fertile soil for executive primacy, authoritarianism, and populism than flexible constitutional arrangements. Rapid change, within the formal rules of the system and without explicit revolution, may be easier in a rigid constitutional environment than under flexible constitutional arrangements.

This discussion alerts us to the existence of yet another relevant type of public power: constituent power. For present purposes, constituent power may be defined as the power to make, amend, and repeal constitutional law.[137] Constituent power was invisible to Montesquieu because, in the systems, he knew there was no relevant distinction between constitutional and non-constitutional law. More surprisingly, nor did the American Founders fully appreciate the political significance of constituent power—perhaps because they were engaged in the very process that would make it visible and identifiable as a separate species of political power. However, in classic constitutional theory, the last word—constituent power—must lie somewhere. In a codified constitutional system, it lies with the constituent assembly—the body to which the Constitution itself gives power to amend or repeal the constitution. In the United Kingdom, non-codified, constitutional system, the last word is formally given to Parliament. Courts have the final power to interpret legislation, and in so doing, they may refuse to interpret a statute inconsistently with some judge-made, common-law, "fundamental" right or principle.[138] However, Parliament has the power to override the common law by statute. Even so, it cannot legislate in such a way as to create "higher law" in the sense associated with codified constitutionalism because no Parliament can "bind" its successors. Any statutory provision enacted by an earlier Parliament can be repealed or amended by a later Parliament. In that sense, but only in that sense, the United Kingdom lacks a constitution.

Constituent power is important for the understanding of executive primacy and populism because, if the government can control the constituent body or the institution in which constituent power resides, it can determine the content of the constitution and, therefore, the extent of its own power.[139]

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[137] *See, e.g.*, Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 73, at 419–52.

[138] Roger Masterman & Shauna Wheatle, *Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law*, *in* THE UNITY OF PUBLIC LAW: DOCTRINAL, THEORETICAL AND COMPARATIVE PERSPECTIVES (2018).

[139] David Landau, *Populist Constitutions*, 85 U. CHICAGO L. REV. 521, 521–35 (2018); Kim Scheppele, *Autocratic Legalism*, 85 U. CHICAGO L. REV. 545, 545–83 (2018).

Populists and autocrats greatly value the capacity, which control of constituent power can give them, to change the basic terms of politics.[140] The process underway in the United Kingdom at the time of writing, to give effect to the so-called "Brexit referendum," by which it was decided that the United Kingdom should leave the European Union, provides an excellent and graphic illustration. That decision was of the very greatest constitutional significance and will lead to the deepest changes in U.K. constitutional law since the decision to join the European Community (as it was then called) in the 1970s. Normally, in order to remain in power, the U.K. executive must be able, through the party system, to control the House of Commons. However, the present situation is not normal, and there is serious doubt whether Theresa May's Conservative government will be able to secure a Parliamentary majority for its constitutionally-transformative proposals. The harder it is for the executive to capture the constitutional levers of power by amending constitutional law, the less likely that radical forms of executive supremacy and populism will be able to take root. Constitutional theorists think a lot about original exercises of constituent power that produce a codified constitution, and constitutional lawyers give considerable attention to the occasional use of constituent power to amend codified constitutions. But, the relevance of constituent power to the ongoing conduct of politics has received less attention. Like electoral power, constituent power can often be found in the populist toolbox.

The harder it is to change the constitution formally, the greater the need to invent informal methods of keeping the Constitution "up to date" with changing social, political, and economic conditions. One of the most important informal methods is judicial interpretation.[141] A good example is provided by the U.S. Supreme Court's reading out of (or in to) the U.S. Constitution of abortion rights despite the fact that the Constitution says nothing about abortion, or about a right to privacy on which abortion rights were built.[142] This helps to explain why authoritarian regimes (dominant executives) typically put great weight on controlling the judiciary.

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[140] *See* Maciej Bernatt & Michał Ziółkowski, *Statutory Anti-Constitutionalism*, 28 WASH. INT'L L.J. 487 (2019); Jan-Werner Mueller, *Populism and Constitutionalism*, *in* OXFORD HANDBOOK, *supra* note 3, at 590–606.

[141] However, one of the motivations for "originalist" (as opposed to "dynamic") modes of interpretation is to preserve the past.

[142] Roe v. Wade, 410 U.S. 113 (1973); TUSHNET, *supra* note 89, at 33; Reva B. Siegel, *The Constitutionalization of Abortion*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 73.

VIII. FOURTH ENGINE OF CHANGE: TRANSITIONAL NATION-BUILDING

More nation-states were born in the twentieth century than in any other. There were two major junctures: transition from war to peace and decolonialisation. Both junctures were characterised by rapid manufacturing of new states, the borders of which were based primarily on top-down, geopolitical and strategic, rather than bottom-up, socio-political considerations. In the rush to decolonise in the mid-twentieth century, foundational documents modelled on classical, Montesquieuan constitutional principles were more-or-less imposed on many newly-independent states.

It will be recalled that Montesquieu detected two axes of separation of powers in the English system: socio-political, between the monarchy, the aristocracy, and the common people; and institutional and functional, between the monarch-in-Parliament, the (monarchical) executive and the judiciary. The socio-political axis was effectively erased from the constitutional script when Montesquieu's analysis was adopted and adapted for use in America.[143] Indeed, socio-political groups, notably Native Americans and African slaves, were effectively excluded from the constitutional apparatus of the new polity. Indigenous people were similarly denied recognition in the Australian constitutional system. In Africa and Asia, ethnic and religious divisions that had been more or less successfully suppressed during the colonial period came to the surface after independence was granted under constitutional arrangements that made no provision (such as vertical separation of powers) for the management of such divisions. Inter-communal and inter-group strife may plausibly be identified as one of the drivers of executive primacy and populism.[144]

Another way of thinking about the relationship between the two dimensions of separation of powers is in terms of the distinction between liberty and equality. Liberty was the value that drove eighteenth-century constitutional theorising and constitution making. For Montesquieu, both dimensions of separation served this value. Today, liberty is harnessed with equality, which is the underpinning value of democracy. Classic public law

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[143] *See also supra* note 38.

[144] Classic constitutional law and theory pre-date the maturation of the nation-state in the nineteenth century and the mass movement of people from one nation to another. As a result, although classic constitutionalism contemplates conferral of sovereignty on "the people," classic constitutional principles say little or nothing about how "the people" is constituted. Now, citizenship and migration law are central to the definition of a polity, and particular attitudes to migrants and asylum-seekers are readily identified with populism. However, these matters are typically treated as sub-constitutional.

theory has little to say about equality, and classic democratic theory is primarily concerned with political rather than material equality. Today, the post-WWII fundamental human rights project within constitutionalism, and especially its concern with "third-generation," social and economic rights in areas such as housing and education, may be understood as partly directed towards rectifying this classic lack of attention to material equality. However, not all aspects of inequality are dealt with at the constitutional level. More recent constitutional bills of rights may include social and economic rights; but while the U.S. Constitution has been found sufficiently capacious to accommodate bans on active discrimination on grounds of race and religion, for instance, it has been found much less welcoming to demands for positive action to eliminate material inequality.[145] To the extent that law is used to this latter end, it is more likely to be sub-constitutional than constitutional—statute or judge-made doctrines of administrative law. However, equality is as marginal to the classic model of administrative law as it is to the classical constitutional paradigm.

The orientation of classic public law theory to liberty and individualism over equality and sociality helps to explain why it does not have much to contribute to the study and understanding of pathologies of equality-focused democracy, such as populism. All of the approaches to populism reviewed in Part II of this article focus on conflict between groups defined in terms such as "high" and "low" or "elite" and "common." There is good evidence that one of the roots of populism is actual and perceived inequality between social groups—between the beneficiaries of capitalism and globalisation, and "those left behind."

IX. FIFTH ENGINE OF CHANGE: THE POST-WWII RIGHTS REVOLUTION

Montesquieu's political ideal was liberty, not rights. Liberty, for him, was freedom to do whatever the law permits, but nothing that it forbids.[146] One hundred and fifty years later, Dicey incorporated this ideal of legality into his concept of the rule of law and justified his approach by claiming that the best way to protect rights was to build them into the main body of the law, not embody them in a separate bill of rights.[147] At first, the American Founders,

[145] CANE, *supra* note 6, at 70–72.

[146] MONTESQUIEU 1989, *supra* note 33, at 155.

[147] ALLISON DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 119 (8th ed. 1982).

too, resisted the idea of a separate bill of rights. They eventually acquiesced in order to buy off anti-Federalist opposition to the draft Constitution. The prime purpose of the first ten Amendments to the Constitution, ratified in 1791, was to limit the powers of the federal government to a greater extent than did the main document itself.[148] The rights were, first and foremost, limitations on governmental power, not expressions of, or direct protections for, the autonomy of individual citizens.[149] In this way of thinking, individuals are best protected by limiting the sphere and powers of government. This is an understanding of rights fitted for an era of small government.

By the middle of the twentieth century, there was much greater tolerance of and, indeed, desire for, large and robust government. The rise of fascism and Nazism had also made people painfully aware of the weaknesses of democracy as means to liberty, equality, security, and the risk that populism would morph into dictatorship. Fundamental human rights were conceived as a way of controlling strong, interventionist governments. Regional and global human rights regimes proliferated, and courts—either dedicated constitutional courts or all-purpose courts—became the preferred mode of protecting and enforcing rights.[150] In the United States, the Constitution was initially used in the courts mostly to protect private property and contractual ("economic") rights against public regulation. This project was more-or-less abandoned in the 1930s, and the Supreme Court moved on to using the Bill of Rights as a tool for protecting the civil and political rights of social groups subjected to discrimination, particularly on grounds of race.[151] The next move was towards protecting individual autonomy in areas such as sexual behaviour and reproduction. At the frontier of the kingdom of rights are economic and social rights—to adequate housing and education, for instance. In Samuel Moyn's words, rights have become "the last utopia," the all-purpose means to democracy, freedom, and even prosperity.[152]

The important point to make in the present context is that, because of their association with the paradigm of classical constitutionalism, and because

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[148] Cane, *supra* note 70, at 2–8.

[149] Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POLITICAL RESEARCH Q. 623 (1994). This is still the way "implied constitutional rights" are understood in Australia: CHERYL SAUNDERS, THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS 275 (1st ed. 2011).

[150] *See, e.g.,* Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL ADMINISTRATIVE LAW (Michael Rosenfeld ed., 2012).

[151] *See generally* TUSHNET, *supra* note 83, at 183–231.

[152] SAMUEL MOYN ET AL., THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

of the centrality of U.S. constitutionalism to that paradigm, rights "belong to" constitutional law, not administrative law. Furthermore, because the classical paradigm puts legislatures, not executives, at the centre of the governmental universe, the prime function of rights in the classical way of thinking is to control legislative power. Because the famous 1803 U.S. Supreme Court decision in *Marbury v. Madison*[153] is universally recognised as the *fons et origo* of judicial review of legislation—significantly also called "constitutional review"—the gold standard of rights protection (in constitutional theory, at least) is judicial. Rights are now linked with judicial enforcement.[154] Documentary bills of rights are directed, first and foremost, against legislative power. This is not to say that constitutional rights are not available against executive and administrative power, but this use is treated, subliminally, at least, as subsidiary to the main thrust of the fundamental human rights project. This may partly be explained by saying that the modern obsession with rights has focused the attention of constitutional theorists on the relationship between the judicial and legislative powers, much to the neglect of other powers of government that are at least as important for understanding how power is created, exercised, and controlled. When it comes to executive primacy and populism, the relationship between the courts and the legislature is only part of the story, and probably not the most significant part.

The twentieth-century, judicially-enforced, human rights revolution had the general effect (in theory, at least) of strengthening judiciaries against legislatures and, to a lesser extent, executives. However, this happened against a background in which the democratic principle of popular election to public office had already undermined the acceptability and legitimacy, if not the incidence and practices, of judicial creativity in making and interpreting law and in controlling the other branches of government.

Ironically, universal acceptance of the desirability of judicial independence, for which Montesquieu can be given most credit, has aggravated the problem. Judicial independence was originally championed in a period when the main pre-occupation of European political philosophers

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[153] *See* discussion *supra* note 55.

[154] For an excellent discussion of the judicial gold-standard in the context of environmental constitutionalism see, Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformational*, 16 INT. J. CONST. L. 836, 836–70 (2018) (arguing for a "contradjudicative" model of enforcement); *see also* IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES (Erin Daly & James R. May eds., 2018).

was how best to weaken monarchical executives and when democracy was not highly valued.[155] Making judges independent of the monarch was an obvious move. However, with the advent of democracy, this very independence from political control quickly provided reason to weaken judiciaries as much as possible. Courts came to be seen as operating under a democratic deficit and as plagued by a "counter-majoritarian difficulty."[156] By strengthening judiciaries legally and politically vis-à-vis both legislatures and executives, the post-WWII human rights movement aggravated the perceived democratic deficit under which courts operate. A further aggravating factor is the tendency to link human rights with democracy, which (as we observed earlier) is now understood by many to be the whole point of a constitution.

This paradox makes courts vulnerable in contests with strong executives, thus strengthening executives even more. A common populist strategy is to weaken courts as much as possible. From this point of view, the rights revolution is important not only to understanding the position and role of courts, but also the desire of strong executives to disable them.

X. SIXTH ENGINE OF CHANGE: "GLOBALISATION"

The scare quotes are used to indicate that the word and concept of globalisation are given very broad meanings in this article. At the core of classic constitutional theory sits the nation state, as this institution developed between the sixteenth and the nineteenth centuries. International law (a branch of public law) started out as the "law of nations." Peak nation-state (as it were) occurred in the mid-late-twentieth century as a result of de-colonialisation and the fall of the Berlin Wall in 1989. The first nation states were typically created by amalgamation of smaller governmental units into a single larger entity. The feasible size of a nation-state is related to, and limited by, topography, available modes of transport and communication, and cultural factors such as ethnic and religious diversity. The first technology invented to evade the limitations of the nation-state as a unit of governance was colonialism, which produced its own peculiar set of institutional and political expedients to address the challenges of governance of diversity at a distance.[157] Next came federation, first invented in the United States. Treaty-

[155] *See supra* Part V.

[156] *See, e.g.*, Joel L. Colón-Ríos, *The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules*, 25 CAN. J. L. & JURIS. 53, 56 (2012).

[157] Generally, colonial governance tended to be autocratic and non-democratic.

based, supra-national confederation in the form of the European Union is the latest major development along these lines.

The nation-state (federal or unitary) was firmly established as the basic unit of governance by the middle of the nineteenth century. By then, however, technological change was generating new possibilities and problems that crossed the borders of nation-states. International organisations (such as the International Postal Union) were created to facilitate productive cooperation between nation-states.[158] The main business of such organisations is coordination and regulation of the activities of nation-states, other international organisations and, increasingly, individuals. In the twentieth century, advances in military technology that made "world war" possible internationalised the search for peace. More recently, the end of the Cold War, the information revolution, and heightened awareness of global problems such as climate change, have brought about another step-change in the position of the nation-state.

The first generation of international organisations were created by treaties and agreements between nation-states. Now, there are international organisations that do not owe their existence to the actions of nation-states, and some have even entered into treaties with nation-states.[159] This point is critical to understanding the significance of such bodies in the context of this article. Within nation-states, one of the functions of public law is to help to reconcile unilateral use of official coercion, by the state against its citizens, with the human aspiration for "self-government." By contrast, as between nation-states, the basic technique for legitimating coercion is consent. Treaties are agreements between nation-states that regulate their interactions. Organisations that are not established by treaties between nation-states cannot rely on the consent of states to legitimise their regulatory activities. Where, then, can they look?

Many international organisations are, effectively, mini-governments without citizens or territory. In terms of classic constitutional theory, many of them look like administrative organs lacking any or, at least, any mature, legislature and any, or at least, any independent, courts. This helps to explain

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[158] *See generally* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW (3d ed. 2015).

[159] INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY (Richard Collins et al. eds., 1st ed. 2011); Fernando Lusa Bordin, THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (2019).

the emergence of the concept of "global administrative law" as a conceptual framework for thinking about allocation and control of the power of such international organisations.[160] Global administrative lawyers are concerned with legitimising the exercise of administrative power by international organisations by disciplining it in the name of established values found in domestic administrative law, such as transparency, participation and reason-giving.[161] Nevertheless, many international organisations perform legislative and judicial as well as administrative functions, and this has encouraged some scholars to think about and assess international organisations in terms of the legitimating tropes of constitutional law, such as "democracy," "rule of law," and "human rights."[162] Also, even though the European Union is a treaty-based organisation, there is a lively debate about whether it is best understood in administrative or constitutional terms.[163]

The basic point to draw from this brief discussion is that political practices and the exercise of political power within nation-states (framed by domestic, constitutional and administrative law) are increasingly affected by exercises of power not only between nation-states ("internationally") but also "above" or "beyond" the nation-state ("supranationally"—a term applied to the European Union, for instance), and in juristic spaces between nation-states ("transnationally"). For instance, there is good reason to think that one of the triggers of populism in some countries has been the increasing impact on the traditional "sovereignty" of the nation-state[164] of supranational and

[160] For a recent assessment see generally *Symposium, Global Administrative Law*, 13 INT'L J. CONST. L. 463 (2015).

[161] *See, e.g.*, Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 214 (2006).

[162] *See generally* Andreas L. Paulus, *The International Legal System as a Constitution*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (2009); Mattias Kumm, *On the History and Theory of Global Constitutionalism*, *in* GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 173 (2018) ("at the heart of a global constitutionalist account of international law are certain principles drawn from the eighteenth-century tradition of the American and French revolutions"). For discussion of the relationship between the constitutional and administrative approaches in the global context see Ming Sung Kuo, *On the Constitutional Question in Global Governance*, 2 GLOBAL CONSTITUTIONALISM 437, 437–68 (2013); Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, *in* THE TWILIGHT OF CONSTITUTIONALISM (2010); Danielle Hanna Rached, *Doomed Aspiration of Pure Instrumentality*, 3 GLOBAL CONSTITUTIONALISM 338, 338–72 (2014).

[163] For a leading administrative interpretation see, Peter L. Lindseth, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION STATE (2010); *What's in a Label? The EU as 'Administrative' and 'Constitutional'*, *in* COMPARATIVE ADMINISTRATIVE LAW, *supra* note 103, at 680–98; *see also*, A.H. BIRCH, *supra* note 88. For a discussion of the idea and practice of an EU Constitution see Jean-Claude Piris, *Does the European Union have a Constitution? Does it Need One?*, THE JEAN MONNET CENTER FOR INT'L AND REG. ECON. & L. JUST., https://jeanmonnetprogram.org/archive/papers/00/000501.html; *see also The European Union Constitution*, CIDEL PROJECT, http://www.proyectos.cchs.csic.es/euroconstitution/Home.htm (last visited Jan. 26, 2018).

[164] Its relationships with its citizens on the one hand, and other nation-states on the other.

transnational centres, sites, and exercises of power. One scholarly reaction to such developments is to create new legal categories such as European Union Law or the Law of International Organizations, more-or-less distinct from domestic public law. However, this tactic is unsatisfactory if we take seriously the idea, with which this article started, that public law provides a holistic normative framework for the exercise of political power.

Putting the point bluntly, classic constitutional and administrative law and theory, being focused on the political practices of the nation-state, lack the resources to understand and explain nation-state politics in a globalised world. Under the classical model, foreign affairs beyond the borders of the nation-state are, basically, a matter for the unilateral discretion of the repository of domestic executive power. This approach was developed in and suited for a world that no longer exists. Understanding why that is so requires us to cast our gaze way beyond domestic politics.

Elsewhere, I have argued that the approach outlined earlier, that organises public law around two parameters: concentration and diffusion of power in the allocation of power, and control by checks and balances and accountability—can also be fruitfully applied to supranational and transnational sites of power.[165] Space does not permit elaboration here.

XI. CONSTITUTIONALISING ADMINISTRATIVE LAW

One way of telling the historical story on which this paper is based is as follows. In medieval England, all the main powers and functions of government were concentrated in the hands of the sovereign monarch. In the seventeenth century, the monarch was stripped of personal legislative power and "sovereignty" passed to the legislature. At the same time, the monarch was also stripped of personal adjudicative power, which was invested in "independent" courts ultimately subject, and answerable, to the legislature. The monarch was left with executive (and administrative) power. Upon the foundation of the United States, sovereignty in that system was moved outside government and located in the people. Legislative power was conferred on the legislature, judicial power on the judiciary and executive (and administrative) power on the president. However, as Frederick Port observed in 1929, by the early twentieth century, much legislative power had shifted back from the

[165] Peter Cane, *A Framework for Historical Comparison of Control of National, Supranational, and Transnational Public Power*, *in* COMPARATIVE ADMINISTRATIVE LAW, *supra* note 103, at 36.

legislature, and much adjudicatory power had shifted back from the courts, to the monarch's successor, the president in the U.S. system and the Prime Minister and Cabinet in the English system.[166] In other words, the diffusion of power brought about by the English Revolution was significantly reversed, resulting in greater concentration of power in the executive than had been the case for several centuries. From this perspective, the period on which modern constitutionalism was born was one of "constitutional exception" characterised by relatively strong legislatures and relatively weak executives. Diffusion of power—separation of institutions and functions—was the preferred eighteenth-century mechanism for reducing and controlling the power of the executive. The question raised by the re-concentration of power in one institution was how to control that power by means other than separation.

The invention of administrative law may be understood as providing an answer to that question. Whereas institutional design (separation of institutions and diffusion of power and functions) was the main constitutional-law tool for limiting and controlling executive power, the main administrative-law tool was retrospective "accountability" for the exercise of executive and administrative power to institutions outside of, and in that sense, independent of, the executive (the legislature and the courts), and to institutions located within the executive branch (such as tribunals and ALJs) protected by some form of Chinese Wall designed to give them a measure of independence from those required to account to them. Typically, administrative-law mechanisms (such as judicial review of administrative action) lacked the constitutional status of institutional design principles. This put administrative law at a relative juridical disadvantage because it lacked the "higher law" status that was accorded to institutional design principles under classical constitutional theory. Even in the English system where constitutional law lacked this higher-law status, administrative law was conceptualised as the younger and weaker sibling of constitutional law.

Post-WWII decolonialisation and the consequent creation of a large number of new nation-states based on regimes varying all the way from liberal democracy to party socialism,[167] the processes of globalisation charted in the previous section, and growing disenchantment with representative democracy

[166] F.S. PORT, ADMINISTRATIVE LAW 327–28 (1929).

[167] For more on the socialist constitutionalism see, e.g., Baogang He, *Socialist Constitutionalism in Contemporary China*, *in* CONSTITUTIONALISM BEYOND LIBERALISM 176 (Michael W. Dowdle, et al. eds., 2017); *see also* Hualing Fu et. al., SOCIALIST LAW IN SOCIALIST EAST ASIA (2018) (primarily chapters 6, 7 & 8).

have added urgency to the question of how best to control executive power and its pathologies, such as populism. Two techniques have already been discussed: fundamental human rights and global administrative law.

A. Administrative Separation of Powers

Another suggested technique for controlling executive power is what Jon Michaels has dubbed "a new, administrative separation of powers."[168] His idea is to analyse the operation of U.S. administrative agencies in tripartite terms, but instead of the three interacting elements being a legislature, an executive, and a judiciary, they would be politically-appointed agency heads, politically-insulated civil servants, and members of the public (through their participation in agency proceedings). The role of the legislature, the executive, and the judiciary would be to preserve a "well-functioning, rivalrous administrative separation of powers" under which the three elements of the agency would check and balance each other.[169]

This is an ingenious suggestion in the context of the U.S. system of governance. It recognises the importance of bureaucratic power and sets it in formal competition with executive power. It also provides citizens with a means, other than the ballot box, for exerting influence on government. To this extent, it formally recognises popular participation and democracy as forms of self-government in a way that the Founders certainly did not. It reinterprets classic constitutional theory in the light of the growth of the administrative state. However, it is not obvious that Michaels' approach takes us very far towards reinventing the classical model of public law to address phenomena such as executive primacy, populism and globalisation. Its utility is also limited by the way it constructs the relationship between the executive and the bureaucracy, which is very different in the United Kingdom, for instance, from what it is in the United States.[170]

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[168] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 515–597 (2015); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y. U. L. REV. 227, 227–91 (2016) [hereinafter OF CONSTITUTIONAL CUSTODIANS]. Michaels's ideas should not be confused with those of Bruce Ackerman. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 633–729 (2000). Ackerman was interested in re-calibrating the relationships amongst the traditional three branches—legislature, executive and judiciary—not within the executive. For a more general study of separation between elected executives and appointed bureaucrats see CARL DAHLSTRÖM & VICTOR LAPUENTE, ORGANIZING LEVIATHAN: POLITICIANS, BUREAUCRATS AND THE MAKING OF GOOD GOVERNMENT (2018).

[169] Michaels, OF CONSTITUTIONAL CUSTODIANS, *supra* note 168, at 256.

[170] CANE, *Controlling Administrative Power*, *supra* note 6, at 91–94. The articles by Bernstein and Terada in this Symposium are relevant here. Bernstein, *supra* note 118; Terada, *supra* note 118.

B. Constitutionalisation of Administrative Law

A fourth technique used to modify the traditional models in light of changes in government and politics, in the past two centuries and more, is to insert more provisions into a codified Constitution that deal with the executive branch than are found in the U.S. Constitution, for instance. A good example of such an approach is the 1996 Constitution of the Republic of South Africa.

In certain respects, the South African Constitution is a very contemporary document. In addition to providing in separate chapters for a national legislature, national executive, and judiciary, it deals at length with each of the three levels of government: national, provincial, and local. It also provides for a constitutional court as well as a national high court and court of appeal. It specifies in some detail the powers of constitutional courts, and it provides frameworks for public administration and the security services, including the armed forces and the police. It makes brief provision concerning the status of treaties and customary international law. It has a separate chapter (Chapter 10) entitled "Public Administration," which sets out "basic values and principles governing public administration" and creates a Public Service Commission accountable to the National Assembly, and it recognises the existence of political parties.[171]

For present purposes, the most noteworthy provisions are: sections 32, 33 and 34 in Chapter 2: Bill of Rights; sections 55(2) and 173; and Chapter 9.[172] Section 32 creates a constitutional right of access to information held by the government;[173] and section 34 creates a right of access to a court or other "independent and impartial tribunal or forum" for the resolution of legal disputes.[174] Section 33 creates a right "to administrative action that is lawful, reasonable and procedurally fair," and provides that "everyone whose rights have adversely affected by administrative action has a right to be given written reasons."[175] The duty to give effect to these rights is laid on the national legislature, which must "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal" and

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[171] *See, e.g.*, S. AFR. CONST. (1996).

[172] Cora Hoexter, *The Constitutionalization and Codification of Judicial Review in South Africa*, *in* EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNMENT (2010).

[173] S. AFR. CONST., *supra* note 171, at ch. 2 § 32.

[174] *Id.* at ch. 2 § 34.

[175] *Id.* at ch. 2 § 33.

"promote and efficient administration."[176] Section 173, headed "Inherent Power," empowers the national courts (amongst other things) "to develop the common law, taking into account the interests of justice."[177]

The aggregate effect of these provisions is to give citizens a constitutional guarantee of lawful, reasonable, and procedurally fair treatment by the administration, a right to reasons, and a guarantee that legislation will be enacted to provide for access to a court or tribunal for review of administrative action. The constitution also empowers the courts to elaborate these guarantees in common law. Thus, the Constitution establishes three sources of "administrative law": the Constitution itself, statutory law, and common law. The Constitution prevails over statutory and common law (Section s 1(c) and 2), and (applying the fundamental, unwritten constitutional principle implicit in Section 1: "The Republic of South Africa is a democratic state founded . . . on the rule of law") statute prevails over common law. Nevertheless, the co-existence of three sources of law has been described by a leading scholar as a "mistake."[178]

Section 55(2) requires the National Assembly to "provide for mechanisms (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state."[179]

Chapter 9 is entitled "State Institutions Supporting Constitutional Democracy."[180] It establishes six institutions including a Public Protector, an Auditor General and an Electoral Commission.[181] These institutions, says section 181(2), are "independent . . . and they must be impartial and must exercise their functions and perform their powers without fear, favour or prejudice."[182] They are accountable to the National Assembly (s 181(5)).[183]

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[176] *Id*.

[177] *Id.* at ch. 2 § 173.

[178] Cara Hoexter, *Administrative Justice in Kenya: Learning from South Africa's Mistakes*, 62 J. AFRICAN L. 105, 105–28 (2018). Similar concerns have been raised in India: Raeesa Vakil, *Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights*, 16 INT'L J. CONST. L. 475, 475–502 (2018).

[179] S. AFR. CONST., *supra* note 171, at ch. 2 § 55(2).

[180] *Id.* at ch. 9.

[181] *Id*.

[182] *Id.* at ch. 9 § 181(5).

[183] *Id*.

The institutions established by Chapter 9 have been called "hybrid institutions."[184] This name indicates that they share with courts the characteristic of "independence" even though they do not perform traditionally judicial functions. Their role, it has been said, is not to enforce the law against government but rather to ensure that government acts with "integrity." Integrity is a much broader concept than legality: acting illegally is a form of acting without integrity, but there may be many other forms including, for instance, inefficiency, ineffectiveness, "maladministration" and incivility.

Some scholars have suggested that such non-judicial, integrity-promoting-and-protecting institutions should be conceptualised as constituting an "integrity branch" of government,[185] sitting alongside the judicial branch and concerned particularly with integrity in public administration. Proliferation of such institutions in the second half of the twentieth century and consequent diversion of attention away from judicial review to non-judicial review of administrative action, has been more common in parliamentary regimes than in presidential systems.[186] These developments may be explained as products of transformations and reinterpretations of the maxi-state undertaken since the 1980s to satisfy neo-liberal, economic and political principles and aspirations, expressed in ideas and initiatives such as "new public management" (NPM) and "third-party government."[187]

If we think of a constitution as expressing a polity's deepest and most enduring values and commitments, constitutionalisation of such institutional innovations signals a belief that they are of fundamental social and political importance. More generally, the South African Constitution traces at least some of the changes discussed in this paper. However, it is, as yet, hard to find constitutional updating reflected in scholarly theorising about public law in ways that would be necessary to provide sound legal and constitutional

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[184] Charles M. Fombad, *The Role of Emerging Hybrid Institutions of Accountability in the Separation of Power Scheme in Africa*, in SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM 314–34 (2016); Charles M. Fombad, *The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism*, *in* CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE (2018).

[185] *E.g.*, John McMillan, *The Ombudsman and the Rule of Law*, 44 AUSTL. INST. ADMIN. L. FORUM 1, 1 (2005); W.M.C. Gummow, *A Fourth Branch of Government?*, 70 AUSTL. INST. ADMIN. L. FORUM 19, 19–25 (2012); Chris Field, *The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability*, 72 AUSTL. INST. ADMIN. L. FORUM 24, 24–32 (2013).

[186] For instance, there is no national ombudsman in the United States: Cane, *supra* note 6, at 187–89.

[187] *Id.* at 437–74.

accounts of contemporary phenomena such as modern executive primacy and populism. As yet, we lack theoretical foundations for modifying constitutional design to meet challenges to liberty and equality presented by such phenomena.

XII. CONCLUSION

In the early eighteenth century, a French aristocrat visited England and, later, composed a stylised and idealised account of what he had seen. The account was driven by a then-very-widespread aspiration to promote individual liberty[188] and by the author's desire to strengthen the French aristocracy against the French monarchy by turning a system of "absolute" monarchical power into an aristocratic republic. Montesquieu's analysis of the English system caught the imagination of the right people at the right time. More than two centuries later, it still provides the mainframe for constitutional and public law thought despite the fact that practices of politics have changed radically in the past three hundred years, as have our aspirations for and expectations of government and governance. This article has aimed to track such changes and to analyse their impact on and implications for constitutional law and theory. Put bluntly, the argument has been that, the foundations of constitutional law and theory, having been laid in a period of constitutional exception, no longer fit the world they serve to frame.

Imagine, if you can, that you are a twenty-first-century Montesquieu. The universal value is no longer liberty as such, but democratic liberty, which has a good dose of equality thrown in. No longer is there only one polity in the world that espouses liberal democracy as its foundational value. Choose a system that, in your mind, is best designed to realise your ideal of liberal democracy. Observe and describe that system. Next, explain why you think your chosen system is the best-designed to realise your ideal of liberal democracy by comparing it with other systems. What are the features of the system that give it the edge in promoting liberal democracy?

Lastly, attempt to fit your picture into the classical public-law frame without resorting to drastic Procrustean expedients (please forgive the mixing

[188] Understood similarly to the first limb of Dicey's late-nineteenth-century "rule of law": no penalty without breach of the law: DICEY, *supra* note 106, at 119.

of metaphors).[189] In case of failure, try to design a frame (or a bed) into which your picture will fit. Good luck!

[189] In the Greek myth, Procrustes removed people's limbs in order to make them fit into his bed. Hence the term "Procrustean bed."