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Re-Thinking Executive Control of and Accountability for the Agency

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Re-Thinking Executive Control of and Accountability for the Agency

Abstract

The organization of many Western governments has undergone dramatic structural and procedural changes over the past century. A large portion of public administration previously done by departments within a more centralized structure of government has been shifted to administrative units, often referred to as “agencies” that fall outside the constitutional core—an “agencified” model. This article investigates the historical contexts and legal developments associated with these changes and illuminates how “agencification” has altered the balance between executive control powers and executive accountability obligations. It examines how the organizational changes have been addressed in both the responsible government models of the United Kingdom, Canada, and Australia, and the republican presidential model of the United States. The article identifies a separation of accountability and control by the executive through its use of the agency and draws conclusions with implications for constitutional law, political theory, and practice.

Keywords

Administrative agencies; Separation of powers; Government accountability

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Re-Thinking Executive Control of and Accountability for the Agency

BENEDICT SHEEHY & DONALD FEAVER*

The organization of many Western governments has undergone dramatic structural and procedural changes over the past century. A large portion of public administration previously done by departments within a more centralized structure of government has been shifted to administrative units, often referred to as “agencies” that fall outside the constitutional core—an “agencified” model. This article investigates the historical contexts and legal developments associated with these changes and illuminates how “agencification” has altered the balance between executive control powers and executive accountability obligations. It examines how the organizational changes have been addressed in both the responsible government models of the United Kingdom, Canada, and Australia, and the republican presidential model of the United States. The article identifies a separation of accountability and control by the executive through its use of the agency and draws conclusions with implications for constitutional law, political theory, and practice.

L'organisation de nombreux gouvernements occidentaux a subi des changements structureaux et procéduriers spectaculaires depuis un siècle. Une partie importante de l'administration publique, qui revenait jadis aux ministères d'un gouvernement de structure plus centralisée, est aujourd'hui accomplie par des unités administratives indépendantes du noyau constitutionnel et souvent connues sous le nom d'« organismes publics ». Cet article enquête sur le contexte historique et l'évolution juridique associés à ces changements et met en lumière la manière dont l'apparition de ces organismes a perturbé l'équilibre entre le contrôle par le pouvoir exécutif et la responsabilité de ce même pouvoir exécutif. Il examine la manière dont les changements organisationnels ont été abordés tant par les gouvernements responsables du Royaume-Uni, du Canada et de l'Australie que par le régime présidentiel républicain des États-Unis. L'article identifie une distinction entre responsabilité et contrôle opérée par le pouvoir exécutif par son recours aux organismes publics et en tire

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des conclusions qui touchent le droit constitutionnel, la théorie politique et les pratiques courantes.

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THE ORGANIZATIONAL STRUCTURE OF MANY WESTERN GOVERNMENTS has undergone a dramatic change over the past century. This change first took hold with the emergence of the “administrative state” in the United States in the 1930s, followed in more recent decades by the rise of the “regulatory state” in many Organisation for Economic Co-operation and Development (OECD) countries.¹ The structural feature common to both the administrative and the regulatory states is the increasing number of public administrative bodies—referred to in this article as “agencies”—that have been created and situated outside the constitutionally prescribed administrative core of government.²

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1. See Donald Feaver & Benedict Sheehy, “The Political Division of Regulatory Labour: A Legal Theory of Agency Selection” (2015) 35:1 Oxford J Leg Stud 153 at 157 [Feaver & Sheehy, “The Political Division of Regulatory Labour”].
 2. See *ibid*; Donald Feaver & Benedict Sheehy, “The Shifting Balance of Power in the Regulatory State: Structure, Strategy, and the Division of Labour” (2014) 41:2 JL & Soc’y 203 [Feaver & Sheehy, “The Shifting Balance”]; Roger Wettenthal, “Agencies and Non-Departmental Public Bodies: The Hard and Soft Lenses of Agencification Theory” (2005) 7:4 Pub Mgmt Rev 615 at 616.

In the Commonwealth countries of Canada, Australia, and the United Kingdom, these agencies have taken over the bulk of public administrative work that was previously done by departments embedded within the core of government.³

Although substantial literatures in political science, public administration, economics, and law focus on the agency and the agencification of government, a deficit in understanding persists around the executive branch of government's control of and accountability for the administration executed by these agencies. From a constitutional law perspective, the interposition of the agency into the administration of government altered the balance of power institutionalized in the classical constitutional models. Agencification was done without attention to the founding principles of these constitutions, which sought to strike a balance between the exercise of control powers on the one hand and accountability obligations for the exercise of those powers on the other. Rather, the agency evolved organically as a solution to specific technical, economic, and logistical imperatives in distinct historical, political, and legal contexts. The constitutional balance referred to, however, not only concerns the balance of powers between the executive, legislative, and judicial branches of government. It also refers to a balancing of powers between the agency and the executive. Thus, instead of a balanced model informing the development of the machinery or institutions

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3. See Harold Seidman & Robert Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State*, 4th ed (New York: Oxford University Press, 1986); Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (London: Harvard University Press, 1990); Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); Richard H Pildes & Cass R Sunstein, "Reinventing the Regulatory State" (1995) 62:1 U Chicago L Rev 1; Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996); Martin Loughlin & Colin Scott, "The Regulatory State" in Patrick Dunleavy et al, eds, *Developments in British Politics 5* (Hampshire, UK: Macmillan Press, 1997) 205; Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54:1 *Current Leg Probs* 103; Michael Moran, "Review Article: Understanding the Regulatory State" (2002) 32:2 *British J Political Science* 391; Jacint Jordana & David Levi-Faur, "The Politics of Regulation in the Age of Governance" in Jacint Jordana & David Levi-Faur, eds, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, UK: Edward Elgar, 2004); David Levi-Faur, "The Global Diffusion of Regulatory Capitalism" (2005) 598:1 *ANNALS American Academy Political & Social Science* 12; Karen Yeung, "The Regulatory State" in Robert Baldwin, Martin Cave & Martin Lodge, eds, *Oxford Handbook of Regulation* (New York: Oxford University Press, 2010) 64.

of government, the agencified model has been described as a network of bodies, each separated from the core of government to varying degrees.⁴

Within the foregoing context, this article investigates how the changed structure of government in the regulatory state, the hallmark of which is the agency, altered the balance between executive control of and accountability for the administrative arm of government. Canadian administrative law scholar, John Willis, presaged this problem some eight decades ago.⁵ The article asks how agencification has affected the balance of power between the three constitutionally defined branches of government, and how it has impacted the accountability relationship between elected officials and the electorate.

In summary, the administrative and regulatory state's agencified model of government treats control and accountability as separate and distinct issues rather than as mutual and interdependent power relations. The outcome is a structural separation of control power and accountability obligations that undermines the constitutional balance of powers—a formula of “equilibrated powers”⁶ underlying both the classical responsible government and presidential republican constitutional models. Unsurprisingly, this separation of accountability and control has led to a variety of issues with respect to agency control and accountability, which have spawned a literature of their own. We argue, however, that the agency is not at the core of the problem. In fact, scholars acknowledge that a strict separation of powers doctrine has posed an insurmountable obstacle to the effective administration of governments since at least the mid-nineteenth century.⁷ It may be argued from this perspective that a great amount of the research on agency autonomy or independence and accountability misses the point. The point, as argued in this article, is the level of accountability of the executive for the exercise of its control over agencies. In brief, the research to

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4. See Organisation for Economic Co-operation and Development, *Distributed Public Governance: Agencies, Authorities and Other Government Bodies* (Paris: OECD, 2002); Sol Picciotto, “Regulatory Networks and Global Governance” (2006) [unpublished, archived at University of London Institute of Advanced Legal Studies]; Anne-Marie Slaughter, “The Accountability of Government Networks” (2001) 8:2 *Ind J Global Leg Stud* 347.
 5. See “Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional” (1935) 1:1 *UTLJ* 53 at 59. Willis writes, “The practical problem is how to fit into our constitutional structure these new institutions whose growth seems inevitable.”
 6. See Justice Scalia's dissent in *Morrison v Olson*, 487 US 654 at 2625, 108 S Ct 2597 (1988).
 7. In the United States, see *e.g.* Candace H Beckett, “Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government” (1988) 29:3 *Wm & Mary L Rev* 635 at 635-36. In the United Kingdom, see criticisms of Dicey glossing over the issue in Arthurs' article. See HW Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 *Osgoode Hall LJ* 1 at 6 [Arthurs].

date has left a significant gap with respect to accountability and control of the executive branch of government in relation to its control over the agencies, and it is this gap that the article seeks to address.

Perhaps the main reason for this gap is the myth or misconception that agencies are somehow autonomous—*i.e.*, free to a greater or lesser degree of executive control. We argue to the contrary: Agency autonomy is limited and agencies are subject to extensive executive control. Indeed, we demonstrate that although the agency is a post-constitutional part of government, it has been integrated into government by the judiciary and legislature—albeit on an ad hoc basis over a period of decades. This ad hoc integration, however, has had unforeseen consequences and in part, has led to the creation of a disequilibrium between the executive's legal and political powers to control agency action on the one hand, and accountability for its exercise of these control powers on the other. While initially the balance appears to have been overlooked, whether the balance has been neglected by design or inadvertence under the current agencified model is a separate matter not addressed in this article.⁸ What we do argue, however, is that the post-constitutional ad hoc integration of the agency and its increased use in the regulatory state has empowered the executive because the integration process ignored the substantive foundational principles of constitutional design that sought to balance control powers with accountability obligations.

As noted, the agency was the product of ad hoc pragmatics and evolution rather than an integral part of the institutional design of government. Unsurprisingly, its connection to the institutions of government and the consequences for balanced governance powers were neglected in its creation and on-going use. The constitutions establishing the governance institutions of the various jurisdictions considered in this article (the United Kingdom, United States, Canada, and Australia) were created upon consideration of the various issues and risks associated with governance—namely power, tyranny, and accountability. In the process different models were advanced and thoroughly tested in debate and practice. By contrast, the agency appeared simply as an ad hoc, pragmatic solution. These different development processes have had significant implications for the ongoing implementation of first principles of governance, from issues such as rule of law and procedural fairness to matters of balance of powers among the governing institutions that make up the three branches of government.

This article addresses the foregoing issues using a conceptual framework or paradigm⁹ that does not address contemporary concerns of practice the way

8. We have argued this in Feaver & Sheehy, "The Shifting Balance," *supra* note 2.

9. See Willis, *supra* note 5.

public administration or political science does. Rather, following legal and historical analysis, it highlights the conceptual gaps and inconsistencies and links those gaps and inconsistencies to contemporary issues, among other things.

The article is divided into six parts. Part I of the article examines the ideas and problems of control and accountability and then lays out the background of the overall problem of the separation of accountability and control. The second part provides a historically informed account of constitutional design, explicating how control and accountability of the executive branch of government were intertwined in two distinct classical models: the Commonwealth responsible government model and the American presidential republican model.

The third part of the article examines the rise of the agency in the United States, the United Kingdom, Canada, and Australia. Although the constitutional structure of government is different in each country, there are clear common patterns. Most importantly, the executive exercise of its authority to control agencies under the agencified model is treated as separate from executive accountability. This argument is put forward in depth in relation to the republican and responsible government models in the fourth and fifth parts, respectively. The final part of the article provides a synthesis of the discussion, showing that the separation of control and accountability found in the agencified model explains the rise of the increasingly empowered—but increasingly unaccountable—executive.

I. CONTROL, ACCOUNTABILITY AND THE STRUCTURE OF GOVERNMENT

Western political history, from ancient times to the present, is marked by the conflict between those who assert a right to exercise power and those who struggle to hold those who exercise power accountable for its use and abuse. The tension between these competing demands in the Anglo context extends well back in history, to before the signing of the *Magna Carta* and the *Acts of*

Settlement.¹⁰ To the extent that the struggle ever achieved any semblance of balance, it can be argued that such balance occurred in the late eighteenth and early nineteenth centuries in the constitutional institutions embodied in the responsible and republican models of government of that era (together referred to as the “classical models”).¹¹ In these models, the balance between control and accountability is evident in both the structures of government they establish and in the distribution and allocation of rights and duties within those structures.

The balance is manifest in the intricate combination of political norms and conventions with the legal doctrines that comprise constitutional law and bear upon its interpretation.¹² In fact, the two classical models achieve a functional balance between control powers and accountability obligations¹³ through such a subtle weaving of legal and political norms that it is easy to overlook how this balance acted as the foundation of both of these models.¹⁴ The argument is not a nostalgic view of some long gone golden era. Rather, it is that the design of the institutions of government of that era was more suited to their time. These institutions became constitutions that were overtaken by events leading to the issues that are the topic of this article. Before turning to these structures, however, an examination of the terms “accountability” and “control” must be undertaken. Clearly, the meanings of both accountability and control depend

10. The Anglo context refers to the Commonwealth countries and the United States. See George H Sabine & Thomas Landon Thorson, *A History of Political Theory*, 4th ed (Hinsdale, Ill: Dryden Press, 1973) at 484. Sabine & Thorson observe that:

The medieval tradition that reached Locke through Hooker, . . . held that government—the king specifically but not less parliament itself and every political agency—is responsible to the people or the community which it governs; its power is limited both by moral law and by the constitutional traditions and conventions inherent in the history of the realm.

See also Willis, *supra* note 5.

11. See David Held, *Models of Democracy*, 3d ed (Stanford: Polity Press, 2006). Held provides a description of the structural characteristics of the different models of democratic governments.
12. See Geoffrey Marshall & Graeme C Moodie, *Some Problems of the Constitution*, 5th ed (London, UK: Hutchinson University Library, 1971); Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (New York: Oxford University Press, 1984).
13. We are not arguing that the balance is perfect in a proportional sense but simply that some functional balance exists.
14. See Steven G Calabresi & Kevin H Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary” (1992) 105:6 Harv L Rev 1153; Robert J Jr Pushaw, “The Inherent Powers of Federal Courts and the Structural Constitution” (2001) 86:3 Iowa L Rev 735; Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can Bar Rev 67.

not only on the context but also on the disciplinary approach, and some review of the terms is merited.

A. CONSIDERING CONTROL

The term “control” is used in disciplines ranging from computing and policing to accounting, psychology, and corporate law. A broad, helpful definition of control, connecting it to power, comes from both the political and legal literatures. In the political context, Robert A Dahl explains the observation and measurement of power as: (1) control over resources, (2) control over actors, and (3) control over events and outcomes.¹⁵ In other words, control is the exercise of power. Similarly, at law, control is a term used to denote power and its exercise.¹⁶ In the context of control in administrative law, Jerry L Mashaw states, “By ‘control’ is meant both the formal power to shape agency decision process and the use of that power to exclude procedural control by others.”¹⁷ In the context of this article, control is the ability to have an agency act in a way that suits the executive’s agenda. We turn next to examine the concept of accountability.

B. CONSIDERING ACCOUNTABILITY

Accountability is such a broad theme in a range of literatures across law, public management, economics, and political science that Oxford has recently published edited volumes on the topic. Indeed, the editors of the Oxford Handbook of Public Accountability assert, “Accountability is the buzzword of modern governance” and the subject of a burgeoning literature.¹⁸ The term accountability is used in a wide variety of contexts with a range of meanings usually related to the purpose for which it is either sought or avoided.¹⁹

At a high level of abstraction, Kevin Kearns describes accountability as “[an] environment ... a constellation of forces—legal, political sociocultural, and economic—that place pressure on organizations and the people who work

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15. “The Concept of Power” (1957) 2:3 *Systems Research & Behavioral Science* 201. See also Talcott Parsons, *Structure and Process in Modern Societies* (Glencoe, Ill: The Free Press, 1960).
 16. See Andrew Halpin, “The Concept of a Legal Power” (1996) 16:1 *Oxford J Leg Stud* 129.
 17. “Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development” (1990) 6 *JL Econ & Org* 267 at 288.
 18. Mark Bovens, Robert E Goodin & Thomas Schillemans (New York: Oxford University Press, 2014) at 1 [Bovens, *Oxford Handbook*].
 19. See Benedict Cornelius Sheehy, *Regulating the University: Examining the Regulatory Framework of Australian University Corporations* (PhD Thesis, Australian National University, 2010) at 88-102 [unpublished], online: <openresearch-repository.anu.edu.au/handle/1885/8954>.

in them to engage in certain activities and refrain from engaging in others.”²⁰ In other words, Kearns identifies accountability as the regulation of the activities or behaviour of people and organizations. This article focuses on the behaviour of the executive branch of government and regulating it by putting legal and political pressure on it. As Robert D Behn observes, “For the highest officials... we impose accountability through an elaborate constitutional system of checks and balances—including periodic elections.”²¹ Simply put, the ultimate and perhaps core accountability institution and mechanism for the executive in representative democracies is electoral. Yet, as we argue in this article, the design and use of the agency impairs this accountability mechanism by obscuring the legal and political connection between the executive and the agency.

Certainly, conceptions and practices of accountability by and for agencies have changed over time and vary across jurisdictions in Britain, North America, and Australia.²² The work of leading public administration scholars on the development and operation of agencies within and across jurisdictions provides a realism that may elude legal scholars who engage in higher-level constitutional law analysis. Neither realism nor abstraction is unimportant. Rather, when placed side by side and synthesized, they provide a much more powerful lens through which to understand government, its issues, and its processes.

For purposes of this article, we draw the following definition of accountability from the public administration and political science scholars’ use of the term²³: “accountability” means public accountability of the executive branch of government, within the institutions of representative democracies and ultimately to the electorate, for its use of power in the administration of the public good by way of the agency form. We turn next to consider a technical legal definition of the term.

20. *Managing for Accountability: Preserving the Public Trust in Public and Nonprofit Organizations* (San Francisco: Jossey-Bass, 1996) at 29 [Kearns].

21. *Rethinking Democratic Accountability* (Washington, DC: Brookings Institution Press, 2001) at 6.

22. See G Bruce Doern & Stephen Wilks, *Changing Regulatory Institutions in Britain and North America* (Toronto: University of Toronto Press, 1998). Note the challenges for agency and administrative law analysis that the differences create. See also Arthurs, *supra* note 7 at 2-3.

23. See Bovens, *Oxford Handbook*, *supra* note 18 at 5-6.

C. ACCOUNTABILITY AT LAW

At law, accountability can be defined as “the obligation to explain and justify conduct.”²⁴ Thus, accountability is not an arbitrarily imposed obligation to explain or justify some decision, act, or phenomenon. Rather, the concept of accountability is inherently linked with the concept of obligation. An accountability is an obligation. In the agency context, for example, Mark Considine states, “[A]ccountability is defined as the legal obligation ... that agencies obey those in the line of authority above them.”²⁵ The understanding of accountability as an obligation or duty is critical for this article as the core argument is that the executive is only weakly accountable for the direction of the state by shielding itself from accountability through the use of agencies.

Accountability as a fundamental principle of the legal system creates the basic constitutional-administrative law issue of executive accountability for agency action. The issue with the traditional narrow legal definition, however, is that it fails to consider alternative forms and systems of accountability and control that link agency action, government, and the electorate—a weakness we argue that has been exploited by the executive. Thus, even though the academic discipline of law accepts broader conceptions of accountability to include a “family” of accountability paths,²⁶ the conservative nature of law as an institution is slower to adapt such thinking into practice. We turn next to examine the institutional accountability practices of the Westminster and republican systems.

D. EXECUTIVE ACCOUNTABILITY IN WESTMINSTER AND REPUBLICAN SYSTEMS

The term “executive accountability” in both Westminster’s responsible government and republican systems refers ultimately to some form of democratic accountability.²⁷ It ranges from a narrow or strict responsibility to explain or justify actions to legislators in some official forum, whether that be Parliament,

24. Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13:4 *Eur LJ* 447 at 450.

25. “The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services” (2002) 15:1 *Governance* 21 at 21.

26. See Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Edmond Montgomery Publications, 2008) 78 at 112.

27. See G Bruce Doern, “Approaches to Managing Interdependence among Regulatory Regimes in Canada, the United Kingdom, and the United States” in G Bruce Doern & Stephen Wilks, eds, *Changing Regulatory Institutions in Britain and North America* (Toronto: University of Toronto Press, 1998) 263 at 266 [Doern, “Approaches to Managing”].

Congress, or some committee, or the requirement to explain or justify to an interested voting public with a stake in an issue,²⁸ to the electorate generally, or to some broadly conceived public good.²⁹

The Westminster³⁰ and republican traditions developed differently and, as a consequence, have configured accountability structures and processes somewhat differently. Donald J Savoie describes the history of the Westminster model as “a story of the struggle for power between the king and Parliament, then between Parliament and the executive.”³¹ He continues, “Some would argue that the struggle has recently been extended to ministers and public servants.”³² The Westminster system itself struggles to control the executive in a majority government, which has been described as an “elective dictatorship.”³³ Democratic accountability in this system relies primarily on the convention of ministerial responsibility³⁴, despite the well-known fact that it is impossible for ministers to be knowledgeable about the full range of activities of their departments.³⁵ The substantive object of this protracted struggle was the sovereign power to rule. The outcome ensconced power in an amorphous, unwritten constitution and embodied that power in an empowered individual minister, the prime minister and in the institution of parliament—particularly as evidenced in the doctrine of parliamentary sovereignty.³⁶

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28. This is the model of regulatory accountability used to power Ayres and Braithwaite’s Tripartite model. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 54-60.
29. In Willis’s era, the public interest in US jurisprudence was in such clear focus that he was able to write: “the ultimate deciding factor is always what the public interest requires.” Willis, *supra* note 5 at 72.
30. Of course, “Westminster” itself is not a simple or singular concept across the jurisdictions where it is found. See *e.g.* R A W Rhodes, John Wanna & Patrick Weller, *Comparing Westminster* (Oxford: Oxford University Press, 2009) [Rhodes, *Comparing Westminster*]. The use of the term here refers to a Parliament with effectively unified executive and legislative branches and the institution of ministerial responsibility.
31. Court Government and the Collapse of Accountability in Canada and the United Kingdom (Toronto: University of Toronto Press, 2008) at 25.
32. *Ibid.*
33. David Hamer, *Can Responsible Government Survive In Australia?*, 2d ed (Canberra, Austl: The Department of the Senate, Canberra, 1994) at 344..
34. Savoie, *supra* note 31 at 32.
35. It was clear even at the time of Dicey’s writing—*i.e.*, mid-19th century—that ministers could not answer for all the activities of their departments. See G W Jones, “The Prime Minister’s Power” (1964) 18:2 Parliam Aff 167.
36. Adam Tomkins and Geoffrey Marshall discuss the UK system. See *ibid* at 41-42.

In the Canadian context, Savoie observes that there was a “widely held view in Britain that the United States was too democratic and too republican.”³⁷ The consequence was that Canada instituted an unelected Senate. A similar fear of “too much democracy” has long been an issue in the United States,³⁸ although to a lesser degree, and led to limitations on the proximity of the populace to the legislative machinery of government.³⁹ The Australian approach is an interesting hybrid modelled on the United States, establishing the three distinct branches of government in a Parliamentary democracy.⁴⁰ Indeed, Sir Owen Dixon, former Chief Justice of the High Court of Australia, stated, “[I]n most respects [Australia’s] constitution makers followed with remarkable fidelity the model of the American [Constitution] Indeed... roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions.”⁴¹

The basic difference between executive accountability in the republican and Westminster systems is that whereas the president is not answerable to congress (a representative legislative body) for the administration of government, the executive is answerable to the Parliament in the Westminster system.⁴² Rather, in the republican system, the president is directly answerable to the electorate for the administration of government. The implications of this are significant in many respects; however, in terms of implications for executive accountability for its use of the agency form in the regulatory state, the systems are very similar.

In terms of both focus and implications, the term “executive accountability” differs in responsible government and presidential republican models. In the responsible government model, the three branches of government operate more collaboratively, relatively speaking, with a small separation of powers. As a result, the focus on executive accountability is found in the institution of the opposition in parliament and specifically in question period. Ultimate ministerial accountability comes through the constitutional law convention of ministerial

37. *Supra* note 31 at 36.

38. J Allen Smith, “Recent Institutional Legislation” (1907) 4 P Am Polit Sci Assoc 141 at 141.

39. See e.g. James Madison, “Federalist No 10” in *The Federalist Papers* (1787). Madison raises the concern that direct democracy can be harmful, narrow-minded, and excessively partisan, and accordingly, is best put through a representative body.

40. See James A Thomson, “American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law” (1997) 30:3 J Marshall L Rev 627 at 640.

41. *Ibid* at 628, citing Owen Dixon, “Two Constitutions Compared” in Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Melbourne: Law Book, 1965) at 734.

42. This continuous accountability is considered to be one of the causes of the inability of Westminster Parliaments’ to effectively control their executives. See Hamer, *supra* note 33 at xvii-xviii.

resignation—an executive accountability institution undermined by the party system⁴³ and generally of contested value and currency.⁴⁴ In the contest set up by the separation of powers of the presidential republican model, executive accountability is a function of the focus of the other two branches of government on keeping the executive in check.⁴⁵

Both of these models were structured and designed to provide institutional accountability of the executive branch of government and are significantly challenged in the regulatory state. Work by Savoie examining the empowered prime minister in the responsible government model⁴⁶ and by Eskridge on the republican model,⁴⁷ identify and analyze the exacerbation of accountability issues resulting from the executives' increased use of the agency in the regulatory state. These authors argue that one consequence of the growing trend to conduct government business through agencies is a greatly empowered executive that is less accountable via traditional accountability institutions for its acts and decisions.

It is important not to overemphasize democratic accountability for executive action. As Michael Dowdle observes, “in the Anglo-American world, intellectual and political support for electoral democracy has always been decidedly mixed.”⁴⁸ In other words, democratic accountability has been only a limited feature of the systems and has been mediated in different ways. Direct democracy has been deemed undesirable while the institution of representative democracy has become the chosen path. As a result, not only has accountability of the executive for its actions been allocated to different institutions institutionally, but, in more recent times, as the need for administration has overwhelmed earlier administrative structures, the regulatory state has shifted to focus on new institutions that

43. See Rhodes, *Comparing Westminster*, *supra* note 30 at 122.

44. See Diana Woodhouse, “Ministerial Responsibility in the 1990s: When do Ministers Resign?” (1993) 46:3 *Parliam Aff* 277. For a nuanced, cross-jurisdictional examination, see Elaine Thompson & Greg Tillotsen, “Caught in the Act: The Smoking Gun View of Ministerial Responsibility” (1999) 58:1 *Aust J Pub Admin* 48.

45. See Walter Dellinger, “Appendix: The Constitutional Separation of Powers Between the President and Congress” (2000) 63:1 *L & Contemp Problems* 513.

46. *Supra* note 31 at 31.

47. See William N Eskridge, Jr & John Ferejohn, “Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State” (1992) 8:1 *JL Econ & Org* 166 at 166-67.

48. *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) at 4.

expand opportunities for accountability. This shift includes new thinking about independent accountability agencies,⁴⁹ markets,⁵⁰ and even new technologies.⁵¹

Recognizing the challenges of holding the executive in both systems to account, different solutions arose. In the United States, mid-nineteenth century reformers put hope in a professionalized bureaucracy. In the United Kingdom, that same era saw a resort to the courts as a preferred solution—a position only adopted in the United States in the 1930s.⁵² In the present era of the regulatory state, however, the ability to hold the executive to account for the agency is a matter of increasing concern. For example, a study of twenty parliaments across the United Kingdom, Canada, Australia, and New Zealand describes the situation as follows, “[C]ontrol of delegated legislation...is virtually non-existent in many of the twenty parliaments and inadequate in all of them. Parliamentary supervision of government business enterprises and other non-departmental government activities is derisory.”⁵³ Similar concern has been expressed in the United States, spawning a whole literature in law,⁵⁴ economics,⁵⁵ and political science.⁵⁶

At law, close connections exist between the terms accountability and obligation, and between power and control. In the context of the governance

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49. See John Ackerman, “Understanding Independent Accountability Agencies” in Susan Rose-Ackerman & Peter Lindseth, eds, *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010) 265.
50. See Johnston Birchall, Christopher Pollitt & Keith Putnam, *Decentralising Public Service Management* (Basingstoke, UK: Macmillan, 1998); B Guy Peters & Donald J Savoie, *Governance in a Changing Environment* (Montreal: McGill-Queen’s University Press, 1995); Benedict Sheehy, “Regulation by Markets and the Bradley Review of Australian Higher Education” (2010) 52:1 *Austl U Rev* 60.
51. See Roger Brownsword, “Code, Control, and Choice: Why East is East and West is West” (2005) 25:1 *J Legal Stud* 1.
52. See Dowdle, *supra* note 48.
53. Hamer, *supra* note 33 at xvii.
54. See Abner S Greene, “Checks and Balances in an Era of Presidential Lawmaking” (1994) 61:1 *U Chicago L Rev* 123; Neal Kumar Katyal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within” (2006) 115:9 *Yale LJ* 123; Gillian E Metzger, “The Interdependent Relationship Between Internal and External Separation of Powers” (2009) 59:2 *Emory LJ* 423.
55. The American Economic Association has a whole classification code dedicated to the issue; code D73 is used to classify scholarly literature in the field of economics that focuses on “administrative processes in public organizations.” See American Economic Association, “JEL Classification System,” online: <www.aeaweb.org/econlit/jelCodes.php?view=jel>. See also Patrick Dunleavy, *Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science* (New York: Routledge, 1991).
56. See B Dan Wood & Richard W Waterman, “The Dynamics of Political Control of the Bureaucracy” (1991) 85:3 *Am Pol Sci Rev* 801.

and legal literatures, control and accountability are frequently used together. For example, it is common to read of “the control and accountability of public body x.”⁵⁷ This phrasing raises the question of whether the terms are being used as synonyms or as representing distinct but interrelated concepts.⁵⁸ One tradition sees the two as largely unrelated, considering control as *ex ante* decision-making influence whereas accountability is *ex post* oversight.⁵⁹ In this view, one can have accountability without control and vice-versa. A second tradition sees them as related concepts on a continuum. This tradition acknowledges that accountability is itself a type of control. In Colin Scott’s words, it treats “control and accountability as linked concepts, operating on a continuum where managerial control refers to the right to *ex ante* involvement in decision-making, while accountability-based control refers to *ex post* oversight.”⁶⁰

Kearns’ definition of accountability as “an environment... a constellation of forces”⁶¹ is too broad for the purposes of this article. Accordingly, we will use the narrower legal and political meanings (*i.e.*, “the obligation to explain and justify conduct”⁶² in the contexts of the formal governance institutions). In these narrower political and legal traditions, the two concepts are treated as types or classes of norms, rules, and practices that either grant a right or impose an obligation on institutions of government and upon the public officials who work within them. These rights and obligations can be mapped both as specific legal rules and as political practices that, combined, operate as mixed formal and informal rule systems. In turn, these rule systems form the broad control and accountability systems that create the foundations of the distinct structures of both classical models of government. It is our argument that these accountability

57. Leslie Eldenburg & Ranjani Krishnan, “Management Accounting and Control in Health Care: An Economics Perspective” in Christopher S Chapman, Anthony G Hopwood & Michael D Shields, eds, *Handbook of Management Accounting*, vol 2 (Oxford: Elsevier, 2007).

58. See Colin Scott, “Accountability in the Regulatory State” (2000) 27:1 *JL & Soc’y* 38.

59. *Ibid* at 40.

60. *Ibid* at 39. See also Richard Mulgan, “Accountability Issues in the New Model of Governance” (Australian National University Working Paper No 91, 2002) online: <openresearch-repository.anu.edu.au/handle/1885/41701>. Mulgan states:

‘[A]ccountability’ is not the same as ‘regulation’ or ‘control’, which are essentially forward-looking mechanisms of influencing behaviour, whereas accountability is retrospective, inquiring into actions that have already taken place. Systems of control and regulation often include accountability mechanisms, as when people are held accountable for breaking the law or for acting unprofessionally. But they are not identical to these mechanisms (*ibid* at 3).

61. Kearns, *supra* note 20 at 65.

62. Bovens, *Oxford Handbook*, *supra* note 18 at 294.

and control systems have been separated over time, though they have been designed to function best together.

It is critical to the analysis to distinguish between two different types of control and accountability relationships. The first are the legal controls and legal accountabilities. These are set out in the positive law of the constitution. Legal control and legal accountability occur in the context of control powers or accountability obligations enshrined in law. In other words, control and accountability are considered legal when they can be enforced through the courts.⁶³ The second are the political accountability and political control of conventions and practices. This second type exists only in, and through, institutions and political networks. As will be demonstrated, legal and political are not commensurate and as between the two, political control and political accountability are less symmetrical than the legal.

Political control arises where a political actor has power to influence decisions of public bodies. Political accountability occurs through government organs, such as parliament or congress, with their related structures and processes, and ultimately by way of election. Legal control and legal accountability and related political control and political accountability were established in a historical context markedly different from the present. We turn next to consider that context.

II. HISTORICAL CONTEXT: CONTROL AND ACCOUNTABILITY IN CLASSICAL CONSTITUTIONS

The two classical models of governments, the responsible government and presidential republican models, find their roots in the eighteenth and nineteenth centuries. As noted, they provided roughly balanced levels of control and accountability but importantly, were reflective of their times.⁶⁴ A small number of ministers and officers wielded control power, limited in scope, over small populations and had specific, personal obligations to answer or account. Their power and obligation were appropriate for the relatively small administrative machinery under the control of government (the executive, legislative, and judicial branches). For example, the first Presidential Cabinet of the United

63. Although in respect of legal accountability and control, the legally correct and more precise terms are “rights” and “duties,” these terms are not used in this article. This decision was taken because in the context of constitutional law both legal and political discourses use the terms “powers” and “obligations,” as opposed to the Hohfeldian terminology of “claims” (rights) and “duties”.

64. See Willis, *supra* note 5 at 72.

States appointed by President George Washington was composed only of a Secretary of State, a Secretary of the Treasury, a Secretary of War, and an Attorney General—a size suited to administering the limited needs of a nation with less than one million voters.⁶⁵ The Cabinet of the English government, by contrast, while originally providing advice to the sovereign monarch as the Privy Council, was reconstituted under the responsible government model to include elected officials. The cabinet of George III (1760–1820),⁶⁶ for example, had nine members known as the Great Officers of State,⁶⁷ and eight further members.⁶⁸ These officers obtained their positions by a combination of appointment by royal prerogative, inheritance, and election.⁶⁹ Further, it is to be kept in mind that those exercising power were for the most part sitting in Parliament and governing about 2 million voters.⁷⁰

A. THE AGENCY AND THE RISE OF THE ADMINISTRATIVE STATE

Although agencies (particularly adjudicative tribunals) have existed in Britain for centuries,⁷¹ the modern agency came into its own in the United States in the

65. The first census, conducted in 1790, registered 3,929,214 people. US, US Census Bureau, *Measuring America: The Decennial Censuses from 1790 to 2000* (September 2002) at Appendix A, online: <www.census.gov/prod/2002pubs/pol02marv.pdf>. Given that suffrage was only granted to white male landowners, and that families seldom had less than three children, a back of the envelope calculation leads to the suggestion that the voting population was less than one million.

66. See John Cannon, “George III” (2004), online: Oxford Dictionary of National Biography <dx.doi.org/10.1093/ref:odnb/10540>.

67. Lord High Steward, Lord High Chancellor, Lord High Treasurer, Lord President of the Council, Lord Privy Seal, Lord Great Chamberlain, Lord High Constable, Earl Marshal, and Lord High Admiral. See D A Winstanley, “George III and His First Cabinet” (1902) 17:68 *Engl Hist Rev* 678 at 679 [Winstanley]. See also JH Plumb, “The Organization of the Cabinet in the Reign of Queen Anne” in *Transactions of the Royal Historical Society: Sixth Series, Volume 7* (Cambridge: Cambridge University Press, 1998) 137. For discussion of the formation of the Cabinet in the UK, see John P Mackintosh, *The British Cabinet* (London: Stevens & Sons, 1977) at 35-74.

68. Winstanley, *ibid* at 680.

69. *Ibid.*

70. The first census, conducted in 1801, registered 10,942,646 people but the census was far from complete. See UK, HC, “Abstracts of the Answers and Returns: Enumeration, Part I England and Wales”, Cmnd 140 (1801), online: A Vision of Britain Through Time <www.visionofbritain.org.uk/census/SRC_P/1/GB1801ABS_1>; Richard Wall, Matthew Woollard & Beatrice Moring, *Census Schedules and Listings, 1801-1831: An Introduction and Guide* (Colchester, UK: University of Essex, Dept of History, 2004).

71. See Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge: Cambridge University Press, 2006).

twentieth century. The agency in this context refers to a specialized body and organizational form granted a distinct set of legal powers to execute its mandate and allocated a specific set of rule-making, adjudicative, and administrative tasks.⁷² To use a conceptually helpful, if outdated,⁷³ Canadian phrase, agencies can be described as “governments in miniature.”⁷⁴

The difference between the agencies in the United Kingdom and the agencies in the American model is significant. In the United Kingdom, agencies—with adjudicative tasks, among other things—have existed for a long time as a part of the legal and administrative apparatus of government. They have been accepted by judiciary, legislature, and executive alike.⁷⁵ In contrast, in the United States, with its strong separation of powers, the agency took on distinct and contested powers and required high levels of support from various interested parties to survive and achieve its mission.⁷⁶

In addition, whereas the UK scholarship has long focused on the variety of functions and forms of agencies⁷⁷—a matter that readily distracts from the executive accountability and constitutional issues—the US discussion has focused on the supposed autonomy and contested control of the agency, including the problem of purported rogue agencies. Again, these focal points distract from the more foundational issues of linking the agency to the three branches of government, and particularly executive accountability for agency

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72. See Feaver & Sheehy, “The Political Division of Regulatory Labour,” *supra* note 1. A definition coincident with Harold M Bowman, “American Administrative Tribunals” (1906) 21:4 *Polit Sci Q* 609.
73. See Richard Schultz & G Bruce Doern, “No Longer ‘Governments in Miniature’: Canadian Sectoral Regulatory Institutions” in G Bruce Doern & Stephen Wilks, eds, *Changing Regulatory Institutions in Britain and North America* (Toronto: University of Toronto Press, 1998).
74. Term coined in Willis, *supra* note 5 at 73. The term is still used in Canadian administrative law. See Liston, *supra* note 26.
75. See discussion in William A Robson, *Justice and Administrative Law: A Study of the British Constitution*, 3d ed (London: Stevens and Sons, 1951) at 17-27.
76. See Thomas K McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Mass: Harvard University Press, 1984) at 63. For a broader argument, see Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Networks, Reputations, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001).
77. Hood’s popular “zoo” description of the variety is an apt example. See Christopher Hood, “The Hidden Public Sector: The ‘Quangocratization’ of the World?” in Franz-Xaver Kaufmann et al, eds, *Guidance, Control and Evaluation in the Public Sector* (Berlin: Walter de Gruyter, 1986) 165. William A Robson provides an earlier analysis and discussion of variety. See Robson, *supra* note 75 at 89-316.

conduct. Agencies can be connected to any of the three branches of government, but are, for the most part, bodies of the executive branch. Their mandates can include a host of activities from rulemaking and adjudication to delivery of basic public services.

As an organizational form, the agency was developed as a solution to the problems arising from a strict application of the separation of powers doctrine⁷⁸ and its responsible government equivalent, rule of law.⁷⁹ A strict application of the doctrine creates legal, political, and administrative problems because complex social problems require a coordinated, simultaneous contribution from all three branches of government. In practical terms, the separation hinders the efficient and timely delivery of public services because the necessary rule-making, adjudicative, and administrative functions and powers are restricted to the separate branches of government. The related departments of these branches all have their own policies, rules, and procedures. This arrangement causes significant delays when trying to solve problems that require contributions from all three branches. This structural isolation, which addresses the political concern of avoiding tyranny, fails to address the more mundane problem of effective and efficient conduct of the administration of government. That such coordination problems should arise illustrates both the effectiveness of the design in terms of limiting opportunities for tyranny as well as the costs inherent in that design.

A good example of the problem that the separation of powers creates can be seen in the United States. In the 1880s, after the court struck down state legislation in *Wabash, St Louis and Pacific Railway v Illinois*, regulation of railway freight tariffs at the federal level became the only option and presented the Federal Government with a difficult problem.⁸⁰ As was recognized in the United Kingdom with the passage of the *Regulation of Railway Act of 1873*,⁸¹ the setting of freight rates required a flexible rule-making procedure that allowed for frequent changes of a sort that was wholly unsuited to the rule-making procedures of traditional institutions of government, such as Congress, whose procedures were more suited to less dynamic contexts with considerably less urgency. The freight tariff rule-making process was done on an ongoing basis in a manner resembling an adjudicative process. As part of this process, parties affected by the

78. See David H Rosenbloom, "Public Administrative Theory and the Separation of Powers" (1983) 43:3 Pub Admin Rev 219.

79. Willis, *supra* note 5 at 70.

80. See George W Hilton, "The Consistency of the Interstate Commerce Act" (1966) 9 JL & Econ 87.

81. 118 US 557, 7 S Ct 4. See also Marshall E Dimock, *British Public Utilities and National Development* (London: George Allen & Unwin, 1933) at 70.

rules presented their positions on rate adjustments to a court-like body which, after hearing the submissions, would decide an appropriate freight rate. The final step, implementing the rates, required monitoring and, if need be, enforcement.

Given that the separation of powers doctrine required each of these functions to be executed by a separate branch of government, the classical model's structure created an unworkable procedure for which there was no constitutional solution. Accordingly, the only solution was to create a new alternative—a new body that was empowered to conduct all three constitutionally separated governance functions. The Interstate Commerce Commission (ICC), modelled on the UK's Railway and Canal Commission,⁸² was created as a permanent body empowered to administer a complex regulatory scheme that included ongoing rule-making and adjudicative functions in the setting of freight rates. The ICC was also tasked with monitoring and enforcement functions and powers.⁸³

Clearly, the classical models of government, with their strict separation of powers, are poorly suited to complex governance problems that require a coordinated amalgam of rule-making, adjudicative, and executive functions. Over time it became clear that a single organization, an “agency” designed to deal with the many and increasing complex economic and social problems, was a more effective and efficient organizational form than the separate branches of government.⁸⁴ The agency readily allows such coordination problems to be solved. The agency has been described as a “one stop shop”, empowered with varying combinations of rule-making, administrative decision-making, and

82. See I L Sharfman, *The Interstate Commerce Commission*, vol 1 (New York: The Commonwealth Fund, 1931) at 16.

83. See Thomas Gilligan, William J Marshall & Barry R Weingast, “Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887” (1989) 32:1 JL & Econ 35.

84. The need for a more flexible form of governance arrangement emerged as a consequence of increasing social and political complexity through the nineteenth century. Increasing population growth, rapid economic development as a result of industrialization, and social issues arising from a shifting demographic required government take a more interventionist role in society. This resulted in intensification of the policy-making and steering functions. In Britain, the changing function and role of government was prompted by the passage of the *Reform Acts* of 1832 and 1867 which expanded the franchise and contributed to the rise of the party system. See *Representation of the People Act, 1832* (UK) 2 & 3 Wm IV, c 45. See also *Representation of the People Act, 1867* (UK) 30 & 31 Vict, c 102. In the United States, political and social change following the Civil War resulted in the consolidation of federal power, and immigration and Western territorial expansion fueled demand for the provision of public services as well as the need to regulate an increasingly complex economy.

adjudicative functions and powers.⁸⁵ The concern, of course, is that combining these functions and powers within a single body results in what Rosenbloom describes as “a nullification of the constitutional separation of power doctrine, as all the powers are collapsed within a single organizational structure.”⁸⁶ This combination raises the spectre of tyranny.

The innovative solution of the ICC was important not only because it became the prototypical federal agency⁸⁷ and served as a model for similar bodies elsewhere,⁸⁸ but also because of the way it actively combined all three of the sovereign governance functions and powers. With that being said, the creation of the ICC was not an easily won solution. Rather, it followed a protracted political battle between the President and Congress over control of the regulation of railroad companies⁸⁹ and went through a series of significant law reforms from its inception in 1887 until 1940.⁹⁰

More widespread use of agencies based on the model of the ICC did not occur until after the onset of the Great Depression and the creation of the New Deal agencies, of which the Tennessee Valley Authority was the exemplar. The creation of the New Deal agencies is said to have confirmed the establishment of the “administrative state.”⁹¹ The administrative state is defined by Edward Rubin as the structural change in government “from a system of rules elaborated and implemented by the judiciary to a system of comprehensive regulation elaborated and implemented by administrative agencies.”⁹² In addition to being separate from the judiciary, the agency was also to be independent of the executive. This independence or autonomy, however, is more mythical than real.⁹³ The myth of agency autonomy—*i.e.*, freedom from executive control—can be traced back to Chief Justice Sutherland’s judgment in the United States Supreme Court

85. Frank Bannister, “E-Government and Administrative Power: The One-Stop-Shop Meets the Turf War” (2005) 2:2 *Electronic Government* 160, online: <dx.doi.org/10.1504/EG.2005.007092>.

86. *Supra* note 78.

87. See McCraw, *supra* note 76 at 62.

88. For example, section 101 of the Australian Constitution establishes an Inter-state Commission based on the ICC. See *An Act to Constitute the Commonwealth of Australia*, 1900 (UK) 63 & 64 Vic c 12, s 101.

89. See Hilton, *supra* note 80.

90. See McCraw, *supra* note 76 at 62-63.

91. See Feaver & Sheehy, “The Political Division of Regulatory Labour”, *supra* note 1 at 31.

92. “It’s Time to Make the Administrative Procedure Act Administrative” (2003) 89:1 *Cornell L Rev* 95 at 96.

93. See McCraw, *supra* note 76 at 62-63.

case *Humphrey's Executor v United States*.⁹⁴ In that case, he stated that an agency “is an administrative body created by Congress to carry into effect legislative policies embodied in the statute. ... Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.”⁹⁵

In commenting on the implications of Sutherland’s assertion, Geoffrey P Miller summarizes how the notion of an agency that is neither legislature nor court, yet is independent of the executive branch, is exceedingly difficult to reconcile with a tripartite structure of government. Even fervent admirers of independent agencies have recognized this fact, conceding that they were created “[w]ithout too much political theory.”⁹⁶

In other words, the agency, while solving administrative problems, creates its own new problems in terms of constitutional law and the institutional structure of government, and consequently government accountability for the agency, as well as agency accountability to government. Specifically, it clearly falls afoul of the theories and doctrines of constitutional law and particularly the separation of powers doctrine. It also challenges democratic theory and practice with respect to accountability and control.

B. THE AGENCY AND THE RISE OF THE REGULATORY STATE

The rise of the regulatory state, like the administrative state, relies on the agency. The difference between the two is that whereas the administrative state used the agency sparingly (relatively speaking), and often as a public service delivery organization addressing complex governance problems, the regulatory state uses the agency as the primary method for creating and administering a comprehensive regulatory infrastructure. These regulatory agencies perform nearly every aspect of governance. They range from advisory and policy bodies, rule makers, and quasi-judicial decision-making bodies to operational bodies overseeing the provision of public goods such as health care and urban transportation systems. These organizations are charged with everything from rule creation, administration, and monitoring through to adjudication and enforcement.

The sections that follow examine the complications that arise from the interposition of the agency in terms of executive control and accountability, in both republican presidential and responsible government models. We will

94. (1935) 295 US 602, 55 S Ct 869 [*Humphrey's Executor*].

95. *Ibid* at 628.

96. Geoffrey P Miller, “Independent Agencies” (1986) 1986:1 Sup Ct Rev 41 at 43.

demonstrate how grafting the agency onto the classical models interferes with executive accountability for the administration of government, despite the executive's continuing and increasing control over the administrative machinery of government situated in agencies in the regulatory state. In particular, we make clear the basic constitutional problem, namely that the agency emerged after the institutionalization of government structures within constitutions, and so is not explicitly addressed in the classical constitutional frameworks, it has been necessary to create new structures and procedures to control it.⁹⁷ These include such bodies as independent accountability agencies.⁹⁸ As the phrase "agencies are creatures of statute" indicates, agencies are post-constitutional organizations whose relationship to the constitutionally identified branches of government has been determined post facto and largely on an ad hoc basis.

What will become evident in the discussion is that the process of integrating the agency into the constitutional framework was commenced by the judiciary and subsequently reinforced by statutory developments.⁹⁹ Although a foundational principle in classical constitutional design was to balance accountability and control within government, neither the judiciary nor the legislature attended to that foundation in determining the legal and political accountability and control relationships between the executive, the agencies, and the rest of government. Indeed, both courts and legislatures have treated control and accountability as separate and independent concepts rather than as complementary power relationships that need to be balanced within the institutional and organizational frameworks of government. As a result, the regulatory state's agencified model tends to lead to an unacceptable degree of severance of the control and accountability relationship. In what follows, we present an explanation of the changes to the structure and institutions of government, showing how the executive has come to exercise considerable control powers over the agency while attenuating its corresponding accountability obligations for the exercise of those control powers. We turn now to examine this proposition in the two constitutional models—first, the presidential republican and then the responsible government model of the Westminster system.

97. See Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) 84:3 *Colum L Rev* 573; Steven P. Croley, "Theories of Regulation: Incorporating the Administrative Process" (1998) 98:1 *Colum L Rev* 1.

98. See Ackerman, "Understanding Independent" *supra* note 49.

99. See Bernard Schwartz, "Some Recent Administrative Law Trends: Delegations and Judicial Review" (1981) 1982:2 *Wis L Rev* 208; Feaver & Sheehy, "The Shifting Balance," *supra* note 2.

III. AGENCY CONTROL AND ACCOUNTABILITY IN THE REPUBLICAN MODEL

This section of the article explores the relationship of the executive branch to the so-called independent agencies in the republican model. The discussion begins with the historical premise that the agency is largely independent of the executive branch as per Justice Tuft's decision in *Myers v United States* (discussed in greater detail below).¹⁰⁰ Yet, since this initial era when the foundations of the administrative state were laid, the legal and political relationship between the president and the agency has undergone significant change.¹⁰¹ Gradually, over the intervening years, the executive acquired a considerable degree of legal and political influence over the agency and its activities without, however, a corresponding increase in accountability. The executive's increase in control has come about as a result of a series of Supreme Court decisions, combined with other forms of direct and indirect presidential intervention. The executive's acquisition of greater legal control of the agency has consequently also allowed it to acquire greater political control of the machinery of government.¹⁰² Indeed, we will demonstrate that executive accountability for the agency is virtually non-existent.¹⁰³

A. EXECUTIVE CONTROL OF AGENCIES IN THE ADMINISTRATIVE STATE

The starting point for this analysis is the United States Supreme Court's articulation of the executive-agency relationship in the era of the administrative state. In that era, the USSC struggled with the constitutional complexities of respecting Congress's desire to insulate the independent agencies from the influence of the executive branch without trampling the separation of powers doctrine.¹⁰⁴ The first test of this balancing act, *Myers v United States*, was decided in 1926.¹⁰⁵ At first glance, *Myers* appears to be a setback for Congress. However, the decision set the stage for the decision in *Humphrey's Executor*, which is said

100. (1926) 272 US 52, 47 S Ct 21 [*Myers*].

101. See Elena Kagan, "Presidential Administration" (2001) 114:8 Harv L Rev 2245.

102. See Peter Swire, "Incorporation of Independent Agencies into the Executive Branch" (1985) 94:7 Yale LJ 1766.

103. See Robert E. Cushman, "Constitutional Status of the Independent Regulatory Commissions" (1939) 24:1 Cornell LQ 13; Harold H. Bruff, "On the Constitutional Status of the Administrative Agencies" (1986-1987) 36:2 Am U L Rev 491; Frederick R. Anderson, "Revisiting the Constitutional Status of the Administrative Agencies" (1986-1987) 36:2 Am U L Rev 277.

104. See Swire, *supra* note 102 at 1768.

105. *Supra* note 100.

to be the “high-water mark” of agency independence from executive control based upon a “division of governance labour” implementing the separation of powers doctrine.

Early in the administrative state era, Congress endeavoured to insulate the independent agencies from executive influence by constituting agencies in a manner that sought to dilute the president’s appointment power, challenge the president’s implied removal power, and impose the legislative veto. The *Appointments Clause* is an important source of the president’s powers to control the administration. It provides that the president may appoint all “officers of the United States”—in certain cases requiring the advice and consent of the Senate.¹⁰⁶ It has long been acknowledged that presidents use this power to appoint heads of departments and other senior personnel who share their political agenda.¹⁰⁷ Congress sought to dilute this power by designing the independent agencies with a governance structure that relied on multimember boards. Agencies such as the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the National Labor Relations Board (NLRB) are all governed by multimember boards. Additionally, Congress included the requirement that their officials be appointed for fixed terms that do not correspond to presidential terms of office, making it difficult for a president to appoint an entire board.

In addition to diluting the effects of the president’s power to appoint, Congress also endeavoured to insulate the independent agencies by setting the terms under which appointees can be removed from office. Whereas the Constitution explicitly grants the president the power to appoint, it does not grant the president any explicit removal power.¹⁰⁸ Until the decision of *Myers v United States* in 1926, the Supreme Court had not made any rulings regarding the source and extent of the removal power.¹⁰⁹ Despite declaring the agency separate from the executive, Chief Justice Taft also held that:

Article II grants to the President the executive power of the Government, *i.e.*, the general Administrative control of those executing the laws, [and]... that the President’s power of removal is ... an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does

106. Swire, *supra* note 102 at 1776.

107. See Patricia Ingraham, “Building Bridges or Burning Them?: The President, the Appointees, and the Bureaucracy” (1987) 47:5 Pub Admin Rev 425.

108. US Const art III, s 2, cl 2.

109. See *Myers*, *supra* note 100. The provision, as stated in *Myers* is: “Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.” *Ibid* at 241.

not by implication extend to removals ... and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.¹¹⁰

Accordingly, the USSC decided that the removal order made by the president was a valid exercise of his plenary powers and that the statutory provision limiting his power to remove was therefore void. In determining that executive power includes an implied power to remove superior officers from office, the Supreme Court identified a legal control power that simultaneously held significant political implications.¹¹¹

Thus the *Myers* decision established a significant legal link between the president and agencies, a link that was examined more closely in *Humphrey's Executor v United States*. The facts of that case are well known. President Roosevelt fired William Humphrey, a Federal Trade Commissioner, because Roosevelt believed Humphrey did not support the New Deal—a clearly politically motivated act. Roosevelt's decision was challenged pursuant to a statutory provision that permitted the president to dismiss only in the event of "inefficiency, neglect of duty, or malfeasance in office."¹¹² The United States Supreme Court drew upon a concept previously raised in *Myers*—"the character of the office"—and developed it further as a means of limiting the broader *Myers* holding and hence, limiting the scope of the legal control link between the executive and agency.¹¹³

The "character of the office" concept was central to the decision in *Humphrey's Executor*. The USSC noted that the Post Office, the agency in question in *Myers*, performed functions that were executive and administrative in nature. By contrast, the USSC characterized the "distinctive character" of the Federal Trade Commission as being more "quasi-legislative" than administrative.¹¹⁴ By analyzing whether the powers and functions exercised by an agency are predominantly quasi-legislative or judicial (as opposed to executive, as they were in *Myers*), the USSC identified a justification for limiting the president's removal power to those agencies whose functions are primarily administrative in nature. The USSC decided that the duties of the Federal Trade Commission were "neither political nor executive" and that its rule-making function required special expertise and impartiality.¹¹⁵ Hence, the circumstances necessitated some insulation from

110. *Ibid* at 117.

111. The implication being that a senior appointment is not likely to act in a manner contrary to the president's wishes for fear of being removed.

112. *Humphrey's Executor*, supra note 94 at 622.

113. *Ibid* at 632.

114. *Ibid* at 624.

115. *Ibid*.

presidential influence and the removal was found to be invalid.¹¹⁶ The effect of *Humphrey's Executor* was that presidential control was limited to a tenuous link via the exercise of the removal power that could only be applied in respect of a certain type of agency—one exercising only executive functions. Significantly, the decision was handed down at a time when the majority of agencies possessed rule-making and adjudicative powers. This subtle distinction between executive and legislative agencies provides the foundation for the rise of the “executive” agency and the decline of the independent agency as a governance mechanism.

B. EXECUTIVE CONTROL IN THE REGULATORY STATE

Since the era of *Humphrey's Executor* and contemporaneously with the change from the administrative state to the regulatory state, a gradual and significant erosion of congressional control power occurred. In the administrative state era, Congress endeavoured to insulate the independent agencies from executive influence by diluting the president's appointment power, sidestepping the president's implied removal power, and frequently imposing a legislative veto. In the rising regulatory state era, however, the judiciary invalidated all three mechanisms, effectively shifting legal and political control of the independent agencies from Congress to the executive branch.

Three United States Supreme Court cases chart the course of this shift. The first, *Buckley v Valeo*, was decided in 1976.¹¹⁷ In it, the Supreme Court held that a legislative scheme granting Congress control over the appointment of officers to the Federal Electoral Commission was unconstitutional. Similarly, in a case handed down in 1986, *Bowsher, Comptroller General of the United States v Synar, Member of Congress, et al*, the Supreme Court further rejected a legislative scheme used by Congress to control the removal of senior officers—a scheme that had gone unchallenged for more than sixty years.¹¹⁸ In *Bowsher*, a case involving the removal of the comptroller general pursuant to statutory provisions that restricted the presidential removal power, the USSC noted that the statute's “removal powers over the Comptroller General's office dictate that he will be subservient to Congress.”¹¹⁹ The USSC remarked that by “placing

116. See Swire, *supra* note 102.

117. 424 US 1, 96 S Ct 612.

118. 478 US 714, 106 S Ct 3181.

119. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the USSC rejected the suggestion that it should invalidate the 1921 removal provision rather than the Deficit Act's conferral of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General's office. *Ibid* at 729-30, 734-36.

the responsibility for execution of the... Act in the hands of an officer who is subject to removal only by... Congress, [Congress] in effect has retained control over the execution of the Act and has intruded into the executive function.”¹²⁰ The USSC also noted that the comptroller general was performing functions that were primarily executive in nature (although he also had some rule-making powers). Accordingly, consistent with the nature of the office line of reasoning, the legislative scheme was struck down as void.

The USSC also struck down the third and final means by which Congress sought to maintain control over agencies—the “legislative veto.” The legislative veto was developed as a means of controlling delegations of rule-making powers to agencies and first appeared in the *Legislative Appropriations Act* in 1932.¹²¹ After appearing in over two hundred pieces of legislation, the single-house veto (congressional veto) mechanism was challenged in *Immigration and Naturalization Service v Chadha et al.*¹²² Although the facts in *Chadha* did not involve an agency, the Supreme Court held that the one-house legislative veto of actions taken by public officials involved in “executing the law” is a restraint on the executive power to administer legislation.¹²³ Consequently, the legislative veto was found to be unconstitutional. The effect of this decision, as with the ones that went before, was a complete erosion of the power of Congress to control the independent agencies. The net result is an increasingly powerful executive vis-à-vis a less autonomous agency and an increasingly powerless Congress. The United States Senate Select Committee on Intelligence (SSCI) investigation into the Central Intelligence Agency (CIA)’s Detention and Interrogation Program illustrates the problem well. Congress sought to investigate the agency’s use of torture. The agency lied to members of Congress, hacked into the SSCI’s computers, and made every effort

120. *Ibid* at 734-36.

121. See Jonathan B Fellows, “Congressional Oversight Through Legislative Veto After *INS v Chadha*” (1984) 69:6 Cornell L Rev 1244 at 1244.

122. (1983), 462 US 919, 03 S Ct 2764.

123. *Ibid*.

to obstruct oversight.¹²⁴ The SSCI was ultimately able to compile and prepare for release a six thousand page report. By way of response, President Obama, while publicly condemning the actions of the CIA and praising exposure of its wrongs, sought to minimize the details of the report to the electorate by way of extensive redaction.¹²⁵ The agency's actions, with the acquiescence or connivance of the executive, are one of the starkest examples of the shifting accountability and control between Congress and the executive.

C. POLITICAL CONTROL IN THE REGULATORY STATE

The judiciary's erosion of congressional control through the limitation of congressional removal powers and legislative veto coincides with the ascendancy of other measures by the executive to exercise control over agencies. Beginning in 1980, Ronald Reagan used "his appointment power, perhaps more successfully than any modern President, to staff the agencies with officials remarkable for their personal loyalty and ideological commitment, who would subscribe to his (obligingly clear) policy agenda in the face of competing bureaucratic pressures."¹²⁶

These appointments laid the foundation for Reagan's Executive Order 12,291, requiring executive (but not independent) agencies to submit major rule changes to the Office of Information and Regulatory Affairs (OIRA) (a specialist branch of the Office of Management and Budget (OMB)), along with both a regulatory impact analysis and a cost-benefit analysis. According to Kagan, although Executive Order 12,291 "explicitly disclaimed any right on the part of the OMB, or of the President himself, to dictate or displace agency decisions, the order effectively gave OMB a form of substantive control over

124. The details of the battle between the SSCI and the CIA are the subject of much journalistic investigation, including The Guardian's three part inside story. See Spencer Ackerman, "Inside the fight to expose the CIA's torture secrets," *The Guardian* (9 September 2016), online: <www.theguardian.com/us-news/2016/sep/09/cia-insider-daniel-jones-senate-torture-investigation>. A similar scenario played out in the 1970s with the Church Committee's congressional investigation into CIA activities and the executive's efforts to avoid scrutiny. See John Prados & Arturo Jimenez-Bacardi, eds, "White House Efforts to Blunt 1975 Church Committee Investigation into CIA Abuses Foreshadowed Executive-Congressional Battles after 9/11", *National Security Archive Electronic Briefing Book No 522* (20 July 2015), online: <nsarchive.gwu.edu/NSAEBB/NSAEBB522-Church-Committee-Faced-White-House-Attempts-to-Curb-CIA-Probe/>.

125. See Connie Bruck, "The Inside War: To Expose Torture, Dianne Feinstein Fought the CIA—and the White House," *New Yorker* (22 June 2015), online: <www.newyorker.com/magazine/2015/06/22/the-inside-war>.

126. Kagan, *supra* note 101 at 2277.

rule-making...”.¹²⁷ This Executive Order penetrated deeply into the independent agencies and put them under the scrutiny of the executive as never before.¹²⁸

Executive Order 12,291 was replaced by Executive Order 12,866 of the Clinton Administration in 1993. Executive Order 12,866 was aimed at all “significant regulatory action... likely to result in a rule” that:

- (1) would have an annual effect on the economy of one-hundred million dollars or more, or adversely affect the economy or a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;
- (2) create a serious inconsistency or impede action taken by another agency;
- (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; or
- (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.¹²⁹

Upon the issuance of Executive Order 12866, the Director of the OMB sent a memorandum to all “heads of executive departments and agencies, and independent regulatory agencies,” stating that OIRA would have “primary responsibility” under the order for a number of “specific regulatory review and planning functions.”¹³⁰ This executive order is remarkable in its heavy-handed, wide ranging command, exercising considerable control over a number of agencies. This use of Executive Order 12866, particularly in terms of its directions to the heads of independent agencies, is an assertion of executive control power and an illustration of the degree to which the executive branch has been able to exert its influence upon agencies traditionally viewed as outside the scope of executive control.

This combination of the president’s control of agency activities by means of the appointment power, removal power, and financial oversight— often referred to in terms of “financial accountability” and regulatory review and planning—has granted the President near complete control over all aspects of the administrative machinery of government. This control effectively draws the agencies and their activities within the legal and political control of the executive branch. The

127. *Ibid.*

128. For a brief overview, see Keith Henderson, “Shrinking the Administrative State: New Public Management Before and After 9/11” (2005) 25:1 *Revista de Ciencia Política* 271.

129. See Steven Croley, “White House Review of Agency Rulemaking: An Empirical Investigation” (2003) 70:3 *U Chicago L Rev* 821 at 827.

130. *Ibid.*

question that naturally arises with this dramatic increase of executive control powers is whether the correlative accountability obligations of the executive have also increased.

D. EXECUTIVE ACCOUNTABILITY

The gradual assumption by the executive of increasing control of agencies has not coincided with a corresponding increase in executive branch accountability. As Shane notes, presidential accountability for control over agency action is ambiguous at best in that:

“[I]t is a striking feature of the unitary executive literature that it gives little sustained attention to what “accountability” means. . . . The point of accountability, by definition, must surely be the actual operational capacity of any decision-maker to be held to account. It is not at all self-evident that the President is more accountable in this sense than other public officials.¹³¹

The gradual drawing of the agency into the sphere of the executive branch’s legal and political control—without imposing a corresponding accountability obligation—has resulted in a functional separation of control and accountability. This separation undermines the balance underlying the republican “checks and balances” model. Stated differently, on one hand the president has gained and is able to exercise considerable legal control, while on the other hand, the president is accountable to no one but the electorate—*i.e.*, has only political accountability. A further step unbalancing the model comes from the above noted myth of agency autonomy or independence that allows the president to avoid political accountability. As such, the president is able to assert that agencies are independent and hence, they—not he—are to blame for any failure.

The argument of a president’s lack of culpability or purported powerlessness, combined with agency culpability, is legitimated on the legal grounds that, at law, the agency is indeed an independent legal entity.¹³² By way of this legal demarcation and shift of legal accountability for the agency itself away from the executive to the agency, using the legal form of independent legal entity, the executive has gained the legal right to sidestep legal accountability. This legal demarcation shifts the focus of what would otherwise be citizen scrutiny and challenge to the executive’s administration of the law.

131. Peter Shane, “Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking” (1995) 48:1 Ark L Rev 161 at 196.

132. *Ibid.* See also Nicholas Bagley & Richard L Revesz, “Centralized Oversight of the Regulatory State” (2006) 106:6 Colum L Rev 1260; Feaver & Sheehy, “The Political Division of Regulatory Labour,” *supra* note 1.

The result of being able to sidestep legal accountability is that the elected executive is equally able to sidestep political accountability. The argument thus far is that, despite the elected executive's considerable legal and political control over the agency, it is able to engage in a blame-shifting exercise¹³³ by which it is able to avoid political accountability for matters delegated to agencies, and further, that it does so by relying on the myth of agency autonomy. The actual state of affairs is that the agency is subject to political control by the executive in discharging its mandate. Yet, because of the myth of agency independence, the executive is able to accuse the agency for failures of policy, execution, and enforcement when convenient and so avoid blame while simultaneously controlling the agency. This bold assertion calls for some support.

In the aftermath of the financial turmoil in 2008, the Financial Crisis Inquiry Commission (the Commission), for example, investigated the actions by regulatory agencies and the consequences of their decisions with respect to the economic crisis gripping the United States. Among other things, the Commission identified the culpable parties, but oddly failed to note, or comment on, the missing connection between presidential control and presidential accountability for agency action. This point is starkly evident in the Commission's report (the Report), which was submitted in January 2011.¹³⁴ The Report makes it clear that the president has the power to direct policy and administration through the appointment and removal of cabinet personnel, such as the treasury secretary, as well as the heads of the financial services agencies, such as the Federal Reserve. Despite clear malfeasance on the part of successive treasury secretaries, Federal Reserve Presidents Greenspan and Bernanke or the New York Federal Reserve President Geithner, none of it was linked to the presidents—politically or legally.¹³⁵ This example is but one of many similar instances in which the agency has borne the brunt of public criticism and political scrutiny without ever having such criticism and scrutiny brought to bear on the ultimate power behind the agency—the executive.

Whereas the president and his administration's superior officers bore the ultimate legal sanction of the courts in the traditional configuration of the

133. See Christopher Hood, "The Risk and the Blame Game" (2002) 37:1 *Government & Opposition* 15.

134. United States, Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, (Washington, DC: United States Government Printing Office, 2011).

135. *Ibid.* There are obvious coordination problems associated with attaching ex post responsibility to the executive for policy failure—as was the case with President Bush.

republican Government model, a different pathway to legal liability arose under the agencified model of government. Under the agencified model, the citizen is granted rights to bring an action not against the President and his administration, but against the agency.¹³⁶ Where the citizen is successful in obtaining a judgment, the sanction and order are against the agency as if it were not part of the executive or even the traditional structure of government.¹³⁷ This configuration provides extensive political cover for the elected executive. Not only can the executive avoid answering to the public politically for its influence over the decisions of agencies, it can avoid answering the public at law because it is able to avoid accountability for agency actions before the courts.

As set out above, in the republican model the executive branch gradually drew the independent agencies into its sphere of legal and political control. However, this gradual acquisition of legal and political control powers was not balanced with any corresponding increase in legal and political accountability obligations. This situation was a result of the executive's skillful management of opportunities to express its power and the judiciary's willingness to ensure the legislature did not encroach on executive powers. We turn next to examine similar phenomena in the responsible government model.

IV. AGENCY CONTROL AND ACCOUNTABILITY IN THE RESPONSIBLE GOVERNMENT MODEL

In countries with responsible government models, constitutional law operates differently in terms of executive power and accountability, including power and accountability for agencies. For example, the constitution of Canada makes no explicit reference to the civil service and as a result, the relationship between the executive and its agencies is difficult to explicate in terms of positive constitutional law.¹³⁸ The independence of the civil service relies on the subtleties of constitutional conventions¹³⁹ within the institutions of Westminster parliaments rather than

136. See *Nixon v Fitzgerald* (1982), 457 US 731, 102 S Ct 2690.

137. Actions against the executive are conducted as "citizen suits." See Adam Babich, "Citizen Suits: The Teeth in Public Participation" (1995) 25:1 *Envl L Reporter* 10141.

138. This lack of explicit reference is the point of departure for Savoie who is, in turn, criticized by Lorne Sossin for ignoring constitutional conventions. See Lorne Sossin, "Speaking Truth to Power?: The Search for Bureaucratic Independence in Canada" (2005) 55:1 *UTLJ* 1 at 1 [Sossin, "Speaking Truth"].

139. See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991).

the hard law of written constitutions.¹⁴⁰ Indeed, the independence of the civil service from the government of the day has been described in the Westminster system as follows:

Bureaucratic independence represents a crucial check on the legitimate powers of the government of the day to pursue its policy preferences. Given that the executive branch of Canadian governments is the repository of immense power, sporadic supervision, and relatively scant public scrutiny, the internal dynamics by which this power may be constrained become crucial to the integrity of responsible government and the rule of law.¹⁴¹

Thus, the separation of executive accountability obligations from executive control powers over the agencies in the Westminster model followed a different path. Instead of the executive drawing the agency into its sphere of legal control, as found in the republican model, the executive pursued a different strategy in maximizing control while simultaneously minimizing its accountability obligations.¹⁴² Its strategic focus has been on the politicization of the civil service, including, of course, the agency.¹⁴³ The core power of the executive is derived at least partly from the sovereign prerogative powers. The “little separation of powers” doctrine, which allowed the responsible government model to avoid some of the coordination problems posed by the stricter republican separation of powers doctrine¹⁴⁴, allowed this different path. From the outset, the Westminster system allowed a strong executive through the institution of Cabinet, described

140. See Sossin, “Speaking Truth”, *supra* note 138.

141. *Ibid* at 5-6.

142. See Feaver & Sheehy, “The Shifting Balance,” *supra* note 2.

143. See B Guy Peters & Jon Pierre, eds, *Politicization of the Civil Service in Comparative Perspective: The Quest for Control* (New York: Routledge, 2004); Christopher Hood & Martin Lodge, *The Politics of Public Service Bargains: Reward, Competency, Loyalty - and Blame* (Oxford: Oxford University Press, 2006); Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (Canberra: ANU E Press, 2008); Bradley E Wright, “Public Service and Motivation: Does Mission Matter?” (2007) 67:1 *Pub Admin Rev* 54; John Stone, “The Degradation of the Public Service” (2011) 55:7&8 *Quadrant* 36.

144. Indeed, Chief Justice McLachlin stated that administrative tribunals “may be seen as spanning the constitutional divide between the executive and judicial branches of government.” See *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24, [2001] 2 SCR 781. See Pauline German, “Separation of Powers: Contrasting the British and Australian Experiences” (2006) 13:1 *eLaw J* 141 at 143. According to German, the High Court in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* held that, notwithstanding the separation demarcated by the three different chapters of the constitution, “a strict division of powers between the executive and legislature was not practical.”

by Bagehot as “a close union, nearly the complete fusion, of the executive and legislative power...[which is] while it lasts and holds together, the most powerful body in the State.”¹⁴⁵

A. EXECUTIVE CONTROL OF AGENCIES

The prerogative powers of government in the responsible government model, which are the legacy of the battle for sovereign powers in the United Kingdom, provide the foundation for the executive right to wield legal and political control powers over agencies.¹⁴⁶ The scope of these powers is plenary and subject only to limitations imposed by Parliament.¹⁴⁷ This prerogative power is the source of a very important distinction in responsible government between the executive’s authority to direct agency action and the agency’s power to manage its own operational activities.¹⁴⁸ For example, in Australia, the New South Wales *Public Sector Management Act 2002* reads, “the ordinary and necessary departmental authority of a Minister with respect to the direction and control of staff is not limited by anything in this Act.”¹⁴⁹ As a consequence, unlike what was seen in the republican model, there has been no need for the executive to contest the status of agencies and compete with the legislative or judicial branches of government for control over the agencies or to try to draw agencies into the scope of executive control. The agency is firmly within the grasp of the minister. The issue is better

145. *The English Constitution*, 2d ed (London: Oxford University Press, 1963) at 9-13.

146. In Canada and Australia, the prerogative power to direct and control the public service is subsumed in section 3 of the *British North America Act* and section 61 of the Australian Constitution, which provides that executive power derives some of its content by reference to the Crown prerogatives. See *British North America Act, 1867*, (UK) 30 & 31 Vict, c 3, s 3. See also *An Act to constitute the Commonwealth of Australia, 1900* (UK) 63 & 64 Vic c 12, s 61. One such prerogative power is the rights vested in the Crown through its Ministers to “direct and control” the civil service. For example, the New South Wales *Public Sector Management Act* reads: “the ordinary and necessary departmental authority of a Minister with respect to the direction and control of staff is not limited by anything in this Act.” As a consequence, there has been no need for the executive to contest the status of agencies and compete with the legislative or judicial branches of government for control or to pursue a strategy to draw agencies into the scope of executive control. See *Public Sector Employment and Management Act 2002* (NSW), s 161 [*Public Sector Act*].

147. See *Davis v Commonwealth*, [1988] HCA 63 at para 35, 166 CLR 79.

148. See Phillippe Lagassé, “Parliamentary and Judicial Ambivalence Toward Executive Prerogative Powers in Canada” (2012) 55:2 Can Pub Admin 157. In the republican model, there is a potential to contest and require submission to another branch of government. In the responsible government model, this potential does not exist. Power resides with the executive as a manifestation of its prerogative powers.

149. *Public Sector Act*, *supra* note 145.

framed as a matter of agency independence, which—as Lorne Sossin argues—is understood as an aspect of the rule of law.¹⁵⁰

The distinction between executive direction and agency management provides the foundation for the political strategy that underpins the use of the agencified model in the regulatory state. Under this model, it is clear that “government has withdrawn from the control of operational detail in statutory [agencies]... entrusting such control to senior public sector management.”¹⁵¹ At the same time, the executive “still requires devices such as the ministerial direction in order to exercise control over this detail as the need arises.”¹⁵² In other words, the apparent distinction between direction and management—*i.e.*, political and legal control versus managerial autonomy—is a strategic device capable of use by the executive in the agency.

Beginning with the proposition that the responsible government’s format for granting independence to its regulatory bodies observes “the distinction between policy and operational issues,”¹⁵³ the question that arises is not how much managerial autonomy agencies will be granted—they are granted almost total managerial control. Instead, the question is how much autonomy from ministerial control via directions, political and patronage appointments,¹⁵⁴ and other means will agencies be granted? The answer to this question is complicated by the important distinction between the executive’s ability to exercise formal legal control, as distinguished from informal political control. As a consequence, determining agency autonomy by evaluating the amount of legal control statutorily granted to a minister is an analysis that concerns itself with only half of the control power held by the executive.

The other half is evident when one evaluates agency autonomy in terms of political control—a manifestly more difficult task.¹⁵⁵ The executive is able to

150. “Speaking Truth”, *supra* note 116 at 44-46.

151. Austl, Commonwealth, Information and Research Services, *Ministerial Directions to Statutory Corporations* (Research Paper No 7) by Christos Mantziaris (Department of the Parliamentary Library, 1998) at 7.

152. *Ibid.*, citing Mark Aronson, “Ministerial Directions: The Battle of the Prerogatives” (1995) 6:1 Pub L Rev 77 at 88.

153. Mark Aronson, “Government Liability in Negligence” (2008) 32:44 Melbourne University Law Rev 44 at 54.

154. See Sossin, “Speaking Truth,” *supra* note 138 at 10.

155. See Matthew D McCubbins, Roger G Noll & Barry R Weingast, “Administrative Procedures as Instruments of Political Control” (1987) 3:2 JL Econ & Org 243; Matthew D McCubbins, Roger G Noll & Barry R Weingast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies” (1989) 75:2 Va L Rev 431.

apply a range of less transparent, informal means to exercise this political control. Further, the efficacy of these informal methods of political control is markedly more difficult to identify, let alone measure—a “muddle” that has long been recognized in Canada.¹⁵⁶ One important means of distinguishing formal legal and informal political executive control of agency activities is examination of the agency’s organizational form. The executive is able to select an agency form that delivers the type and amount of control it wishes to exercise and the type (legal or political) of accountability it is willing to accept. Its choice of the agency’s legal form is limited to the four following options: non-statutory (executive) agency, statutory agency, statutory corporation, or government business enterprise (Crown corporation).¹⁵⁷ Each type has different levels of legal autonomy and is subject to different types of political and legal control.¹⁵⁸ Briefly, the greater the agency’s legal autonomy, the more the executive exercises its control via political means, and the less the legal autonomy, the less the executive exercises control via political means.

1. EXECUTIVE LEGAL CONTROL

The legal control of agencies through the use of formal legal mechanisms is limited to those mechanisms explicitly identified in the legislation that creates an agency.¹⁵⁹ The most prevalent form of legal control is the ministerial direction.

156. See H N Janisch, “The Role of the Independent Regulatory Agency in Canada” (1978) 27 UNBLJ 83. In comparing the concept of the “independent” agency in the Commonwealth countries, Janisch sums up the general position in referring to the status of independent agencies in Canada:

Canada never completely adopted the American model of an independent regulatory agency, although it has, on occasion, gone far in that direction. This hesitation is of central importance for an understanding of current regulatory issues in this country. Indeed, the history of regulation in Canada has been largely a constant process of working out the tensions inherent to our commitment to parliamentary responsibility and the need for regulatory tribunals which fall to some degree outside the sphere of immediate political control (*ibid* at 87).

157. See Feaver & Sheehy, “The Shifting Balance,” *supra* note 2 at 223.

158. See Austl, Commonwealth, Information and Research Services, *Government Business Enterprises and Public Accountability through Parliament* (Research Paper No 18) by Stephen Bottomley (Department of the Parliamentary Library, 2001).

159. See Lorne Sossin, “The Ambivalence of Executive Power in Canada” in Paul Craig & Adam Tompkins, eds, *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006); Lorne Sossin, “The Puzzle of Independence for Administrative Bodies” (2008) 26:1 NJCL 1. See also Philip Bryden, “How to Achieve Tribunal Independence: A Canadian Perspective” (Paper delivered at the 9th AIJA Annual Conference, Perth, 7 April 2006), online: <www.aija.org.au/Tribs06/papers/Bryden.pdf>; Arthurs, *supra* note 7.

The ministerial direction is a legal power bestowed on ministers to direct an agency to take a particular decision or to adopt a particular interpretation of a policy or of a strategy. The powers granted to a minister to direct may be general or specific. For example, the Australian *Broadcasting Services Act 1992* grants the minister both a general power of notification and a specific power of direction.¹⁶⁰

Where the legislature gives the executive a legal power to control, summed up by Mantziaris as a “power [that] might extend to all of the activities of the [agency], a specified range of activities, or specific transactions,”¹⁶¹ the power is wide in scope, deep, and practically without limitation. As noted in the Uhrig Review, the lack of specificity and clarity of powers is clearly problematic. John Uhrig found

a lack of effective governance for several of the authorities considered by the review due to several factors including unclear boundaries in their delegation, a lack of clarity in their relationships with Ministers and portfolio departments, and a lack of accountability for the exercise of their power.¹⁶²

This lack of clarity is exacerbated by the unclear boundary between legal control powers and political control powers, an issue to which we turn next.

2. EXECUTIVE POLITICAL CONTROL

Informal political control of agencies by the executive takes several forms.¹⁶³ Beyond the fundamental political control that comes from the fact that the head of the civil service, who has the power to appoint agency heads, holds his or her position “at the pleasure” of the government of the day,¹⁶⁴ the most prevalent form of political control is informal communication between Ministers and agency heads. Such informal communications may establish de facto political control that occurs in a “zone of moral and legal uncertainty.”¹⁶⁵ This zone of uncertainty is a zone in which the agency mandate may contradict the minister’s strategic political objectives, leaving the agency in a quandary. Is it to pursue its public mandate as set out in its enabling legislation? Or is it to respond to the minister’s political directives? Although various answers to this question have

160. (Cth) at s 160.

161. Mantziaris, *supra* note 151 at i.

162. Review of the Corporate Governance of Statutory Authorities and Office Holders (Canberra: Commonwealth of Australia, 2003) at 5.

163. See *Hughes Aircraft Systems International v Airservices Australia*, [1997] FCA 558, 146 ALR 1 [Hughes].

164. Sossin, “Speaking Truth,” *supra* note 138 at 56.

165. Mantziaris, *supra* note 151 at i.

been proposed, the core issue of ensuring executive accountability for agency action is ultimately a matter of political will and indeed, good will and good faith in dealings with the machinery of responsible government.¹⁶⁶

Making agencies more responsive to ministers is a key objective of the New Public Management (NPM) reform program.¹⁶⁷ Responsiveness to ministers is ensconced in the broader discussion about government reform, which is focused on making agencies more responsive to citizens or, in the language of NPM, “customers.”¹⁶⁸ While the theory is clear—*i.e.*, accountability is to the minister¹⁶⁹ and can contribute in turn to ministerial accountability in its own right¹⁷⁰—the reality of a politicized public service, personal loyalties to a minister who may have had involvement in the appointment process or ongoing supervision, and self-interest of a careerist agency CEO, may lead to different outcomes.

A more potent but subtle means by which the executive has been successful in gaining political control of agencies has been by its use of statutory corporations and government business enterprises.¹⁷¹ These two legal forms create an arm’s length legal relationship between government and the agency, but they do not necessarily loosen a tight political rein. Political reins may continue through appointment powers, power to set key performance indicators, and budget allocations. For example, a minister may have the right to appoint the CEO of a statutory corporation, have the power to appoint some or all of the members of the board of directors, or be a shareholder of the corporation.¹⁷² In such instances, while the minister may not have direct legal control powers, such as through a power to issue ministerial directions, powers of appointment allow the creation

166. See Sossin, “Speaking Truth,” *supra* note 138 at 56.

167. See MacDermott, *supra* note 143 at 2.

168. See Christopher Hood & Guy Peters, “The Middle Aging of New Public Management: Into the Age of Paradox?” (2004) 14:3 *J Pub Admin Research & Theory* 267; George A Larbi, *The New Public Management Approach and Crisis States* (Geneva: United Nations Research Institute for Social Development, 1999); Brian Dollery & Chang W Lee, “New Public Management and Convergence in Public Administrative Systems: A Comparison between Australia and the Republic of Korea” (2004) 9:1 *J Econ & Soc Pol’y* 1.

169. Australia’s Joint Committee of Public Accounts statement summarized by Bottomley as “staff in a GBE are accountable to management who are in turn accountable to the board of directors. The directors, individually and collectively, are accountable to the relevant portfolio minister who, in turn, is accountable to Parliament for the performance of GBEs in that portfolio.” *Supra* note 135 at iii.

170. See Sossin, “Speaking Truth,” *supra* note 138 at 5.

171. See Feaver & Sheehy, “The Political Division of Regulatory Labour,” *supra* note 1 at 177.

172. See Bottomley, *supra* note 158 at 5.

of significant personal loyalty to the minister and hence provide a clear avenue for political control.

While the separate legal entity doctrine of corporate law might appear to sever the political levers of power, company law norms regulating informal control are difficult to apply in the case of statutory agencies for three reasons. First, and most importantly, company law is part of private law, whereas statutory bodies and some government business enterprises are generally governed by public law.¹⁷³ These bodies of law are markedly different and largely incommensurate.¹⁷⁴ Accordingly, application of the private law of directors' duties to statutory corporations and government enterprises is inappropriate.

Second, the variable structure of the statutory corporation and the range of ministerial discretions are incompatible with the singular organization of directors and members and their limited rights and duties in limited liability companies. Whereas corporations limited by shares have a clear and well-established structure, statutory corporations, as creatures of statute, can be organized as the legislature sees fit. Third, the norms and duties placed on limited liability companies are at odds in many instances with the public duties that may be required of statutory bodies. Thus, looking to company law for restraints on ministerial control in statutory authorities is simply misguided.

Taking the analysis one step further, however, there may be some limitations on the executive's ability to set up and operate a government business enterprise using a company limited by shares. As we have argued elsewhere:

Where ministers are de facto controllers of such companies, they will be liable to statutory and common law directors' duties as shadow directors. The remedies provided might be useful in dealing with ministers so acting; however, the court's conservative application of the rules in company law cases generally suggests that such rules may be expected to have little impact on the actions of government appointees.¹⁷⁵

173. See Gerald Frug, "The Ideology of Bureaucracy in American Law" (1984) 97:6 Harv L Rev 1276. The exception is the companies limited by shares, where the government controls a limited liability company—but not its subsidiary. In these cases, standard corporate legal duties apply. See *Commonwealth Authorities and Companies Act 1997* (Cth), s 34 [*Commonwealth Authorities*].

174. See Arthurs, *supra* note 7 at 29.

175. Feaver & Sheehy, "The Political Division of Regulatory Labour", *supra* note 1 at 172.

Further, such judicially applied legal controls may be of limited value where the company claims commercial confidentiality,¹⁷⁶ providing the executive with cover, or where the activities in question are conducted by a subsidiary free of government accountability protocols established under legislation.¹⁷⁷ In these cases, political control triumphs over legal accountability. Once again, executive control powers are not balanced by executive accountability obligations in the agencified responsible government model, an issue we next examine in greater detail.¹⁷⁸

B. EXECUTIVE ACCOUNTABILITY

Whereas the degree of the executive's legal control powers is explicitly set by statute, the degree of legal accountability of the executive for agency activity may be explicit or implicit, depending again on the legal organizational form, among other things. In responsible government countries, agencies as public bodies fall under the remit of a particular minister. Hence, the core accountability question is whether the accountability obligation embodied in the doctrine of ministerial responsibility balances the control power.¹⁷⁹ Mantziaris observes, "[to] the extent that [an agency] is independent, there is no ministerial responsibility for the authority. It is for Parliament to determine the manner and extent of its accountability."¹⁸⁰ Although in some instances there may be a clear line of authority,¹⁸¹ the evidence is that over time, the executive has increasingly withheld from Parliament information about the activities of agencies it controls.¹⁸² And senior bureaucrats, dependent on the goodwill of their ministers, have aided

176. Valarie Sands, "The Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases" (2006) 29:3 UNSW LJ 334.

177. See Bottomley, *supra* note 158 at 10-11.

178. See *Commonwealth Authorities*, *supra* note 150 at s 34. This section exempts subsidiaries from accountability obligations under Part 4 of the same Act.

179. This is a matter that has troubled a number of public administration scholars. See Paul Finn, "The Abuse of Public Power in Australia: Making our Governors our Servants" (1994) 43:1 Pub L Rev 43; Michael Cole, "Quangos: UK Ministerial Responsibility in Theory and Practice" (2000) 15:3 Pub Pol'y & Admin 32; Linda English & James Guthrie "Mandate, Independence and Funding: Resolution of a Protracted Struggle Between Parliament and the Executive Over the Powers of the Australian Auditor-General" 59:1 Australian J Pub Admin 98.

180. Mantziaris, *supra* note 151 at 12.

181. See *e.g.* Bottomley, *supra* note 158 at iii.

182. R Paul Wilson, "Minister's Caucus Advisory Committees Under the Harper Government" (2015) 58:2 Can Pub Admin 227.

ministers in obscuring agency activities. Perhaps there is no better example than the statement of former Canadian Prime Minister Jean Chretien in response to a judicial inquiry into corruption in his government: “I am responsible but I am not to blame.”¹⁸³

The legislature’s power to separate control power and accountability obligations and treat them as distinct and severable is noted in academic opinion. Finn and Lindell suggest in the Australian context that it is “within the province of Parliament in allocating functions to non-departmental agencies, to override that principle in a particular legislative scheme if that scheme falls within a head of [federal] legislative power.”¹⁸⁴ The principle referred to is that of vesting responsibility for the statutory authority in the government—*i.e.*, there was no need to have ministerial responsibility for any particular agency.

The principle of ministerial responsibility has no necessary part to play in the creation of independent statutory authorities. Rather, it is for parliament to “ordain the nature and limits of the authority’s independence from and accountability to Parliament.”¹⁸⁵ In other words, if Parliament decides to create agencies without ministerial accountability, it is free to do so, and the primary way of doing so in the regulatory state is through the choice of legal form.¹⁸⁶ Indeed, some public administration scholars have advocated this separation, arguing that “traditional vertical methods of accountability would destroy the ‘autonomy, flexibility, user-responsiveness and subsidiarity’” that make the agency an important innovation facilitating the efficacy of government.¹⁸⁷

The view that Parliament is free to determine accountability as it sees fit is consistent with Lord Wilberforce’s statement in *British Steel v Granada Television* that:

[A]s regards the British Steel Corporation, the conduct of its affairs and the disclosures and reports which have to be made, are, as one would expect of a public body, regulated by statute, now by the Iron and Steel Act 1975. The legitimate interest of the public in knowing about its affairs is given effect to through information which

183. See Savoie, *supra* note 31 at 257-89.

184. Paul Finn & Geoffrey Lindell, “The Accountability of Statutory Authorities”, in Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth: Fifth Report* (1982), Appendix 4.

185. *Ibid.*

186. See Feaver & Sheehy, “The Political Division of Regulatory Labour”, *supra* note 1 at 165; Bottomley, *supra* note 158 at 13.

187. CC Hood & GF Schuppert, “Evaluation and Review” in CC Hood & GF Schuppert, eds, *Delivering Public Services in Western Europe* (London: Sage, 1988) 246 at 254, cited in Cole, *supra* note 155 at 33.

is a statutory duty to publish and through reports to the Secretary of State who is responsible to Parliament.¹⁸⁸

The Australian High Court followed the *British Steel* decision in the *Lange* case, in which it extended the Federal Court's decision in *Hughes Aircraft Systems International v Airservices Australia*, signaling that in interpreting the accountability of statutory corporations, courts should be guided by constitutional considerations.¹⁸⁹ Although this might appear to be an extension of the classical constitutional accountability framework to agencies situated outside the constitutional core of government, the extension comes with a critical qualification. In *Lange v Australian Broadcasting Corporation*, the court looked to constitutional considerations rather than limiting itself to the enabling legislation to interpret the provision.¹⁹⁰ The purposive approach to interpretation was given a larger foundation than the specific piece of legislation. In *Hughes*, the court declared that where a minister is granted no legal control or supervisory authority over a body, it logically follows that no accountability is expected. There are two problems with the approach taken by the courts. First, the courts recognize only legal control and ignore political control, though they are certainly not ignorant of it. Second, the courts identify two distinct lines of accountability. The first line is the traditional line of ministerial accountability. The second line is a direct line of accountability to Parliament by-passing the minister altogether. In *Lange*, the High Court of Australia stated, "the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature."¹⁹¹ That is, an agency may be accountable directly to Parliament, bypassing a minister entirely.¹⁹² As a consequence, a minister may have no legal accountability for an agency, yet still be able to exercise political control over agency policymaking—a complete separation of accountability and control.

This structuring of accountability and control powers upsets the traditional configuration of the responsible government model. In the traditional model, the ministers bore the ultimate legal sanction of the courts. Under the agencified

188. [1981] AC 1096 at 1169, [1980] 3 WLR 774.

189. *Hughes*, *supra* note 163.

190. [1997] HCA 25 at 208, 4 LRC 192.

191. *Ibid* at para 48.

192. A third mode not identified by the court arises where an agency may be accountable to both a Minister and the legislature.

model, as we have seen, this accountability rule no longer holds.¹⁹³ As with the republican model transformed by the interposition of the agency, citizens are no longer empowered to bring an action against the minister; rather, they must exercise their rights against an agency. Again, the result is that where the citizen is successful in obtaining a judgment, the sanction and order are against the agency—as if it were not part of the executive.

This configuration provides extensive political cover for the elected executive and it allows the executive to avoid both public political accountability for its control of the agencies, as well as legal accountability before the courts. Such political tactics undermine the citizen-state relationship and should be a concern to scholars and citizens alike, as elections are rarely single issue events.¹⁹⁴ We consider these implications next.

V. IMPLICATIONS OF THE SEVERANCE OF CONTROL AND ACCOUNTABILITY

The separation of control and accountability under the agencified model of government has enormous implications for government and democracy. It is clear that the failure to attend to the balance between executive control and executive accountability in the regulatory state's agencified model has facilitated a re-distribution of power and enabled the executive branch to both dominate government and simultaneously avoid accountability in unprecedented ways. In a speech on the rule of law in 1997, Justice Mason, then the President of the New South Wales Court of Appeal, observed that during his tenure as the New South Wales Attorney General between 1987 and 1997, the core of government “shrank as many governmental functions were outsourced or placed under the oversight of statutory corporations operating under charters obliging them to act commercially with little or no ongoing formal executive oversight.”¹⁹⁵ He went on to note that use of statutory corporations had diminished legal control of the administration to such a degree that many of the basic premises of the rule

193. See Michael Cole, “Quangos: UK Ministerial Responsibility in Theory and Practice” (2000) 15:3 *Pub Pol’y Admin* 32. See references in Woodhouse, *supra* note 44. See also references in Thompson & Tillotsen, *supra* note 44.

194. See Georgy Egorov, “Single-Issue Campaigns and Multidimensional Politics” (2015) National Bureau of Economic Research Working Paper No 21265.

195. Justice Keith Mason, “The Rule of Law, Judicial Review and the Public-Private Divide” (Forum Address delivered at Testing the Boundaries of New Zealand’s Public Law Domain, Wellington Town Hall, 20 March 2006), online: <www.supremecourt.justice.nsw.gov.au/Documents/mason_speeches.pdf>.

of law were under threat. This view is echoed by Bottomley who, citing Justice Finn, notes that “[e]xecutive-driven monitoring of the corporate planning and performance appraisal processes and the weakening of Parliamentary control and accountability” illustrate this shifting balance.¹⁹⁶ While there is a clear, pragmatic reason for having agency executives appear before parliament and answer to the press, these practices undermine executive accountability. The agency executives are acting under orders and guidance from the executive, whether minister or president; they are neither answerable to parliament nor to the press. Rather, they are directly and appropriately answerable to those instructing them.

As a constitutional law doctrine and as a part of democratic theory, the rule of law requires the executive to be accountable at law for its administration of government. The issue Mason identified is that the executive’s ability to exercise political control without legal accountability undermines the rule of law. In a rule of law state, the executive cannot escape the review of the courts, leaving the citizens without remedy. How can a citizen ruled by an unfair, overreaching, biased, or corrupt executive and lacking recourse to the courts be said to be living in a country that adheres to the rule of law principle?

As we have argued, in the regulatory state, executive control of agencies—and in particular executive political control—is not necessarily tied to corresponding accountability obligations. To the extent that legal and political rights and obligations parallel each other, they do so only because the legislature has so decided. Political accountability is subverted by law. As noted by Ian Thynne, “The problem lies partly in the unwillingness of governments to keep parliaments informed of company activities, though it also lies in the inability of parliaments to sustain the questioning of responsible ministers.”¹⁹⁷ More insidious, therefore, than the legislature’s tacit complicity in allowing the executive to choose the organizational forms that facilitate the refusal to answer, is its refusal to press the executive when no answer is forthcoming from the government to questions put to it by the Opposition in Question Period. In other words, all political parties that have a realistic prospect of forming the government are complicit and prepared to compromise the integrity of the parliamentary system in order to reap the gains of the separation of accountability and control in the agencified model.

In the United States, Professor Froomkin describes the problem in the following manner:

196. Bottomley, *supra* note 158, citing Paul Finn, “The Abuse of Public Power in Australia: Making our Governors our Servants” (1994) 5:1 Pub L Rev 43.

197. “The Incorporated Company as an Instrument of Government: A Quest for a Comparative Understanding” (1994) 7:1 Governance 59 at 77.

The obscurity in which federal government corporations operate allows them to have the best of both worlds and to avoid both the accountability mechanisms designed to rein in government and the laws and rules that regulate private firms. Congress has failed to come to grips with these issues.¹⁹⁸

In other words, the same set of circumstances that prevail in the Westminster responsible government model prevails also in the American republican context.

In short, the executive has been able, through agency selection, among other means, to effectively adjust the degree of legal control it wishes to exercise over a given agency and the amount and type of accountability it is willing to absorb. Though it is often assumed that the degree of legal control determines the corresponding degree of accountability obligations, this is not necessarily so. Where the executive considers either political or legal accountability undesirable—as in the case where the executive is exposed to hostility for unpopular policy—or where legal control is potentially harmful, the executive can create an agency for which it is not legally accountable while still wielding political control.¹⁹⁹ In sum, the creation of the agency allows for the establishment and maintenance of an accountability deficit.

A further consequence of agencification of the regulatory state is the shifting of oversight responsibilities for delivery of public goods and services away from the executive to courts and Parliament, as in the case of statutory corporations. The agencified model allows politically unpopular service decisions or failures in provision to be blamed squarely on the agency and privatized providers. This allocation of blame enables the government of the day to avoid political blame for those services and failures at the ballot box.²⁰⁰

From the perspectives of constitutional law and democratic theory, the agencified model of government is distinguished from the responsible and republican models of government by the collapse of three critical democratic institutions that imbue those constitutions: the separation of powers, executive and ministerial responsibility, and political accountability. In the place of these institutions and related constitutional doctrines of organization and accountability, the agencified model substitutes a very narrow avenue of legal accountability by way of judicial review of administrative action in agencies. In other words, accountability has been reduced from a range of public

198. A Michael Fromkin, “Reinventing the Government Corporation” (1995) 1995:3 U Ill L Rev 543 at 632.

199. See Christopher Hood, *The Blame Game: Spin, Bureaucracy and Self-Preservation in Government* (Princeton: Princeton University Press, 2010) at 24-43.

200. *Ibid.*

mechanisms via Parliament to the single, narrow, expensive judicial remedy of administrative litigation. This shift from political accountability to exclusive legal accountability, by way of judicial review, poses a unique challenge to democratic theory, which relies ultimately on political accountability. Further, this narrowing similarly denies citizens access to the courts on an increasing range of matters obscured by agency structure under the political control of the executive. The agencified model also changes the structure of control powers. Rather than granting legal control to the executive and having political control hammered out in the political institutions designed for such—*i.e.*, parliaments, congresses, and ultimately elections—the agencified model circumvents political discourse and allocates political debate and accountability to technocratic and market discourse. The courts are ill equipped to deal with these discourses, even if they were not institutionally constrained from most of such discourse in the first instance.²⁰¹ In other words, courts are not the correct forum for discussion of government policy and furthermore, have no expertise in developing or challenging policy.

Finally, the agencified model allows the executive to escape significant legal and political accountability while leaving substantial legal and political controls in its hands.

VI. CONCLUSION

Despite the simultaneous worldwide shift to a less accountable executive operating an agencified state, the path is not a single trajectory. As we have demonstrated, the path differs in republican and responsible government models.²⁰² In the republican model, the agency was a solution to problems resulting from a strict separation of powers doctrine. In the Westminster countries, the agency arose as the government sought to achieve efficiencies and efficacy first in the coordinated

201. See Michael M Harmon, “The Simon/Waldo Debate: A Review and Update” (1989) 12:4 *Pub Admin Q* 437. See also Richard J Stillman II, “Review Article: Dwight Waldo’s *The Administrative State: A Neglected American Administrative State Theory for our Times*” (2008) 86:2 *Pub Admin* 581.

202. See Tom Christensen & Per Lægreid, “Regulatory Reforms and Agencification” (Paper delivered at the ECPR Conference, Budapest, 8-10 September 2005), online: <regulation.upf.edu/ecpr-05-papers/tchristensen.pdf>.

delivery of collective solutions, next in the development of the welfare state, and later on in its dismantling.²⁰³

These different paths, have, however, had remarkable and markedly similar effects on society and government. It is clear to many scholars and observers that the executive has become “hyper-powered.” This powerful executive, we have argued, is insufficiently accountable and is so by design. The corollaries of a hyper-powered executive are a disempowered legislature, a politicized civil service,²⁰⁴ and arguably an increasingly disenfranchised and disengaged electorate.²⁰⁵

Yet, these are not the only outcomes. The executive has not only benefited from the agencified model but has also suffered certain costs. Over time, the agencies, by their simple prevalence, become self-justifying. An institutional path dependency develops—a justification for their existence. And important issues, such as the novel approach to control and accountability identified and analyzed in this article, become harder to identify as they are submerged by the institutionalization, or broad unquestioning acceptance of the agency form. As Christensen observes, “Autonomous regulatory agencies emerge because it is taken for granted that they are the most appropriate organizational form.”²⁰⁶ Using them, he argues, may “enhance the legitimacy of a decision to privatize, by distracting attention from more substantive concerns. ... The agency form is established simply because it has become the norm.”²⁰⁷

In other words, the original justifications of efficiency and effectiveness have now gone, and executive accountability for agency action has withered simply because it is the “way we do things around here” (*i.e.*, it has become institutionalized).

These issues are not merely some hobbyhorse of academics. The agencified model of government has hobbled normative debate about a government’s policy agenda, public policy generally, the public service and public goods and

203. See Wolfgang Steek & Kathleen Thelen, “Introduction: Institutional Change in Advanced Political Economics” in Wolfgang Steek & Kathleen Thelen, eds, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford: Oxford University Press, 2005) 1.

204. See Christopher Hood & Martin Lodge, *The Politics of Public Service Bargains: Reward, Competency, Loyalty – and Blame* (Oxford: Oxford University Press, 2006); MacDermott, *supra* note 143; Bradley E Wright, “Public Service and Motivation: Does Mission Matter?” (2007) 67:1 *Pub Admin Rev* 54; John Stone, “The Degradation of the Public Service” *Quadrant* (1 July 2011) 36, online: <quadrant.org.au/magazine/2011/07-08/the-degradation-of-the-public-service/>.

205. While there are certainly a wide variety of reasons, this may be an additional reason.

206. *Supra* note 202 at 25.

207. *Ibid.*

services. This muting of political debate unfolds as the agencies' techno-political determinations extend more and more. It insulates from debate such questions as social goals to be pursued, democratic processes by which such goals will be pursued, and ultimately even the ideals a society holds for itself and the role of its government in realizing these ideals. Again, Christensen identifies the issue: The agencified model "with autonomous agencies as its main organizational form, will represent a less positive state, encourage the hollowing out of the state, and weaken social goals."²⁰⁸

The severing of control and accountability does nothing to halt that trajectory. To the contrary, it facilitates both a hyper-powered executive and the stifling of political debate. As the main mechanism of the regulatory state, the agency contributes to what leading public policy scholar Bruce Doern describes as that "dense regulatory complexity [that]... produces a lack of accountability, cynicism in political life, and a lack of respect for democratic political institutions."²⁰⁹ David Hamer, a former member of both the upper and lower houses in Australia observed, "[The electorate] generally are not very impressed with politics, but they tend to blame their politicians rather than their political systems."²¹⁰ It may well be time to reconsider these systems, and look for new ways to take back control of the executive by reimposing accountability for the agency and reigniting relevant and engaged democratic debate.

In summary, agencies are critical in advancing the various political agendas of the government of the day and despite their supposed independence, they are quite subject to ministerial control. The agencification of government has occurred with good reason. The logics of specialization and efficiency in the highly technical environment of contemporary society make administration by non-specialists unviable. Governments of all the jurisdictions considered here have adopted the agencification model to such an extent that the agencies are too numerous and large for the executive to hold primary and singular accountability. Yet, the executive is still able to exercise significant control over its agencies. As a result, there is both a pragmatic logic to the separation of accountability and control and a pernicious aspect in the strategic opportunity it presents. Undoubtedly the strategists for the elected government will seek out and exploit the separation. That is what this article seeks to identify. Problematically, from a practical point of view, this makes effective, democratic accountability—whether via elections or the institution of ministerial responsibility—a dubious prospect. Perhaps more

208. *Ibid.*

209. Doern, "Approaches to Managing", *supra* note 27 at 266.

210. *Supra* note 33 at back cover.

critically, from the perspective of both constitutional law and democratic theory, new and innovative solutions need to be developed that can be adopted within the institutional framework of the legal systems of the common law world. This is, however, a topic for another article.²¹¹

211. John Ackerman has made some steps in that direction. See “Understanding Independent”, *supra* note 49.