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Comparative Political Process Theory and the Importance of Judicial Prudence

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COMPARATIVE POLITICAL PROCESS THEORY AND THE IMPORTANCE OF JUDICIAL PRUDENCE

—Conor Casey[1]

I. RESPONSIVE JUDICIAL REVIEW: COMPARATIVE POLITICAL PROCESS THEORY

Professor Dixon's work is a masterclass in comparative constitutional law scholarship. It is nuanced in its methodology, rich in contextual qualitative analysis, and deeply learned. In a Neo-Elyian spirit, it aims to offer "general guidance for courts as they seek to construe a democratic constitution"[2] and other relevant legal materials to make judicial determinations that "counter risks of anti-democratic monopoly power and democratic blind spots and burdens of inertia, and calibrate the scope and intensity of constitutional doctrines accordingly".[3]

The normative case for comparative political process theory (CPPT) is that, like its canonical forebear in *Democracy and Distrust*,[4] it allows Courts to act as reinforcers of the minimum core of the democratic game, sidestepping the well-trodden legitimacy concerns that arise where they deign to act as counter-majoritarian platonic guardians of fundamental rights and values, which are invariably deeply contestable.

The ultimate hope of CPPT is that Courts can sometimes play a useful role in slowing down attempts to create anti-democratic forms of monopoly power or in deterring attempts to create such power. Even in not-so-well-functioning democracies, Professor Dixon hopes that CPPT can still help Courts act as an "important '*speed bump'* or deterrent against action that is seriously determined to erode democratic rule, even if it cannot ultimately stop it".[5]

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[2] Rosalind Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (Forthcoming) Ch. 9.

[3] ibid.

[4] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980).

[5] Dixon (n 2).

A great strength of Professor Dixon's work is that it does not shy away from the objections that will surely be directed its way. One likely criticism might be a version of the objection that Professor Dixon paints an overly sanguine picture of judicial inclination to act in a democracy-reinforcing way. Some might point out that, in a given constitutional order, judges actually have a dismal track record of protecting the democratic process in the face of threats like gerrymandering, disenfranchisement, or oligarchical capture through staggering spending on political campaigns.[6]

Another, more general, critique might be that there are very tricky practical obstacles facing those judges who *are*, in principle, disposed to infuse their interpretive work with a concern for the need to reinforce the democratic rules of the game. For example, for actors whose work is largely case-driven and time-sensitive, and whose access to facts is largely confined to briefs and affidavits, it may be difficult, for example, to accurately assess the reversibility of, and intent behind, political acts that might undermine the democratic rules of the game, or to guess whether their own intervention will succeed, incur backlash or merely exacerbate other political risks.

Others, like those who work within a classical legal framework, might object that the work sometimes, without warrant, conceptually elides democracy and liberalism, such that one might finish reading with the impression that no *true* democracy can exist without accepting liberal rights claims (those related to abortion or LGBT issues, for instance). The natural lawyer may retort that the question of what rights are owed to persons is entirely distinct from how to maintain an institutional framework for allocating public power to rulers—that it is what is just and conducive to the common good of each and all that demands recognition or non-recognition of rights claims, not fealty to the type of regime a given polity has adopted.[7]

It is, therefore, to her credit that Professor Dixon meets many of these obvious objections head-on, devoting a very significant portion of her argument to describing in some detail potential limitations on successful judicial action. These limitations are built into CPPT and its aspiration of offering general guidance and conceptual heuristics to judges. Courts, as Professor Dixon squarely acknowledges, require many conditions to engage in democracy reenforcing interpretation. There are "quite stringent conditions for the practice of responsive judicial review",[8] including a degree of political/public tolerance or support for the judiciary, functional independence from the political

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6 As recently argued by Moyn and Doerfler with respect to the United States in Samuel Moyn and Ryan Doerfler, 'The Ghost of John Hart Ely' (2022) 75 Vand L Rev 769.

7 See, generally, Conor Casey and Adrian Vermeule, 'Myths of Common Good Constitutionalism' (2022) 45 Harv JL & Pub Pol'y 103; Adrian Vermeule, *Common Good Constitutionalism: Reclaiming the Classical Legal Tradition* (Polity 2022).

8 Dixon (n 2) ch 5.

branches, as well as possession of remedial tools that can render their judgements efficacious.

Aside from requiring institutional tools and resources, Professor Dixon notes that CPPT also demands a particular judicial temperament and disposition of prudence. This requirement is partly required because judges must be wary of incurring backlash that might undermine their perceived legitimacy in the long run.[9] It is also because—and I consider this a particularly critical point—they must be extremely wary when characterising the *nature* of a particular legislative or constitutional change initiated by the political branches, lest they misstep and needlessly exacerbate other political risks.

Professor Dixon asserts that it will often be difficult to "judge when a particular legislative or constitutional change will threaten the stability of the democratic minimum core".[10] In some instances, judges may "*over-estimate* the risk posed by legislative or formal constitutional changes—based on the (mistaken) view that existing national constitutional arrangements are the only possible or plausible way of realizing a commitment to the democratic minimum core".[11]

Professor Dixon argues that a helpful heuristic for avoiding this potential difficulty is to focus on the *intent* behind the measures: are political actors acting in a clear attempt to game the system in favour of a partisan incumbent, or rejig institutional checks and balances for the base goal of partisan aggrandisement? Or are they engaged in actions aimed at something more benign, such as the pursuit of a good faith normative vision in the interest of the common good, but which nonetheless might implicate institutional allocations of public power? I take Professor Dixon to say that, generally speaking, in the former instance, judges should be more assertive, while in the latter, greater caution is warranted.

Professor Dixon's account of the many preconditions—institutional and temperamental—required for judges to undertake successful judicial action thus skilfully avoids building her arguments on 'nirvana fallacy'[12] tainted foundations. That is to say, Professor Dixon avoids offering an account of the capacity of judges that pits an idealised Herculean picture of judicial ability - with a realistic 'warts and all' version of the typical performance of the political branches.

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9 Dixon (n 2) Ch. 6.
10 Dixon (n 2) Ch. 3.
11 ibid.
12 See Harold Demsetz, 'Information and Efficiency: Another Viewpoint' (1969) 12 JL & Econ 1, 2.

It is, instead, an account attuned to the typical institutional limitations of judicial capacity, and its nuance means it can accommodate for system-specific conditions that might make the theory unworkable or implausible in practice.[13] This is not to say that judges will *always* or even *generally* have the ability or inclination to engage in democracy-enforcing interpretations but that they *sometimes* will, and this can be a good thing if done prudently. The work excels as a rich account, bolstered by several deep comparative case studies, of when and why a Court might feel prudentially well-placed to use its various powers and standing to try and defend the minimum core of democracy against serious threats.

II. TWO EXAMPLES

I devote the remainder of this essay to two examples drawn from long-running constitutional debates to highlight the wisdom of Professor Dixon's emphasis on judicial caution and humility when assessing whether political branch action represents a threat to the democratic core. Here, I focus on debates concerning legislative delegation of broad statutory authority to the executive and the appropriate level of political executive control over bureaucracies.

Both examples raise concerns about institutional checks and balances and the risks of institutional monopolisation of power important to Professor Dixon's minimum core. I contend that these examples highlight the serious risks inherent to judges engaging in imprudent and blinkered assessment of potential political risks posed to the minimum democratic core, and that such analysis can leave judges blind to other political risks to the common good and democratic responsiveness that their actions may exacerbate.[14]

A. Delegation and Democracy

Legislatures' delegation of broad statutory authority to the executive branch has long been a core staple of contemporary governance. Although this practice is both widespread and entrenched, in many constitutional systems, it exists under a cloud of jurisprudential suspicion on the basis that it is in deep tension with a dedication to checks and balances and democratic government.[15]

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[13] Moyn and Doerfler (n 6).

[14] Throughout this part, I draw heavy inspiration from Professor Vermeule's approach to constitutional design and regulation outlined in Adrian Vermeule, *The Constitution of Risk* (CUP 2016).

[15] For an overview of debates in my home jurisdiction of Ireland, see Conor Casey, 'The Supreme Court and the Reformation of the Non-Delegation Doctrine: Náisiunta Leictreacht v Labour Court, Minister for Business Enterprise, and Ireland [2021] IESC 36' (Forthcoming 2022) 3 ISCR.

There is no denying that the delegation of statutory authority can greatly empower the executive branch. Countless open-ended and capacious legislative grants of statutory authority are a key reason why, in both presidential and parliamentary systems, the executive is the chief lawmaker. In addition to determining the policies underpinning most of the laws that affect citizens and drafting the bulk of statutes given legal force by legislatures, executives effectively make their own binding law through the use of copious delegated statutory power across every conceivable policy area. Going beyond determining the policies underpinning most of the laws that affect citizens and drafting the bulk of statutes given legal force by legislatures, executives effectively make their own binding law through the use of copious delegated statutory power across every conceivable policy area.

For some, this state of affairs is a standing threat to the minimum democratic core that Professor Dixon highlights, undermining the lawmaking function of the legislature and concentrating immense institutional power in the executive-led administrative state. For example, democratic concerns and fears about institutional monopolisation of power are at the heart of ongoing calls by an array of jurists and judges in the United States to reinvigorate judicial limitations on the scope and depth of legislative delegations of authority. Many jurists advocate for judicial innovations, such as the 'non-delegation' and 'major questions' doctrines, to curb the permissible scope and depth of legislative delegation. The former requires that all matters of significant principle and policy that a statute wishes to achieve and address must be enumerated by the legislature, leaving the executive space to fill in the technical details.[16] The latter doctrine is a canon of statutory interpretation that presumes the legislature will speak explicitly in statutory text where it wants to delegate authority to regulate an issue of significant social, economic, or political concern.[17]

These kinds of judicial interpretations, as the critics of capacious delegation maintain, are invaluable democracy-reinforcing initiatives because they oblige the people's representatives in the legislature to actually deliberate and decide on the most important principles and policies of a statute in the transparent open forum of the legislative process while preventing excessive accumulation of power in the executive.

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[16] See the dissent of J. Gorsuch in *Gundy v United States* 204 LEd 2d 522 588 US (2019) for an example of what a robust delegation doctrine might look like.

[17] For a recent and controversial example, see *National Federation of Independent Business v Deptt. Labor* 2022 SCC OnLine US SC 91 : 595 US (2022) where the Supreme Court upheld an injunction against enforcement of a vaccine mandate rule issued by the Occupational Safety and Health Administration on the basis it was likely to be found unconstitutional at full hearing. In a concurring opinion, J. Gorsuch stated that the doctrine exists to help "ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands".

These critiques pose an interesting question: if the broad delegation of statutory authority to the executive is such an obvious standing threat to democracy, why do so many other jurists vigorously resist the idea that judges should force the legislature to decide on major issues of principle and policy? Are they simply displaying complacency in the face of clear danger? The answer to this question, I suggest, demonstrates the great sense in Professor Dixon's unswerving admonishment that judges must tread carefully before deciding a measure is, in fact, democracy eroding. Moreover, for many jurists, the primary reason not to worry about capacious delegation is that a well-rounded assessment ofthe risks and rewards it carries as an institutional practice leads to the conclusion that it is simply indispensable to ensuring democratic responsiveness and,in fact, is a core mechanism for securing the common good.

Jurists supportive of broad delegation might point out the diverse reasons that legislatures in virtually every constitutional order have *embraced* the delegation of extensive regulatory authority to the executive and administrative bodies. A common argument is that copious delegation stems from pragmatic recognition by legislative actors it represents a more efficacious and expedient means of improving the responsiveness of the state to the desires or needs of the electorate.[18]Along these lines, Professor Mashaw notes how the sheer complexity of modern policy environments spurs legislators to give the executive and administrative bodies vague mandates with wide discretion to maximise their political flexibility and responsiveness.[19] Professor Sunstein links these developments to the reality that most parliamentarians are generalists, and not intimately familiar with much of the complex social and economic subject matter they seek to regulate. While they can provide broad guiding principles, they have neither the time nor the expertise to legislate in terms of policy minutiae, or epistemically complex or uncertain issues, compared to the executive branch and the permanent civil service aiding it.[20]

Viewed through this contextual lens, the ability to vest broad rule making authority seems functionally indispensable for both the legislature and executive to pursue many political goals. Instead of seeing this choice as an abdication of democratic responsibilities, delegation can be considered another useful constitutional mechanism through which to discharge them.

Relatedly, some jurists assert that consideration must be given to the risks inherent in aggressive judicial application of doctrines demanding that the legislature should decide all questions of principle and policy when enacting

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18 Jerry Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1 JL Econ & Org 81, 95.

19 Jerry Mashaw, 'Judicial Review of Administrative Action' (2005) Revista Direito GV 153–70, 155.

20 Bruce Ackerman, 'The New Separation of Powers' (2000) 133 Harv L Rev 633, 696; Cass Sunstein, 'The Most Knowledgeable Branch' (2016) 164 U Pa L Rev 1607, 1647–48.

statutes. For instance, Professor Stewart points out how the "[d]etailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized and complex issues", which a multimember legislative body is deeply structurally incapable of doing at any level of scale,[21] leading to a dent in the capacity of the State to deploy public power effectively or flexibly.

Others argue that application of strong forms of the delegation doctrine—scouring a statute for the enunciation of all possible principles and policies—involves quite subjective judicial judgement and line-drawing, and a doctrine that makes them "determinative of an administrative program's legitimacy could cripple the program by exposing it to continuing threats of invalidation and encouraging the utmost recalcitrance by those opposed to its effectuation".[22] Such a doctrine could hover over the administrative state as a "self-created, ill-defined, and virtually uncontrollable license to overturn any regulatory legislation".[23] In other words, the main effect of such doctrinal initiatives could be to wholly impede the ability of the State to act for the common good *tout court* while, at the same time, greatly inflating judicial power.[24]

The broader point at stake here, as Professors Sunstein and Vermeule point out, is that a myopic focus on risks stemming from public power (eg delegation) and how it might be abused a certain way can lead to neglecting the risk of abuses stemming from other sources that public power can keep in check. Examples of this phenomenon include citizens being "hurt or subordinated" by market or employment exploitation or the vagaries of "ill-health, poverty, or pollution".[25] Judicial enforcement of the delegation doctrine to attempt to force greater democratic deliberation, by whatever name it might be called, will invariably hamstring executive and legislative ability to act for the good of the *demos* by counteracting such vagaries, whether through providing a robust welfare system, regulating a complex globally interconnected economy in the public interest, or taming abuses of private power or exploitation. Prudent

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21 Richard B. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv L Rev 1667, 1695.

22 ibid 1697.

23 Kurt Eggert, 'Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary' (2021) 24 Chap L. Rev 707, 709–10.

24 Professor Emerson notes "The democratic irony of nondelegation…is that it remedies a purported deficit in popular control by empowering unelected judges to invalidate statutes duly enacted by the people's representatives. Moreover, the democratic argument against legislative delegation rarely engages in an analysis of comparative democratic-institutional competence. When the legislature delegates, it ordinarily delegates to the executive branch. And the executive branch, too, has claims to democratic legitimacy". Blake Emerson, 'Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory' (Forthcoming 2022) 73 Hastings LJ.

25 Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (HUP 2020) 5.

analysis of the supposed democratic risks of delegation would do well to bear such considerations in mind.

All of this is to say that in adopting a well-rounded, prudent analysis of the universe of different political risks surrounding a constitutional practice, such as capacious delegation, an approach that at first glance may look like the dangerous accumulation of institutional power and the sidelining of the legislature may, in fact, represent a benign practice whose intent is generally to facilitate the State to act for the common good.

B. The Political Executive and the Administrative State

Similar considerations of humility and avoidance of conceptual myopia should equally apply to assessments of whether shifts in the balance of powers between the political executive and other bureaucratic actors imperil the minimum core.

In addition to dispersing public power through a generic tripartite separation of powers, many constitutional systems vest considerable power in an administrative state made up of a vast array of civil servants and statutory bodies not under the sole control of the judicial, legislative, or executive branch. Professor Dixon notes that an increasingly important component of modern administrative states are such bodies as "government centers for science, weather, emergency management or disease control, or central banks…human rights, equality and electoral commissions" and "integrity and accountability institutions such as a national ombudsman" designed to use their technocratic expertise and professional skill in the public interest and with a high degree of political independence.[26]

Indeed, most constitutional democracies are characterised by an expectation that *all* civil servants, even those within core executive departments close to the political executive, will not act as mere tools of an incumbent administration but will exercise an overriding sense of duty to the State and public interest that is broadly conceived.[27] Consequently, across many systems, such concepts as merit, technocratic competence, security of tenure, and insulation from partisan politics are core principles guiding the work of bureaucracies. As a result, many commentators rightly consider a civil service with the institutional and cultural capacity to insist that executive action follow the law,

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[26] Dixon (n 2) Ch. 3.

[27] Lorne Sossin, 'From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion' (2005) 55 UTLJ 427, 430; Neal Kumar Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within' (2006) 115 Yale LJ 2314.

respects technocratic expertise, and refrains from partisan excess[28] to be indispensable to a well-functioning polity. to

Despite the importance of bureaucratic independence to a well-functioning constitutional democracy, political executives still usually enjoy an array of constitutional tools that they can deploy to leverage robust control over both civil servants in core executive departments and the kind of independent bodies mentioned above. These tools include power over the appointment and removal of bureaucratic personnel (which can be used to embed ideologically sympathetic actors across the administrative firmament), synoptic oversight of policy-making from the centre to ensure that it is in line with executive priorities (eg the Office of Management Bureau in the US or Cabinet Office in the UK), authority to issue executive directives and guidelines to steer civil servants to orient their discretion in a particular direction, and the ability to budgetary control as a carrot and stick.[29]

Given the indisputable importance of bureaucratic autonomy for the reasons just discussed, should muscular use of such powers automatically trigger alarm that the democratic core could be under threat? Again, as with delegation, it is my contention that extreme care is warranted before labelling institutional developments dangerous or suspect merely because they empower the political executive. Depending on context and intent, the political executive's use of tools within its authority to leverage more control can be an entirely benign development, one that counteracts certain risks, such as bureaucratic inertia, mission-specific myopia, or capture by external actors, and infuses the institutional technology of the administration with a valuable normative vision.[30]

The powers listed above can alternatively, of course, be used in a way that *should* trigger concern for the democratic minimum core. Several obvious risks loom in circumstances where an executive erodes bureaucratic independence and autonomy to such an extent that officials are more likely to make determinations aligned with the executive's political preferences—not in a thicker normative sense but in the crude partisan sense unconcerned with the common good.[31]

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28 Jon D. Michaels, 'The American Deep State' (2018) 93 Notre Dame L Rev 1653, 1656; Jon Michaels, 'An Enduring, Evolving Separation of Powers' (2015) 115 Colum L Rev 515, 542-544.

29 Conor Casey, 'Political Executive Control of the Administrative State: How Much is Too Much?' (2021) 81 Md L Rev 257.

30 Adrian Vermeule, 'Bureaucracy and Distrust: Landis, Jaffe, Kagan on the Administrative State' (2017) 130 Harv L Rev 2463, 2482; Elena Kagan, 'Presidential Administration' (2000) 114 Harv L Rev 2245.

31 Matthew C. Stephenson, 'The Qualities of Public Servants Determine the Quality of Public Service' (2019) Mich St L Rev 1177, 1185.

Dismantling tenure protections and staffing bureaucracies with political hacks dedicated to diligently implementing executive directives, no matter how arbitrary, odious, or irrational, carries obvious risks. If done with enough partisan aggression and at a large enough scale, executive control over the administrative state can be used as a pathway to hollow out well-established principles associated with constitutional government, including the rule of law, robust prosecutorial independence, freedom of political speech, and free and fair electoral competition that offers a genuine chance for the rotation of power between parties.

These vital principles will clearly suffer if bureaucrats, such as prosecutors and revenue officials, can arbitrarily dangle the threat of sanctions over the heads of political opponents of the executive, if regulators can engage in targeted harassment of media opposed to their political masters' policies, or if electoral commissions and human rights ombudsmen can turn a blind eye to the distortion of electoral competition or human rights abuses.

Another clear danger is evident when executives cynically use their budgetary powers[32] to intentionally gut an administrative body's funding, to the point where it struggles to discharge the basic statutory duties the legislative branch has entrusted it with or that the Constitution has assigned it.[33] The use of budgetary powers in good faith to ensure that scarce resources match the executive's policy priorities is one thing, but to deliberately cripple a lawfully constituted public body is quite another.[34]

Nevertheless, it is also critical to bear in mind that not all legislative or constitutional developments involving the political executive exercising more control over the bureaucracy ought to be construed as posing similarly unacceptable threats. Committing to a "unitary executive theory"[35] of executive-bureaucratic relations is not a prerequisite to accepting the proposition that

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32 Assuming that either the Constitution or accumulated institutional practice and convention place the duty of formulating an annual budget onto the political executive.

33 For a discussion of this phenomenon in Brazil, see Mariana Mota Prado, Assessing the Theory of 'Presidential Dominance from a Comparative Perspective: The Relationship Between the Executive Branch and Regulatory Agencies in Brazil' in Susan-Rose Ackerman and others (eds.), *Comparative Administrative Law* (Edward Elgar 2010) 225, 234. For a similar discussion with respect to the United States, see Jody Freeman and Sharon Jacobs, 'Structural Deregulation' (2021) 135 Harv L Rev 585.

34 Freeman and Jacobs suggest that the real question is "whether, considering all of the surrounding evidence, agency reforms that have potential to reduce functional capacity appear to have been taken in good faith with a purpose other than weakening the agency's ability to perform its legislative tasks". ibid, 627.

35 The so-called unitary executive theory stems from US constitutional law debates and, broadly speaking, concerns the level of constitutional authority the president enjoys over the bureau- cracy and officials who are engaged in any kind of law enforcement or policymaking. For an overview of the different strong and weak iterations of the theory, see Cass Sunstein and Adrian Vermeule, 'The Unitary Executive: Past, Present and Future' (2020) Sup Ct Rev 83, 88–90.

bureaucratic independence, whether in core executive departments or 'fourth-branch' institutions, is not an unqualified good but, rather, one that has the potential to sow the seeds of other political risks that need attending to.

For one thing, the pursuit of valuable policy goals critical to the common good cannot hope to succeed unless the institutions of the political executive as well as the administrative state are staffed by personnel who are sufficiently committed to achieving similar ends. A civil service or constellation of fourth-branch institutions staffed with too many personnel who have an excessively Burkean disposition to addressing pressing problems, who are trapped by old-fashioned or defunct socio-economic paradigms, or who have a deep reluctance to address them out of pure ideological disagreement, or, because of alignment with vested private interests, may create serious institutional choke points that are deeply obstructive of the executive's policy goals.[36] Sometimes, a robust use of appointment, removal, directive, and budgetary powers will be warranted to prevent this risk from materialising.

Where political executives take steps to assert greater power over the administrative state and civil service in order to successfully advance good faith normative goals for the common good, this course of action should generally be seen as benign and distinguished from engaging in the partisan curbing of institutional checks and balances. It might be helpful to consider some concrete scenarios of what good faith political executive action on this front might look like.

Imagine a new left-wing government that has just assumed power. At the top of their legislative agenda is tackling child poverty and inequality by increasing borrowing, spending, aiming for full employment, and introducing a wealth tax. The government is aware that independent experts in the State's influential and statutorily independent Fiscal Advisory Council (all appointed during the prior neoliberal administration) are likely to publish a damning report on their proposed budget and recommend immediate course reversal. In response, the political executive uses its constitutionally granted removal powers to dismiss the current crop of experts and appoint an entirely new panel of ideologically sympathetic—but non-party member—Keynesian and Marxian economic experts.

Next, consider a social conservative administration elected on a mandate of protecting unborn life (by restricting abortion access) and a pro-family agenda of promoting marriage and easing financial burdens on parents (through tax subsidies and enhanced child benefit payments). The incumbent board of the statutorily independent Human Rights Commission (appointed by a previous

[36] For a case study applying this argument to the Star Wars Universe, see Conor Casey and David Kenny, 'How Liberty Dies in a Galaxy Far, Far Away: Star Wars, Democratic Decay, and Weak Executives' (2021) Law. Lit. 1.

liberal government) take a diametrically different philosophical stance on the nature and content of human rights and issue a scathing public communique about the government's agenda being "illiberal" and "backwards". In response, the executive dismisses the board and appoints a new crop of board members with experts from the academy, NGOs, and a range of religious organisations, all of whom broadly work within a natural-law-grounded human rights framework. The executive relies on the statutory authority it has under the legislation establishing the commission, which permits it to remove board members where it "appears to be necessary for the effective performance of the Commission".

Finally, envisage a new administration that is keen to engage in immigration reform, starting with the State's immigration enforcement agency. Imagine that this agency has, over the years, earned a reputation for the zealous and heavy-handed deportation stance of its senior civil servants. In a bid to reduce the volume of deportations while it works on introducing a bill to the legislature that would regularise the immigration status of many migrants, the new administration introduces an appropriations bill that significantly reduces the budget of the enforcement agency and concurrently issues a directive demanding that the agency use its statutory discretion and depleted resources to prioritise deporting only those who have committed serious criminal offences.

One might protest vociferously at the political substance of these scenarios if one is a neoliberal, social liberal, or an immigration hawk, considering them unwise or downright immoral. However, it would be histrionic to maintain that the use of appointment, removal, and budgetary powers in these scenarios would be *democracy*-threatening since the intent in each instance was not to lace the bureaucracy with hacks and "yes-men" for a base goal like building party hegemony over the State and its institutions. The purpose was, instead, to infuse the institutional technology of the bureaucracy with what the executive views as a more compelling normative vision than the status quo up to this point in time—in other words, to not allow the orienting view of the relevant parts of the administrative state to be based on a harmful understanding of political economy, human rights, or migration policy. This kind of robust normative steering of the ship of State, with an eye to making it more responsive to the needs of the common good, should generally be seen as very distinct from an incumbent administration trying to capture it for partisan purposes.

It would be easy to go on and provide more examples highlighting why giving wide latitude to the political executive to steer and direct the normative vision of the administrative state is critical to addressing important political challenges and ensuring democratic responsiveness to. The point is a general one. Whether the issue entails tackling economic and health inequalities, environmental degradation, public health crises, or immigration reform, the act of combining bureaucratic hostility towards the political executive with very high levels of independence and insulation from political control may spark

a proliferation of veto points that jeopardise their pursuit and harm the common good. The corollary of this point is that a unified and determined political executive with the ability to exert robust countervailing force and direction over the bureaucracy in order to curb precisely such risks can be indispensable to a well-functioning polity.[37]

Accordingly, we ought to refrain from offering blanket observations about the appropriate relationship between the political executive and firmament of agencies that make up the administrative state, for example by regarding as somehow eternally fixed the legitimate level of control the former should wield over the latter. As with delegation, we should first pause and then engage in well-rounded and non-myopic analysis of proposed changes to the balance of executive-bureaucratic relations in favour of greater political executive control, rather than rush to regard them as presumptively suspect or threatening to the democratic minimum core.

III. CONCLUSION

There is much to recommend in Professor Dixon's new work, and its rich insights will doubtless generate extensive discussion. I hope this short essay helps highlight the wisdom of Professor Dixon's emphasis on the importance of judicial prudence when assessing whether political branch action actually represents a threat to the democratic core.

[37] See Max Weber, 'The Reich President' (1986) 53 Soc Res 125, 128–29 (Gordon C. Wells trs).