**The Supreme Court and the Reformation of the Non-Delegation Doctrine: *Náisiunta Leictreacht* *v The Labour Court, Minister for Business Enterprise, and Ireland* [2021] IESC 36.**

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**Introduction**

The vesting of broad rulemaking authority in the Government and administrative bodies by the Oireachtas has been a staple of our constitutional order for over 80 years.[[2]](#footnote-2) Despite being such a deeply entrenched practice, it has sat in a position of ambivalence, even tension, with judicial interpretation of Article 15.2.1. Article 15 jurisprudence has struggled to reconcile competing principles and considerations. Namely, the paramountcy of parliamentary law-making on the one hand, and accommodating vast swathes of state regulatory activity in socio-economic life for the common good on the other.

This tension has long bent, as a matter of strict legal principle, toward prioritizing the former; with the canonical[[3]](#footnote-3) *Cityview Press v Anco*[[4]](#footnote-4)test striving to uphold legislative primacy by insisting executive rulemaking be strictly cabined by statutes where *all* principles and policies are enumerated by the legislature. In practice, however, every law student soon learns that judicial application of its own doctrine has bent over backwards to facilitate the rulemaking activity of the executive-led administrative state.[[5]](#footnote-5) Since *Cityview* was decided, judges have only invalidated grants of rulemaking authority effectively lacking *any* statutory guidance by the Oireachtas.[[6]](#footnote-6)

To further muddy the jurisprudential waters, in recent years the Supreme Court – in *Bederev v Ireland*[[7]](#footnote-7) and *O’Sullivan v Sea Fisheries Protection Authority*[[8]](#footnote-8) -appeared to recast the *Cityview* test[[9]](#footnote-9) through several doctrinal innovations. These cases tapered down the centrality of ensuring a delegating statute contained all possible principles and policies to be Article 15 compliant, emphasized the importance of statutory safeguards and ongoing Oireachtas oversight,[[10]](#footnote-10) and overall took a distinctly more negative and looser approach to the permissible bounds of delegating rulemaking power. In some respects, it looked like an attempt to finally align constitutional principle and widespread constitutional practice, but without officially overruling *Cityview*. These judgments raised considerable commentary and speculation: Was the *Cityview* test now defunct? What is the purpose of searching for ‘principles and policies? And are statutory safeguards providing for the review of regulations by the Houses of the Oireachtas of any significant constitutional weight for the purposes of Article 15?

These questions and this state of legal limbo and ambiguity have been, I will argue, definitively settled by the Supreme Court in *Náisiunta Leictreacht v Labour Court* (‘NECI’).[[11]](#footnote-11) The case represents the most significant treatment of Article 15.2.1 since *Cityview* and offers a definitive recasting of the doctrinal test for assessing the constitutionality of delegated rulemaking authority.[[12]](#footnote-12) The *Cityview* test, at least as formally articulated in judicial doctrine and understood by legal scholars, is definitively dead and buried. In this article, I will give an account of what has replaced it and whether it is for better or worse.

Part I introduces *NECI* and gives an account of the Supreme Court judgments of MacMenamin and Charelton JJ. Part II outlines its doctrinal significance. Part III defends the judgment from two anticipated lines of critique. Namely, that the judgment is in tension with our scheme of separation of powers, or that it raises democratic concerns.

**Part I – *NECI v Labour Court and Ireland* [2021] IESC 36**

**Facts**

A core aspect of Ireland’s industrial relations legislative framework is Chapter III of the Industrial Relations (Amendment) Act 2015 (‘2015 Act’). The provisions of Chapter III provide the Labour Court[[13]](#footnote-13) statutory authority to issue a ‘Sectoral Employment Order’ (‘SEO’) setting minimum terms and conditions across sector-wide areas of the economy. The Labour Court can issue an SEO upon application by a trade union of workers, or employers’ organisation, or a combination of both, asking it to examine the terms and conditions of workers of a ‘particular class, type, or group’[[14]](#footnote-14) where said applicant group is ‘substantially representative’[[15]](#footnote-15) of their ‘economic sector’[[16]](#footnote-16). The phrase ‘economic sector’ is defined as one concerned with a specific economic activity requiring specific qualifications, skills, or knowledge.

Before examining whether an SEO should be made, the Labour Court must consider if it is ‘normal and desirable practice’[[17]](#footnote-17) to have separate terms and conditions relating to pay, sick pay, or pension schemes in respect of the workers in the economic sector to which the request applies. It must also consider whether any ultimate recommendation is likely to “promote harmonious relations” between workers and their employers in the economic sector the request concerns.[[18]](#footnote-18) Before an SEO can be issued, the Labour Court must publish a notice of intent to examine the request and open it to public representations.[[19]](#footnote-19)

After its examination of a request for an SEO and hearing public representations, the Labour Court may, if it thinks appropriate, make a recommendation to the Minister for Business Enterprise an SEO be adopted following consideration of several additional statutory criteria:[[20]](#footnote-20) (a) the potential impact on levels of employment and unemployment in the identified economic sector concerned; (b) the terms of any relevant national agreement relating to pay and conditions for the time being in existence; (c) the potential impact on competitiveness in the economic sector concerned; (d) the general level of remuneration in other economic sectors in which workers of the same class, type or group are employed; (e) that the sectoral employment order shall be binding on all workers and employers in the economic sector concerned. Any recommendation issued to the Minister must be accompanied by a report confirming these conditions were considered.[[21]](#footnote-21)

A mandatory statutory precondition on the Labour Court’s power to make a recommendation is that one cannot be issued unless it is satisfied a proposed SEO ‘would promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned’ and is reasonably necessary to ‘promote and preserve high standards of training and qualification’ and ‘ensure fair and sustainable rates of remuneration, in the economic sector concerned.’[[22]](#footnote-22)

If the Minister considering the recommendation is satisfied the Labour Court has complied with the requisite statutory conditions, she is obliged to lay the recommendation before the Houses of the Oireachtas in the form of a statutory order.[[23]](#footnote-23) If this is subsequently approved by each House, the order is promulgated as a statutory instrument and gains binding force of law.[[24]](#footnote-24) Once promulgated, an SEO applies to every worker of the class or type in the economic sector it is expressed to apply, notwithstanding the fact a worker or employer may not have been a party to the request.[[25]](#footnote-25)

Some years earlier, the Supreme Court in *McGowan v Labour Court*[[26]](#footnote-26) declared s 27(3) of the Industrial Relations Act 1946 – effectively the statutory precursor to Chapter III - unconstitutional.[[27]](#footnote-27) The Supreme Court found the impugned parts of the 1946 Act allowed parties entering into a sector wide employment agreement to set any terms of employment they wanted, subject only to the Labour Court finding those proposing the agreement were ‘substantially representative of the sector’. Due to the absence of any other statutory guidance, limits, or direction, and a lack of any ministerial or legislative ability to consider or veto any agreement reached before it gained the force of law, the Supreme Court found the provision substantively amounted to a sweeping abnegation of legislative authority to unaccountable private parties to create law in a very important area of socio-economic policy.[[28]](#footnote-28) These private parties could, with minimal statutory guidance or direction, set working conditions and renumeration for every employee and employer in a particular sector, with potential attendant knock-on effects for the wider economy.[[29]](#footnote-29)

The contrast between the statutory schemes in the 1946 and 2015 Acts is quite stark. The 1946 Act effectively provided no statutory guidance in terms of what social, economic, moral criteria the Labour Court had to consider, or what outcomes it should strive for, before making consequential statutory orders that would have considerable impact for those subject to it, and perhaps society more generally. It also had no role for a government minister or the Houses of the Oireachtas to review a proposed order before it gained the force of law. Chapter III clearly attempted to address, in a laboriously deliberate way, the various concerns raised by the Supreme Court in *McGowan*.

Notwithstanding these statutory alterations, the plaintiffs in *NECI* opted to mount a full-scale constitutional challenge to Chapter III on similar Article 15 grounds as in *McGowan*. The plaintiff (the respondent in the Supreme Court), a company limited by guarantee representing small and medium sized electrical contractors, applied for a judicial review of an SEO, the subject of a recommendation by the Labour Court, under the procedures laid down in Chapter III, and subsequently embodied in a statutory instrument, SI 251/2019.

The effect of this Order was to set terms and conditions for workers across the entire electrical contracting area in the state. The recommendation was made in response to applications to the Labour Court from Connect trade union, and two employers’ groups, namely, the Electrical Contractors’ Association, and the Association of Electrical Contractors of Ireland, which were treated as a joint applicant by the Labour Court.[[30]](#footnote-30)

**High Court judgment**

In the High Court, Simons J held the decision to issue the SEO was unlawful as insufficient reasons had been given by the Labour Court to ensure statutory compliance with the terms of Chapter III. More significantly, however, Simons J went on to hold that Chapter III of the 2015 Act itself constituted an unlawful alienation by the Oireachtas of its constitutional role as the sole legislator for the state. Applying the *Cityview* test, Simons J concluded that the terms in Chapter III did not provide sufficient principles and policies to guide the power of the Labour Court.[[31]](#footnote-31) Simons J observed that making an SEO involved significant policy choices with far-reaching effects, going far beyond merely filling in the details of goals set by the legislature. This judgment was appealed directly to the Supreme Court due to its public importance. The Supreme Court upheld the High Court’s finding there had been a failure to follow the provisions of Chapter III, but vigorously rejected the finding Chapter III was itself unconstitutional.

**Supreme Court judgment**

**Judgment of the Court – MacMenamin J**

The bulk of the Supreme Court’s judgment in *NECI* was dedicated to offering a definitive statement on the proper interpretation Article 15.2.1 and the permissible bounds of delegated rulemaking authority. The starting point for MacMenamin J’s discussion of the appropriate doctrinal test was to cite *Bederev* and *O’Sullivan*, which he said ‘recently explained’ how the *Cityview* test should be correctly applied.[[32]](#footnote-32) As alluded to in the introduction, ‘recently recast’ may have been a more apt description of the impact of *Bederev* and *O’Sullivan* on *Cityview*. But whichever way one wants to describe the impact of these cases, it is clear the Supreme Court in *NECI* emphatically doubled down on their move away from a rigorous application of the principles and policies test outlined in *Cityview*.

Famously, this test required a delegation of rulemaking authority by the Oireachtas to be accompanied by the articulation of all principles and policies and confinement of the delegate to the role of filling in the details to give life to legislative directives. In stark contrast, here the Supreme Court stated that dwelling on the presence or absence of all principles and policies is not the right doctrinal test, but rather a series of ‘indicators or pointers’[[33]](#footnote-33) and ‘indispensable foundation stone’ to assist courts determine ‘the ultimate issue’.[[34]](#footnote-34) Namely: ‘whether or not the Oireachtas has acted as sole *legislator,* or has impermissibly delegated legislative power’.[[35]](#footnote-35) The Supreme Court suggested that probing whether a statute delegating rulemaking authority contains *all* relevant principles and policies, risked distracting from the text and structure of the Constitution and the essential question of whether the Oireachtas’ ‘constitutional duty as sole legislator’ had been abdicated.[[36]](#footnote-36)

These passages clearly build on *O’Sullivan* and *Bederev’s* negative recasting of the delegation doctrine*.* In *O’Sullivan*, for example, O’Donnell J acknowledged the possibility of the Oireachtas providing a wide range of freedom for a delegate to exercise rulemaking authority and stressed the importance of focusing on the overall question of whether the area of rule-making authority is so ‘broad as to constitute a trespass by the delegate, or subordinate, on an area reserved to the Oireachtas’.[[37]](#footnote-37) In other words, the presence or absence of all possible principles and policies is not the ultimate test. To be sure, the Supreme Court did not totally jettison the relevance of searching for principles and policies in a statute but, as in *O’Sullivan,* noted the exercise was a useful conceptual tool for discerning whether there has been a ‘limited or unlimited delegation of power’[[38]](#footnote-38) and an impermissible ‘usurpation, arrogation, or trespass’ on legislative power.[[39]](#footnote-39)

After putting the principles and policies test in its proper place, MacMenamin J proceeded to sketch the broader set of questions a Court grappling with the ultimate constitutional question of alienation must answer.[[40]](#footnote-40) For the Supreme Court, these key questions include: whether principles and policies discernible in a statute indicate the presence of boundaries, guidelines, or rules of conduct laid down by the Oireachtas to guide the delegate; whether the delegated rulemaking authority concerns a defined subject matter or not; whether the legislation indicates discernible objectives the Oireachtas wants the delegate to achieve; whether the power delegated is delimited or wholly open-ended; and whether the power delegated has safeguards in the form of being subject to review by a Minister or the Houses of the Oireachtas. For the Supreme Court, these questions offer a useful, more granular, means of probing the ultimate question of whether there has been a structural abdication of the Oireachtas’ constitutional role than the classic *Cityview* approach.[[41]](#footnote-41)

When conducting this assessment, MacMenamin J added a Court must bear in mind the Constitution is a ‘continuously operative charter of government’ which ‘does not’ and ‘cannot’ require the Oireahtas to ‘predetermine every choice made by a subordinate’ through exhaustive enumeration of all possible principles and policies. Instead, it is ‘basic, discernible rules of conduct or guidelines which the subordinate must observe’ are required to ensure there has been no alienation of Article 15 power.

The Supreme Court then outlined some normative arguments for why a strong-form principles and policies test would, in fact, be counter-productive for safeguarding the Oireachtas’ constitutional role as lawmaker. For a start, MacMenamin J noted that some areas of policy that lawmakers engage with require scientific or technocratic expertise the Oireachtas, as a body of generalists, simply does not possess, meaning they would be unable to address them without vesting rulemaking authority in a body with the requisite knowledge. More broadly, the Court was concerned that if the Oireachtas lacked flexibility to delegate broad rulemaking authority it would substantively deny it ‘the necessary attributes of a legislature in a democratic society’, like being able to respond decisively to complex policy questions on behalf of the electorate for the common good.[[42]](#footnote-42)

Having outlined the appropriate doctrinal test for Article 15 questions and the background normative considerations that should orient application of the test, the Court proceeded to apply it to the provisions of Chapter III. The Supreme Court did not attempt to disguise, or playdown, the fact Chapter III gave the Labour Court considerable statutory discretion over entire economic sectors, and consequential and important socio-economic activity. The Court was very cognizant the discretionary power of the Labour Court could have very considerable impact on the lives of those subject to it, and wider social and economic ripple-effects.[[43]](#footnote-43)

But the Supreme Court was emphatic this fact alone did not serve to make authority to make these choices an usurpation of legislative power, as opposed to ‘engaging in the decision-making power which the Oireachtas actually vested in it by law’ by the broad statutory framework of s 15 and s 16 and subject to safeguards in s 17.[[44]](#footnote-44) Overturning the conclusion of the High Court on this point, MacMenamin J found that Chapter III provided a constitutionally appropriate level of guidance and direction to the Labour Court. MacMenamin J rejected the High Court’s determination that mandatory considerations like ensuring a proposed SEO is ‘substantially representative’ of an ‘economic sector’ and would be ‘normal and desirable’ or ‘expedient’ to adopt its terms concerning renumeration and working conditions, provided too little direction to be Article 15 compliant.

While agreeing Chapter III contained broad and capacious statutory terms that could be ‘far-reaching’[[45]](#footnote-45) in their consequences, MacMenamin J held it was within the Oireachtas’ authority and prerogative to delegate broad normative discretion, provided it did not substantially represent an alienation. MacMenamin J bolstered his conclusion on Chapter III’s constitutionality by observing that the Labour Court was constrained by a need to be satisfied an SEO will satisfy several ‘legislative goals’[[46]](#footnote-46) set by the Oireachtas in the delegating statute, namely that it will ‘promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned’ and is reasonably necessary to ‘promote and preserve high standards of training and qualification’ and ‘ensure fair and sustainable rates of remuneration, in the economic sector concerned.’[[47]](#footnote-47) Aside from these ‘outcome’ related criteria, MacMenamin J notes the Oireachtas also provided guidance by mandating the Labour Court have regard to several policy/moral considerations in s 16 before issuing an SEO recommendation.[[48]](#footnote-48)

Thus, while the Supreme Court accepted Chapter III effected a broad delegation of authority, they found that when one assessed the ‘overall and cumulative effect’[[49]](#footnote-49) of the statutory provisions in question they were not ‘too imprecise to provide any meaningful’ guidance that would make a broad vesting of rulemaking discretion elide into an alienation of Article 15 authority to make laws. The fact the choices left to the Labour Court were broad and inevitably involved policy choices – for example decisions that might affect different stakeholders in an economic sector in very divergent ways – did not, of itself, make Chapter III an alienation of legislative power. Instead, the Labour Court’s wide decision-making powers were a consequence of a deliberate legislative choice of the Oireachtas to set capacious statutory parameters and broad legislative goals in a complex and sensitive policy area for its delegate to operate within.[[50]](#footnote-50)As a contrasting example of what might be an ‘inordinately broad’ delegation of statutory rulemaking authority to a delegate, MacMenamin J highlighted a statute like that invalidated in *McDaid v Sheehy* [1991] IR 1, where the Oireachtas gave the Government unconstrained authority to set taxes on imports ‘by order’, with no other guidance as to the policy goals to be achieved or the criteria to shape their pursuit.[[51]](#footnote-51)

Curiously, after stressing that the availability of significant scope for choice for the Labour Court in making SEO’s was not an alienation of legislative power, MacMenamin J proceeded to ‘disagree’ that such choices could be construed as ‘policy choices’.[[52]](#footnote-52) MacMenamin J’s attempted to distinguish a delegate making policy choices on the one hand from a delegate making ‘decisions…within a given set of parameters’ to ‘achieve outcomes with particular effects, or consequences’[[53]](#footnote-53) on the other. This distinction is facially unconvincing given that the normative choices the Labour Court makes in assessing and weigh up different statutory criteria are obviously, inescapably, policy decisions. But convincing or not, MacMenamin J’s attempted distinction does little to detract from the clear thrust of the judgment in rejecting the High Court’s approach to the appropriate doctrinal test for Article 15. This, MacMenamin J surmised, was an approach to principles and policies ‘no longer favoured’ post *Bederev* and *O’Sullivan*.[[54]](#footnote-54)

The second substantive part of MacMenamin J’s judgment concerned the relevance and weight of political-democratic control mechanisms in the assessment of whether a delegation represents an alienation of legislative power. MacMenamin J made it clear that the fact the Labour Court’s broad decision-making authority is subject to two-levels of political review – ministerial and legislative – were very consequential considerations indeed.[[55]](#footnote-55) Ministerial review involved a genuine check for whether the Labour Court has complied with its statutory obligations; allowing for the possibility a Minister would refuse to accept a recommendation if it felt the conditions set by the Oireachtas were ignored.[[56]](#footnote-56) MacMenamin J was also of the view that the High Court gave insufficient weight to the statutory safeguards in Chapter III providing for review by the Houses of the Oireachtas.[[57]](#footnote-57) The fact the statutory provisions here required a positive resolution of each House ensured it was more than a ‘relevant consideration’ for whether there had been an alienation; it was a ‘very weighty consideration’.[[58]](#footnote-58)

MacMenamin J concluded the judgment by finding there was no impermissible delegation of legislative authority and no trespass on the function of the legislature by the provisions of Chapter III.[[59]](#footnote-59) While the delegation of rulemaking authority was significant, the statute set out discernible and intelligible goals to guide the delegate and cabin its discretion; and a robust review procedure where the Minister and Houses of the Oireachtas must review (with the possibility of vetoing) a proposed order before it gains the force of law.

**Concurring judgment of Charleton J**

In his short concurring judgment, Charleton J emphasised that the ‘fundamental rule’ underpinning Article 15 is that enough guidance must be given to a subordinate rulemaker so ‘that control by the Oireachtas as to the outcome might still be maintained’.[[60]](#footnote-60) What Article 15 does not permit is ‘delegation so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas’.[[61]](#footnote-61) Charleton J stressed that references to the principles and policies test in constitutional discourse, although ‘often repeated’, did not make it an ‘an imperative in the Constitution’.[[62]](#footnote-62)

Assessing whether a statute vesting rulemaking authority contains principles and policies is, for Charleton J, better viewed as an analytical tool, a heuristic, a way of gauging the existence of the ‘continued guiding hand within discernible boundaries’ of the Oireachtas.[[63]](#footnote-63) As in his judgment in *Bederev,* Charleton J once again put serious emphasis on the importance of ongoing scrutiny or oversight of the Houses of the Oireachtas for assessing if there has been an unconstitutional alienation. For Charleton J, the return of regulations to the Oireachtas for negative or positive approval ‘may be a key factor’ in assessing a statute’s compliance with Article 15.

Charleton J surmises the ‘overall package’ of factors the Court must consider in assessing an Article 15 challenge as encompassing the degree of power delegated, the extent of aims and boundaries guiding the rule maker discernible from the parent legislation, and the type of Oireachtas scrutiny provided for.[[64]](#footnote-64) Later in his judgment, Charleton J repeated these criteria in a pithier form when he said the ‘test applicable’ is ‘what guidance is given, what limits are set and the degree of democratic involvement subsequent to rule making’.[[65]](#footnote-65)

**Part II – The end of *Cityview Press***

The Court’s constitutional rationale for limiting the amount of rulemaking power the Oireachtas can vest in a delegate, stems from the structural imperative of preventing its law-making power from being ‘abnegated’ or ‘alienated’.[[66]](#footnote-66) This has been attributed to judicial attempts to uphold our Constitution’s separation of powers and democratic principles[[67]](#footnote-67) articulated in Articles 5 and 15.[[68]](#footnote-68)

The *Cityview* test the Supreme Court articulated to vindicate these principles required that statutory grants of rulemaking power must not go beyond giving authority to implement all the ‘principles and policies’ contained in the authorizing legislation.[[69]](#footnote-69) If a statute goes beyond this, rulemaking authority strays from permissible subordinate regulatory power to an unconstitutional delegation of legislative power.[[70]](#footnote-70) But as noted in my introductory passage, every Irish lawyer knows the test was simply never applied as cited.[[71]](#footnote-71) When it came to applying the test, the Court’s awareness of the need for capacious delegation in a political community with executive-centred government, seemed to consistently trump any concern it had over ensuring rulemaking was strictly cabined by legislative direction.[[72]](#footnote-72)

Judicial application of the *Cityview* test has always implicitly recognised that tightly circumscribing the power of the Oireachtas to delegate statutory power may simply undermine its substantive institutional power, by frustrating its ability to efficaciously pursue legislative objectives.[[73]](#footnote-73) The existence of the administrative state in Ireland, and the necessity of delegated statutory power to its maintenance and efficacy, has been acknowledged by the judiciary itself from the earliest days of our constitutional order.[[74]](#footnote-74) The Court’s understanding of the necessity of delegated rulemaking authority in this context has two interrelated consideration. One stems from an awareness of the complexity of the social and economic issues the Oireachtas seeks to regulate, which can require a level of expertise, information, and technocratic skill the legislature may not possess as a body of generalists.[[75]](#footnote-75) The second consideration stems from the fact that the socio-economic conditions the Oireachtas seeks to regulate change rapidly and demand a level of policy-adjustment legislatures are institutionally ill-equipped to provide in detailed primary statutes due to time and informational constraints.[[76]](#footnote-76)

A strong undercurrent of Article 15.2.1 case law has therefore been judicial recognition that broad delegation of rulemaking authority carries ‘obvious attractions’ and is ‘indispensable’ to the ‘functioning of the modern state’ due to the ‘complex, intricate and ever-changing situations’ confronting the political branches.[[77]](#footnote-77) Our Courts have always sensibly appreciated that if broad delegation of rulemaking authority was impermissible, it would hamstring the practical capacity and power of the Oireachtas to act, all in the name of safeguarding its *formal* prerogatives.[[78]](#footnote-78) The stark fact is the Oireachtas may need to delegate broad statutory authority to the executive and administrative bodies if it wants to achieve valuable and complex policy objectives, precisely because it might lack institutional capacity, time, and expertise to exhaustively specify in primary legislation how it intends to address a given issue.[[79]](#footnote-79)

This clear judicial appreciation of the need to vest broad regulatory authority in the administrative state means its consistent failure to apply its own test was, with respect, a problem entirely of its own making. The Court’s formal articulation of the principles and policies test proceeded from a conception of executive-legislative relations that reduced wielders of delegated statutory power to diligently sketching the details of normative choices and objectives definitively decided upon and passed on by the legislature.[[80]](#footnote-80)

But given their keen awareness of the need for broad and deep executive discretion, the Superior Courtsought to have known this kind of classical liberal, simple principal-agent conception of executive-legislative relations, would be impossible to square with the fact executive-centred government has been the structural spine of our constitutional order since its inception. The *Cityview* test, in its formal articulation, sits in irreconcilable tension with this core of our small-c Constitution[[81]](#footnote-81) and this is why the Court’s practical application of the test has always diverged.[[82]](#footnote-82)

*Bederev*[[83]](#footnote-83) and *O’Sullivan*[[84]](#footnote-84)were the first clear signs the Supreme Court was clearly uncomfortable with the gap between the delegation doctrine’s formulation and application. As opposed to assessing whether *all* relevant principles and policies are contained in a parent statute vesting rulemaking authority,[[85]](#footnote-85) in these cases the Court substantially recast the focus of the delegation doctrine to turn on the negative, looser, question of whether there has been a wholesale trespass on the power of the Oireachtas – to be assessed through a combination of the presence or absence of statutory guidance and ongoing oversight by the Houses.

With *NECI*, the *Cityview* interpretation of Article 15.2.1 which neuters the normative discretion of those wielding rulemaking authority, has been definitively displaced and replaced with the negative more capacious test sketched in *Bederev* and *O’Sullivan*.[[86]](#footnote-86) What is to be avoided now, says the Supreme Court, is a level and type of delegated rulemaking authority which in substance represents a de facto shutting-up shop over a particular policy area. That is, a situation where a delegating statute couples very broad rulemaking discretion with no guidance from the Oireachtas to the delegate as to the desired direction of their regulatory choices, or the criteria that should inform them. *NECI* also solidified *Bederev’s* decision to ramp up the importance to assessing Article 15 compliance of providing for ongoing supervision and annulment of regulations by the Houses, which was never previously considered a fundamental part of the *Cityview* test.[[87]](#footnote-87) For while O’Higgins CJ in *Cityview* did refer to ongoing supervision by the Houses of delegated rulemaking authority as a ‘safeguard’, he also said that regardless of such safeguards the Court nevertheless had to apply the principles and policies test as the true marker for whether there had been a delegation of statutory power ‘neither contemplated nor permitted by the Constitution’.[[88]](#footnote-88)

At one point in the judgment, the Court invoked the dicta of the *Cityview* test and appealed to doctrinal continuity by concluding the *NECI* test remains whether a delegation of rulemaking authority is ‘more than a mere giving effect to principles and policies which are contained in the statute itself’.[[89]](#footnote-89) But any doctrinal continuity *NECI* offers is artificial, as the interpretive gloss MacMenamin J ascribes to this *Cityview* dicta is considerably different from how previous cases and scholarly consensus understood it. *NECI* asks whether the rulemaking authority delegated is guided by the Oireachtas or subject to its ongoing oversight and review such that it does not slough off legislative direction entirely. This is, on any plausible reading, very different from asking whether the rulemaking power merely puts flesh on the bones of a detailed set of normative goals the Oireachtas has decided upon.[[90]](#footnote-90) There is simply no denying the stark distinction between the test outlined by the Supreme Court in *NECI,* and the rigorous application of *Cityview* undertaken by Hogan J in the Court of Appeal in *Bederev*[[91]](#footnote-91)and Simons J in the *NECI* High Court judgment.

Now that everything has changed utterly, what will the future hold for Article 15 jurisprudence? I suggest that post-*NECI,* Courts are likely to be much more sanguine as a matter of constitutional principle and practice, about normative choices and substantive policy issues being decided upon by a statutory delegate – typically a member of the Government. Provided the guiding hand of the Oireachtas is present in a delegating statute through discernible statutory bounds directing the delegated rulemaking power and/or the retention of a scrutiny or veto power, Courts are very likely to stay their hand.

Going forward, it is likely only statutes utterly devoid of any statutory guidelines or oversight like those in *McDaid, Laurentiu,* and *McGowan* that will fall foul of *NECI* - statutes whose only policy seemed to be to ‘permit the executive to be at large’ over a given policy area.[[92]](#footnote-92)

**Part III - Defence of judgment**

In this part I offer a defence of the judgment in NECI from two possible objections. These are that *NECI* is in tension with our scheme of separation of powers and that it raises democratic concerns. I suggest that underpinning these types of objections is often unarticulated and taken for granted normative assumptions about the proper interpretation of, and interaction between, Articles 5, 15 and 28. These assumptions relate to the purpose and meaning of highly abstract and deeply contestable constitutional and juridical concepts like ‘the separation of powers’, ‘checks and balances’, ‘legislative power’, ‘executive power’ and ‘democracy’. Once the normative values informing different possible interpretations of Articles 5, 15 and 28 are brought to the surface, I argue the Supreme Court’s judgment is a sensible and justifiable determination, and normatively more compelling than the *Cityview* test.

1. **Separation of powers**

Article 15 and Article 28 do not, taken by themselves, provide a comprehensive sketch of the appropriate relationship between the legislature and executive on a plethora of issues; including the permissible bounds of rulemaking authority the Oireachtas can vest in a delegate. Posited text and structure provide the broad parameters for answering such questions, but interpretation dealing with more retail questions about their relationship in this context will inevitably, inescapably, involve recourse to principles of political morality and normative theories about the purpose of Government and separation of powers.[[93]](#footnote-93) It is no solution to this under determinacy to stipulate that the separation of powers simply *demands* a specific approach to the delegation of rulemaking authority. Any determination of such issues must instead justify its conception of the separation of powers and its underlying purposes.

Article 15.2.1, on any reasonable reading, prohibits the alienation of the Oireachtas’ power of making laws for the state, whether to other branches or to external political actors. This is why, for example, ‘the executive power’ of the state given to the Government by Article 28 cannot plausibly be interpreted as allowing it to enact a statute.[[94]](#footnote-94) But serious disagreement should immediately break out when one asks what exactly constitutes an alienation of Article 15.2.1 authority. As just noted, disagreement on the question of what constitutes alienation when it comes to delegated rulemaking authority cannot be resolved by stipulative definitions of ‘legislative power’ or ‘separation of powers’ but will be anchored on the conflicting values and ends jurists envision these concepts pursuing and upholding.[[95]](#footnote-95) These different normative understandings will in turn help determine its ‘prescriptions and influence the understandings it develops’[[96]](#footnote-96) of legislative-executive relations.

Some reactions to *NECI* will likely lament it as a blow to the separation of powers, as disrespectful to the integrity of legislative power.[[97]](#footnote-97) Some, indeed, will likely wish the Supreme Court doubled down on the *Cityview* principles and policies test, instead of recasting it in looser form. What kind of vision of the separation of powers, implicitly or explicitly, can we say will animate this kind of critique?

Professor Carolan argues, I think persuasively, that the normative vision of the separation of powers underlying a strong-form approach to the *Cityview* test has conceptual roots in strands of classical liberal and Anglo-American constitutional thought.[[98]](#footnote-98) These traditions often adopt the position that generally applicable rules of binding conduct and political decisions concerning the most sensitive and pressing socio-economic issues, are the unique preserve of the directly elected legislature. On this view, power to set generally applicable rules of binding conduct over important policy issues are the heart of ‘legislative power’. The executive is, in turn, viewed as a faithful subordinate executioner who diligently implements legislative directives, using its discretion to apply law to particular facts, or make technical decisions that fill-in-the-details of the legislature’s goals.[[99]](#footnote-99) In other words, what is impermissible is when the executive or administrative body is given authority to make rules involving ‘more than a mere giving effect to principles and policies’ already set out by the legislature.[[100]](#footnote-100)

This interpretation of the separation of powers and executive-legislative relations has found considerable support in other common law constitutional systems, most notably in the United States. Arguments in favour of robust application of the delegation doctrine in that system stem from a vision of constitutional government that puts the legislative branch at the heart of policymaking, and which is hostile to a highly active executive-led administrative state.[[101]](#footnote-101) It is no coincidence that the most famous invocation of the doctrine in the US came during the stand-off between President Roosevelt and a classical liberal and laissez faire sympathetic US Supreme Court over his ambitious New Deal programme. While the US has had an administrative state since its foundation, this period in particular saw an enormous delegation of statutory power by Congress to the executive and administrative agencies.[[102]](#footnote-102) Capacious rulemaking power was provided to allow the executive to marry institutional energy and flexibility, with technocratic expertise, to engage in large-scale socio-economic regulation and redistribution to tackle the deep political and economic problems the US faced following the Great Depression.[[103]](#footnote-103) Unimpressed by some of these constitutional developments, the Supreme Court invalidated two significant statutes[[104]](#footnote-104) in 1935 after deploying a strong-form delegation doctrine that required Congress to lay down all relevant ‘policies and establishing standards’ while leaving to ‘selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by the legislature, is to apply.’[[105]](#footnote-105)

But soon thereafter, the Supreme Court backed down and opted for a far looser and open-ended version of the delegation test that has since never been deployed to invalidate a statute.[[106]](#footnote-106) All Congress needs to provide when delegating rulemaking authority is a basic intelligible principle to guide the delegate’s statutory discretion and the Federal Courts will uphold it as permissible.[[107]](#footnote-107) If the Supreme Court’s classical liberal and small-government vision of the separation of powers had prevailed, it is fair to say the US system of executive-centred government would look very different today.

It is also no coincidence those calling most vocally today for a reinvigoration of a strong form of the delegation doctrine, are jurists of a classical liberal or libertarian bent critical of the post-New Deal administrative state and extensive government involvement in socio-economic life.[[108]](#footnote-108) Jurists supportive of a revived strong delegation doctrine[[109]](#footnote-109) tend to view the administrative state and the broad rulemaking authority it enjoys, as an erosion of democratic government and dedication to individual liberty they regard as the heart of the separation of powers.[[110]](#footnote-110)

It is easy to see why aggressive application of the delegation doctrine, one which demands the legislature decides all questions of principle and policy, would be an attractive interpretation of legislative power for those hoping to corrode the working of a vigorous executive-led administrative state. This is partly because, as Professor Stewart points out, 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;[[111]](#footnote-111) leading to a dent in the capacity of government to wield public power effectively or flexibly. Moreover, application of strong forms of the delegation doctrine – scouring a statute for the enunciation of all possible principles and policies - involves quite subjective judicial judgment 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.’[[112]](#footnote-112) Such a doctrine could hover over the administrative state as a ‘self-created, ill-defined, and virtually uncontrollable license to overturn any regulatory legislation’ a Court disfavours for ideological reasons.[[113]](#footnote-113) These are some of the reasons why constitutional doctrines like the delegation doctrine are considered the heavy artillery of actors hoping to blast apart or harm the capacity of the state to regulate.[[114]](#footnote-114)

Strong-form *Cityview* style versions of the delegation doctrine in the US have, perhaps unsurprisingly, been subject to a slew of trenchant critique from defenders of an energetic state and broad delegation of rulemaking authority to the executive. A broad range of scholars have drawn from history, text and structure, and functional and normative arguments to critique the idea the separation of powers inevitably requires a strong form delegation doctrine. They have also highlighted the weakness of the argument the concept of the ‘legislative power’ has consistently been understood in the history of Anglo-American jurisprudence as prohibiting the executive from being vested with discretion to make generally applicable rules of binding conduct under statutory delegation.[[115]](#footnote-115) Prominent public law scholars like Vermeule, Posner, Mortenson, and Bagley, have gone so far as to argue that there is *no foundation* in constitutional text and structure or in originalist sources for *any* kind of constitutional restriction on Congress’ Article I ability to enact statutes granting delegated rulemaking power.[[116]](#footnote-116) As a matter of historical record, these scholars argue giving effect to delegated statutory power, no matter how capacious, was conceptually always understood as an exercise of *executive power* – involving as it does the bringing into execution the statutory directives of the legislature whether specific or open-ended. The real basis for the delegation doctrine, they argue, lies in an explicitly classical liberal conception of legislative power, filtered through the lens of a small-government orientation to constitutional law that became influential in the late 19th Century.[[117]](#footnote-117)

The main analytical point I want to cash out from this brief excursion into US jurisprudence and its heated debates, is that giving content to broad concepts like the separation of powers and legislative power, and how they relate to the delegation doctrine, inevitably involves deeply contestable normative arguments about the ends and purpose of government. Making these underlying normative commitments explicit and clear is thus critical to offering a full-bodied assessment of the merits of different interpretations of the relationship between Article 15 and 28 – like the rival *Cityview* and *NECI* tests.

For example, if one is sympathetic to smaller-scale government and hostile to policymaking by the executive branch and administrative agencies like the jurists mentioned above, then the strong-form *Cityview* vision of the delegation doctrine will be of immense attraction due to its asymmetric anti-regulatory slant. In contrast, if one takes the position that the inevitably broad and vague contours of a Constitution’s separation of powers framework should be fleshed out to empower the state to affirmatively act for the common good, then this same test will be far less appealing.[[118]](#footnote-118) For many jurists, under contemporary conditions of extreme economic and social complexity, centering policymaking in the executive-led administrative state, will often be the most normatively defensible configuration of the separation of powers.[[119]](#footnote-119) This is because for a state to pursue provide any kind of robust welfare system, regulate a complex globally interconnected economy, and tame abuses of private power or exploitation, an extensive administrative apparatus vested with broad and deep statutory discretion is required.[[120]](#footnote-120) Those who hold this view and regard the administrative state ‘properly and intelligently deployed’ as an ‘engine of unsurpassed power for promoting the common good’[[121]](#footnote-121), will thus be deeply skeptical of a vision of the separation of powers which endorses something like the *Cityview* test.

As already noted, this test would, if enforced with any consistency, have a very deleterious effect on the ability and capacity of the state to administer and provide the kind of complex and important social, welfare, and regulatory schemes critical to the common good. Because of this, many will (reasonably I think) take the view a separation of powers dedicated to individual liberty and curbing the executive’s ability to regulate, will be too blinkered to the serious political threats to welfare and the common good that can proliferate in the private socio-economic sphere, under the watch of officials unable to act with Hamiltonian vigour and dispatch.[[122]](#footnote-122) Proponents of a robust executive branch and active regulatory state will, for all these reasons, be more likely to support interpretation of legislative power which endorses a loose and capacious approach to the bounds of rulemaking power under statutory delegation.

All of which is to say that interpreting the scope of permissible delegation of rulemaking authority involves, like very many areas of constitutional interpretation, an inescapable measure of normative principle and political morality being brought to bear on under-determinate constitutional text and structure.[[123]](#footnote-123) In articulating a capacious negative delegation test which better accommodates the work of the executive-led administrative state, I suggest the Supreme Court in *NECI* have offered a sound interpretation; one which gives respect to the long-standing constitutional practices of delegating broad authority to the executive that flesh out our separation of powers framework sketched in Articles 15 and 28, appreciates the good normative reasons motivating officials to construct and sustain robust executive government, and also makes sense of prior judicial precedent which purported to uphold one version of executive-legislative relations, but in practice was supportive of a very different one. Overall, this recast doctrine provides valuable ‘constitutional flexibility’ which enhances the Irish state’s capacity to act for the common good.[[124]](#footnote-124)

In contrast, I respectfully suggest that the presuppositions and normative commitments behind a strong-form version of *Cityview* cut a path to an approach to constitutional government deeply unsuited to the challenges of contemporary governance, long since defunct as a matter of constitutional practice in virtually every well-functioning constitutional system, never truly enforced by our Courts, and certainly not mandated by the text and structure of our Constitution. I anticipate many might disagree with this characterisation, but I respectfully suggest the onus will be on those who support applying the *Cityview* test as *actually articulated* to explain why it would not be deeply disruptive to the practical operation of our administrative state, or why this cost is worth bearing.

1. **Democratic concerns?**

Some critiques of broad delegated rulemaking authority stem from democratic objections. Put simply, this is the view that respecting democracy principles demands that those who make ‘policy should be directly accountable to those who are affected by it.’[[125]](#footnote-125) In the Irish context, proponents of a rigorous delegation doctrine often argue it is necessary to ensure lawmaking coheres with Article 5’s description of the state as ‘democratic’.

This position has some support from some of our most preeminent jurists. In *Laurentiu,* for example,Keane CJ noted with concern how ‘increasing recourse to delegated legislation ... has given rise to an understandable concern that parliamentary democracy is being stealthily subverted and crucial decision-making powers vested in unelected officials.’[[126]](#footnote-126) More recently, Hogan J writing for the Court of Appeal in *Bederev[[127]](#footnote-127)* argued that a core objective of the delegation doctrine is ‘ensuring that, in the democratic society guaranteed by Article 5, policy decisions having a legislative character are taken by the body directly accountable to the People (namely, the Dáil and the wider Oireachtas) through the electoral process contemplated by Article 16’.[[128]](#footnote-128)The common theme in these dicta is the view that delegated rulemaking that gives broad policy and normative discretion to a delegate invites tension with the state’s constitutional dedication to a democratic form of government, as it risks eroding democratic accountability.

It is trite to say, but true all the same, that democracy is a contested concept[[129]](#footnote-129) and very indeterminate at the level of institutional prescription, coming as it does in a wide range of forms. One legal system may make broad use of referendums, sortition, citizens assemblies, recalls, and other tools of direct democracy, another might have a highly indirect system of representation. One might have first-past-the-post voting, another proportional representation. Some systems demand a political party secure a certain percentage of the national vote before being allowed to take up a parliamentary seat, others do not. Some democracies have a strongly parliamentary system of the classic Westminster variety, another might have a more robust separation of powers with a separation of legislative and executive personnel, or a Westminster system with a powerful constitutional court capable of invalidating legislative enactments. One might employ representation only for individual citizens, while another may recognize representation of citizens in a more corporatist fashion, via intermediate organizations like civil society groups, professions, vocational associations, and trade unions. All of which is to say that justifying a legal concept like the delegation doctrine on democratic grounds requires its proponents to move beyond abstract invocations of democracy, to a more concrete vision of what it entails or demands that is normatively compelling.

Again, as with separation of powers arguments, standing behind critiques from democracy appears to be a particular vision of representative democracy steeped in classical liberal thought. In this picture, directly elected representatives assemble and debate in plenary session and agree and hammer out the principles and policies they wish to pursue and encode in detailed statutes.[[130]](#footnote-130) The executive is a subordinate institution which enjoys only indirect democratic legitimacy through its ability to hold the confidence of the legislature. Its main job, living up to its name, is to faithfully implement statutes enacted by the legislature and, where necessary, fill in the gaps to bring life to its principal’s edicts. But the main normative commitments behind the rules binding citizens are decided by the directly elected legislature. On this conception, vesting normative and policy discretion in the executive - which *NECI* permits in spades - is an evasion of democratic accountability and erodes representative democracy.

There are several responses to this possible line of critique. The first is that it is of serious democratic significance that in most cases the wielder of delegated rulemaking power is a minister.[[131]](#footnote-131) The fact of the matter is that the Government in our constitutional order has never been a mere faithful implementer of legislative directives but has always been the focus of democratic hope and expectation. This is par for the course for Westminster style-systems which, from around the 19th Century onward, have been profoundly shaped by the party system, which became the link between the electorate, legislature, and the government. Parliamentary elections in Westminster systems are, largely speaking, not about electing individual parliamentarians who come together as a collective and hammer out detailed statutes after full and free debate in plenary session. Elections instead became the method for determining which party will govern and control both the executive and legislative arms of state.[[132]](#footnote-132) Since the inception of the party system, voters became less likely to vote for an individual parliamentarian as such; instead, they had more incentive to vote for a party representative standing on a manifesto commitment they pledged to deliver should their party acquire a majority and form a government with their leader at the helm. Voters in Westminster systems have long tended to base their vote on an assessment of the effectiveness of a party’s leadership during their time in executive office, or potential effectiveness if they were to gain it.

Our electorate, I think it is fair to say, generally look to the Taoiseach and Government to articulate solutions to political problems and tend to vote to reward or punish governing parties based on their perceived performance during elections. It is only in the most technical and formalist sense that one can maintain the Government is not directly democratically accountable to the electorate for its actions, including any use of broad rulemaking authority. A Government that people think is abusing its rulemaking authority can be held to account in the next general election, just as with any other aspect of its policymaking like preparing the budget or conducting foreign affairs.

This is aside from the important fact the Government is always democratically accountable to the Dáil for the exercise of rulemaking authority and that most regulations made under statutory delegation are invariably subject to negative or positive review by the Houses of the Oireachtas – an important element of the *NECI* test. Therefore while the practical operation of our democratic system certainly does not resemble a 19th Century classical liberal form of government, it is far less obvious in what ways capacious executive rulemaking represents an evasion of democratic accountability for the use of public power.

It is also worth stressing the ways in which executive empowerment and the expansion of the administrative state in Ireland are, whether one likes it or not, the cumulative product of democratic decision-making over decades of political life. Delegation of rulemaking authority has hardly been wrested from the Oireachtas, or grudgingly given to the Government. Indeed, as in virtually every constitutional system, delegation of extensive regulatory authority to the executive and administrative bodies has been *embraced* for reasons already touched upon. Like, for instance, the fact 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.[[133]](#footnote-133) 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 maximize their political flexibility and responsiveness.[[134]](#footnote-134) Professor Sunstein links these developments to the reality 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 for policy minutiae, or epistemically complex or uncertain issues, compared to the executive and the permanent civil service aiding it.[[135]](#footnote-135) Broad vesting of rulemaking to administrative bodies has also been linked to a desire to signal credible political commitment to a particular line of policy, by insulating decisions from immediate opportunistic partisan shifts by the political branches.[[136]](#footnote-136) In each case, the ability to vest broad rulemaking authority seems functionally indispensable for the Oireachtas to pursue its goals. Instead of seeing it as an abdication of its democratic responsibilities, delegation is another useful constitutional mechanism to fulfill them.

On this framing, our executive-led administrative state and its construction and maintenance through broad delegation of rulemaking, is unproblematic from a democratic perspective. It only exists and endures because of the long-term operation of our democratic system, and the decisions of successive elected parliamentarians over the life of the state. If there was enough impetus, this broad rulemaking authority could be rescinded by the Oireachtas at any time and our administrative state deconstructed. But there appears to be precisely zero democratic appetite for such a radical, destabilizing shift in our system of government.

**Conclusion**

*NECI* represents the most important treatment of Article 15 since *Cityview* and copper fastens the doctrinal recasting of the nondelegation doctrine begun in *Bederev* and *O’Sullivan*. With this judgment, the Supreme Court has effectively elevated its cognizance of “the realities of the administrative state”[[137]](#footnote-137) from a secondary consideration which merely ameliorated the application of constitutional principle, to a core consideration at the heart of its Article 15 jurisprudence. While we are likely to see fewer successful Article 15 challenges in the future, *NECI* will no doubt generate rich discussion amongst scholars for years to come due its significance for legislative power and the separation of powers. Let the debate begin.

1. Lecturer in Law, University of Liverpool School of Law & Social Justice. The author would like to thank Oran Doyle, Tom Hickey, David Kenny and an anonymous reviewer for helpful comments. All errors remain my own. [↑](#footnote-ref-1)
2. For example, in the 1939 case of *Pigs Marketing Board v Donnelly* [1939] 1 IR 413. For recognition of the practice in constitutional drafting process see Gerard Hogan, *Origins of the Irish Constitution, 1928-1937* (Royal Irish Academy 2012) 480. [↑](#footnote-ref-2)
3. Described as such in *Collins v Minister for Finance* [2013] IEHC 530. [↑](#footnote-ref-3)
4. [1980] IR 381. [↑](#footnote-ref-4)
5. Eoin Carolan, ‘Democratic Control or High-Sounding Hocus-Pocus - A Public Choice Analysis of the Non-Delegation Doctrine’ (2007) 29 Dublin University LJ 111, 117; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009) 62-63. [↑](#footnote-ref-5)
6. Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) 90-91; Gerard Hogan, David Kenny and Rachael Walsh, ‘An Anthology of Declarations of Unconstitutionality’ (2015) 54 Irish Jurist (ns) 1, 21-22. [↑](#footnote-ref-6)
7. [2016] 3 IR 1. [↑](#footnote-ref-7)
8. [2017] 3 IR 751. [↑](#footnote-ref-8)
9. Laura Cahillane, ‘Principles, Policies and Fair Procedures after O'Sullivan v Sea Fisheries Protection Authority and Crayden Fishing Company Ltd v Sea Fisheries Protection Authority’ (2019) 1 Irish Supreme Court Review 51, 58. [↑](#footnote-ref-9)
10. Maria Cahill and Sean O’Conaill, ‘Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution’ (2017) 36 University of Queensland LJ 259, 266. [↑](#footnote-ref-10)
11. [2021] IESC 36. [↑](#footnote-ref-11)
12. For a superb treatment of the implications of the case for labour law and industrial relations See Alan Eustace, ‘The Electrical Contractors Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation’ (2021) Modern L Rev 1-15. [↑](#footnote-ref-12)
13. The Labour Court has been a core part of the Irish administrative state since the enactment of the Industrial Relations Act 1946. Its functions have expanded over time but have long including deploying technocratic expertise and relying on its insultation from the direct influence of partisan politics to promote harmonious industrial relations between employers and employees and secure fair renumeration/equitable working conditions. [↑](#footnote-ref-13)
14. Industrial Relations (Amendment) Act 2015, s 14(1). [↑](#footnote-ref-14)
15. Industrial Relations (Amendment) Act 2015, s 15(1). [↑](#footnote-ref-15)
16. Industrial Relations (Amendment) Act 2015, s 13(1). [↑](#footnote-ref-16)
17. Industrial Relations (Amendment) Act 2015, s 15(1)(c). [↑](#footnote-ref-17)
18. Industrial Relations (Amendment) Act 2015, s 15(1)(d). [↑](#footnote-ref-18)
19. Industrial Relations (Amendment) Act 2015, s 15(2)-(4). [↑](#footnote-ref-19)
20. Industrial Relations (Amendment) Act 2015, s 16(2). [↑](#footnote-ref-20)
21. Industrial Relations (Amendment) Act 2015, s 16(2)(a)-(e). [↑](#footnote-ref-21)
22. Industrial Relations (Amendment) Act 2015, s 16(4). [↑](#footnote-ref-22)
23. Industrial Relations (Amendment) Act 2015, s 17(1)-(3). [↑](#footnote-ref-23)
24. Industrial Relations (Amendment) Act 2015, s 17(4). [↑](#footnote-ref-24)
25. Industrial Relations (Amendment) Act 2015, s 19. [↑](#footnote-ref-25)
26. *McGowan v Labour Court* [2013] IESC 21. [↑](#footnote-ref-26)
27. See Michael Doherty, ‘New Morning? Irish Labour Law Post-Austerity’ (2016) 39 Dublin University LJ 51. [↑](#footnote-ref-27)
28. *McGowan* (n 26) paras 30-32. [↑](#footnote-ref-28)
29. ibid. [↑](#footnote-ref-29)
30. *NECI v Labour Court and Ireland* [2020] IEHC 178. [↑](#footnote-ref-30)
31. ibid. [↑](#footnote-ref-31)
32. *NECI* (n 11) para 54. [↑](#footnote-ref-32)
33. ibid, para 55. [↑](#footnote-ref-33)
34. ibid. [↑](#footnote-ref-34)
35. ibid. [↑](#footnote-ref-35)
36. ibid, para 57. [↑](#footnote-ref-36)
37. ibid, para 65. [↑](#footnote-ref-37)
38. ibid, para 59. [↑](#footnote-ref-38)
39. ibid, para 61. [↑](#footnote-ref-39)
40. ibid, para 62. [↑](#footnote-ref-40)
41. ibid, para 63. [↑](#footnote-ref-41)
42. ibid, para 70. [↑](#footnote-ref-42)
43. ibid, para 137. [↑](#footnote-ref-43)
44. ibid, para 92. [↑](#footnote-ref-44)
45. ibid, para 92. [↑](#footnote-ref-45)
46. ibid, para 90. [↑](#footnote-ref-46)
47. Industrial Relations (Amendment) Act 2015, s 16(4). [↑](#footnote-ref-47)
48. NECI (n 11) para 95. [↑](#footnote-ref-48)
49. ibid, para 88. [↑](#footnote-ref-49)
50. ibid, para 97. [↑](#footnote-ref-50)
51. ibid, para 92. [↑](#footnote-ref-51)
52. ibid, para 99. [↑](#footnote-ref-52)
53. ibid. [↑](#footnote-ref-53)
54. ibid. [↑](#footnote-ref-54)
55. ibid, paras 130-131. [↑](#footnote-ref-55)
56. ibid, para 126. [↑](#footnote-ref-56)
57. ibid, paras 130-131. [↑](#footnote-ref-57)
58. ibid, para 134. [↑](#footnote-ref-58)
59. ibid, para 137. [↑](#footnote-ref-59)
60. ibid, para 21 (per Charleton J.) [↑](#footnote-ref-60)
61. ibid, para 22. [↑](#footnote-ref-61)
62. ibid, para 26. [↑](#footnote-ref-62)
63. ibid, para 22. [↑](#footnote-ref-63)
64. ibid, para 31. [↑](#footnote-ref-64)
65. ibid, para 31. [↑](#footnote-ref-65)
66. *See Cityview Press* (n 4) 399; *Laurentiu v Minister for Justice* [1999] 4 IR 26, 63. [↑](#footnote-ref-66)
67. Oran Doyle, ‘Administrative Action, the Rule of Law, and Unconstitutional Vagueness’ in Laura Cahillane, James Gallen & Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 241-242. [↑](#footnote-ref-67)
68. *Kennedy v Law Society* [2002] 2 IR 458, 486; Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (6th edn, Bloomsbury 2018) 283. [↑](#footnote-ref-68)
69. *Cityview Press* (n 4) 398. [↑](#footnote-ref-69)
70. O’Donnell J stated in *McGowan* (n 26): ‘If in truth any piece of regulation amounted to truly delegated legislation, it would offend Article 15, since it is plain from the very language thereof, and indeed the constitutional structure, that the function of legislation is one that cannot be delegated by the Oireachtas to any other body’. [↑](#footnote-ref-70)
71. Doyle (n 6) above. [↑](#footnote-ref-71)
72. Eoin Carolan, ‘Democratic Accountability and the Non-Delegation Doctrine’ (2011) 33 Dublin University LJ 220, 222. [↑](#footnote-ref-72)
73. *Bederev* (n 7) 53. [↑](#footnote-ref-73)
74. *Pigs Marketing Board* (n 2). [↑](#footnote-ref-74)
75. *Cityview Press* (n 4) 398; *Laurentiu* (n 66) paras 70-71. In *Maher v Minister for Agriculture* [2001] 2 IR 139, 245. [↑](#footnote-ref-75)
76. *Maher* (n 75) 245. [↑](#footnote-ref-76)
77. *See Cityview Press* (n 4) and *Maher* (n 75); Eoin Carolan, ‘Democratic Accountability and the Non-Delegation Doctrine’ (n 72) 228. [↑](#footnote-ref-77)
78. ibid. [↑](#footnote-ref-78)
79. *National Union of Railwaymen v Sullivan* IR [1947] 77, 84. In *BUPA Ireland v Health Insurance Authority* [2006] IEHC 431; *Bederev* (n 7) 53. [↑](#footnote-ref-79)
80. Eoin Carolan, ‘Democratic Control or High-Sounding Hocus-Pocus’ (n 5) 116-119. [↑](#footnote-ref-80)
81. By small-c constitution we refer to the ‘amorphous and ever-changing body of constitutional norms, customs, and traditions – “constitutional conventions” which suffuse and give concrete effect to the Large-C codified Constitution’. See Adrian Vermeule, The Small-C Constitution, Circa 1925 Jotwell (October 2010) <https://classic.jotwell.com/the-small-c-constitution-circa-1925/> (accessed 7 January 2022). [↑](#footnote-ref-81)
82. Hogan, Whyte, Kenny, Walsh, *Kelly: The Irish Constitution* (n 68) 307. [↑](#footnote-ref-82)
83. *Bederev* (n 7). [↑](#footnote-ref-83)
84. *O’Sullivan* (n 8) paras 39-40. [↑](#footnote-ref-84)
85. ibid*.* [↑](#footnote-ref-85)
86. A similar conclusion has been reached by Eustace, ‘The Electrical Contractors Case’ (n 12) 12. [↑](#footnote-ref-86)
87. One issue that did not arise in this judgment that arose in *Bederev*, was the extent to which the Court, when discerning whether a delegating statute contains direction and guidance for the delegate, can or ought to have regard to the views of that delegate as to how it interprets the statute and implements it in practice. This facet of *Bederev* was subject to critique by the authors of *Kelly.* The question of judicial deference to executive interpretations of statutory provisions is a controversial issue in many legal systems like the United States and Canada and it will be interesting to see whether the Supreme Court squarely revisits the question, or whether the dicta in Bederev was a once off. Hogan, Whyte, Kenny, Walsh, *Kelly: The Irish Constitution* (n 68) 302. [↑](#footnote-ref-87)
88. *Cityview* (n 4) 398-399. [↑](#footnote-ref-88)
89. *NECI* (n 11) para 60. [↑](#footnote-ref-89)
90. An even more recent case, *McGrath v DPP* [2021] IESC 66 supports the view there is doctrinal discontinuity between *Cityview* and *NECI*. O’Donnell J (as he then was) said in this case that *NECI* made it clear the ‘*Cityview Press* approach is helpful…but cannot be considered an infallible guide’. O’Donnell J added that ‘it may also be possible to address the question by reference to the consideration of whether the Oireachtas has abdicated its function under Article 15.2.1° and that a relevant consideration may be the scope of the area of delegation: see *Sea Fisheries Protection Authority*; *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1; and *NECI*.’ Paras 68-69. [↑](#footnote-ref-90)
91. *Bederev v Ireland* [2015] IECA 38. [↑](#footnote-ref-91)
92. Kenny and others (n 68) 305. [↑](#footnote-ref-92)
93. Ronald Dworkin, *Laws Empire* (OUP 1986) 228-238. [↑](#footnote-ref-93)
94. See Conor Casey, ‘Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order’ (2017) 41 Dublin University LJ 1. [↑](#footnote-ref-94)
95. Eoin Carolan, ‘Democratic Control or High-Sounding Hocus-Pocus’ (n 5) 118-119; Nick Barber, ‘Prelude to the Separation of Powers’ (2001) 60 Cambridge LJ 59-88. [↑](#footnote-ref-95)
96. Matthew Lawrence, ‘Subordination and the Separation of Powers’ (2021) 131 Yale LJ 78, 94. [↑](#footnote-ref-96)
97. For previous critiques of the Courts ‘lax’ application of the *Cityview* test see Rossa Fanning, ‘Reflections on the Legislative Process Following Leontjava v Director of Public Prosecutions (2004) Irish Jurist 286, 298-300. Although Fanning maintains he does not come to ‘praise or bury’ the doctrine, he suggests it is part of a ‘proud constitutional tradition’ in Irish public law of protecting the ‘integrity within the legislative process’ from erosion through vesting policy discretion in the executive. See also Maria Cahill and Sean O’Conaill, ‘Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution’ (n 10) 268. Cahill and O’Conaill argue that weak application of the delegation doctrine seriously undermines the ‘principle of separation of powers, the quality of our legislative democracy, and the supremacy of the Constitution which seeks to vindicate those principles.’ [↑](#footnote-ref-97)
98. Eoin Carolan, ‘Democratic Control or High-Sounding Hocus Pocus?’ (n 5). Or as Loughlin puts it, many constitutional concepts ‘tend to rest on eighteenth-century assumptions of limited government’. Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2011)446. [↑](#footnote-ref-98)
99. Margit Cohn, *A Theory of the Executive Branch: Tension & Legality* (Oxford University Press 2021) 44-45. [↑](#footnote-ref-99)
100. *Cityview Press* (n 4). [↑](#footnote-ref-100)
101. Eoin Carolan (n 72) 225. [↑](#footnote-ref-101)
102. See Gary Lawson, ‘The Rise and Rise of the Administrative State’ (1994) 107 Harvard L Rev 1231, 1232; Bruce Ackerman, *We the People Volume One: Foundations* (Harvard University Press, 1991); Cass R Sunstein, ‘Constitutionalism after the New Deal’ (1987) 101 Harvard L Rev421, 447-448. [↑](#footnote-ref-102)
103. Susan E Dudley, ‘Milestones in the Evolution of the Administrative State’ (2021) 150 *Deadalus: Journal of the American Academy of Arts & Sciences* 33, 35. [↑](#footnote-ref-103)
104. See *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935); *Panama Refining Co v Ryan*, 293 US 388 (1935). [↑](#footnote-ref-104)
105. ibid 530. [↑](#footnote-ref-105)
106. Andrew Coan and Nicholas Bullard, ‘Judicial Capacity and Executive Power’ (2016) 102 Virginia Law Review 765, 779-780. [↑](#footnote-ref-106)
107. *Whitman v American Trucking Associations Inc,* 531 US 457 (2001) 474-476. Scalia J noted how in ‘the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance’. [↑](#footnote-ref-107)
108. See Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press 2015); Gary Lawson, ‘The Rise and Rise of the Administrative State’ (1994) 107 Harvard L Rev 1231. For a good summary of this flavor of constitutionalism see Adrian Vermuele and Cass Sunstein, ‘The New Coke: On the Plural Aims of Administrative Law’ (2015) The Supreme Court Review 41; Adrian Vermeule and Cass Sunstein, ‘Libertarian Administrative Law’ (2015) 82 University of Chicago L Rev 393. [↑](#footnote-ref-108)
109. In *Gundy v United States* 588 US \_\_\_ (2019) Gorsuch J, joined by Roberts CJ and Thomas J declared in dissent that the ‘intelligible principle’ test should be abandoned in favor of a new approach that demands greater specificity from Congress when it delegates authority to the administrative state. In an extensive solo concurrence in Department of *Transportation v Association of American Railroads* 575 US 43, 66-91 (2015), Thomas J argued for an even more radical revival of the doctrine by arguing that a correct reading of the separation of powers and legislative power yielded the conclusion it is unconstitutional for Congress to give the President or an agency ‘the discretion to formulate generally applicable rules of private conduct’ at all. [↑](#footnote-ref-109)
110. The centrality of liberty to the separation of powers is an understanding taken by several current conservative justices of the Supreme Court. See, eg in *Department of Transportation v Association of American Railroads* 135 S Ct 1225 (2015), 1245, Thomas J argued that ‘at the center of the Framers’ dedication to the separation of powers was individual liberty’. In *City of Arlington v FCC* 569 US 290 (2013) at 315, Roberts CJ, in dissent, argued that the Framers divided governmental power for ‘the purpose of safeguarding liberty’. While on the Court of Appeals Gorsuch J in *Gutierrez-Brizuela v Lynch* 834 F3d 1142 (10th Cir 2016), 1149, suggested that ‘the founders considered the separation of powers a vital guard against governmental encroachment on the people’s liberties, including all those later enumerated in the Bill of Rights’. [↑](#footnote-ref-110)
111. Richard Stewart, ‘The Reformation of American Administrative Law’ (1975) 88 Harvard L Rev 1667, 1695. [↑](#footnote-ref-111)
112. ibid 1697. [↑](#footnote-ref-112)
113. Kurt Eggert, ‘Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary’ (2021) 24 Chapman L Rev 707, 709-710. [↑](#footnote-ref-113)
114. See Maggie McKinley, ‘Petitioning and the Making of the Administrative State’ (2018) 127 Yale LJ 1538, 1543; Gillian Metzger, ‘Foreword: 1930s Redux: The Administrative State Under Siege’(2017) 131 Harvard L Rev 1, 8. [↑](#footnote-ref-114)
115. *See generally* Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Year of American Administrative Law* (Yale University Press 2012); Nicholas Parrillo, ‘A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s’ (2021) 130 Yale L J 1288, 1302. [↑](#footnote-ref-115)
116. Adrian Vermeule and Eric Posner, ‘Interring the Nondelegation Doctrine’ (2002) 69 University of Chicago L Rev 1721, 1722; Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, 121 Colum L Rev 277 (2021). [↑](#footnote-ref-116)
117. It is hard to tell if any of this US jurisprudence had a sizeable impact on judicial conceptions of executive-relations here, especially in *Cityview*. There is no doubt it been extensively referred to by counsel and cited by the Court in most major Article 15.2.1 cases – from *Donnelly* through to *Cityview* and *NECI.* I make no conclusion on this point save to say it is a possibility, and an unfortunate one at that. [↑](#footnote-ref-117)
118. If one adopts a positive rather than negative approach to constitutionalism. See NW Barber, Principles of Constitutionalism (Oxford University Press 2018) 2-6. [↑](#footnote-ref-118)
119. See Cass R Sunstein & Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (Harvard University Press 2020) 4-5. [↑](#footnote-ref-119)
120. Martin Loughlin, *Foundations of Public Law* (n 98) 435. [↑](#footnote-ref-120)
121. Adrian Vermeule, *Common Good Constitutionalism: Reclaiming the Classical Legal Tradition* (Forthcoming 2022, Polity). [↑](#footnote-ref-121)
122. Adrian Vermeule, *Constitution of Risk* (Cambridge University Press 2014) 11. [↑](#footnote-ref-122)
123. Dworkin, Laws Empire (n 93). Tom Hickey, ‘Judges and the Idea of Principle in Constitutional Adjudication’ in Laura Cahillane, James Gallen & Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 68-69; Finn Keyes, ’Our Herculean Judiciary?: Interpretivism and the Unenumerated Rights Doctrine’ (2020) 4 Irish Judicial Studies Journal 45, 50. [↑](#footnote-ref-123)
124. Eustace, ‘The Electrical Contractors Case’ (n 12) 15. [↑](#footnote-ref-124)
125. Vermeule and Posner (n 116) 1748. [↑](#footnote-ref-125)
126. Laurentiu (n 66) para 83. [↑](#footnote-ref-126)
127. Bederev (n 91). [↑](#footnote-ref-127)
128. ibid, para 61. [↑](#footnote-ref-128)
129. See David Prendergast, ‘The judicial role in protecting democracy from populism’ (2019) 20 German LJ 245. [↑](#footnote-ref-129)
130. See Carl Schmitt, *The Crisis of Parliamentarianism* (trs Ellen Kennedy, 2nd edn, MIT Press 1988) 34-35. [↑](#footnote-ref-130)
131. Or, if the delegate is an independent administrative body like the Data Protection Commissioner or Central Bank, the fact it typically requires ministerial consent to promulgate rules. [↑](#footnote-ref-131)
132. Martin Loughlin, *Foundations of Public Law* (n 98) 266. [↑](#footnote-ref-132)
133. Jerry Mashaw, ‘Prodelegation’ Why Administrators Should Make Political Decisions’ (1985) 1 Journal of Law, Economics, & Organization81, 95. [↑](#footnote-ref-133)
134. Jerry Mashaw, ‘Judicial Review of Administrative Action’ (2005) Revista Direito GV 153-170, 155. [↑](#footnote-ref-134)
135. Bruce Ackerman, ‘The New Separation of Powers’ (2000) 133 Harvard L Rev 633, 696; Cass Sunstein, ‘The Most Knowledgeable Branch’ (2016) 164 University of Pennsylvania L Rev 1607, 1647-1648. [↑](#footnote-ref-135)
136. Mark Pollack, ‘Leaning from the Americanists (Again): Theory and Method in the Study of Delegation’ (2002) 25 Western European Politics 200, 208-209. [↑](#footnote-ref-136)
137. *NECI* (n 11) para 53. [↑](#footnote-ref-137)