as the basic demand of human dignity. We can envisage a seamless transition from study of the domestic legal regime, specific to a single jurisdiction, to deeper exploration of the underlying philosophy of right: the former is underpinned and inspired by the latter. Legal rights and duties are genuine—provoking legitimate state force in their defence—only when they are features of a scheme of governance that, correctly interpreted, accords each individual the freedom that his human dignity demands.

11

The Constitutional Separation of Powers

*Aileen Kavanagh**

In the panoply of principles regulating constitutional government, the separation of powers occupies a position of deep ambivalence. On the one hand, all constitutional democracies rest on some form of division between three distinct branches of government—the legislature, executive, and judiciary. Moreover, within these countries, the separation of powers is invoked as an *ideal*, that is as a standard (or, perhaps, set of standards) to which the legal and constitutional arrangements of a modern state ought to conform. The assumption is that the separation of powers is an ideal worth having and that we gain something valuable by conforming to it. Indeed, this assumption has had a long pedigree in the canonical literature on constitutional theory. In the eighteenth century, the separation of powers was hailed as a bulwark against the abuse of state power and the threat of tyranny. Montesquieu wrote that without a separation of powers, there would be 'no liberty'.[1] The French Declaration of the Rights of Man in 1789 went so far as to suggest that 'Any society in which the safeguarding of rights is not assured, and the separation of powers is not established, has no constitution.'[2] Right up to the present day, theorists argue that the separation of powers is the very 'essence of constitutionalism'[3] and 'a universal criterion of constitutional government'.[4]

However, despite being a pervasive feature of constitutional democracies, there are deep reservations about the separation of powers in contemporary times. The first line of common criticism concerns the perceived stringency of the separation requirement. If what is required is a complete separation of three mutually exclusive functions carried out by three branches of government hermetically sealed from each other, then this has never been instantiated in any modern state.[5] Indeed, as one commentator observed, 'if powers truly were separated so that each branch of government could

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[1] C. Montesquieu, *The Spirit of the Laws* (1748), bk 11, ch 6. [2] Art 16.

[3] E. Barendt, 'Is there a UK Constitution?' (1997) 17 *Oxford Journal of Legal Studies* 137; E. Barendt, 'Separation of Powers and Constitutional Government' (1995) *Public Law* 599.

[4] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Oxford University Press, 1967), 97; E. Carolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford: Oxford University Press, 2009), 18.

[5] Carolan, above n 4, 18; V. Nourse, 'The Vertical Separation of Powers' (1999) 49 *Duke Law Journal* 749, at 754; C. Mollers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 8.

exercise only a discrete set of powers to the exclusion of the other branches, the Nation would be ungovernable'.[6] Many argue that some 'intermixture' of functions is both necessary and desirable.[7]

There is a second (related) line of criticism stemming from this concern about the strictness of the separation. If the ideal of the separation of powers requires us to maximize the independence and separation of the three branches of government, is this undermined by a system of checks and balances? After all, a scheme of checks and balances involves a degree of mutual supervision between the branches of government and, therefore, a degree of interference by one branch into the functions and tasks of the other.[8] As Geoffrey Marshall pointed out, it is unclear whether a scheme of checks and balances 'is part of, or a departure from, separation of powers theory'.[9]

A third argument is that the classic tripartite separation of powers articulated in the eighteenth century is archaic and anachronistic, because it fails to account for other sources of power in the modern state, most notably, the 'fourth branch' of the 'administrative state'.[10] Since administrative agencies combine adjudicatory, rule-making, and executive functions, they are 'abhorred by separation of powers traditionalists'.[11] Moreover, although the United States is sometimes heralded as an archetypal 'separation of powers system', there is a perennial worry that the institutional separation between the legislative and executive branch under the US Constitution leads to gridlock and ineffective government.[12] Little wonder, then, that US scholars question whether the separation of powers is a principle worth preserving in modern times.[13]

There are also conceptual problems. Many theorists argue that the separation of powers is bedevilled by indeterminacy and confusion.[14] The ideas of legislative, executive, and judicial powers have not proved capable of precise definition.[15] And there is considerable disagreement about which values underpin the doctrine.[16] For some, the purpose of the separation of powers is to curb abuse of power, partly by preventing its concentration in the hands of one person or body. For others, its purpose is to protect liberty and the rule of law.[17] Still others argue that the central value of the separation of powers is that it ensures 'efficiency' in government, where efficiency is understood as 'the matching of tasks

[6] R. Pierce, 'Separation of Powers and the Limits of Independence' (1989) 30 *William & Mary Law Review* 365; Vile, above n 4, 318.

[7] See Carolan, above n 4. [8] Vile, above n 4, 18; Carolan, above n 4, 32.

[9] G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), 103; C. Munro, *Studies in Constitutional Law* 2nd edn (Oxford: Oxford University Press, 2005), 307.

[10] P. Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 *Columbia Law Review* 573, at 581; Carolan, above n 4, 42ff.

[11] Marshall, above n 9, 118; A. Vermeule, 'Optimal Abuse of Power' (2015) 109 *Northwestern University Law Review* 673, at 680.

[12] R. Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 *The American Journal of Comparative Law* 531, at 562.

[13] See eg R. Goldwin and A. Kaufman (eds), *Separation of Powers—Does It Still Work?* (Washington, D.C.: AEI Press, 1986); E. Posner and A. Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

[14] Marshall, above n 9, 97, 124. [15] Ibid 124.

[16] Carolan, above n 4, 27; W. B. Gwyn, *The Meaning of the Separation of Powers* (The Hague: Martinus Nijhoff, 1965), 127.

[17] T. R. S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1994), ch 3.

to those bodies best suited to execute them'.[18] Perhaps if we could disentangle the various values served by the separation of powers, this would help us to assess intelligently what counts as achieving the ideal, and what is at stake in various possible violations.

The aim of this chapter is to do some of this disentangling work. It will proceed in the following way. Section I will examine 'the pure view' of the separation of powers which is premised on a triad of mutually exclusive functions. I argue that this account of the separation of powers is flawed, but that an appreciation of its flaws points us in the right direction. Section II presents a reconstructed view which seeks to meet the criticisms levelled at the orthodox or pure account. I argue that the separation of powers requires a division of power and labour, rather than a strict separation of functions. In section III, I argue that the separation of powers is not exhausted by division-of-labour considerations. It must be supplemented by the dimension of checks and balances. Section IV brings these dual dimensions together, arguing that they are both underpinned by the value of 'coordinated institutional effort between branches of government' in the service of good government.[19] There is no denying that this argument has an air of paradox about it. How can a doctrine which urges us to *separate* powers be underpinned by the value of institutional coordination in a *joint* enterprise? Part of the task of section IV will be to explain this apparent paradox, before dissolving it.

I. Separation of Powers: The Pure View

Throughout its history, the 'separation of powers' has received effusive praise and vitriolic opprobrium in equal measure.[20] But what does it require? This is harder to answer than one might think because the term 'separation of powers' is fraught with ambiguity. The first source of ambiguity concerns the word 'powers', which could refer either to institutions (as in 'powers in the land') or to the legal authority to do certain acts or, alternatively, to the functions of legislating, executing, or judging.[21] The second source of ambiguity concerns the word 'separation'. Separation can vary in form and degree. It can be absolute or partial—and partial separation can allow for some interconnection. Given these ambiguities, the phrase 'separation of powers' has been used to refer to a wide array of different ideas (not all of which are compatible), including: a triad of mutually exclusive functions; a prohibition on plural office-holding; the isolation, immunity, or independence of one branch of government from interference from another; or a scheme of interlocking checks and balances.[22] How do we navigate between these ideas?

[18] N. Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59; J. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 *Harvard Law Review* 1939, at 1994.

[19] D. Kyritsis, 'What is Good about Legal Conventionalism?' (2008) 14 *Legal Theory* 135, at 154; D. Kyritsis, 'Constitutional Review in a Representative Democracy' (2012) 32 *Oxford Journal of Legal Studies* 297, at 303; see also Carolan, above n 4, 186.

[20] For an in-depth historical account of the 'pattern of attraction and repulsion' to the idea of the separation of powers, see Vile, above n 4, 3ff.

[21] J. Finnis, 'Separation of Powers in the Australian Constitution: Some Preliminary Considerations' (1967) 3 *Adelaide Law Review* 159; Vile, above n 4, 12; Marshall, above n 9.

[22] Marshall, above n 9, 100.

A useful place to start is Maurice Vile's influential articulation of 'the pure doctrine of the separation of powers'.[23] According to the pure doctrine, the separation of powers requires that:

> the government should be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[24]

Though Vile conceded that the separation of powers has 'rarely been held in this extreme form, and even more rarely been put into practice',[25] the pure doctrine is widely invoked as an ideal-type or a benchmark against which alternative conceptions of the separation of powers are assessed.[26] Indeed, with its emphasis on a distinction between three different types of function, the pure doctrine is often thought to encapsulate 'the traditional understanding that governmental activities can be classified under three functional headings—legislative, executive, or judicial—with each function associated with one of the three branches of government'.[27] A strict separation along functional lines is thought to lie at the heart of 'the classic doctrine of the separation of powers'.[28]

Interestingly, the pure doctrine is often associated with Montesquieu,[29] despite the fact that Montesquieu never clearly articulated a theory of functional separation and specialization in its pure form.[30] Moreover, Montesquieu's tripartite distinction has been widely criticized as overly simplistic, even in the eighteenth century.[31] Nonetheless, it is now commonplace to think of the classic theory of the separation of powers as a

[23] Vile, above n 4, 13. [24] Ibid. [25] Ibid.

[26] K. Malleson, 'The Rehabilitation of Separation of Powers in the UK', in L. de Groot-van Leeuwen and W. Rombouts (eds), *Separation of Powers in Theory and Practice: An International Perspective* (Nijmegen: Wolf Publishing, 2010), 99–122, at 115.

[27] T. Merrill, 'The Constitutional Principle of Separation of Powers' (1991) *Supreme Court Review* 225, at 231; see also G. Brennan and A. Hamlin, 'A Revisionist View of the Separation of Powers' (1994) 6 *Journal of Theoretical Politics* 345, at 351; Barendt, 1995, above n 3, 601 (describing the pure doctrine as the 'classic' formulation); B. Manin, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787', in B. Fontana (ed), *The Invention of the Modern Republic* (Cambridge: Cambridge University Press, 1994), 27–62, at 30; M. Hansen, 'The Mixed Constitution versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy' (2010) 31 *History of Political Thought* 509, at 510.

[28] Brennan and Hamlin, above n 27, 351; Barendt, 1995, above n 3, 601; M. E. Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 *University of Pennsylvania Law Review* 603, at 608.

[29] See A. Tomkins, *Public Law* (Oxford: Clarendon Press, 2003), 36; Hansen, above n 27, 511, 517; L. N. Cutler, 'Now is the Time for All Good Men…' (1989) 30 *William & Mary Law Review* 387.

[30] Vile, above n 4, 90. As Manin observes, 'the question here is not whether or not Montesquieu himself advocated this pure version of the theory of the separation of powers. The fact is that for decades if not centuries, most legal experts and political actors (with the notable exception of the American Federalists) believed and proclaimed that he did' (Manin, above n 27, 30).

[31] See further L. Claus, 'Montesquieu's Mistakes and the True Meaning of Separation of Powers' (2005) 25 *Oxford Journal of Legal Studies* 419; D. Kyritsis, *Shared Authority* (Oxford: Hart Publishing, 2015), 107.

'theory about division between three different functions'[32] inspired by Montesquieu and that the principle prohibits any intermixture of functions.[33] Whatever the truth of its intellectual provenance,[34] the 'pure doctrine' has had an enduring influence on our thinking about what the separation of powers requires.[35] It has become the orthodox understanding of what the principle requires. Therefore, we should subject this idea to some close analysis.

The pure view has three central components: a separation of *institutions*, a separation of *functions*, and a separation of *personnel*. I will address the issue of separation of personnel later in the chapter. Here, I will focus on the requirement of functional separation since this idea lies at the heart of the pure view. Two features of that requirement bear emphasis at the outset. The first is that the pure doctrine of functional separation seems to posit a 'one-to-one correlation'[36] between the three branches of government and their respective functions. To each branch, there is an identifiable function which, in turn, gives the branch its name. We could call this the '*one branch—one function*' view.[37] The second feature is the requirement that each branch must be confined to the exercise of its own (single) function and should not encroach upon the functions of the other branches. For it to assume any other function would be ultra vires. We can call this the '*separation as confinement*' view.

Both of these ideas—the 'one branch—one function' view and the 'separation as confinement' requirement—are deeply problematic. Let us start with the 'one branch—one function' idea. The claim that there is a one-to-one correlation between function and branch is impossible to sustain in any modern state. As is well known, the executive typically carries out a significant legislative function in the form of 'delegated legislation'. Indeed, in many countries, the executive has a predominant role in primary legislation as well. Executive power is strikingly multifunctional.[38]

Even if we set aside the executive, serious problems arise with respect to the courts and legislatures as well. When we look at the courts, we can see that the judicial branch has to keep order in the court and manage court facilities (thus carrying out executive functions). The courts also exercise legislative functions when they make rules governing court procedures and the costs of litigation. Many people also argue that in settling disputes about what legal rules require, the courts also make new law, albeit within certain limits.[39] Certainly in common law systems, there is a widespread recognition

[32] Hansen, above n 27, 523; W. Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart Publishing, 2011), 86.

[33] Vermeule, above n 11, 680.

[34] Dicey argued that the separation of powers as understood in France and the United States in the eighteenth century was based on a misunderstanding of Montesquieu. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 8th edn (London: Macmillan, 1915).

[35] E. Corwin, *Constitution of the United States of America: Analysis and Interpretation* (Washington, D.C.: United States Printing Office, 1953), 9–10.

[36] D. Kyritsis, 'Principles, Policies and the Power of Courts' (2007) 20 *Canadian Journal of Law and Jurisprudence* 379, at 386; Merrill, above n 27, 231.

[37] See Merrill, above n 27, 231.

[38] W. B. Gwyn, 'The Indeterminacy of the Separation of Powers in the Age of the Framers' (1989) 30 *William & Mary Law Review* 263, at 266.

[39] Of course, whether the creative aspect of the judicial role is aptly characterized as 'making law' is an ongoing matter of dispute in legal theory. See further R. Dworkin, *A Matter of Principle* (Cambridge,

that 'law-making—within certain limits—is an inevitable and legitimate element of the judge's role'.[40] Moreover, in those jurisdictions where courts have the power to strike down legislation for non-compliance with constitutional rights, the idea that the judicial function is exclusively to apply the law looks strained, at best. When we turn to the legislature, a similarly multifunctional picture emerges. The legislative branch needs to keep order in the legislature, administering the process for voting on bills (an executive task) and it also needs to resolve disputes over contempt and breach of privilege (arguably a judicial function).[41]

Clearly, the strict 'one branch—one function' view cannot be sustained as a descriptive matter, because all three branches exercise all three functions to some degree. In order for each branch to be well organized for its own tasks, they must all carry out executive, legislative, and judicial tasks.[42] This multifunctionality casts doubt on the explanatory power of the pure doctrine. With its monolithic insistence that each branch perform one single function and no other, it seems to present a theory of what distinguishes the branches of government which does not capture the complicated institutional realities of modern states.[43] Little wonder, then, that 'the problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law'.[44]

Is there any way of rescuing the functional classification which is widely believed to lie at the very heart of the separation of powers? One solution is to relax the stringency of the 'one branch—one function' requirement and accept that it is a matter of degree. On this view, we could say that each branch of government has a primary or core function, even though it may sometimes perform other functions at the periphery. In this way, we can preserve some correlation between branch and function, whilst not requiring a strict one-to-one correlation entailed by the pure doctrine.[45]

Clearly, this 'core functions' approach to the separation of powers is much more promising, both as a descriptive and as a normative matter. By accommodating a degree of multifunctionality, it rescues the separation of powers from claims of being irrelevant as a theory for modern government. It also avoids the mistake of thinking that just because two things cannot always be distinguished clearly, that therefore there is no distinction between them. But whilst it deflects some of the more obvious critiques of the so-called pure account of the separation of powers, it does not solve all the problems with the orthodox understanding. First, it continues to cash out the distinctness between the branches in terms of one single function—albeit in terms of a primary, rather than exclusive one. This is problematic because we know that the overlap

Mass.: Harvard University Press, 1985), 48; J. Gardner, 'Legal Positivism: 5½ Myths', in J. Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012); and Dyzenhaus in this volume.

[40] Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 4 *European Human Rights Law Review* 350, at 352; Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of Public Teachers of Law* 22.

[41] Strauss, above n 10, 573.

[42] T. Endicott, *Administrative Law* 2nd edn (Oxford: Oxford University Press, 2011), 15.

[43] G. Lawson, 'The Rise and Rise of the Administrative State' (1994) 107 *Harvard Law Review* 1231; see further M. E. Magill, 'The Real Separation in the Separation of Powers' (2000) 86 *Virginia Law Review* 1127, at 1136–47.

[44] Lawson, above n 43, 1142.

[45] Barendt, 1995, above n 3; Carolan, above n 4, 21.

of function is not just at the peripheries of the various functions, but is significant, pervasive, and unavoidable. As Victoria Nourse observed, it is an 'open secret that the departments all perform the functions of other departments'.[46]

Second, even those who advance a 'core functions' approach face the formidable challenge of identifying—and then describing—what the core branch functions are. Take, for example, the executive. In most modern states, we would resist the conclusion that its core function is to execute or give effect to policy, with other functions relegated to a secondary or peripheral role. In many countries, we think of the executive as the body which initiates—rather than executes—policy. What is the 'core' function of the courts? Is it to adjudicate individual disputes, or apply the law, or uphold the rule of law, or to hold the other branches to account? The task of identifying the core function of legislatures fares no better. Though it is certainly tempting to say that the core task of the legislature is to legislate, this is widely disputed by political scientists who argue that legislatures typically carry out a multiplicity of functions and it is by no means a foregone conclusion that lawmaking is the most important amongst them.[47] For many, the main role of the legislature is not to make law, but to scrutinize and pass judgment on legislative proposals made by the executive.[48] The main role of the legislature is, thus, to legitimate rather than legislate. It follows that softening the rigours of the pure doctrine by allowing for branches to exercise peripheral or non-core functions does not escape entirely the 'intractable puzzles'[49] posed by the pure doctrine.

Let us turn now to the idea of 'separation as confinement'. Clearly, if the import of this idea is to urge each branch to confine itself to the exercise of one, single function, then this will be vulnerable to some of the same problems encountered by the 'one branch—one function' view. After all, if each branch exercises more than one function (indeed, if it is both inevitable and desirable that they should), then the 'separation as confinement' view will seem like a misguided prescription. However, it runs up against further difficulties. For when we look at how each branch carries out its respective tasks, we can see that the idea of institutional 'confinement' fails to capture a crucial feature of the institutional practice. This is the interdependence of—and interaction between—the three branches of government when carrying out their respective roles in the constitutional order.

Consider, for example, the role of the legislature. When the legislature enacts a statute, it has a number of legislative tools at its disposal. One such tool is to rely on *vague* terms in the statutory text, such as 'reasonable care', 'offensive behaviour', or 'within a reasonable time'.[50] When the legislature relies on such terms, the legislation sets out the general legal framework, leaving it to other bodies (often the courts) to fill in the gaps and work out how it should be applied in individual cases.[51] This is an example of what Joseph Raz has called 'directed powers', that is, where the legislature gives

[46] Nourse, above n 5, 758, 760, 782, 789.

[47] P. Norton, *Parliament in British Politics* 2nd edn (Basingstoke: Palgrave Macmillan, 2013), 9ff.

[48] Ibid 7.

[49] Lawson, above n 43.

[50] Vague language is not exceptional, but is rather a 'pervasive legislative tool' and is ineliminable in the law. See T. Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1, at 5.

[51] J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), 194.

other institutional actors (either ministers or subordinate administrative bodies or the courts) discretion to decide what the law requires, subject to the ends which must be served by the exercise of those powers.[52] And, as Raz points out, 'the general function of directed powers is to introduce and maintain a certain division of power and of labour between various authorities'.[53]

The prevalence of various kinds of directed powers in legislation illustrates some of the limitations of the 'separation as confinement' view. When deciding how to legislate, the legislator does not confine itself to its own function viewed in isolation. On the contrary, it is an integral part of the legislative role that the legislature has to make decisions about the appropriate division of labour between various state institutions, assessing the relative institutional competence of each, and to take account of the role those other organs can play. This should not surprise us since the legislature is often dependent on the courts and other actors to implement and give effect to the legislation it enacts.

The same kind of interaction and interdependence is manifest when we look at the same situation from the point of view of the courts. In fact, from this point of view, the interdependence of the branches of government seems even more pronounced, since the courts' dependence on the legislature is a defining feature of the courts' institutional role, since judges must apply the law enacted by the legislature. However, despite this applicative role, it would be a mistake to think of the judicial role as entirely passive. The legislation may contain 'directed powers', thus directing them to develop the law in ways unregulated by the statute, albeit constrained by the framework set out by it.[54] Moreover, when the courts are dealing with an area of the law which is regulated partly by statute and partly by judge-made law, the courts have to integrate legislation with doctrine and to ensure that there is overall coherence in the law, so that the legislation and doctrine can work well together.[55]

Therefore, it is unhelpful to say that the branches of government should confine themselves to their own function if by that it is meant that they make their decisions in isolation from, or oblivious to, the actions and decisions of the other branches of government. As Aharon Barak has put it, the branches of government are not '*latifundia* that have no connection between them'.[56] In order to carry out their respective roles, each branch must take account of the role and responsibilities of the other branches. The 'separation as confinement' view fails to capture the interactive and interdependent nature of the way in which each branch carries out its respective tasks.

Given the shortcomings of the 'one branch—one function' and 'separation as confinement' ideas which lie at the core of the pure doctrine, it might be tempting to dismiss the separation of powers outright as a meaningful constitutional ideal. That was the route taken by many British scholars throughout the nineteenth and twentieth

[52] J. Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 249. [53] Ibid 243.
[54] Gardner, above n 39; A. Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259, at 270–4.
[55] Raz, above n 52, 377; P. Sales, 'Judges and Legislature: Values into Law' (2012) 71 *Cambridge Law Journal* 287, at 296.
[56] A. Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 36.

centuries. Bemoaning the 'facile alignment'[57] between function and institution presupposed by the pure or orthodox account, many scholars dismissed the separation of powers as a complete irrelevance for British constitutional law.[58] In the United States, too, the rigid and formalistic prescriptions of the 'one branch—one function' view has prompted leading scholars to call for the abandonment of the separation of powers as an outmoded ideal for modern government.[59]

However, whilst we should certainly reject the pure doctrine, this does not mean that we should abandon the principle of the separation of powers altogether. On the contrary, the flaws of the pure doctrine should stimulate us to develop a more plausible conception of the separation of powers—one which does not fall prey to the shortcomings of the pure doctrine. Such an account faces two challenges. The first is to provide a meaningful way of accounting for the distinctness of the branches of government in a way which does not collapse into an implausible essentialism about function which has bedeviled the pure doctrine since its inception.[60] We can call this the *desideratum of distinctness*.[61] The second challenge is to develop a conception of the separation of powers which can accommodate the interaction and interdependence between the branches. We can call this the *desideratum of interaction*. With both of these desiderata in place as points of guidance, we can now embark on the reconstructive effort.

II. Separation of Powers: The Reconstructed View

Let us start by posing a basic question: *why* separate power between different branches of government? Nobody wants a return to unified authority under one single ruler empowered to make all governmental decisions. But why not? What do we gain by separating powers between different branches of government? The classic eighteenth-century answer to this question was that the separation of powers helps us to avert the risk of tyranny and potential abuse of power. As Montesquieu warned, 'constant experience shows us that every man interested with power is apt to abuse it, and to carry his authority as far it will go'.[62] The solution was to divide power amongst distinct organs of government, so as to ensure that no single body was omnipotent, whilst simultaneously allowing them to check and sanction each other when that was required. Right up to the present day, curbing abuse of power and preventing its concentration is regarded as the primary purpose of the separation of powers.[63]

But this overlooks the sound intuition which lies at the heart of the 'one branch—one function' view, namely, that there must be some meaningful correlation between the nature of particular institutions on the one hand, and the tasks we assign to them on the other.[64] If the sole purpose of the separation of powers is to prevent a concentration

[57] J. Griffith, 'A Pilgrim's Progress' (1995) 22 *Journal of Law and Society* 410, at 411; I. Jennings, *The Law and the Constitution* 5th edn (London: University of London Press, 1959), 281–2, 303.
[58] S. de Smith and R. Brazier, *Constitutional and Administrative Law* 8th edn (London: Penguin, 1998).
[59] Posner and Vermeule, above n 13. [60] Nourse, above n 5.
[61] Kyritsis, above n 36. [62] Vile, above n 4, 78.
[63] R. Albert, 'Presidential Values in Parliamentary Democracies' (2010) 8 *International Journal of Constitutional Law* 207; Magill, above n 43.
[64] Magill, above n 28, 606.

of power in one person or body, then we could fulfil that purpose by dispersing powers randomly amongst a variety of bodies. If concentration of power is the problem, then dispersal of power is an obvious solution, no matter what form the dispersal takes. Similarly, if the sole purpose is to ensure that powers are checked and monitored, then we can satisfy this goal by putting institutional checks in place, without worrying about the basis of the original power-allocation.

But from a constitutional point of view, we are extremely reluctant to accept that powers should be allocated to different branches on a random basis. We think it matters a great deal who gets to decide what in constitutional law. Not only do we want to ensure that the right decisions are made by the institutions which govern us, we also care about whether the right decisions have been made by the right body.[65] In other words, our constitutional thinking is sensitive to jurisdictional concerns which are a crucial determinant of political legitimacy. Therefore, we need a positive justification for allocating powers to particular branches, beyond the negative reasons of seeking to avoid a concentration of power. Can such a justification be found?

One possible justification is rooted in the nature of governing and the multitasking which this requires.[66] Responsible government in any complex society comprises a multiplicity of different tasks. Every country needs an executive body to initiate and make policy decisions. But beyond this, responsible government needs a means of making clear, open, prospective, stable, general rules for the community. And, as H. L. A. Hart pointed out, any complex legal system needs a means of resolving disputes about the rules and their application.[67] But there is no 'one-size-fits-all' decision-making process which would be appropriate for all the tasks the State must carry out. Typically, we need an *independent body* (the courts) to resolve disputes about the rules required in individual cases; and we need a *deliberative and representative body* (a legislative assembly) to make general rules for the community which can be deliberately made and changed.

Here we have the seeds of a division of labour between the three branches of government. It shows that the point of separating power is not just to disperse power randomly amongst various bodies, but to create two particular branches of government—the courts and the legislature—which are distinct from the executive branch, and to which the executive will be accountable.[68] Note that, on this understanding, the separation of powers is motivated by two basic concerns of institutional design. The first is to allocate power and assign tasks to those bodies best suited to carry them out. In the literature on the separation of powers, this is sometimes referred to as the value of 'efficiency'.[69] The second is to put mechanisms in place to correct for potential abuse of power and jurisdictional overreach.

[65] Thus, the justification of judicial review is a (second-order) question about the relative institutional competence and legitimacy of the courts vis-à-vis the executive and legislature to make decisions about rights, rather than a first-order debate about what rights require. See J. Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18; Compare with A. Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

[66] L. Green, 'The Duty to Govern' (2007) 13 *Legal Theory* 165.

[67] H. L. A. Hart, *The Concept of Law* 3rd edn, L. Green (ed) (Oxford: Clarendon Press, 2012).

[68] Endicott, above n 42, 15.

[69] Barber, above n 18.

How do we work out how to allocate power to different branches? Typically, we assess whether an institution is well equipped to carry out certain tasks, in part, by virtue of various procedural features the institution may possess, such as its composition, decision-making process, resources, access to information, and the skills and expertise of the people who work within these institutions.[70] Understanding an institution requires that we should attend to the reasons for choosing and maintaining that institution.[71] This means that in order to work out which tasks to assign to which institutions, we need to relate those tasks to the appropriate decision-making processes and the values which the various institutional roles are meant to serve. In short, we must relate substantive tasks to decision-making processes.[72]

For example, in order to have an effective organ for making clear, open, prospective, stable rules for the community, we need a legislative assembly which is structured so that it can deliberate on legislative proposals and enact and change law in response to all the reasons that bear on such decisions. The fact that the legislature is accountable to the electorate gives it a range of institutional incentives. Most obviously, its decisions will be responsive to the wishes of the electorate in various ways. This is also a way of ensuring that there is sufficient support and cooperation amongst the general populace and that there is input on legislative proposals from a wide range of perspectives. Moreover, its connection to the electorate gives it political legitimacy to make public policy decisions on behalf of the community.

Similarly, in order to have an effective adjudicative body for resolving disputes about what the law requires, we need a body which is independent (both from the executive and legislature, and from the individual parties). Being independent helps the courts to adjudicate fairly and even-handedly between opposing parties, by applying the law faithfully to the dispute in question.[73] The independence of the courts ensures that they will not become the mere instrument of the executive or legislative branch when adjudicating disputes about what the law requires. It enables them to resist pressure from those other branches, thus strengthening their ability to uphold the rule of law.[74]

How does this division of labour differ from the pure doctrine which advocated a tight one-to-one correlation between branch and function? The main difference is that rather than trying to distinguish the branches of government in terms of single mutually exclusive functions, the approach adopted here cashes out the separation of powers in terms of a division of labour between distinct organs of government, where each organ performs a different institutional role.[75] Note that the distinction between the institutional roles of the courts and the legislature does not map directly onto a distinction between the function of making law and the function of applying it. In fact, it cuts

[70] Kyritsis, 2012, above n 19; Vile, above n 4; Carolan, above n 4.

[71] T. Nagel, 'Due Process', in J. Pennock and J. Chapman (eds), *Due Process: Nomos XVIII* (New York: New York University Press, 1977), 93–125.

[72] Kyritsis, 2008, above n 19.

[73] R. Ekins, 'Statutory Interpretation and the Separation of Powers', draft working paper (on file with author), at 8.

[74] For this reason, many scholars argue that the separation of judicial power from the legislature and executive is a necessary precondition for the rule of law. See Allan, above n 17, and in this volume.

[75] J. Raz, 'The Institutional Nature of Law', in Raz, above n 51, 106; Claus, above n 31, 445.

across that distinction, because institutional roles can encompass a number of different functions. On the view advanced here, separate institutions can share powers and functions, whilst performing different roles in the joint enterprise of governing.[76]

But once we admit some sharing and overlap of function, the worry arises that this account of the separation of powers flouts the *desideratum of distinctness*. For example, if both the courts and the legislature make law, how can we distinguish between them? The answer is that whilst both institutions make law, they do so in different ways—ways which are informed by their different roles in the constitutional scheme. That is, there is an important qualitative difference between legislative lawmaking on the one hand, and judicial lawmaking on the other.[77]

In general, the ability and power of the courts to make new law is generally more limited than that of the legislators, since courts typically make law by filling in gaps in existing legal frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances, etc. Judicial lawmaking powers tend to be piecemeal and incremental[78] and the courts must reason according to law, even when developing it. By contrast, legislators have the power to make radical, broad-ranging changes in the law, which are not based on existing legal norms. Thus, as John Gardner observed:

> What is really morally important under the heading of the separation of powers is not the separation of law-making powers from law-applying powers, but rather the separation of legislative powers of law-making (ie powers to make legally unprecedented laws) from judicial powers of law-making (ie powers to develop the law gradually using existing legal resources).[79]

Of course, there is sometimes an overlap in the lawmaking tasks both institutions carry out. Some legislative lawmaking is incremental and interstitial, and some judicial lawmaking can have wide-ranging effects.[80] Nonetheless, both branches are subject to different institutional constraints and incentives—constraints which arise from, and inform, the scope and limits of their constitutional role.[81]

One final question arises from the *desideratum of distinctness*. This is the question of whether the separation of *powers* requires a separation of *personnel*. Clearly, some separation of persons between the branches is advisable as a general matter. There are some tasks which would be difficult to carry out if performed by only one person or body. For example, it may be difficult for one body to make decisions and then review

[76] See generally Kyritsis, above n 31; R. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: The Free Press, 1990), 101.

[77] For a more detailed account of the distinction between legislative and judicial lawmaking, see Kavanagh, above n 54, 270–4; Gardner, above n 39, 37–47; Raz, above n 51, 194–201.

[78] Kavanagh, above n 54, 270–4. [79] Gardner, above n 39, 41.

[80] For the view that judicial lawmaking is nonetheless typically piecemeal and incremental (despite occasionally having wide-ranging effects), see A. Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55, at 73–9.

[81] To clarify: the distinction between the judicial and legislative roles is not that between constrained and unconstrained decision-making. Rather, it lies in the nature and extent of the constraints. See further J. Raz, 'The Authority and Interpretation of Constitutions', in L. Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 152–93, at 153.

or check them, since the body might become susceptible to various forms of bias and self-interest which will prevent it checking the original decision in any meaningful way. In fact, this is a common way of showing that a separation of powers (and persons) is required by the rule of law. On this view, the very idea of government subject to law requires that the law is upheld and enforced (against the government and/or the legislature) by independent courts.[82]

However, the desirability of some separation of personnel does not mean that we must take an absolutist position on this question, since we are familiar with the possibility of one person or body 'wearing two hats' in a way which is conducive overall to good government.[83] These are exactly the kinds of arguments which were used in the United Kingdom to support the fact that judges were members of the upper chamber of the legislature (the House of Lords). There, it was argued that judges could contribute legal knowledge and judicial expertise to the legislative process, whilst nonetheless preserving their judicial independence when deciding cases. The separation of roles was maintained largely due to the observance of constitutional conventions to ensure that the relevant actors exercised self-restraint.[84] Here is not the place to rehearse or evaluate the arguments for and against these arrangements. It is merely to suggest that such overlaps are not necessarily precluded by the principle of the separation of powers (at least on the reconstructed view advanced here), as long as a 'separation in thought' is observed.

III. Combining Separation and Supervision

Thus far, I have argued that the separation of powers requires a division of labour between the branches of government, such that they each play a distinct role in the constitutional scheme. But we have not yet said anything about checks and balances. This may seem like a grave omission since the contemporary literature on the separation of powers—especially that which is focused on the US system—emphasizes the central importance of checks and balances. Indeed, there are many who argue that such checks are the very 'essence'[85] of the separation of powers. In this section, I will argue that division-of-labour considerations do not exhaust the meaning or rationale of the separation of powers. In order to curb abuse of power (an important concern of institutional design), it is necessary to supplement division of labour with checks and balances. In short, we need to combine separation with supervision.

In thinking about this issue, it is useful to recall James Madison's canonical account of the value of checks and balances within a constitutional separation of powers. Writing in *The Federalist Papers*, Madison argued that the first task for the separation of powers was to make some 'division of the government into distinct and separate departments',[86] where each department must have a 'will of its own'.[87] But then 'the

[82] Allan, above n 17.

[83] See J. Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, at 433ff.

[84] See eg Sales, above n 55, 292. [85] Barendt, 1995, above n 3.

[86] J. Madison, 'No. 51', in C. Rossiter (ed), *The Federalist Papers* (New York: Penguin Putnam, 1999), 288–93.

[87] Ibid.

next and most difficult task is to provide some *practical security* for each, against the invasion of the others'.[88] Madison contended that it was not 'sufficient to mark, with precision, the boundaries of these departments [of government], and to trust to the parchment barriers against the encroaching spirit of power'. In order to avert the risk of abuse of power we must 'so contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places'.[89]

In this way, checks and balances are required by the separation of powers in order to prevent one branch of government usurping another and to provide each branch with the 'necessary constitutional means' to resist such usurpation and prevent it occurring. Checks and balances help to protect the separation, as well as helping to ensure that each branch does not overstep its role in the constitutional scheme. This follows from the normal precepts of institutional design. When setting up institutions, we should structure institutions so that they can play to their institutional strengths. But we also need to consider how to mitigate any of their attendant risks.[90] This is why the separation of powers includes both a division-of-labour and checks-and-balances component. Implementing the separation of powers is a 'two-sided exercise',[91] involving both the identification of the valuable role each institution can play, as well as an appreciation of their attendant risks.

Viewed in this way, the separation of powers has both a positive and negative dimension. On the positive side, it gives us a principled starting point for thinking about how to allocate power to different institutions. The positive dimension of the separation of powers explains why it plays a fundamental role in constitutional formation. After all, the first (positive) role of constitutions is to *constitute* government—to set up the institutional framework for organizing government, setting forth the powers and procedures of the various institutions and the basic structure of the legal system.[92] But a good governmental structure will also require that there are mechanisms in place to curb potential abuse of power and provide reassurance and security that each branch of government will observe its limitations when carrying out its role. Therefore, the separation of powers also fulfils the negative virtue of curbing, limiting, and checking government power. As Christoph Mollers put it the 'separation of powers should not be understood as a pure instrument of restraining political power. It is also an instrument that constitutes this power.'[93] It embodies what Vile described as the dual values of *coordination* and *control*.[94]

IV. Governing Together in a Joint Enterprise

Thus far, I have argued that the separation of powers comprises both a division-of labour component and checks-and-balances component. The task of this section is to

[88] J. Madison, 'No. 48', in Rossiter, above n 86, 276–81; see also Allan, above n 17, 53.
[89] Madison, above n 86. [90] Kyritsis, 2012, above n 19, 303. [91] Ibid.
[92] L. Alexander, 'What Are Constitutions, and What Should (and Can) They Do?' (2011) 28 *Social Philosophy and Policy* 1, at 2.
[93] Mollers, above n 5, 10. [94] Vile, above n 4, ch 12.

show that both of these elements are underpinned by the deeper value of coordinated institutional effort between branches of government in the service of good government.[95] I will call this the 'joint enterprise of governing' for short. At first blush, this argument has an air of paradox about it. How can the *separation* of powers be underpinned by the value of *coordinated* institutional action as part of a *joint* enterprise?

The paradox is dissolved once we see that there are different forms and degrees of separation, not all of which preclude coordination or joint action between the separated bodies. If we support the pure doctrine, we will think of the branches as completely separated—isolated and insulated from the other branches. However, on the reconstructed view, we will think of the branches—not as solitary entities confined to one single function—but as constituent parts of a joint enterprise, each with their own role to play. Though distinct, these parts have to work together. Though they are independent from one another, they are also interdependent in various, subtle ways. The US Supreme Court captured this idea of separate but interconnected branches when it observed that:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[96]

Some of that interdependence came into view when we considered the tasks of legislating and adjudicating. There, we saw that the branches of government must take account of the acts and decisions of the other branches when carrying out their own tasks. No one branch can carry out all the tasks of governing. Therefore, each branch makes a (necessarily) partial contribution to the joint enterprise. The legislature may enact the general rules and provide the statutory framework, but the courts must decide what those general rules mean and require in particular cases, which may involve resolving indeterminacy in meaning, filling in gaps in the framework, and integrating particular statutory provisions into the broader fabric of legal principle. Here we see lawmaking as a collaborative enterprise, where each branch contributes different elements in ways which reflect their particular institutional structures, skills, competence, and legitimacy. Thus, when making decisions as part of the scheme of governance, each branch must recognize what Jeremy Waldron called 'the collective action structure'[97] of the problems they face and the decisions they have to make. On this view, the separation of powers is not just a principle which informs the distribution of power and the division of labour, but also the *relationships* between the three branches when carrying out their distinct roles as part of a joint enterprise.

One central feature of that joint action is the requirement of *inter-institutional comity*.[98] Inter-institutional comity is 'that respect which one great organ of the State owes to another'.[99] As the House of Lords (now UK Supreme Court) put it in *Jackson v*

[95] Kyritsis, 2008, above n 19; Kyritsis, 2012, above n 19; see also Carolan, above n 4, 186.
[96] *Youngstown Co v Sawyer* 343 US 579 (1952), 635 (per Jackson J).
[97] J. Waldron, 'Authority for Officials', in L. Meyer, S. Paulson, and T. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 45–70.
[98] J. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, at 428.
[99] *Buckley v Attorney General* [1950] Irish Reports 67, 80 (per O'Byrne J); see further A. Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication', in G. Huscroft (ed),

Attorney General, 'the delicate balance between the various institutions... is maintained to a large degree by the *mutual respect* which each institution has for the other'.[100] This is by no means a peculiar feature of the separation of powers in the United Kingdom. The requirement of reciprocal respect between the institutional actors is a generalizable feature of any constitutional system based on the separation of powers.

How do the various branches of government show respect for decisions of the other branches as contributions to the joint enterprise of good government? This will vary depending on the institution and its interrelationship with other institutions. But, in broad terms, it involves both a *leeway requirement* and a *mutual support requirement*. Comity requires each institution to give the other institutions leeway to carry out their own tasks and functions (the *leeway requirement*). They should respect the jurisdiction of other institutions and be alert to the fact that other institutions may be better placed to carry out a certain task. As the UK Supreme Court put it, both the courts and legislature must recognize that each institution has 'their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other'.[101]

All the institutions must exercise some self-restraint when appropriate—both to ensure that they keep within their own jurisdiction, and to ensure that they do not trespass into the jurisdiction of another institution. Self-restraint may also be required in the sense of refraining from criticizing the decisions of the other branches, when to do so would undermine the ability of that branch to do its job well. Beyond this self-restraint, each branch of government may be required to actively support the decisions of the other branches, either by implementing those decisions or interpreting them in a way which respects the underlying substantive and institutional choices or in allocating to other institutions tasks which they are well placed to carry out well (the *mutual support requirement*). They must support each other in the general promotion of good government.[102]

The idea that the value underpinning the separation of powers is coordinated institutional effort in the joint enterprise of governing may seem jarring, given the strong hold of the pure doctrine over our understanding of the separation of powers. But the idea of the branches being both independent *and* interdependent—distinct but interconnected—also has some pedigree in the canonical literature. After all, one of Madison's central insights was that we should not conceive of the legislative, executive, and judicial power as 'wholly unconnected with each other'.[103] Indeed, Madison viewed the branches of government as 'constituent parts' of the overall scheme of government and it was 'their mutual relations' which would provide 'the means of keeping each other in their proper places'.[104]

Expounding the Constitution (Cambridge: Cambridge University Press, 2008), 184–216, at 187ff; Endicott, above n 42, ch XV, 17.

[100] [2005] UKHL 56, [2005] 3 WLR 733 [125] (emphasis added).

[101] *AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland)* [2011] UKSC 46, [2012] 1 AC 868 [148].

[102] Ibid. [103] Madison, above n 88. [104] Madison, above n 86.

It is often thought that by recommending checks and balances, Madison introduced a relational or inter-institutional dimension to the more traditional understandings of the separation of powers. That is correct. However, on the view advanced here, the relational dimension goes far beyond the existence of checks and balances. It includes more positive forms of inter-institutional interaction where the branches must take account of each other's actions and work together in partnership. Mutual supervision takes place against the broader backdrop of mutual respect and support. In this way, the reconstructed view honours the *desideratum of interaction*, not only by accepting the need for checks and balances, but also by acknowledging the wider context of the constitutional relations between the branches. In some contexts, the interaction between the branches will be supervisory, where the goal is to check, review, and hold the other to account. At other times, the interaction will be a form of cooperative engagement where the branches have to support each other's role in the joint endeavour.[105]

V. Conclusion

This chapter has argued that we should abandon the pure doctrine in favour of a reconstructed view underpinned by the value of coordinated institutional effort in the joint enterprise of governing. The argument presented here marks a departure from traditional accounts of the separation of powers in two main ways. First, instead of distinguishing the branches in terms of three mutually exclusive functions, we should think of the separation of powers as requiring a division of labour where each branch plays a distinct role in the constitutional scheme. Though the labour is divided, functions may be shared.

Second, instead of conceptualizing the branches of government as isolated or compartmentalized bodies with 'high walls'[106] between them, the view advanced here emphasizes the necessary interdependence, interaction, and interconnections between the branches. The actions of each branch take effect in a complex interactive setting, where the branches take account of—and coordinate with—the actions of the other branches. They have to work together in the joint enterprise of governing.

There is no denying that this understanding of the separation of powers posits a less strict or rigid separation between the branches than the orthodox account would allow. But the strictures of the pure view are not observed anywhere. In every constitutional democracy, the dogma of a strict separation of functions 'contrasts sharply with the actual constitutional distribution of powers as well as constitutional practice and reality'.[107] Some intermixture of function is both unavoidable and desirable. But if this is so, what explains the stubborn appeal of the pure doctrine over centuries?

Some commentators have suggested that the key to 'the global diffusion' of the pure doctrine is its seductive simplicity.[108] After all, the pure view provides a clear and simple way of distinguishing between the branches, and it provides a neat answer to the

[105] Malleson, above n 26, 119.

[106] *Plaut v Spendthrift Farms Inc* 514 US 211 (1995) (per Scalia J).

[107] Heun, above n 32, 86. [108] Carolan, above n 4, 22.

sound intuition that there must be some meaningful correlation between the nature of each institution and the tasks allocated to it.

However, it must also be remembered that the separation of powers was forged as a foundational principle of constitutional government at a time when the prevailing concern was to limit power and curb its abuse. Viewed in the context of the 'tyrannophobia'[109] of the eighteenth century, the separation of powers was wielded as a slogan requiring a strict separation on functional lines and/or a system of checks and balances conceived as powerful 'sanctioning devices'.[110] Both of these views rested on distrust of political power and both were conceived as a way of keeping each branch of government within strict bounds.[111] Since the aim was to ward off tyranny and prevent the abuse of power, the very strictness of the classic and formal tripartite distinction became a 'voice of assurance'[112] that the limits of power would be observed.

As is often the case when a political ideal captures the imagination of large numbers of people and is wielded in political struggles, its main tenets become simplified slogans which bear little relation to the original ideas which animated it.[113] This is what happened with the separation of powers in the eighteenth century, where the seductively simple 'one branch—one function' idea became a popular shorthand for the much more complex, nuanced, and interactive division of labour between the branches which existed in constitutional practice.[114] If taken as a descriptive assertion, the 'one branch—one function' view was unsustainable. But if viewed prescriptively as an abbreviated way of expressing the injunction to all three branches of government to ensure that they do not stray beyond their proper constitutional role, then its appeal can be seen more clearly.[115] The lure of the strict 'one branch—one function' view is that it seems to hold out what Peter Strauss calls the 'promise of containment of government function'.[116]

The problem is that the pure view cannot deliver on this promise, largely because it is radically detached from the practice of contemporary constitutional government. Despite its persistent appeal, the descriptive and normative inadequacies of the pure view have also led to widespread disillusion with the separation of powers, thus accounting for the deep ambivalence surrounding the principle right up to the present day. Not only does the pure view posit an impossibly tight connection between each institution and its corresponding function, it obscures the necessary and desirable interconnections, interdependence, and interactions between the branches of government. In fact, it goes further by casting a presumptively negative light on such interactions.

The account of the separation of powers presented in this chapter embraces institutional interaction and collaboration as part and parcel of the ideal of the separation

[109] Posner and Vermeule, above n 13.

[110] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

[111] Vile, above n 4, 335.

[112] P. Strauss, 'Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency' (1987) 72 *Cornell Law Review* 488, at 513. Bernard Manin argues that this was an important driver of the Anti-Federalist position in the American Founding era (Manin, above n 27, 44ff).

[113] J. Raz, 'The Rule of Law and its Virtue', in Raz, above n 51.

[114] Claus, above n 31, 445.

[115] See further J. Finnis, 'The Fairy-Tale's Moral' (1999) 115 *Law Quarterly Review* 170, at 172–4.

[116] Strauss, above n 112, 526.

of powers, rather than being antithetical to its basic requirements. It emphasizes that lawmaking, law-applying, and law-executing are collaborative tasks where each organ of government must cooperate with the other organs in an interactive setting.[117] We should reject the rigidities of the pure doctrine, together with the implausible essentialism about function on which it rests. Freed from its strictures, we can consider the possibility of a sharing of functions and power amongst the branches of government where each has a distinct role in the joint enterprise of governing.

[117] W. Eskridge and P. Frickey, 'Foreword: Law as Equilibrium' (1994) 108 *Harvard Law Review* 26, at 28–9.