SEPARATION OF POWERS IN THOUGHT AND PRACTICE?

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Abstract: The rationale of the separation of powers is often elided with the rationale of checks and balances and with the rationale of the dispersal of power generally in a constitutional system. This Essay, however, focuses resolutely on the functional separation of powers in what M.J.C. Vile called its "pure form." Reexamining the theories of Locke, Montesquieu, and Madison, this Essay seeks to recover (amidst all their tautologies and evasions) a genuine case in favor of this principle. The Essay argues that the rationale of the separation of powers is closely related to that of the rule of law: it is partly a matter of the distinct integrity of each of the separated institutions—judiciary, legislature, and administration. But above all, it is a matter of articulated governance (as contrasted with compressed undifferentiated exercises of power).

Introduction

My topic is the separation of powers, conceived as a political principle for evaluating the legal and constitutional arrangements of a modern state. What is this principle and why is it important? The question takes us in interesting directions if we distinguish the separation of powers from two other important principles that are commonly associated, if not identified with it. These other principles are, *first*, the principle of the division of power—counseling us to avoid excessive concentrations of political power in the hands of any one person, group, or agency; and, *second*, the principle of checks and balances—holding that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other power-holders. Does the principle of the separation of powers have any meaning over and above

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these two principles? I think it does, and in this Essay I will explore aspects of the separation of powers that are independent of what we value in the principles of checks and balances and division of power.

The separation of powers counsels a qualitative separation of the different functions of government—legislation, adjudication, and executive administration. But the justification for this separation is not made clear in the canonical literature of seventeenth and eighteenth-century political theory: Montesquieu's "justifications," for example, were mostly tautologies.[1] And in the spirit of those tautologies, modern constitutionalism has, until recently, taken the separation of powers for granted—meaning that it takes for granted that the separation of powers is necessary to avoid tyranny, but it does not explain why. I think a qualitative separation is necessary; this is not a debunking essay. The point of this Essay is to find out something about the justification for the separation of powers.

By contrast, much recent work on the separation of powers has had a critical edge. Eric Posner and Adrian Vermeule are skeptical about its value in relation to the exigencies of modern government,[2] and John Manning has expressed doubts about the legal/constitutional status of the principle.[3] The former critique provokes us to identify specific justificatory considerations that we may think Posner and Vermeule are in danger of side-lining, whereas Manning's critique opens up space for us to conceive of this principle in political theory terms, uncontaminated by particular judicial formulations.

So, to anticipate briefly: the question is what, specifically, is the point of the separation of powers? And the answer I shall give is two-fold. I look first to the integrity of each of the distinguished powers or functions—the dignity of legislation, the independence of the courts, and the authority of the executive, each understood as having its own role to play in the practices of the state.[4] Secondly, I look to the value of articulated, as opposed to undifferentiated, modes of governance.[5] The idea is instead of just an undifferentiated political decision *to do something about X*, there is an insistence that anything we do to X or about X

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[1] *See infra* notes 69–83 and accompanying text.

[2] *See* Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 208 (2010) (referring to the separation of powers as "suffering through an enfeebled old age").

[3] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1944–45 (2011) (stating that "the Constitution adopts *no freestanding principle of separation of powers*").

[4] *See infra* Part VIII.

[5] *See infra* Part IX.

must be preceded by an exercise of legislative power that lays down a general rule applying to everyone, not just X, and a judicial proceeding that makes a determination that X's conduct in particular falls within the ambit of that rule, and so on. Apart from the integrity of each of these phases, there is a sense that power is better exercised, or exercised more respectfully so far as its subjects are concerned, when it proceeds in this orderly sequence. These are preliminary thoughts. In what follows I shall try to make them clearer.

I. Is the Separation of Powers a Legal Principle?

In his recent work, Manning has made a good case for the proposition that the separation of powers is not a principle of the U.S. Constitution.[6] The Constitution, says Manning, "adopts *no freestanding principle of separation of powers*. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale."[7] (The contrast here may be between the federal Constitution, which, as Manning points out, contains no Separation of Powers Clause,[8] and some of the state constitutions which, at least textually, do.)[9]

I think Manning has made a reasonable case, though I would have liked to see his argument related more explicitly to Dworkinian methodology:[10] whatever it says in the constitution, does the best interpretation of the constitution's provisions require us to embrace this as a background legal principle? I guess Manning thinks that this is the view held by those he calls functionalists, and he judges their interpretive exercise unsuccessful.[11]

Assuming Manning is right about the legal and constitutional situation, the separation of powers may remain an important principle of our *political* theory—indeed an important principle of the body of theory we

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[6] Manning, *supra* note 3, at 1944.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, Ind. Const. art. III, § 1; Va. Const. art. I, § 5. I say "at least textually" because, as one scholar has observed, recognition of separation of powers in the early state constitutions "'was verbal merely,' and that in practice it meant little more than a prohibition on plurality of office." M.J.C. Vile, Constitutionalism and the Separation of Powers 147 (2d ed. 1998) (quoting Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 514 (1925)).

[10] *See* Ronald Dworkin, Law's Empire 225 (1986) ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

[11] *See* Manning, *supra* note 3, at 1945, 1950–58.

call constitutionalism.[12] Not everything to which a constitutionalist political theory commits us is found in our Constitution—a proposition that is self-evident in the case of a country like the United Kingdom (which lacks a codified constitution), but which is true also, I think, of the United States.

Think of a couple of analogies. There is no explicit textual principle of democracy in the U.S. Constitution.[13] Nevertheless democracy is an indispensable part of our best theory of government, and it would be wrong to forego any interest in it simply on account of its lacking any explicit textual home. The same is true, also, of the rule of law. Although the framing of the Constitution was permeated by the spirit of the rule of law, still the rule of law is not presented explicitly in the Constitution as a freestanding principle and cannot be judicially enforced as such.[14] These examples suggest that, even when a principle lacks specific legal status, it still may be an indispensable part of our constitutionalism, an indispensable touchstone for evaluating the operation of and any change in our constitutional arrangements.

I take it that Manning would have no difficulty with this analysis: the separation of powers, like democracy and the rule of law, may be an indispensable part of our theory of politics (in America) or our American constitutional*ism*, even if it is not, in the legalistic sense, a freestanding principle of our Constitution. So we are not excused by Manning's argument from considering the meaning of this principle. On the contrary, that consideration can take its course more easily now, because we can focus steadily on what is conceptually distinctive about the principle without being distracted by the various uses that judges

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[12] "Constitutionalism" has many meanings, many of them having to do with an ideology of limited government. I have expressed doubts about identifying constitutional government with limited government. Jeremy Waldron, *Constitutionalism: A Skeptical View*, *in* Contemporary Debates in Political Philosophy 270–73 (Thomas Christiano & John Christman eds., 2009).

[13] *See generally* U.S. Const. (containing no textual principle of democracy). True, we can infer the importance of certain democratic considerations from Article I, section 2, clause 1 and also from the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments, but the principle of democracy itself cannot be regarded as legally enshrined.

[14] *See generally* U.S. Const. (containing no textual principle of the rule of law). Although A.V. Dicey argued that the rule of law stood alongside parliamentary sovereignty as one of two dominant aspects of English constitutionalism, he described it mostly as a "characteristic" of the constitution or "a special attribute of English institutions," rather than as one of its legal principles. A.V. Dicey, Introduction to the Study of the Law of the Constitution 107, 110, 115 (Liberty Classics 1982) (1885). *But cf. id.* at 120 (describing the rule of law as "a fundamental principle of the constitution").

have found for it when they have treated it—wrongly in Manning's view—as one of the principles that it is their sworn duty to uphold.[15]

By saying we should treat the separation of powers as an important political principle, albeit a non-legal one, I do not mean to say that it has merely "moral" force, as though it were just something a particular theorist dreamed up and now wants the rest of us to watch him apply. The principle of the separation of powers has a powerful place in the tradition of political thought long accepted as canonical among us. Think of the way it was present to the minds of the founding generation—federalists and anti-federalists alike. It had a positive, not just a normative presence, but its positive presence was not a matter of legal positivity. It was already accepted among the founding generation as an established touchstone of constitutional legitimacy. We see this in the way James Madison introduces the topic in *Federalist No. 47*, where he says, of "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct":

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[16]

It is not that Madison is uncritical of the heritage of, say, "the celebrated Montesquieu," the "oracle who is always consulted and cited on this subject."[17] He was perfectly capable of excoriating Montesquieu

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[15] *See* Manning, *supra* note 3, at 1947–48. For an example of judges treating the principle of separation of powers as something they must protect, see *Morrison v. Olson*, 487 U.S. 654, 694–95 (1988) (holding that the Ethics in Government Act of 1978 did not violate the principle of separation of powers because it was not a judicial usurpation of properly executive functions).

[16] The Federalist No. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008).

[17] *Id.*; Vile, *supra* note 9, at 94–99 ("The name most associated with the doctrine of the separation of powers is . . . Montesquieu. His influence upon later thought and upon the development of institutions far outstrips, in this connection, that of any of the earlier writers we have considered. It is clear, however, that Montesquieu did not invent the doctrine

and other "enlightened patrons of liberty" when he thought they had got things wrong.[18] It is just that he does not regard it as an open possibility simply to repudiate this maxim. And this is not just because his opponents had made an issue of the separation of powers, though they had.[19] Sometimes standards of political evaluation are compelling for us, even when the compulsion is not legal.

II. Adjacent Principles: Division of Power and Checks and Balances

Understood in this way, the separation of powers does not operate alone as a canonical principle of our constitutionalism. It is one of a close-knit set of principles that work both separately and together as touchstones of institutional legitimacy. The principles I have in mind are the following:

1. The principle of the separation of the functions of government from one another (the "Separation of Powers Principle").
2. The principle that counsels against the concentration of too much political power in the hands of any one person, group, or agency (the "Division of Power Principle").
3. The principle that requires the ordinary concurrence of one governmental entity in the actions of another, and thus permits one entity to check or veto the actions of another (the "Checks and Balances Principle").
4. The principle that requires laws to be enacted by votes in two coordinate legislative assemblies (the "Bicameralism Principle").
5. The principle that distinguishes between powers assigned to the federal government and powers reserved to the states or the provinces (the "Federalism Principle").

The Division of Power Principle has the same sort of status as the Separation of Powers Principle (on John Manning's account of that principle).[20] It is not a legal principle in that it is not an enforceable

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of the separation of powers, and that much of what he had to say in Book XI, Chapter 6 of the De l'Esprit des Loix was taken over from contemporary English writers, and from John Locke.").

[18] *See* James Madison, *Helvidius No. 1* (1793), *reprinted in* The Pacificus-Helvidius Debates of 1793–1794: Toward the Completion of the American Founding 55, 58 (Morton J. Frisch ed., 2007).

[19] For some discussion of the views of the Federalists' opponents toward the separation of powers, see The Complete Anti-Federalist 55–63 (Herbert J. Storing ed., 1981).

[20] *See* Manning, *supra* note 3, at 1944.

principle of the legal constitution.[21] The Bicameralism and Federalism Principles, by contrast, are evidently principles of the U.S. Constitution, and the Checks and Balances Principle is an umbrella term for a number of principles such as the presidential veto, the Senate's "advise-and-consent role" in a number of areas, and the principle of judicial review of legislation.[22]

It is common, in essays of this kind, to go on to excoriate judges and colleagues for "confusing" these principles with one another, and for using the language of separation of powers loosely and inaccurately.[23] No doubt M.J.C. Vile is right to say that the separation of powers "represents an area of political thought in which there has been an extraordinary confusion in the definition and use of terms."[24] But it is futile for the analytic philosopher to go on pedantically in those tones. People use a phrase as they use it. All I want to say is that the separation of executive, judicial, and legislative functions from one another has some importance in our constitutional theory even apart from—or over and above—the importance of observing any of the other principles I have mentioned. What matters to me is that we isolate and understand that importance. We can then choose to use *the phrase* "separation of powers" as we like, maybe as though it represented a conglomeration of the considerations that pertain to the first three principles on my list, and maybe the last two as well. But at least we will now have some grasp on a particular set of considerations that really

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[21] True, the Constitution does divide power in particular ways; but the Division of Power Principle presents it as a wholesale matter and embodies a general theory about *why* this is important that the Constitution does not necessarily embrace.

[22] It is possible that we should say about some instances of the Checks and Balances Principle what I said about the Division of Power Principle. To identify, say, the Senate's role in ratifying treaties as a matter of checks and balances is to subscribe to a particular theory about why the Senate was given that power, and that theory might or might not be correct. That might not be thought correct, for example, by one who believed—as James Madison asserts in *Helvidius No. 1*—that the Senate has this role simply because treaty-making is a form of law-making. *See* Madison, *supra* note 18, at 59.

[23] *See, e.g.*, VILE, *supra* note 9, at 2 ("The doctrine of separation of powers . . . [has] been combined with other political ideas, the theory of mixed government, the idea of balance, the concept of checks and balances, to form the complex constitutional theories that provided the basis for an effective, stable political system."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907–09 (1994) (stating that federalism, "once properly defined, does not secure citizen participation, does not make government more responsive or efficient by creating competition, and does not encourage experimentation," and that the U.S. Supreme Court "can proclaim the virtues of federalism with a straight face only because it does not know what federalism is").

[24] VILE, *supra* note 9, at 2.

cannot be identified with any of the other principles except the Separation of Powers Principle.

Also, I do not at all mean to deny the importance of the other principles, particularly, in this context, the Division of Power Principle and the Checks and Balances Principle. Indeed, "the great problem to be solved" at the time of the Founding "was to design governance institutions that would afford 'practical security' against the excessive concentrations of political power."[25] That was important for a number of reasons:

(a) It was important perhaps purely to reduce the amount of power in anyone's hands and thus the amount of damage to liberty or other interests that any fallible or corrupt official might be able to inflict;
(b) Or maybe competition between dispersed centers of power might have been thought healthy and productive;[26]
(c) Or we may want there to be multiple centers of recourse—many places to which citizens can appeal, when they are not receiving satisfaction from other centers of government;
(d) Or perhaps its value was purely symbolic (and no less important for that): it was crucial, I think, to republican thought in America to avoid the institution, internally of any sovereign power within the Constitution, comparable to the "sovereignty" of the British Parliament.[27]

From this point of view, the separation of powers might be thought of as a means to the division of power. Because we want to divide power up, what would be better than to begin by dividing the power of a judge from that of a legislator and from that of an executive official? But that cannot be the whole story about the separation of powers. For one thing, the Division of Powers Principle might require a much finer-grained division than Separation of Powers can supply: it might look for bicameral division within the legislature, for example, or it might look to reject any theory of the unified executive. Moreover, certain justifica-

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[25] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2316 (2006) (quoting The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)).

[26] *Id.* at 2312 (discussing the "vigorous, self-sustaining political competition between the legislative and executive branches").

[27] *See* Hannah Arendt, On Revolution 152 (1963) ("[T]he great and, in the long run, perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic . . . .").

tions for the division of powers, like justification (b) above, might make no sense so far as the functional separation is concerned. In what sense are we to imagine "self-sustaining competition" between, say, courts and legislatures, particularly if courts are thought of, as they usually are in the separation-of-powers tradition, as performing straightforward adjudicative functions rather than reviewing legislation;[28] in what sense can there be healthy competition between deciding cases and making law?

On the other hand, the separation of powers may have features that are unpalatable from the perspective of the Division of Power Principle. The functional separation of powers may be associated with something like a principle of legislative supremacy, at least in the sense that it envisions the legislature as having an initiating place on the assembly line of law-making/law enforcement. That is what John Locke thought,[29] and I believe Vile is wrong to say that "the main objection to seeing Locke as a proponent of the doctrine [of the separation of powers], even in a modified form, is his emphatic assertion of legislative supremacy."[30] Because Locke is emphatically not suggesting that legislative supremacy entitles legislators to perform adjudicative and executive functions,[31] Vile's complaint against Locke must be premised on something like the Division of Power Principle or the Checks and Balances Principle, not on the Separation of Powers Principle, in and of itself.

I have less space to devote to it, but I think something similar can be said about the relation between Separation of Powers and Check and Balances. We did not invent a distinction among legislative, executive, and adjudicative powers in order to establish the existence of entities that could check and balance one another. The Framers may have had a "vision that power should be divided and balanced creatively to prevent misuse,"[32] but that was not the only vision in play,[33] and not the vision

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[28] *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 454 (1991) ("[Under a formalist view], the Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional.").

[29] John Locke, Two Treatises of Government 366–67 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[30] Vile, *supra* note 9, 68–69.

[31] Locke, *supra* note 29, at 364–66.

[32] E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 Geo. Wash. L. Rev. 506, 511 (1989).

[33] *See, e.g.*, Lawrence Goldman, *Introduction* to The Federalist Papers, at ix, xvi (Lawrence Goldman ed., 2008) ("In view of the many sources of internal conflict between states [under the Articles of Confederation] there was a case for an enhanced national govern-

specific to the Separation of Powers Principle. The distinction of powers under the Separation of Powers Principle—if it makes sense at all—is given to us by a theory of articulated governance, which distinguishes these functions for what they are, not what they can do to hold one another in check. Ordinary adjudication is different from legislating and the difference is important—important, as I shall say, for the rule of law—and it would remain important on that ground whether judicial power was conceived as a way of limiting the power of legislators or not.[34]

I have said that the importance of the Division of Power and Checks and Balances Principles, great though that is, does not account for all of the importance of Separation of Powers. The importance of the Separation of Powers Principle is predicated on the vital distinction between various functions of governance—legislative, adjudicative, and executive—considered in and of themselves, and the vitality of that distinction may be of little interest—certainly little inherent interest—from the point of view of Division of Power and Checks and Balances. All that the Division of Power Principle cares about is that power be dispersed; it does not care particularly what the dispersed powers are. And all that Checks and Balances cares about is that power checks power or be required to concur in another power's exercise; again what the powers are that counterpoise each other in this balance is of incidental interest.

We can also put this point the other way. People worry about whether the functional separation envisaged in the Separation of Powers Principle is archaic; they worry about the difficulty of applying it to modern agencies, for example, which seem to perform both rule-

ment to act as an arbitrator or a restraint."); *id.* ("The states' foreign relations were of particular importance in the 1780s at a time of economic weakness and depression of trade . . . .").

[34] In a recent article, Adrian Vermeule has done a good job of considering various constitutional and other legal devices for ensuring that no one person or agency can act without the concurrence of another. *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1436–42 (2011). This makes sense under the auspices of the Checks and Balances Principle, and it may be an advantage of what is envisaged by the Division of Power Principle that it makes available separate entities for performing this task. But I cannot really see why Vermeule identifies this function with the separation of powers, among other principles. *See id.* at 1437. Or rather I can sort of see it: using his example, the fact that there is a legislature that is distinct from the presidency means that we can set things up so that the President cannot declare war on his own initiative; there is this other entity that we can say has to concur as well. *See id.* But the idea that this could be one of the reasons why we have a separation of legislative from executive power seems strange. At best, it is a side benefit of a separation set up on intrinsic grounds of differentiation of function.

making and quasi-adjudicative functions.[35] Vile, for example, speaks of a modern "realization that the functional concepts of the doctrine of the separation of powers were inadequate to describe and explain the operations of government" in the modern world.[36] He says that "we have seen the emergence of terms such as 'quasi-judicial,' 'delegated legislation,' or 'administrative justice,' which represent attempts to adapt the older categories to new problems."[37] I do not think he actually accepts the obsolescence of the doctrine, but he sees the problem as important. But it is not important, and cannot be made important, from the point of view of the Division of Power Principle or the Checks and Balances Principle. A quasi-judicial body is just as good a place to disperse power into or to use as a check against other exercises of power as a judicial body—what matters is the dispersal or the checking, not the taxonomy. But for the Separation of Powers Principle, considered separately, the taxonomy is all-important. And now we have to begin our discussion of why.

III. For the Maintenance of Liberty?

At the beginning of his great book, *Constitutionalism and the Separation of Powers*, M.J.C. Vile goes to considerable trouble to produce a pure definition of the separation of powers, distinguished from adjacent principles. He says "[a] 'pure doctrine' of the separation of powers might be formulated in the following way:"

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three 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

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[35] *See, e.g.*, Vile, *supra* note 9, at 6; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 578 (1984) ("[F]or any consideration of the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.").

[36] Vile, *supra* note 9, at 6.

[37] *Id.* at 11.

> must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.[38]

It is a fine definition, as is the meditation on the difficulties of "pure" theory that accompanies it.

It is interesting, though, that Vile chose to incorporate into his "pure" definition a reference to the value-consideration that he thought made the separation of powers important: "It is essential for the establishment and maintenance of political liberty."[39] Are we to be committed by definition to that account of the principle's importance? I am not sure. On the one hand, Vile could say that the positive presence of the principle in our canonical political theory is, as a principle, crucial for liberty. That is how James Madison described it, and Montesquieu.[40] Others, however, might be mindful of the possibility of explicating the value of the principle in other terms. Jeremy Bentham, for example, complained that Montesquieu's discussion of the separation of powers was "destitute of all reference to the greatest happiness of the greatest number."[41]

I do not want to pander to Bentham, but I think we should keep an open mind. Maybe the separation of powers matters most for liberty. Maybe it matters also for other values like, as I shall say, the rule of law.

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[38] *Id.* at 14. But having made the distinction of a pure theory of separation of powers, Vile spoils things a bit by adding immediately: "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." *Id.* This seems to reintroduce a blurring among the Separation of Powers, Division of Power, and Checks and Balances Principles, just when we thought we were getting clear about the distinction between them. It is important, however, to note that Vile has in mind here only *negative* checks associated with the pure doctrine:

> The pure doctrine as we have described it embodies what might be called a "negative" approach to the checking of the power of the agencies of government. The mere existence of several autonomous decision-taking bodies with specific functions is considered to be a sufficient brake upon the concentration of power. Nothing more is needed. They do not actively exercise checks upon each other, for to do so would be to "interfere" in the functions of another branch.

Id. at 19.

[39] *Id.* at 14.

[40] *See* The Federalist No. 47, *supra* note 16, at 239; Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty . . . .").

[41] Vile, *supra* note 9, at 125 (quoting 1 The Works of Jeremy Bentham 123 (John Bowring ed., Edinburgh, William Tait 1843)).

(Of course the rule of law may in turn be thought to matter mainly for liberty's sake; but that is not necessarily so; many people relate the rule of law to values like dignity rather than, or as well as, liberty.)[42] I want to keep this possibility open, for I think the rule of law may possibly offer a refreshing account of why the separation of powers is important. And the first canonical account of the importance of the separation of powers that I want to look at does invoke what we would call rule-of-law considerations, though it is arguable that those considerations in turn point us to liberty.

IV. The Lockean Justification

One of the earliest and most interesting arguments specifically about the separation of powers is found in John Locke's *Second Treatise of Government*.[43] Early on in his discussion of political or civil society, Locke made a pitch for investing legislative power in a large representative assembly. Legislative authority should be placed, he said,

> in collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject, equally with other the meanest Men, to those Laws,

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[42] *See* Lon L. Fuller, The Morality of Law 162 (2d ed. 1969); Joseph Raz, *The Rule of Law and Its Virtue*, *in* The Authority of Law: Essays on Law and Morality 210, 221 (2d ed. 2009); Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1, 28 (2008).

[43] *See* Locke, *supra* note 29, at 364. The argument I am about to expound is not the "efficiency" justification which M.J.C. Vile asserts as Locke's contribution, when he says,

> Locke argued that the legislative and executive powers should be placed in separate hands for the sake of efficiency, on the grounds of the division of labour. Laws which take only a short time to pass need "perpetual execution," and therefore there must be an executive always in being. The representative nature of the legislature renders it too large, and therefore too slow, for the execution of the law.

Vile, *supra* note 9, at 67 (footnote omitted). It is more a matter of principle than that. But Vile does also mention the argument I want to highlight:

> Locke had that distrust both of Kings and of legislatures which made him unwilling to see power concentrated in the hands of either of them. For this reason, as well as for reasons of efficiency and convenience, he concluded that the legislative and executive powers should be in separate hands. "It may be too great a temptation to humane frailty, apt to grasp at Power, for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage." There could hardly be a clearer statement than this of the essence of the doctrine of the separation of powers.

Id. at 68 (quoting Locke, *supra* note 29, at 364).

> which he himself, as part of the Legislative had established: nor could any one, by his own Authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to License his own, or the Miscarriages of any of his Dependents.[44]

The idea here is that oppressive laws are less likely if the law-makers are ordinary citizens and have to bear the burden of the laws they make themselves:

> [T]he *Legislative* Power is put into the hands of divers Persons who duly assembled, have . . . a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.[45]

It is a well-known argument and it continues to be invoked in modern political theory.[46] It is not perfect of course: a fanatical legislator may be prepared to have the burdens of his oppressive law fall upon him or his family; or the generality of laws may be mitigated by the use of predicates like race or gender, which make it less likely that he in particular will suffer under its auspices. It is an imperfect prophylactic against oppression, but an important one nonetheless.

But here is the point: it definitely will not work if the law-makers can control the application of the law, that is, if the law-makers can make prosecutorial decisions or participate in adjudication. For then they will have the power to direct the burden of the laws they make away from themselves. As Locke puts it,

> [I]t may be too great a temptation to human frailty . . . for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage . . . .[47]

So as a necessary condition for this prophylactic against oppression to work, we must separate the function of law-making from the other

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[44] Locke, *supra* note 29, at 329–30.

[45] *Id.* at 364.

[46] *See, e.g.*, Friedrich A. Hayek, The Constitution of Liberty 170–71 (1960).

[47] Locke, *supra* note 29, at 364.

functions of execution and adjudication. Necessary, I emphasize, not sufficient. As Daryl Levinson and Richard Pildes indicate, party cahoots between legislators and executive officials may have the effect of undermining the separation, even if the powers themselves are put in different hands.[48]

Locke's argument is not the most sophisticated argument in the world, but it is an interesting one. And it has the advantage of pointing specifically to functional separation. It is not a theory about the dispersal of power as such, or about checks and balances. It is a theory specifically oriented to the Separation of Powers.

V. Separation in Thought

I also want to mention one other argument that John Locke makes, though I am afraid this is an anti-separation of powers argument. It begins from his realization that the tripartite division of function envisaged in the traditional formulas may not be satisfactory. Locke envisages a fourth power: the federative power, "the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."[49] I will refrain from going into detail here, but Locke makes a pretty good case for saying that this power should be united with, not separated from, the executive power. Or at least it should be united in the same hands, the same agency, even if it is understood to be separate in principle.

And that is a point I want to stress. Even while Locke accepts that the same person will have to exercise both powers, it is important to understand that the powers in question are in principle separate. As he states:

> Though, as I said, the Executive and Federative Power of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands; or that the Executive and Federative Power should be placed in Persons that might act separately, whereby the Force of the Publick would be under different

[48] Levinson & Pildes, *supra* note 25, at 2344.

[49] Locke, *supra* note 29, at 365.

> Commands: which would be apt some time or other to cause disorder and ruin.[50]

The distinction may not seem to matter much, but compare it to what the U.S. Constitution does in Article II. It simply assumes in the juxtaposition of clauses 1 and 2 of Section 2 of the Article that domestic enforcement of the laws and direction of foreign policy are the same—both executive functions.[51] I have heard esteemed colleagues say that this too is what Locke thought,[52] but it is not. He thought that the federative and the executive were quite different powers—not least because the federative power "is much less capable to be directed by antecedent, standing, positive Laws, than the Executive."[53] So even if the powers are placed in the same hands, it is going to be very important for people to be extra clear in some other way about the distinction, lest the inherent lawlessness of the federative power infect the emphatically law-governed nature of the ordinary (as opposed to the prerogative) actions of the domestic executive.

The importance of this kind of separation *at least in thought* is usually neglected in the separation-of-powers tradition. And probably for good reason: by itself, it is hardly enough to satisfy the requirements of constitutionalism. But let us think about it for a moment anyway.

Consider, by way of analogy, judges in Diplock courts in Northern Ireland, where during the Troubles, criminal cases were often tried without juries.[54] Though the same individual combined in himself the functions of judge and jury, he did not fail to separate them in thought and to a certain extent in action. A judge hearing a case would scrupulously differentiate the functions, for example, by laboriously issuing end-of-trial directions to himself, and then taking the time to make distinct findings of fact, and only then proceeding, if there was a guilty verdict, to sentence the defendant.[55] It is not a perfect analogy because it involves an intra-judicial separation. But I think it is possible to grasp

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[50] *Id.* at 366.

[51] *See* U.S. Const. art. II, § 2, cls. 1–2.

[52] *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 267 (2001) (stating that, according to Locke, "[b]ecause the state enjoyed the federative power, it acted on behalf of civil society in international affairs").

[53] Locke, *supra* note 29, at 366.

[54] John Jackson & Sean Doran, Judge Without Jury: Diplock Trials in the Adversary System 8–9 (1995); *see also* Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 Am. J. Crim. L. 1, 11–13 (1995) (describing Diplock courts).

[55] Jackson & Doran, *supra* note 54, at 269–70.

the difference between a Diplock judge insisting on the articulation of these different roles and a Diplock judge merely blurring them.

Or, for a second example, consider the political theory of Thomas Hobbes. Hobbes we know was an adamant opponent of the separation of powers. The various powers of government are, he says, indivisible, incommunicable, and inseparable.[56] But it seems to me that there is all the difference in the world between (i) a Hobbesian ruler exercising the united powers of sovereignty in a crude undifferentiated way and (ii) his exercising those powers as separable incidents of his authority, even though they are united in one set of hands. And mostly Hobbes's sovereign is a ruler of the latter type. He does not rule in an undifferentiated way. He thinks it is important, for example, that there be legislation enacted and promulgated prior to the exercise of sovereign power against any person, so that people know where they stand and so there is no misunderstanding.[57] And he envisages courts—which are of course the sovereign's courts—to deal with the application of the laws.

I think this distinction is important between (i) a sovereign who just blurs the distinction between the powers that he has because, in crude and simple terms, they are all *his*, and (ii) a sovereign who unites all power in his person but nevertheless articulates the powers in his exercise of them. For a Type (i) absolutist, power is just exercised in a lashing-out kind of way. Not only is the one person judge, jury, and executioner, but he barely discerns the difference between adjudicating, fact-finding, and punishment.

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[56] Thomas Hobbes, Leviathan 127–28 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); *see id.* at 225 (stating that "Powers divided mutually destroy each other").

[57] Thomas Hobbes, De Cive 74–75 (Sterling P. Lamprecht ed., Appleton-Century-Crofts 1949) (1642). In arguing that laws should be publicly declared, Hobbes observes that

> [S]ince it . . . much more conduceth to peace, to prevent brawls from arising, than to appease them being risen; and that all controversies are bred from hence, that the opinions of men differ concerning meum and tuum, just and unjust, . . . good and evil, . . . and the like, which every man esteems according to his own judgement; it belongs to the same chief power to make some common rules for all men, and to declare them publicly, by which every man may know what may be called his, what another's, what just, what unjust, what honest, what dishonest, what good, what evil, that is summarily, what is to be done, what to be avoided in our common course of life. But those rules and measures are usually called the civil laws, or the laws of the city, as being the commands of him who hath the supreme power in the city. And the civil laws (that we may define them) are nothing else but the commands of him who hath the chief authority in the city, for direction of the future actions of his Citizens.

Id.

It may be hard for a Type (ii) absolutist to resist falling back into Type (i) undifferentiated authority. We find Hobbes back-sliding on a number of occasions, as in this passage from *De Cive*, in effect denying the distinction between execution and judgment:

> [B]ecause the right of the sword is nothing else but to have power by right to use the sword at his own will, it follows, that the judgement of its right use pertains to the same party: for if the power of judging were in one, and the power of executing in another, nothing would be done.[58]

Hobbes comes close again to blurring the line when he suggests that one reason the sovereign cannot be bound by the general laws he enacts is that he can change them whenever he likes:

> The Soveraign of a Common-wealth . . . is not Subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: . . . and therefore he that is bound to himselfe onely, is not bound.[59]

All of which goes to show that this distinction may not matter very much in and of itself, and that our tradition of separation of powers has been wise to insist upon actual separation of institution, office, and personnel, not just on an abstract identification and awareness of differentiated function.

But the fact that it is insufficient in itself does not mean that it may not be important in the context of a more full-blooded principle. It may still be the case that part of what we deplore about violations of the separation of powers is often that they fail even to distinguish between the various phases of power or the various functions that one and the same person or institution is exercising.

VI. What Montesquieu Might Have Meant

I suspect that this is part of what worried Montesquieu about concentration of powers—not just that they would be in one set of hands, but that in those hands, even the conceptual distinctions between legis-

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[58] *Id.* at 74.

[59] Hobbes, *supra* note 56, at 184.

lating and judging, and between judging and enforcement, would be erased.[60]

One of Montesquieu's images, indeed a very common image in mid and late eighteenth-century political thought, is the image of Turkish justice—a judge in a despotic state who simply comes upon someone doing something and lashes out at him, beating him or killing him or taking his property, without anything remotely like an account of what the victim is supposed to have done, let alone any sort of hearing.[61] As Montesquieu states in a famous chapter in *The Spirit of the Laws*, "Among the Turks, where the three powers are united in the person of the sultan, an atrocious despotism reigns."[62] A little earlier in the book, Montesquieu tells us something odd: "It is constantly said that justice should be rendered everywhere as it is in Turkey."[63] Really? Constantly said by whom? The answer, it turns out, is that this was constantly said by people who were irritated by the elaborate technicality and legalism of French society, where there were innumerable rules, privileges, and jurisdictions, as well as interminable procedures for securing any sort of relief.[64] Each claim was broken down into its detailed parts and assessed against the relevant standards and the repository of judicial decisions. And many good-hearted people apparently protested against this elaborate legalism,[65] imagining that it would be better to be ruled by a sort of Solomonic cadi-figure, able to cut through all the legalism and see through to the moral essentials of the matter.[66] And

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[60] *See* Montesquieu, *supra* note 40, at 157 (articulating a worry, well before the famous passage from Book XI on the separation of powers, that in a monarchy when the sovereign took on the role of judge and an accused person was set free, "one would not know if a man had been acquitted or pardoned").

[61] *See e.g.* Jeremy Bentham, Of Laws in General 153 (H.L.A. Hart ed., 1970) (n.d.) ("A Cadi comes by a baker's shop, and finds the bread short of weight: the baker is hanged in consequence. This, if it be part of the design that other bakers should take notice of it, is a sort of law forbidding the selling of bread short of weight under the pain of hanging.").

[62] Montesquieu, *supra* note 40, at 157.

[63] *Id.* at 74.

[64] There are hints of this in Montesquieu's earlier work. *See* Montesquieu, Persian Letters (C.J. Betts ed., Penguin 1973) (1721) (letters 44, 68, and 86). The suggestion seemed to originate from Jean Bodin's work, admiring the simplicity of absolutist administration in Turkey. *See* Mark Hulliung, Montesquieu and the Old Regime 93–97 (1976).

[65] Others provide discussions of "all-pervasive legalism" in seventeenth and eighteenth-century France. *See* David Parker, La Rochelle and the French Monarchy: Conflict and Order in 17th-Century France 19 (1980); Michael P. Breen, *Patronage, Politics, and the "Rule of Law" in Early Modern France*, 33 Proc. W. Soc'y for French Hist. 95, 98 n.8 (2005), *available at* http://hdl.handle.net/2027/spo.0642292.0033.006.

[66] *Cf.* Max Weber, Economy and Society 882–89 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978) (1922) (describing the futile call for straightfor-

Montesquieu could hardly believe his ears: according to Montesquieu, articulate legal structures are all that stand between monarchy and despotism.[67] You do not get wise King Solomon if you take the Turkish option; you get lazy, unthinking, undifferentiated exercises of power:

> In Turkey, where one pays very little attention to the fortune, life, or honor of the subjects, all disputes are speedily concluded in one way or another. The manner of ending them is not important, provided that they are ended. The pasha is no sooner informed than he has the pleaders bastinadoed according to his fancy and sends them back home.[68]

What is important, I think, about this image of the failure of the separation of powers is not just that the powers are all in one set of hands; it is that the person who holds them does not even think to distinguish them.

VII. Where Are the Rest of the Eighteenth-Century Arguments?

Admittedly this is a bit of a reach so far as Montesquieu is concerned. But everything is a bit of a reach so far as Montesquieu is concerned. Montesquieu actually provides next to nothing in the way of a tissue of argument for the separation of powers in the most famous passages devoted to the subject.

M.J.C. Vile asks, "What does Montesquieu have to say about the separation of powers?" and replies, "A remarkable degree of disagreement exists about what Montesquieu actually did say."[69] In fact Montesquieu said very little in the chapter traditionally thought of as devoted to this subject (Book XI, Chapter 6 of *The Spirit of the Laws*, "On the

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ward social or ethical judging, as a protest against esoteric legalist technicality in modern Europe).

[67] *See* Vile, *supra* note 9, at 89–90. M.J.C. Vile, in examining the writings of Montesquieu, noted the importance of the rule of law in Montesquieu's account of monarchy:

> The idea of a separation of agencies and functions, in part at least, is implicit and explicit in his treatment of monarchy. The judges must be the depository of the laws; the monarch must never himself be a judge, for in this way the "dependent intermediate powers" would be annihilated. The king's ministers ought not to sit as judges, because they would lack the necessary detachment and coolness requisite to a judge. There must be many "formalities" in the legal process in a monarchy in order to leave the defendant all possible means of making his defence, and the judges must conform to the law.

Id. (footnotes omitted).

[68] Montesquieu, *supra* note 40, at 75.

[69] Vile, *supra* note 9, at 94.

Constitution of England"). He announced several times that unless the different powers of government are separated, tyranny would result, but he never explained why.[70]

Montesquieu's theory does not seem primarily to be one of checks and balances, though he alludes to this once or twice in other parts of the book: he says "one must give one power a ballast, so to speak, to put it in a position to resist another"[71] and "power must check power" to prevent abuse.[72] There is a brief reference in Book XI, Chapter 6, to the importance of the executive having "the right to check the enterprises of the legislative body," but it is not elaborated and the reason adduced for it—that otherwise "the latter will be despotic, for it will wipe out all the other powers, because it will be able to give to itself all the power it can imagine"—seems to presuppose rather than support the principle of the separation of powers.[73] That apart, the only reference to checks and balances in the chapter, "On the Constitution of England," is to the possibility of checks within the legislature, with the aristocratic element checking the popular element and vice versa.[74]

Much of what Montesquieu wrote in support of the separation of powers consisted of a simple assertion: "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty."[75] Why not? "[B]ecause one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[76] Tyrannical execution of the laws is no doubt always a fearsome possibility; but why is it more possible when the laws have been enacted by the same person as the person applying them? The argument is not spelled out. I guess Montesquieu might be endorsing the argument spelled out by John Locke about ways of avoiding oppressive laws, so that "tyrannical execution of the laws" refers to their execution in such a way as to exempt the law-makers.[77] But one has to do an awful lot of construction to reach that interpretation.[78]

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[70] *See* MONTESQUIEU, *supra* note 40, at 156–66.

[71] *Id.* at 63.

[72] *Id.* at 155.

[73] *See id.* at 162.

[74] *Id.* at 160.

[75] *Id.* at 157.

[76] MONTESQUIEU, *supra* note 40, at 157.

[77] *See* LOCKE, *supra* note 29, at 364.

[78] There is some support for it in this passage about republics in which powers have become united: "Observe the possible situation of a citizen in these republics. The body of the magistracy, as executor of the laws, retains all the power it has given itself as legislator. It can plunder the state by using its general wills; and, as it also has the power of judging, it can destroy each citizen by using its particular wills." MONTESQUIEU, *supra* note 40, at 157.

> Often Montesquieu offers little more than tautologies:
>
> > Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator.[79]

In other words: the failure to separate powers leads to arbitrariness because it involves *a failure to separate the powers.*[80] There is the same tautology in this passage: "If . . . the executive power were entrusted to a certain number of persons drawn from the legislative body, there would no longer be liberty, because the two powers would be united, the same persons belonging and always able to belong to both."[81]

It is high time we acknowledged Montesquieu's failure to provide us with substantive arguments explaining in detail why the separation of powers is necessary for liberty. It is not that I doubt the proposition, but one would like from such a respected "oracle" an account of why it is true.[82] True, it is widely recognized among serious students of Montesquieu that linear argument is not his forte.[83] But we have not ac-

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But this does not seem to be much more than an argument based on aggregation: there will be plunder by those who control the legislative power and there will be plunder by those who control the executive power; he points to nothing additionally problematic in the combination of the two powers in the same hands. *See id.*

[79] *Id.*

[80] Montesquieu's argument is filled out slightly more in a passage much earlier in *The Spirit of the Laws.* Comparing despotisms with monarchies subject to the rule of law, Montesquieu observes:

> In despotic states, the prince himself can judge. He cannot judge in monarchies: the constitution would be destroyed and the intermediate dependent powers reduced to nothing; one would see all the formalities of judgments cease; fear would invade all spirits; one would see pallor on every face; there would be no more trust, honor, love, security, or monarchy.

Id. at 78.

[81] *Id.* at 161.

[82] The Federalist No. 47, *supra* note 16, at 239 (referring to Montesquieu as "the oracle who is always consulted and cited on this subject").

[83] *See, e.g.*, Émile Durkheim, Montesquieu and Rousseau: Forerunners of Sociology 52 (1960) ("He does not begin by marshalling all the facts relevant to the subject, by setting them forth so that they can be examined and evaluated objectively. For the most part, he attempts by pure deduction to prove the idea he has already formed."); *see also* Voltaire, *The A B C* (1768), *in* Political Writings 85, 96 (David Williams ed. & trans., Cambridge Univ. Press 1994) ("I looked for a guide on a difficult road. I found a travelling companion who was hardly any better informed than I was. I found the spirit of the author, who has plenty, and rarely the spirit of the laws. He hops rather than walks . . . .").

knowledged the point as it applies to the separation of powers: we still say that, on this at least, he must have provided arguments.

I fear that Montesquieu's failure to spell out the arguments infected James Madison as well. When Madison was trying to establish that Montesquieu argued for a limited rather than a complete separation of powers, he referred to Montesquieu's reasons for the principle:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body" says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an *oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.[84]

Madison does not tell us, however, where these other passages are (where Montesquieu's reasons are supposedly spelled out more explicitly) or what they say. And he himself just falls in with Montesquieu's practice of abbreviated argumentation, with the bare assertion that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[85] He adds that "it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct," but that turns out to be just an investigation of the extent of desirable separation, not an account of the connection with liberty.[86]

I suspect, too, that this is why we tend to blur the distinction between the various principles I described in Part II of this Essay— particularly the distinction between Separation of Powers, on the one hand, and the Division of Power and Checks and Balances Principles on the

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[84] The Federalist No. 47, *supra* note 16, at 241.

[85] *Id.* at 239.

[86] *See id.*

other. We quickly switch over to the latter two when we are pressed for an argument about the importance of Separation of Powers, because we understand *their* justifications but we have not been bequeathed any good arguments specific to the Separation of Powers Principle by our heritage of political thought.

Again, I do not mean the tone of these comments to be skeptical. I am just lamenting the lack of argument in the canonical sources. When Donald Elliott sought to explain why our separation-of-powers jurisprudence was so abysmal, he might have acknowledged that we came by it honestly.[87] The political theory was abysmal even in its pre-jurisprudential form, and we have not done nearly enough since the time of Montesquieu and Madison to acknowledge that and to undertake some repair.

VIII. Articulated Governance

So we have to do a lot of the work on our own. We get a little bit of help from John Locke in the seventeenth century; we do not get much help from the eighteenth-century theorists, even the ones nearest and dearest to us (i.e., James Madison), though there are things we can figure out for ourselves that we can then read back into their work, to preserve their mythic status among us.

Fortunately, the terms in which the principle presents itself offer us good clues to its importance. The principle takes the basic process of governance and divides it conceptually into three main functions: enacting a law, adjudicating disputes on the basis of a law, and administering a legal decision. That conceptualization suggests two things. It suggests, *first*, that it is a mistake to think of the exercise of political power as something simple—as, for example, a straightforward use of coercive force by public authority. And *secondly*, it suggests that each of the phases into which the principle divides the exercise of power, is important in itself, and raises issues of distinct institutional concern.

I alluded to the first argument in Parts V and VI, suggesting in Part V that even if one has a Hobbesian sovereign, who will not cede power to any coordinate entity, it is still a good thing for the sovereign to be aware of political power as something articulated rather than simple.[88]

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[87] *See* Elliott, *supra* note 32, at 507 ("Our separation of powers jurisprudence is abysmal because the Supreme Court has failed for over two hundred years of our history to develop a *law* of separation of powers.").

[88] *See supra* notes 56–59 and accompanying text.

The point is not so much about the oppressiveness of the exercise. A.V. Dicey illustrates his account of the importance of the rule of law with a story about Voltaire, who "was lured off from the table of a Duke, and was thrashed by lackeys in the presence of their noble master . . . and because he complained of this outrage, [he] paid a . . . visit to the Bastille."[89] Our outrage about Voltaire's treatment fuels our anger about any lack of process in the matter and about the lack of legal recourse. But even if it were a deserved thrashing, we would still want the exercise to be preceded (by a considerable length of time) by the enactment of a statute prohibiting whatever it was that Voltaire supposedly did and threatening corporal punishment. We would want it also to be preceded by a judicial hearing at which Voltaire could face his accusers and state his side of the matter, and by a solemn executive determination that the sentence of the court was to be carried out in such-and-such a fashion, and at such-and-such a time (e.g., after suitable opportunities for appeal). We would want the thing to be slowed down in this way and for an orderly succession of phases to follow one another.

Notice, therefore, that this is not necessarily a way of limiting government, in the sense of curbing its action, though I guess it could be described as a way of making action more difficult by making it more involved. But the idea is to channel it, not restrict it, and, through the channeling, to open up the decision making for access by Voltaire or anyone else at various points.

As the Diceyan context of our illustration reveals, these concerns are in large part concerns associated with the rule of law.[90] The rule of law is not just the requirement that where there *is* law, it must be complied with; it is the requirement that government action must, by and large, be conducted under the auspices of law, which means that, unless there is very good reason to the contrary, law should be created to authorize the actions that government is going to have to perform. This usually means an articulated process of the sort we have been talking about, so that the various aspects of law-making and legally authorized action are not just run together into a single gestalt.

We begin with an action or type of action that it is envisaged the state may want to perform. We propose and deliberate upon the contours of that action as a matter of general policy and the formulation of

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[89] DICEY, *supra* note 14, at 112.

[90] *Id.* at 110. Dicey used Voltaire's case to illustrate the first of his three principles of the rule of law: "[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land." *Id.*

authorizing norms. The representatives of the people settle, deliberatively, on a clear set of formulations and then vote. Those formulated and authorized norms are then communicated both to the people (individuals and firms) and to the agencies that will be responsible for their administration.[91] The people (and firms) have time to take the norms on board, internalize them, and organize the conduct of their lives and business, while the agencies begin the process of weaving these norms into the broader fabric of their supervision of various aspects of social life and begin developing strategies for (as it might be) inspection and enforcement. In these ways, the norms embodying the original policy have time to "settle in" and become a basis on which people can order their expectations. And then various disputes or allegations of violations may arise. The agencies responsible for the norms may initiate an action—a prosecution or something of the sort. If the matter is not resolved, it will go before the court, where the issue of compliance will be argued out, not just factually, but in terms of how the norms that were communicated to the people are to be understood and how it is to be related to the rest of the law. After a hearing, there will be a determination, and if necessary further enforcement of, or supervision of compliance with, whatever order the court makes.

This, by my count, is a ten-part process. But the numbers do not matter. What matters is that the governmental action has become articulated and many of the stages in that articulation correspond to rule-of-law requirements, like the principles of clarity, promulgation, the integrity of expectations, due process, and so on. Each of those elements embodies concerns about liberty, dignity, and respect that the rule of law represents. They offer multiple points of access, participation, and internalization. Each and all of them represent the step-wise incorporation of new norms into the lives, agency, and freedom of those who are to be subject to the norms. There is a serious failure of the rule of law when any of these various steps is omitted, or when any two or more of them are blurred and treated as undivided. And that is where, I think, we find the overlap between respect for the rule of law and the Separation of Powers Principle.

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[91] Or, the general outlines of a normative strategy may be communicated to an agency that in turn develops rules which are communicated both to those who will be subject to them and to those charged with their administration. This does not make a difference to the general process of articulating an exercise into several stages, though it may make it much more difficult to map it onto the separate functions of government represented in familiar versions of the principle we are considering.

I am not saying that Separation of Powers and the principle of the rule of law are one and the same. Some would say that my picture does not do justice to the full tenor or force of rule-of-law concerns; that is probably right. It is not meant to. The rule of law has some aspects that have little to do with Separation of Powers. But the two principles engage similar or overlapping concerns. To insist on being ruled by law is, among other things, to insist on being ruled by a process that answers to the institutional articulation required by Separation of Powers—there must be law-making before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is the enforcement of any order. To insist, as Dicey does, that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law," is to insist that his punishing or suffering must be preceded by a process as elaborate as this.[92] It may not be an *ex tempore* or off-the-cuff use of political authority.

It does not matter whether the authority in question is legitimate in itself, for example on account of its democratic credentials. It does not matter that it has been, in some overall sense, authorized by the people. Even if the exercise of power has been legitimated democratically—in the sense that someone has been chosen as a political leader in free and fair elections and now he wants to put the policies that he ran on into force—*still*, what he proposes and regards himself as authorized to do must be broken down into these component parts. It must be housed in and channeled through these procedural and institutional forms, successively one after the other. That is what the rule of law requires, and I believe that is what is maintained too by Separation of Powers. The legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual.

IX. The Integrity of the Three Particular Institutions

That last formulation—that the legislature, the judiciary, and the executive each must have its separate say before power impacts on the individual—sounds like a version of checks and balances, a requirement of separate concurrences in the proposed exercise of power from three institutions or agencies. But that really does not get at what the Separation of Powers requires.

The Separation of Powers requires not just that the legislature and the judiciary and the executive concur in the use of power against some

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[92] *See* Dicey, *supra* note 14, at 110.

particular person, X. Instead the legislature should do its kind of work—*legislative* work—in this matter, which really means not addressing X's situation specifically at all. The judiciary should do *its* kind of adjudicative work in regard to X and X's relation to the law that the legislature has enacted. And the executive should do *its* work of administration, not only the prosecution of X and the enforcement of any order made against him, but also the development of broad strategies of implementation of the legislation that the legislature has enacted. The Separation of Powers Principle holds that these respective tasks have, each of them, an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication.

Some kinds of such contamination are familiar to us. James Madison and others were concerned that state legislatures in the immediate post-revolutionary period were enacting resolutions aimed at the situations of particular individuals: putting them out of business, for example, or confiscating their estates.[93] We see this concern in the Bills of Attainder clauses of Article I of the U.S. Constitution, but the Bills of Attainder clauses also reflect concerns about the rule of law and the Separation of Powers.[94] The idea is that it is not appropriate for a legislature to target individuals. Not only does such a process run together what ought to be distinct functions of government, but it means that society does not get the benefit of the legislature doing the distinctive and important work it is set up to do for matters of this kind (if anybody, like X, is to be put out of business or their estates confiscated). We want there to be a place where *that sort of thing* is deliberated upon; not with reference to X in particular, but in general. That is, we want there to be an institutional setting where the assembled representatives of the people can consider and discuss, in a general way—at the level of

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[93] *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 78 (1995) (noting Madison's "alarm about abuses in the states . . . traced to the debilities of the Confederation"); James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 843 (2004) ("[Madison's] overarching concern—what he called the most 'dreadful class of evils' besetting the new nation under the Articles of Confederation, . . . was the factious spirit in the states which chronically drove stable and interested majorities to enact unjust measures benefiting themselves while systematically neglecting or harming weaker groups and the public good." (some internal quotation marks omitted)).

[94] *See* U.S. CONST. art. I, §§ 9–10.

normative generalization and general justificatory considerations—laws that could conceivably authorize this sort of thing. It is hard, under the best of circumstances, to maintain the focus at this general level. But that is what legislatures are for, in our scheme of governance, and the Separation of Powers Principle tries to facilitate that by making it harder for those whose focus is more on individual cases (either in an executive way or in an adjudicative way) to bring their specific mentality into play to affect or undermine the legislative mentality.

I mention the possibility of executive-minded people or judicially minded people coming into the legislature as a sort of distraction from its quintessentially legislative task. Equally, the legislature can be distracted from the inside, by its own failure to focus deliberations in the way and at the level of abstraction that the legislative function requires. For example, if, as in a Westminster-style constitution, the executive is a committee of the ruling party in the legislature, then there is a danger that the legislature will gravitate naturally to the administration's agenda.[95] That is not necessarily a bad thing, so long as members of the Cabinet, say, are able to distinguish genuinely legislative agenda-setting—proposing that this general policy be embodied in a statute or this bill enacted—from an agenda that is thoroughly executive-minded in its character. (That again, is a way in which the considerations discussed earlier about separating powers at least in thought matters for our discussion.)[96] But if the legislature is dominated and overborne by the executive's need just to "get certain things done"—*whatever it takes* to be able to act against X, for example—then that is a problem from the point of view of this principle.[97]

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[95] *See* Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries 10–12 (1999).

[96] *See supra* Part V.

[97] *Cf.* Bernard Manin, The Principles of Representative Government 74–79 (1997) (describing the problems that Jean Jacques Rousseau saw in combining democratic administration with democratic law-making). What Rousseau says is this:

> He who makes the law knows better than any one else how it should be executed and interpreted. It seems then impossible to have a better constitution than that in which the executive and legislative powers are united; but this very fact renders the government in certain respects inadequate, because things which should be distinguished are confounded . . . . It is not good for him who makes the laws to execute them, or for the body of the people to turn its attention away from a general standpoint and devote it to particular objects.

Jean-Jacques Rousseau, *The Social Contract*, *in* The Social Contract and Discourses 180, 239 (J.H. Brumfitt & John C. Hall eds., G.D.H. Cole trans., J.M. Dent & Sons Ltd. 1973) (1762).

We are also familiar with concerns about the contamination of the adjudicative function with executive functions, ranging from the Soviet practice of "telephone justice"[98] to the famous dissent of Lord Atkin in the 1942 wartime British case of *Liversidge v. Anderson*: "I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive."[99] This is not to say that it is inappropriate for judges to apprehend and even sympathize with the needs and exigencies of executive government particularly in wartime or a state of emergency, but their job is to balance executive claims and concerns against those of liberty, for example, *according to law*, not simply to swat away irritating challenges to executive authority.[100] The role of a court is to settle disputes according to law and to conduct highly formalized hearings on any question about whether action should be taken against an individual, an agency, or a firm for a failure to comply with applicable law.

What about judicial law-making? We all know that judges make law as well as discover it; through their collective power to establish a line of precedent, they in effect create and promulgate new norms for the community as well as putting authoritative new glosses, through their powers of interpretation, on norms created by other institutions. There is much to be said about this familiar topic and most of it we cannot pursue here. Suffice it to say that our familiarity with judicial law-making, especially in a common law system, should not blind us to the difficulties it poses from a separation-of-powers point of view. It certainly poses difficulties from the point of view of the particular parties before the law-making court, who find in effect that their rights are being determined by new law imposed retroactively upon them. And we see in cases like the U.S. Supreme Court's 1989 decision in *Teague v. Lane* and its progeny, the heroic and convoluted efforts that have to be

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[98] *See e.g.*, Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 385 (2006) ("In his mind's eye the judge can always see the shiny black visage of truth—the telephone in his chambers. This oracle will never fail you, as long as you do what it says." (quoting ALEXANDER SOLZHENITSYN, 3 THE GULAG ARCHIPELAGO 521 (Thomas P. Whitney & Harry Willetts trans., Harper & Row 1974)); Inga Markovits, *Last Days*, 80 CALIF. L. REV. 55, 66, 81 (1992) (defining telephone justice as an attempt by one with political power to sway a decision).

[99] Liversidge v Anderson, [1942] A.C. 206 at 244 (Eng.).

[100] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping [steel] production [during war time]. This is a job for the Nation's lawmakers, not for its military authorities.").

made to prevent this retroactivity reaching further into the legal system.[101] Maybe the difficulties are neither avoidable nor insuperable, but they are the kind of difficulties that arise when the logic of one kind of governance function is contaminated with another. The Separation of Powers endorses and upholds the distinct character of each of the three functions of government, and what we see in the case of adjudication is that can impose on legal governance.

It is a little harder to see the threats that the executive faces in this regard—the threats to the integrity or purity of its essential function. This is partly because the executive usually seems to be the aggressor in separation-of-powers issues: it is always the executive threatening the independence of the judiciary or the executive undermining the integrity of a distinct legislative process.[102] When this happens, the executive is usually conceived to be powerful enough that the damage, if there is any, is always done to the other power in the equation. So it is hard to think of cases where the integrity of the executive's distinct function in government is corrupted by the encroachment of the other powers.

Still, the sort of thing that might be at stake here can be illustrated by a couple of examples, neither of them perfect. Forgetting for the moment John Locke's distinction between the executive and the federative powers, we may want to say that control of military action and the conduct of war is a quintessential executive function. Both generals and executive officials often complain about the encroachment of the judiciary on the conduct of armed operations: they say, "You cannot hold hearings on the battlefield."[103] This is a sort of illustration of ap-

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[101] Teague v. Lane, 489 U.S. 288, 296 (1989) (holding that the petitioner could not benefit from a Supreme Court decision decided after his murder conviction became final).

[102] *See* Vile, *supra* note 9, at 408 (citing the "exercise of presidential power to commit American troops abroad without congressional approval" as an abuse of power); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1728 (1996) ("[T]he President commands the largest military establishment on earth and the massive security apparatus that goes with it. Finally, the President maintains either direct or primary control over the 'administrative state,' the colossal array of agencies that legislate and adjudicate under any but the broadest definition of 'executing' the laws."); *see also Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (stating that the President does not have the power to suspend the writ of habeas corpus, for in doing so he "certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law").

[103] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(f), 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001). The Military Order provides:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not prac-

prehensions about damage done to the performance of executive functions as such by the encroachments of other branches.

Similarly, in all executive operations, there may be complaints that processes of deliberation, more appropriate to the legislature, are being imposed on the executive, hobbling and limiting its agility and its decisiveness of action, which are defining features of its modus operandi as an executive. The executive, it may be said, is not supposed to be a talking shop; or, the kind of talk executive officials have to engage in is much more a matter of strategizing and planning public administration than debating the general merits of policy. Its shape is appropriately managerial rather than dialectical and, however much we believe in deliberative democracy, we should be wary of trying to transform it into a mode of discussion more appropriate for one of the other branches.[104]

What, finally, should we say about administrative rule-making, which seems to represent an assumption of legislative responsibility by agencies within the executive branch? One advantage of treating the Separation of Powers as a distinct political principle, disentangled from the legal details of the constitutional scheme, is that we can deal with

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> ticable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Id.; *see* Brief for Retired Generals and Admirals et. al. as Amici Curiae Supporting Respondents, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2986451 (arguing that a decision requiring habeus corpus for aliens detained overseas as enemy combatants could undermine military effectiveness); *see also* Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. Rev. 1551, 1552 (2011) ("[I]n the . . . months following the September [11th] attacks, the American people were led to believe that many questions about civil liberties or separation of powers needed to yield to the overwhelming pull of necessity, of national security, of self-preservation.").

[104] Lon Fuller's arguments about the inappropriateness of adjudicative procedures in allocative economic decision making in a mixed economy are also relevant here:

> If these portents of what lies ahead can be trusted, then it is plain that we shall be faced with problems of institutional design unprecedented in scope and importance. It is inevitable that the legal profession will play a large role in solving these problems. The great danger is that we will unthinkingly carry over to new conditions traditional institutions and procedures that have already demonstrated their faults of design. As lawyers we have a natural inclination to 'judicialize' every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.

Fuller, *supra* note 42, at 176.

this issue more sensitively than those who are concerned with nondelegation doctrines.[105] Let us assume—what seems more or less right—that agency rule-making is a sort of legislative function. Then the first thing Separation of Powers commands is that, as far as possible, the processes and perhaps even the personnel devoted to this sort of law-making should be separate from the processes and perhaps the personnel involved in the administration of the rules and in the adjudication of cases arising under them. It is important that these functions be conceived as distinct and that they be distinguished in institutional space— even if the whole thing is happening under the auspices of the branch of government labeled "executive."

The Constitution sets up a branch called "the legislative"—establishes it as an elective institution and assigns important legislative functions to that branch.[106] Indeed Article I of the Constitution begins by saying that "*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[107] But the principle of the Separation of Powers, conceived of (as it must be, if Manning is right) as a political, rather than a legal principle[108] does not require that.[109] What it requires is that legislative powers, wherever located, should be separated in conception and, as far as possible, institutionally from executive and judicial powers. What I am saying is that even if Article I amounts to a nondelegation rule, such a rule is not necessarily endorsed by the principle of the Separation of Powers.[110] The latter principle, Separation of Powers, is indifferent to delegation provided that the institution to which law-making is delegated remains distinctively legislative in character and, as I said, is distinguished clearly in conception and, as far as possible, institutionally, from judicial and enforcement functions wher-

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[105] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting) (arguing that judges must be "particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation").

[106] U.S. Const. art. I.

[107] *Id.* § 1 (emphasis added).

[108] *See supra* notes 12–15 and accompanying text.

[109] *See, e.g.*, *Mistretta*, 488 U.S. at 381 (advocating a flexible understanding of the separation of powers that does not require "a hermetic division among the Branches").

[110] This really illustrates an advantage of Manning's account. *See* Manning, *supra* note 3, at 1944. Once we see that separation of powers cannot be understood as a freestanding legal doctrine, we are free to explore its implications unentangled with other constitutional doctrines such as nondelegation. Whether Manning agrees with that is another matter. He is more interested, I think, in the *particular* separations for which the Constitution provides (once the general principle is abandoned) rather than in ways in which the general principle can be conceived as an evaluative principle of political theory.

ever they, in turn, are located. What is important from the separation-of-powers point of view is that there be a legislative stage to the enforcement of administration policy, and that the integrity of that stage be protected against encroachments both as a matter of process and as a matter of mentality from the character of other stages of governance.

In this Part, I have argued that the principle of the Separation of Powers commands us to respect the character and distinctiveness of each of the three main functions of government. But I do not mean to say that we should regard the Separation of Powers Principle as a conglomerate of three principles: one commanding respect for the legislature, one commanding respect for the courts, and a third for the executive. There are aspects of what Separation of Powers requires that can be seen in this light—for instance, people commonly talk about the independence of the judiciary as a distinct principle of modern constitutionalism.[111] And I have tried in my work to encourage similar solicitude for the dignity of legislation.[112] But it would be unfortunate if each of these were conceived independently of the others. Commanding respect for the integrity of each of these three operations of government is important precisely because they have to fit together into the general articulated scheme of governance on which I placed so much emphasis in Part VIII. We want these three things, each in its distinctive integrity, to be slotted into a common scheme of government that enables people to confront political power in a differentiated way.

X. A Forlorn and Obsolete Principle?

In *The Executive Unbound*, Eric Posner and Adrian Vermeule talk of the separation of powers as suffering these days "through an enfeebled

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[111] *See* Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, *in* Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives 39, 41 (Michel Rosenfeld ed., 1994) (identifying modern constitutionalism as based on, among other things, "an independent judiciary"); Martin Rhonheimer, *The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's "*Political Liberalism*" Revisited*, *in* The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching 191, 212 (William F. Murphy, Jr. ed., 2013) ("The great achievements of modern constitutionalism have been to subordinate absolute power to legal restrictions and controls; to institutionalize certain natural rights and personal liberty, securing them as positive law; and to develop an independent judiciary.").

[112] *See* Jeremy Waldron, *Legislation and the Rule of Law*, 1 Legisprudence 91, 93 (2007). *See generally* Jeremy Waldron, The Dignity of Legislation (1999) (highlighting ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law).

old age."[113] Their understanding of the Separation of Powers Principle is probably too closely tied to Madisonian checking and balancing to be of much use in our analysis.[114] But I suspect they would say also that the particular meaning I have assigned to the principle of the Separation of Powers is also one that is obsolescent in modern circumstances. They may be right.

If they are, does this mean that the effort undertaken in this Essay to understand the distinctive character and justification of the principle of the Separation of Powers is forlorn and useless? No. For even if the principle is dying a sclerotic death, even if it misconceives the character of modern political institutions, still it points to something that was once deemed valuable—namely, *articulated government through successive phases of governance each of which maintains its own integrity*—and may still be valuable even though we cannot have the benefit of it anymore. It is always useful to have a sense of what we have lost, and often—regrettably—we only see something clearly as it falls away from our grasp. The principle of Separation of Powers—as distinguished from the principle of Checks and Balances and as distinguished from the general principle commanding the dispersal of power—had something distinctive to offer in our constitutionalist thinking. Let others be ruthless and dismissive of the dying; I say we need to know, even if only elegiacally, what it is a pity we have lost.

Conversely, on my account, the Separation of Powers raises a genuine set of concerns and warns against a certain over-simplification of governance—concerns and a warning that are not given under the auspices of any other principle (though perhaps the rule of law comes close). The concerns do not evaporate even as the principle is made to seem impracticable. Posner and Vermeule insist strongly on "[o]ught implies can."[115] They say we should not shed tears for something we cannot anymore have.[116] Okay. But as we dry our eyes and look clear-headedly to the future, we will see the concerns about undifferentiated governance (endorsed by an undifferentiated process of elective acclamation) still standing there, concerns we would not have recognized but for our thinking through this forlorn principle. Grinning or grimacing, we need to be aware of what these concerns are that we now say

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[113] Posner & Vermeule, *supra* note 2, at 208.

[114] *See id.* at 18–20. For what it's worth, the authors' critique of James Madison's "ambition must be made to counter ambition" scheme in Federalist No. 51 is devastating. *See id.* at 21–24.

[115] *Id.* at 5.

[116] *See id.*

cannot be answered, and what dangers (previously warned against) we are now willing to court or to embrace.