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Note to readers: This is a rough first draft. And at the moment it is a bit front-heavy. The balance is not quite right between the first eight sections, where I distinguish the separation of powers from other principles and lament the lack of any good set of received arguments focused on this principle in its specificity, and the last couple of sections where I try and set out some principle-specific arguments of my own about the separation of powers. Sections 9 and 10 need to be much more filled out; and they will be (I hope) in later versions. Also the footnotes veer between the crude and the fastidious; I will fix this later.

Separation of Powers or Division of Power?
Jeremy Waldron

1. Introduction and Outline
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 a couple of other important principles that are commonly associated, if not identified with it. These other principles are, first, the principle of the division of power—the principle that counsels us to avoid excessive concentrations of political power in the hands of any one person, group, or agency; and, secondly, the principle of checks and balances—the principle 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 these two principles? I think it does, and in this paper I want to explore aspects of the separation of powers that are independent of what we value in the other two principles.

The separation of powers counsels a qualitative separation of the different functions of government—for example, legislation, adjudication, and executive administration. But the justification for this separation is not made clear in the canonical literature of 17th and 18th century political theory: Montesquieu’s “justifications,” for example, were mostly tautologies. And in the spirit of those tautologies, modern constitutionalism has, until recently, taken the separation of powers for granted; I mean it takes for granted that the separation of powers is necessary to avoid tyranny, but it doesn’t explain why. I think a qualitative
separation is necessary; this is not a debunking paper. The point of my paper is to find out something about its justification.

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,¹ and John Manning has expressed doubts and about the legal/constitutional status of the principle.² The former critique invites us to identify specific justificatory considerations that we may think Posner and Vermeule are in danger of side-lining, while Manning’s critique opens up space for us to conceive of this principle in political theory terms, uncontaminated by particular judicial formations.

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 function—the dignity of legislation, the independence of the courts, and the integrity of the executive, each understood as having its own role to play in the practices of the state. Secondly, I look to the value of articulated, as opposed to undifferentiated, modes of governance. The idea is instead of just an undifferentiated political decision to do something about V, there is an insistence that anything we do to V or about V must be preceded by an exercise of legislative power that lays down a general rule applying to everyone, not just V, and a judicial proceeding that makes a determination that V’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.

2. Is the Separation of Powers a Legal Principle?

In recent work, John Manning has made a good case for the proposition that the separation of powers is not a principle of the US Constitution.³ The Constitution, says Manning, “adopts no freestanding principle of separation of powers. The idea

¹ Eric Posner and Adrian Vermeule, in The Executive Unbound: After the Madisonian Republic 208 (2010), speak of the separation of powers as “suffering through an enfeebled old age.”

of separated powers unmistakably lies behind the Constitution, but it was not
adopted wholesale.” 4 (The contrast here may be between the Federal Constitution,
which, as Manning points out, contains no Separation of Powers Clause, and some
of the state constitutions which, at least textually, do.) 5

I think Manning has made a reasonable case, though I would have liked to
have seen his argument related more explicitly to Dworkinian methodology:
whatever it says in the constitution, does the best interpretation of the constitutions’
provisions require us to embrace this as a background legal principle? 6 I guess
Manning thinks that this is the view held by those he calls functionalists, and he
judges their interpretive exercise unsuccessful. 7

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 call constitutionalism. 8 Not
everything that a constitutionalist political theory commits us to is found in our
constitution—a proposition that is self-evident in the case of a country like the

3 John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939
(2011).

4 Ibid., 1944.

5 I say “at least textually,” because M.J.C. Vile, Constitutionalism and the Separation of
Powers 147 (Second edition, 1998) cites Corwin to the effect that 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.”

6 I mean something along the lines of the analysis in Chapters 7 and 10 of Ronald Dworkin,
Law’s Empire (1986).

7 Manning, supra note 1, at __.

8 “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 in Jeremy Waldron, Constitutionalism: A Skeptical View, in Contemporary
Debates in Political Philosophy 267 (Thomas Christiano and John Christman eds., 2009),
267. I won’t go into that here, except to point forward to some discussion later in this paper
which criticizes the view that the function of the separation of powers is just to place limits on
the exercise of political power. (Cf. Vile, supra note 3, 15: “The doctrine of the separation of
powers is clearly committed to a view of political liberty an essential part of which is the
restraint of governmental power….”)
United Kingdom that lacks a codified constitution but which is true also, I think, of the United States.

Think of a couple of analogies. There is no principle of democracy in the U.S. Constitution. (True, we can infer the importance of certain democratic considerations from Article I, 2.1 and also from the 15th, 19th, 24th and 26th Amendments, but the principle of democracy itself cannot be regarded as legally enshrined.) Nevertheless democracy is an indispensable part of our best theory of governance, and it would be wrong to forego any interest in it simply on account of its lacking legal status. The same is true, also, of the rule of law. Although the framing of the American constitution was permeated by the spirit of the rule of law, still the rule of law is not presented in the constitution as a free-standing principle and cannot be judicially enforced as such. These examples suggest that, even when a principle lacks specific legal status, it may still 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 Professor 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 constitutionalism, even if it is not, in the legalistic sense, a free-standing 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 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.

By saying we should treat the separation of powers as an important political principle, albeit a non-legal one, I don’t 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.

9 And although 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, and 115 (Liberty Classics edition, 1982). But cf. ibid., 120, where Dicey does describe the rule of law as “a fundamental principle of the constitution.”
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 #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.\(^{10}\)

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.”\(^{11}\) He was perfectly capable of excoriating Montesquieu and other “enlightened patrons of liberty” when he thought they had got things wrong.\(^{12}\) It is just that he doesn’t regard it as an open possibility to simply repudiate this maxim. And this is not just because his opponents had made an issue of it, though they had. Sometimes standards of political evaluation are compelling for us, even when the compulsion is not legal.

\(^{10}\) JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, THE FEDERALIST PAPERS, No. 47 (Lawrence Goldman ed., 2008), 239.

\(^{11}\) Ibid.

3. 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 political legitimacy. The principles I have in mind are the following:

1. The principle of the separation of powers (i.e. of the functions of government) from one another.
2. The principle that counsels against the concentration of too much political power in the hands of any one person, group, or agency.
3. The principle of checks and balances, which requires the ordinary concurrence of one governmental entity in the actions of another (and thus permits the first entity to veto the actions of another).
4. The principle of bicameralism, requiring two coordinate legislative assemblies.
5. The principle of federalism, distinguishing between powers assigned to the federal government and powers reserved to the states.

Principle 2—which I shall call the principle of the division of power—has I think the same sort of status as Principle 1, the separation of powers. It is not a legal principle, not an enforceable principle of the legal constitution. (True, the constitution does divide power; but Principle 2 embodies a particular theory about why this is important that the Constitution does not necessarily embrace).

Principles 4 and 5, by contrast, are evidently principles of the US Constitution and Principle 3 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.13

It is common, in essays of this kind, to go on to excoriate judges and colleagues for “confusing” principles 1 through 5 with one another, and using the language of separation of powers loosely and inaccurately. No doubt Vile is right

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13 It is possible that we should say about some instances of Principle 3 what I said about Principle 2. 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. It might not be thought correct for example by one who believed—as Madison asserts in Helvidius # 1—that the senate has this role simply because treaty-making is a form of law-making.
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.”\textsuperscript{14} 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 powers 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 an conglomeration of the consideration that pertain to Principles 1, 2, and 3 on my list, and maybe 4 and 5 as well. But at least we will now have some grasp on a particular set of considerations that really can’t be identified with any of the other principles except principle 1.

Also, I don’t at all mean to deny the importance of the other principles, particularly (in this context) principles 2 and 3. According to Rick Pildes and Daryl Levinson, “the great problem to be solved” at the time of the Founding “was to design governance institutions that would afford ‘practical security’ against ‘excessive concentrations of political power.’”\textsuperscript{15} 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 interest that any fallible or corrupt official might be able to do.

b) Or, maybe competition between dispersed centers of power might have been thought healthy and productive: Pildes and Levinson talk of “vigorous, self-sustaining political competition between the legislative and executive branches.”\textsuperscript{16}

c) We may divide power because we 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.

\textsuperscript{14} VILE, supra note 3, at 2.

\textsuperscript{15} Pildes and Levinson, Separation of Parties not Powers

\textsuperscript{16} Ibid.
d) Or its value might be purely symbolic (and no less important for that): it was crucial, I think, to republican thought in America to avoid the institution, internally if any sovereign power within the Constitution, comparable (for example) to the “sovereignty” of the British Parliament.\footnote{Cf. Arendt, \textit{On Revolution} 153 (1973): “The 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.”}

From this point of view, the separation of powers might be thought of as a means to the division of power. Since we want to divide power up, what 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 can’t be the whole story about the separation of powers. For one thing, Principle 2 might require a much finer-grained division that Principle 1 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 justifications 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 (deciding cases) rather than reviewing legislation; 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 Principle 2. The functional separation of powers may be associated with something like a principle of legislative supremacy, at least in the sense that it envisions that legislature as having an initiating place on the assembly line of law-making / law enforcement. That’s what John Locke thought and I believe M.J.C. 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.”\footnote{Vile, supra note 5, 68-9; cf. John Locke, \textit{Two Treatises of Government} 366-7 (Peter Laslett ed., 1988), II, §§149-50.} Since Locke is emphatically not suggesting that legislative supremacy entitles legislators to perform adjudicative and executive functions, Vile’s complaint against Locke must...
be premised on something like Principle 2 or Principle 3, not on Principle 1, in and of itself.

I have less space to devote to it, but I think something similar can be said about the relation between Principle 1 and Principle 3. 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,”¹⁹ but that was not the only vision in play, and not the vision specific to Principle 1, the separation of powers. The distinction of powers under Principle 1—if it makes sense at all—is given to us by a theory of articulated governance that 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.

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.²⁰ This makes sense under the auspices of Principle 3, and it may be an advantage of what is envisaged by Principle 2 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.²¹ Or rather I can sort of see it: using his example, the fact that there is a legislature which 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. 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.

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²¹ Ibid., 1440.
I have said that the importance of principles 2 and 3, great though that is, does not account for all of the importance of principle 1, the separation of powers. The importance of principle 1 is predicated on the vital distinction between various functions of governance—legislative, adjudicative, and executive functions—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 Principles 2 and 3. All that Principle 2 cares about is that power be dispersed; it doesn’t care particularly what the dispersed powers are. And all that Principle 3 cares about its that power check 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 put this point also the other way round. People worry about whether the functional separation envisaged in Principle 1 is archaic; they worry about the difficulty of applying it to modern agencies, for example, which seem to perform both rule-making and quasi-adjudicative functions. Vile, for example, speaks of a “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.” He says “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.”22 I don’t 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 Principle 2 or Principle 3. 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, considered separately as Principle 1, the taxonomy is all important. And now we have to begin our discussion of why.

4. Liberty or the Rule of Law?
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]

22 VILE, supra note 5, at 11.
‘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 must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.²³

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”—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 Madison described it, and Montesquieu. 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

²³ Ibid., 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.” This seems to reintroduce a blurring between Principles 1, 2, and 3, 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.”
The separation of powers was “destitute of all reference to the greatest happiness of the greatest number.”

I don’t want to pander to Bentham, but I think we should keep an open mind on this. 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. (Of course the rule of law may in turn be thought to matter mainly for liberty’s sake; but that ain’t necessarily so; many people relate the rule of law to values like dignity rather than or as well as liberty.) I want to keep this possibility open, for I think a rule of law may possibly offer a clearer and 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.

5. 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.

(Now, the argument I am about to expound is not the “efficiency” justification which 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.

It is more a matter of principle than that.)

Early on in his discussion of political or civil society, Locke makes a pitch for investing legislative power in a large representative assembly. Legislative authority should be placed, he says

24 Quoted by Vile, Ch. 5.

25 Fuller; Raz; Waldron.

26 But Vile does also mention the argument I want to highlight:
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, 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.27

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:

[Th]e 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 public good.28

It’s a well-known argument and it continues to be invoked in modern political theory.29 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.

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“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.”

27 LOCKE, TWO TREATISES, supra note 329-30 (II, §94)

28 Ibid., 364 (II, §143).

29 HAYEK, THE CONSTITUTION OF LIBERTY
But here’s the point: it definitely won’t work if the law-makers can control the application of the law, i.e. 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 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.

So as a necessary condition for this prophylactic against oppression to work, we must separate the function of law-making from the other functions of executive and adjudication. Necessary, I emphasize, not sufficient. As Pildes and Levinson 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.30

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 Principle 1.

6. Separation in Thought

I also want to mention one other argument that Locke makes, though I am afraid this is an anti-separation of powers argument. Well, sort of.

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.”31 We can’t go into the detail here, but Locke makes a pretty good case for saying that this power should be united with, not separated from, the

30 Cite.

31 Locke, Two Treatises, supra note 15, 365, (II, §146)
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’s a point I want to stress. Even while he accepts that the same person will have to exercise both powers, it is important for everyone to understand that the powers in question are in principle separate. Listen to how he puts the point:

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 common-wealth 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 public would be under different commands: which would be apt some time or other to cause disorder and ruin.\(^\text{32}\)

The distinction may not seem to matter much, but compare it to what the US Constitution does in Article II. It simply assumes in the juxtaposition of clauses 1 and 2 of the Article that domestic enforcement of the laws and direction of foreign policy are the same—both executive functions. I have heard esteemed colleagues say that that too is what Locke thought, but it is not.\(^\text{33}\) 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.”\(^\text{34}\) 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

\(^{32}\) Ibid., 366 (II, §148)

\(^{33}\) Golove and Hulsebosch at NYU.

\(^{34}\) Locke, Two Treatises, supra note 15, 366 (II, §147)
itself, it is hardly enough to satisfy the requirements of constitutionalism. But think about it for a moment anyway.

Consider, for example, judges in “Diplock courts” in Northern Ireland, where during the troubles, criminal cases were often tried without juries. 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. It is not a perfect example because it involves an intra-judicial separation. But I think it is possible to grasp 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, for example. Hobbes we know was an adamant opponent of the separation of powers. The various powers of government are, he says, are “indivisible,” “incommunicable and inseparable”35 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 type (ii). He doesn’t 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.36 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

35 HOBSES, LEVIAHAN, Ch. 18. See also ibid., Ch. 29, where Hobbes maintains that “Powers divided mutually destroy each other.”
judge, jury, and executioner, but he barely discerns the difference between adjudicating, fact-finding, and punishment.

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 followes, that the judgement of its right use pertaines to the same party: for if the Power of judging were in one, and the power of executing in another, nothing would be done.37

He come close again to blurring the line when he suggests that one reason the sovereign can’t be bound by the general laws he enacts is that he can change them whenever he likes:

The sovereign of a Commonwealth … is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws 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 himself only is not bound.38

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

36 De Cive, VI. 9: “[S]ince it no lesse, nay it much more conduceth to Peace to prevent brawles from arising, then to appease them being risen; and that all controversies are bred from hence, that the opinions of men differ concerning Meum & Tuum, just and unjust, … good and evill, … and the like, which every man esteems according to his own judgement; it belongs to the same chiefe power to make some common Rules for all men, and to declare them publiquely, by which every man may know what may be called his, what anothers, what just, what unjust, what honest, what dishonest, what good, what evill, that is summarily, what is to be done, what to be avoyded in our common course of life. But those Rules and measures are usually called the civill Lawes, or the Lawes of the City, as being the Commands of him who hath the supreme power in the City. And the Civill Lawes (that we may define them) are nothing else but the commands of him who hath the chiefe authority in the City, for direction of the future actions of his Citizens.”

37 Ibid., Ch. VI.8.

38 HOBBES, LEVIATHAN, Ch. 26.
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 doesn’t 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.

7. 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 legislating and judging, and between judging and enforcement, would be erased.

One of Montesquieu’s images, indeed a very common image in mid- and late-18th 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. “Among the Turks, where the three powers are united in the person of the Sultan, an atrocious despotism reigns.” That’s from the famous chapter in The Spirit of the Laws on the constitution of England.

A little earlier in the book, Montesquieu tells us something odd. He says “It is constantly said that justice should be rendered everywhere as it is in Turkey.” Really? Constantly said by whom? The answer, it turns out, is that this is

39 Compare also Jeremy Bentham, Of Laws in General 153 (H.L.A. Hart ed., 1970): “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.”

(it is left to Edmund Burke to argue, in the second day of his speech in opening the trial of Warren Hastings, that all this discourse rests on misapprehensions about the despotic and lawless character of Asian regimes: Burke, Works, Vol. IX, p. ___).


41 Ibid., 74, Bk. VI, ch. 2.
constantly said by people who are irritated by the elaborate technicality and legalism of French society, where there are innumerable rules, privileges and jurisdictions, and interminable procedures for securing any sort of relief. Each claim is 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, 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. And Montesquieu could hardly believe his ears: articulate legal structures, he says, are all that stand between monarchy and despotism. You don’t 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 they are ended. The pasha is no sooner informed than he has the pleaders bastinadoed according to his fancy and sends them back home.

What’s 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 person who holds them has not even thought to distinguish them.

**8. Where are the Rest of the Eighteenth Century Arguments?**

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42 Cf. Max Weber’s account of the futile call for straightforward social or ethical judging, as a protest against esoteric legalist technicality, in modern Europe: **MAX WEBER, ECONOMY AND SOCIETY** 882 ff. (Guether Roth and Claus Wittich eds., 1978).

43 **VILE, supra note 3, notes the importance of ROL 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,28 and the judges must conform to the law” (Ch. 4)

44 **MONTESQUIEU, supra note 405, 75, Bk. VI, ch. 2.**
Admittedly this is a bit of reach so far as Montesquieu is concerned. But everything is a bit of 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.

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.” In fact Montesquieu said very little. He announced several times that unless the different powers of government are separated, tyranny would result, but he never really explained why. Much of what he said consists of 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.” Why not? “Because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.” Tyrannical execution of the laws is always no doubt 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 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. But one has to do an awful lot of construction to reach that interpretation.

Often Montesquieu offers little more than tautologies:

Nor is there liberty is the power of judging is not separate from the 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.

In other words: the failure to separate powers leads to arbitrariness because it involves… a failure to separate the powers. There is the same tautology in this passage:


46 In one other part of the book, Montesquieu alludes to the idea of checks and balances: S/L 5.14: “one must give one power a ballast, so to speak, to put it in a position to resist another.”

47 Ibid.
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. 48

It is time we acknowledged Montesquieu’s failure to provide us with arguments explaining in detail why the separation of powers is necessary for liberty. It is not unusual. Among serious students of Montesquieu, it is widely recognized that linear argument is not his forte. 49 (I can say that; I am a devotee of The Spirit of the Laws; but I learn from what is hinted at rather than articulated in its assertions.)

I fear that Montesquieu’s failure to spell out the arguments infected 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 controul, 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. 50

48 Ibid., 161, Bk. XI, ch. 6.

49 Cf. Voltaire’s observation: “I looked for a thread through this labyrinth; the thread is broken at almost every article. I found the spirit of the author, but rarely the spirit of the laws. … He hops more than he walks.”

50 Federalist #47, 241.
Madison doesn’t tell us, however, where these other passages are (where Montesquieu’s reasons are supposed to have been 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

> 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.  

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 investigating of the extent of desirable separation, not an account of the connection with liberty.

I suspect, too, that this is why we tend to blur the distinction between the various principles I described in section 3 of this paper (p. 6 above)—particularly the distinction between separation of powers, on the one hand, and the principle of the division of power and the principle of checks and balances on the other. We quickly switch over to the latter two when we are pressed for an argument about the importance of the separation of powers, because we understand their justifications but we have not been bequeathed any good arguments specific to the separation of powers by our heritage of political thought.

I don’t mean the tone of these comments to be skeptical. I am just lamenting the lack of argument in the canonical sources. When Donald Elliot sought to explain why our separation of powers jurisprudence was so abysmal, he might have acknowledged that we came by it honestly. The political theory was abysmal even in its pre-jurisprudential form and we haven’t done nearly enough since the time of Montesquieu and Madison to acknowledge that and to try and fill it out.

9. **Articulated Governance**

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

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51 Ibid., 239.
Fortunately, the terms in which the principle presents itself offers 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, a straightforward use of coercive force by public authority, for example. 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 sections 6 and 7, suggesting (in section 6) 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.

The point is not so much about the oppressiveness of the exercise. It may be: 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.”52 Our outrage about the 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 was supposed to have done and threatening corporal punishment, we would want it also to be preceded by a judicial hearing at which Voltaire could 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 such-and-such a time (after opportunities for appeal etc.) We would want the thing to be slowed down in this way and for an orderly succession of phases to succeed 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, because 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.

52 DICEY, supra note __, 112.
As the Diceyan context of our illustration reveals, these concerns are in large part concerns associated with the rule of law. 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 as a matter of general policy and the formulation of authorizing norms. The representatives of the people settle, deliberatively, on a clear set of formulations and vote on that. 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. The people have time to take the norms on board, internalize them, and organize the conduct of their lives accordingly, 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 (at 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. At that time, 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

53 Recall that Dicey used Voltaire’s case to illustrate the first of his three principles of the rule of law (ibid., 110): “[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 manner before the ordinary Courts of the land.”

54 Or, the general outlines of a normative strategy may be communicated to an agency who in turn develop 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 a n exercise into several stages, though it may make it much more difficult to map it onto the separate functions of government represented in the principle we are considering.
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 don’t 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 and
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 principle of the separation of powers.

I am not saying that the separation of powers and the rule of law are one and
the same. The rule of law has some aspects that have little to do with the
separation of powers. Some would say that this picture doesn’t do justice to the
full tenor or force of rule-of-law concerns; that is probably right; it is not meant to.
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 that that entails before there is the enforcement of
nay order (or other pre-existing settled standing laws). 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. It may not be an ex tempore or off-
the-cuff use of political authority.

It doesn’t matter whether the authority in question is legitimate in itself, for
example on account of its democratic credentials. It doesn’t 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 the separation of powers. The legislature, the judiciary and the executive – each must have its separate say before power impacts on the individual.

10. The Integrity of the Three Particular Institutions
That last formulation—“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 doesn’t 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 particular person, V. Instead it requires that the legislature should do its kind of work—legislative work—in this matter, which really means not addressing V’s situation specifically at all; it requires that the judiciary should do its kind of adjudicative work in regard to V and V’s relation to the law that the legislature has enacted; and it requires that the executive should do its work of administration, not only the prosecution of V 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 principle holds that these respective tasks have, each of them, an integrity of its 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. Madison and others were concerned that state legislatures in the immediately post-revolution period were enacting resolutions aimed at the situations of particular individuals: putting
them out of business, for example, or confiscating their estates.\textsuperscript{55} We see the concern against this referred to in the bills-of-attainder clause of Article I of the U.S. Constitution, but it also reflects concerns about the rule of law, in the sense discussed in the previous section, and overlapping concerns about the separation of powers. The idea is that it is not appropriate for a legislature to proceed in that way. Not only does it run together what ought to be distinct functions of government, but it means that society does not get the benefit of the legislature’s doing the distinctive and important work it is set up to do for matters of this kind (if anybody, like V, 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 V 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, i.e. at the level of 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 tries to facilitate that by making it harder for those whose focus ins 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 sort of distract 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. 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 executive-minded in its character. (That again, is a way in which the considerations discussed earlier about separating powers at last in thought matters

\textsuperscript{55} Citation?
for our discussion.\textsuperscript{56} But if the legislature is dominated and overborne by the executive’s need just to “get certain things done”—\textit{whatever it takes} to be able to act against V, for example—then that is a problem from the point of view of this principle.\textsuperscript{57}

Too, we are familiar with concerns about the contamination of the adjudicative function with executive functions, ranging from the Soviet practice of “telephone justice”\textsuperscript{58} to the famous dissent of Lord Atkin in the wartime British case of \textit{Liversidge v Anderson} [1942] AC 206, 244: “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.”\textsuperscript{59} This is not to say that it is inappropriate for judges to apprehend and even sympathize with the needs and exigencies of executive government particular in wartime or a state of emergency; but their job is to balance executive claims and concerns against those of liberty, for example, \textit{according to law}, not simply to swat away irritating challenges to executive authority. 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.

\textsuperscript{56} See section 6 above.

\textsuperscript{57} Cf. Bernard Manin on the problems of combining democratic administration with democratic law-making in Rousseau. What Rousseau says is this (\textit{Social Contract}, Bk. III, ch. 4: “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.”

\textsuperscript{58} See e.g. Inga Markovits, \textit{Last Days}, 80 CALIF. L. REV. 55, 81 (1992) and Jeffrey Kahn, \textit{The Search for the Rule of Law in Russia} 37 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 353, at 385 (2006), citing, among others ALEXANDER SOLZHENITSYN, \textit{The Gulag Archipelago}, Vol. III, 521 (1974): “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.”

\textsuperscript{59} \textit{Liversidge v Anderson} [1942] AC 206, 244.
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 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 Teague v. Lane and its progeny, the heroic and convoluted efforts that have to be made to prevent this retroactivity reaching further into the legal system.\(^6^0\) 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 the 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. 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 military function. Both generals and executive officials often complain about the encroachment of the judiciary on the conduct of armed operations: they say, “You

\(^6^0\) Teague v. Lane 489 U.S. 288 (1989)
cannot hold hearings on the battlefield.” This is a sort of illustration of apprehensions 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, 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. Lon Fuller’s arguments about the inappropriateness of adjudicative procedures in allocative economic decision-making in a mixed economy are also relevant here.61

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 distiunct political principle, disentangled form the legal details of the U.S. constitutional scheme, is that we can deal with this issue more sensitively than those who are concerned with non-delegation doctrines etc. Let’s assume—what seems more or less right—that agency rule-making is a sort of legislative function. Then the first thing the 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

61 Fuller, The Morality of Law (1964): “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 unthinkingiy 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.
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, as framed, sets up a branch called “the legislative”—
establishes it as an elective institution and assigns important legislative functions to
that branch. 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.” 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 does not require that. What it
requires is that legislative powers, whatever 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 (1) amounts to a non-delegation
rule, such a rule is not necessarily endorsed by the principle of the separation of
powers.62 The latter principle 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 wherever 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 section, 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 don’t 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,

62 So this really illustrates an advantage of Manning’s account. Once we see that separation of
powers cannot be understood as a free-standing legal doctrine, we are free to explore its
implications unentangled with other constitutional doctrines such as non-delegation. Whether
Manning agrees with that is another matter. He is more interested I think, in the particular
separations that the constitution provides for (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.
and a third for the executive. There are aspects of what the 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. And I have tried to encourage similar solicitude for the dignity of legislation. 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 section 9. We want these three things, each in its distinctive integrity, to be slotted into a common scheme of government which enables people to confront political power in a differentiated way.

11. A forlorn and obsolete principle?
In The Executive Unbound, Posner and Vermeule talk of the separation of powers as suffering these days “through an enfeebled old age.”63 Probably their understanding of the separation principle is too closely tied to Madisonian checking and balancing to be of much use in our analysis.64 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 paper 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 be still be valuable even though we can’t 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 the separation of powers—as distinguished from the

63 POSNER AND VERMEULE, THE EXECUTIVE UNBOUND, supra note 1, 208.

64 Ibid., p. 19. (For what it’s worth, their critique on pp. 21-4 of Madison’s “ambition must be made to counter ambition” scheme in Federalist # 51 is devastating.)
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 don’t evaporate even as the principle is made to seem impracticable. Posner and Vermeule insist strongly on “ought implies can.” They say we shouldn’t shed tears for something we cannot anymore have. OK. 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 wouldn’t 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 cannot be answered, what dangers (previously warned against) we are now willing to court or to embrace.

65 Ibid., p. 5.