A Turbulent Origin and an Uncertain Legacy: The Separation of Powers in the United States and Canada

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I. Introduction

Today, it is widely accepted that any state government that means to maintain the liberty of its citizens must subscribe, in one form or another, to a separation of governmental powers. Undoubtedly, the separation of powers is among the most significant and impactful political theories of modern history. It has served as an integral element of constitutional theory and a guide for institutional structure and development in states around the world for over two centuries.[1] Alongside the concept of representative government, the separation of powers has been styled "the second pillar of western political thought supporting 'constitutional' systems of government".[2]

For a theory of such moment, the meaning, and purpose, of the separation of powers are subjects of remarkable ambiguity. A look at the theory's historical underpinnings, its discussion in academic scholarship, and its invocation in jurisprudence, reveals a striking diversity in characterisations of the theory. Different historical traditions have given the concept an array of possible interpretations.[3] Today, the organisational principles associated with the theory differ greatly from

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1 M J C Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967) 2, 7.

2 ibid 2.

3 Christoph Mollers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 40.

one country to another, and state structures ostensibly modelled on the theory's canons take a variety of forms.[4]

Though the definition of the separation of powers and the conditions purportedly required for its realisation may differ according to the time, place, and even individual in question, it would be beneficial to identify the theory's principal components to orient an analysis of the theory. Professor Maurice Vile of the University of Kent is a leading authority on the subject,[5] and helpfully articulates a strict version of the theory—dubbed the "pure doctrine"—endorsed for its accuracy even by Vile's critics.[6] Vile sets out four principles that underpin the "pure" form of the separation of powers.[7] First, a state must be divided into three branches or departments: legislature, executive, and judiciary. Secondly, all government acts must be classified as an exercise of the legislative, executive, or judicial function, and fall within the exclusive jurisdiction of the corresponding branch. Thirdly, each branch must be composed of distinct individuals; plurality of office is prohibited. Finally, if a state's institutional structure is properly constituted in accordance with the foregoing three principles, the fourth principle holds that each branch of government will necessarily act as a check on the others. In this way, each branch is confined to its respective sphere and domination by any one branch is prevented. Vile's four-faceted definition will be used as a point of reference throughout this article's analysis of the separation of powers theory.

II. Overview

This article will begin with an overview of the evolution of the separation of powers theory. This will be followed by an analysis of the theory's role in, and impact on, contemporary constitutional practice in the United States—the most renowned state-patron of the separation of powers theory. This article will then consider the theory's relationship to constitutional theory and practice in Canada, a country with historical and political traditions that diverge significantly from those of its southern neighbour. Finally, the implications of each state's distinctive

[4] ibid 43.

[5] See comments on the significance of Vile's work in: Carl J Friedrich, 'Review of *Constitutionalism and the Separation of Powers*, by M J C Vile' (1968) 73(4) The American Historical Review 1099 <https://www.jstor.org/stable/1847396> accessed 10 November 2017; H G Nicholas, 'Review of Constitutionalism and the Separation of Powers, by M J C Vile' (1967) 1(2) Journal of American Studies 294 <https://www.jstor.org/stable/27552802> accessed 10 November 2017.

[6] William Gwyn, 'Review of *Constitutionalism and the Separation of Powers*, by M J C Vile' (1969) 41(4) The Journal of Modern History 524, 526 <https://www.jstor.org/stable/446581> accessed 10 November 2017. Although Professor Gwyn asserts that Vile's analysis "ignores the sociocultural aspect of Western Constitutionalism", he nevertheless lauds Vile's definition of the "pure doctrine" as "a rather full one, including both the goal of the separation of powers and the process by which the goal is reached".

[7] Vile (n 1) 14–17.

approach to the separation of powers will be compared and contrasted, and the benefits and drawbacks of each approach will be assessed.

In the United States, the primary purpose of the theory has been to separate and balance functionally specialised governmental organisations to prevent the preponderance of any single branch of government. To this end, the state is divided into the three prescribed branches with mutually exclusive membership, in line with the first and third principles of the pure separation of powers theory. A modified version of the pure theory's second principle is also implemented: each branch is prohibited from accruing any power that does not correspond to the branch's designated function if this is not otherwise sanctioned by the narrow regime of checks and balances. However, even in its adulterated form, the principle of allocation according to function is not strictly adhered to. This may be because of pragmatic considerations or because a definitive categorisation of a specific state power is not possible.

In Canada, the executive is fused with the legislature in violation of the pure theory's prohibition on the plurality of office. This form of organisation is designed to embrace, rather than guard against, the supremacy of the legislature. Accordingly, in Canadian constitutional theory, the separation of powers doctrine does not serve the same purpose as in the United States. Instead, the doctrine serves as the nominal and protean rationale for whatever institutional arrangements happen to characterise the Canadian polity at a given time. The theory further serves to carve out boundaries which should not be crossed and as a reminder that alterations to Canada's existing state structure are, in general, to be avoided.

A comparison of the two approaches suggests that the American interpretation of the separation of powers, and the form of state organisation to which it has given rise, allows for, if it does not directly precipitate, a degree of political deadlock that is avoided, or at least less pronounced, in Canada's parliamentary system.

One conspicuous commonality between the states, relative to the separation of powers, is also revealed in this article's analysis. The first aspect of this shared quality is that both the American and Canadian constitutions explicitly eschew some of the most fundamental principles of the separation of powers theory. That both constitutions deviate, and were in fact intended to deviate, from the theory's key tenets is evident as much from the historical context of their creation as from the texts themselves. Yet, despite clear departures from separation of powers orthodoxy in both constitutions, and the drastically different structure of government organisation in each state, jurisprudence in both the United States and Canada is wont to invoke the separation of powers as each state's constitutional bedrock.

Why is this the case? This article contends that the theory's formulation in a neat, apothegmatic phrase, has given it a peculiar staying power in the ethos

of constitutionalism. The apparent appeal of the phrase "separation of powers" has, however, led to its indiscriminate application. The theory is thus an unsettled one—its principles are susceptible to different treatment, and a given principle may be interpreted either as a non-derogable rule, a flexible guideline, or ignored altogether. In practice, the doctrine is invoked in discrete situations to lend a veneer of legitimacy to laws and decisions that tend toward a separation of state powers along functional lines. However, because the theory is so nebulous, its normative value is extremely limited. It is hardly possible for state organisation to be guided by a theory espousing principles of an unknown quantity. Compliance with the separation of powers is therefore often elusive, and it is uncertain when courts will conclude that the separation of powers has been unacceptably violated and order remedial action.

III. Evolution of the Separation of Powers

The separation of powers theory has its roots in the theory of mixed government.[8] This latter theory is premised on the participation of each major societal order in the core aspects of government.[9] It was grounded in recognition of the need for each societal element to be able to protect its own distinct interests. Proponents believed this was achieved by assigning each order responsibility for an assortment of state activities, which would have the effect of preventing the dominance of any single order in the broader governance of the state.[10] This theory is of ancient pedigree: Plato's Laws, Aristotle's Politics and Polybius' Histories evince the principle's influence on the governmental structures of ancient Athens and Rome.[11] The mixture described by Plato was of monarchy and democracy, while Aristotle was concerned with democracy and oligarchy. A threefold mixture of monarchical, aristocratic, and democratic elements characterised the Roman polity depicted by Polybius. Under the Republic, each Roman order participated in the state's various functions and was thereby able to exert a restraining influence on its counterparts. Of this system, Cicero remarked, "such a government insures

[8] Vile (n 1) 3; Mollers (n 3) 46; Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) 217–218.

[9] Vile (n 1) 33.

[10] Ackerman (n 8) 217–218.

[11] William Gwyn, *The Meaning of the Separation of Powers* (Tulane University 1965) 24.

[sic] at once an element of equality, without which the people can hardly be free, and an element of strength".[12]

A. Separating the powers: the English civil war

The tripartite organisation of the Roman system was not, broadly speaking, dissimilar from the structure of the English government on the eve of that country's Civil War, from which event the separation of powers first emerged as a distinct theory of government.[13] In his response to the demands of the Long Parliament embodied in the Nineteen Propositions of 1642, King Charles I extolled the benign effects that flowed from the kingdom's existing mixture of monarchy, aristocracy, and democracy:

> The experience and wisdom of your ancestors hath so moulded this [government] out of a mixture of these, as to give this kingdom (as far as human prudence can provide) the conveniences of all three, without the inconveniences of any one, as long as the balance hangs even between the three estates, and they run jointly on in their proper channel.[14]

The king's response was grounded in political philosophy stretching back to Aristotle that had conceived of state organisation in terms of tasks, such as agricultural, military, and financial, rather than in terms of functions.[15] However, the seventeenth-century contest between the Crown and Parliament which culminated in the Civil War had brought two distinct functions of government into sharp relief: legislating on one hand, and executing the law on the other.[16] To the Parliamentary faction, the importance of these two broad, though originally ill-defined,[17] functions was not taxonomic, but normative. Their separation was necessary for the achievement of a desired end: defence of the Englishman's famed

[12] Marcus Tullius Cicero, *On the Commonwealth* (James E G Zetzel tr, CUP 1999) book 1, ch 45.

[13] Gwyn (n 11) 37; Vile (n 1) 3.

[14] Charles I, 'Propositions Made by Both Houses of Parliament… with His Majesties Answer Thereunto' (1642) <http://oll.libertyfund.org/pages/1642-propositions-made-by-parliament-and-charles-i-s-answer> accessed 13 November 2017.

[15] Vile (n 1) 27.

[16] ibid 21, 25.

[17] Gwyn (n 11) 28–30. The distinction grew out of an earlier dichotomy between legislation (including taxation) and the "functions of government", or the royal prerogative, which included more than just the execution of laws. In the day-to-day management of the country, it was accepted that the king was capable of exercising legislative as well as executive and judicial functions. The ambiguity of the limits of these two broader functions was a significant contributing factor in bringing about the Civil War.

civil liberty from the caprice of arbitrary government.[18] For, though the legislature was capable of both enacting limits on the Crown's activities and holding the Crown's agents accountable for abuses, these safeguards were jeopardised by the Crown's participation in legislation.[19] The prevailing system of mixed government allotted tasks to the Commons, the Lords, and the Crown, vouchsafing for each a role in the broader function of legislating. The Crown was thus armed with the means of frustrating the restraining impulses of the Houses of Parliament, while the latter obstinately refused to exercise their tax-raising powers to finance, among other things, Charles' military schemes.[20]

The resulting impasse between Royalist and Parliamentary factions caused disillusionment with the efficacy of the mixed government model.[21] The turning point in the development of the separation of powers theory came with the evolution of the Parliamentary position from advocating Parliament's dominance in legislating, to demanding the king's complete exclusion from the legislature. The monarch was deprived even of his "negative voice", or veto, and was wholly confined to carrying out, or executing, the laws enacted by Parliament.[22] Though the English system had not yet recognised a separate judicial function of government,[23] all four elements of Vile's pure theory of the separation of powers were otherwise realised at this point. Charles, however, ever animated by notions of the divine right of kings,[24] did not meekly suffer the diminution of what he saw as his royal prerogative. Civil War convulsed England from 1642 to 1646, and again briefly in 1648.[25] Victory ultimately fell to the Parliamentarians. On 31 January 1649, even as he mounted the scaffold outside the Banqueting House in Whitehall where he was to be executed, Charles met his fate decrying the inroads that Parliament had carved into royal privilege.[26]

Yet the constitutional situation remained volatile. Even before Charles' departure, the burgeoning power of Parliament had led to excesses as tyrannical as those of the monarchy that had precipitated civil upheaval in the first place. After Charles fell into Parliament's custody in 1647, the prospect gradually arose of a rapprochement between Crown and Parliament. To pre-empt any such

[18] ibid 8–9.

[19] ibid 35.

[20] Trevor Royle, *Civil War: The Wars of the Three Kingdoms, 1638–1660* (Little, Brown & Company 2004) 20–25.

[21] Vile (n 1) 39.

[22] ibid 41–43.

[23] ibid 27. The idea of a 'judicial power' vested in the House of Lords, did come from the Civil War, but was a peripheral development, and never matured into a freestanding principle.

[24] Royle (n 20) 25.

[25] Patrick Little, *The English Civil Wars* (Oneworld Publications 2014) 150.

[26] Dame Cicely Veronica Wedgwood, *The Trial of Charles I* (World Books 1964) 191–192.

development, the New Model Army, aligned with the more radical elements of Parliament, purged Parliament of those deemed too royalist or Presbyterian in their sympathies.[27] The remaining members—who comprised what came to be known as the "Rump Parliament"—rode roughshod over what remained of the constitutional order. The Commons passed an ordinance to have the king tried for treason, and, when this was opposed by the House of Lords, whose concurrence was constitutionally required for any such act, declared itself the "supreme power" in the nation capable of unilaterally passing whatsoever legislation it pleased.[28] In this manner, the trial and execution of the monarch proceeded. Within a week, the Rump Parliament approved a motion to abolish the House of Lords, that "useless and dangerous"[29] body that had proved so unamenable to its regicidal designs, and whose existence as a check on the power of the Commons was now deemed inexpedient.[30] The ruthlessness of the Rump Parliament continued unabated; factions within the self-perpetuating body menaced opponents with special committees that both administered Parliament's laws and summarily adjudicated breaches.[31] Dissatisfaction spread over Parliament's continuous accrual of power and assumption of both judicial and executive roles.[32] Parliament's refusal to heed calls for reform led, in 1653, to its dissolution by Oliver Cromwell, who re-established executive dominance by declaring a Protectorate and fashioning himself Lord Protector.[33]

By the time of the Restoration, following the death of Cromwell in 1658 and the collapse of his son Richard's short-lived Protectorate, the Royalist Sir Charles Dallison could cogently sum up the lessons of the preceding decades of political turbulence: "Whilst the Supremacy, the power to judge the law, and the authority to make new laws, are kept in several hands, the known law is preserved, but united it is vanished, instantly thereupon, and arbitrary and tyrannical power is introduced."[34] English political theorists thus came away from the Civil War with a well-founded fear of arbitrary rule, whether by King or Parliament, and a novel conception of governmental organisation to preclude these eventualities: the separation of state activities into comprehensive, mutually exclusive categories

[27] Royle (n 20) 480, 484.
[28] Samuel Rawson Gardiner, *History of the Great Civil War, 1642–1649: 1647–1649*, vol 4 (Longmans, Green & Co 1893) 290.
[29] C H Firth and R S Rait (eds) *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office 1911) 24.
[30] Royle (n 20) 505–506.
[31] Vile (n 1) 43.
[32] Gwyn (n 11) 33–34, 37.
[33] ibid 33–34.
[34] Vile (n 1) 46.

according to function. The trick appeared to be keeping the state organs confined to their designated function.

B. Taming the legislature with checks & balances: locke and montesquieu

Appearing in 1689, from amongst the eddies of constitutional theory swirling about in the wake of the Civil War, John Locke's Second Treatise of Government had a major impact on the development of the separation of powers theory.[35] In that work, Locke set out to reconcile the nascent theory with the supremacy of Parliament. Locke explained the natural supremacy of the legislative function by virtue of it preceding the executive function, and setting the laws by which executive power may be exercised: "[W]hat can give laws to another, must needs be superior to him."[36] The articulation of the supremacy of law was a crowning achievement of the English Civil War and remains a central tenet of democratic political theory.[37] But the danger of legislative despotism had drawn attention to the need for a balancing of the constitution. Locke, drawing on the older theory of mixed government, advocated a legislative role for the executive that would allow it to check the excesses of the legislature. The executive veto was reintroduced to balance the legislative and executive powers and ensure that the chief executive (the king) "is no more subordinate than he himself shall think fit."[38]

During the Civil War, the categorical separation of state functions, in conformity with the second principle of the pure theory of the separation of powers, had laid bare the dangers of legislative supremacy. Specifically, the English experience had exposed the futility of the theory's fourth principle: the conceptual safeguards inherent in creating multiple autonomous branches with their own institutional interests could not ensure the proper allocation of state functions and the maintenance of each branch within its defined sphere.[39] The rampant self-aggrandisement of the Long Parliament attested to the theory's deficiency in this regard. Locke's solution was an intermingling of state functions between the branches to serve as checks. This violation of the second principle of the separation of powers theory was found necessary, in light of the impotence of

[35] ibid 58.
[36] John Locke, *Second Treatise of Government* (Aziloth Books 2013) 79.
[37] Cooper v Canada [1996] 3 SCR 854 [23]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 [139].
[38] Locke (n 36) 80.
[39] Vile (n 1) 139–140, 146, 148.

the fourth principle, to keep the powers, if no longer wholly separate, then at least substantially so.

The credit for founding the separation of powers theory generally falls to Locke's intellectual disciple, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu. The French writer's celebrated 1748 publication, The Spirit of the Laws, was a scientific study of governments throughout history that sought to demonstrate a causal connection between the nature and form of a state's government and the laws of that state.[40] The book's most influential chapter, credited with establishing the separation of powers doctrine in earnest, was, ostensibly, an analysis of the English Constitution, and drew heavily on the ideas of contemporary English writers and political theorists including Locke.[41]

While the separation of powers theory may not, in fact, have originated with Montesquieu, he was responsible for its apotheosis and enduring status as a universal constitutional precept. To an unprecedented degree, Montesquieu emphasised the theory as the essential element of any constitution that had political liberty as its aim.[42] Significantly, Montesquieu was also the first to clearly demarcate the "power of judging" as an independent function.[43] Conceptually, Montesquieu also removed the king from the legislature, where he continued to occupy a role in English theories by virtue of his veto over legislation.[44] Montesquieu was thus the first to express the pure theory's first principle in its modern formulation, requiring separation of the state into three distinct branches: legislative, executive, and judicial. However, Montesquieu also proposed a Lockean intermingling of functions to provide the executive branch with an active means of defence against the legislature. Montesquieu advised that, in addition to a veto, the executive ought to possess the power to convene and regulate the duration of meetings of the legislature, because "if the executive does not have the right to check the enterprises of the legislative body, the latter will be despotic… since it will be able to give to itself all the power it can imagine."[45] Thus, Montesquieu's articulation of the separation of powers theory, like Locke's, prescribed checks and balances

[40] ibid 76.

[41] ibid 58, 85.

[42] Sir William Ivor Jennings, *The Law and the Constitution* (University of London Press 1960) 20–21.

[43] Vile (n 1) 104. However, in decreeing that judgments should always be "a precise text of the law" to avoid the uncertainty inherent in judicial "opinions", Montesquieu deemed the judiciary to be of far less significance than it would come to assume as the theory matured. See: Montesquieu, *The Spirit of the Laws* (Anne Cohler, Basia Miller, and Harold Stone trs, CUP 1989) 158.

[44] Montesquieu (n 43) 164.

[45] ibid 162.

reminiscent of the theory of mixed government. Ironically, it was this very theory that the separation of powers doctrine had been explicitly designed to supersede.

On the surface it appeared that, for Montesquieu, the definitive characteristic of the English Constitution, responsible for that country's then unrivalled political liberty, was the separation of the three fundamental powers of government. The true subject of Montesquieu's fancy, however, is a matter of some debate. Noting the English monarch's role in the legislature and in judicial appointments, as well as the Lords' prerogative as the supreme court of appeal, James Madison asserted that, "on the slightest view of the British constitution, we must perceive that the legislative, executive, and judicial departments are by no means totally separate and distinct from each other."[46] A century later, Albert Venn Dicey, the eminent British constitutional theorist, similarly commented on the incongruence between the actual relationships between branches of the English government and Montesquieu's caricature of them. Dicey concluded that Montesquieu "misunderstood the principles and practice of the English Constitution on this point."[47] In fact, it has been contended that Montesquieu was not describing the English Constitution at all. Rather, Montesquieu was describing the ideal constitution for the prevention of tyranny. As his point of reference, Montesquieu chose the constitution of a nation which, in the preceding century, had overthrown two despotic monarchs, and which contrasted sharply with his native France, then labouring under the yoke of monarchical absolutism.[48] For many, then, Montesquieu's famous chapter was not a description of the English Constitution, but a prescription for a constitution at once conducive to liberty and repugnant to tyranny.[49]

C. Trial and error: the American revolution and the founding decade

It was therefore natural that, in the latter half of the eighteenth century, discontented and democratically-minded subjects in the British colonies in America couched criticism of their government in the language of Locke, and increasingly, after the publication of The Spirit of the Laws, in terms of the separation of powers.[50] Under Britain's colonial administration, governors administered the colonies in a more or less arbitrary fashion, free from the restraints placed on the

[46] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (Penguin Books 1987) No. 47, 303.
[47] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (St Martin's Press 1961) 338.
[48] Jennings (n 42) 21–23.
[49] Vile (n 1) 77.
[50] ibid 122, 127.

executive back in England, and in no way beholden to the representative colonial legislatures. Thoroughly aristocratic governor's councils dominated all state functions, forming the legislative Upper Houses, governors' advisory councils, and the colonies' supreme courts.[51]

After throwing off the bonds of imperialism, the newly independent American States drafted constitutions based on the separation of powers.[52] Initially, a strict separation of powers was much in vogue. To varying degrees, reform-minded framers of the early state constitutions rejected the concept of checks and balances as a loathsome vestige of the antidemocratic, class-based system of mixed government.[53] The pure theory of the separation of powers thus experienced a renaissance. The revolution had been galvanised by the idea that all state authority emanated from the people. Because the people directly delegated their authority to elected representatives in the distinct branches of government, whose accountability was maintained by periodic elections, it was thought unnecessary and undesirable for the legitimately held authority of each department to be subject to interference from the other branches.[54] Accordingly, aside from electoral sanction, the early state constitutions placed their faith in the fourth principle of the pure theory of the separation of powers and relied exclusively on the theory's intrinsic conceptual safeguards to maintain the branches of government within their respective bounds.[55]

It is somewhat surprising that the pure model of the separation of powers experienced the revival that it did. Strict separation had undergone an abortive experiment in England in the previous century, after which Montesquieu, the "oracle" of the American Revolution,[56] had warned of the dangers of a rigid separation, hence Dicey's observation that Montesquieu's doctrine was either misunderstood, exaggerated, or misapplied by its revolutionary proponents of the eighteenth century.[57]

In a sequence of events reminiscent of the English experience following the Civil War, the American state legislatures, bereft of positive restraints, quickly permeated all spheres of government activity. Those bodies soon accumulated a disproportionate degree of power in their hands, which was not infrequently used

[51] ibid 127; Robert F Williams, 'Evolving State Legislative and Executive Power in the Founding Decade' [1988] 496 The Annals of the American Academy of Political and Social Science 43, 44 <http://www.jstor.org/stable/1046317> accessed 18 November 2017.

[52] Vile (n 1) 135; Williams (n 51) 44.

[53] Malcolm P Sharp, 'The Classical American Doctrine of "The Separation of Powers"' [1935] 2(3) The University of Chicago Law Review 385, 396 <https://doi.org/10.2307/1596321> accessed 10 January 2018; Vile (n 1) 139, 141; Williams (n 51) 43, 45.

[54] Vile (n 1) 141.

[55] ibid 139–40, 146, 148; Williams (n 51) 45–46.

[56] Madison, Hamilton, and Jay (n 46) No. 47, 303.

[57] Dicey (n 47) 338.

in an arbitrary manner.[58] As James Madison observed at the time, in an essay that would later form part of The Federalist Papers, "the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex".[59] It was now the turn of the Americans to address the reality that, as Madison put it, "in a republican government, the legislative authority necessarily predominates".[60]

Not everyone in the nascent Republic had been under the same illusions about the wisdom of reviving the pure theory, and many had warned against it.[61] Madison, in particular, disparaged the illusory divisions between the branches of government—the "parchment barriers"—relied upon in the state constitutions.[62] Preoccupied with ensuring the subjugation of the executive following their escape from monarchical oppression and despotic colonial administration, Madison observed that the framers of the new republican constitutions "seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations".[63] Madison elucidated the lesson that America had been forced to learn for itself: "[T]he mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[64]

As in England after the odious reign of the Long Parliament, there followed in America a backlash against the extreme form of the separation of powers. While the theory continued to underpin state constitutions, it was supplemented with checks and balances—mechanisms that had been shouted down as monarchical derogations from the separation of powers in the revolutionary pique of 1776.[65] Madison noted of the continued presence in state constitutions of language suggestive of the pure theory that, "notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."[66] With this development, the second principle of

[58] Vile (n 1) 143–144.
[59] Madison, Hamilton, and Jay (n 46) No. 48, 309.
[60] ibid No. 51, 320.
[61] Vile (n 1) 147.
[62] Madison, Hamilton, and Jay (n 46) No. 48, 309.
[63] ibid No. 48, 309.
[64] ibid No. 48, 312.
[65] Vile (n 1) 148.
[66] Madison, Hamilton, and Jay (n 46) No. 47, 305.

the pure theory, stipulating a rigid separation of powers according to function, was banished from American constitutional practice.

After experience with the early state constitutions had underscored the sagacity of active checks on the power of each branch of government, the atmosphere was conducive to their inclusion in the Federal Constitution of 1787.[67] To weaken the legislative branch, Madison secured agreement for a divided, bicameral legislature.[68] A plethora of cross-functional roles further ensured the interdependence of the executive and legislative branches. The chief executive, the President, was given a veto over the legislature, though one subject to override by two thirds of Congress. The President received the power to appoint his own magistrates as well as judges, though subject to confirmation by the Senate. The power to negotiate treaties was vested in the President, again qualified by the requirement of senatorial confirmation. The President was accorded the position of Commander-in-Chief of the armed forces, but Congress retained the power to declare war.[69] It must be noted, however, that what has been styled "the greatest of these checks and balances"[70] came more than a decade after the promulgation of the Federal Constitution. In 1803, Justice Marshal's famous dictum in Marbury v Madison established the judicial prerogative to review both legislative and administrative action for constitutional compliance. This added another potent check on the improper exercise of power to those set out in the Federal Constitution. Specifically, Justice Marshal erected a formidable judicial barrier against the perennial danger of legislative tyranny, should the executive veto prove insufficient.[71]

The American system was therefore contrived such that oppressive state measures required, in most instances, the cooperation of at least two branches of government.[72] Each of those branches was to exercise its own function as independently as possible. However, to maintain its independence, each branch required the ability to interfere in the functions of other, overly ambitious branches. Experience had shown that, "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim required, as essential to a free government, can never in practice be duly maintained".[73] The emphasis, though, remained on the separation of powers, because, to the extent that each branch had a role in the functions of the others, it was not aimed at fusing the branches, but erecting

[67] Vile (n 1) 148; Williams (n 51) 53.
[68] Madison, Hamilton, and Jay (n 46) No. 51, 320.
[69] Vile (n 1) 156.
[70] Jennings (n 42) 27.
[71] *Marbury v Madison* 5 US (1 Cranch) 137 (1803), [177]–[178].
[72] Laurence H Tribe, *American Constitutional Law* (Foundation Press 1978) 16.
[73] Madison, Hamilton, and Jay (n 46) No. 48, 308.

effective barriers between them.[74] An effective separation of the branches, not their fusion, was still regarded as the bulwark against the tyranny of any one branch.

IV. The Separation of Powers in the United States

A. Flexible separation: by design and necessity

The historical evolution of the separation of powers theory in America demonstrates that adherence to the theory in the United States is qualified to a considerable extent. The pure theory's first and third principles are dutifully observed in the organisation of state institutions into executive, legislative, and judicial branches, with mutually exclusive membership. The theory's American modifications are most evident in relation to the second principle's injunction to allocate state powers according to function. Derogation from the pure theory's second principle had, however, been inevitable, even if it had not been considered the most effective means of suppressing tyranny. In his concurring opinion in the United States Supreme Court's 1986 decision in Bowsher v Synar, Justice Stevens explained that "one reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterised with only one of those three labels". Justice Stevens went on to observe that, "as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned".[75] In Youngstown Sheet & Tube Co v Sawyer, Justice Frankfurter, with more concision and less colour, asserted that, "the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed".[76]

As these statements by Supreme Court Justices make clear, there is no definitive test for determining which category a particular state power properly falls under. Thus, even if the Framers had not consciously rejected a strict separation according to function in favour of one involving checks and balances, pursuing a rigid separation would have led to arbitrary results, and would likely have proved unworkable. Consider the 1983 case of Immigration and Naturalization Service v Chadha,[77] where the Supreme Court grappled with the constitutionality of a congressional veto over the Attorney General's decision to suspend the deportation of an illegal immigrant. As the prominent American constitutional law scholar Laurence Tribe noted, the decision on deportation could have been branded

[74] Vile (n 1) 153.
[75] *Bowsher v Synar* 478 US 714 (1986) [749].
[76] *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) [610].
[77] *Immigration and Naturalization Service v Chadha* 462 US 919 (1983).

legislative, executive, or judicial, depending on whether it was taken by the House of Representatives, the Attorney General, or an administrative tribunal.[78] Recourse to the pure theory's second principle of allocation based on function is of little use in determining which branch of state properly has jurisdiction over such a decision.

B. Lingering division on the second principle: guideline or dogma?

Ambiguity has nevertheless persisted concerning the status of the pure theory's second principle in American constitutional practice. Even after the promulgation of the Madisonian Constitution, the separation of powers continued to be invoked as if it mandated rigid separation. This can be seen in Supreme Court decisions of the late nineteenth century, such as Kilbourn v Thompson, which adopted the extreme view that each branch must "be limited to the exercise of the powers appropriate to its own department and no other."[79] Similarly absolutist interpretations continue to find expression in modern jurisprudence. In the 1988 Supreme Court decision in Morrison v Olson, Justice Scalia prefaced his dissent with the archetypical formulation of separation of powers orthodoxy, found in Part the First, Article XXX, of the Massachusetts Constitution of 1780:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men.[80]

Of this exact provision Madison had observed that, "[i]n the very constitution to which it is prefixed, a partial mixture of powers has been admitted". In reality, Madison continued, that constitution's interdiction "goes no farther than to prohibit any one of the entire departments from exercising the powers of another department".[81] Yet, after reciting this tract, Scalia proceeded to read into the Federal Constitution's vestment clauses exactly what American history and the Framers warned against: a categorical, unyielding separation of state powers along functional lines. Reproducing the second of the Constitution's three vestment clauses, which states that "[t]he executive Power shall be vested in a President of the United States of America", Scalia declared in no uncertain terms that, "this

[78] Laurence H Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 137.
[79] *Kilbourn v Thompson* 103 US 168 (1880) [103].
[80] *Morrison v Olson* 487 US 654 (1988) [697].
[81] Madison, Hamilton, and Jay (n 46) No. 47, 305–306.

does not mean some of the executive power, but all of the executive power".[82] On this footing, Scalia excoriated the majority's decision to uphold the validity of the impugned legislation providing for independent investigation into executive misconduct. Governmental investigation and prosecution of crimes, argued Scalia, is a "quintessentially executive function" and depriving the President of exclusive control over that power "is enough to invalidate the statute".[83]

Justice Scalia's interpretation of the separation of powers ignores the lessons of history, the exigencies of indeterminate categorisation, and the character of the Constitution itself. The reality is that the Madisonian version of the theory that won out in the Federal Constitution admits of a more flexible separation. No statement comparable to that of Article XXX of the 1780 Massachusetts Constitution can be found in the Federal Constitution—a similar provision was deliberately rejected in the early stages of its drafting.[84] However, lexical semantics and the nebulous nature of the separation of powers theory have permitted the debate over rigid separation to continue, even after the issue was definitively decided in the Federal Constitution.

The Constitution's rejection of a rigid separation was not interpreted uniformly, even amongst the Framers. Certainly, some of the Framers were cognisant of the compromise they had struck between ideological orthodoxy and practicability, and felt that its Americanisation had not emasculated, but improved the separation of powers theory. As Alexander Hamilton observed:

> [T]he separation of powers has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is… not only proper but necessary to the mutual defense of the several members of the government against each other.[85]

Others, however, and Madison in particular, did not believe that a compromise had been struck at all. Madison considered the doctrine, properly understood, never to have required a rigid separation of powers according to function. Allegations that the checks and balances of the Federal Constitution violated the separation of powers were "warranted neither by the real meaning annexed to that maxim by its author [Montesquieu] nor by the sense in which it has hitherto been

[82] Morrison (n 80) [705] (emphasis in original).
[83] ibid [705]–[706].
[84] Tribe (n 78) 128.
[85] Madison, Hamilton, and Jay (n 46) No. 66, 384.

understood in America".[86] Madison believed the theory only required that "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments" and that "none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers".[87]

Madison was committing a fallacy by claiming to adhere to the "real meaning" of the separation of powers while advocating for checks and balances. As Tribe observes, "it is a misnomer of intellectual history [that] 'separation of powers' is often used as a shorthand phrase for the complex system of checks and balances created by the Constitution which in fact mingle the different types of governmental power".[88] Madison's conceptual obfuscation is part of the reason modern constitutional scholars assert that "the separation of powers may well be the most misunderstood part of the Constitution; certainly misunderstandings of it date from the moment it was brought into being in the document".[89] The ambiguity created by the use of the phrase "separation of powers" to describe a constitution characterised by checks and balances has allowed interpretations such as those found in Kilbourn v Thompson and the Morrison v Olson dissent to persist. Advocates of a rigid separation can justifiably claim that such a principle follows directly from basic separation of powers theory. After all, does not the separation of powers stand for just that, a separation of powers? However, it is untrue to claim that the separation of powers model that guided Madison and his fellow Framers in drafting the Constitution called for a rigid separation.

C. Tyranny, not pedantry: the true criterion for application

The issue with interpretations advocating a strict separation of powers along functional lines, in addition to their impracticability and reliance on historically and textually inaccurate readings of the Constitution, is that they place undue emphasis on adherence to the theory's principles at the expense of the theory's ultimate aim. The purpose of the theory had always been to prevent a "tyrannical concentration of all the powers of government in the same hands."[90] The Founding Fathers were never concerned with ideological orthodoxy for its own sake. As Gwyn notes, the Framers were more intent on laying the foundations of stable government "than with creating a system of government based on the

[86] ibid No. 47, 308.
[87] ibid No. 48, 308.
[88] Tribe, *American Constitutional Law* (3rd edn) (n 78) 137.
[89] Robert A Goldwin and Art Kaufman, *Separation of Powers—Does it Still Work?* (American Enterprise Institute 1986) 138.
[90] Madison, Hamilton, and Jay (n 46) No. 48, 312.

abstract maxims of political philosophers".[91] Accordingly, the application of the separation of powers theory in the departmental allocation of state powers does not hinge on the dictates of an abstract principle of state organisation. The true criterion for the theory's invocation is whether there is a danger of one branch's power being augmented or diminished to the point where either that branch's own independence or that of another branch is threatened.

This explains both the inconsistent application of the theory's principles and why the rigidity of Scalia's interpretation is unwarranted. Of course, a more rigid approach is taken "where the constitution by explicit text commits the power at issue to the exclusive control" of a specific branch, in which case the Supreme Court has "refused to tolerate any intrusion."[92] Generally, however, the theory is applied only where necessary to achieve its objective. Thus, the Court has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment".[93] At the same time, "the Court has not hesitated to strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separate branches or that undermine the authority and independence of one or another coordinate branch."[94]

In line with this flexible, principled approach, the Supreme Court in Morrison v Olson allowed the removal from the President's purview of a state power it recognised to be executive in nature. Though the President was denied control over both the independent counsel and his investigation into executive misconduct, neither were these permitted to come under the control of Congress or the judiciary. The Court therefore reasoned that the separation of powers was not unduly affected by this failure to allocate a state power along functional lines given that the executive was not significantly impaired and no branch increased its power at the expense of any other.[95] Conversely, in instances perceived to be more portentous, the Court has not hesitated to intervene under the auspices of upholding the separation of powers. In Immigration and Naturalization Service v Chadha, the Court refused to countenance a congressional veto on the Attorney General's decision of whether or not to deport an illegal alien from American soil.[96] Similarly, in Clinton v City of New York, the Court stepped in to preclude

[91] William B Gwyn, 'The Indeterminacy of the Separation of Powers in the Age of the Framers' (1989) 30(2) William and Mary Law Review 263, 263 <http://scholarship.law.wm.edu/wmlr/vol30/iss2/4> accessed 10 January 2018.

[92] *Public Citizen v Department of Justice* 491 US 440 (1989) [485].

[93] *Misretta v United States* 488 US 361 (1989) [382].

[94] ibid.

[95] Tribe, *American Constitutional Law* (3rd edn) (n 78) 139–140.

[96] *Immigration and Naturalization Service v Chadha* 462 US 919 (1983).

executive encroachment on core legislative competencies, despite the legislature's complicity in the encroachment. The Court in that case invalidated legislation, which had been duly passed by Congress, allowing the President to apply "line-item cancellations" to certain provisions of appropriations bills. Effectively, the legislature would have thereby conferred on the executive the ability to carry out unilateral statutory amendments.[97] The Court refused to permit such an augmentation of executive power.

A malleable view of the separation of powers also characterises the approach taken towards relations between the judiciary and the other branches of government. The same article of the Constitution that stipulates the creation of the Supreme Court also vests Congress with the power of establishing such other federal courts as it sees fit.[98] Furthermore, the jurisdiction of the Supreme Court and Federal Courts may be circumscribed "under such regulations as the Congress shall make."[99] Although the Constitution permits these cross-branch interferences, courts will invoke the separation of powers when they perceive intrusion into the judiciary's core jurisdiction beyond what is sanctioned by the Constitution. Thus, in the historic 1872 case of United States v Klein, the Court invalidated legislation directing the Court to interpret a previous law in a manner that would preclude former Confederate soldiers the benefit of compensation for property loss. The Court, in perceiving that it was being "forbidden to give effect to evidence which, in its own judgment such evidence should have", found that Congress had "passed the limit which separates the legislative from the judicial power".[100]

America's adherence to the separation of powers theory is thus a matter of degree. The Federal Constitution faithfully reflects both the first and third principles of the pure theory: the government is divided into executive, legislative, and judicial branches, and the membership of each is kept strictly separate. Indeed, it has been said that the rigidity with which the latter precept has been observed is "the most significant aspect of the doctrine in forming the special character of American government."[101] However, the American Constitution clearly departed from the second principle's strict division of governmental powers along functional lines. As Justice Blackmun observed, writing for the majority in Misretta v United States:

> In adopting this flexible understanding of separation of powers, we simply have recognised Madison's teaching that the greatest security against tyranny… lies not in a hermetic division between the

[97] *Clinton v City of New York* 524 US 417 (1998).
[98] Tribe, *American Constitutional Law* (n 72) 33.
[99] ibid 33.
[100] ibid 39.
[101] ibid 134.

> Branches, but in a carefully crafted system of checked and balanced power within each Branch.[102]

As we have seen, the dilemma of indeterminate categorisation of state powers also necessitated, in the words of the Supreme Court, a "pragmatic, flexible view of differentiated governmental power".[103]

V. The Separation of Powers in Canada

A. Fusion of the executive and legislature

The immediate difference between the American and Anglo-Canadian systems, as they relate to the separation of powers, is the latter's flagrant breach of the pure theory's third principle: the prohibition on the plurality of office. In the Westminster system, the executive Cabinet consists entirely of members of the legislature. This duality was a main criticism of British government during and after the American Revolution. In The Rights of Man, Thomas Paine denounced a system that allowed the same officials to justify in one capacity the measures that they advise and carry out in another; a system in which "the advisers, the actors, the approvers, the justifiers, the persons responsible and the persons not responsible, are the same persons."[104] As for the room such an arrangement leaves for the separation of powers theory, the moguls of British Constitutional theory were convinced the theory had no place whatsoever in the parliamentary system. Walter Bagehot, in The English Constitution, dubbed "erroneous" those descriptions of the Constitution in which "the legislative, executive, and judicial powers are quite divided [such that] each is entrusted to a separate person or set of persons [and] no one of these can at all interfere with the work of the other".[105] In The Law of the Constitution, Dicey also declared the separation of powers an idea "alien to the conceptions of modern Englishmen".[106] Bagehot explained that the concept of a separation of powers, where "ultimate power is different upon different point—now resid[ing] in one part of the constitution, and now in another" is inconsistent with the English system of parliamentary supremacy, in which "the supreme determining power is upon all points the same".[107] Within

[102] *Misretta* (n 93) [381].
[103] *Buckley v Valeo* 424 US 1 (1976) [122], cited in Misretta (n 93) [381].
[104] Thomas Paine, *Rights of Man* (University College Cork 2014) 137 <https://www.ucc.ie/archive/hdsp/Paine_Rights_of_Man.pdf.> accessed 5 November 2017.
[105] Walter Bagehot, *The English Constitution* (OUP 1961) 2.
[106] Dicey (n 47) 337.
[107] Bagehot (n 105) 194–195.

the English system, "[n]o matter whether the question upon which it decides be administrative or legislative, [Parliament] can despotically and finally resolve".[108]

Rather than a separation between legislative and executive powers, Bagehot asserted their fusion to be "[t]he efficient secret of the English Constitution".[109] The connecting link, divined Bagehot, in what is undoubtedly the most famous sartorial metaphor in constitutional law, is the Cabinet—the "buckle which fastens" the legislature to the executive.[110]

From this commentary on the constitution of the United Kingdom, to which the Canadian Constitution is "similar in Principle",[111] it is readily apparent that "the separation of powers in Anglo-Canadian constitutional law is neither explicit nor complete."[112] Peter Hogg, a leading authority on Canadian constitutional law, explains that this stems from the parliamentary system being a form of "responsible government".[113] This appellation denotes the accountability of the executive to the legislative assembly. The Prime Minister holds the premiership by virtue of being the leader of the party commanding a majority in the House of Commons. If the House of Commons passes a motion of no confidence, or if the government is defeated on a vote of sufficient import, the Premier is deemed to have lost the confidence of the majority of the House and cannot continue in office.[114] The Premier must then resign or call elections. This differs from the American system in which the President serves out his term in office regardless of the support of Congress, which is not uncommonly controlled by a party different than the one to which the President belongs.[115]

Thus, the national legislature gives the Cabinet the power to rule and is simultaneously ruled by it, as the Cabinet comprises the leaders of the party predominating in the legislature.[116] Naturally, this marriage of executive and legislative branches is a recurring theme in Canadian jurisprudence. In Attorney General of Québec v Blaikie et al, the Supreme Court ruled that Section 133 of the British North America Act 1867,[117] stipulating French and English language requirements for legislation, also applied to executive Orders in Council issued by provincial governments, as well as to regulations and orders emanating from

[108] ibid 201.
[109] ibid 9.
[110] ibid 11.
[111] Constitution Act 1867 (Canada), 30 & 31 Vict c 3, preamble.
[112] RG Brian Dickson, *The Rule of Law: Judicial Independence and the Separation of Powers: An Address by The Right Honourable Brian Dickson, P.C. Supreme Court of Canada to The Canadian Bar Association* (sn 1985) 6.
[113] Peter W Hogg, *Constitutional Law of Canada*, 2016 Student Edition (Thomas Reuters 2016) ch 9-2.
[114] ibid ch 9-22.2–9-22.3.
[115] ibid 9-3.
[116] ibid 9-22.1.
[117] British North America Act 1867 (Canada), 30 & 31 Vict c 3.

subordinate statutory bodies.[118] In determining that such delegated legislation should be treated the same as legislative enactments for the purposes of Section 133, the Court considered the practical implications of executive-legislative fusion:

> [I]t is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body.[119]

Accordingly, the Court found that legislative powers delegated by the legislature to the executive, "which is part of itself", must be viewed "as an extension of the legislative power of the legislature" such that "the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature".[120]

Even where asserting a distinction between executive and legislative branches might appear advantageous, their symbiosis in the parliamentary system means that the executive often cannot escape being implicated in actions of the legislature. For this reason, in Wells v Newfoundland the Supreme Court held that the Newfoundland Government could not point to the passage of a provincial statute as an event that had frustrated its contract with the Plaintiff so as to relieve it from liability. The Court refused to entertain such a claim from the Province, given that "the same individuals control both the executive and legislative branches of government… therefore it is disingenuous for the executive to assert that the legislative enactment of its own agenda constituted a frustrating act beyond its control".[121]

A more pernicious side of the parliamentary arrangement came to into focus in Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources).[122] In that case, Petro-Canada, a Crown Corporation, had refused to furnish information to the Auditor General who was investigating on Parliament's behalf the propriety of a major asset purchase made with appropriated funds. The Governor in Council, which approved Petro-Canada's annual budget, refused to order Petro-Canada's compliance with the Auditor General's request for disclosure.

[118] *Attorney General of Québec v Blaikie et al* [1981] 1 SCR 312 [333].
[119] ibid [320].
[120] ibid.
[121] *Wells v Newfoundland* [1999] 3 SCR 199 [53].
[122] *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* [1989] 2 SCR 49.

In these circumstances, the Auditor General's only statutory recourse, set out in Section 7(1)(b) of the Auditor General Act 1976-77,[123] was to report to Parliament. That body, however, he found unwilling to take the Government to task for its lack of transparency. The Court, to which the Auditor General turned for redress in light of Parliament's lethargy, refused to provide an alternative remedy to the parliamentary reporting procedure. The fact that the thoroughly conservative Parliament was indisposed to scrutinise questionable expenditures made by the Mulroney Administration was merely a symptom of the Westminster system, and, as such, not reviewable by the Court. The Court could only shrug its shoulders at the realities of the system and inform the Auditor General that he must do the same:

> It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not… constitutionally cognizable by the judiciary.[124]

As the Supreme Court made clear, for better or worse, there is no separating the executive from the legislature in Canada's parliamentary system.

Like Bagehot and Dicey before him, Peter Hogg has observed the fate to which the separation of powers theory is condemned in a parliamentary system: "The close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions."[125] The Supreme Court of Canada has often agreed with this view. Indeed, on multiple occasions[126] the Court has cited the following passage from Hogg:

> There is no general 'separation of powers' in the Constitution Act, 1867. The Act does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only 'its own' function. As between the legislative and executive branches,

[123] Auditor General Act 1976–77 (Canada).

[124] ibid [103].

[125] Hogg (n 113) ch 14-5.

[126] *Douglas/Kwantlen Faculty Assn v Douglas College* [1990] 3 SCR 570 [601] (La Forest J); *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 [52] (McLachlin J, dissenting); *Re Residential Tenancies Act*, 1979 [1981] 1 SCR 714 [728] (Dickson J). See also *Reference re Secession of Quebec* [1998] 2 SCR 217 [15].

> any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any such separation. As between the judiciary and the two political branches, there is likewise no general separation of powers. Either the Parliament or the legislatures may by appropriate legislation confer non-judicial functions on the courts and… may confer judicial functions on bodies that are not courts.[127]

Incredibly, notwithstanding the above, the separation of powers theory is not uncommonly referred to in Canadian jurisprudence as a "fundamental principle of the Canadian Constitution."[128] Still more ironic, given the pronouncements of Bagehot and Dicey on the subject, is where the Supreme Court has located the source of this principle of Canadian law. "The separation of powers", wrote Justice McLachlin (as she then was) in her dissenting opinion in Cooper v Canada, "was incorporated into the Canadian Constitution by the Constitution Act 1867, through that provision's reference to a constitution 'similar in Principle to that of the United Kingdom.'"[129] The majority in Harvey v New Brunswick pointed to the same preambular clause as the source of the separation of powers in the Canadian Constitution, declaring the principle to be "inherent in British parliamentary democracy".[130]

B. Separation of the judiciary from the political branches

The separation of powers, to the extent that it applies in Canada, concerns the relationship between the courts and the political branches of government. Though a separation of powers in toto is incompatible with Canada's state structure, there is a conviction that some measure of separation is fundamental to the state's institutional arrangement. Justice Dickson, formerly of the Supreme Court, observed that, "some of the powers in the constitution were and still are, so separated that their holders have autonomous powers."[131] Justice Dickson explained that "judges have power of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded

[127] Hogg (n 113) 7–37.
[128] *Provincial Judges Reference* (n 37) [138]. See also Cooper (n 37) [28] and *Doucet–Boudreau v Nova Scotia* 2003 SCC 62 [94].
[129] *Cooper* (n 37) [22]. See also *Canada v Vaid* 2005 SCC 30 [21]; Dickson (n 112) 6.
[130] *Harvey v New Brunswick* [1996] 2 SCR 876 [68].
[131] Dickson (n 112) 6.

as a separate and independent part of the constitution".[132] As alluded to by Justice Dickson, the application of the separation of powers theory in Canada has been largely, if not exclusively, focused on "the relationships between the legislature and the executive on the one hand, and the judiciary on the other".[133] The dissent in Doucet-Boudreau v Nova Scotia summed up the extent of the theory's application in Canada accordingly: "Our Court has strongly emphasised and vigorously applied the principle of separation of powers in order to uphold the independence of the judiciary" and ensure that courts "as a general rule, avoid interfering in the management of public administration."[134]

However, not even in this respect does the principle hold fast in Canadian practice. One illustration of this is the Supreme Court's power to render advisory opinions. This is a traditionally "executive" function, performed by the Attorney General and other law officers of the government.[135] However, the Court has held that, because "the Canadian Constitution does not insist on a strict separation of powers[,] Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts."[136] Though the function may be "legal", the Court recognised it is not "judicial", being outside the framework of adversarial litigation or genuine controversy.[137] As the Court found nothing objectionable in this, clearly, as in the United States, the second principle of the pure separation of powers theory, mandating a strict separation of powers along functional lines, is not followed in Canada, even as between the judiciary and the political branches.

C. Normative value: an unhelpful guide to "proper spheres"

The object of the separation of powers theory in Canadian constitutional theory is to maintain some manner of separation between the courts and political branches. However, the theory provides little guidance as to how each side's proper sphere is to be delineated. Broad statements invoking the theory, but offering little utility in actually delimiting institutional boundaries, are found in a variety of Supreme Court decisions.[138] In the Provincial Judges Reference, the Court held that the separation of powers requires "the preservation of the basic structure" of

[132] ibid.
[133] *Provincial Judges Reference* (n 37) [140]. See also Doucet–Boudreau (n 128) [108].
[134] *Doucet–Boudreau* (n 128) [109]–[110].
[135] Hogg (n 113) 8–19, 7–37.
[136] *Secession Reference* (n 126) [14].
[137] ibid [15].
[138] *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 [389].

government.[139] In Canada v Vaid, the Court stated that, by virtue of the separation of powers principle, "[e]ach of the branches of the state is vouchsafed a measure of autonomy from the others."[140] In Cooper v Canada, the Court declared that "the separation of powers requires that certain functions be exclusively exercised".[141] But what functions? It is all very well to state that "the judiciary must be free from encroachment by government upon matters within its proper sphere" and, equally, "the judiciary must not encroach upon the proper domain and jurisdiction of government".[142] But with no functional guideline, the "proper domain" of each branch is indeterminate.

The divergence of opinion between the majority and dissent in Doucet-Boudreau, to take one prominent example, demonstrates how uncertainty in demarcating the legitimate sphere of each branch is in no way attenuated by appealing to the separation of powers theory. Doucet-Boudreau concerned a decision by the Nova Scotia Supreme Court to implement a novel remedy in seeking to uphold the French-speaking minority's language rights guaranteed by the Canadian Charter of Rights and Freedoms.[143] Francophones had been promised French language schools that, for years, failed to materialise, while their language increasingly faced the dangers posed by assimilation. To protect the Charter rights at issue in the face of the provincial government's inaction, the trial judge set compliance deadlines for the government and retained personal jurisdiction to order hearings to verify progress was being made.[144]

The majority upheld the lower court's remedy despite its dubiously executive character. The majority began by paying lip service to the existence of a separation of powers, admonishing that "courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance".[145] Then, as if to illuminate a threshold on which it really cast little, if any, light, the majority decreed that, "[d]eference [to the other branches] ends, however, where the constitutional rights that the courts are charged with protecting

[139] *Provincial Judges Reference* (n 37) [108].
[140] *Vaid* (n 129) [21].
[141] *Cooper* (n 37) [13]. See also *Provincial Judges Reference* (n 37) [139].
[142] Dickson (n 112) 11–12.
[143] Canada Act 1982, Schedule B Constitution Act 1982 (Canada), Part I Canadian Charter of Rights and Freedoms.
[144] *Doucet–Boudreau* (n 128) [5]–[15].
[145] ibid [34].

begin".[146] The majority went on to confirm the separation of powers principle as the supreme tool of pragmatism in Canadian jurisprudence:

> A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.[147] [emphasis in italics added]

Thus, even the vague standard of respecting each branch's proper sphere is subject to the broad qualification that judicial transgressions are permissible where necessary to uphold the Charter.

The dissent took a harder line on the requirements of the separation of powers. The dissent was of the mind that "[d]espite—or, perhaps, because of—the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada".[148] The dissent concluded that, "[b]y purporting to be able to make subsequent orders [after disposing of the matter before him], the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive".[149]

The two opinions in Doucet-Boudreau are diametrically opposed. Significantly, the Court as a whole approached the issue with a similar understanding of the separation of powers and its elasticity. The majority recognised that "extend[ing] the court's jurisdiction beyond its proper role… will breach the separation of powers principle",[150] while the dissent agreed that the separation of powers "flexibly delineates the domain of court action".[151] However, the fact remained that the separation of powers theory offered no guidance on the court's proper role or domain. The dissent therefore viewed the lower court's presumption to supervise executive compliance with its decision as an encroachment on executive power and a violation of the separation of powers. Conversely, the majority found that such an injunction was central to the court's ability to fashion Charter remedies, similar to contempt proceedings, garnishments, and writs of seizure.[152] What the majority perceived as the exercise of a core judicial right, the dissent viewed as an

[146] ibid [36].
[147] ibid [56] (emphasis added).
[148] ibid [106].
[149] ibid.
[150] ibid [105].
[151] ibid [94] (emphasis added).
[152] ibid [70].

unacceptable intrusion into the executive's core competencies. The divergence in the Court's opinion is symptomatic of the lack of guidance proffered by the theory.

In Canada, the "separation of powers" is not used to indicate a division of governmental power according to function, nor a prohibition on the plurality of office, nor the institutional restraints on each branch that such an arrangement is said to give rise to. It is of little to no practical use in defining the appropriate boundaries between the courts and the other branches or identifying the powers that might lie within those boundaries. In short, the separation of powers is merely a catch-all phrase to refer to Canada's existing arrangement of state powers. It seems that, as Sir William Ivor Jennings, one of the twentieth century's leading authorities on constitutionalism, declared,

> [I]f a political principle which has some basis in reason receives general acceptance and can be formulated in a neat phrase, it becomes a reason in itself; its original justification is forgotten, and it is used for purposes for which it was never intended.[153]

D. Saving grace: the cautionary function

Despite the criticism that, in Canada, the separation of powers principle lacks normative value for institutional arrangement, the existence of the principle does have one redeeming quality. The persistence of the idea of a "separation of powers" in the ethos of Canadian constitutionalism encourages a measure of caution before either the courts or the political branches of government decide to undertake a course of action with the potential to affect the existing constitutional structure. The unarticulated "proper role" of each branch, whatever it may be, is duly considered before any such action is taken. In Vaid, for instance, the idea that a separation of powers must be maintained imbued the Court with a sense of prudence before rendering a decision with the potential to interfere with parliamentary privilege and hence Parliament's bona fide functions. At the same time, the principle was flexible enough that the Court was not compelled to countenance such an injustice as Parliament "deny[ing] its employees human rights protections which Parliament itself imposed on every other federal employer".[154] The point, however, is the value of the initially cautious posture assumed by the Court. If the Court was not conditioned to observe such caution, the legislature might be deprived of control over its own procedure. In such an eventuality, "inefficiency would result from

[153] Jennings (n 42) 25.
[154] *Vaid* (n 126) [2].

the delay and uncertainty would inevitably accompany external intervention".[155] Herein lies the value of the separation of powers principle in Canada, as the Court's caution proceeds partly from a notion that there is a separation of powers among the branches of the Canadian government that must be respected. The separation of powers is not a matter of ideological orthodoxy, nor, as the Court has stated, is it a sign of respect for parliamentarians.[156] It is a principle that militates against the weakening of any branch of government, not so much to prevent the strengthening of another branch, but to ensure the continuing effectiveness and efficiency of all branches.

VI. Comparison: Canada and the United States

One key difference between Canadian and American practice concerning the separation of powers is that, in Canada, there is less emphasis on allocating state powers on the basis of function. This method of allocation is, in American constitutional theory and practice, partially maintained outside the established regime of checks and balances. Thus, references to state actions that are, for instance, "quintessentially executive",[157] are not uncommon in American jurisprudence. However, this type of labelling, as a precursor to appropriate allocation, is not reflected in Canadian jurisprudence, which evinces greater concern for branches carrying out their "proper roles" than respecting functional divisions. In executing its perceived proper role, one branch may legitimately infringe on the functions of another. This variance in state practice is evidenced by the Supreme Court of Canada's power to render advisory opinions—a prerogative not shared by its American counterpart because the function is not, strictly speaking, judicial.[158]

Apart from this difference, the principle serves a relatively similar purpose in both countries: preventing an undue encroachment of one branch upon another, such that one branch is unacceptably weakened, or another unacceptably strengthened, producing either the threat of tyranny or inefficiency.

The core comparison therefore comes down to the major difference between the two systems of government as they relate to the separation of powers theory. This difference centres on Canada's patent violation of the pure theory's third principle prohibiting plurality of office, a principle so vigilantly adhered to in the United States. The parliamentary arrangement, according to Bagehot, wards off political deadlock—that pitfall of the American system that has led some constitutional scholars to declare, "the fundamental problem, in trying to make the

[155] ibid [29].
[156] ibid.
[157] *Morrison* (n 80) [705]–[706].
[158] *Secession Reference* (n 126) [13]–[15].

government of the United States work effectively, is not to preserve the separation of powers, but to overcome it."[159] A statutory initiative emanating from the President may be so altered by demands of individual congressmen with their own distinct interests that, if the bill does emerge from the congressional committees, the series of compromises it has been made to reflect often leave it bearing no resemblance to what was initially proposed.[160] Furthermore, while Congress presides over the law, the President carries out its administration, and "the President does not have to exert himself in carrying out laws he doesn't approve of".[161] Though the President may be impeached for gross negligence, "between criminal nonfeasance and zealous activity there are infinite degrees".[162] In the extreme, such a dynamic may devolve into what Professor Bruce Ackerman of Yale Law School terms a "crisis in governability", characterised by "endless backbiting, mutual recriminations, and partisan deadlock" with each branch of government using its constitutional prerogatives to frustrate the activities of the others.[163]

In Canada, not only does the separation of powers principle not prevent the subjugation of one branch by another as it does in America, the principle actually protects such subjugation. The Supreme Court of Canada in the Provincial Judges Reference explained that one aspect of the Canadian separation of powers is the protection of the "hierarchical relationship between the executive and the legislature, whereby… once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices".[164] In Canada, the separation of powers thus allows for overlap of the executive and legislative branches and also maintains the subjugation of the former by the latter. This subjugation guards against the kind of foot-dragging and mutual-frustration techniques that are facilitated by the executive-legislative divide in the American version of the separation of powers. Government policy, perceived Bagehot, "acts by laws—by administrators; it requires now one, now the

[159] Goldwin and Kaufman (n 89) 138–139.
[160] Ackerman (n 8) 254.
[161] Bagehot (n 105) 197.
[162] ibid.
[163] Norman Dorsen, Comparative Constitutionalism: Cases and Materials (Thomson/West 2010) 215.
[164] *Provincial Judges Reference* (n 37) [139].

other" and the excellence of the British Constitution is that it has achieved unity between the two and "in it, the sovereign power is single, possible, and good".[165]

VII. Conclusion

The meaning of the "separation of powers" has altered significantly since the theory's inception during the English Civil War and early experiments with the theory in the newly liberated American colonies. The deficiencies of the pure version of the theory quickly manifested themselves, and the mixed-government mechanism of checks and balances was superimposed onto the theory to compensate. Despite contrary misconceptions, a pragmatic and flexible approach rather than a strict approach toward the separation of powers was intended by the Framers of the American Constitution. Generally, such an approach has also prevailed in American jurisprudence. While there is still impetus to allocate state powers to each branch of government according to function, a fundamental element of the American Constitution—its checks and balances—precludes any such rule being strictly adhered to. The indeterminate nature of many state activities, which defy the requisite labelling, also precludes such a rule from being faithfully observed. The United States government is, however, divided into executive, legislative, and judicial branches, and rigidly enforces a ban on concurrent membership in any two branches. This is more than can be said for Canada, as far as observance of the pure theory of the separation of powers is concerned.

The Anglo-Canadian system of parliamentary government is fundamentally at odds with the prohibition on the plurality of office, given that the executive is composed exclusively of members of the legislative assembly. In Canada, the theory is interpreted exclusively in terms of the relationship between the courts on the one hand, and the two political branches of government on the other. The separation of powers does not refer to anything more concrete than the institutional arrangements that characterise the Canadian government at any given time. The doctrine serves as a cautionary brake upon any branch contemplating any sort of foray outside its conventional sphere of activity. While this strays far indeed from the separation of powers as originally conceived, the theory, so understood, serves no small benefit in Canadian constitutional practice.

It is difficult to directly compare the separation of powers in Canada and the United States; to do so is to deal in two different currencies. In both nations, the principle has the same salutary effect of cautioning against adventurist institutional action. However, in the United States, the separation of powers has been interpreted to require a rigid separation of the political branches from one another, and the simultaneous arming of each branch with the constitutional means of foiling the

[165] Bagehot (n 105) 202–203.

others' designs. While this approach to the separation of powers may prevent an undesirable accumulation of power in any single branch of government, it also has the unwelcome effect of facilitating political stalemate unless the branches exhibit a sufficient degree of cooperation and willingness to compromise. The Canadian approach may have the advantage of avoiding this predicament.