

THE REAL THREE-BODY PROBLEM: THE SEPARATION OF POWERS TODAY

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INTRODUCTION: QUESTIONS FROM THE CASE OF *BOWSHER V. SYNAR*

There are many possible entry points into the subject of today's constitutional separation of powers. One such entry point is through the well-known Supreme Court case of *Bowsher v. Synar*.¹ *Bowsher*, in this case, was the Comptroller General of the United States, a position the Court determined to be legislative and thus forbidden the exercise of executive branch powers.²

The *Bowsher* Court declared at the outset that “the Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.”³ The purpose of this “separating and dividing the powers of government”⁴ was said to be, “of course,”⁵ to “diffuse power the better to secure liberty.”⁶ A bit more elaborately, the Court declared that “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.”⁷ And according to the *Bowsher* Court, the three branches were “wholly independent”⁸ of one another.

In further justifying the idea of the separation of powers, the *Bowsher* Court cited the historic desire “to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power.”⁹ Taken literally, this suggests that the separation of powers and checks and balances are not coordinate, complementary, or mutually limiting principles, but that the separation of powers is a means toward the end of having a checking mechanism on government power.

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1. 478 U.S. 714 (1986). For a recent summary, see *Collins v. Yellin*, 594 U.S. 220, 245 (2021). There are many academic responses to *Bowsher*. See, e.g., Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 350–51 (1989); Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287, 292–93 (1989); Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

2. *Bowsher*, 478 U.S. at 721–32.

3. *Id.* at 721 (quoting the legislative veto case of *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

4. *Id.*

5. *Id.*

6. *Id.* (quoting the classic separation of powers case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

7. *Id.* at 722 (quoting THE FEDERALIST NO. 47, at 325 (James Madison) (Jacob E. Cooke ed., 1961) (quoting Montesquieu)).

8. *Id.*

9. *Id.*

Consider, then, the desire for “full, vigorous, and open debate on the great issues affecting the people.”¹⁰ As of the time of the adoption of the constitutional separation of powers, there was, for nearly all persons, no guarantee of speech rights as against any government actor.¹¹ Perhaps the structural separation and checking provisions themselves afford some protection for full, vigorous, and open public issues debate. Or perhaps these separation and checking mechanisms actually do a fully satisfactory job, all by themselves, of protecting public issue speech. Or perhaps, finally, the structural separation and checking only minimally protects public issue speech.

But with each of these possibilities, the relation between the presumed political speech protective purpose of the separation of powers and today’s First Amendment becomes deeply problematic. Today’s First Amendment provides, by any measure, a remarkable degree of protection for speech by ordinary persons on public issues.¹² So to the extent that the goal of the separation of powers is to protect free political speech, today’s First Amendment is a much more direct, explicit, and tailored way to achieve that goal. The free speech clause may well have additional purposes, some non-political in nature.¹³ But the free speech clause is indeed often thought to focus crucially on promoting full, vigorous, and open public issue discussion.¹⁴

To the extent that we think of the separation of powers as intended to promote free political speech, we might well wonder what value the separation of powers doctrine still has. If we took the separation of powers more seriously, would we then have significantly freer political speech than we now have? And would that be desirable? Why shouldn’t the enforced free speech clause suffice?

However useful the separation of powers may once have been in optimizing the flow of political speech, it may well now seem redundant in light of the strong and extensive protection of such speech under the free speech clause. The best argument for some independent value of the separation of powers in

10. *Id.*

11. See U.S. CONST. amend. I, added after, e.g., the Speech and Debate Clause, U.S. CONST. art. I, § 6, cl. 1.

12. The reader is invited to search for European or Canadian equivalents of, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (subversive advocacy); *Rankin v. McPherson*, 483 U.S. 278 (1987) (protecting controversial political expression outside of the government employee’s job responsibilities); *Snyder v. Phelps*, 562 U.S. 443 (2011) (group-abusive political and cultural speech unwelcomed by funeral participants); *Watts v. United States*, 394 U.S. 705 (1969) (on the scope and limits of political true threat law).

13. For accounts of such possible purposes, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

14. See, e.g., ZACHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 115–24 (1960); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016); Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521 (1977); Greenawalt, *supra* note 13, at 140–47; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011). Note, in particular, the focus on the ‘checking’ function as emphasized in Blasi, *supra*.

protecting political speech focuses on judicial independence. Perhaps the courts would not have protected political speech under the First Amendment as well if the courts had not been largely independent from the president and Congress. Perhaps, at a specific level, the Court could not have fully protected political speech without the established power of judicial review established in *Marbury v. Madison*.¹⁵

On this understanding, political speech jurisprudence must still depend, at least indirectly, on the structural separation of powers. But even on this understanding, there is no obvious need for any general, three-branch separation of powers. We may assume that the Court must be independent, to whatever degree, of Congress, or of the Senate, and perhaps also of the president. But it is far from clear that the Supreme Court's robust protection of political speech also depends on the separation of Congress from the president, or on the president from Congress. The goal of a robust protection of political speech thus does not seem to get a full three-branch separation of powers theory off the ground.

Ultimately, the majority in *Bowsher* struck down the underlying deficit-reducing statutory arrangement at issue.¹⁶ Specifically, the majority declared that

Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws by an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.¹⁷

The *Bowsher* majority's reference here to 'practical terms' might seem to imply a functional, pragmatic approach to the separation of powers. The main alternative to a practical approach is that of a formalist, categorically focused, definitionally-oriented, line-drawing approach.¹⁸ The contest between varieties of formalism and functionalism in approaching separation of powers cases is perpetual.¹⁹

15. 5 U.S. 137 (1803).

16. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

17. *Id.*

18. For discussion of the functionalist versus formalist distinction in separation of powers cases, see, e.g., Thomas W. Merrill, *The Constitutional Principle of the Separation of Powers*, 1991 SUP. CT. REV. 225, 225–27 (“[T]he Court has alternated between the formal and functional constructions[.]”); M. Elizabeth Magill, *The Real Separation in the Separation of Powers*, 86 VA. L. REV. 1127, 1129 (2000) (referring to “two competing schools of thought, formalism and functionalism, and the predictable bickering back and forth between adherents to each school”); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (classifying thereunder the relevant Justices).

19. See, e.g., authorities cited *supra* note 18.

Justice White's dissenting opinion in *Bowsher*, however, takes the majority's approach not to be practical or functional, but to be "distressingly formalistic."²⁰ At the level of statutory text,²¹ the Comptroller General was well-insulated from congressional removal on political grounds.²² Removal of the Comptroller General would require a joint resolution of Congress,²³ with a possible presidential veto,²⁴ on only statutorily specified for-cause grounds,²⁵ and with subsequent judicial review.²⁶

Realistically, Congress's empowerment of the Comptroller General to make legislatively guided budget cuts, along with the Office of Management and Budget,²⁷ was, under the circumstances, more an admission of a congressional lack of self-control than an act of congressional aggrandizement, ambition, or power-seeking.²⁸ One could easily argue that Congress was recognizing its collective inability to generate responsible budgets consistently and was providing, through the Comptroller General, a statutory mechanism to reduce the resulting public harm.²⁹

Whether the majority in *Bowsher* was justified, on the merits, in rejecting this practical or realistic legislative arrangement is not crucial for our purposes. Instead, the point is that *Bowsher* illustrates the irrelevance of the familiar distinction between formalist and functionalist approaches to the separation of powers. In this respect, consider how a critic might characterize the Court majority's conclusion that the statute in *Bowsher* amounted to an illicit, ambitious power grab by Congress.

In Justice White's dissenting view, the majority's approach amounted to a "distressingly formalistic view of [the] separation of powers."³⁰ The supposed formalism of the majority lay in its attempt to discern and delineate formal boundary lines of constitutional authority between Congress and the executive, rather than to recognize real interbranch power relations.³¹ But Justice White's dissenting critique could also be expressed, just as naturally, by saying that the

20. *Bowsher*, 478 U.S. at 758 (White, J., dissenting).

21. See the Comptroller General's stringent removal protection provision at 31 U.S.C. § 703(e)(1)(b).

22. *See id.*

23. *See Bowsher v. Synar*, 478 U.S. 714, 727–28 (1986).

24. *See id.*

25. *See id.* at 728.

26. *See id.* at 729.

27. *See id.* at 732.

28. The logic of congressional pre-commitment regarding harmful legislative temptations has been explored by John Elster. *See* JOHN ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (rev. ed. 1984). For elaboration, see R. George Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?*, 18 CUMB. L. REV. 69 (1987). *See also* Gewirtz, *supra* note 1, at 351 (on congressional power renunciation in *Bowsher*).

29. *See* authorities cited *supra* note 28.

30. *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J., dissenting).

31. *See id.* at 761–64.

majority's approach was actually practical, functional, and pragmatic,³² but inaccurate, misguided, or otherwise unsuccessful on its own functionalist terms. On this line of analysis, the majority undertook a defective practical approach. The majority failed to perceive important pragmatic elements of the underlying circumstances.³³

The classic distinction between formalist and practical or functionalist approaches to separation of powers questions is, therefore, of minimal value. Functionalists must inevitably address the formal constitutional and statutory texts. And formalists must recognize that the separation of powers doctrine serves one or more practical purposes, which may be fulfilled to varying degrees. Otherwise, why adopt the doctrine in the first place? To depart from the underlying purposes or functions of the separation of powers would presumably tend to undermine the meaningfulness and authority of the Constitution. Moreover, formalism is ultimately based in some form of practical reason that involves functionally connecting constitutional textual means to one or more underlying constitutional purposes or goals. We might just as well say that 'excessive' formalism is impractical, or simply a form of bad functionalism.

Overall, then, the *Bowsher* case reflects multiple long-standing indeterminacies, fallacies, and unresolved problems that arise at the most basic levels of constitutional analysis and proliferate thereafter. We address further chronic difficulties below.

I. THE CONSTITUTIONAL SEPARATION OF POWERS AND ITS PURPOSES

The idea of constitutional separation of powers is the stuff of elementary school instruction. The principle may indeed seem clear, familiar, and uncontroversial. Consider the declaration by James Madison:

Power being found by universal experience liable to abuses, a distribution of it into separate departments, has become a first principle of free governments Hence the merited praise of governments modelled on a partition of their powers into legislative, executive, and judiciary, and repartition of the legislative into different houses.³⁴

The influential British observer A.V. Dicey later declared that "[t]he principle which . . . shapes every part of the American polity, is that distribution of

32. *See id.* at 726 (majority opinion) ("in practical terms" as being Justice White's focus). Note, certainly, that a concern for practicality, function, and purpose may include a concern for symbolic effects.

33. *See* authorities cited *supra* note 28.

34. JAMES MADISON, *Government of the United States*, NAT'L GAZETTE (Feb. 6, 1792), reprinted in JAMES MADISON: WRITINGS 508 (Jack N. Rakove ed., 1999); *see also* DAVID HUME, *Of the Balance of Power* (1752), reprinted in DAVID HUME'S POLITICAL ESSAYS 142 (Charles W. Hendel ed., 1953) ("[P]reserving the balance of power is founded . . . on common sense and obvious reasoning.").

executive, legislative, and judicial authority among bodies each coordinate with and independent of the other.”³⁵

The basic idea of the separation of powers may seem largely unproblematic, yet only a generation after the constitutional framers, Jeremy Bentham, in particular, was persuaded neither of the merits³⁶ nor the intelligibility³⁷ of the doctrine. Bentham concluded, specifically, that “[i]n general, those by whom this phrase [i.e., the balance of power] has been used have not known what they mean by it. It has no determinate meaning in their minds.”³⁸

Bentham’s view may seem extreme, but it is easy to argue that he was, in this respect, merely ahead of his time. Consider that the constitutional scholar Aziz Huq has observed that “[c]ontemporary academic writing on the Constitution’s separation of powers is thick on the ground, but prolixity has not precipitated much by way of consensus.”³⁹ Professor Rebecca Brown has similarly concluded that the separation of powers doctrine has become an “incoherent muddle.”⁴⁰ And the noted separation of powers specialist M.J.C. Vile has argued that the separation of powers “represents an area of political thought in which there has been an extraordinarily confusion in the definition and use of terms.”⁴¹

It is implausible that much of this doctrinal confusion could have been avoided simply by adopting an explicit textual separation of powers clause.⁴² Explicit constitutional provisions such as the terse Free Speech or Equal Protection Clauses are, in themselves, more the sources than the arbiters of contentious issues. Consider the language of California’s state constitutional

35. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 135–36 (8th ed. 1915) (reprint ed. 2024).

36. See JEREMY BENTHAM, HANDBOOK OF POLITICAL FALLACIES 163 (Harold A. Larrabee ed., 1971) (1824). In the prior generation, Condorcet had referred to what he saw as France’s “futile balance of powers.” See MARQUIS DE CONDORCET, SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND (1793), reprinted in CONDORCET: SELECTED WRITINGS 209, 237 (Keith M. Baker ed., 1976). See also BENJAMIN CONSTANT, PRINCIPLES OF POLITICS APPLICABLE TO ALL GOVERNMENTS (1815), reprinted in CONSTANT: POLITICAL WRITINGS 175, 180 (Biancamaria Fontana ed. & trans., 1988).

37. See BENTHAM, *supra* note 36, at 163.

38. *Id.* Bentham implicitly raises the question of the nature of the relationship between checks and balances on the one hand and the separation of powers on the other. Doubts about the separation of powers in this sense were then raised in G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 299, at 338 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821) (“It is implicit in the organic unity of the powers of the state itself that *one* and the same spirit decrees the universal and brings it to determinate actuality in implementing it.”).

39. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1518 (2018) (reviewing JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)).

40. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991), quoted in Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 349, 350 (2016).

41. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2 (2d ed. 1998) (1967).

42. For a reference to the non-adoption of any such clause, see *Trump v. United States*, 603 U.S. 593, 637 (2024).

separation of powers clause: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the other except as permitted by this Constitution.”⁴³ As one would expect, the separation of powers in California is actually far from complete separation, and a matter of one degree or another, according to context.⁴⁴

An important complication is that the most crucial separation of powers—or, in this case, checks and balances—may not concern distinguishing legislative, executive, and judicial powers, and then separating them in one way or another, to whatever degree. One might instead focus on the importance of socioeconomic classes and their divergent perceived interests. One might then seek stability or progress through a constitutional balancing of the contending socio-economic classes’ power.⁴⁵ Balancing one class against another could be as important as balancing one lawmaking and enforcement phase against another.

The balancing of socioeconomic class powers was crucial to the Baron de Montesquieu’s classic scheme.⁴⁶ As an American commentator rightly observed, Montesquieu “thought and wrote in terms of separation and balance as between orders and estates—king, nobles, commons,”⁴⁷ as distinct from more or less separable governmental phases, processes, or functions.⁴⁸ And it is hardly clear that judicially chasing elusive distinctions among legislative, executive, and judicial actions is today more important than the power relationships between and among our social and economic classes.⁴⁹

The American constitutional focus has instead been on issues arising from separation of governmental functions. The focus on three governmental functions, or else on three more or less distinct governmental branches, logically yields a total of six possible vectors of concern, where either of any two branches may seek to affect the others.⁵⁰ A case in which all three federal

43. *Simon v. City of San Francisco*, 135 F. 4th 784, 797 (9th Cir. 2025) (quoting CAL. CONST. art. III, § 3).

44. *See id.* at 804 (quoting *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 554, 539 (Cal. 2001)) (“Nothing in California’s separation of powers doctrine prevents informal coordination between the branches, but instead prevents ‘one branch of government from exercising the *complete* power constitutionally vested in another.’”).

45. *See, e.g.*, Malcolm P. Sharp, *The Classical American Doctrine of “The Separation of Powers”*, 2 U. CHI. L. REV. 385, 385 (1935) (“[T]he familiar idea that it is . . . the balance of different classes’ power, that is the essential feature of democracy.”).

46. *See* 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. XI, ch. 6, at 151–52 (Thomas Nugent trans., 1949) (reprint ed. 1962) (1748).

47. Benjamin F. Wright, *The Origins of the Separation of Powers in America*, 40 *ECONOMICA* 169, 170 (1933).

48. *See id.*

49. For brief discussion, see 2 JÜRGEN HABERMAS, *ALSO A PHILOSOPHY OF HISTORY* 292 (Ciaran Cronin trans., 2024) (2019).

50. Setting aside cases where all three branches are arguably involved. *See* Cass R. Sunstein, *The Separation of Powers Is a They, Not an It*, 48 *HARV. J.L. & PUB. POL’Y* 149 (2025).

branches were involved would further multiply the logically inescapable complications.

Regardless of these permutations, there is no hope of a meaningful, function-oriented separation of powers if we cannot sufficiently clarify what the purposes or goals of our separation of powers ought to be. We have already seen that the Supreme Court in *Bowsher* focused on securing “liberty.”⁵¹ Case law before⁵² and after⁵³ *Bowsher* supports *Bowsher*’s emphasis on the value of liberty. The thought, as classically expressed by Justice Robert Jackson, is that “the Constitution diffuses power the better to secure liberty.”⁵⁴

The goal of securing liberty, presumably beyond merely the freedom of political speech, is related in some fashion to that of avoiding governmental arbitrariness. Here, the classic judicial formulation is that of Justice Brandeis. In his *Myers* dissent, Justice Brandeis argued that “the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power.”⁵⁵ And there is inevitably some relation between individual liberty and the possible separation of powers goal of promoting government accountability.⁵⁶

But let us simply ignore any possible conflicts among goals such as securing liberty, avoiding arbitrary rule, and promoting accountability in government. Let us also ignore any possible differences between protecting the liberties we have and expanding both the types of liberties and the number of persons whose liberty is protected. And finally, let us ignore any possible disputes, of whatever severity, over even the basic meaning of individual liberty as of the founding in 1789.

What we cannot ignore, though, is that the basic meaning of liberty, including in constitutional contexts, is today deeply and indeed essentially contested.⁵⁷ Even if the framers and ratifiers were of one mind on the basic relevant meaning of ‘liberty’, our own culture, today, is not. This creates a problem in constitutional theory.

51. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

52. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

53. *See, e.g., Collins v. Yellin*, 594 U.S. 220, 245 (2021) (“[T]he separation of powers is designed to preserve the liberty of all the people.”).

54. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). The liberty referred to here is presumably broader than freedom of political speech. For discussion of the framers’ concern especially with a tyranny of the majority impairing individual rights, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

55. *Myers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting). For discussion, see, e.g., David Fellman, *The Separation of Powers and the Judiciary*, 37 REV. POLITICS 357–58 (1975); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989).

56. *See, e.g., Huq & Michaels, supra* note 40, at 346.

57. *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC’Y 167, 167 (1955).

To borrow the dichotomy of Sir Isaiah Berlin, we care about both negative liberty and positive liberty.⁵⁸ Negative liberty is roughly a matter of the absence of social restraints on thinking, choice, and action.⁵⁹ Those social restraints can certainly take the form of binding law. This is Berlin's own basic negative liberty formulation:

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree[.]⁶⁰

Liberty understood in roughly this fashion was plainly a concern of those who fashioned and then later expounded American constitutional principles.⁶¹

But liberty has also long been understood and valued in a plainly different sense.⁶² Berlin classically referred to this sense as one of positive liberty.⁶³ On this view, the above-described negative liberty sometimes amounts merely to a lack of interference with one's personally damaging choice to engage in addictive or otherwise gravely self-destructive acts, for no social payoff.⁶⁴ Negative liberty could thus take the form of a predictably wasted, pointless life.

Positive liberty, in contrast, has historically involved a focus on something like the realization of one's potential, personal development, self-fulfillment, genuine autonomy, and authentic flourishing.⁶⁵ Even an age of relativism, skepticism, and subjectivism cannot entirely eradicate all differences between a life's pointlessness and its meaningfulness.⁶⁶ There is thus normally thought to

58. See ISAIAH BERLIN, *Two Concepts of Liberty* (1969), reprinted in LIBERTY 166, 178–94 (Henry Hardy ed., 2002).

59. For background, see the essays in FREEDOM: A PHILOSOPHICAL ANTHOLOGY (Ian Carter, Matthew H. Kramer & Hillel Steiner eds., 2007); Ian Carter, *Positive and Negative Liberty*, STANFORD ENCYC. OF PHIL., (Nov. 19, 2021), <https://plato.stanford.edu/entries/liberty-positive-negative> [<https://perma.cc/F6RV-RAFM>].

60. BERLIN, *supra* note 58, at 169. One's negative liberty can be impaired not only by prevention of one's action, but by various sorts of after-the-fact punishments.

61. For a defense of negative liberty in exceptionally stark terms, see Henry David Thoreau, *On the Duty of Civil Disobedience*, in R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION 25 (2d ed. 1992). More recently, see, e.g., F. A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

62. As expounded in the authorities cited *supra* note 59.

63. See BERLIN, *supra* note 58, at 178.

64. See *id.* at 169.

65. For Berlin's own account, see *id.* at 178–80, 187–194.

66. For contemporary discussion, see, e.g., MARTHA NUSSBAUM, CREATING CAPABILITIES (2011); CHARLES TAYLOR, *What's Wrong with Negative Liberty?*, in 2 PHILOSOPHICAL PAPERS 211 (1985). This is certainly not to deny that persons must have some negative liberty to realize their potential in accordance with positive liberty. For a schematic account, see Gerald C. McCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967). Nor is this to deny the potential for political abuse of positive liberty. See, e.g., John Plamenatz, *On le Forcera d'être Libre* (1965),

be a difference between, say, learning how to become a person who cures a dread disease, and becoming the kind of person who obsesses over counting blades of grass.

None of this is to take sides between those who emphasize some form of negative liberty, and those who instead emphasize a sensible form of positive liberty. The point is instead to recognize one of the crucial limitations of the doctrine of the separation of powers, insofar as it is intended to secure, or promote, liberty.⁶⁷ The idea of securing or promoting liberty through the separation of powers tells us nothing about the innumerable basic choices we face among forms of negative and positive liberty. Are negative and positive liberty in general equally worthwhile? Which forms of either negative or positive liberty merit greater sacrifice? Is the separation of powers equally effective in all these contexts? Equally costly in terms of other values that must be sacrificed?

This is not to suggest that the constitutional framers should have clarified what they meant, even roughly, in the context of the separation of powers. Even if they had, we would then still have to determine whether to feel constitutionally bound by the framers' text or their otherwise conveyed meaning. The point is rather that thinking of somehow promoting liberty as a purpose of the separation of powers settles little of consequence and leaves all the interesting questions unresolved.

Complicating matters is that other, often conflicting, purposes beyond those noted above are ascribed to the separation of powers. For some writers, for example, the separation of powers is not crucially a sacrifice of efficient government for the sake of liberty. Rather, the primary goal of the separation of powers is actually a certain kind of efficiency.⁶⁸ Thus N.W. Barber has argued that "[t]he essence, though not the whole, of separation of powers lies in the meeting of form and function."⁶⁹ The goal of the separation of powers is thus "the matching of tasks to those bodies best suited to execute them."⁷⁰

On such interpretations, the separation of powers principle is primarily a matter of an optimal division of the labor of governing.⁷¹ In a phrase, "[t]he core

reprinted in HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS 318 (Maurice Cranston ed., 1972).

67. See *supra* notes 51–54 and accompanying text.

68. See, e.g., N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59 (2001).

69. *Id.* at 59.

70. *Id.*

71. See *id.* This logic might be extended to cover principles of federalism as well, if we choose to think of federalism as a vertical, rather than horizontal, form of the separation of powers. For broader perspectives on federalism, though, see Andreas Follesdal, *Federalism*, STANFORD ENCYC. OF PHIL. (Nov. 2, 2022), <https://plato.stanford.edu/entries/federalism> [<https://perma.cc/CE6Z-3RC2>]. For the classic "laboratory of the states" approach, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

of the doctrine is not liberty, as many writers have assumed, but efficiency.”⁷² The problem for all those concerned about separation of powers is that on many understandings, liberty and efficiency, and liberty and utility more broadly, come into frequent and basic conflict.⁷³

On some accounts, though, there is a basic compatibility between liberty on the one hand and certain forms of ‘inefficiency’ on the other. The slowly grinding and thus inefficient wheels of the separation of powers may prevent illiberal projects from being legally imposed on the public. Or relatedly, delays in law-making may amount to “a positive feature of the rule of law”⁷⁴ insofar as such inefficiencies promote legal stability,⁷⁵ predictability,⁷⁶ and broad consensus-building,⁷⁷ all for the sake of human flourishing.⁷⁸ The difficult task is then to distinguish benign delays from the pathologies of governmental rent-seeking mechanisms, gridlock,⁷⁹ and the chronic inability to address serious long-term threats to the public well-being.⁸⁰

A natural temptation, at this point, is to declare that there are, or should be, several distinct basic functions of the separation of powers. The great separation of powers scholar William B. Gwyn referred to possible functions such as achieving liberty,⁸¹ avoiding tyranny,⁸² promoting the rule of law,⁸³ reducing the group bias effects of government officials,⁸⁴ and promoting governmental efficiency.⁸⁵

72. Barber, *supra* note 68, at 59. See also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993–96 (2011). For further discussion, see Aileen Kavanagh, *The Constitutional Separation of Powers*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 221–23 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

73. Consider, for example, the classic conflict between the intense wishes of a large majority and the religious or speech liberties of a small, unpopular group of dissenters, as in, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (Westboro Baptist funeral picketing case).

74. MELISSA MOSCHELLA, *ETHICS, POLITICS, AND NATURAL LAW: PRINCIPLES FOR HUMAN FLOURISHING* 153 (2025).

75. *See id.*

76. *See id.* at 153–54.

77. *See id.* at 154.

78. *See id.*

79. *See, e.g.*, Jeffery Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), www.newyorker.com/magazine/2013/12/09/our-broken-constitution [https://perma.cc/QK5D-B6FW]. Classically, see MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982) (on pathologically increasing institutional rigidities).

80. To the extent that members of Congress in particular cannot point to their own contributions to important broad public successes, the pathologies of rent-seeking behavior and irresponsible spending and regulation become correspondingly more attractive. *See generally* GORDON TULLOCK, *THE RENT-SEEKING SOCIETY* (Charles K. Rowley ed., 2005).

81. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers*, 30 WM. & MARY L. REV. 263, 264–65 (1989) (drawing upon W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965)).

82. *See id.* at 264.

83. *See id.*

84. *See id.*

85. *See id.* at 264–65. *See also* Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 343 (1989).

The problem here, though, is one of the now multiplied basic conflicts and indeterminacies. There is no obvious hierarchy among such functions. There is no consensus on their actual or desirable tradeoff rates. The most obvious tradeoffs may be between promoting government by hard-won consensus, and prompt efficiency in responding to substantial problems. Efficiency in the sense of allocating powers to the most appropriate branch may have little connection to efficiency in responding to a crisis, or in translating legitimate democratic preferences into law. And there may well be harsh conflicts between minimizing the risks of tyranny, on the one hand, and substantially promoting liberty on the other.⁸⁶ Minimizing the risk of tyranny may require that we reject policies that give us a likely higher and stable level of liberty, with only a slightly higher, and still quite low, risk of tyranny. And perhaps even tyranny in some sense comes in morally important degrees.⁸⁷ Not all despotisms are equal in their benevolence, enlightenment, or overall impact of liberties.⁸⁸

At this point, it is fair to conclude that the separation of powers doctrine amounts largely to a series of conceptual conflicts and basic uncertainties, compounded and piled atop one another. But in light of the doctrine's centrality to contemporary discussion, we should, for pragmatic reasons, assume that there is sufficient meaning to the doctrine and proceed accordingly to a more substantive evaluation and critique. We undertake such an evaluation and critique below.

II. SOME SUBSTANTIVE PROBLEMS OF THE CONSTITUTIONAL SEPARATION OF POWERS

Let us then simply assume that there is some sufficiently coherent doctrine of the separation of powers to allow for meaningful substantive discussion and critique. For such purposes, there need not be a commonly shared core, or essence, of the separation of powers doctrine.⁸⁹ This means, though, that many separation of powers advocates can deny in good faith that any given critique, however substantial, touches their own favored version of the doctrine.

There is also the problem of the tendency of some leading proponents of the separation of powers to grossly overstate their case. Overstated claims have been common and conspicuous in this context. There may, conceivably, be

86. Consider the disadvantages of maxi-min strategies, as well as of the so-called, and often self-defeating, precautionary principle. See, e.g., Adam Hayes, *Ultimate Guide to Game Theory: Principles and Applications*, INVESTOPEDIA (July 18, 2025), www.investopedia.com/terms/g/gametheory.asp [<https://perma.cc/UZQ7-2U9G>]; CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

87. Consider the differences between a tyrant who rules arbitrarily, without check or consultation, but for generally benign, if not beneficial purposes, and the tyranny of any of the most important mid-twentieth century dictators.

88. For a very brief overview, see Jeremy Black, *Enlightened Despotism*, 60 TEACHING HIST. 32 (1990). At greater length, see DAVID FRASER, *FREDERICK THE GREAT: KING OF PRUSSIA* (2001).

89. For background, see, e.g., Halmar Wennerberg, *The Concept of Family Resemblance in Wittgenstein's Later Philosophy*, 33 THEORIA 79 (1967).

some minimal legitimate role for overstating the case for the separation of powers, but obvious exaggerations carry credibility risks. Consider, merely for example, the official French Declaration of the Rights of Man.⁹⁰ This celebrated document declares that “[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”⁹¹ Sir William Blackstone had earlier declared, with regard to the legislative and executive, that “wherever these two powers are united together, there can be no public liberty.”⁹²

In the American constitutional context, Alexander Hamilton approved of a related exaggeration originally propounded by Montesquieu. Hamilton wrote that “I agree that ‘there is no liberty if the power of judging be not separated from the executive and legislative powers.’”⁹³ This sentiment may be of the sort that could have loosely inspired the recent overruling of the *Chevron* doctrine⁹⁴ by the *Loper Bright* case.⁹⁵ We need not herein compare *Chevron* and *Loper Bright* on their respective treatments of the separation of powers. Our point is instead a matter of the chronic overstatement and exaggeration by advocates of the separation of powers. One might hold that *Loper Bright* treated the separation of powers with greater devotion than did *Chevron*. But it would not be easy to establish that the Court, in reclaiming authority from the executive branch in *Loper Bright*, has say, meaningfully increased public liberty. Federal judges are no more democratically responsible than executive agency heads. It is hardly as though liberty was moribund under *Chevron* but is now vigorous because *Loper Bright* overruled *Chevron* deference.⁹⁶ The practice of exaggerating separation of powers claims by the doctrine’s leading proponents ultimately tends to backfire.

A further underlying problem for those who assert the virtues of the separation of powers is one of the doctrine’s as yet unrecognized complexity. There are more moving parts in constitutional separation of powers problems than, by loose comparison, in the physical interactions of two or three ordinary size physical objects. Constitutional separation of powers problems are

90. See *Declaration of the Rights of Man – 1789, Approved by the National Assembly of France, August 26, 1789*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/rightsof.asp [https://perma.cc/8EYC-GHS9] (last visited June 14, 2025).

91. *Id.* at article 16.

92. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. 1, ch. 2 (1765), https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp [https://perma.cc/77A6-VX5C] (last visited June 14, 2025).

93. THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 420, 421 (Joanne B. Freeman ed., 2001) (quoting MONTESQUIEU, *supra* note 46, at bk. XI, ch. VI). See also DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 127–28 (1984) (discussing James Madison, in The Federalist no. 47, on Montesquieu).

94. See *Chevron, USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

95. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–13 (2024). The *Loper Bright* majority quotes Hamilton, but only more generally on the subject of judicial review. See *id.* at 385.

96. For a brief overview, see R. George Wright, *The Loper Bright Regulatory Landscape*, 15 IND. INT’L & COMP. L. REV. 245 (2025).

generally more difficult than are the latter sort of physical problems. It is revealing that physics has a much more difficult time understanding the interactive effects of three bodies, as, by loose analogy, in our three-branch separation of powers contexts,⁹⁷ than it does in the two-body case. And most separation of powers cases involve all three governmental bodies, to at least some degree, rather than just two.

Comparing the three federal government branches to three more-or-less separate interacting mechanical bodies is admittedly a matter of loose analogy. But it is an analogy that the constitutional framers themselves explicitly embraced. The framers were influenced by the idea of a Newtonian clockwork mechanism.⁹⁸ For the constitutional framers, the “delicate balances of the government”⁹⁹ reflected the Newtonian account of the delicate balances among, say, the Earth, Moon, and Sun.¹⁰⁰ Similarly, Jeremy Bentham thought in the mechanical terms of governmental “composition and resolution of forces.”¹⁰¹

Separation of powers theorists acknowledge that there are new and more difficult coalition building and obstruction problems in moving from a two-body model of the separation of powers to a three-body model of the separation of powers.¹⁰² Any two governmental branches, or bodies, may be capable of thwarting the ambitions of the third.¹⁰³ Ultimately, though, the Newtonian mechanical analogy as applied to the separation of powers raises more constitutional difficulties than potential solutions.

As it turns out, Newton was indeed capable of explaining much of the interactive effects of two ordinary-size bodies moving at non-relativistic speeds.¹⁰⁴ Unfortunately, though, predicting the interactive effects of three such physical bodies is not anything even remotely like merely fifty percent more difficult. In fact, the three-body interaction problem is remarkably more difficult.¹⁰⁵ Perhaps even the familiar transitive relation may not always hold for

97. As in, merely for example, the three constitutional body cases of *Chevron* and *Loper Bright*, *supra* notes 94–95 and accompanying text.

98. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2016) (quoting KAMMEN, *supra*, at 18–19) (“In the Framers’ Newtonian vision, the separation of powers was to be ‘a machine that would go of itself.’”).

99. Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 HARV. J.L. & PUB. POL’Y 7, 7 (1993) (with an orrery being a display model of the solar system).

100. See *id.*

101. JEREMY BENTHAM, *HANDBOOK OF POLITICAL FALLACIES* 165 (Harold A. Larrabee ed., 1971) (1824). Bentham himself tended to think of the separation of powers in practice as obstructionist, preventative, and often based largely on “sinister” interests. *Id.* at 163.

102. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 16 (2d ed. 1998) (1967).

103. See *id.*

104. See, e.g., Richard Montgomery, *The Three-Body Problem*, SCI. AM. (Aug. 1, 2019), [www.scientificamerican.com/article/the-three-body-problem](https://perma.cc/CK9C-YAGY) [https://perma.cc/CK9C-YAGY].

105. See *id.* See also Alain Chenciner, *Three body problem*, SCHOLARPEDIA (2007), [http://www.scholarpedia.org/article/Three_body_problem#:~:text=Alain%20Chenciner%20\(2007\)%2C%20Sc](http://www.scholarpedia.org/article/Three_body_problem#:~:text=Alain%20Chenciner%20(2007)%2C%20Sc)

the relations among three physical bodies, or in our legal context, the three government branches.¹⁰⁶ And then if we see a given separation of powers problem as involving, say, the Senate, the House of Representatives, the Supreme Court, other federal courts, the president, and at least one federal agency that is unsympathetic with the president's agenda, we are up to at least a six-body problem,¹⁰⁷ for which even our most advanced artificial intelligence sites have no valid answer.¹⁰⁸

Suppose, then, that we limit the separation of problem to involve simultaneous negotiations among only three parties. Such negotiations, as we might expect, often resist any prediction of their outcome, let alone of the main later effects of any such outcome.¹⁰⁹ The sheer number of relevant variables may generate additional complexity.¹¹⁰ There is "a lack of theory that can adequately explain the multiplicity of interactions that typically characterize such negotiations."¹¹¹ And again, none of the three branches of government is monolithic in its interests, priorities, or beliefs.¹¹²

Predicting the significant effects of the operation of the separation of powers in any given instance may thus be virtually impossible. There may be detectable tendencies when the operations of the separation of powers are observed over a run of many cases. But again, consider the physical analogy. Knowing the tendency of a fair coin toss, in the long run, is of limited help in predicting the outcome of the next coin toss or set of coin tosses.

Overall, then, the three-body problem of our three governmental branches compares, at a minimum, to that with which the physical scientists are confronted. But even setting all such problems aside, a number of basic substantive problems and indeterminacies in the separation of powers doctrine then remain. We may here merely list but a few. These substantive indeterminacies are not fatal to the separation of powers doctrine. But as long as basic indeterminacies remain, the status of the doctrine remains fundamentally unclear.

First, the practical problem of classifying exercises of government power as either legislative, executive, or judicial, or along any other scheme, has never

holarpedia,%2C%20(10)%3A2111.&text=The%20problem%20is%20to%20determine,Newton's%20law%20of%20inverse%20squares. [https://perma.cc/FBJ9-BEGX].

106. For background, see *Transitive Relations*, GEEKS FOR GEEKS (July 23, 2025), www.geeksforgeeks.org/transitive-relations [https://perma.cc/FE6D-Y3GG].

107. See Chenciner, *supra* note 105. We are assuming that all six bodies sometimes exert simultaneous mutually interactive effects, which may well be realistic.

108. See *id.*

109. See, e.g., Larry Crump & A. Ian Glendon, *Towards a Paradigm of Multiparty Negotiation*, 8 INT'L NEGOT. 197 (2003).

110. See *id.* at 197.

111. *Id.* Imagine trying to predict the timing of breaking off, resuming, and abandoning three-body or three-party negotiations.

112. See *id.* at 199. Again, imagine a divided Congress, or a rift between a given president and the federal administrative body in question.

been solved.¹¹³ In part, this is a matter of inevitable mixture and overlap. Professor Philip Kurland noted that “sometimes the judiciary has to create rules, . . . sometimes the legislative and sometimes the judiciary has to enforce rules, and sometimes the legislative and sometimes the executive has to resolve controversies over the rules.”¹¹⁴

Bringing clarity to any of these various “sometimes” categories is as yet an unfulfilled substantive task. Classically, Montesquieu granted a well-designed legislature a supervisory power over the agencies that execute the law.¹¹⁵ But when this supervisory power extends beyond some point, *Bowsher*-type legislative overextension questions arise.¹¹⁶ Nor can classification problems be solved by re-classifying judicial operations as a form of executing the laws, nominally reducing the classes of government power down to two.¹¹⁷

Nor have we arrived at closure, or even made much progress, on the questions of the most basic relative power relationships among the branches. The traditional view may have been that “the judiciary is beyond comparison the weakest of the three departments of power.”¹¹⁸ But there have, no less, been periods of a perceived imperial judiciary,¹¹⁹ with such views then in turn being contested.¹²⁰

Similarly contested has been the basic relative power relationships between Congress and the president. John Adams wrote that “[t]he Legislative Power in our Constitution, is greater than the Executive The Legislative Power will increase. The Executive will diminish.”¹²¹ But then, there has been congressional

113. See Barber, *supra* note 68, at 60; Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 603 (1986).

114. Kurland, *supra* note 113, at 603.

115. See 2 JOHN PLAMENATZ, *MAN AND SOCIETY* 38 (M.E. Plamenatz & Robert Wokler, eds., 1992).

116. See *supra* notes 2–10 and accompanying text.

117. Classically, see THOMAS PAINE, *The Rights of Man*, reprinted in KEY WRITINGS 54, 211–12 (Hayden Harry Clark ed., 1961) (1792); JAMES HARRINGTON, *The Commonwealth of Oceana*, reprinted in POLITICAL WRITINGS 35, 61 (Charles Blitzer ed., 1955) (1656) (classifying “the people” as a legislative power, along with the Oceana senate, giving rise to the need for an executive-magistracy).

118. THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 420, 421 (Joanne B. Freeman ed., 2001) (citing Montesquieu on this point). See also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986).

119. See, e.g., MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996). But see MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* (2006) (rejecting the basic such view). Classically, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). One obvious methodological problem is filtering out the effects of the critic’s own political biases in analyzing such matters.

120. See, e.g., KOZLOWSKI, *supra* note 119.

121. JOHN ADAMS, *Letter to Roger Sherman*, in WRITINGS FROM THE NEW NATION 1784–1826, at 228, 230 (Gordon S. Wood ed., 2016). See also THE FEDERALIST NO. 71 (Alexander Hamilton); GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 559–60 (3d ed. 1961) (discussing Montesquieu on “the greater power of the legislature”).

gridlock,¹²² the rise of the administrative state,¹²³ and an intermittently imperial presidency.¹²⁴ Further complications, such as an imperial presidency conjoined with an imperial Supreme Court, as checked to whatever degree by lower courts and the career administrative branch, are certainly possible. The permutations are multiple, and interminable in their unfolding.

And then, there are largely unrecognized problems regarding what we might call governmental division of labor or task-aptness questions. We might assume that each governmental branch should attend, at least primarily, to its proper work. But what should count as a branch's proper work may be a surprisingly difficult question. And this may be true even if we set entirely aside the problems of unavoidable overlap of governmental functions.¹²⁵

Professor N.W. Barber raises an initial concern in the context of which body should do what. He declares that “[t]o show that one body is not well equipped to perform a task is not a reason to switch that task to another body.”¹²⁶ More concretely, Professor Barber sensibly argues that “[e]ven if . . . the courts are badly placed to undertake a task[,] it does not follow that the legislature . . . will do any better.”¹²⁷

The natural assumption is that if the courts, and the Supreme Court in particular, are better than Congress and the president at some particular task of government, then the courts, and the Supreme Court ultimately, should be the branch that undertakes that task.¹²⁸ This may seem obvious, but it is not even correct. Consider that the three governmental branches all produce law, or at least constituent elements of law. Each branch's lawmaking, or elements thereof, may partly compete with, but partly complement, the law-making authority of the other branches. The three branches are not always competitive suppliers of law, in a marketplace for “buyers” or consumers of law. But sometimes, they are in a position to compete, and it is possible to adopt broad

122. See, e.g., Michael Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107 (2013).

123. See, e.g., PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

124. Classically, see ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). More contemporarily, see Steven Greenhut, *Under Trump, the imperial presidency reaches its apogee*, R STREET (Feb. 16, 2025), www.rstreet.org/commentary/under-trump-the-imperial-presidency [https://perma.cc/3GRV-6WGE]. But see Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 372 (1976) (“Often, and for considerable periods of time, the concern in the United States has been with the weakness of the executive, not with its strength.”). Medieval European theorists often assumed a dominant monarchy. See, e.g., DANTE, *MONARCHY* 11 (Prue Shaw trans., 1996) (1315) (on the rise of an eventual world emperor); FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 14 (Anthony Pagden & Jeremy Lawrance eds., 1991) (1528) (casually inferring, from the inability of a commonwealth as a whole to engage in diverse government functions, that “it must necessarily entrust all this business to a single man”). But see MARSILIUS OF PADUA, *THE DEFENDER OF THE PEACE* 124 (Annabel Brett ed. & trans., 2005) (1324) (on the need to regulate the Prince's conduct according to law, for the sake of avoiding tyranny).

125. See *supra* notes 113–117 and accompanying text.

126. Barber, *supra* note 113, at 74.

127. *Id.*

128. See *id.*

policies that encourage the lower-cost production of a higher quality law, overall.

Each law-making branch has some finite amount of resources, and some strengths and weaknesses, in generating law. Some law-making tasks involve greater costs than others, including opportunity costs for the governmental body in question. The public has an interest in the making of law without unnecessary waste of resources. And law may be created in alternative ways, at different costs, by the different branches.

So, our natural tendency may be to allocate all law-related tasks, at the federal level, to the branch that can perform them best. If the courts are better at producing law, then, we assume, the courts should generally make the law. The idea would be to respect the ‘absolute’ advantage that the courts have, in this context, over the other branches.¹²⁹

The logic here seems clear enough. Suppose it is September in Minnesota, and a healthy Minnesota Vikings all-pro tackle has a choice between chopping wood, on his own property, for the impending winter, or else paying a local college student, of merely ordinary physical ability, to do the work. The Viking would, we assume, do the work far better and far faster than the college student possibly could.

Logic, to this point, would suggest that the Viking should, rationally, do the work. But complications aside, this is not really the expected outcome. The Viking would indeed outperform the college student at the task in question. But in reality, this sort of advantage is largely irrelevant. The opportunity cost—to the Viking, to his team, to the Viking fans, and even to the broader public, of the Vikings player’s missed meetings, missed workouts, missed film study, etc., because of the wood-chopping would outweigh the obvious deficiencies in the college student’s doing the work instead and any opportunity costs the college student would incur.¹³⁰

The crucial point is that the typical local college student may, all else equal, hold a clear comparative advantage over the Viking in chopping the Viking’s firewood. The idea of comparative advantage, and the overall benefits to all parties where it is respected, is attributed to the classical economist David Ricardo.¹³¹

129. For a discussion of Adam Smith’s principle of absolute advantage, see, e.g., Monica Das, *Absolute and Comparative Advantage*, INT’L ENCYC. OF THE SOC. SCI. (William A. Darity, Jr. ed., 2d ed. 2008), <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/absolute-and-comparative-advantage#:~:text=During%20the%20seventeenth%20and%20eighteenth,the%20inflow%20of%20precious%20metals.> [<https://perma.cc/YP6R-WE3H>].

130. For a definition and examples of opportunity costs, see, e.g., *Opportunity Cost*, ECONLIB, www.econlib.org/library/topics/college/opportunitycost.html [<https://perma.cc/L7Y7-YXZP>] (last visited June 14, 2025) (linking to additional resources).

131. See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 119–43 (Dover ed. 2004) (1817). More broadly, see John Aldrich, *Discovery of Comparative Advantage*, 26 J. HIST. ECON. THOUGHT 379, 380–84 (2004). In the law school context, see Gregory W. Bowman,

The problems, and the potential value, of attending to comparative advantage or its logical analogue in separation of powers contexts are complex. But the complications, and the prospect of benefits for all those who pay for and consume the production of law, are significant. The key is that the houses of Congress, the president, the independent and less-independent administrative agencies, and the trial and appellate courts all do many things, the doing of some of which could be allocated elsewhere. Suppose that the Supreme Court really is slightly better at ascertaining matters of ordinary fact than any other branch of government, including the most relevant administrative agency. Respecting the principle of comparative advantage or its analogue, though, might require some shifting of this fact-finding responsibility to some other branch, allowing the Court to focus on those tasks where it holds a comparative advantage.

In any event, the possible role of comparative advantage in separation of powers analysis is an important unsolved, and largely unrecognized, source of indeterminacy in the doctrine of the separation of powers. The comparative advantage problem thus joins the list of major substantive problems in the separation of powers that have lingered unresolved for centuries.

III. WHAT CAN BE DONE IF THE BASIC PROBLEMS OF THE SEPARATION OF POWERS REMAIN UNSOLVED?

It seems likely that the basic conceptual and substantive problems of the separation of powers are largely here to stay. We may certainly wish success to all present and future attempts to address such problems on the merits. But other, complementary avenues are worth pursuing as well. Most importantly, we can seek to make progress by probing into what separation of powers theorists tend to take for granted.

Let us then begin by noting what is famously assumed by major separation of powers theorists. Classically, James Madison's 51st Federalist Paper assumes that electoral control of government officials and, as well, a separation of powers are necessary to reduce the effects of government officials' ambition and their desire for aggrandizement.¹³²

Madison's Newtonian goal was, famously, that "[a]mbition . . . be made to counteract ambition,"¹³³ with the intensity and pervasiveness of ambition itself

The Comparative and Absolute Advantages of Junior Law Faculty: Implications For Teaching and the Future of American Law Schools, 2008 BYU EDUC. & L.J. 171 (2008). For a more elaborate but also more narrowly focused discussion, see R. George Wright, *At What is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

132. See THE FEDERALIST NO. 51 (James Madison), reprinted in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST WITH LETTERS OF "BRUTUS" 251–53 (Terence Ball ed., 2003).

133. The logic here owed something to Adam Smith's 'invisible hand' and to Mandeville's Fable of the Bees. See, e.g., Peter Foster, *Adam Smith's Invisible Hand*, ADAM SMITH WORKS (Nov. 30, 2018), www.adamsmithworks.org/documents/adam-smith-peter-foster-invisible-hand [https://

being assumed to be largely constant. The vice of ambition was thus assumed to be more or less constant, but subject to beneficial redirection. Thus, the need, and the possibility, of “supplying by opposite and rival interests, the defect of better motives.”¹³⁴

The connection between the defects or vices of human nature and the separation of powers had been articulated earlier by John Locke. Locke had concluded that “it may be too great temptation to human 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 . . . to their own private advantage.”¹³⁵ On such views, the separation of powers is largely, if not entirely, an ingenious structural mechanism for limiting the harms of what are assumed to be more or less constant and unaltered tendencies to vices of character.

This perspective was much later summarized by Professor Sheldon Wolin in these terms:

The Federalists had accepted as axiomatic that the shape of constitutional government was dictated by the selfish nature of man and his restless pursuit of interest The aim of a political organization was not . . . to alter their moral character, but to arrange institutions in such a manner that human drives would cancel each other or, without conscious intent, be deflected towards the common good.¹³⁶

As grateful as we might be for the institution of the separation of powers, and for the substantive rights protections of the First Amendment, all such institutions may nevertheless leave us still a bit uneasy. Famously, Judge Learned Hand reported that he often wondered “whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts.”¹³⁷ He concluded that “[t]hese are false hopes.”¹³⁸

Most importantly, Judge Hand then declared that “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it While it lies there it needs no constitution, no law, no court to save it.”¹³⁹ For our current purposes, we may certainly include the separation of powers within the compass of the constitution and laws.

perma.cc/ZQ8G-UGFC]; BERNARD MANDEVILLE, *THE FABLE OF THE BEES* (Philip Harth ed., 1989) (1714) (on the possible transmutation of selfish private vices, through structural mechanisms, into public benefits).

134. MADISON, *supra* note 132, at 252.

135. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 11, § 143, at 76 (C.B. MacPherson ed., 1980) (1690).

136. SHELDON S. WOLIN, *POLITICS AND VISION* 349 (Princeton Univ. Press 2016) (1960).

137. LEARNED HAND, *The Spirit of Liberty* (1944), *reprinted in* *THE SPIRIT OF LIBERTY* 189, 189–90 (Irving Dilliard ed., 1952).

138. *Id.* at 190.

139. *Id.*

We need not herein go as far as Judge Hand does on this occasion. The basic idea for our purposes is instead that the separation of powers, along with electoral responsibility and other constitutional provisions, cannot suffice to protect liberty and other jurisprudential goals. Montesquieu had himself earlier appreciated the limits of focusing on institutional or structural mechanisms.¹⁴⁰ The separation of governmental powers is, ultimately, fully compatible with a loss of public liberty.¹⁴¹ Montesquieu believed that to ensure liberty, a public spirit of virtuous self-reliance was necessary as well.¹⁴²

On such understandings, an effective separation of powers depends on “the character of the populace.”¹⁴³ This dependence seems inevitable, regardless of the precise form that the separation of powers takes in any given case. This recognition of the need for relevant public virtues is a special case of the broader insight that excellence in constitutions, like other laws, may require a degree of the “excellence of the people”¹⁴⁴ as a complement.

The constitutional indispensability of basic virtues was famously recognized by Justice Brandeis in his concurring opinion in the *Whitney* case.¹⁴⁵ Justice Brandeis declared courage, rather than a well-calibrated institutional separation of powers, to be “the secret of liberty.”¹⁴⁶ To the virtue of courage we may add other basic, cross-cultural epistemic and moral virtues, including that of attention to the pursuit of meaningful truth;¹⁴⁷ genuinely deserved trustworthiness that is based on competence, transparency, and fidelity;¹⁴⁸ and

140. See ALAN RYAN, ON POLITICS, BOOK TWO: HOBBS TO THE PRESENT, 529–30 (2012).

141. See *id.* See also CONDORCET, *supra* note 36; CONSTANT, *supra* note 36.

142. See RYAN, *supra* note 140, at 530.

143. Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 REV. POL. 231, 233 (2000).

144. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 155 (Paul Smith ed., 2004) (1867) (ebook).

145. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on* assuredly quite separate grounds, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

146. *Id.*

147. See, e.g., Philip E. Dow, *Developing Truth Seekers*, in INTEGRITY, HONESTY, AND TRUTH SEEKING 274, 274–303 (Christian B. Miller & Ryan West eds., 2020); *id.* at 274 (“The pursuit of truth has always . . . provided a foundation for human flourishing.”). More broadly, see *id.* at 303 (John Adams as holding that “‘virtue is the only foundation of republics’”). The fuller quotation is that “Public Virtue cannot exist in a Nation without private, and public virtue is the only Foundation of Republics.” *Letter from John Adams to Mercy Otis Warren on April 16, 1776*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-04-02-0044#:~:text=The%20Form%20of%20Government%2C%20which,pure%20Religion%2C%20or%20Austere%20Morals.> [https://perma.cc/FPQ8-U59K] (last visited Oct. 14, 2025). This is not to suggest that Adams’s own list of relevant public and private virtues would match those of a given observer today.

148. See, e.g., Mara Olekalns, Feyona Lau & Philip L. Smith, *Resolving the Empty Core: Trust as a Determinant of Outcomes in Three-Party Negotiations*, 16 GRP. DECISION & NEGOT. 527, 527 (2007). Consider the value of genuine trustworthiness in circumstances of interminable inter-branch governmental gridlock and polarization on, e.g., governmental indebtedness. See also KEVIN VALLIER, TRUST IN A POLARIZED AGE (2020); TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 2003).

practical wisdom in decision making, especially under prisoner's dilemma-type separation of powers problems.¹⁴⁹

Promoting the relevant virtues, such as courage and fortitude, genuine trustworthiness, and practical wisdom certainly need not involve legal coercion, or even any governmental involvement in attempts to inculcate any basic virtues, or any governmental soul-craft.¹⁵⁰ The relevant virtues need not be inculcated from the top down. Nor should encouraging the basic, cross-cultural virtues be considered a threat to liberalism or to the proper role of public reason.¹⁵¹

This is not to suggest that the basic virtues complementary to the separation of powers are readily manipulable. There are no dials to conveniently and effectively turn. But it is implausible that societies have no choice as to the virtues, either epistemic or moral, that they effectively teach, model, validate, emphasize, and reward.

At our most optimistic, we might sympathize with Thomas Jefferson's virtue-focused response to the problems of the separation of powers. In 1819, Jefferson wrote to Judge Spencer Roan that "I . . . resign everything cheerfully to the generation now in place. They are wiser than we were, and their successors will be wiser than they, from the progressive advance of science."¹⁵² Cultures can, within limits, gain or lose in their practical wisdom.

But we need make no claim here for the inevitability of progress in the virtues linked to the separation of powers. The needed progress, instead, would

149. See, e.g., PRACTICAL WISDOM: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES (Mario De Caro & Maria Silvia Vaccarezza eds., 2021); WHAT IS WISDOM AND CAN IT BE TAUGHT? PHILOSOPHICAL, PSYCHOLOGICAL & PEDAGOGICAL PERSPECTIVES (Eeva K. Kallio & Päivi Tynjälä eds., 2025); Valerie Tiberius, *Wisdom and Perspective*, 102 J. PHIL. 163, 174–75 (2005). See also Katherine J. Bangen, Thomas W. Meeks, Dilip V. Jeste, *Defining and Assessing Wisdom: A Review of the Literature*, 21 AM J. GERIATRIC PSYCHIATRY 1254, 1263 (2013); Jeffrey A. Greene & Scott C. Brown, *The Wisdom Development Scale: Further Validity Investigations*, 68 INT'L J. AGING & HUM. DEV. 289 (2009).

150. The utopian writer Samuel Butler envisioned a class of persons "trained in soul-craft," akin to physicians. See SAMUEL BUTLER, EREWHON ch. X, at 59 (Warbler Classics 2023) (1872). For brief discussion, see WOLIN, *supra* note 136, at 34.

151. For the crucial exposition, see JOHN RAWLS, POLITICAL LIBERALISM (1993). See also the sources cited in Jonathan Quong, *Public Reason*, STAN. ENCYC. OF PHIL. (Apr. 20, 2022), <https://plato.stanford.edu/entries/public-reason/> [<https://perma.cc/H563-X8FD>]. Rawls himself relies on thin versions of basic virtues such as civility, tolerance, and an active sense of fairness for his own version of justice as fairness. For discussion, see Christie Kartley & Lori Watson, *Virtue in Political Thought: On Civic Virtue in Political Liberalism*, in VIRTUES AND THEIR VICES 415, 422, 431 (Kevin Timpe & Craig A. Boyd eds., 2014).

152. THOMAS JEFFERSON, *Limits to Judicial Review: Letter to Judge Spencer Roane* (1819), reprinted in THOMAS JEFFERSON: WRITINGS 1425, 1428 (Merrill D. Peterson ed., 1984). For a sense of Enlightenment confidence in moral progress, see R. George Wright, *Cruel and Unusual Punishments and the Constitutional Status of the Idea of Progress*, 20 FIU L. Rev. (forthcoming 2025).

arise from our better understanding how best to promote¹⁵³ the virtues that support the operation of the separation of powers.¹⁵⁴ There certainly appears to be room, at present, for a fully legitimate increase in our collective attention to promoting the relevant basic virtues.

153. We need not claim that the relevant epistemic and moral virtues can be directly or explicitly taught. It has been said that “many wisdom scientists view wisdom as malleable and educable, while . . . others say that it cannot be directly taught; according to them, it develops through life experience and informal unintentional learning or can be nurtured indirectly by arranging conditions contributing to its development.” Kallio & Tynjälä, *supra* note 149, at 37. Nor need we claim that the virtues as displayed in separation of powers contexts will also be displayed in other contexts, such as on the field of battle, or in choosing a life-partner. *See, e.g.*, JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2005) (emphasizing the role of situation and circumstance).

154. Finally, we make no claim that the virtues noted above are exhaustive. They are instead illustrative. One might well make a case for the value, in separation of powers contexts, of the virtue of epistemic humility. Epistemic humility here involves not an under-rating of one’s own abilities, but a genuinely realistic recognition of both one’s capacities and one’s limitations, here in terms of political and policy disputes. *See*, for background, CHRISTOPHER M. BELLITTO, *HUMILITY: THE SECRET HISTORY OF A LOST VIRTUE* (2023); ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* ch. 9, at 236–56 (2007); Dennis Whitcomb et al., *Intellectual Humility: Owning Our Limitations*, 94 *PHIL. & PHENOMENOLOGICAL RES.* 509 (2017). Consider, for example, the role of a reasonable epistemic humility in judicially assessing the boundaries of administrative agency judgments involving individual rights claims during a pandemic. In that context, note the epistemic humility, and the practical wisdom, of Judge David Hamilton’s opinion regarding COVID-19 regulatory response. *Cassell v. Snyders*, 990 F.3d 539, 549 (7th Cir. 2021).