N.W. Barber
Fellow and Tutor in Law
Trinity College
University of Oxford

The Separation of Powers and the British Constitution[1]

This paper provides an account of the nature of the separation of powers and considers its application in the British constitution. It charts the developing understanding of the principle in British constitutional scholarship over the last century, and shows the ways in which the British constitution has shifted towards a modern understanding of the principle in the last twenty years.

Key words: Separation of Powers, British constitution, United Kingdom, Parliament, Judicial Independence, Rule of Law

The separation of powers is a troublesome concept. Some writers argue that it is an essential part of constitutionalism, and that, as such, all constitutions should adhere to it.[2] Others consider it a feature that only characterises presidential-style constitutions, and exclude other systems from its reach.[3] Allied to this, there is a profound, and often unexplored, division between those who see the separation of powers as normative principle, as a set of reasons that apply to all those who create and operate constitutions, and those who regard it as primarily as a mechanism of categorisation, a helpful way of dividing up different polities. Perhaps because of this uncertainty, the constituent elements and purpose of separation of powers are unclear. What the separation of powers requires to be separated and how absolute this separation must be, is subject to considerable debate.

This paper reflects on the nature of the separation of powers and, in the course of this discussion, its applicability to the United Kingdom's constitution. The paper begins by considering the content of the separation of powers, sketching some of its demands and drawing attention to some of its ambiguities. The middle sections consider the implications of separation of powers for the British constitution, and chart a shift in the attitude of commentators over the last fifty years or so. From almost universal scepticism in the 1960s and 1970s over the applicability of the separation of powers, the consensus has changed, with many writers now arguing that the principle does, indeed, speak to the British constitution.

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[1] This paper builds on ideas found in *Barber N.W.* 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59 and *Barber N.W.* The Constitutional State (Oxford: Oxford University Press, 2010). Thanks are due to Menaka Guruswamy and Jackie Fernholz.

[2] *Barendt E.* 'Is there a United Kingdom Constitution?' (1997) 17 Oxford Journal of Legal Studies 137, 140–142; *Vile M.J.C.* Constitutionalism and the Separation of Powers 2nd ed. (Indianapolis: Liberty Fund, 1998); *Lane J.* Constitutions and Political Theory (Manchester: Manchester University Press, 1996), chapter 2; *Carolan E.* The New Separation of Powers (Oxford: Oxford University Press, 2009).

[3] *Calabresi S.G., Bady K.* 'Is the Separation of Powers Exportable?' (2010) 33 Harvard Journal of Law and Public Policy 5; *Hathaway O.* 'The Case for Promoting Democracy Through Export Control' (2010) 33 Harvard Journal of Law and Public Policy 17.

The final section discusses the resurgence of the separation of powers as a constitutional principle, and the ways in which it may have affected the structure of the contemporary constitution.

The Separation of Powers

There are numerous versions of the separation of powers, but perhaps the most common understanding of the principle presents three types of division between three branches of state.[4] The three branches are the legislature, the courts, and the executive. The three divisions are between institutions, between powers, and between officials in those institutions. These nine elements can be placed on a table:

Institution	Legislature	Courts	Executive
Power	Legislative	Judicial	Executive Power
Officials	Legislators	Judges	Executive Officials

Looking along the first row, there are structural differences between the three institutions. Legislatures tend to consist of large groups of people gathered in a forum that facilitates debate and discussion. [5] The institution enables its members to express their views on issues: they can debate the broad policy direction of the state, and the particular decisions made by executive officers. Mechanisms exist for the legislature to reach conclusions following debates, such mechanisms enable this large group of disparate people to reach decisions about the acts and direction of the state.

The courts, in contrast, are essentially triadic in structure.[6] There is a judge who decides a dispute between two contesting parties. The decision-making processes focus tightly on the case at point: there are rules of evidence to test the parties factual claims, and the judge considers the parties' submissions about how the law should be applied in their particular situation.

Finally, the executive is bureaucratic in structure. It is a large organisation, divided into many different offices. The divisions within the executive generally track the technical divisions required by the tasks faced by the state. So, subsets of the executive focus on foreign affairs, education, social welfare and so forth.

Turning to the second row, a distinction is drawn between the types of power that the institutions characteristically act through. The legislature acts through resolutions and statutes. Statutes are a form of law-making instrument that is normally general and broad. They are general, in that they apply to a large number of people — often all the people in the state. They are broad, in that they normally apply to an area of law rather than a particular legal question. Statutes are also prospective: they change the law, but do so, normally,

[4] See generally Vile, note 2 above, chapter 4; Montesquieu C. The Spirit of the Laws, transl. by *Cohler A., Miller B., Stone H.* (Cambridge: Cambridge University Press, 1989), Book 11, chapter 6; *Gwyn W.B.* The Meaning of the Separation of Powers, (Tulane: Tulane Studies in Political Science, 1965), chapter 1.

[5] *Wheare K.* Legislatures, (Oxford: OPUS, 1968), 5.

[6] *Shapiro M.* Courts: A Comparative and Political Analysis, (Chicago: Chicago University Press, 1981), chapter 1.

only for the future. Resolutions are a second important form of legislative act. These are not legally binding, but allow the legislature to express an opinion on some issue.

The courts, in contrast, act through decisions, judgments, delivered in response to a particular course of litigation. Judgments ordinarily focus on a narrow issue of law. Normally, because judicial decisions are answers to disputes, the judgments are backward-looking: they provide an authoritative statement of the legal obligations and rights of the parties at the time the disputes arose. In some, older, accounts of the separation of powers the proper role of judicial power ended at this point: the power of the judges was simply to apply pre-existing law to a dispute.[7] However, it is now generally recognised that the judicial power, even narrowly understood, extends to developing the law. Judges can develop the law by interpreting and clarifying existing law, filling in gaps in the law, and — more debatably, perhaps — by changing the law. The judicial power to develop the law is very different from that of the legislature. Ordinarily, judges can only change the law through decisions on particular cases: the judicial law-making power is slow and incremental.

The executive enjoys the power to apply the law and policy of the state in a given case. One of the most important characteristics of executive power is its connection with force, coercion. The legislature and the courts can declare what the law is, but they rely on the executive to carry out the law: catching backsliders, locking up criminals. The executive also has a role in shaping the state's laws: within the boundaries set by the legislature and courts, the executive formulates rules governing the application of the laws.[8]

Finally, in the third row, the people who occupy these institutions tend to be appointed for very different reasons. Legislators are elected, and, consequently, they need not have any particular skills or abilities. Their purpose is to, in some way, represent the people of the state. On any given issue before the legislative, those representatives with technical expertise in an area will be out-numbered by their unqualified colleagues. Judges are appointed because of their knowledge of the law; they are legal experts. They are not, or not always, experts in the facts of the disputes they address: it is the task of the parties before the court to explain the facts to the judge. Finally, the executive is technocratic. Most officers of the executive branch are appointed for their skills in administration or their expertise in the particular subject regulated by their department.

There are, then, three possible types of division an account of the separation of powers might call for. First, it may call for a separation of *institutional structures*: perhaps every state requires each of these three types of institution. A large assembly, structured like a legislature, for instance, could not be substituted for the triadic structure of the courts. Second, it may call for a separation of *powers* (in the sense set out in the second row). Perhaps the state needs to exercise all three of these types of power: it needs to be able to produce general statutes, narrower administrative rules and decisions, and produce judgements that resolve disagreements over these rules. Perhaps it would be a mistake for an institution in one column to exercise a power found in another column: the legislature should not decide cases, the courts should not pass statutes. Finally, it may call for a separation of *persons*. Maybe the state needs three types of officers: those who are elected, and enjoy democratic legitimacy; those who are experts in resolving conflicts over the law; and those who possess technical expertise. Perhaps it would be a mistake for the type of person found in one column to also act in another column. Maybe judges can never properly act as legislators,

[7] *Montesquieu*, note 4 above, 158.

[8] *Carolan*, note 2 above, chapter 6.

or members of the executive should never sit in the courts — because their qualifications to act as one type of state official do not entitle them to act in another branch.

The lines between these columns are drawn by different writers with varying strength. A divide is commonly drawn between 'pure' and 'partial' versions of the doctrine.[9] The pure theory calls for complete separation of the three branches of the state; a strict delineation between the executive, the legislature and the judiciary. The lines drawn in our table would be hard: they would constitute absolute divisions between the institutions, powers, and people of the three branches. There must be three distinct institutions, each institution can only exercise the particular power type allocated to it, and no officer from one institution can serve in another institution.

The alternative vision of the doctrine, the 'partial' version, emphasises the significance of checks and balances within the constitution. The lines between the columns are soft, and can be crossed on occasion. Each of the institutions of state is given some power over the others, their functions are deliberately constructed so that they overlap. These overlaps may have offensive or defensive goals. Offensively, one branch may be given some control over the other: the legislature, for example, might be able to scrutinize the workings of the executive. One branch of state is empowered to examine and limit another. Defensively, institutions might get powers normally allocated to another branch to protect themselves from interference: so, judges might be given executive powers over the running of their courts, legislatures might be given judicial powers to punish their own members for misconduct. Whilst it is normally more appropriate for another institution to undertake this type of decision, judges are given administrative powers to insulate the courts from the executive, and the legislature is given some judicial powers to guard against the intrusion of the judges. Though the 'pure' version of the separation of powers is found in some of the older literature on the topic, it is now widely viewed as impractical, and few if any modern scholars would support it.[10]

Before moving on to discuss the separation of power in the British constitution, it is worth noting that there is a further, vital, question about the separation of powers that has, deliberately, been left to one side. Whilst the broad outlines of the common understanding of the separation of powers are relatively clear, the reasons that lie behind this understanding are far murkier. Why should the institutions, powers, and people found in each column be tied together? Why should, for example, judges decide cases whilst legislators produce statutes? As this paper progresses, the question of the purpose of the separation of powers will be considered: the common understanding of the principle is animated by good reasons, but it is only once we have identified these reasons that we can produce a full and satisfying account of the principle.

The Separation of Powers and the Old British Constitution

Most scholars writing on the British constitution[11] before about 1990 were profoundly sceptical about the applicability of the doctrine to the constitution. The objections were made at two levels.

[9] Vile, note 2 above, chapter 1; Gwyn, note 4 above, chapter 1.

[10] Vile, note 2 above, 19–20.

[11] Some doubt whether Britain has a constitution. It certainly lacks a Constitution with a capital 'c', a unifying constitutional text, but it does possess a set of rules that create — or 'constitute' — the state. When

First, and most basically, it was argued that the separation of powers should not be applied to parliamentary-style constitutions. Parliamentary systems were, it was claimed, based on a fusion of powers, not a separation of powers.[12] In a parliamentary system the legislature selects the political part of the executive branch, which then remains dependent on the legislature for its position and power. The prime minister, the leading executive official, is not elected by the people, and has no constitutionally protected area of power; she can only act with the express or tacit support of the legislature. In a presidential system, in contrast, the leading executive official is elected: the president is chosen by the people, and then gets to pick the other executive officers. The executive has a legitimacy that is independent of the legislature, and is given a constitutionally protected area of power over which the legislature may not encroach.[13] The presidential-style model of a constitution clearly matches the simple account of the separation of powers set out in the last section more closely than the parliamentary model. Perhaps, it might be thought, applying the separation of powers to a parliamentary constitution makes a category error: it applies a standard applicable to one type of constitution, the presidential, to an alternative type, the parliamentary.

Buttressing this argument, it was also observed that the British constitution contained many other instances where 'fusion' appeared to have been preferred over 'separation' of powers. Older constitutional scholars could hold up the office of the Lord Chancellor as an illustration of the inapplicability of the principle to the British constitution. The Lord Chancellor was a member of the legislature — he acted as speaker of the House of Lords — a member of the executive who sat in Cabinet, and, in what was left of his time, sat as a judge.[14] Furthermore, until recently, the highest court in the British legal orders was the House of Lords. A committee of the legislature served as the final domestic court, reporting its decisions back to a chamber of Parliament.

As we shall see, the constitutional reforms of the last decade have addressed these overlaps but other apparent violations remain within the British constitution. The executive has the power to make law through delegated legislation, and possesses a power to decide some legal disputes through a network of tribunals. The legislature is able to exercise judicial power over its members — punishing them for misconduct — and could, arguably, also exercise this power over other citizens in some situations. Finally, the courts play a significant role in the development of the law. The Common Law, the law that regulates a vast area of private transactions, has been crafted by the judges, not by Parliament.

Our first set of objections simply claimed that the separation of powers was not applicable to the British constitution. A second, and more profound, set of objections challenged the integrity of the separation of powers as a principle. The separation of powers rests on a mistake: there is no natural division of power between the three institutions of the

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academics talk of a British constitution they are referring to the constitution with a small 'c': that set of rules that constitutes the state. See further, *Barber N.W.* The Constitutional State, chapters 5 and 6.

[12] *Bagehot W.* The English Constitution (1867 edition) (London: Watts & Co, 1964), chapter 1; *de Smith S.A.* 'The Separation of Powers in New Dress' (1966) 12 McGill Law Journal 491; *Hood Philips O.* 'A Constitutional Myth: Separation of Powers' (1977) 93 Law Quarterly Review 11.

[13] *Linz J.* 'Presidential or Parliamentary Democracy: Does it Make a Difference?' in Juan J Linz and Arturo Valenzuela (eds.), The Failure of Parliamentary Democracy (John Hopkins University Press 1994); *Sartori G.* Comparative Constitutional Engineering 2nd ed. (New York: New York University Press 1997), 84.

[14] *de Smith*, note 12 above.

state. The stronger version of the objection argued that there was no material distinction between legislative, judicial and executive powers.[15] The weaker version of the objection contended that the division was blurred,[16] and, more subtly, that even so far as the division can be maintained this did not provide a reason to match these powers to the corresponding state institutions.[17] Whilst the first set of objections to the separation of powers argued that the principle ought not to be applied to the British constitution, the second set makes the far more radical claim that the principle ought not to be applied to any constitution. As Geoffrey Marshall put it, perhaps the separation of powers is 'a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.'[18]

The Separation of Powers Reassessed

During the 1990s there was a slow resurgence of interest in the separation of powers. A number of eminent scholars argued that the principle was an aspect of the British constitution, that its force could either be detected in its institutional structure,[19] or should be applied to it.[20] There were two groups of reasons for this renewal of interest in the separation of powers.

First, the confident claim of older scholars that the British system was not characterised by the doctrine came under scrutiny: perhaps the gap between the demands of the separation of powers and parliamentary systems had been exaggerated. Some aspects of the separation of powers were indeed crucial to the British system. The judiciary, for example, has long been insulated from the other two branches of state. Under the Act of Settlement 1701 the position of judges in the higher courts was protected: they can, probably, only be removed after a resolution of both Houses of Parliament — a procedure that has only been used once in the last three hundred years. Furthermore, some of the apparent 'fusion' of the branches of state looked, on closer inspection, to be rather superficial. Whilst the highest court was, technically, a committee of the legislature, in reality a profound gap existed between the House of Lords (Judicial Committee) and the rest of Parliament. The members of the judicial committee were appointed for their legal expertise, and the rest of the Lords invariably accepted the judgments of the committee. Though judicial members of the House did participate in legislative debates, they constituted a tiny percentage of the legislature, and their role in the making of statutes tended to be limited and fairly technical.

Similarly, whilst there is a strong connection between the legislature and executive branches — with the political part of the government tying the two together — there are also profound differences. The executive branch in the United Kingdom is very large: depending on how you calculate it, there are hundreds of thousands, perhaps even a million, people working in the executive. There are civil servants, soldiers, policemen, nurses, all of

[15] *Jennings I. Law and the Constitution*, 5th ed. (London: London University Press, 1959), 281–282 and 303.

[16] A point recognised by Madison: *Madison J., Hamilton A., Jay J.* Federalist Papers, (London: Penguin Classics, 2003), N 37, 244.

[17] *Marshall G.* Constitutional Theory, (Oxford: Oxford University Press, 1971), 99–100.

[18] Ibid., 124.

[19] For a pioneering reassessment, see: *Munro C.* 'The Separation of Powers: Not Such a Myth' [1981] Public Law 19; *Allan T.R.S.* Law, Liberty and Justice (Oxford: Oxford University Press, 1993), chapter 3.

[20] *Barendt E.* 'Separation of Powers and Constitutional Government' [1995] Public Law 599.

whom could be considered part of this branch of the state. They, for the most part, do not sit in Parliament. Indeed, in a clear instance of the separation of persons, civil servants are barred from sitting in the House of Commons.[21] In their working life, these state employees are expected to be apolitical: following the policies set by the political branch of the state.[22] If we remove the political part of the government — which should, perhaps, be understood as a committee of Parliament — there is a profound divide between the executive and the legislature in the United Kingdom. The legislature, or rather, the Commons, is elected and sets the policy direction of the state. The executive is technocratic, its members are chosen for their administrative or practical skills, and its task is to realise the policies of the legislature as manifested in law and in the decisions of the Cabinet. In some ways the distinction between the executive and the legislative branches is more pronounced in a parliamentary system than in a presidential one.

Finally, some of the overlaps pointed to by the older scholars could be seen as instances of the operation of the separation of powers rather than violations of that principle. The executive's power to make rules through delegated legislation, for example, is a feature that most systems — presidential as well as parliamentary — possess. As Eoin Carolan has recently argued, what the separation of powers requires in this context is that this delegated law-making power be exercised in a way that reflects the institutional strengths and limits of the executive branch. The task of the executive, through administrative rule making, is to adapt and implement legislative rules, taking account of the context in which they operate.[23] The skills of the executive branch — its knowledge and ability to adapt quickly — complement the capacities of the legislative branch.

The second shift in British scholars' understanding of the separation of powers related to the nature of the doctrine. Older scholars seemed to regard it either as a purely descriptive term — a more or less accurate way of catching a group of constitutions that shared some common factors — or as a principle that applied only to a subset of constitutions, presidential-style constitutions. More recent writing on the separation of powers, however, has treated it as a principle of constitutionalism: a principle that applies to all constitutions at all times.[24] Recognition of the separation of powers as a principle of constitutionalism brings with it a danger: the risk of utopianism. Some of the writings on the division between presidential and parliamentary systems present the division as a competition between the two forms of constitution.[25] One of these models — or some combination of the two — is better than the other; there is a winner to be identified.

It seems unlikely that the separation of powers, taken as a principle of constitutionalism, will identify a single brand of constitution that is best for all states. There are a number of considerations that point against this. Most obviously, the best type of constitution for a country will depend, in large part, on local circumstances. Though we may be reluctant

[21] House of Commons Disqualification Act 1975, s.1(1)(b).

[22] See now the Civil Service Code, paras 13 and 14.

[23] *Carolan*, note 2 above, chapter 6.

[24] See, for example: *Barber N.W.* 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59; *Barendt*, note 20 above, and *Barendt E.* 'Is there a United Kingdom Constitution?' (1997) 17 Oxford Journal of Legal Studies 137; Lane, note 2 above, chapter 2; *Carolan*, note 2 above.

[25] See, for example: *Calabresi S.* 'An Agenda for Constitutional Reform' in *Eskridge W., Levinson S.*, eds., Constitutional Stupidities, Constitutional Tragedies (New York: New York University Press, 1998); *Ackerman B.* 'The New Separation of Powers' (2000) 113 Harvard Law Review 633.

to concede to Montesquieu that the national climate shapes the constitution,[26] it is certainly the case that history, geography, religion and ethnic divisions will all help determine the best division of power within a particular country. The optimal balance between the branches of state, in particular the judiciary and the legislature, varies widely. Some systems need strong judicial review: entrenched rights to protect minority groups and individuals from the legislature. In other systems — where, perhaps, there is a more tolerant culture — the legislature may provide a good forum for different groups in society to meet and discuss the direction of the state. Indeed, it may be that there is no unique best play off between the values that animate democracy and the values that underpin human rights. This might be a choice between incommensurables, between which different states could strike different — but equally valid — balances. Finally, and most basically, looking around the world it is plain that there are many examples of relatively successful presidential states and relatively successful parliamentary states. There are costs involved in radical constitutional change. There is the price of the shift itself: the disruption caused, the difficulty in creating new structures. There is the inevitable risk surrounding the outcome of the change: constitutional reforms are unpredictable things, and may bring unanticipated problems in their wake. But more importantly, people get to know and understand the constitutional structures of their own community. Americans have a decent understanding of the presidential structure, Britons have a good grasp of the parliamentary mechanism. Changing the basic structure of either of these states risks harming the constitutional culture that underpins them. The value of a citizenry that, in broad terms, understands how its political structures operate, should not be underestimated.

The point of the last paragraph was to show that if we take the separation of powers to be a principle of constitutionalism it is highly unlikely that it will pick between the presidential and parliamentary models. An attractive interpretation of the separation of powers will be flexible enough to allow both models of constitutions — and hybrid models, too — to satisfy its demands.

At the start of the renaissance of the separation of powers in British constitutional scholarship, the principle was presented as a simple protector of liberty. In Eric Barendt's paper, 'Separation of Powers and Constitutional Government', published in 1995, Barendt argues that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult. Power is divided between the branches of the constitution, with each element checking the others. This interpretation gains the support of Justice Brandeis who, in *Myers v U.S*, wrote that the purpose of separation of powers 'was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'[27] Concerted state action is made more difficult by the existence of checks and balances between the various organs of state.[28]

There are a number of difficulties with accounts that treat liberty as the sole objective of the separation of powers. First, they assume that that liberty and a strong state are in-

[26] *Montesquieu*, note 4 above, Part 3 Book 14.

[27] *Myers* v *US* (1926) 272 U.S. 52, at p. 293; see also *Montesquieu*, note 4 above, Book 19 chapter 27; *Barendt*, note 20, 605-606; *Calabresi S., Rhodes K.* 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 Harvard Law Review 1153, 1156, where separation of powers is described as 'institutionalising conflict'.

[28] *Vile*, note 2 above, 14.

evitably opposed to each other, that the citizen can only be truly free within a state whose power for concerted action is limited by institutional conflict. There are some theorists who treat liberty in purely negative terms, as absence of state constraint, but most modern philosophers draw attention to the claims of positive liberty.[29] The state's task is not just to avoid unwarranted limits on the actions of individuals, but also to ensure that there are valuable options to them.[30] A richer notion of the purpose of the state will point us towards a richer understanding of the separation of powers. Additionally, the simple liberty model of the separation of powers cannot explain why a particular power should be allocated to a particular institution, nor why a particular type of person should exercise these powers. A satisfying account of the separation of power would, for example, explain why courts decide cases rather than produce statutes, why we expect executive officials to be experts in some field or other but allow anyone to become a legislator.

Subsequent writers on the principle identified a different guiding purpose that may animate the separation of powers. Inspired, in part, by the resurgence of interest in institutional analysis in America,[31] an alternative approach to the separation of powers claims that the point of the doctrine is to promote efficient state action by ensuring that powers are allocated to the institution best able to make use of those powers.[32] There is a long tradition of scholars who place efficiency, rather than just liberty, as at the heart of the separation of powers.[33] James Madison, for example, noted the power of the doctrine to protect the people from tyrannical government,[34] but also recognised its capacity to enhance good government.[35] As one delegate at the Convention in Philadelphia put it, when all the powers of state were vested in a single body 'none of them can be used with advantage or effect.'[36] In one of the best recent interpretations of the doctrine, Eoin Carolan provides a re-interpretation of the doctrine that stresses its dependence on the values that underpin the state.[37] We can only fully understand the demands of the separation of powers once we have understood the proper objectives of the state.

Identifying efficiency as at the core of the separation of power is only the first step towards producing a satisfying account of that principle. 'Efficiency' is, in itself, an empty

[29] *Berlin I.* 'Two Concepts of Liberty' in *Berlin I.* Four Essays on Liberty (Oxford: Oxford University Press, 1969).

[30] See, for example, *Raz J.* The Morality of Freedom (Oxford: Clarendon Press, 1988).

[31] *Komesar N.* Imperfect Alternatives (University of Chicago Press: 1996); *Rubin E.* 'The New Legal Process' (1996) 109 Harvard Law Review 1393.

[32] *Barber*, note 24 above; Carolan note 2 above; *Gerangelos P.* The Separation of Powers and Legislative Interference in Judicial Process (Oxford: Hart Publishing, 2009).

[33] *Gwyn*, note 4 above, 32–34; *Anderson A.* 'A 1787 Perspective on the Separation of Powers', in *Goldwin R., Kaufman A.* ed. The Separation of Powers — Does it Still Work? (Washington: AEI Press, 1987), 145; *Morgan D.* The Separation of Powers in the Irish Constitution, (Dublin: Round Hall Ltd., 1997), 4; *Laslett P.*, in *Locke J.* Two Treatises of Government ed. P. Laslett, (Cambridge 1988), 118-120; *Peabody B., Nugent J.* 'Toward a Unifying Theory of the Separation of Powers' (2003-2004) 53 American University Law Review 1, 26.

[34] *Madison*, note 16 above, especially N 47.

[35] Ibid, N 37, 243. Madison wrote: 'Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government.'

[36] *Farrand M.* The Records of the Federal Convention of 1787, vol. III, at p. 108 (Yale: Yale University Press, 1966).

[37] *Carolan*, note 2 above.

concept: we need some values that are worth maximising before an efficient maximizer becomes attractive. There is not enough space to address the purpose of the state fully here,[38] but any plausible account of what the state ought to do would accommodate, in some way, the importance of democracy: of mechanisms that allow the members of the state to determine the state's policies. Democracy requires, most obviously, that the bodies that set the direction of the state are under the control of its citizens. In presidential and parliamentary systems the legislature is elected by the people, and determines the broad policies of the state. In a presidential system the people also elect the head of the executive, who is given some constitutional latitude over the implementation of the statutes passed by the legislature and, within limits, is also given some power to autonomously determine state policy. In a parliamentary system the executive is connected to the electorate through the legislature. The head of the executive branch only has the latitude that the legislature is willing to allow her.

Democratic government cannot be realised simply through the creation of democratic institutions. These institutions must also be capable of achieving the objectives set by their members: the elected elements of the state must be effective. This requires at least two further elements, each of which is vital to the separation of powers.

First, there must be some mechanism that allows the integration of expertise into the process. Technical expertise needs to inform the creation of laws and policies, both by dissuading elected officials from foolish or impractical schemes and, also, by showing how sensible policies can be implemented. Once the policies are in place, experts are needed to carry on the business of government and, within bounds, modify the policies over time. The need for expertise within the constitution brings with it a need for some form of accountability in government. Unelected experts may gain their place in the constitution because of their expertise, but democracy requires that their influence on legislation be mediated through elected representatives, and, when implementing or modifying policies, that they explain and justify their decisions to those who enjoy a democratic mandate.

Second, democracy can only function in a system in which there is a reasonable degree of certainty over the meaning and application of the law. If the elected officials of the state are to set its policies, they must be able to identify the rules that presently guide the conduct of state officials, and they must be able to effectively alter these rules. The statutes produced by the legislature, for example, must be applied by state officials and must, to an extent, make the difference they aspire to make. Otherwise the state may possess democratic institutions, but it will not be governed democratically. For a number of different reasons, therefore, the separation of powers requires us to subscribe to a further principle: that of the rule of law. Both the separation of powers and the rule of law require that the courts are, to a significant degree, independent of the other branches of state, and that judges make decisions according to the relevant law and not because of bribes or political pressure. This is not just a matter of applying the law to private parties: the rule of law and the separation of powers each demand that the law also be applied to state officials, tying them to the decisions made by the elected elements of the constitution. It is only once the rule of law exists in a state that the legal instrument of the statute is rendered effective — and it is only once statutes are effective, that democracy can flourish.

[38] I discuss the purpose of the state in greater detail in *Barber N.W.* The Constitutional State (Oxford: Oxford University Press, 2010), chapters 2 and 3.

These last paragraphs have presented a very simple and very thin account of the purposes of the state, tying the aim of the state tightly to values instantiated by democracy. This is not enough to provide a satisfying account of the state — there is more to the state than a mere vehicle for democratic processes — but it does demonstrate how quickly reflection on the nature and point of the state can help clarify the nature of the separation of powers. And, moreover, this richer account of the separation of powers begins to explain some of what the older writers on the principle assumed. It explains why there is a need for different types of institution in the state, why they should be allocated and exercise different types of power, and why different types of person should act within these institutions.

The Resurgence of the Separation of Powers

It would be rash to draw a causal link between the reawakening of academic interest in the separation of powers and the increasing political appreciation of its demands. Nevertheless, in a number of areas the British constitution has shown a fresh awareness of the claims of the principle: separation of powers has been a consideration behind a number of constitutional reforms over the last twenty years, leading Vernon Bogdanor to argue that it has become the basis of the modern constitution.[39]

The most obvious and widely discussed constitutional reform linked to the separation of powers has been the ending of the judicial role of the House of Lords and the creation of the Supreme Court.[40] The Constitutional Reform Act 2005 created a new Supreme Court, separate from the legislative branch, consisting of judges who no longer sit in the House of Lords.[41] Though this change is likely to be largely cosmetic — the same type of people will exercise the same type of powers in the same type of way as under the old system — it has removed one of the most obvious and least justifiable overlaps of power in the British system.[42] Alongside the creation of a supreme court, the Constitutional Reform Act also reduced the role of the Lord Chancellor. The Lord Chancellor lost the power to sit as a judge, and also lost his role in judicial appointments. The office of the Lord Chancellor still exists, but he is now equivalent to a minister for justice; a Cabinet member with special responsibility for the courts and the legal process who is under a legal duty to support the judges, and to defend their independence.[43] The Lord Chancellor has also ceased to serve as speaker of the House of Lords,[44] though he remains a member of Parliament. Older writers used to hold up the Lord Chancellor as a one-man refutation of the relevance of the separation of powers to the British constitution: following the Constitutional Reform Act 2005, this charge can no longer be made.

Whilst the creation of the Supreme Court and the reform of the role of the Lord Chancellor may be the most prominent moves towards the separation of powers, there are a number of other, less obvious, areas in which the influence of the principle has been felt. The enactment of the Human Rights Act 1998 has given further domestic legal protection to the rights

[39] *Bogdanor V.* The New British Constitution (Oxford: Hart Publishing, 2010), 285.

[40] See further, *Steyn J.* 'The Case for a Supreme Court' (2002) 118 Law Quarterly Review 382.

[41] The Constitutional Reform Act 2005.

[42] *Woodhouse D.* 'The Constitutional and Political Implications of a United Kingdom Supreme Court' (2004) 24 Legal Studies 134 and D. Pannick, 'Replacing the Lords By a Supreme Court' [2009] Public Law 723.

[43] Constitutional Reform Act 2005, s.3.

[44] Constitutional Reform Act 2005, s.18.

contained in the European Convention on Human Rights. Article Six of the Convention requires that on decisions about a person's criminal liability or that adjudicate on her civil rights and obligations, she is 'entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Applying this provision, the courts have handed down decisions that have restricted the judicial powers of Ministers, ending the power of the Home Secretary to set the effective length of sentences for 'life' prisoners.[45] Sentencing is, it seems, part of the judicial function and, as such, should be exercised by judges and not officers of the executive branch.

Conclusion

This paper has charted the renaissance of separation of powers in the British constitution. In part, it has told a story of a shift in fashion, of the development of one of the hardest to analyze aspects of constitutional life: the constitutional culture that lies behind the rules and decisions that define the state. Whilst it was once rejected out of hand, scarcely discussed by academics and lawyers, the separation of powers has slowly found a place in British constitutional thought. Now it is accepted as a principle that underpins the British constitution; it is a principle that is cited by judges[46] and invoked in political debate. Alongside this resurgence in practical effect, there has also been a reassessment of the nature of the principle. In its early, simple, forms it was a crude protector of liberty, frustrating tyrants by insisting on the division of powers. In its modern incarnation, it is seen as a principle of effective institutional ordering: demanding that its supporters consider the point of the state, and the ways in which the constitution should be structured to achieve the state's objectives. Whilst its full meaning and implications have yet to be worked through, it seems that separation of powers will play an important role in the development of the British constitution, and — in its incarnation as a principle of constitutionalism — of constitutions more generally.

[45] R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46, and see now Criminal Justice Act 2003.

[46] For example: Matthews v Ministry of Defence [2003] UKHL 4. For a good discussion, see: *Turpin C., Tomkins A.* British Government and the Constitution 7th ed. (Cambridge: Cambridge University Press, 2012), 130–139.