Constitutional forum constitutionnel

Bringing the Mixed Constitution Back In

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I. Introduction

No doubt exists that the separation of powers is a fundamental architectural principle in Canadian public law jurisprudence. But what about the idea of a mixed constitution? A simple CanLII search for "mixed constitution" turns up six cases. In five[1] of these cases, the search reveals the following phrases: "pre-mix constituted goods," "the mix constituting the excavated material," "the Owners' mixes constitute 'bread and rolls'," "the improper mixing constituted a fraudulent misrepresentation," and "quality control for the asphalt mix constituted." Clearly baking and aggregate blends figure largely in constituted mixes, but the constitutional jurisprudential sense is largely absent. That said, concerns about pre-mixing, constituted goods, excavating, improper mixing, and quality control do have some salience for the discussion that follows.

One case, however, does refer to the mixed constitution in the sense that I wish to focus on in this reflection on Jacob Levy's "The Separation of Powers and the Challenge to Constitutional Democracy"[2] and on the contributions of my fellow discussants — Professors Yann

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1 The phrases are taken from the following cases: *Bank of Montreal v Quality Feeds Alberta Ltd,* 1995 CanLII 808 at para 7; *Great West Development Marine Corp v Canadian Surety Co*, 2000 BCSC 806 at para 26; *Stikeman Elliott LLP v Puratos NV,* 2017 TMOB 29 at para 21; *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd,* 2017 ABCA 378 at para 5; and, *TNL Paving Ltd v British Columbia (Ministry of Transportation And Highways),* 1999 CanLII 5186 at para 297.

2 Jacob T Levy, "The Separation of Powers and the Challenge to Constitutional Democracy" (2020) 25:1 Rev Const Stud 1.

Allard-Tremblay, Hillary Nye, and Arjun Tremblay. In this reflection, I will briefly examine the separation of powers, the related idea of checks and balances, and the mixed constitution generally and as they appear in Canadian public law jurisprudence. For the discussion of the mixed constitution, I will examine this singular case — the *Patriation Reference*[3] — to illustrate how the idea of a mixed constitution *is* part of our legal tradition and is therefore of potential jurisprudential use. I will then turn to discuss the two themes that the mixed constitution, when contrasted with the separation powers, raises in my mind: the import of the mixed constitution for administrative law, and the idea of public faith that an older constitutional tradition embraces, but which is not part of a modernist or positivist understanding of a constitutional order. My main point will be that the idea of bringing the mixed constitution back into our jurisprudence — if not in name, then in substance — will improve both the descriptive and normative purchase of our public law jurisprudence and improve the quality of resulting analyses.

II. Pre-mixed Constitutive Goods

In this section, I will provide a short examination of three basic concepts as they appear in Canadian jurisprudence: the separation of powers; the associated notion of checks of balances; and the concept of a mixed constitution, or mixed government.

The Separation of Powers

The Canadian constitutional model is often described as a "hybrid"[4] of the British and American models with the "US-inspired separation of powers … superimposed on a British, 'Westminster' system of government."[5] In this sense, our constitutional structure was already "premixed" and we simply adopted the admixture through the wording of the preamble to the *British North America Act, 1867*[6] (now the *Constitution Act, 1867*): "a Constitution similar in Principle to that of the United Kingdom." Any excavation of the origins of our Constitution, however, discloses the basic reality that the three branches often share each other's functions and, in doing so, check, overlap, and cooperate with each other.[7] Examples of usually unproblematic sharing or overlaps of power include the Speaker of the House possessing a quasi-judicial function, judicial "legislative" practices of "reading in" words into statutes, and cabinet having an appeal function. Numerous other overlaps, and even fusions, exist.[8] So, it is

3 *Re: Resolution to amend the Constitution,* [1981] 1 SCR 753, 1981 CanLII 25 [*Patriation Reference*].

4 See Warren J Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 1031 at 1031, 1043.

5 Peter Cane, "Understanding Administrative Adjudication" in Linda Pearson, Carol Harlow & Michael Taggart, eds, *Administrative Law in a Changing State* (Oxford: Hart Publishing, 2008) 273 at 293.

6 *The Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK) [*CA, 1867*].

7 Adam Tomkins offers a good analysis of the separation of power in the British tradition. See Chapter 2 in *Public Law* (Oxford: Oxford University Press, 2003). He considers the defining feature of the British order to be a separation of power (singular) between the Crown and Parliament alone. This is not the case in Canada, and is one reason why Canada finds itself *between* the British and American models of the separation of powers.

8 For an analysis of some of the more problematic overlaps and fusions, see Mary Liston, "The Most Opaque Branch? The (Un)Accountable Growth of Executive Power in Modern Canadian Government" in Richard

clear, as discussed by Professor Levy in his lecture, that the Westminster system that we have "inherited" in Canada does not possess a bright line separation of powers.

Nevertheless, our jurisprudence does invoke the principle of the separation of powers. One of the most cited "definitions" of the separation of powers starkly illustrates the "elemental" form it usually takes in the jurisprudence. Dickson CJ, for the Supreme Court, coined this definition when he wrote:

> There is in Canada a separation of powers among the three branches of government — the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[9]

Dickson CJ's descriptive statement reflects how the *Constitution Act, 1867* laid out the three branches of government in our Westminster parliamentary system. Very little has been added to his statement since and it remains rather sleek, if not skeletal, in content. So, while accurate and uncontroversial, the principle of the separation of powers remains less than helpful in making sense of Canada's constitutional order.

Despite the basic division or structure that Dickson CJ's statement confirms, constitutional scholar Peter Hogg consistently argued throughout his career that the *Constitution Act, 1867* neither set out a general separation of powers nor insisted that each branch of government only exercise its own function.[10] One key reason was that the executive power was vested in the Queen and the Crown appears in every branch of government.[11] Perhaps for this reason, the Supreme Court of Canada has described the American model as "strict"[12] in comparison to Canada's, and has been hesitant to supply much in the way of substantive content. We therefore do not get a strong sense of the differences between the two countries in the case law. Since Confederation, then, the basic idea of the separation of powers has been simultaneously much simpler and more complicated than the American ideal type with its separate and distinct branches — though even James Madison acknowledged the necessary (and often salutary) intermixing of powers,[13] while Alexander Hamilton endorsed the partial intermix-

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Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 19.

9 *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CanLII 14 at para 39.

10 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 7.3(a) and editions before and after.

11 *CA, 1867*, *supra* note 7, s 9. On this point, see Levy *supra* note 2 at 5. See also Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004) at 24-25.

12 See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 13 [*Secession Reference*]. Here, the separation of powers is discussed in relation to the Canadian practice of the highest court giving advisory opinions in reference cases: "However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., *Muskrat v United States*, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement." On the Supreme Court's reference function and the separation of powers, see Chapters 1 and 4 in Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart Publishing, 2019).

13 Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, (New York: Bantam, 1982) at Nos 38, 47.

ture for special and necessary purposes such as impeachment.[14] By critiquing the paucity of content in this principle, I do not mean to undermine its importance. The replacement of a unitary monarchy with three institutions in which formerly unitary public power has been separated, redistributed, and housed remains a significant legal and political achievement. As Martin Loughlin writes: "The establishment of a legal system that operates in accordance with its own conceptual logic while remaining free from gross manipulation by power-wielders is an achievement of considerable importance."[15]

Because of its thin content, the separation of powers does very little analytic work in most cases, other than act as a recurring reminder that the judiciary should not usurp the jurisdiction of the other two branches. Where nuance is provided, it involves overt acknowledgement of overlap. We can see this in the *Secession Reference*, where the Supreme Court explicitly states the true nature of the Canadian model in its discussion of, and justification for, the constitutional validity of the courts' reference function:

> Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid.[16]

I will return to the implications of this quote when I later argue why the mixed constitution may be a better descriptor for the structure and functions of modern government. A second strong acknowledgement of overlap is this well-known admonition written by Major J for the Court:

> The doctrine of separation of powers is an essential feature of our constitution. It maintains a separation of powers between the judiciary and the other two branches, legislature and the executive, and to some extent between the legislature and the executive … On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government. … The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.[17]

The tensions that such overlaps produce can create strong anxieties in public law jurisprudence. Judicial anxiety is surely one of the reasons why Dickson CJ expressed the reality of the Canadian separation of powers in this way:

> It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not, with all respect to the contrary position taken by Jerome A.C.J., constitutionally cognizable by the judiciary. The *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament.[18]

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14 *Ibid* at Nos 66.

15 Loughlin, *supra* note 11 at 42.

16 *Secession Reference*, *supra* note 12 at para 15.

17 *Wells v Newfoundland,* [1999] 3 SCR 199, 1999 CanLII 657 at paras 52-54.

18 *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources*), [1989] 2 SCR 49, 1989 CanLII 73 at 103.

That *grundnorm*, however, no longer operates as the dominant constitutional principle. Instead, an open set of interrelated architectural principles work together and in tension with each other — principles such as constitutional supremacy, parliamentary sovereignty, the rule of law, separation of powers, democracy, and so on.

The "strictest" form of separation advanced by the Supreme Court is in its interpretations of the principle of judicial independence that have had the effect of amplifying that independence from the other branches.[19] Along with the preamble, section 96 of the *Constitution Act, 1867* represents the interpretive fount for the principle of judicial independence and maintains the traditional function of the superior courts in a common law system. We can trace the important development of independence for courts, especially in matters of judicial review, to the historical significance of the United Kingdom's *Act of Settlement, 1701*.[20] Peter Cane underscores the importance of the judicial branch for the rule of law and the separation of powers for our constitutional model: "Independence of the judiciary is universally accepted to be a necessary condition of good government and freedom of the individual regardless of the details of other constitutional arrangements. This is particularly true in Westminster systems, where the main significance of the separation of powers lies in the independence of the judiciary."[21] This view is also consistent with Professor Levy's discussion of Montesquieu's views on the judicial power and the Constitution of England.[22] The most ardent advocate and crafter of the jurisprudence on judicial independence was Lamer CJ[23] and I will return to some of the implications of his writings on judicial independence in Section III below when I reflect on the separation of powers, the mixed constitution, and administrative tribunals.

To Separate is Also Not Necessarily to Check

The related idea of "checks and balances" is even less prevalent in our constitutional jurisprudence. Generally in the case law, it is most often used in relation to non-governmental institutions, relations, and schemes rather than governmental ones. When the concept of checks and balances is used in Canadian public law jurisprudence, it often describes how a statutory scheme internally operates. It also appears in relation to the workings of the criminal justice system. Regarding constitutional jurisprudence,[24] checks and balances are most often asso-

19 In his overview of the principle of the separation of powers, Warren Newman insists that the associated principle of judicial independence "can stand alone as an autonomous principle of the first order". Newman, *supra* note 4 at 1040. While principles have independent status from each other, I would argue that it is jurisprudentially undesirable to have any principles stand alone and autonomous of other principles. Regarding the four principles at stake in the *Secession Reference*, Supreme Court maintained that: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other." *Secession Reference*, *supra* note 12 at para 49.

20 *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject,* (UK), 1701, 12 & 13 Will III, c 2 [*Act of Settlement, 1701*].

21 Cane, *supra* note 5 at 279-280.

22 Levy, *supra* note 2 at 6-7. See Cane, *supra* note 5 at 276-80.

23 See *Reference re Remuneration of Judges of the Provincial Court (PEI),* [1997] 1 SCR 3, 1998 CanLII 833.

24 On CanLII, 'checks and balances' appears in 23 Supreme Court cases. The search turned up 1,145 cases in total. Discussion of the internal checks and balances particular to section 1 can be found in *Bell ExpressVu Limited Partnership v Rex,* 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*]. There it was understood that the judiciary ought not to (re)interpret all statutes to make them conform to the *Charter*. Instead, section 1 provides an opportunity for a government to justify the infringement of a *Charter* right, and section 52

ciated with the section 1 *Oakes* balancing test and the section 33 legislative override in the *Charter of Rights and Freedoms*.[25] The concept does not overtly appear at all in relation to the separation of powers.

This last result is interesting for the reason that Brian Singer suggests: in order for checks and balances to work — that is, to set power against power — different fields of action should already overlap in some way.[26] When seen this way, there is no need for a separate concept of checks and balances if the function of an existing overlap serves that purpose. Where overlaps may problematically prove suboptimal as constraints on the exercise of public power, or where power is problematically fused to facilitate the arbitrary exercise of public power, the separation of powers on its own may do the work of checks and balances. In other words, there may be less need to invoke this concept in our system.

An intriguing development is that, while the concept of checks and balances appears in section 1 jurisprudence, the Supreme Court rejected a lower court's proposition to explicitly add the separation of powers to section 1's *Oakes* test. Binnie J for the court wrote:

> … Marshall J.A. proposed that a court should ask itself at each stage of the s. 1 analysis whether the judicial response to the questions posed conform to the separation of powers doctrine. …
>
> In summary, whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed. Canadian courts have undertaken this role in relation to the division of powers between Parliament and the provincial legislatures since Confederation. The boundary between an individual's protected right or freedom and state power must also be refereed. The framers of the *Charter* identified the courts as the referee. While I recognize that the separation of powers is an important constitutional principle, I believe that the s. 1 test set out in *Oakes* and the rest of our voluminous s. 1 jurisprudence already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations, as indeed was the case here. To the extent Marshall J.A. invites a greater level of deference to the will of the legislature, I believe acceptance of such an invitation would simply be inconsistent with the clear words of s. 1 and undermine the delicate balance the *Charter* was intended to achieve. I would therefore not do as he suggests.[27]

The end result of this particular case, then, was to return the separation of powers to its prior status as a kind of ghost principle in the legal machine — doing very little work and saying very little despite re-acknowledgement of its fundamental status.

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authorizes a reviewing court to declare an offending statute invalid if it the government fails to meet the requirements of sections 1's *Oakes* test. Checks and balances in relation to section 33 is mentioned in *Re BC Motor Vehicle Act,* [1985] 2 SCR 486, 1985 CanLII 81, where Lamer CJ pointed out that the American constitution does not have the internal checking and balancing mechanisms of sections 1 and 33 and also rejected the American approach to due process protection. See also *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59, [2014] 3 SCR 31 where Rothstein J in dissent accused the majority of violating the checks and balances internal to the *Charter* by sourcing the right of access to justice in section 96 of the *CA, 1867*, thereby providing it with stronger protection than what is given to *Charter* rights and also putting the principle of access to justice out of the ambit of section 33 and therefore beyond legislative response.

25 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), *1982,* c 11 [*Charter*].

26 Brian CJ Singer, "Montesquieu on Power: Beyond Checks and Balances" in Rebecca E Kingston, ed, *Montesquieu and His Legacy* (Albany: SUNY Press, 2009) 97.

27 *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66, [2004] 3 SCR 381 at paras 100, 116.

Excavating the Mixed Constitution: "To mix is not to separate." [28]

Professor Levy succinctly lays out Aristotle's idea of a mixed constitution or mixed government.[29] He then demonstrates how Montesquieu, by "re-describing" the English Constitution, "joined the existing institutions of mixed government with a quite different principle: the rule of law," which resulted in the idea of a separation of powers that, in turn, provided a strong institutional basis for judicial independence.[30] Following Aristotle, Montesquieu associated each branch with one of the three traditional classes or social orders, thereby maintaining their separate bases of power.[31] By way of contrast, in the United Kingdom Victorian constitutionalist AV Dicey looked to the *Act of Settlement 1701* as *the* British jurisgenerative moment when the central courts gained independence from royal control and transferred their loyalty from the monarch to the rule of law.[32] For Dicey, this institutional change galvanized the rule of law because the government became accountable not just to a sovereign parliament, but also to an independent judiciary.

It is not in the context of judicial independence, however, where mixed government comes into our jurisprudence. Rather, it is in the *Patriation Reference*'s analysis of conventions, constitutional morality, and federalism as a form of local democratic and representative government. The mixed constitution appears in the part of the judgment where Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer JJ all agree about the essential nature of constitutional conventions:

> Dicey first gave the impression that constitutional conventions are a peculiarly British and modern phenomenon. But he recognized in later editions that different conventions are found in other constitutions. As Sir William Holdsworth wrote … :
>
> > In fact conventions must grow up at all times and in all places where the powers of government are vested in different persons or bodies — where in other words there is a mixed constitution. "The constituent parts of a state," said Burke … "are obliged to hold their public faith with each other, and with all those who derive any serious interest under their engagements, as much as the whole state is bound to keep its faith with separate communities." Necessarily conventional rules spring up to regulate the working of the various parts of the constitution, their relations to one another, and to the subject.
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> Within the British Empire, powers of government were vested in different bodies which provided a fertile ground for the growth of new constitutional conventions unknown to Dicey and from which self-governing colonies acquired equal and independent status within the Commonwealth. Many of these culminated in the *Statute of Westminster, 1931*, 1931 (U.K.), c. 4.[33]

In the *Patriation Reference*, the Supreme Court cites the concept of a mixed constitution, but usefully detaches it from its ancient connection with social classes (as seen in Aristotle and Montesquieu's conceptions). Instead, the Court defines it as a plurality of persons, institutions, and offices that exercise government power for the public good. Again, this comports with the American trajectory of the separations of powers laid out by Professor Levy. It is

28 Levy, *supra* note 2 at 5.
29 *Ibid* at 3-5.
30 *Ibid* at 5-6.
31 *Ibid* at 8.
32 Cane, *supra* note 5 at 276-77.
33 *Patriation Reference, supra* note 3 at 880.

also clear in the *Patriation Reference* that the "orientation towards harmonious cooperation"[34] from the mixed government tradition informs the judicial conception of the convention of seeking provincial consent before requesting the amendment of the Canadian Constitution by the Parliament at Westminster. The ethos behind the convention is described as a kind of constitutive "public faith."

In public law for example, many of the canons of statutory interpretation and their associated practices incentivize harmonious cooperation and reinvigorate public faith between the judiciary and the legislature. In a key case involving the modern approach to statutory interpretation, which was already discussed above, the Supreme Court draws upon the idea of "institutional dialogue" as embodying this kind of ethos. Iacobucci J, discussing institutional dialogue explicitly and invoking the separate of powers implicitly, writes in *Bell ExpressVu*:

> This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta* … the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)" (*Vriend* … at para. 139).[35]

On my reading, the mixed constitution links together several fundamental principles that undergird a kind public faith. Part of this public faith is the role morality that legal actors hold while in office that Professor Nye's contribution to this issue explores.[36] This public faith or public ethos is a blend of harmonious cooperation (i.e. mixing and balancing) and effective oversight (i.e. reviewing, separating, and checking). It remains aspirational. And, as Professor Levy's lecture and the accompanying commentary from all four discussants raises, public faith has come under severe stress in our times.

Professors Levy and Allard-Tremblay provide incisive analysis of how political parties and factions have undermined the institutional incentives created by the separation of powers for actors to be loyal to the office rather than to their party or faction, how this has contributed to a set of difficult governance challenges, and how these challenges present an opportunity to reflect on whether the current state of distrust — a loss of public faith in government — can be productively harnessed. It seems clear that the development of modern political parties in Canada, as in the United States and the United Kingdom, has undone much of the work done in the earlier history when the executive and legislature were more separate.[37] The problem of partisan loyalty and the spectre of executive impunity, as a result of the dominance of the political executive, has significant implications for the separations of powers, the mixed constitution, and the administrative state. The Canadian case remains different from the Ameri-

34 Levy, *supra* note 2 at 9-10.

35 *Bell ExpressVu*, *supra* note 24 at para 65.

36 Hillary Nye, "Checking the Other and Checking the Self: Role Morality and the Separation of Powers" (2021) 30:4 Const Forum Const 45.

37 See Cane, *supra* note 5, at 277-78 on this point, referring to the United Kingdom. See also Liston, *supra* note 8.

can, but it is vulnerable to these trends. With this in mind, I next turn to the two themes that Professor Levy's lecture has raised for me, and I will be drawing on these ideas of "harnessing distrust"[38] and "sources of resilience"[39] — but first I will recap Part II.

The Aggregate Mix: A Recap

The key points to take forward from Part II's discussion of fundamentals consists of the following. First, the principle of the separation of powers is a fundamental, but rather skeletal, constitutional principle in Canadian jurisprudence which shapes and supports the actual architecture of our government. This underscores Peter Hogg's claim that we do not yet have a general separation of powers doctrine: right now, it remains bare bones. The separation of powers should be understood functionally — three institutions with core competencies which each house different powers and purposes. It is not strict or "watertight" and beneficial overlaps are legitimate and welcome. The separation of powers most usefully buttresses the independent judicial function and it is crucially related to the complementary principles of the rule of law, deference to and respect for each branch's jurisdiction, and legality. It is also related to the political constitution, which I also call constitutional morality and public faith. The separation of powers is related to the concept of checks and balances (but not strongly in our jurisprudence, which I have argued is appropriate given existing permissible overlaps). Lastly, the separation of powers could be innovatively linked to the concept of the mixed constitution/mixed government should that opening be taken up in the future. Such an uptake, with novel content, could further "Canadianize" the doctrine perhaps by resuscitating the dormant idea of institutional dialogue, understood as a relational theory about "how the branches of government operate and interact within a working constitutional system."[40]

III. The Mixed Constitution and Administrative Law: Pluralism and Public Faith

In this brief set of reflections, I argue that US debates about the legitimacy of the administrative state are not relevant for the Canadian model of the separation of powers and judicial review. Indeed, both the Canadian separation of powers and the idea of mixed government illustrate how the administrative state, including administrative tribunals, serves to disperse power and provide another institutional avenue for legal subjects to demand accountability, fairness, and legality from executive actors whose decisions affect their rights, interests, and privileges.

(Im)proper Mixing?

Unsurprisingly, given the distance in time between the development of the original idea and its modern variant, the separation of powers has almost nothing to say about the administra-

38 Yann Allard Tremblay, "Harnessing Distrust and the Power of Intercession for the Separation of Powers" (2021) 30:4 Const Forum Const 37.

39 Levy, *supra* note 2 at 17. Arjun Tremblay, "Are there "Sources of Resilience" When the Separation of Powers Breaks Down?"" (2021) 30:4 Const Forum Const 25.

40 Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30:1 Kings LJ 43 at 46.

tive state. Because administrative bodies possess differing combinations of the three functions — adjudicative, legislative, and executive — they present descriptive and normative challenges under a strict understanding of the separation of powers, although the Canadian model is less burdened by these challenges. This critique of the administrative state, grounded in a model of a strict separation of powers, currently holds a great deal of sway in the United States. There, debates about the separation of powers and the executive branch, including both presidential and administrative powers, rage.[41] Two examples are debates about whether the Constitution requires that the President control a hierarchically organized executive branch, or whether the Constitution requires that each branch exercise *only* the power assigned to it. If strictly enforced, this second argument would result in the dismantling of many administrative agencies. In the United States, then, models of the constitutional state have become distorted, partial, and even overtly partisan.[42]

These sorts of debates occasionally surface in Canada, but really ought not to, given the differences between the US and Canadian public law orders, models of the separation of powers, and political cultures. Questions may arise about the constitutional nature of a particular administrative body,[43] for example, but not the wholesale repudiation of the administrative state. In a Westminster system operating under the rule of law, with a functioning constitution, and with institutions that maintain "public faith," the constitutional status of administrative actors should not be a matter of widespread dispute. Canadian public law has tended to analogize the hybrid architecture of many administrative bodies as a kind of "government in miniature," to use the phrase originally coined by John Willis.[44] To take another analogy, this time a more organic concept from nature, many administrative bodies might be seen as "fractal" — little governments replicating big government in different ways and across different scales. This complex institutional pluralism can be a desirable feature in a constitutional order.[45] Understood this way, the administrative state facilitates the *dispersion* of government power, rather than its improper concentration. After the recent experience with the Trump presidency, we can see that the administrative state and its actors can function as sites where distrust can be fruitfully harnessed, especially when confronting outright presidential mendacity. A better understanding of the separation of powers is therefore one that recommends

41 For an overview of these debates, see M Elizabeth Magill, "Beyond Powers and Branches in Separation of Powers Law" (2001) 150:2 U Pa L Rev 603. Even a trenchant critic like Richard Epstein does not advocate for the abolition of the administrative state whole-hog but, following libertarian ideology, recommends a minimal administrative state. See Richard A Epstein, *The Dubious Morality of Modern Administrative Law* (London, UK: Rowman & Littlefield, 2020).

42 Kavanagh, *supra* note 40 at 63.

43 But see *Reference re Code of Civil Procedure (Que), art 35,* 2021 SCC 27 for a recent example of the judicial branch protecting and preserving the historical jurisdiction and status of section 96 courts. See also the recent constitutional challenge to the jurisdiction of British Columbia's Civil Resolution Tribunal on the basis that the legislative scheme violates section 96 by creating a section 96 court within the provincial executive: *Trial Lawyers Association of British Columbia v British Columbia (AG),* 2021 BCSC 348.

44 See John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional" (1935) 1:1 UTLJ 53 at 78. See also Mary Liston, "Administering the Canadian Rule of Law" in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context,* 3rd ed (Toronto: Emond Montgomery, 2018) 139-182.

45 See Paul Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly & Vanessa A MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 84.

a general division of labour among the branches, while also acknowledging shared functions between institutions, and supplementing institutional design with appropriate counterbalances (both positive in encouraging action and negative in constraining action). This understanding also comports with the idea of a mixed constitution presented above. Both provide a better descriptive and normative understanding of institutional relations in complex governance.

This paper follows many other scholars in proposing that the separation of powers needs to be updated in Canadian jurisprudence. It is beyond the scope of this paper to lay out this more complex understanding of the separation of powers in relation to the modern state, but many scholars are at work on this shared project.[46] And, as I have said above, it is my view that the literature on "institutional dialogue" also supports this conception of a functional division where institutions both counter and cooperate and where overlapping functions are presumed legitimate until shown otherwise.[47]

I am not, however, totally sanguine. Complex governance poses challenges for democratic and rule of law accountability as well as for institutional coherence and coordination, particularly when we create more strongly independent public actors (e.g. auditors, ombuds, watchdogs) and bodies (e.g. central banks, electoral commissions, agencies like Statistics Canada) than the more garden variety administrative agencies, boards, commissions, and tribunals. Distrust of the administrative state is part of the loss of public faith in government. Powerful executives may upset the dispersion of power that the administrative state contributes to by putting partisan loyalists in charge of administrative bodies. When in charge, partisan loyalists will shape the policy-making and discretionary powers exercised by those bodies in favour of the political executive's agenda. As Bruce Ackerman writes of presidential systems, although this can apply to parliamentary systems as well: "Presidential systems encourage the politicization of the bureaucracy, leading to the demotion of career civil servants to second-tier positions as presidents keep pushing political loyalists into key administrative positions in their on-going struggle with Congress."[48] Ackerman suggests, however, that such a strategy is short-term in a parliamentary system where the incentives and sources of resilience differ. Once a strong civil services tradition has been established, he argues that the "political logic

46 In addition to Magill, *supra* note 41, see also Bruce Ackerman, "The New Separation of Powers" (2000) 113:3 Harv L Rev 633; Richard Albert, "The Fusion of Presidentialism and Parliamentarism" (2009) 57:3 Am J Comp L 531; NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018); Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: Oxford University Press, 2009); Mogens Herman Hansen, "The Mixed Constitution Versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy" (2010) 31:3 History of Political Thought 509; Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus & Malcom Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 221; and Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford: Oxford University Press, 2017).

47 See e.g. Dennis Baker, "A Feature, Not a Bug: A Coordinate Moment in Canadian Constitutionalism" and Jacob T Levy, "Departmentalism and Dialogue" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 397, 68.

48 Bruce Ackerman, "Good-bye, Montesquieu," in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010) at 131.

of parliamentarianism is likely to sustain the professional tradition."[49] Over the last twenty years, Canada federally, and in some provinces, has seen significant challenges to this tradition of a strong civil service, and there have been significant incursions on the independence of administrative bodies.[50] One potential remedy — a remedy that recognizes the constitutional dimension of both the administrate state and administrative law — would be to better guarantee indicia of independence for certain types of administrative bodies that perform functions that have significant public law or constitutional import, such as adjudication.

Quality control

But, there is a rub with this remedy. One of the trickiest features of the administrative state has been the development of administrative tribunals (in the true sense of the word "tribunal") and their constitutional relationship with superior courts in our legal system.[51] Our jurisprudence certainly discloses a somewhat fraught relationship between administrative tribunals and some judges at the Supreme Court. The creation of non-court adjudicative bodies, housed in the executive branch and without the constitutional guarantees of independence (such as the *Valente*[52] requirements of security of tenure, financial security, and institutional independence over administrative matters), continues to produce strong tensions. This is primarily due to the ongoing efforts of the judicial branch to protect and preserve the jurisdiction and status of section 96 courts — courts which constitutionally represent the separation of powers. The "rule" that has developed over time is that administrative bodies can exercise delegated adjudicative powers (if properly authorized by the enabling legislation) so long as the government that creates that body (federal or provincial) does not completely re-create a section 96 court.[53] The intent behind this rule is to ensure that provinces do not create a parallel system of administrative justice that would replace the superior courts whose judges are federally appointed. With some exceptions, this has generally not posed a problem constitutionally.[54] Nevertheless, if one wanted to enhance the independence of administrative tribunals by extending some of the constitutional guarantees of independence, as was done in the United Kingdom in 2007,[55] our jurisprudence sets up a roadblock. One very bright separation of powers line that McLachlin CJ (for the Court) entrenched regarding the administrative state is this:

> Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of

49 *Ibid* at 132.
50 See Liston, *supra* note 8.
51 See Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge: Cambridge University Press, 2006).
52 *Valente v The Queen,* [1985] 2 SCR 673, 985 CanLII 25.
53 *Re Residential Tenancies Act, 1979,* [1981] 1 SCR 714, 1981 CanLII 24.
54 *Supra* note 43.
55 See Cane's discussion of these reforms and the resulting *Tribunals, Courts and Enforcement Act 2007*, *supra* note 5 at 286-287.

> independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.[56]

Here, our separation of powers puts us between a rock and a hard place: if we give administrative tribunals more independence, we may violate the Constitution; but, if we do not provide them with more protection from the executive, then their power-dispersing function fails and we may end up with a partisan body that risks using its powers arbitrarily in order to toe the party line.

Of equal interest are battles over jurisdiction and interpretation. Some judges have maintained a hierarchical approach whereby courts need not defer to an administrative actor's interpretations of statutory provisions or other questions of law concerning civil or human rights.[57] This debate is ongoing. In *Cooper v Canada (Human Rights Commission)*, Lamer CJ (concurring) maintained that while the judiciary does not have an interpretive monopoly over questions of law as an interpretative matter (and also if the legislature intends that the administrative body be the main interpreter), he insisted that courts must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution, including the *Charter*.[58] Administrative bodies therefore cannot access the section 52 remedy of "striking down" legislation that offends the Constitution; only courts can exercise this power. The dissent in *Cooper*, penned by McLachlin J with L'Heureux-Dubé J, vociferously disagreed and held that if a tribunal's jurisdiction includes questions of law, then that includes the power to determine whether or not its enabling legislation is unconstitutional. They rejected Lamer CJ's "holy grail" conception of the Constitution (specifically the *Charter*) and underscored how important adjudicative bodies are for access to justice in the modern state and for providing alternative routes to accountability than judicial review in the superior courts:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[59]

The *Cooper* dissent eventually won out. But for those who have anxieties about arbitrary administrative interpretations that implicate constitutional matters, a jurisprudential balance and check has been struck. Regarding general interpretation, a presumption of reasonableness exists when administrative actors interpret their enabling legislation, rather than the more

56 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52, [2001] 2 SCR 781 at para 24.

57 See David Dyzenhaus on the consequences of Lamer CJ's formalist understanding of the separation of powers in relation to administrative bodies and especially those adjudicative bodies which interpret rights (e.g., human rights tribunals). He argues that Lamer CJ sought to preserve a "judicial monopoly" on the interpretation of law. David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27:2 Queen's LJ 445 at 488.

58 *Cooper v Canada (Human Rights Commission),* [1996] 3 SCR 854 at para 13.

59 *Ibid* at para 70. The remedy that administrative bodies use is to decline to apply the offending statutory provision in the case or dispute at bar. This remedy returns to issue back to the other branches which can then decide whether or how to amend the statute.

stringent standard of correctness.[60] Where a legislature has created an administrative decisionmaker to implement a statutory scheme, this presumption instructs courts to be cognizant that in order to fulfill its mandate, that body has the jurisdiction to interpret the law applicable to all issues that come before it, including constitutional matters if it can consider questions of law.[61] It will be up to a particular complainant to displace that presumption and demonstrate that the administrative interpretation or decision is unreasonable. Key to this exercise, and to the culture of justification[62] that exists in Canadian public law, are the reasons given by the particular administrative actor seeking to justify the decision and its outcome. Reasons also serve to "check" the judiciary because they need to be mindful of legislative intent to delegate authority to that administrative actor (including the power to interpret the enabling legislation), the jurisdiction of that administrative actor, and the limits on their own exercise of powers. In this way, our constitutional and administrative legal order not only sanctions overlap, but also interpretive pluralism and the dispersion of public power. But, these overlaps are also accompanied by a variety of internal and external checks on power — both administrative and judicial.[63] Quality control is ensured through judicial review with courts properly deferring to justified interpretations and retaining the last adjudicative word on constitutional matters.

Scaling Up Constraints on Executive Power from Administrative Law

Many Canadians harbour deep anxieties about the concentration of power in the executive branch, and in particular unaccountable bodies like the Prime Minister's Office. Administrative law might provide useful resources to maintain the separation of powers but also provide accountability. But, these resources can only reach their potential with a rethinking of the separation of powers along the lines discussed above. Both constitutional and administrative law in common law systems locate a separate source of power as well as an overarching reason for understanding the judiciary as providing a necessary oversight function to review exercises of executive power. This oversight function theoretically encompasses *all* forms of executive power, including the once solely monarchical prerogative powers. However, judicial review of prerogative powers is highly deferential and sometimes not even justiciable.[64] If we were to better see the constitutional dimension of administrative law — that is, as a form of common law constitutionalism — it might serve as an institutional site for further constraints on the potentially unlawful use of executive discretion and prerogative power. What if, for example, we "scaled up" the foundational insight from the *Roncarelli*[65] case that "there is no such thing as absolute and untrammelled discretion" in public law and hold that such a bottom line should apply to prerogative power in order to further "tame" it. The end result would be that most, if not all, exercises of public power should be subject to judicial review in administrative law on the grounds of fairness, legality, proportionality, rationality, and reasonableness. In my view, exercises of public power should always be subject to a justification requirement at

60 *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

61 The legislature is always free to take away this function from an administrative body.

62 See the Honourable Madam Justice Beverley McLachlin on this "ethos of justification" in Canadian public law. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 Can J Admin Law & Practice 171 at 174.

63 See Nye on how internal checks work, *supra* note 36 at 52.

64 *Black v Canada (Prime Minister)*, 54 OR (3d) 215, 199 DLR (4th) 228, 2001 CanLII 8537.

65 *Roncarelli v Duplessis*, [1959] SCR 121, 1959 CanLII 50.

judicial review. Courts would then engage in different intensities of judicial review dependent on the context, thereby preserving the separation of powers by respecting different functions, expertise, and the deference principle. Professor Nye advances a similar view when she suggests Canadian public law should move towards a "stronger default of reviewability of exercises of public power" as one important direction for reform.[66] One recent example of such a development would be the game-changing decision by the UK Supreme Court in *Miller II* where Prime Minister Boris Johnston's advice to the Queen regarding prorogation was found to be unlawful.[67]

Public faith

In the short space left for this set of reflections, I want to highlight one other potential benefit of seeing Canadian public law through the lens of a mixed constitution rather than the separations of powers. This brings us back to Aristotle's idea of regime and the now unconventional view that in a constitutional polity, law itself must be moderated in order to prevent the domination of law or the domination of purely legal modes of structuring institutional and personal relationships. As Jill Frank argues: "Aristotle … holds both that the rule of law, and … the constitution, moderates the rule of men, and also that the rule of men moderates the rule of law, including the constitution."[68] Key to this idea of moderation — which is different than the language of balance that is linked to the separation of powers — are a set of aspirations informed by good judgment, practical wisdom, and responsiveness to context that can inform human relations and institutional design. In this sense, moderation is not just an individual virtue, it is also a constitutive feature and purpose of the constitution and its associated branches, offices, and subordinate bodies.[69] Aileen Kavanagh evokes this idea of moderation in her discussion of "inter-institutional comity" as a constitutive practice requiring that "the relationships between the branches of government … be based on a 'mutuality of respect' between them."[70] And, as Professor Nye further argues: "It has always been the case that good governance required good faith actors with a particular conception of their role to occupy that role and carry out their vision of what it requires"[71] — although, importantly, not as "entirely separate entities pursuing their own goals, but as interconnected 'partners in authority' engaged in the 'joint-enterprise of government' for the betterment of society."[72]

A commitment to moderation in law and politics is not what immediately springs to mind when we think about the separation of powers. And yet, this commitment to moderation informed the judicial approach to understanding conventions in the *Patriation Reference* as well as their understanding of the political constitution and the larger constitutional morality. What prevents a prime minister or president from going too far in the extension of their prerogative power? What prevents judges from being activist? What stops an administrative official from imposing their own policy preferences in their decision-making rather than what is intended by the legislature? Isn't one reason some kind of public faith? Professor Tremblay

66 Nye, *supra* note 36 at 52.
67 *R (Miller) v The Prime Minister and Cherry and others v Advocate General for Scotland*, [2019] UKSC 41.
68 Jill Frank, "Aristotle on Constitutionalism and the Rule of Law" (2007) 8:1 Theor Inq L 37 at 40.
69 *Ibid* at 47.
70 Kavanagh, *supra* note 40 at 66.
71 Nye, *supra* note 36 at 54.
72 Kavanagh, *supra* note 40 at 66 [footnotes omitted].

points to this kind of answer when he talks about formal institutional constraints and public norms as ongoing sources of resilience even as the separation of powers may be breaking down. Professor Nye emphasizes the importance of internal checks provided by a role morality which limits the discretionary power of all public actors, right up to the political executive.[73] The idea of a mixed constitution, and its association with public faith, provides a potential source of resilience for Canadian public law.

IV. Separating, Mixing, Checking, Balancing, Reviewing, Moderating, and Dialoguing

Public power required separation and redistribution. But that was not the only *telos* of the historical process. Once separated, we need to create a variety of institutional interrelations to achieve other goals such as institutional accountability and integrity, opportunities for participation, and the development of expertise and efficiencies. As Hugh Breakey phrases it, "we separate only to reconnect."[74] One route to reconnection is by looking back to the idea of a mixed constitution, since, as Professor Levy writes, "[t]he continuities between ancient and modern constitutionalism run both backward and forward."[75]

I have argued that the institutional pluralism that the administrative state represents is desirable because it has the potential to counteract pooling of power. Our constitutional model does not prohibit shared or overlapping functions so long as powers exercised are within jurisdiction and actors stay within the bounds of their authority.[76] Institutional design considerations guide us in our choice about whether to divide, to fuse, to coordinate, to compete, to separate, to balance, to check and so on. Jurisprudence can make these choices evident and disclose the purposes, strengths, and failings of various institutional relations, particularly where overlaps and fusions occur. In this way, judicial decisions themselves function as a feedback loop leading to potential opportunities for reform.

This reflection has argued that we might better see these considerations if we moved beyond the current conception of the separation of powers to a more nuanced understanding. We might, for example, revive the older model of a mixed constitution but update its content. As Jacob Levy writes, this revival has the potential "to simulate the desirable effects of ancient constitutionalism even after its traditional forms became anachronistic."[77] If that seems too far-fetched, we can further develop the seemingly dormant idea of institutional dialogue in Canadian public law. We even have a toehold in the *Patriation Reference* as a launching pad for either possibility.

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73 Nye, *supra* note 36 at 51.

74 Hugh E Breakey, "Dividing to Conquer: Using the Separation of Powers to Structure Inter-Relations between Institutions" (2014) 12 *Research in Ethical Issues in Organizations* 29.

75 Jacob T Levy, "Montesquieu's Constitutional Legacies" in Rebecca E Kingston, ed, *Montesquieu and his Legacy* (Albany: SUNY Press, 2009) 115 at 117 [Levy, "Montesquieu"].

76 See Iain Stewart, "Men of Class: Aristotle, Montesquieu and Dicey on the 'Separation of Powers' and 'The Rule of Law'" (2004) 4 Macquarie LJ 187.

77 Levy, "Montesquieu", *supra* note 75 at 125.