The politics-administration dichotomy : a reconstruction

Overeem, P.

6 | A Constitutional Principle

> "[A] near complete integration of politics and administration is a rather good characterization of totalitarianism, and perhaps liberty is a product of disjunction." (Waldo in Brown and Stillman 1986: 137)

6.1 Mistaken identity

In the previous chapters I have reconstructed the tradition of thinking about the politics-administration dichotomy in American and Western European administrative and political thought, from its earliest origins to its most recent treatments. Looking back on the road we have traveled we unfortunately cannot conclude that almost two centuries of explicit discussion about the relationship between politics and administration have resulted in a greater consensus or even in greater clarity about the issues at stake. On the contrary, the tradition seems to have got stuck in a confused heap of misunderstandings and misunderstandings of misunderstandings. In retrospect, the history of the dichotomy looks like a comedy of errors in three acts with a recurrent motif of 'mistaken identity'. Before suggesting a turn of events towards a happy ending or at least a happier continuation of the tradition, it may be illuminating to recall briefly how the *dramatis personae* – the classics, critics, and revisionists – have been deceived with regard to the meaning of the dichotomy.

The classics, by whom I have particularly understood Wilson, Goodnow, and Weber, have given authoritative accounts of the politics-administration dichotomy, although the idea itself stems from older political and administrative thinking. For all three, the dichotomy was not just an analytical construct, but above all a norm to structure the practice of government. Depending on their particular circumstances, the classics had diverging motives to propose a dichotomy between politics and administration. Simply put, Wilson and Goodnow wanted to separate administration from politics in order to preserve administrative values, whereas Weber aimed to subordinate administration to politics so as to preserve

political values.[1] This gives their formulations of the dichotomy a particular one-sidedness: they did not sufficiently take both sides of the problem into account. More importantly, they all three pitted the dichotomy against constitutionalism in general, and the separation of powers in particular. Wilson and Goodnow believed the dichotomy could serve as an alternative to the separation-of-powers doctrine. Weber was no less ready to abandon constitutional restraints, as his choice for plebiscitary democracy under nearly absolute political leadership makes clear (Slagstad 1988). Although the idea to separate politics and administration as such was very opportune, none of the classics perceived its constitutional relevance.[2]

The heterodox critics of the mid twentieth century, second, instead of improving upon our understanding of the purpose of the dichotomy, have instead seriously distorted the classical case for it. After transforming politics/administration into policy/administration and interpreting the dichotomy in a way that turns administrators into the passive instruments of politics, they inferred its untenability from the 'discovery' that administrators do in fact have discretion and make policy decisions. Hence, they rejected the dichotomy and sometimes even the very distinction between politics and administration. Unfortunately, their instrumentalist misinterpretation is still omnipresent in the literature.

Revisionist authors in the last three decades, finally, have attempted to clarify and advance the debate through historical reconstruction and the proposal of theoretical alternatives. Their rereading has led to a general rehabilitation of the classics, but in their zeal to resolve some misunderstandings created by the critics they have gone so far as to deny every connection between the classics and the dichotomy. With the best of intentions they did worse than a partial job resolving the puzzle, often making the case for the dichotomy still worse. The theoretical substitutes they presented have not been suitable to replace the dichotomy.

Now it is one thing to reconstruct how a tradition of thinking has gone astray, but something else to get it back on track again. In order to approach

[1] By means of the dichotomy, the classics aimed to *preserve* certain values, not to put them above all other values. Wilson, for instance, ultimately valued political freedom over administrative professionalism: "It is better to be untrained and free than to be servile and systematic" (1887: 207). And: "Liberty cannot live apart from constitutional principle; and no administration, however perfect and liberal its methods, can give men more than a poor counterfeit of liberty if it rests upon illiberal principles of government" (1887: 212). This does not mean, however, that "constitutional and administrative questions, in contrast to political questions, are closely related for Wilson," as Storing has claimed (1995a: 413; italics deleted).

[2] The classical dichotomy (in its 'American' version) was subsequently adopted by orthodox students of public administration in the 1920s and 1930s who integrated it with the ideas of Scientific Management. This association was neither necessary nor intrinsic, however, and this movement should not be seen as a distinct generation in the tradition of thinking about the dichotomy (see section 4.1).

the issue afresh we must ask why we actually got the idea now known as the politics-administration dichotomy in the first place. One common error of all three generations just described is that they have not seriously enough considered the challenge to which the dichotomy was originally invented as a response: the challenge to give the increasingly powerful public administration a proper place within constitutional democratic government. I believe we can develop an understanding of the dichotomy that is based on these original considerations and at the same time is still relevant today. I call this 'the dichotomy as constitutional principle,' and I argue my case for this view in the following steps. First, in the next section (6.2) I examine the relatively recently developed 'Constitutional School' in the study of public administration because my proposal connects to that approach. After that, it is explained what it means to say that the dichotomy can be understood as a constitutional principle (6.3). Subsequently, I present a negative argument for understanding the dichotomy as a constitutional principle, based on Waldo's suggestion to think through a situation in which there is no dichotomy at all (6.4). In section 6.5, then, I argue that the dichotomy already actually functions as a constitutional principle in practice. To strengthen my case, I then attempt to reconcile the dichotomy to the constitutional idea most closely related to it: the separation-of-powers doctrine (6.6). I conclude with a brief section showing how this approach connects to the dichotomy's original purpose, particularly as it was understood in the French approach discerned in Chapter Two (6.7).

6.2 The Constitutional School

During the greater part of the twentieth century, the field of Public Administration has paid little attention to constitutionalism and constitutional thinking. The idea expressed in Alexander Pope's well-known poetry line – "For forms of government let fools contest / whate'er is best administer'd is best" (1963 [1733-4]: 534) – while rejected by most political philosophers (Anter 1995: 88 n.197), has received much more sympathy from students of public administration. Woodrow Wilson, as we remember, argued in his famous essay that the time of constitutional questions was over and that attention should now be turned to administrative questions instead ("It is getting harder to *run* a constitution than to frame one"; 1887: 200). He apparently overlooked the obvious fact that the position of public administration within the state and its demarcation from politics are important constitutional issues themselves. Nevertheless, most students of public administration have followed him on this point. While Wilson's dichotomy between political and administrative questions has met general disfavor, his

'second dichotomy' between constitutional and administrative questions has long remained almost unchallenged. Even in Western Europe, where the study of public administration traditionally starts from a legal point of view, the field has been dominated more by administrative law than by constitutional law.[3]

This situation has changed since the late 1970s with the emergence of a self-conscious constitutional approach in (American) Public Administration. The main contributor to this approach is undoubtedly John Rohr. Rohr was a student of Herbert Storing and several of Rohr's most important ideas can already be found in the Storing's writings already.[4] They both were, in turn, students of the well-known political philosopher Leo Strauss (Pangle 2006: esp. 115-117) and, though not Straussians in the strict sense of the word, in their writings they often show the same predilection for classical political philosophy. Another major influence on Rohr's thought came from Leonard D. White, who as Public Administration's first textbook writer and historiographer showed that early American administrative thought and practice "were intrinsically connected with and subordinate to Federalist political and constitutional theory," as Storing put it (1965: 51). After Rohr's ground-breaking work, several others have further developed the constitutional approach, including Richard Green, Kent Kirwan, Peter Lawler, Douglas Morgan, David Rosenbloom, and several others.[5] By now the constitutional approach is established so securely among the theoretical perspectives on public administration that some even speak of a Constitutional School (Spicer and Terry 1993: 239ff.).

The main concern of this approach is the position and legitimacy of public administration in the constitutional order.[6] Although it aims at a rather high level

[3] An exception to this rule is the work of Norton Long, who in an essay pointedly titled 'Bureaucracy and Constitutionalism' stated that "[a]n assessment of the vital role of bureaucracy in the working American constitution seems to be overdue" (1952: 810; cf. 1954: 30). Elsewhere he wrote: "Attempts to solve administrative problems in isolation from the structure of power and purpose in the polity are bound to prove illusory" (1962: 62-63).

[4] Storing primarily wrote about the American Founding (he published the Anti-Federalist writings) and about aspects of the American constitutional order, such as the presidency and slavery (1995d), but he also wrote a long and critical review of Simon's administrative thought (1962) and a much more sympathetic review of the work of Leonard D. White (1965).

[5] For instance, Cook 1996; Kirwan 1977, 1981b, 1981a; Lawler 1988; Lawler, Schaefer, and Schaefer 1998; Morgan 1988, 1990, 1998; Rosenbloom 1983, 1984, 2006; Schaeffer and Schaeffer 1979. See also Rohr 1995: xiii (including n.6), for a helpful though now somewhat dated overview.

[6] Because of this central question, and because of its predilection for classical political thought, the constitutionalist approach has a special position in contemporary Public Administration theory. In contrast to the modernist and mostly positivist mainstream the constitutionalist approach is frankly normative (cf. Vile 1998: esp. ch. 11 and p. 386 about the opposition between constitutionalism and behavioralism) and in contrast to the postmodernist sidestreams, it willingly accepts the existing institutions of constitutional and representative democracy as a regime that is fundamentally (although not perfectly) just (cf. Rohr 1989: 91-92 n.39; *pace* Farmer 1995; Fox and Miller 1996).

of generality, its literature is often quite specifically addressed to the American situation. To a large extent, the approach can be understood as a response to the waves of neo-liberal bureaucrat bashing in the 1980s and new managerialism in the 1990s. Rohr and his colleagues were particularly triggered by President Reagan's declaration, in his first inaugural speech, that "government is the problem" and they have vigorously opposed New Public Management and Vice-President Gore's Reinventing Government initiative. This explains why these authors have been particularly motivated to argue against the alleged illegitimacy of the administrative state, and to combat the idea that public administration is at most a necessary evil and at best a passive instrument of politics. The constitutional approach is, however, much more than an outcry of political opposition to the New Right. In fact, Storing stated in the 1960s already that "administration is the heart of modern government precisely to the extent that public administration is not mere administration, but the main field in within which political and constitutional problems now move" (1965: 48; cf. pp. 45-46). Nor is its relevance limited to the American context. There is in principle no reason why the constitutional approach should not also be adopted in other parts of the world, including Europe. (Wilson described administration after all as running *a* constitution, not *the* Constitution.) Indeed, the approach can probably have a particular appeal for Europeans, as for them the (constitutional) legitimacy of public administration is generally more obvious than for Americans.

In their approach, the constitutional theorists have resuscitated normative concepts like 'public interest' and 'responsibility' (Storing 1995b) and argued that the American administrative state is compatible with the constitutional republic envisaged by the Founding Fathers (Rohr 1986). Indeed, within that republican scheme they typically elevate public administration to a position of high responsibility and respectability. Long already described it as "a constitutional check on both legislature and executive," stating: "It is high time that the administrative branch is recognized as an actual and potentially great addition to the forces of constitutionalism" (1952: 817 and 818). Rohr in particular has compared the role of public administration to the role the Framers originally designed for the Senate (1986: ch. 3; cf. Storing 1995a: 419 and 1995c: 302).[7] In his view, public administration is the keel of the ship of state or the "balance wheel" between the traditional constitutional powers. When administrators perceive a distortion in the power balance of the three separated branches of government, they should deliberately "choose their constitutional master" and use their discretionary room to put their weight in the appropriate scale to help

[7] Pestritto says Rohr wants the bureaucracy to play "the role originally intended for the House of Representatives" (not the Senate) and he strangely persists in this odd mistake (2005: 235-236).

restore the equilibrium (Rohr 1986: 182; Morgan 1988). This is, basically, how public administrators can perform their duty of "democratic statesmanship" (Lawler, Schaefer, and Schaefer 1998; Rohr 1986: 185; Storing 1995a).

Those within the field of Public Administration who have adopted the constitutional approach have mostly defended the administrative state, the 'welfare/warfare state' developed by Progressives and New Dealers in the early twentieth century and strongly expanded since the 1960s (following Rohr 1986).[8] Some other authors adopting the same approach, however, have criticized this preference, arguing that it gives public administration too strong and too independent a role within government (e.g., Lawson 1994; Pestritto 2007; cf. also Marini 1994: 10-11).[9] For our purposes, it is not necessary to determine the constitutional legitimacy of the administrative state in America. Even though the politics-administration dichotomy has indeed been used as an instrument to establish and expand that regime, the idea as such is not necessarily related to that effort. Indeed, those who are most critical toward the administrative state should perhaps particularly embrace the politics-administration dichotomy as a constitutional principle, because it implies the primacy of politics over the bureaucracy. I think, however, that I can even argue the more difficult case that the politics-administration dichotomy is a constitutional principle even if we assume the administrative state is *not* unconstitutional. This also seems to be the more relevant case, because, as Vile has said, "opponents of the administrative state should not assume that it can be abolished" (1998: 408) and therefore our aim should rather be to constitutionalize it.

Even if one appreciates the main tenets of the constitutionalist approach, as I do, one can be critical of some of its elements as they have been developed in the (American) literature. For one thing, it is not always easy to understand how the lofty idea of public administration of its representatives can be matched with their Tocquevillean orientations (Lawler 1998) and their aversions to "big government" (Storing 1995c). Of course, an elevated view of public administration does not logically exclude a wish to keep it small, but both politically and theoretically

[8] In *To Run a Constitution* Rohr claims to show 'the [constitutional] legitimacy of the administrative state,' as the subtitle says, but throughout the book he remains quite ambivalent about the constitutional legitimacy of that regime. What he has succeeded in, in my opinion, is to establish the constitutionality of public administration as an institution (irrespective of its size or power). This is surely an achievement, particularly in the United States, but it is obviously something different.

[9] These critics have especially stressed two points: that the delegation of administrative powers by Congress is unconstitutional (the so-called non-delegation doctrine) and that according to article II of the American Constitution *all* executive and hence also all administrative power is vested in the President (the unitary executive doctrine). These claims are subject to debates in American constitutional law that cannot be resolved here, but if correct, they have disastrous consequences for the constitutionality of the administrative state as it has developed since the New Deal.

the combination is certainly odd. Furthermore, the constitutionalist approach often seems to overshoot its mark. Calling all civil servants potential 'statesmen' is an exaggeration that threatens to erode the meaning of statesmanship as an ideal.[10] Likewise, catch phrases like 'balance wheel' and 'choosing one's own constitutional master,' though understandable from the political climate in which they originated, are better shunned as potentially perilous overstatements. They go against the grain of the constitutionalist approach itself. For if public administration is granted a legitimate place within the constitutional order, it should at least be subject to the checks and balances and other mechanisms of constitutionalism characterizing and sustaining that very order. The idea of public administrators using their discretion to choose freely among their constitutional masters seems alien to this order. Public administration, though autonomous in some respects, should ultimately be kept subordinate to the traditional three branches (an aspect Rohr recognizes but does not strongly emphasize; e.g. 1986: 181-185) and administrative decisions should never be as authoritative and definite as legislative, executive, or judicial decisions. Particularly from a constitutionalist viewpoint, therefore, the legitimacy of public administration has to be complemented with notions like the primacy of politics and political accountability.

This brings us to the politics-administration dichotomy again. Interestingly, several representatives of the Constitutional School have addressed the dichotomy in their work. They do so in a way that differs from what is common in the study of public administration. As Rosenthal has noted, one can study the relationship between politics and administration on the "regime level" as well as on the "incumbent authority level," but unfortunately "the fascination of analysts rests mainly with the latter – at the expense of a more detailed structural investigation of democratic political-administrative regimes" (1990: 392). Representatives of the constitutionalist approach, by contrast, have primarily directed their attention to the meaning of the dichotomy for the polity in general. Their appreciation of the dichotomy, however, varies from mild ambivalence to outright rejection. Norton Long, for one, was a severe critic of the politics-administration dichotomy (1962) and Storing, emphasizing the discretion of administrators, emphasized that public administration is a political actor in its own right. At the same time, he said

[10] Hence Green rightly says that administrators are "both clerk and statesman" (1998: 91; cf. p.109), but it seems even better to say that they are neither of these, but something in between. In any case, "true statesmen are rare" and "*administrative* statesmanship is a drastically limited version of the original concept" (1998: 107). Hence he adopts the useful distinction between "being a statesman" and "performing acts of statesmanship," adding: "We needn't require officials to *be* statesmen. The qualities of statesmen are too rare and their powers too awesome. However, we do want officials to perform occasional acts of statesmanship" (1998: 108; cf. Dannhauser 1980).

that administration, though not neutral and merely technical, should also not be susceptible to the "shifting political breezes" either (1965: 49; cf. Kirwan 1981a: 210-211). Rohr, in turn, is also critical of the dichotomy, but surprisingly he also sees it as the expression of a relevant constitutional insight. It is worthwhile to cite him at length:

> "The link between subordination to constitutional masters and freedom to choose among them preserves both the instrumental character of Public Administration and the autonomy necessary for professionalism. In this way we can reinstate the great insight of the discredited dichotomy between politics and administration. This tired old war-horse still plays the mighty stallion, despite academic efforts to put him out to pasture. Every student of Public Administration denies the possibility of making a distinction between politics and administration; but everyone else continues to make that distinction. Although the attack on the dichotomy is well-founded in social-science literature, it always fails to convince because the dichotomy holds the high ground from which administration can be seen both as subordinate to the political leadership of the day and as professionally exempt from political interference. By suggesting a theory of Public Administration that combines constitutional subordination and autonomy, I hope to preserve the enduring insight of the venerable dichotomy without succumbing to its naïve view of administration as apolitical. Administration is political; but like the judiciary, it has its own style of politics and its distinctive functions within the constitutional order" (1986: 183-184).

Here we see a truly ambivalent stance towards the dichotomy. From its problematic interpretations Rohr tries to save a meaning of the dichotomy that he does not want to discard lightly. Lawler, finally, shows the same ambivalence when he first rejects the politics-administration dichotomy, saying that it "rests on an imprecise or distorted understanding of the nature of the American regime," but then (on the very same page) adds that for good reasons public administrators "are comparatively insulated from the passions of partisans politics," and even that "the legitimacy of the existence of the career civil service in America is rooted in the distinction between politics and administration" (1988: 52).

Overall, authors like Long, Storing, Rohr, and Lawler seem to hold that public administration should be exempted from party politics, but not from politics per se. Administration is subordinate to and separate from politics, but in its own way it is political, too. Just like Wilson, these authors want to free public administration from bad politics, but at the same time to place it under the influence of good politics. As I have argued before (Overeem 2005), this combination of rejecting the dichotomy and still accepting the value of political neutrality of administrators is conceptually and practically problematic, because

political neutrality presupposes the dichotomy: in order to keep administration politically neutral, it must be distinguished and distanced from (partisan) politics. Authors in the Constitutional School are very sensitive to the fact that Wilson and Goodnow proposed the dichotomy as an alternative to the separation-of-powers doctrine. Pestritto, for instance, scorns Wilson for the idea that "the inefficient separation-of-powers system should be replaced with the more efficient separation of politics and administration" (2005: 227; cf. pp. 24, 127; cf. Rohr 1986: 61, 88). Its historical background gives these authors a justified suspicion towards the politics-administration dichotomy that, however, also debars them from imagining alternative understandings of the dichotomy that are more congruent with the constitutionalism they hold dear. They seem deluded by the arguments from administrative discretion and policy making that we have found to be insufficient to refute the dichotomy in Chapter Four (e.g., Rohr 1989: ch.1). They think that Wilson's two dichotomies are inextricably tied up to each other, believing that the dichotomy "allowed scholars of public administration to avoid addressing complex questions surrounding public law and the constitution" (Levy 2009: 147). This is a misunderstanding that makes their stance towards the dichotomy needlessly critical and ambivalent. These problems vanish as soon as one realizes that the goal of keeping politics and administration apart is itself of great constitutional interest. In this chapter, therefore, I build upon insights from the Constitutional School but also go beyond them, arguing that the dichotomy (properly understood) is in fact quite consistent with their line of thinking. The following three sections offer three arguments for this view.

6.3 The dichotomy as constitutional principle

First of all, it must be considered what it means to say that the politics-administration dichotomy can be understood, even best be understood, as a constitutional principle. The term 'constitution' and its derivatives do not just refer here to a written document of basic law, but more broadly, to the highest legal and political order in the state. At the same time, it is intended to mean something more specific than Rohr's concept of regime, which refers to the order of the entire political community and thus, to use a modern distinction, not only that of the state but particularly also that of society (1989: 68, 90-91 n.33; cf. *ancient régime*, for instance, or *politeia* in ancient Greek). To me, the politics-administration dichotomy is first and foremost a principle of government. Further, describing the dichotomy as a constitutional principle also refers to the concept of 'constitutionalism' (literally, it would be better to call it a constitutional*ist*

principle, but this expression is too uncommon). 'Constitutionalism' refers to the fact that constitutions do not only establish and empower governments, but also limit them by law.[11] Constitutional principles are thus meant to prevent anarchy by making government powerful enough through the division and coordination of functions, and to prevent tyranny by limiting government (i.e., checking its power) by means of accountability procedures and checks and balances. Constitutional principles are concerned with what Vile calls "two functional requirements, *control* and *co-ordination*" (1998: 362; cf. pp. 362-368, 376, 409, 417). Both elements are important, but overall the emphasis in constitutional theory seems to lie on the prevention of tyranny rather than on the prevention of anarchy. This asymmetry makes the integration of constitutionalism with administrative thought (which is typically more concerned with performative values such as effectiveness and efficiency) often particularly difficult.

Constitutional principles concern the distribution of authority within a polity, and so they do not specify exact interactions but tend to be rather general and gross. Constitutional principles, says Vile, "have the same relation to political action as military strategy has to tactics": they set broad goals without specifying the details of (the proper action in) each particular situation (1998: 326; cf. pp. 8-9). Because of their general character constitutional principles are not restricted to one particular national context. The doctrine of the separation of powers, for instance, has different meanings and applications in the United States, France, and Great-Britain, to name only some important countries (Gwyn 1965; Rutgers 2000; Vile 1998). Nevertheless these conceptions are sufficiently similar to make comparisons between them possible and sensible.

Grey (1979) has presented an analytical framework to classify constitutional principles or norms, as he calls them, on three dimensions. First, their status can be described as extralegal (uncodified, unenacted), as ordinary law, or as fundamental law (inflexible and overriding). Second, the way in which constitutional principles are enforced may be either 'political' or 'special'. Grey speaks of political enforcement when the constitutionality of legislation is ultimately determined by the "ordinary lawmaking and law-approving bodies" and of special enforcement when this is done by other bodies, mostly constitutional courts or committees (1979: 196). Finally, constitutional principles vary with respect to the source of their authority: some are based on claims to

[11] These two sides of constitutionalism have been indicated by the Latin words *gubernaculum* and *jurisdictio* (Maddox 1982: 808-809). In a well-known exchange, Giovanni Sartori and Graham Maddox debated which of the two is the primary purpose of constitutionalism: checking government power in order to guarantee the freedom of citizens against public power (Sartori 1962, 1984), or establishing government power in order to protect citizens against private powers (Maddox 1982, 1984). As could be expected, the debate has not ended and is still undecided.

reason and truth or self-evidence (as in the case of natural-law inspired norms), others on claims to usage and acceptance, and a third group on legal enactment. This framework helps to characterize the politics-administration dichotomy. How exactly the dichotomy functions as a constitutional principle will differ from country to country, but in general it seems that the dichotomy itself is mostly extra-legal (it is uncodified and not formulated explicitly in most constitutions), although ordinary legislation can be and often actually is derived from it. The fact that the politics-administration dichotomy is normally not codified and enacted as law does not make it less important, however, not even in a legal sense: "A supreme enacted constitution may coexist with unenacted constitutional norms that have the full status of judicially enforceable fundamental law" (Grey 1979: 205). Further, the dichotomy seems to be upheld by different bodies in different countries, depending on whether there is judicial review by a constitutional court (as in the United States) or not (as in the Netherlands). Lastly, the dichotomy seems to derive its authority in most cases mainly from a claim to reasonableness and secondarily perhaps from a claim to usage and acceptance. It mostly does not derive its authority from legal enactment.

The fact that constitutional principles are first of all norms, does not mean that they are detached from reality. As Vile has explained, they contain both empirical and normative considerations:

> "'Constitutionalism' consists in the *advocacy* of certain types of institutional arrangement, on the grounds that certain ends will be achieved in this way, and there is therefore introduced into the discussion a normative element; but it is a normative element based upon the belief that there are certain demonstrable relationships between given types of institutional arrangement and the safeguarding of important values. (…) It is therefore a type of political theory that is essentially empirical, yet which overtly recognizes the importance of certain values and of the means by which they can be safeguarded" (1998: 8-9).

Vile illustrates nicely how constitutional principles combine both empirical and normative elements with the case of the separation-of-powers doctrine. The 'pure' doctrine of the separation of powers, he argues, consists of three elements, namely first, a prescription to make a division between three "agencies" or branches of government, viz. the legislative, the executive, and the judiciary; second, an assertion, as "a sociological truth or 'law,' that there are in all governmental situations three necessary functions to be performed (…). *All* government acts, it is claimed, can be classified as an exercise of the legislative, executive, or juridical functions" (1998: 17); and third, a recommendation to have "separate and distinct groups of people, with no overlapping membership" and distributed

over different branches to perform these functions (1998: 15-18). No matter how related these three elements are, the second of them differs essentially from the other two: while the first and the third are clearly prescriptive, the identification of government functions (their number and nature), however general and controversial it may be, is an empirical or better a factual claim.[12]

The notion that constitutional principles contain empirical elements (*is*) as well as normative elements (*ought*) applies also to the politics-administration dichotomy. Wilson's assertion that "[a]dministrative questions are not political questions" (1887: 210) and Goodnow's statement that "the action of the state as a political entity consists either in operations necessary to the expression of its will, or in operations necessary to the execution of that will" (1900: 9) are factual claims, claims of what *is*. Hence they can, in principle, be falsified by factual counter-evidence, even though they are so general that it will be difficult to do so convincingly. At any rate, those who formulate constitutional principles must reckon with reality: "[L]ike the military strategist they will be the more successful the more they keep in mind the hard facts of the terrain they survey" (Vile 1998: 326). One example of such a "hard fact," according to Vile, is "the tendency towards the abuse of power in political man" (1998: 367; cf. pp. 406-407). Constitutional principles that do not reckon which such basic facts are unrealistic and vulnerable to charges of naïveté.

What hampers the possibility of 'falsifying' the politics-administration dichotomy, of course, is that it contains not only empirical but also normative elements. To the extent that it does so, the dichotomy-as-constitutional-principle is immune to empirical criticism. Thus, Wilson's just-quoted empirical or factual claim about the essential difference between political questions and administrative questions is immediately followed by this normative claim: "Although politics sets the tasks for administration, it should not be suffered to manipulate its offices" (1887: 210). Referring to actual practice in order to show that Wilson was incorrect here amounts to a naturalistic fallacy. Instead, opponents should show that Wilson's recommendation is not the right way to achieve the goals he wants to achieve, or that these goals are not the right goals. When this route is

[12] In general, it seems that claims concerning government functions tend to be empirical or factual, and those concerning government institutions normative. For a constitutional principle it is important to distinguish between the institutions and the functions of government. Merry has emphasized the need "to distinguish the separation of functions from the separation of institutions" and argued that, for constitutional purposes, the functional arrangement is more important than the institutional arrangement: "For the prevention of undue concentration [of power, PO], the separation of institutions is only a necessary preliminary. Final sufficiency depends upon the functional arrangement" (Merry 1978: 104). As we have seen, Goodnow in particular made use of this distinction (cf. Vile 1998: 347ff on the concept of function).

taken the discussion becomes much more normative. Just like the separation-of-powers doctrine, the dichotomy is based on the presupposition that, in Vile's just-cited words, "there are certain demonstrable relationships between given types of institutional arrangement and the safeguarding of important values" (1998: 9). These arrangements and values are at least in part constitutional in nature.

6.4 Counterfactual reasoning

A helpful way to see that the politics-administration dichotomy does indeed function as a constitutional principle is to imagine a situation in which the dichotomy would be completely absent. As a thought experiment, Waldo has proposed to try to imagine a state without the dichotomy: "What would a 'polity' that transcends politics and/or administration *be*?" (1981: 5). This is not simply a polity in which the line dividing politics and administration is blurred, which is all too familiar, but one in which such a line is entirely absent and perhaps even unthinkable. Waldo's own answer to his question is interesting and disturbing and involves two steps. First, he claims that a state in which the politics-administration dichotomy is entirely absent simply cannot exist. The complete abolition of the dichotomy is an illusion: "[A]ny thought that one or both of the two realms might somehow be transformed, or vanish, and that the problem of relating one to the other would thereby vanish, I regard as illusory. Utopias, whatever their differences, predict or presume abolition of the distinction, or at least present a satisfactory solution to the problem of putting the two together" (1984: 232). Conversely, this means that in every existing state the dichotomy manifests itself. Hence Waldo speaks of the "perdurability of the politics-administration dichotomy" (1984). Next, Waldo argues that attempts to realize a state without the dichotomy are not only bound to fail, but also pernicious. He suggests that such a state is properly described in George Orwell's *1984*, the best-known combination, in his view, of a political and an administrative novel (1968: 25). The line between politics and administration is blotted out especially in totalitarian states. This insight – that the abolition of the dichotomy is pernicious and characteristic of totalitarian states – has remained largely unnoticed by students of public administration, but it has been recognized by some others. Roger Scruton, for instance, states it very clearly in his *Dictionary of Political Thought* under the lemma 'bureaucracy':

> "In totalitarian states (…) it is impossible to distinguish government from administration, appointment to political office and to administrative office being alike determined by the ruling party. In one sense this provides the nearest approach

> to complete bureaucracy that has yet been achieved. In another sense, however, it is further removed from bureaucracy than from any form of government known in the West, since it prevents the existence of genuinely administrative, as opposed to political decisions. The policies of the party are enacted at every level, from Politburo to factory floor. This amalgamation of politics and administration has sometimes been thought to be a feature of oriental despotism" (2007: 69).[13]

We can extend Waldo's argument a bit further. As we know, totalitarianism comes in two types: a left-wing communist type, the most characteristic example of which has been the Soviet-Union, and a right-wing fascist type, typified by Nazi Germany. (To see the point even more clearly, one should not think of the historical, actually existing totalitarian states, but of the totalitarian 'ideal' states, if one may call them thus, of which these actual states were deliberate but unfinished approximations.) Now it seems that on the left, in the communist ideal states, all activities of the state (insofar as it is not withered away) are officially transformed into administration, planning, and management. In such ideal states, at the end of history, there is no politics left, as Marx and Engels said in the *Communist Manisfesto* (cf. Schluchter 1987: 11 n.1). On the right, in fascist states, by contrast, all activities of the state (which does not wither away, but is instead massively present) are turned into politics, power play, and ultimately, as the continuation of politics with other means, war.[14] Thus, it seems that in these two variants the politics-administration dichotomy is abolished in opposite ways: in communist states, politics is eclipsed by administration, while in fascist states, administration is devoured by politics. (Of course, both politics and administration have here obtained a character that differs significantly from that in constitutional democracies.) These are two "simple," indeed much too simple, ways of 'reconciling' politics and administration (Lawrence 1954).

As said already, the actual, historical totalitarian states are incomplete approximations of these ideological ideals, but the resemblance is strong enough to notice that the politics-administration dichotomy was actually rejected in practice as well. Rugge has noted that "both Italian fascism and German national-socialism (…) disclaimed the liberal tenet about the separation between politics and administration; both preached the ideal of a state entirely pervaded by one

[13] Likewise, Luhmann observes that establishing the "functional differentiation" between politics and administration is difficult in both "developing countries" and "ideologically integrated societies" (1982: 381-382 n.29). See also Harris's understatement: "In the developing states of the developing world the distinction between politics and administration is not always clear" (1990: 10; cf. pp.11-12, with references to the Soviet Union, China, and post-colonial countries).

[14] Carl Schmitt, the renowned legal philosopher who is also notorious for having paved the ideological way for German nazism, sharply objected to the "depoliticization" and "neutralization" of the modern state (2001 [1932]).

ideology and commanded by one leader" (2003: 180). Like so many other things, they did this with different degrees of intensity. The Nazis tried to establish the strongest and most absolute political leadership over the administration possible: "The assertion of the primacy of politics, understood as leadership in contrast to administration, was one of the main themes of political thought in the Third Reich" (Stirk 2006: 94). When the Nazi regime became more established, however, and more permanent forms of civil government had to be established in occupied countries as well, the independence of administration gradually reemerged so that, eventually, administration *(Verwaltung)* was even recognized as a form of rule (*Walten*) in its own right. Stirk calls this "the 'turn towards administration' in the political thought of the Third Reich" (2006: 95). Whereas in Germany there where "persistent tensions between the Nazi party and traditional bureaucracy," in fascist Italy an unstable and "tacit compromise" was reached in which the bureaucracy and the government agreed to leave each other more or less alone (Rugge 2003: 180). In general, however, one can say that both right-wing and left-wing totalitarian regimes have failed to erase the politics-administration dichotomy entirely: although formally removed at the 'constitutional' level, a certain kind of dichotomy between politics and administration irrepressibly reemerged at the operational level (cf. Murphy 2007: 405-406 with evidence from the regimes of Hitler, Stalin, and Mao). At the same time, although there is some kind of division of roles and responsibilities in totalitarian states as well, politics and administration are clearly much less distinct there than in free, constitutional governments.

For the lessons to be drawn from this excursion into anti-constitutionalism we can return to Waldo. He argued that attempts to abolish the politics-administration dichotomy are illusory as well as dangerous. The dichotomy is ominously absent in totalitarian states and a characteristic trait, conversely, of constitutional governments. Apparently, certain beneficial effects result from its maintenance. It creates problems that are in fact blessings in disguise:

> "In a situation in which there is principled as well as practical lack of congruence between politics an administration there are opportunities as well as problems, freedoms as well as frustrations. It is close to the mark to say that problems of congruence are a defining characteristic of liberal-democratic institutions. Put the other way around, the term *totalitarian* might best fit an entity in which politics and administration are a seamless robe" (Waldo 1987: 106).

As a government run completely by either bureaucrats or politicians cannot be a limited government, a certain separation between them seems to be a distinctive element of constitutionalism. By pitting politics and administration against each

other, the dichotomy helps to preserve freedom: "[A] near complete integration of politics and administration is a rather good characterization of totalitarianism, and perhaps liberty is a product of disjunction" (Waldo in Brown and Stillman 1986: 137; cf. 1981: 5; 1984: 232; 1990: 82; Carroll and Frederickson 2001: 7). For most students of public administration this will be a counterintuitive and provocative thesis. Unfortunately, in his writings Waldo presented these ideas only very tentatively and never elaborated on them. In particular, he nowhere explained the exact mechanism by which the dichotomy works its beneficial constitutional effects. We must therefore proceed from Waldo's negative, counterfactual argument to a more positive argument and see how the politics-administration dichotomy does actually function as a constitutional principle.

6.5 Constitutional functioning in practice

So far we have seen that the politics-administration dichotomy shares the formal characteristics of constitutional principles in general and that it is absent or at least deliberately suppressed in unconstitutional regimes. After this section, we will also see that it is closely related to the hallmark of constitutionalism, the separation-of-powers doctrine. These are all helpful indicators to make us aware of the constitutional character of the dichotomy. The most important reason to regard the politics-administration dichotomy as a constitutional principle, however, is simply that it functions as such in the practice of modern constitutional states. Indeed, it seems permissible to say of *all* modern constitutional states, because in contrast to particular constitutional arrangements such as bicameralism, federalism, or judicial review, which are present in some constitutional states but not in others, the politics-administration dichotomy is not an optional 'add-on' but an indispensable element. That is why the rejection of the dichotomy is so much an academic exercise; in practice it continues to be widely accepted.

This is of course a crucial claim, but for several reasons it is far from simple to 'prove' it. As far as I am aware, no has as yet systematically studied the actual constitutional functioning of the dichotomy. All we have is tentative suggestions and fragmentary evidence. Moreover, it is difficult to establish convincingly that a certain institutional arrangement has a so far unrecognized function that goes beyond immediate goals of the involved actors. While one can easily show that the politics-administration dichotomy often serves legitimate and not-so-legitimate interests of both politicians and administrators, it is much more difficult to show that it also helps to preserve the constitutional form of government of which they are part and thus, ultimately, to serve the interests of the citizens. Finally, it is to be expected that the precise way in which the dichotomy is made to function

as a constitutional principle differs from case to case. As with the separation of powers, different countries will have developed different ways to make the dichotomy constitutionally effective.

Notwithstanding these difficulties, I think there are important signs indicating that the dichotomy does indeed function as a constitutional principle in practice. In particular I want to refer to the perhaps unlikely case of the United States – the country in which the dichotomy has been most severely criticized and also the country that is still known for its (now relatively limited) spoils system. I do not argue that in the United States (or any other constitutional state) there actually is a clear-cut and uncontested separation between politics and administration. My point is rather that the dichotomy functions there as an important constitutional norm. In several studies, it has been shown that especially the Supreme Court, the formal guardian of constitutionalism in the United States, has a long tradition of articulating and enforcing highly 'orthodox' ideas about public administration in its rulings, and that the politics-administration dichotomy is prominent among them (Rosenbloom 1984; Schultz 1994; Stover 1995). This adherence to the dichotomy has worked in two ways. One is that the Supreme Court has in several important decisions upheld the Hatch Acts, a series of laws prohibiting a large selection of American (federal) civil servants to engage in various kinds of partisan political activity.[15] These laws were first passed in the 1930s and as they have been substantially amended over the years, their content and the case law following from them have grown extremely complex. Although these acts have been the subject of ongoing controversy, their basic idea is still widely shared and the Supreme Court has consistently upheld them against charges of unconstitutionality, violation of states' rights, and vagueness (cf. Bowman and West 2009). By doing so, it has prevented administrators from mingling in party politics. At the same time, in several other decisions the Supreme Court has also opposed political patronage, cronyism, and spoils.[16] It has upheld the principle that administrators cannot be hired, fired, transferred, or promoted on the basis of their political convictions. In other words, (partisan) politics is not allowed to interfere in the administrative process. Although these two lines of rulings – defense of the Hatch Acts and rejection of patronage – are sometimes thought to be contradictory, this impression vanishes as soon as one realizes that, in both ways, the Court has maintained the need for a dichotomy between politics and administration in the practice of government. Concludes Schultz:

[15] Particularly in *United Public Workers v. Mitchell* (1947) and in *United States Civil Service Commission v. National Association of Letter Carriers* (1973) (cf. Rosenbloom 1984: 107-109; Schultz 1994: 420-422).

[16] Most famously in *Elrod v. Burns* (1976), *Branti v. Finkel* (1980), and *Rutan v. Republican Party of Illinois* (1990) (cf. Rosenbloom 1984: 109-112; Schultz 1994: 422-426).

> "Examination of Supreme Court assessment, Hatch Acts, and patronage decisions indicates that the Court has been a consistently strong defender of the politics/administration dichotomy. (…) Together, these decisions constitute a rejection of the Jacksonian claims that spoils is necessary for strong parties, party government, and popular government. The Court has instead adopted the language and assumptions of the Progressive reform era in seeking to place administrative duties beyond the realm of politics" (1994: 426).

An important question for us is *why* the Supreme Court defends the politics-administration dichotomy. Schultz's general reference to "the language and assumptions of the Progressive reform era" does not really provide us with an answer. The question is important, however, because it involves whether the Court sees the dichotomy as a constitutional principle or as something else (a convenient division of labor, for instance). Hence Rosenbloom rightly observes that "[a] central issue raised by the Court's decisions is what *purpose* the creation of a dichotomy between politics and administration can serve" (1984: 116; italics added). To answer this question, he uses his important distinction between 'partisan politics' and 'policy politics' (see section 7.2). The Supreme Court, he argues, has tried to maintain the politics-administration dichotomy only when 'politics' means the former and not when it means the latter. Thus, by upholding the Hatch Acts, the Court has shown that it wants to keep administration out of partisan politics and by its defense of the merit system shows that it wants to keep partisan politics (spoils and patronage) out of administration. But the Court has also permitted administrators to make comments on public policy (most famously in *Pickering v. Board of Education* (1968), a case in which a public school teacher criticized certain policies of his school organization in a newspaper). This shows that the Court has not wanted to keep administration out of 'policy politics'. It believes that the quality of public deliberation about policy can in fact be served by the contribution of civil servants.

This subtle contrast shows that the Court aimed at different goals in its rulings. By protecting the Hatch Acts, it particularly aimed to protect the openness and fairness of the democratic process. By countering patronage, it protected not only administrative efficiency, but above all the rights of the individual (employee) over and above the narrow political values of spoils and strong parties. In general, it seems that the Supreme Court employs a relatively clear and stable hierarchy of values in which, generally speaking, administrative values (efficiency) rank lower than political values narrowly defined (strong parties and party government) and these in turn lower than constitutional values (individual rights and the functioning of democracy in general). In particular, it is important that – in contrast to Wilson, Goodnow, and the orthodoxy of American Public Administration – the

main reason for the Court to defend the dichotomy lies *not* in administrative efficiency.[17] This is not to say that the Court finds efficiency unimportant. In fact, Carl Stover has argued that a concern for this value has been dominant in many Court decisions (1995).[18] It is striking, however, that Stover refers rarely to cases about the relations between politics and administration (those that are so important to Rosenbloom and Schultz), but almost exclusively to cases that concern the workings of administration itself. He shows that, on that terrain, the Court has been a consistent proponent of the 'principles of administration' formulated by the Public Administration orthodoxy in the 1920s and 1930s. So the Court has surely valued administrative efficiency, but the main rationale behind its defense of the dichotomy is something different.[19] Wrote Rosenbloom: "Simply put, the Court has been unwilling to allow the abridgement of public employees' constitutional rights for the sake of the elimination of 'friction' [i.e., inefficiency] alone" (1984: 114). He quotes a statement of Justice Brandeis that clearly expresses the Court's prioritization of constitutional values over administrative values:

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy" (*Myers v. United States* (1926), quoted in Rosenbloom 1984: 115).

To conclude, we can say that the Supreme Court has defended the politics-administration dichotomy in the way it is described in this chapter: as a constitutional principle. While allowing for the involvement of administrators in policy-making, it has consistently attempted to keep them out of partisan politics (the Hatch Acts), while at the same time also trying to keep partisan politics out of administration (patronage). In this double-edged effort, has above all been guided

[17] For Rosenbloom, the (broader) political end of the dichotomy and its constitutional end tend to merge. The reason is that in America, liberty is understood mainly in terms of individual rights and democracy. Protecting these becomes therefore a matter of protecting constitutional values as such. In Europe thought, by contrast, traditionally a public interest or common good is sought that transcends these individual and political concerns.

[18] Schultz sometimes also suggests as much, particularly when it comes to very early decisions on the political neutrality of civil servants such as *Ex Parte Curtis* (1882) and *United States v. Wurzbach* (1929) (1994: 418-420). With respect to the Hatch Acts cases, he says: "The Court's rationale in upholding these restrictions clearly appealed to the rhetoric of neutral competence, including the language of efficiency, the articulation of the evil effects of politics upon administration, and the need to limit party influence in government" (1994: 422; cf. Rosenbloom 1984: 109 for a slightly different assessment).

[19] Again, we see that the politics-administration dichotomy is not necessarily related to Progressivism and the principles of Scientific Management (cf. section 4.1).

by a constitutional concern for the preservation of liberty – understood in the typically American, even Lockean way in terms of individual rights and popular government. In comparison, a 'Wilsonian' concern for administrative efficiency and a 'Weberian' concern for strong parties and strong political leadership do not seem to have been the most important rationale behind the Court's adherence to the dichotomy, although such administrative and (purely) political values are certainly considered in its decisions, too. Therefore, the defense of the politics-administration dichotomy by the Supreme Court should not be interpreted as a sign of the Court's backwardness, but rather as evidence of its constitutional perspicuity.

As said, the constitutional functioning of the dichotomy is not typical for the United States federal government only, but seems to be present in other contexts as well. It can be found, for instance, at the level of local and regional government, most famously but not exclusively in the American council-manager system (Montjoy and Watson 1995; but cf. Svara 1985, 1999; Demir and Nyhan 2008).[20] It can also be found in parliamentary systems such as Britain and the Netherlands, in which the system of ministerial responsibility can be interpreted as a typical manifestation of the dichotomy-as-constitutional-principle. Moreover, all modern constitutional states maintain certain formal and informal norms to constrain the intrusion by politicians upon the workings of administration on the one hand, and the political activity of administrators on the other. Hence the ongoing concerns about the 'politicization' of administrators (Peters and Pierre 2004). Conversely, politicians almost everywhere enjoy certain responsibilities and immunities that most administrators do not have. Indeed, many institutional arrangements suggest the pervasiveness of the dichotomy as a constitutional principle: "The separation between politics and administration is deeply ingrained in the civil service. Merit principles are widely recognized as useful imperatives, ethics codes reinforce these principles, and merit system structures are designed to implement these principles. Statutory law and common law protections exist, often buttressed by union contracts…" (Bowman and West 2009: 59).

The dichotomy thus seems to have a greater normative force in governmental practice than most present-day Public Administration theorists would be willing to admit. This raises the question why findings of administrative discretion and interactions between politicians and administrators are easily interpreted as evidence against the politics-administration dichotomy, whereas obvious

[20] Schultz has noted that the defense of the dichotomy by the Supreme Court has trickled down towards lower levels of government: "The Court's decisions have not only helped politically to neutralize the federal bureaucracy, but along with other Supreme Court and lower court decisions, have done much the same at in state and local governments" (1994: 426).

differences and barriers between them are not as willingly recognized as evidence in its favor. One reason is surely that the dichotomy itself is commonly though unnecessarily interpreted in very specific and instrumentalist ways (Chapter Four). Another reason might be the idea that acceptance of the politics-administration dichotomy must be absolute, in the sense that, in Svara's words, "you either have dichotomy or not" (2006: 134). This seems needlessly strict, however: it is very well possible to say that in one situation the dichotomy (understood as a constitutional principle) is observed or institutionalized in a higher or lower degree than in another. The main reason for overlooking the dichotomy and its actual constitutional functioning, however, seems to be that its institutional expressions are so well-known, so much taken for granted that their rationale is hardly considered. While we study the subtle and shifting interactions between politicians and administrators, the details of regulations and norms governing their behavior, and the differences in political-administrative relations across countries, we tend to forget the broader picture and to overlook the massive fact that politics and administration in our states are simply different and kept apart. The very persistence of this broad divide requires explanation, however, and for more detailed research in this direction I would suggest framing the explanation in terms of its thus far underestimated constitutional function.

6.6 The dichotomy and the separation-of-powers doctrine

One important obstacle to accepting the interpretation of the politics-administration dichotomy as a constitutional principle could well be its apparent incompatibility with the separation-of-powers doctrine, arguably the most important construct in our constitutional thought and practice. The idea that the two constructs exclude one another is nourished, of course, by knowledge of the fact that Wilson, Goodnow, and Weber all treated them as alternatives. Even if it is granted that their positions need not be exhaustive, and that there might be another (French) approach to the dichotomy that is more sympathetic to constitutionalism in general and the separation-of-powers doctrine in particular, the question remains how the dichotomy between politics and administration can be reconciled and integrated with the traditional trichotomy between the legislative, executive, and judiciary. The relation between the two is clearly ambiguous and complicated (Overeem and Rutgers 2003: 174-178). Several authors have struggled with the conceptual frictions between them and different positions on this issue have been adopted. Some believe it is impossible to combine the two simply because they differ with respect to the number and nature of the functions and branches of government: "[T]wo won't go evenly into three" (Rosenbloom 2006: 87). Others,

however, have noted that in practice the two constructs often do go together (O'Toole 1987). In any case, it is clear that the dichotomy, to be acceptable at all, somehow "must be accommodated to [a] constitutional system that ordains that government shall be organized under three rubrics, not two" (Waldo 1987: 106).

One straightforward solution to the puzzle is simply to discard the dichotomy as fundamentally incompatible with American constitutionalism. This, we saw, is the approach of several representatives of the Constitutional School. They emphasize the undeniable fact that the classics presented the dichotomy as a substitute for or at least an amendment to the separation of powers (cf. Rutgers 2000: 293-295; Rohr 1986: 55-89; Pestritto 2005, 2007). In the words of Waldo, "the politics-administration formula, perspective, approach, dichotomy – pick your own noun – was an attempt on the part of public administration to work with and/or around the separation of powers" (Brown & Stillman 1986: 153). Because the two constructs seem obliquely opposed, some would prefer to reject the one to save the other. As we have often seen in this study, however, it is not easy to get rid of the dichotomy and it will recur as long as no perfect utopia or dystopia has been reached. Moreover, the separation-of-powers doctrine on its own provides no answer to the question of how public administration can be integrated into the constitutional order – the original, nineteenth-century challenge to which the dichotomy aimed to provide a (partial) answer. Adopting this solution, therefore, seems to be rather unwise.

Fortunately, there are reasons to believe the dichotomy and the separation-of-powers doctrine can be reconciled. We have seen earlier (section 2.3) that the separation-of-powers doctrine and the politics-administration dichotomy have striking parallels. They are not only theoretical distinctions between government functions, but also practical imperatives to disentangle the government bodies and the officials who perform those different functions. They both combine the notions of separation and coordination. At least since Madison, the separation-of-powers doctrine allows for interaction, partial overlap, and sometimes even cooperation of the branches and so does the politics-administration dichotomy. Further, there are important relations between the two in governmental practice. As O'Toole (1987) has shown, many practical innovations that have shaped the administrative state in America (such as the Pendleton Act and the Hatch Acts) have strengthened the dichotomy and the separation of powers simultaneously. Luhmann has even stated that "the separation of powers acquires its meaning only when it is related to and shaped according to the distinction between politics and administration" (1966: 75).[21] The question remains, however, how we can

[21] Original: "Erst in bezug auf diese Unterscheidung [i.e., between politics and administration] – und insofern ihr nachgeordnet – gewinnt die Gewaltenteilung ihre Bedeutung." He refers to to Goodnow and Bülck.

theoretically reconcile or even integrate them. Several answers to this question present themselves. Briefly put, the politics-administration dichotomy can be seen as a dividing line *within*, *between*, and *behind* the three separated branches of government. Let us consider these three approaches in turn.

First, the dichotomy can be regarded as a division *within* the traditional branches of government. A relatively well-known idea, of course, is that of politics/administration as a division within the executive. Although some take this to be the original American conception (Lawson 1994; Pestritto 2007), it rather seems a typically European approach (Rutgers 2001). Whereas American constitutional thought tends to limit the executive to the White House, Europeans generally use a much broader concept of the executive. For them, the executive encompasses not only the 'core executive' (the president or prime minister, and the ministers of the 'cabinet' and their direct staff) but also the ministerial departments and many other institutions of the government bureaucracy. In this approach, the politics-administration dichotomy runs between the political head and the administrative body of the executive. This contrast has deep roots in nineteenth century European thought (Chapter Two) and is often framed as a contrast between the government (*gouvernement, Regierung*) and public administration (e.g., Ellwein 1970).

Although this distinction is obviously very important (in fact, most studies of political-administrative relations concentrate on the interactions between political executives and their senior civil servants only), it is not exhaustive. Politics/administration can be traced as a division within *all three* branches: not only the executive, but also the legislative and even the judiciary are divided into political and administrative echelons.[22] They are composed of authorities that can in many ways be called political (whether elected or appointed) and these are supported by administrative support staffs. Murphy has vividly described the importance of this kind of support staff within all three branches (2007: 399-403).

What is attractive about this first solution is that it leaves the tripartite division of the separation of powers intact, while at the same acknowledging that all three branches combine political as well as administrative elements. An important problem of this approach, however, is that it treats all three branches equally, whereas in terms of the distinction between politics and administration there are important differences between them. The judiciary in particular does not fit easily into this scheme (can Justices of the Supreme Court and lower judges be properly called political?), but even the support staff of members of a relatively powerful legislative such as the United States Congress dwarfs in comparison to the bureaucracies supervised by ministers. This approach thus tends to overrate a limited group of support staff in comparison to the mass of public administration.

[22] I thank John Rohr for suggesting this approach to me (personal conversation, May 16, 2006).

A second way to combine the politics-administration dichotomy and the separation-of-powers doctrine instead concentrates on the differences between the branches. It takes politics/administration as a division *between* the traditional branches. In this approach, it is most tempting to equate politics/administration with legislative/executive.[23] But whereas in the politics-administration dichotomy the branch that exercises the deliberative and decisional functions has primacy over the branch (or branches) that exercise(s) the executive functions, this is not necessarily the case in the separation-of-powers doctrine. In America, at least, the doctrine of legislative supremacy is not accepted as part of the constitutional tradition and even in the parliamentary democracies in Europe the primacy of the legislative over the executive and the judiciary and that of politics over administration is far from absolute. In its relation to the legislative, the executive paradoxically combines a subordinated formal position with a strong, possibly even predominating, informal position. This "ambivalence of modern executive power" (Mansfield 1989; cf. Vile 1998: 96) parallels the position of the public administration within the state – as is nicely indicated by the fact that the Latin verb *administrare* means "'directing' and 'serving' at the same time" (Dunsire 1973: 1). The thought that the politics-administration dichotomy can be taken as a mere reformulation of the division between legislative and executive therefore comes naturally, but is not unproblematic either.

Again, one may wonder how the judiciary fits into the scheme, but even when we leave that question aside, it is clear that conceptually there are "vital differences between this new formulation of politics and administration and the early modern distinction between legislation and execution" (Vile 1998: 307). For a start, the concept of politics is "a much wider concept than 'the legislative power,' embracing the need for leadership in the formulation of policy, for securing the passage of legislation, and for the oversight of execution" (*idem*). Equating the early modern concept of the executive with the much younger concept of public administration is perhaps even more problematic. Whereas the executive usually consists of a rather limited club of people and is often highly personalized, public administration often implies large numbers of officials and is much more impersonal, even anonymous. Whereas the executive is traditionally

[23] West, for example, sees a "neat correspondence between the politics/administration dichotomy and the separation of powers" (1995: 206; cf. p. 195). He chides what he calls "the traditional model," which in his view is based on "the assumption that administration is an instrumental process that can and should be divorced from politics. It follows from this that one can clearly delineate between the legislative function and administrative/executive activities (which are one and the same under the traditional model), and that these two powers can be formally divided between Congress and the president, respectively" (1995: 99). That this 'traditional model' has very little to do with the classical dichotomy should by now go without saying.

very much occupied with defense and foreign affairs, public administration mostly concerns internal affairs.[24] Overall, therefore, it is unwarranted to treat politics/administration as a mere reformulation of legislative/executive, notwithstanding the undeniable conceptual connection between the two.

There is, however, a more subtle way to regard the politics-administration dichotomy as a division between the branches of government. In this version public administration is not equated with one of the branches, but given a place among them, as a fourth branch. One very simple way to do so is to use the basic distinctions of deciding/executing and general/particular that (as I have argued in section 2.3) lies at the root of both the separation-of-powers doctrine and the politics-administration dichotomy: law must be first be made and then implemented, and law must be general, not particular. Whereas the deciding/executing distinction divides politics and administration by the kind of function they perform, general/particular divides them by the kind of issues they deal with. Now, these two basic distinctions can be used to understand the place of public administration among the traditional three branches of government (see Table 6.1).

Table 6.1 Administration among the branches of government

	'Deciding'	'Executing'
'General'	Legislative	Executive
'Particular'	Judiciary	Administration

Here politics and administration are functions of government that are unevenly distributed over four different institutional branches.[25] In this scheme, the legislative is the most political branch, because it typically makes decisions that regard general issues. The executive is somewhat less political and more

[24] This is the old contrast between 'politics' and 'policey' (Heidenheimer 1986).

[25] This idea is nothing new; it was a prominent contribution of Goodnow already. Vile argues that certain governmental functions are simply more typical of some branches than of others: "It is not possible to allocate particular functions exclusively to each branch of government (…), but it is possible to say that there is a function which is more appropriate to a particular procedure, to attempt to restrict each branch to particular *procedures*, and therefore to make one function the dominant concern of that branch" (1998: 415). Reussing 1996: ch.22 adopts a similar kind of solution).

administrative: although it also deals with general issues (budgets, foreign policy) it typically treats them in a more covert and less directly accountable way than the legislative. It has tremendous powers, and is known to have them, but we hide them behind the fiction that the executive merely executes. This is 'the ambivalence of the executive' mentioned before. The judiciary, similarly, is also political in a limited degree only, because it typically deals with particular cases, albeit that its decisions are authoritative and binding and made in an overt, publicly accountable (although not necessarily democratically legitimated) manner.[26] The administrative, finally, is the least political and obviously the most administrative of the four powers, because it deals with particular, small and generally uncontroversial issues and it lacks the constitutional authority to make final decisions.

There are of course some serious problems with the solution presented in Table 6.1. 'Political' and 'administrative' are multi-dimensional concepts and cannot be reduced to the two simple distinctions of deciding/executing and general/particular. They are helpful but clearly not sufficient to understand the dichotomy properly. Conceptual reductions of politics/administration by straightforward equations with other distinctions have mostly been made by authors who reject the dichotomy (see Chapter Four). Further, the solution suffers from all the problems associated with the deciding/executing decision so sharply highlighted by the Public Administration heterodoxy. The very suggestion that the executive and the administration 'merely' execute, is unacceptable.[27] Additional problems are connected to the general/particular distinction. As we have seen before, it is impossible to frame the difference between politics and administration in terms of the issues they deal with. Proponents (Weber) as well as opponents (Gulick, Appleby) of the dichotomy have noted that every administrative issue can in principle become a political issue (and vice versa). Finally, Table 6.1 suggests a constitutional position of the administration as an equal among the traditional branches that must be rejected as constitutionally inappropriate.

In the first approach (*within*), the separation-of-powers doctrine was broader than the dichotomy: this view attempted to integrate the dichotomy into the separation of powers rather than the other way around. The appeal of this approach may have to do with the idea that since chronologically the separation-of-powers doctrine came first, it must therefore also be conceptually prior, but

[26] The fact that we more easily call the executive 'political' than the judiciary might indicate that general/particular carries greater weight in our conceptualization of politics/administration than deciding/executing.

[27] To overcome the problems related to the concept of 'executive' Vile has remarked that "[i]t would be less confusing if we were able to drop the term 'executive' altogether" (1998: 400). His alternative label for the second branch ('the policy branch') seems not much better, however, because as we have seen, administrators are heavily involved in the policy process, too.

this is clearly a logical fallacy. In the second approach (*between*), the two equal each other: the politics-administration dichotomy is in fact a reformulation of the separation-of-powers doctrine. A third option, finally, is to reverse the relationship and think of the politics-administration dichotomy as not more specific, but as more general (and perhaps even older) than the separation-of-powers doctrine. In this approach, the dichotomy is prior to and presupposed by the separation-of-powers doctrine. Politics/administration is a division *behind* the separation of powers, setting the three traditional branches apart from administration. In this view, the separation-of-powers doctrine not only arranges the relations between three branches of government, but also excludes other institutions from the list of branches. There are three, and only three, constitutionally recognized branches. Other possible candidates are relegated to less authoritative (though not necessarily illegitimate) positions. The traditional branches are singled out, because they are (potentially) political, while the rest of government is regarded as administrative. (Following this approach, the expression *trias politica* should be taken much more literally than it is usually understood and probably originally intended.) While popular representatives, chief executives, and judges have got their responsibility and legitimacy directly from the constitution, administrators obtain theirs only indirectly.

Following this view, it is fundamentally misguided to treat public administration as a 'fourth branch' of government: that would put the public administration on a par with and against the other, established branches. Surely, some authors have favored this notion. One of them is Long: "The theory of our constitution needs to recognize and understand the working and the potential of our great fourth branch of government, taking a rightful place beside President, Congress, and Courts" (1952: 818). Similarly, Peters has spoken of public administration as a separate branch of government (*öffentliche Verwaltung als eigenständige Staatsgewalt*; 1965), and even Vile, although a traditionally-minded constitutional theorist, has urged his readers to "accept that there are now four branches of government" (1998: 400). There are many more authors who support this idea of public administration as a fourth branch (e.g., Merry 1978: 11-12; Reussing 1996: ch. 21; Meier and Bohte 2007), but others have rejected the notion. Rohr, for one, sees the public administration as subordinate (though certainly not a mere instrument, but autonomous, even choosing its own constitutional masters), and hence not as a constitutional branch of government on a par with the traditional three (1986: 182; cf. Nichols 1998). I agree with him that it is misleading to treat 'the administrative' as a fourth branch among the others.[28] This exclusion of the administration from the set of constitutional

[28] Calling public administration a fourth power seems to confuse Montesquieu's two concepts of power: *puissance* and *pouvoir*. Although it evidently *has* power, it therefore *is* not a power.

branches of government need not be based on an originalist reading of the American Constitution, but on the very character of public administration. While the other three branches have a 'final say,' the interpretations and decisions of civil servants "though usually accepted as valid, are in principle subject to review" (Vile 1998: 360).[29]

How do these three solutions relate to each other? They all three seem to make some sense, but simple logic forbids us to see administration at the same time as the lower echelon of each branch (*within*), as associated with some branches (*between*), and as excluded from all three branches (*behind*). The fact that in practice these approaches do exist next to each other suggests that the distinction between politics and administration is a distinction of a different order than that between the legislative, executive, and judiciary. It seems less a distinction between branches or institutions, and more one between rationalities, principles, or norms. Further, it is clear that from the viewpoint of constitutionalism the third solution takes precedence over the other two: after it is established that public administration as an institution is not equal but subordinate to the traditional constitutional branches, it can be allowed that each of the constitutional branches has a lower administrative support staff and that some branches are more political and others more administrative. The politics-administration dichotomy would not be nearly so important if it was only a separation within or between the traditional branches of government. Only by treating the dichotomy as a division *behind* the separation of powers it addresses the issue of how to give public administration a place within the constitution. How exactly it functions as a constitutional principle in connection with the separation-of-powers doctrine will require, however, more theoretical reflection and empirical research in the future.

6.7 Coming full circle

Although an increasing number of scholars have recognized the relevance of studying public administration from a constitutional viewpoint, most of them have remained suspicious of the politics-administration dichotomy because they regard it as incompatible with the separation-of-powers doctrine. I have argued that the two are not only compatible, but even presuppose one another. Moreover,

[29] Thus understood, this third solution is an expression of the French approach associated with Montesquieu in section 2.4. When administration is seen as separate from but not subordinate (perhaps even as superior) to the other branches, however, it rather reflects the German approach associated with Hegel. Perhaps one could say that in the former politics/administration is a line *below* the three separated powers, whereas in the latter it is a line *above* them.

the dichotomy has the formal characteristics of a constitutional principle: it is a practical yet not unrealistic norm for the distribution and control of government power. Although mostly unrecognized, it functions as such a principle in modern constitutional states, while in states lacking a proper degree of constitutionalism (such as failed states, many developing states, dictatorships, and totalitarian regimes), it is conspicuously lacking. In sum, understanding the dichotomy as a constitutional principle can help to make sense of actual thought and practice.

It also provides an opportunity to reconnect our understanding of the dichotomy to its origins, because (as was shown in Chapter Two) in nineteenth-century Europe the dichotomy was mainly conceived for constitutional reasons. In particular, it reconnects the dichotomy to the approach of Montesquieu, the Federalists, and Tocqueville – the 'road not taken' when (neo-) Hegelian thought hijacked the tradition. Under neo-Hegelian influences, Wilson and Goodnow established not only a *politics*-administration dichotomy, but also a *polity*-administration dichotomy: they rejected the separation of powers and attempted to distance administration from the established constitutional order. The Hegelian approach evoked the critique of Weber, but he did not resume the French still-born constitutional approach either. The confrontation of Hegelian and Weberian one-sided understandings of the dichotomy has brought us in Waldo's quandary.

Therefore, I propose to go 'back' to the French tradition discerned in Chapter Two.[30] This means that we draw again upon the tradition of Montesquieu and his followers rather than those of Hegel and Weber and conceive of a legitimate but subordinate role for public administration within the constitutional order.[31] Authors like Vivien have related the distinction and separation between politics and administration to the separation-of-powers doctrine, giving administration a legitimate but subordinate place within the state. This approach has remained hidden, so to speak, for more than a century, but it has partly reemerged since the 1980s. The tentative and preparatory work of Waldo and particularly the constitutional approach developed by Rohr and others, though often ambivalent towards the dichotomy, provide us with the intellectual resources to imagine and appreciate the dichotomy as a constitutional principle again. It allows us to combine the constitutional legitimacy of public administration with a concern for

[30] Lowery has argued that such a return is impossible because of an unbridgeable gap between our concerns and those of the Founding Fathers, as we no longer believe (he claims) in the fragility of liberty and the predominance of human self-interest, as they did (1993: 197, 204). The constitutional approach undercuts precisely these contemporary assumptions (cf. Vile 1998).

[31] Bovens associates Montesquieu only with what he calls "horizontal accountability," and does not sufficiently acknowledge the subordinate role of public administration *vis-à-vis* the established constitutional powers (2003: 65-66).

limited government and respect for the separation of powers. Its basic idea is aptly summarized by Vile: "The autonomy of the administration should be recognized, but at the same time it should be subject to effective control" (1998: 411). This combination of separating administration from politics while also subordinating it to politics is typical for the dichotomy understood as a constitutional principle. It shows that the dichotomy, like all constitutional principles, is meant to prevent both anarchy and tyranny.

Because of these twin aims, the dichotomy is inherently ambiguous. This is already very well-known for the separation-of-powers doctrine, which, as Vile has shown, in the course of its history has integrated the notion of 'separation' and 'balance'. Historically, the doctrine of the mixed or balanced constitution preceded the doctrine of the separation of powers, but gradually the two merged. Conceptually, however, they are contradictory: whereas the notion of 'balance' implies close and constant relations between the powers, that of 'separation' suggests the absence of such relations (Vile 1998: 107-108; cf. Rutgers 2000). In the politics-administration dichotomy, two similar ideas are juxtaposed (see section 3.5). On the one hand, the dichotomy refers to a separation: politics and administration should be 'cut in two' in theory and in practice. This side of the coin has been advocated particularly by the American Progressive Reformers (Wilson, Goodnow) and their 'orthodox' successors. They who have stressed this aspect have been particularly concerned with empowering the administrative state and with the preservation of administrative values. On the other hand, the dichotomy also refers to the subordination of administration to politics – or, conversely, the primacy of politics over public administration. This is the approach taken by Max Weber, particularly, and in much of the European literature more generally (Hyneman (1950) is one of the few Americans taking this line). Although subordination of course presupposes at least an analytical separation, this approach aims not so much to liberate public administration from political interference as to maintain or (re-) establish political control over administration in order to prevent administrative tyranny (*Beamtenherrschaft,* as Weber called it).

Probably unwittingly, Vile has advocated a combination of these two positions. He agrees with "the earlier advocates of administrative autonomy" (i.e., Wilson and Goodnow) that public administration should be made exempt from political interference and political turmoil, but he also insists upon its being subjected to certain controls:

> "Unless the administrative state is abolished altogether – an unlikely eventuality – in some sense politics will have to be taken out of administration. This does not mean,

> however, that the administrative machinery should be left to get on with the job uncontrolled (…). It means that effective methods of control must be established to safeguard the rights of the individual to prevent the abuse of power by administrators, as much as by the legislature or the policy branch [i.e., the executive branch]" (1998: 401).

This is a clear statement in support of the understanding of the politics-administration dichotomy defended here: the constitutional cause (whether the protection of individual rights, as Vile has it, or the achievement of some notion of the common good, as I would prefer) requires that administrators are separated from and subordinated to their political superiors.[32] Bülck has expressed a similar idea: "The administration is dependent and independent at the same time. In the first instance it is dependent and in the second independent, namely from and vis-à-vis the political leadership" (1965: 52).[33] If this combination of separation and subordination seems like the squaring of a circle, it helps to remember that the familiar concept of administrative discretion includes them both (see section 4.5). Discretion implies that certain limiting rules are set by a hierarchically superior (usually political) authority, but also that these rules leave room for professional and prudential (administrative) decision making. Hence, the notion of administrative discretion perfectly fits my understanding of the dichotomy as a constitutional principle (cf. O'Neill 1988). Cook has captured the point precisely: "Within a general theory of constitutionalism, (…) a constitutional theory of public administration is a theory of responsible discretion" (1996: 177).

Ultimately, however, the constitutional importance of the politics-administration dichotomy lies not primarily in the fact that it allows discretionary room to administrators, or in the fact that it allows primacy and supervision to politicians. As a constitutional principle, the dichotomy first and foremost

[32] In the rest of his argument, Vile unfortunately tends to emphasize separation at the cost of subordination. He aims to distance public administration from "the policy branch" and subject it to judicial and especially legislative controls only (1998: 413-420). This seems naïve: if the executive branch is unable to control the bureaucracy effectively, the judiciary and the legislative will be even less so. He poses a false dilemma when he says that "either the government [i.e. the executive or 'policy branch'] must accept full responsibility for every action of the administration, which is unrealistic, or it must be detached altogether from its operation. The middle ground is unacceptable and unworkable" (1998: 413). In most modern governments, however (not only in parliamentary systems with ministerial responsibility, but also in presidential systems), both options are of course adhered to, although in mitigated form: the government accepts full responsibility (but is not *sanctioned*) for every minor administrative error and is nevertheless more or less detached from the administration – as the politics-administration dichotomy requires.

[33] Original: "Die Verwaltung ist abhängig und selbständig zugleich. In erster Linie ist sie abhängig und in zweiter selbständig, nämlich von und gegenuber der politischen Führung"

contributes to the legitimation and limitation of government in its interactions with citizens. It is through the *combination* of separation and subordination that the dichotomy works its most beneficial effects. The mechanism, hinted at but never elaborated by Waldo, is that by maintaining a division between politics and administration within the state its elements can keep each other in check, which in turn gives them less latitude to walk over the liberty of citizens and creates room for responsible citizenship. I think Montesquieu, the Federalists, and Tocqueville would agree.