



A JURISPRUDENTIAL STUDY OF SEPARATION OF POWERS IN THE PRESENT ERA

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ABSTRACT

The classical doctrine of Separation of Powers, once defined by the rigid tripartite division of Montesquieu, is undergoing a radical jurisprudential shift. In the current era (2026), the rise of the "Administrative State," the emergence of "Fourth Branch" integrity institutions, and the integration of Artificial Intelligence (AI) into sovereign decision-making have blurred traditional lines. This article provides a jurisprudential analysis of how modern courts and legal theorists have moved from a formalist (strict separation) to a functionalist (checks and balances) approach. It examines the "Digital Separation of Powers," arguing that algorithmic transparency is the new frontier for judicial review. By analyzing contemporary case law and global constitutional trends, the study concludes that while the core objective—preventing tyranny—remains constant, the mechanisms of institutional friction must be recalibrated for a technocratic age.

Keywords: Separation of Powers, Jurisprudence, Fourth Branch Institutions, Algorithmic Governance, Functionalism vs. Formalism, Constitutionalism 2026, Administrative Law.

INTRODUCTION

The doctrine of Trias Politica was born from a desire to safeguard liberty by ensuring that the person who writes the laws is not the same person who enforces them or judges them. However, the 21st century has introduced complexities that the 18th-century Enlightenment could not have foreseen.

In 2026, we no longer live in a world of three distinct silos. We live in an era of overlapping competencies. The executive now legislates through delegated regulations; the judiciary often "makes law" through expansive interpretations; and independent agencies operate with a degree of autonomy that defies traditional categorization.

The doctrine of Trias Politica, or the separation of powers, was originally conceived as a structural firewall against tyranny. By compartmentalizing the state into legislative, executive, and judicial branches, Enlightenment thinkers like Montesquieu sought to ensure that no single entity could simultaneously create, execute, and interpret the law. This tripod of governance was designed for a slower, more deliberate world where the primary threat to liberty was the centralization of monarchical whims.

In 2026, however, the rigid boundaries of these "silos" have become increasingly porous. The sheer complexity of modern society—ranging from digital privacy to climate engineering—requires a level of technical expertise that traditional legislatures often lack. Consequently, we have seen the rise of delegated legislation, where the executive branch does more than just "enforce" laws; it fills in the substantive details of broad statutes through administrative rulemaking, effectively acting as a secondary lawmaker.

The judiciary has undergone a similar transformation, moving beyond the simple "refereeing" of disputes. In an era of legislative gridlock, courts are frequently called upon to resolve social and technical dilemmas that elected officials avoid. Through expansive interpretations of constitutional principles, judges often establish "law from the bench," creating precedents that function as de facto statutes. This shift blurs the line between interpreting the law and crafting the social policy that governs a nation.

Adding a further layer of complexity is the emergence of the "fourth branch"—independent agencies and technocratic bodies. These entities often operate with a degree of autonomy that defies the traditional tripartite model. They possess quasi-legislative powers to write rules, executive powers to investigate violations, and quasi-judicial powers to adjudicate disputes within their specific domains. This concentration of functions within a single agency represents a significant departure from the original intent of keeping those powers separate.

Ultimately, the 21st-century evolution of Trias Politica suggests that the goal of safeguarding liberty has shifted from maintaining separation to managing interdependence. While the classical silos have crumbled, a new system of "checks and balances" is emerging through transparency, public participation, and judicial oversight of the administrative state. The challenge for 2026 and beyond is ensuring that this modern, overlapping architecture remains as committed to preventing the abuse of power as its 18th-century predecessor

THEORETICAL FOUNDATIONS: FORMALISM VS. FUNCTIONALISM

Jurisprudential debate in the current decade is dominated by two competing schools of thought:

* The Formalist Approach: This school argues for "bright-line" rules. It suggests that if a power is inherently legislative (like setting broad policy), it cannot be exercised by the executive. Formalists in 2026 often cite the "Non-Delegation Doctrine" to push back against the overreach of the administrative state.

* The Functionalist Approach: This school views the Constitution as a living document. It asks not "Does this violate a strict line?" but rather "Does this arrangement prevent one branch from aggrandizing itself at the expense of another?" Functionalism prioritizes workable government over theoretical purity.

The tension between Formalism and Functionalism represents the intellectual fault line of modern governance. While the previous century focused on the expansion of state capacity, the discourse in 2026 is centered on whether that capacity respects the structural integrity of the Constitution. This debate is not merely academic; it determines who holds the ultimate "power of the purse" and the "power of the sword" in an increasingly complex global landscape.

The Formalist Foundation: Seeking Clarity

The Formalist approach is rooted in the belief that the Constitution's text provides a definitive blueprint for the distribution of power. To a Formalist, the three branches of government are like separate rooms in a house; while they share a roof, the walls between them are load-bearing and must not be breached. This school of thought prioritizes "bright-line" rules over situational convenience, arguing that the stability of a republic depends on citizens knowing exactly which body is responsible for which action.

At the heart of the Formalist revival in 2026 is the Non-Delegation Doctrine. This principle asserts that the legislature cannot outsource its primary responsibility—the making of policy—to unelected bureaucrats in the executive branch. Formalists argue that when Congress passes "vague" laws and leaves it to agencies to "fill in the blanks," it creates a democratic deficit where the people who write the rules are insulated from the voters who must live under them.

The Functionalist Response: Prioritizing Efficacy

Conversely, the Functionalist approach views the separation of powers as a flexible set of goals rather than a rigid set of rules. Functionalists argue that the Framers intended for a "living document" that could adapt to unforeseen challenges, such as cyber-warfare or algorithmic bias. For them, the primary question is not whether a power has crossed a line, but whether the arrangement poses a genuine threat to the balance of power or "aggrandizes" one branch over the others.

Functionalism is the philosophy of workable government. In 2026, proponents of this school argue that a modern state cannot function if every technical regulation—from satellite orbital paths to CRISPR gene-editing standards—must be debated and voted on by a generalist Congress. They see the overlap of competencies not as a betrayal of the Enlightenment, but as a necessary evolution to ensure that the government remains capable of addressing 21st-century crises.

The Clash Over the Administrative State

The most visible battlefield for these two ideologies is the Administrative State. Formalists view the "Fourth Branch"—composed of independent agencies—as an unconstitutional hybrid that violates the separation of powers by acting as legislator, prosecutor, and judge. They advocate for a "unitary executive" theory or strict judicial limits to pull these agencies back under the direct control of elected officials or the strict text of the law.

Functionalists, however, see these agencies as essential "buffer zones" that provide the expertise and continuity needed for a stable economy. They argue that as long as there is **judicial review** to check for abuses of power, the mingling of functions within an agency is a fair trade-off for efficiency. To a Functionalist, forcing every minor rule through the formal legislative process would lead to total systemic paralysis.

The Role of the Judiciary

The judiciary in 2026 finds itself in the difficult position of being the final arbiter between these two philosophies. A Formalist judge will often strike down a regulation if the enabling statute is too broad, focusing on the *source* of the power. A Functionalist judge is more likely to uphold the same regulation if it produces a sensible outcome and doesn't explicitly strip another branch of its core functions, focusing on the *impact* of the power.

This jurisprudential divide also affects how laws are interpreted. Formalists lean toward Textualism, looking strictly at the words of the law as written in the 18th or 19th century. Functionalists are more comfortable with Purposivism, looking at the broader intent of the law and how it can be applied to modern circumstances without breaking the fundamental "spirit" of the separation of powers.

THE FUTURE OF LIBERTY AND GOVERNANCE

Ultimately, the debate between Formalism and Functionalism is a debate about the definition of liberty. Formalists believe liberty is best protected by strict, predictable structures that prevent the concentration of power at all costs. Functionalists believe liberty is best protected by an effective government that can respond to modern threats, provided no single branch becomes a law unto itself.

As we move deeper into the decade, the synthesis of these two schools may provide the path forward. We are seeing the rise of "Structural Functionalism," an attempt to create new, clear rules that still allow for modern administrative flexibility. Whether the "walls" of the Trias Politica are rebuilt or replaced by "transparent membranes," the goal remains the same: ensuring that power remains checked, balanced, and accountable to the people.

THE RISE OF THE "FOURTH BRANCH" AND INTEGRITY INSTITUTIONS

The emergence of the "Fourth Branch" represents a fundamental structural recalibration of the state, moving beyond the 18th-century obsession with mere separation toward a 21st-century focus on institutional integrity. These "Integrity Institutions"—comprising Election Commissions, Anti-Corruption Bureaus, and Data Protection Authorities—are no longer viewed by jurists as constitutional anomalies or mere administrative appendages. Instead, they are recognized as the "immune system" of the body politic, specifically designed to protect the democratic process from the very people elected or appointed to manage it.

A primary driver for this shift in 2026 is the recognition that the Executive branch often possesses an inherent conflict of interest, particularly regarding electoral legitimacy. If a sitting government controls the machinery that counts the votes, the Trias Politica is compromised at its root. Consequently, modern jurisprudence has elevated Election Commissions to a status of "functional independence," granting them a constitutional shield that prevents the legislature from defunding them or the executive from dismissing their leadership without extraordinary cause.

Similarly, the rise of Anti-Corruption Bureaus and Data Protection Authorities addresses the asymmetrical power dynamics of the digital age. In an era where the state holds a monopoly on high-tech surveillance and massive procurement budgets, the traditional "checks" of a part-time legislature or a slow-moving judiciary are often insufficient. These integrity institutions operate with a degree of investigative autonomy that allows them to monitor the state's own use of force and finance, ensuring that the "watchers" are themselves being watched by a specialized, apolitical body.

From a jurisprudential standpoint, these institutions represent a bridge between Formalism and Functionalism. While they appear to violate the "bright-line" rules of the three-silo model, they fulfill the ultimate functional goal of the Constitution: preventing the aggrandizement of power. By isolating certain "high-stakes" functions—like the auditing of public funds or the protection of citizen data—from the political fray, the Fourth Branch stabilizes the traditional three, allowing them to focus on their core competencies without the rot of systemic corruption.

The challenge for the current decade lies in the accountability of the unaccountable. As these integrity institutions grow in power, the legal debate has shifted toward how to check the "Fourth Branch" itself without compromising its necessary independence. The 2026 legal landscape is defined by this delicate balancing act: ensuring these institutions have enough teeth to bite back against executive overreach, while remaining tethered to the democratic will through transparent appointments and rigorous judicial review.

SEPARATION OF POWERS IN THE AGE OF AI (ALGORITHMIC GOVERNANCE)

In 2026, the traditional fear of a "monarchical" executive has been replaced by the specter of Executive Algocracy—the governance by algorithms. As state agencies increasingly outsource high-stakes decisions like bail eligibility, social welfare distribution, and tax audits to artificial intelligence, the very nature of political power is being redefined. When a decision is rendered not by a person but by a "black box" model, the central question of Trias Politica shifts: Who is actually exercising the power—the legislature that authorized the tech, the agency that deployed it, or the engineer who coded its weights and biases?

This shift has led to what jurists call Legislative Abdication. In an effort to keep pace with rapid technological change, many 21st-century legislatures pass "broad-brush" statutes that grant agencies the power to implement AI solutions without specific policy guardrails. By failing to define the ethical parameters or the specific logic the AI must follow, the legislature effectively abdicates its law-making role to the "fine-tuning" phase of machine learning. In this vacuum, the "law" is no longer found in the statute books but in the hidden optimization functions of a private contractor's code.

In response, modern jurisprudence has begun to treat Source Code as Law. Courts in 2026 are increasingly asserting that if an algorithm determines a citizen's rights or liberties, that algorithm is a functional equivalent of a regulation. This has birthed a new form of judicial activism: the Algorithmic Audit. Rather than merely reviewing the *outcome* of a decision, judges are asserting the right to "pierce the silicon" and review the underlying code. If the logic is found to be opaque, biased, or inconsistent with due process, the court may strike down the entire digital framework as unconstitutional.

This "Judicial Check on Tech-Power" is fundamentally changing the courtroom. We are seeing the rise of Techno-Legal Clerks—experts trained in both law and data science who assist judges in deciphering neural networks. The legal battle is no longer fought solely over the interpretation of words, but over the "inner morality" of the code itself. This ensures that the executive cannot hide behind a veneer of "mathematical neutrality" to carry out arbitrary or discriminatory actions that would be illegal if performed by a human bureaucrat.

Ultimately, the challenge of Executive Algocracy is ensuring that the Rule of Law does not become the Rule of Code. As we navigate the mid-2020s, the goal is to create a "glass-box" government where every automated decision is explainable, contestable, and tethered to a human-authored legal standard. By treating algorithms as subjects of constitutional oversight, the 21st-century state is attempting to preserve the spirit of the Trias Politica in an era where the most powerful "person" in the room might be a line of code.

5. Comparative Jurisprudential Analysis (2020–2026)

In 2026, the global landscape of Trias Politica is being reshaped by distinct regional philosophies. While the core goal of preventing the abuse of power remains universal, the methods—legal, historical, and technological—vary significantly across the United States, India, and the European Union. These jurisdictions are moving away from traditional "siloed" governance toward sophisticated, adaptive frameworks.

THE UNITED STATES: THE FORMALIST REVIVAL

The U.S. legal landscape in 2026 is defined by a rigorous return to Formalism. The Supreme Court has increasingly utilized the Major Questions Doctrine to dismantle the "administrative state." This shift is based on the premise that federal agencies (the "Deep State" in political parlance) have spent decades usurping legislative power by issuing sweeping regulations without explicit, clear authorization from Congress.

This revival acts as a "bright-line" rule to force power back to the legislative branch. By striking down agency rules on everything from climate emissions to labor standards, the judiciary is effectively telling the Executive that "efficiency" is no excuse for bypassing the democratic process. The 2026 trend is a deliberate shrinking of the Executive's regulatory footprint in favor of direct, albeit slower, lawmaking by elected representatives.

INDIA: PROTECTING THE "BASIC STRUCTURE"

In contrast, India's 2026 jurisprudential focus is on the Basic Structure Doctrine, a unique judicial innovation that serves as a permanent shield against constitutional erosion. The primary tension here is the "Judiciary vs. Executive" battle over institutional autonomy. The Indian Supreme Court maintains that the independence of the judiciary is a "Basic Feature" that even a unanimous Parliament cannot amend or abridge.

The current decade has seen the Court use this doctrine to resist Executive attempts to dominate judicial appointments. By maintaining control over the "Collegium system" (the process by which judges appoint other judges), the judiciary prevents the Executive from packing the courts with political loyalists. For India, the separation of powers is less about "major questions" and more about ensuring the referee is never hired—or fired—by one of the players.

The EUROPEAN UNION: DIGITAL CONSTITUTIONALISM

The European Union has introduced a third path known as Digital Constitutionalism. With the full implementation of the EU AI Act in 2026, the EU is using technology regulation to enforce the separation of powers. This approach recognizes that in a data-driven world, the "Executive" is often a combination of state agencies and the private tech giants that provide their algorithms.

The EU's shift is functionalist: it treats data usage and algorithmic transparency as constitutional concerns. By mandating that AI used for public administration (like social scoring or law enforcement) must be "explainable" and "traceable," the EU is preventing a new form of technical tyranny. Here, the "Fourth

Branch" is not just an office, but a set of digital safeguards that ensure the state's high-tech tools remain accountable to human rights and the rule of law.

By 2026, we see that the 18th-century "three silos" have evolved into localized defense mechanisms. The U.S. uses text to curb the bureaucracy; India uses doctrine to shield its judges; and the EU uses code to regulate the machines. Each jurisdiction is grappling with the same fundamental truth: that the separation of powers is not **a static destination, but a constant, regional struggle to keep authority in check.**

CHALLENGES TO THE DOCTRINE IN 2026

The final frontier of modern jurisprudence in 2026 is the management of the "Permanent Emergency." Historically, emergency powers were intended as temporary suspensions of the norm—short-term measures for pandemics, wars, or natural disasters. However, the 21st century has seen these "temporary" powers become a tool for Executive Bypass. By declaring emergencies over long-term, systemic issues like economic instability or climate change, the executive branch can circumvent the deliberate (and often slow) legislative process, effectively governing through a state of perpetual exception that the Enlightenment thinkers never envisioned.

This reliance on executive decree is exacerbated by Hyper-Polarization, which has rendered many national legislatures functionally paralyzed. In 2026, when a gridlocked parliament cannot pass even basic budgets or policy updates, the executive is often "forced" to step into the vacuum to prevent systemic collapse. This shift transforms the Judiciary from a legal referee into a Political Arbiter. Courts are no longer just interpreting law; they are being asked to decide the fate of entire national agendas, thrusting judges into a hyper-partisan spotlight that threatens the very "appearance of neutrality" required for judicial legitimacy.

Simultaneously, the rise of Private Sovereignty has introduced a power dynamic that operates outside the traditional state-centric model. Global tech giants now exercise powers that look remarkably like those of a sovereign state: they exercise "Judicial" power through opaque content moderation and de-platforming, and "Legislative" power by setting Terms of Service that govern the digital lives of billions. In 2026, a person's right to free speech or digital commerce is often more dependent on a corporate "community standard" than on a national constitution, leading to a profound crisis of accountability.

This has birthed the concept of the "Vertical Separation of Powers." Traditional Trias Politica focuses on the horizontal distribution of power between branches of the state. However, modern legal scholars are now calling for a vertical separation—a structural firewall between state authority and corporate sovereignty. The goal is to prevent a "corporatist" merger where the state uses private platforms to bypass constitutional restraints (such as using tech companies for surveillance) and where corporations use state power to stifle competition or avoid regulation.

As we look toward the remainder of the decade, the challenge is to synthesize these overlapping pressures into a coherent legal framework. The "Permanent Emergency" must be reigned in by sunset clauses, "Hyper-Polarization" must be mitigated by procedural reform, and "Private Sovereignty" must be tethered to public-interest obligations. The 2026 evolution of the Trias Politica suggests that liberty is no longer just protected by keeping three men in three different rooms, but by ensuring that the digital and physical spaces they govern remain open, transparent, and ultimately human.

CONCLUSION

The conclusion of the 2026 jurisprudential shift is the realization that the Separation of Powers is not a static, "dead" doctrine, but a dynamic, living organism. The Enlightenment-era goal of keeping branches in isolated silos has been replaced by a mandate for Institutional Interdependence. In a world defined by rapid technological change and systemic complexity, the objective is no longer to prevent the branches from speaking to one another, but to ensure they are mutually transparent. This shift acknowledges that power cannot be effectively checked if it is hidden behind administrative complexity or proprietary algorithms.

We are moving toward a "Systemic Integrity" model, where the traditional three branches are supported by a robust "Fourth Branch" of auditors, ombudsmen, and AI regulators. In this 2026 framework, these integrity institutions serve as the "sensory organs" of the state. They provide the high-fidelity data that the Judiciary requires to perform its constitutional duty; without this technical expertise, a judge cannot truly "check" an executive that hides behind a "black box" algorithm. The Fourth Branch provides the sunlight, and the Judiciary provides the heat.

However, to prevent the Fourth Branch from becoming an unaccountable technocracy, the Legislature must play a renewed, proactive role. Its task is to provide the specific mandates and ethical boundaries that limit these agencies. By moving away from "vague delegations" and toward precise, science-based legislation, the 100th Congress (and its global peers) ensures that the regulators are themselves tethered to the democratic will. This creates a feedback loop of accountability: the people elect the lawmakers, the lawmakers define the regulators, and the regulators monitor the executors.

This modern architecture embraces the idea that "Liberty is not found in the absence of power, but in the friction between powers." In the 18th century, friction was created by physical distance and slow communication. In 2026, friction is created by procedural transparency and competing expertise. When an AI regulator flags a bias, a court reviews the code, and a legislature amends the statute, the resulting "friction" is exactly what prevents the smooth, silent slide into authoritarianism.

Ultimately, the Trias Politica of the future is a web, not a wall. It is a system designed to be resilient enough to handle global crises while remaining fragile enough to be challenged by a single citizen armed with the right to information.

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