

NATURAL RIGHTS AND MODERN CONSTITUTIONALISM

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¶ 1 Although Montesquieu is freely admitted all round to have had much to do with the emergence, even discovery of modern constitutionalism, he is not generally thought of as a natural rights thinker. It would seem, then, that natural rights are not joined essentially to modern constitutionalism. Montesquieu also apparently lacks any direct links to one of the most prominent features of modern constitutionalism, a special constitutional court with power to act on behalf of rights, constitutional if not always natural or human. Montesquieu is well known as the first to formulate the judicial power as a conceptually distinct power to be kept separate in a proper constitutional system, but he had no notion of the judiciary serving as a constitutional court. The honor of that innovation is generally held to belong to the Americans of the era between the American Revolution and the drafting of the new constitution in 1787. In this paper I wish to make three contributions to the understanding of modern constitutionalism. First, I will contest the view that Montesquieu was not a natural rights thinker and, second, I will attempt to show that his version of natural rights decisively shaped his constitutional theory. Thirdly, I will show how the American constitution came to contain judicial review as a result of the particular way in which the American founders attempted to adapt Montesquieuan constitutional theory to their own circumstances. Montesquieu did not discover this aspect of modern constitutionalism, but the Americans, acting as Montesquieuan, and acting in terms of natural rights, did so. Establishing this last point will have the collateral consequence of establishing an account of the origin of the Supreme Court as an institution possessed of formidable constitutional powers more adequate than the dominant accounts now extant. At the same time, it will help us understand why this aspect of modern constitutionalism is necessarily and deeply controversial.

I. Montesquieu and Natural Rights

¶ 2 Montesquieu is normally not seen as a thinker of either natural law or of natural rights. Even though surveys of these topics seldom include him, he does speak of natural law with some frequency. One of the French terms that he uses is *droit naturel*, a phrase that can also be translated as natural right. Nonetheless, the contexts in which Montesquieu uses this phrase suggest natural law rather than natural right as the preferred translation. In accord with that observation, Montesquieu hardly ever speaks of natural rights (*droits naturels*) in the plural; when speaking of the natural law in the plural, he regularly speaks of *lois*, a word that does not have the same ambiguity as *droit*. Since Montesquieu does not allow the phrase natural rights to slip from his lips, it is no wonder he is seldom seen as a natural rights thinker. Some readers of Montesquieu go so far as to interpret his silence on natural rights as a “[refusal] to take the natural rights of man . . . as the new basis of orientation.”¹

¶ 3 The uncertain place of natural law or natural right in Montesquieu’s political philosophy manifests a broader problem, which has caused much uncertainty and controversy

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¹ David Lowenthal, *Montesquieu*, in LEO STRAUSS & JOSEPH CROPSY, *HISTORY OF POLITICAL PHILOSOPHY* 495 (3d. ed., 1987).

among interpreters of his thought. Does he have a normative stance or standard from which he judges political societies, or is he, as he sometimes appears to be, a relativist, whose chief aim is to give everyone “new reasons for loving his duties, his prince, his homeland and his laws” by showing “each nation . . . the reasons for its maxims”² “Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.”³

¶ 4 Montesquieu appears deliberately to leave his normative perspective in the shade. Thus some readers deny that he has any preferred model; others deny that, but then disagree over what that model is. Some, like many Americans of the founding era, find him a partisan of the ancient republics; others see him as a partisan of monarchy; still others see him as partial to the hybrid he describes as the constitution “devoted to liberty” in Book XI, which is a rationalized version of the British constitution. I believe the last of those four alternatives to be correct, and will now attempt briefly to show why. That in turn is necessary for understanding how Montesquieu’s theory of modern constitutionalism relates to natural rights.

¶ 5 Montesquieu prefaces his discussion of the British constitutional model with one of his most relativist statements:

[e]ach state has an object that is peculiar to it. Expansion was the object of Rome; war that of Lacedaemonia; religion that of the Jewish laws; commerce that of Marseilles; public tranquility that of the laws of China; navigation that of the laws of the Rhodians; natural liberty the object of the policy of the savages; the delights of the prince that of despotic states; his glory and that of the state, the object of monarchies; the independence of each individual is the object of the laws of Poland.⁴

These observations on the varying objects of different states form the context for the presentation of Britain as “the one nation in the world whose constitution has political liberty for its direct purpose.”⁵ Montesquieu leaves us uncertain, however, whether he considers this object merely one among the many political objects he has identified, or whether it has special standing. In order to ascertain that, we must have recourse to the foundations of his political philosophy as presented near the beginning of *Spirit of the Laws*.

¶ 6 Like Hobbes, Locke, and many others before him, Montesquieu begins with the state of nature: “One must consider man before the establishment of societies.”⁶ He begins where Hobbes does, but he does so in order to counter Hobbes’ version of the naturally effective forces in humanity. Montesquieu’s general point is rather like Rousseau’s later and better known critique of Hobbes. The latter has attributed to primordial human nature motives and ideas which are not natural but the products of the experience of society and the learning that occurs there. Montesquieu does not deny that human beings become more or less as Hobbes describes them, i.e., that they come to desire to subjugate one another, and that they are dominated by “motives for attacking others and for defending themselves.” Montesquieu would deny Hobbes’

² MONTESQUIEU, *THE SPIRIT OF THE LAWS*, preface, x, iv (Anne M. Cohler, et. al., trans. & eds., 1989).

³ *Id.* at Bk. I₃, 8.

⁴ *Id.* at Bk. XI₅, 156.

⁵ *Id.*

⁶ *Id.* at I₂, 6.

identification of the state of nature with a state of war, but he does not deny that the human condition does at some point degenerate into a state of war.⁷

¶ 7 Nonetheless, the effective moving forces in human beings as they originally are do not produce disassociation and war, as Hobbes had it, but peace and society. Human beings in a state of nature would not be Hobbesian aggressors, but would be timid. These beings will indeed, “think of the preservation of [their] being” before anything else, but this concern for preservation produces “extreme” timidity, because these beings “at first feel only [their] weakness.”

In this state each feels himself inferior; he scarcely feels himself an equal [as Hobbes had thought]. He will not at all seek to attack, and peace will be the first natural law.⁸

¶ 8 Naturally timid human beings in a state of nature will tend to avoid rather than seek to dominate others. In addition to the feeling of weakness, however, human beings also feel “needs,” particularly the biological need for nourishment. In their active pursuit of nourishment, these primitives run across others of their kind and, reassured by “marks of mutual fear,” they overcome their initial tendency to “flee” and instead “approach one another.” Like other animals, they “take pleasure at the approach of an animal of [their] own kind.”⁹ Natural sexual attraction adds greatly to the forces bringing them into association with each other. These natural feelings, at first hardly different from those operative in other animals, make for a kind of sociability among them. This is a very different sociability from that emphasized in the pre-modern tradition, however, in that there (as in Aristotle, for example) it is the human capacity for speech or reason that makes humans eminently social (and political) animals. Montesquieu rejects important elements of Hobbes’ counter-version of the natural human situation, but his style of thinking is far closer to the latter than to Aristotle or Thomas Aquinas.

¶ 9 Nonetheless, Montesquieu identifies a subsequent rational dimension to the human drift into society: “Besides the feelings that men have from the outset, they also succeed in getting knowledge: thus they have a second bond that the other animals do not have.”¹⁰ Montesquieu nowhere identifies what this acquired knowledge is, but the most plausible answer is that it concerns the advantages of society for the ever pressing task of satisfying their “needs.” They learn, for example, that it is better to hunt in groups than alone.

¶ 10 Original human nature, then, contains effective forces to overcome the original timidity that keeps humans apart from each other; as Montesquieu concludes, there naturally arises a “desire for society.” Montesquieu believes his story to be truer than Hobbes’ because, on the one hand, he knows that human beings are animals with the same survival requirements as other animals. They must eat, they must reproduce. Dominating each other is not a necessary part of their biological repertoire. Montesquieu also rejects the Hobbesian psychological construct that sets human beings against each other. The desire to subjugate others is not only not biologically primitive, but, unlike the primitive feelings that drive Montesquieu’s human animals, it requires certain ideas to be felt as a moving force. “The idea of empire and domination is so complex and depends on so many other ideas, that it would not be the one they would first

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 6-7.

¹⁰ *Id.* at 7.

have."¹¹ He seems to be referring to Hobbes' own analysis of the "principal causes of quarrel": competition, diffidence, glory.¹² Montesquieu is correct to see how complex the ideational substructure of the desire to subjugate others is. At the least, an agent moved by that desire must have firm ideas of the self, of the other, of power, of the future, of resources and their possible scarcity. For the same reason that human beings would not at first think of God, they would not think of dominating others: "A man in the state of nature would have the faculty of knowing rather than knowledge. It is clear that his first ideas would not be speculative ones; he would think of the preservation of his being before seeking the origin of his being."¹³

¶ 11 Montesquieu opposes Hobbes by appealing to the Lockean "way of ideas." Montesquieu's adoption of the Lockean methodology has two elements: the recognition that many of our actions are "idea dependent," i.e., depend on our having certain thoughts or ideas; and the insight that we cannot take for granted that the human mind is automatically furnished with the full repertoire of possible ideas. One must, in effect, construct a "history of ideas." Montesquieu concedes that the pacific state of nature gives way to a state of war because in social life human beings are wonderfully transformed. Naturally fearful and therefore naturally timid animals, human beings are stand-offish. However, "as soon as men are in society, they lose their feeling of weakness; the equality that was among them ceases and the state of war begins."¹⁴ In society the original natural forces are nearly effaced.

¶ 12 Montesquieu's state of war is considerably different from Hobbes': Not only does it commence only after and within society, but it is much more complex, for it exists in three discrete dimensions. "Each particular society comes to feel its strength, producing a state of war among nations. The individuals within each society begin to feel their strength: they seek to turn to their favor the principal advantages of this society, which brings about a state of war among them."¹⁵ "A society could not continue to exist without a government," a necessity imposed by the first tendency of social humanity to fall into the state of war.¹⁶ If a society is to carry on war against other societies, it needs organization and governance; if a society is to keep internal order in the face of the struggle between enstrengthened individuals for the best fruits of society, there must be an order-keeping entity. The creation of government complicates the state of war, however, for while it is a response to the already existing sources of war, it becomes itself a new source of war. Montesquieu aptly quotes the Italian jurist Giovanni Gravina, "The union of all individual strengths forms what is called the political state."¹⁷ But if it is the acquired feeling of strength that produces the state of war, then the political state, the institution established to cope with the state of war, becomes itself a potential source of war because it is the *locus par excellence* of strength and thus of the "feeling of strength." Government is both absolutely necessary, and absolutely dangerous.

¶ 13 Every society, then, faces three forms of the state of war: war with other societies, war among members of the society, war between government and the members of society. In

¹¹ *Id.* at 6.

¹² THOMAS HOBBS, *LEVIATHAN* ch. 13, 88 (Richard Tuck ed., 1996).

¹³ MONTESQUIEU, *supra* note 2, at I₂, 6.

¹⁴ *Id.* at I₃, 7.

¹⁵ *Id.*

¹⁶ *Id.* at 8.

¹⁷ *Id.*

response to these three dimensions of war arise three forms of positive law: the law of nations (*droit des gens*) to deal with relations among societies; the civil law (*droit civil*) to deal with “the relation that all citizens have with one another”; and political (public) law (*droit politique*) to deal with “the relation between those who govern and those who are governed.”¹⁸ Thus Montesquieu brings to light the political problem: the pacification of the three dimensions of war human beings experience once they enter society. The lineage of his theory in Hobbes’ doctrine is plain, but Montesquieu sees the move into society in a far more equivocal manner than Hobbes does, for society is both cause and cure, and certainly not automatically the latter, of conflict among men. Far from there being a deep continuity between social and pre-social humanity, Montesquieu claims that the move into society results in a near erasure of the original human nature. As he says in the preface, man is “that flexible being . . .”¹⁹

¶ 14 As flexible beings, humans are capable of great variety in how they actually live. Montesquieu’s doctrine of the weakness of nature in humanity is the prerequisite for his new science of laws. The varying objects of different governments reflect human flexibility; many if not most of them can also readily be referred to the three-fold political problem, and so one is tempted to say they represent varying responses to that problem. Rome has expansion as its object, i.e., it is organized most definitively around one dimension of the state of war, the war between societies. And, of course, its response is only one of several possible to that dimension of the political problem, for the Spartan is one different alternative, as is the commercial life to which Marseilles is devoted. If all states are to be seen as more or less successful responses to one or more dimensions of the political problem, then it should not be the case that their objects are in principle all equally valid. Montesquieu possesses a transcendent standard against which the objects of all existing polities can be measured

¶ 15 But we require a more determinate standard in terms of which we can judge what counts as a successful response to the challenges of the state of war. Is Rome’s response of aggrandizement better or worse than Sparta’s of non-expansive martial life built on slavery? Is monarchic France more or less successful than despotic China or the hybrid England? We here reach the point at which Montesquieu’s commitments to natural rights become decisive. He speaks most unequivocally of natural right in Book X as he prepares to turn his attention in Books XI and XII to the kind of political order most in accord with natural right. “Men,” Montesquieu affirms, “have the right to kill in the case of natural defense.” Montesquieu here clearly speaks of right (*droit*) in the sense of subjective rights, and the right he affirms derives from nature. That is, he recognizes a natural right of self-preservation. Not only natural law (i.e., the effectual natural forces in men) but also natural right prescribes preservation. Montesquieu does not, however, ground that right in a Hobbesian or Spinozistic manner; the fact that men are (sometimes) irresistibly driven to act so as to preserve themselves is not the ground, but rather “in the case of natural defense I have the right to kill, because my life is mine.”²⁰ I have a right to my life, and others do not, because it is mine, it belongs to me. It is an injustice for others to take from me what is mine, and I may rightly act to protect and preserve what is mine. Thus Montesquieu concludes that conquerors do not have a general right to enslave the conquered, and yet more generally that slavery, despotism, and the like are great travesties. Thus, Lowenthal misses

¹⁸ *Id.*

¹⁹ *Id.* at preface, x, iv.

²⁰ *Id.* at X₂, 138.

something essential when he claims that Montesquieu "refuses to take the natural rights of man . . . as the new basis of orientation." Montesquieu, like Locke, finds the bedrock ground of political morality not in natural law but in right understood as self-ownership.²¹

¶ 16 Montesquieu seems content to build on Locke without providing independent grounding or clarification of the self-ownership/property understanding of natural rights. We must resist the temptation to pass over Montesquieu's locution here as though it is of no great significance. A self-ownership understanding of rights was by his time a well-established motif within political philosophy. As Brian Tierney has shown, the notion of rights grounded in self-ownership goes back at least to Henry of Ghent, a thirteenth-century philosopher from the University of Paris.²² Moreover, self-ownership was explicitly affirmed as the basis of rights in the mid-seventeenth century by the Leveller, Richard Overton:

To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for everyone as he is himselfe, so he has a self-propriety, else could he not be himselfe.²³

The theory was picked up again in the political philosophy of Locke: "every man has a property in his own person; this nobody has a right to but himself."²⁴

¶ 17 Locke has puzzled generations of his readers by calling all rights property. This is his way of attempting to distinguish rights as he understood them from the competing conceptions of natural right sponsored in his day by Hobbes and Spinoza. Hobbes had famously distinguished right from law, two concepts which in previous thought were often conceived as the same thing—witness the ambiguity of the Latin *jus*, the French *droit*, and the German *Recht*, as well as the English right. Hobbes insisted that right and law were actually opposites not synonyms, for a right is a liberty to do or not do, while a law lays down an obligation to do or not do.²⁵ But Hobbes had further insisted that right is a moral liberty and only that; he denied that *in se* right (and certainly not the right of nature) implied any corresponding duty on the part of any other. The right of nature, which begins as a right to preservation, ends up being a "right of every man to everything, including one another's bodies."²⁶ Thomas, a rights bearer in Hobbes' state of nature, has a right to do whatever in his exclusive judgment conduces to his preservation, including physically constraining or even killing Hugo and Samuel. Thomas has a right in the sense that he is morally permitted to do what he can. He is not blamable if he throttles Hugo and takes his hoarded up Dove bars. At the same time, of course, Hugo and Samuel have the same right of nature, which implies they may treat Thomas in just these same ways. None of them is morally obliged to suffer passively Thomas's assertions of his right of nature. They may, under the right of nature, do whatever they can to prevent him from exercising his right of nature.

¶ 18 Locke's notion of rights as property (and of self-ownership as the ultimate basis of rights) is meant to signal a rejection of this Hobbesian construal of natural right. Right as

²¹ On Locke and self-ownership, see MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 275-287 (1994).

²² BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 83-89 (1997).

²³ Richard Overton, *An Arrow Against All Tyrants*, in G.E. AYLMER, *THE LEVELLERS IN THE ENGLISH REVOLUTION* 68 (1975).

²⁴ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 27, 287-88 (Peter Laslett ed., 1988).

²⁵ HOBBS, *supra* note 12, at ch. 14, 91.

²⁶ *Id.*

property is distinguished from right as liberty by the correlative obligations accompanying the existence of the former but absent in the latter. If Thomas possesses a property (right) in his life, then it is not, under usual circumstances, morally acceptable for Hugo to infringe his right. Persons emphatically do not have a right to everything; they do not have a right to one another's bodies or liberty, for example.

¶ 19 By endorsing self-ownership Montesquieu is endorsing this Lockean conception of rights. The political implication of the Lockean position is well drawn out by Locke himself, or more concisely by Thomas Jefferson in the American Declaration of Independence: governments are instituted to secure rights and they are not themselves to be considered empowered to infringe rights if they like, as Hobbes' sovereign was. Two central dimensions of modern constitutionalism are thus derived from the Lockean natural rights orientation: governments have a definite and limited teleology, to secure rights; they have a limited and precise object. Moreover, governments are not to be exempt from controls and limitations; the controller must also be controlled.

¶ 20 From the point of view of Hobbesian rights theory, the Roman response of expansion, for example, to the dislocations caused by the state of war would be a perfectly legitimate response; indeed, so far as Rome was marvelously successful at conquest, it would seem a very fine response. However, from the perspective of rights as property that is no longer so. One has a right to defense, but not to conquest *per se*.

Therefore [says Montesquieu] the right of war derives from necessity and from a strict justice. If those who direct the conscience or the councils of princes do not hold to these, all is lost; and when one finds oneself on arbitrary principles of glory, of propriety, of utility, tides of blood will inundate the earth. Above all, let one not speak of the prince's glory; his glory is his arrogance; it is a passion and not a legitimate right.²⁷

Not only does Montesquieu reject the Roman path of conquest, but he quite explicitly denounces here monarchies of the type prevalent in the Europe of his day, for as he says in Book XI, the object of these monarchies is "his glory and that of the state."²⁸

¶ 21 Montesquieu's standard of natural right as self-ownership equally depreciates the Spartan solution to the political problem, for that polity rested at its core on slavery. "Slavery in its proper sense is the establishment of a right which makes one man so much the owner of another man that he is the absolute master of his life and of his goods."²⁹ Montesquieu's language is revealing, for he reverts to the concept of self-ownership in order to find the proper definition of slavery; its very definition indicates how contrary to natural right it is. A society built on slavery can perhaps have many virtues, but it cannot be a just or ultimately electable society.

¶ 22 Montesquieu affirms and builds on the Lockean doctrine of natural rights, but he does not draw the explicit Lockean conclusion in the Lockean (or Jeffersonian) language that "governments exist to secure these rights." He sees (as Locke also did) that in fact not all governments do exist "to secure these rights." In one way or another, Montesquieu shows us,

²⁷ MONTESQUIEU, *supra* note 2, at X₂, 139.

²⁸ *Id.* at XI₅, 156.

²⁹ *Id.* at XV₁, 246.

most historic governments pursue quite other objects. Montesquieu differs from Locke in taking far more seriously that fact: he wants to know both why most hitherto existing political systems are more or less illegitimate according to the strict criteria of political right, and what allows these more or less illegitimate polities to survive, even thrive. In exploring these issues he is plugging a large gap in Lockean political philosophy.

¶ 23 Montesquieu does not use the language of rights-securing to describe the British Constitution either, and that indicates another important modification of Locke. In Locke, self-ownership flows into the rights of life, liberty and estate, and the proper or legitimate end of government is preservation of the objects of these rights. In Montesquieu, self-ownership more simply leads to the standard of liberty: the rational or good order is the one that is free. Montesquieu gives concrete meaning to such slogans as “a free county” and “the free world.”

¶ 24 Montesquieu defines the standard of right or good government in terms of “liberty,” understood as “that tranquility of spirit which comes from the opinion each one has of his security.” Or, more simply, liberty “consists in security or in one’s opinion of one’s security.”⁸⁰ The security Montesquieu has in mind is assurance that one will not be accosted by the ruling authorities or other citizens in one’s person or possessions, i.e., in the objects of one’s rights. Liberty is the true pacification of society in the two dimensions of war within society that is also consistent with natural right understood as self-ownership. Locke and Montesquieu agree that only a free society supplies that true pacification. Despotisms in their very nature do not, for the body of the society is laid open to the force or threat of force by the ruler, and the claims of self-ownership are hardly recognized. Even the republic, that government marked by virtue and capable of such prodigious human actions as takes away Montesquieu’s breath at times, does not succeed at providing the solution to the state of war: republics “are not free states by their nature.”³¹

Observe the possible situation of a citizen in these republics. The body of the magistracy, as executor of the laws, retains all the power it has given itself as legislator. It can plunder the state by using its general will; and, as it also has the power of judging, it can destroy each citizen by using its particular will.³²

Monarchies are better at providing liberty, but they are still very imperfect compared to the free constitution proper. They “do not have liberty for their direct purpose . . .; they aim only for the glory of the citizens, the state, and the prince . . .”³³ Montesquieu concedes, even insists, that “this glory results in a spirit of liberty that *can* . . . produce equally great things [as the free state, *per se*] and *can perhaps* contribute as much to happiness as liberty itself.”³⁴ The monarchy is good only as far as it mimics and approximates the free regime. Notice how qualified Montesquieu’s judgment is on how likely it is to do so. Moreover, even when it does, the achievement is fragile, for it depends not so much on fixed structures, but on the will of the monarch, who must see the wisdom and goodness of the division of authority between himself and his nobles, especially with

³⁰ *Id.* at XI₆, 157, XII_{1,2}, 187-88.

³¹ *Id.* at XI₄, 155.

³² *Id.* at XI₆, 157.

³³ *Id.* at XI₇, 166.

³⁴ *Id.* (emphases added).

regard to the placement of the judicial authority. Montesquieu is keenly aware of a tendency of monarchies to "degenerate into despotism."³⁵

¶ 25 Montesquieu's emphasis on the opinion of security rather than on the fact of security derives in turn from his taking seriously the Hobbesian/Lockean analysis of the causes of war on the one hand, and the Lockean analysis of labor on the other. Hobbes especially had emphasized the "subjective causes" of war: people make war out of "diffidence," that is, fear they will be at risk if they do not act first. They also make war when they believe they can get away with dominating others. Montesquieu's emphasis on the opinion of security is meant to address these subjective elements in the genesis of the state of war, and thus contribute to the pacification the right order produces.

¶ 26 Montesquieu's positing of the opinion of security as the standard of liberty also appears to be an embodiment of the Lockean insights into labor. Locke demonstrated the political significance of time: the blessings of civil life depend to a very great extent on human labor, and human labor requires securing to the laborer the fruits of that labor, for labor is painful and therefore costly to the laborer. It will not be expended without promise of reward. Given the nature of things, most labor must be expended for the promise of reward, for the fruits of labor appear only in the future. A society organized around labor is a futural society, one where present protection in one's rights is by no means one's sole interest: one desires an assurance of continuing protection, i.e., of security. One wishes for "the opinion of security." Montesquieu's emphasis on opinion of security is indeed a modification of Locke, but it is not a major modification or one that requires any fundamental reformulation of Lockean principles.

II. *The Constitution of Liberty*

¶ 27 The most famous, the most commented upon, the most influential piece of text in all the huge *Spirit of the Laws* is a relatively brief ten-page chapter in Book XI devoted to the Constitution of England. This constitution is not only the only constitution to have liberty, the proper end, as its object, but it is the place "where liberty will appear as in a mirror."³⁶ This chapter is so well-known because in it Montesquieu lays out his theory of separation of powers, an arrangement he considers to be at the core of what makes a constitution free. This theory has been so successful, especially in the United States, that it is difficult to see it with the freshness it must have had for the world when it was new. Our task is to attempt to rewin the position from which it is not familiar in order to understand it truly and to appreciate it properly.

¶ 28 The first step toward bringing it back to life is to see the separation of powers as Montesquieu's answer to the question of how the political problem, or rather set of problems induced by the state of war can be resolved at the level of, or compatible with natural right understood in Montesquieu's special way as liberty, i.e., as "the opinion of security." The separation of powers must first and foremost be seen as the underlying structure of security that can produce liberty, or the opinion of security. Montesquieu does not believe that this opinion can be formed on an arbitrary basis. It must rest on a real security, but, it is also true, not every state of real security necessarily produces an "opinion of security." The citizens must have specific reasons to feel secure.

³⁵ *Id.* at 167.

³⁶ *Id.* at XI₅, 156.

¶ 29 Liberty is the pacification of the three dimensions of the state of war that Montesquieu has identified—potential war with other societies, potential war among members of the same society, and potential war between governors and governed. So far as government by separated powers is the response in chief to the requirements of liberty, it must supply sufficient force and competence to deal both with other communities and to supply order within society; it must also supply means to guarantee that government is safe, i.e., not oppressive towards its own citizens. Too often separation of powers is viewed almost exclusively in terms of the last of these three goals, a focus of attention that produces quite serious misperceptions. Not surprisingly that very fine Montesquieuan, James Madison, gave an extremely perspicuous statement of the Montesquieuan position:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place oblige it to controul itself.³⁷

¶ 30 Montesquieu’s doctrine of separated powers is very frequently confused with or presented as roughly equivalent to the doctrine of checks and balances. The confusion is quite natural, for the two are related, and indeed Montesquieu’s theory of separated powers has as part of it a component of checks and balances. Less frequently, but not negligibly, Montesquieu’s theory of separated powers is confused with or presented as roughly equivalent to the old doctrine of the mixed regime. Again the confusion is natural for the two are related in Montesquieu, and indeed Montesquieu’s theory of separated powers has as part of it a component of the mixed regime.

¶ 31 Montesquieu’s separation of powers is thus a complex affair, combining three conceptually distinct schemes—separated powers, checks and balances, and mixed government. What is most often missed is the primacy of separated powers *per se* in the scheme. The other two are but means for effectuating the first. Montesquieu makes the order of things very clear when, after a somewhat perfunctory identification of the three functions or powers themselves, he goes on to affirm repeatedly that it is the absence of separation in itself that destroys liberty. His identification of the powers is remarkably brief, especially when compared with the fine-tuned discussions of the “metaphysics of powers” we sometimes get from the Supreme Court and such bodies. Apparently the definition of the essence or the boundaries of each power is not the most important feature of the separated powers scheme.

¶ 32 What is important is whether any two of the powers is possessed in one set of hands or one institution.

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.³⁸

The import of the definition of liberty in terms of an “opinion of security” is visible in the reasons Montesquieu declares liberty dead here: the fear of tyrannical making and enforcing of the law.

³⁷ ALEXANDER HAMILTON, JOHN JAY, & JAMES MADISON, *THE FEDERALIST* 269 (George Carey & James McClellan eds., 2001).

³⁸ MONTESQUIEU, *supra* note 2, at XI₆, 157.

The actual exercise of tyrannical power is not the issue so much as the subjective response to the institutional arrangement.

¶ 33 Likewise, the judicial powers must be separate from both the other two. “If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the face of an oppressor.”³⁹ As with so much in his political philosophy Montesquieu’s brief statements here amount to little more than hints or suggestions of his full position, which is probably best understood in terms of the metaphor of a relay race. The three powers, each relating to law in a different way and at a different place, must in effect each play its part and then hand off the baton to the next power. The legislature “makes laws for a time or for always and corrects or abrogates those that have been made.” The legislature exercises a “general will”; Montesquieu clearly distinguishes this from the “power of judging,” which exercises “particular will,” in “judging the crimes or disputes of individuals.”⁴⁰

¶ 34 Montesquieu has in mind the now familiar idea that the legislature only makes general rules, applicable to all who are similarly situated, including the legislators themselves. The legislature in effect knows no proper names, but only general categories and general rules. The judiciary applies these rules to individuals who come within their ambit. Montesquieu is known to have taken the judicial power very seriously—he is the first to elevate it to the status of a separate power. The judicial power is the one he calls “terrible among men.”⁴¹ It is particularly terrible because this is, so to speak, where the rubber hits the road, where the coercive power of the state is actually applied to individuals. In a free state this application can be made only by the judiciary, i.e., by an institution which has nothing but the power of judging individual cases under rules not of its own making, and, moreover, lacks the “force,” i.e., coercive power, that might make it an oppressor. Coercion belongs to the executive, which neither makes the rules nor applies them to individuals except via the agency of the judiciary. Only the judiciary, says Montesquieu, acts on individuals—the other two powers are only “the general will of the state . . . and the execution of that general will.”⁴² As that other great Montesquieuan, Alexander Hamilton, put it, the legislature possesses will, the executive force, the judiciary judgment.⁴³ The successive and cooperative action of all three are required for government to act—with the partial exception of foreign affairs, where the executive has greater (but not complete) resources for independent action. It is the disjunction of these three powers that allows the citizen to feel secure, and which thus is the very definition of a free constitution.

¶ 35 The necessary, but it turns out, not sufficient condition for a free constitution is formal separation of powers, the possession of the different powers by different institutions. That is not sufficient, however, for a number of reasons. Montesquieu is no victim of an overly formal grasp of political realities; he is sensitive to informal processes that undo the achievements of mere forms. Thus he cites the example of Venice, a republic where the grand council has the legislative power, the Pregadi executive power, and Quarantia the power of judging. Venice has a formal separation of powers, but “these different tribunals are formed of magistrates taken from

³⁹ *Id.*

⁴⁰ *Id.* at 158-59.

⁴¹ *Id.* at 158.

⁴² *Id.*

⁴³ HAMILTON, *supra* note 37, at 402.

the same body; this makes them nearly a single power.”⁴⁴ Genuine or actual separation requires that the governing bodies be constituted in ways that keep them separate in practice. Montesquieu proceeds to sketch a new science of constitutional design, a science whose object in the first instance is to ensure that the different powers are different in character and not traceable back to some one body or group that can successfully align them so as to cancel the formal separation.

¶ 36 According to Montesquieu’s science of constitutional design, the properly constructed modern constitution must bear a distinct resemblance to that mainstay of pre-modern constitutional theory, the mixed regime, as projected classically by Polybius, Cicero, and countless other political analysts from antiquity up to Montesquieu’s own time. The free constitution must also be a mixed constitution—what Polybius and the others presented as a mixture of the three pure regime types, monarchy, aristocracy, and democracy. Montesquieu, unlike Polybius and theorists of his sort, builds from the powers toward the mixed regime rather than beginning with the regime types and seeking ways to combine them. This difference proves to be immensely significant.

¶ 37 Montesquieu, unlike Locke his great predecessor in developing a natural rights based modern constitutionalism, identifies the judicial power as separate and independent from the executive, of which Locke had seen it to be a part. This elevation of the judicial power follows directly from Montesquieu’s emphasis on liberty as “tranquility of spirit deriving from an opinion of security,” for, as already noted, the judiciary is *the* intermediary between the people and governmental coercion. If the people feel secure *vis-à-vis* the judiciary, this goes a long way toward rendering them secure altogether. These same considerations underlie the principles for constructing the judiciary that Montesquieu lays down. He, in effect, interprets the British constitution so as to ignore the role of the judges and notice only the role of the juries. The judicial power, “so terrible among men,” is or is to be held by no body of regular and separate officers, but by temporary and changing bodies drawn from the people themselves. Moreover, those threatened by the application of state coercive power against them have some significant say in the selection of the membership of the judicial bodies. The judicial power, then, is firmly in the hands of the people themselves, and this contributes mightily to the sense of security they must feel when they contemplate this “terrible” power. More than that, the system of lodging the judicial power in the hands of bodies drawn from the people renders this power, “so to speak, invisible and null.”⁴⁵

¶ 38 An independent and popular judiciary is a necessary but not sufficient condition for liberty; if the judges (jurors) are free to apply any rule in their dealing with citizens, there can be no liberty, no confidence of security. Judicial judgments must be based “on a precise text of the law.”⁴⁶ That “text” must derive from the legislators. There are natural, almost deductive principles for constructing the legislature of a free constitution. The very first such principle is that it too, like the judiciary, must be popular: “in a free state, every man who is reputed to have a free soul, should be governed by himself,” and, therefore, “the people as a body should have legislative power.”⁴⁷ Not every individual “in a free state” is necessarily “reputed to have a free

⁴⁴ MONTESQUIEU, *supra* note 2, at XI₆, 158.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 159.

soul”—some have “so humble . . . an estate that they are deemed to have no will of their own.”⁴⁸ Montesquieu thus endorses some form of restricted suffrage, although not perhaps as restricted as the British suffrage in the eighteenth century. The link to his theme of liberty as the opinion of security is clear—the people will feel secure if the general rules of society are made by them or their representatives. But he appears to go further in his commitment to broadly popular governance here: it is a principle of right that free souls should govern themselves. This is a democratizing version of the Lockean consent principle. The original freedom (and equality) of human beings is present in civil form via institutions of self-government. These institutions not only conduce to the feeling of security, but are expressive of the fundamental freedom (self-ownership) of the individuals in a free society, or of the fundamental freedom of human beings as such, which can find expression in a free society.

¶ 39 Although free government is fundamentally popular government, it is not directly popular government—it must be representative. “The people should not enter the government except to choose their representatives.” Montesquieu’s reasoning is instructive: “The great advantage of representatives is that they are able to discuss public business. The people are not at all appropriate for such discussions.”⁴⁹ That is to say, there is public business that must be carried on at a certain level of competence, and direct democracy is not suitable for that. The objective tasks of government, the pacification of the state of war, can only be achieved if knowledge and prudence are brought to bear. Thus considerations of competence, as well as separateness *per se*, enter into the construction of the modern constitution. Montesquieu therefore adds to general arguments for separateness between the powers further reason for the distinction between the legislative and executive powers:

Nor should the representative body be chosen in order to make some resolution for action, a thing it would not do well, but in order to make laws or in order to see if those made have been well executed; these are things it can do very well and that only can it do well.⁵⁰

¶ 40 Thus far the Montesquieuan modern constitution appears to be a popular, if representative government; that reflects his grounding in the social contract style of thinking that remains at the bottom of his very sophisticated political science. The modern constitution is less popular than it so far appears, however. In order both to produce a proper separateness and the needed competence, it must also embody aristocratic and monarchic elements. There must be an upper house of the legislature, composed of those “who are distinguished by birth, wealth, or honors.” If they do not have a separate part of the legislature, they will be submerged in the much greater numbers who are not “distinguished by birth, wealth, or honors.” They would then not enjoy liberty, because their rights would perpetually be insecure, or at least they would have good reason to so believe. “The common liberty would not be their endowment and they would have no interest in defending it.”⁵¹ Either this body of citizens would be denied its liberty by the people, or it would have an incentive to overturn the popular order and deprive the people of their liberty, or both.

⁴⁸ *Id.* at 160.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

¶ 41 The upper body needs to be not merely wealthy but to be hereditary as well. This requirement is particularly related to its task of helping maintain separation of powers. Its hereditary character would give it “a great interest in preserving its prerogatives, odious in themselves.”⁵² It would also give it the resources to do so. But this self-interested action helps maintain the difference between the two parts of the legislature, as well as the separation of the legislature from the other powers by accentuating its different bases in society.

¶ 42 Montesquieu completes the idea of the mixed regime by insisting that the executive powers be placed in a monarch. He has two sets of converging reasons for this. Comparative competence points to monarchy: “The executive power should be in the hands of a monarch, because the part of the government that always needs immediate action is better administered by one than by many, whereas what depends on a legislative power is often better ordered by many than by one.”⁵³ This side of Montesquieu’s thought was developed with unparalleled intelligence by Alexander Hamilton in his essays on the presidency in *The Federalist*.⁵⁴

¶ 43 Montesquieu also is concerned with the separateness of the separate powers. Accordingly he blames severely the arrangement whereby the executive is drawn from the legislature; in such a case “there would no longer be liberty, because the two powers would be united, the same persons sometimes belonging and always able to belong to both.”⁵⁵ Montesquieu knows that selection of different people by the same body, as in Venice, also leads to compromising separateness, so the solution is an executive on the British model, not merely unitary, not merely not drawn from the legislature, but not drawn from the people or the nobles either. Although he does not say so explicitly, Montesquieu’s executive should be a full-scale hereditary monarch, possessed of great prestige, wealth, and lineage in his own right.

¶ 44 Montesquieu’s modern constitution thus is marked by the convergence of his new-fangled principle of constitutional construction organized around the separateness of the three powers and the much older notion of the mixed regime. The latter enters Montesquieu’s thinking in the service of the former, however, a fact that signals the great distance between Montesquieuan modern and Polybian pre-modern constitutionalism. Polybius and other theorists of the mixed constitution do not begin with the three powers; indeed the powers have nothing to do with their mandates for the construction of constitutions. They begin instead with the three pure regime types—monarchy, aristocracy and democracy, and their characteristic degenerate forms, tyranny, oligarchy, and (in Polybius’ terms) ochlocracy (mob rule). The good regimes are distinguished from the degenerate ones by the moral character of the ruling elements in each; the rulers in the good regimes seek justice and the common good, and cultivate virtues which make their communities decent and successful. The degenerate regimes are ruled by corrupt ruling classes who seek their own interest and oppress those they rule. In Polybius’ classic version the good regimes tend to metamorphose into their degenerate equivalents because the rulers, or their descendants naturally fall away from the virtue that originally characterized them. Polybius depicts a cycle of regimes that results, as each good regime gives way to its degenerate parallel, which over time in turn activates a new element in the community to rise up, to overthrow the corrupt ruler and establish a new good constitution. Thus the king, originally good, is succeeded

⁵² *Id.* at 160-161.

⁵³ *Id.* at 161.

⁵⁴ HAMILTON, *supra* note 37, at 402.

⁵⁵ MONTESQUIEU, *supra* note 2, at XI₆, 161.

by the tyrant, who is eventually opposed by the noble-spirited men in the community, who eventually establish an aristocracy, directed to justice and the common good. Their descendants eventually become oligarchs, alienating the mass of the virtuous common people, who establish a democracy. And so on. Polybius argued that this cycle occurred with the necessity of natural law, unless through accident or design a community achieved a mixed constitution, i.e., a constitution in which each of the regime elements had a substantial amount of authority. This form was exemplified in the ancient world by Rome, Sparta, and (according to many pre-Montesquieu theorists) in the modern world by England. The important structural feature was the sharing of authority among the one, the few, and the many. It did not matter particularly just how this authority was divided up. The point of it was not to maintain the separateness of the powers or functions but to prevent the elements sharing in rule from losing their virtue, or from falling into the kind of vice and injustice characteristic of the degenerate regimes, that vice and injustice that made constitutions so unstable and transitory. The co-presence of the three regime elements was not to institutionalize division, but to lead to unity and appreciation of the common good by including the three regime elements in the common venture of rule. It should not need emphasizing but liberty understood in the Montesquieuan way was no part of this pre-modern constitutionalism, in large part because natural rights and self-ownership had no place in the theory.

¶ 45 Contrary to most interpretations of both Polybian and Montesquieuan constitutionalism, checks and balances were central to neither theory. That is not to say checks and balances had no place in these models. In Montesquieu's theory, checks and balances, although important, are subordinate to both the demand of separateness of the powers and to the mixed regime as a means to effectuating the separation.

If the executive power does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give itself all the power it can imagine.⁵⁶

The executive needs to be able to check the legislative for the sake of maintaining the separation of powers. And that is it.

¶ 46 Montesquieu's notion of checks and balances is not only limited in purpose but in scope. The judiciary is no part of the system of checking and balancing and the legislature is a part only as checked.

But the legislative power must not have the reciprocal faculty of checking the executive power. For, as execution has the limits of its nature, it is useless to restrict it. . . . But if in a free state, legislative power should not have right to check executive power, it has the right and should have the faculty to examine the manner in which the laws it has made are executed But . . . the legislative body should not have the power to judge the person, and consequently the conduct, of the one who executes. His person should be sacred because, as he is necessary to the state so that the

⁵⁶ *Id.* at 162.

legislature's body does not become tyrannical, if he were all used or judged there would no longer be liberty.⁵⁷

III. Natural Rights and Modern Constitutionalism: The American Case, or How the United States Supreme Court Got Such Big Britches

¶ 47 To those of us who think about modern constitutionalism in an American context, much of Montesquieu's analysis is comfortably familiar, but the examination of this classic presentation of modern constitutional theory throws into very high relief one of the features of the American brand of constitutionalism that we tend to take most for granted—the enhanced and different role of the judiciary. For Montesquieu the judiciary is essentially the jury; he does not deign to mention the judges. In the American constitutional system, the judiciary is preeminently the Supreme Court. For Montesquieu the judiciary is to proceed via strict subordination to legal rules given it by the legislature; in the American constitutional system the judges pass judgment on the laws made by the legislature. In Montesquieu the judiciary is eminently a popular branch; in the American constitutional order it is the least popular, potentially most counter-majoritarian institution. In Montesquieu the judiciary plays no part in the scheme of checks and balances; in the American constitutional order it is the granddaddy of all checking institutions.

¶ 48 These American modifications in the Montesquieuan blueprint have proved to be among the most widely imitated features of the American constitution. There are almost as many countries that have instituted constitutional courts modeled more or less on the U.S. Supreme Court as there are brands of cola aiming to be Coke. If ability to spawn imitators is a sign of success, then the U.S. Supreme Court is surely a great success.

¶ 49 Yet we must recall that much as Americans (and others) have loved the Supreme Court, it has also been almost constantly aswirl in controversy and has steadily aroused levels of opposition that have regularly threatened to endanger its institutional autonomy. The court's opponents have not been consistently liberals or conservatives, not consistently partisans of national or partisans of state power, champions of rights or champions of governmental authority, neither strict nor loose constructionists: at different times all of these have been in opposition, all have rallied to the court. The source of opposition has changed from time to time, but the fact of opposition hardly has. Each time, however, it appears to most of those who are unhappy with the court that its offending actions are idiosyncratic deviations. From the shifting character of the opposition that judgment makes a certain kind of sense. But standing back a bit, it is hard not to conclude that serious, sustained, powerful opposition to the court has not been a deviant fact of court history, but a steady fact, not the exception but the rule, not a product of accidental and extrinsic causes but somehow essential and intrinsic. In this section I plan to explore the oddly ambiguous position of the Supreme Court—secure, successful, respected—fragile, vulnerable, hated, the target of serious doubts about its institutional legitimacy.

¶ 50 Let me begin almost at the beginning: James Madison, the reputed “father of the Constitution,” once called the Constitution a “system without a Precedent,” a phrase he used to bring out the great novelties, the great political innovations the American constitutional order

⁵⁷ *Id.*

contained.⁵⁸ Madison's co-writer in *The Federalist Papers*, Alexander Hamilton, was also very impressed with these novelties, and indeed he announced in Federalist 9 that were it not for these innovations, the "friends of liberty" would not be able to support a republican form of government, for the historical record of republics was not, to that date, very favorable to liberty. The novelties in question, Hamilton announced, were the products of "the science of politics," which, like many other sciences in the 18th century, had made great improvements recently. A glance at the improvements Hamilton lists in Federalist 9 makes it clear that the practitioner of the "science of politics" he has in mind as the one who has made or explained these improvements is Montesquieu.⁵⁹ When the Americans deviated from Montesquieu in constructing the judiciary as they did, it was not for want of attention or respect for the French philosopher.

¶ 51 Hamilton and Madison—and any number of others—agree that the Americans were followers of Montesquieu's innovations, but they were not merely followers: their way of following required them to innovate on their own. The chief adapter was James Madison: in preparing a plan for the upcoming constitutional convention, Madison had put together a comprehensive analysis of what needed to be done in America together with concrete proposals for reform; he had circulated his general ideas among some of the more influential political leaders of Virginia—George Washington, Thomas Jefferson, Gov. Edmond Randolph—as a way of building advance support for his schemes. He even prevailed upon the Virginia delegation to make most (though not quite all) of his scheme theirs, which they did when Gov. Randolph presented it to the convention on behalf of his state's delegation at the opening of proceedings.

¶ 52 Madison proposed, but the convention disposed. One can discern the main outlines of Madison's thinking in the final constitution, but many important changes were made by the convention as a whole, changes inspired in part by the play of conflicting interests, in part by doubts about some of Madison's theories and proposals, in part by cold feet. It is not well known that as the constitutional convention was breaking up, James Madison, the man known to posterity as the "father of the constitution" wrote to his best friend, Thomas Jefferson, then in Paris as American Ambassador to Louis XVI, that the constitutional convention had performed remarkably in producing a new constitution, far more of a departure from the status quo Articles of Confederation than he had thought likely. Nonetheless the convention on the whole had failed: the constitution they were about to set before the country was so flawed that it could never solve the problems it was meant to solve and surely would not last for the ages—as Madison hoped a proper structure would. He was not sure it would last a decade. The father of the constitution was not, then, so fond of his child as most fathers usually are.⁶⁰

¶ 53 This child, Madison thought, was missing a number of vital organs. Madison was speaking out of his disappointment at the failure of the convention to accept a number of features he had originally proposed and which he believed particularly important. I do not refer to the disappointment most textbooks emphasize over the formula of representation in the two houses of Congress. Although he definitely disliked this, it was not the feature of the new Constitution that led Madison to despair of its future.

⁵⁸ James Madison, *Preface to Debates in the Convention*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 39 (Max Farrand ed., 1966).

⁵⁹ HAMILTON, *supra* note 37, at 37-38.

⁶⁰ *James Madison to Thomas Jefferson, 6 September 1787*, in 12 THE PAPERS OF THOMAS JEFFERSON 102 (Julian P. Boyd 1950-1973).

¶ 54 To anticipate the general line of my argument: Madison had worked out a daring synthesis of certain themes in Montesquieu which had been quite separate in the Frenchman's thought, which synthesis in turn required, according to Madison, three absolutely essential institutions—a council of revision, a Congressional negative on state law in behalf of federalism, and a congressional negative on state laws on behalf of individual rights. The convention rejected all three and since Madison believed they were essential, he concluded the constitution would not survive. Nonetheless, the convention did not leave matters at merely turning down Madison's three proposals. With little forethought or over-all planning the delegates turned the jobs that Madison's three institutions were to do over to the judiciary. They thus produced one of their most notable and at that time unique and novel institutions—a judiciary powerful beyond any seen before because armed with the power of judicial review, and strategically placed in the system to fulfill the three essential and essentially non-legal functions Madison had identified. In the convention's adaptations of Madison's adaptations of Montesquieu the Supreme Court acquired its very large britches, and it's very un-Montesquieuan role in American constitutionalism.

¶ 55 The place to begin is with Madison's original scheme. It was, as I have suggested, an adaptation of Montesquieuan political science. In taking Montesquieu seriously Madison was not in the least singular. *The Spirit of the Laws*, published about forty years before the constitutional convention met, was the beginning point for all serious thinking about political construction in late eighteenth century America. The prominence of Montesquieu at the time has been well documented. In his citation analysis of eighteenth century political writings in America, Donald Lutz discovered that Montesquieu was the single most widely cited political thinker of the entire founding era. The French writer became particularly authoritative during the ratification debates, for, it turned out, both sides, Federalists and Anti-federalists alike, appealed to him as their leading authority on what was right and what was wrong about the constitution.⁶¹

¶ 56 Three of Montesquieu's central ideas had a particularly great impact on the Americans: First, was his theory of republicanism, the model for which was ancient Sparta. Second, was his notion of a federal union of republics as a requirement of republics; and third, was his theory of the "free constitution," the model for which, as we have seen, was modern Britain.

¶ 57 For Montesquieu the republic and the free constitution were by no means identical. The republic is not inherently free, and the free constitution is at best only partly republican. The free constitution necessarily mixes its republican with hereditary monarchic and aristocratic elements. And, of course, he added the idea that the mix of monarchic, aristocratic and democratic elements must be superimposed on his all-important distinction among legislative, executive and judicial powers.

¶ 58 Republics, especially the sort Montesquieu called democratic republics, located political power in the hands of the great body of the people and had minimal and mostly ineffective separation of powers. They were not and could not be "free societies": In addition to lacking separation of powers they required rigorous training and control of citizens in order to produce republican "virtue," and thorough control of the economy in order to maintain equality of wealth, simplicity of manners, and frugality—all requirements of republics. According to

⁶¹ DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 136-149 (1988).

Montesquieu, then, the republic and the free constitution were really quite different from each other.

¶ 59 The Americans, Madison included, both for reasons of ideological persuasion and lack of social raw materials, opted after the revolution for a form Montesquieu had implied was impossible—a synthesis of the republican and free models. As Madison put it in *The Federalist Papers* they sought a system "wholly republican," that is, a system that derived all political power directly or indirectly from the great body of the people and had no hereditary or grossly oligarchic authority in it, a system that would be at the same time a "free constitution" in Montesquieu's sense.⁶² One of the major stories of constitution making, indeed one of the major elements of Madison's political science was his attempt to supply on a wholly republican basis the requisites of the free constitution that Montesquieu had argued could never be supplied in that way.

¶ 60 Madison, like most Americans in the 1780's, wanted to construct an order that was at once *free*, *republican*, and *federal*. Madison was the greatest political scientist of his time because he saw that Montesquieu might be a good point of departure, but that his solutions were inadequate, especially in light of the American commitment to all three together. For a constitution to be free meant, at a minimum, that it had to have a genuine separation of powers. For a constitution to be republican meant (according to Madison and the other Americans) that it have no branches not derived from the people. The two interacted in a way that exacerbated a difficulty inherent in separation of powers schemes. Such schemes have two natural problems requiring some sort of resolution: on the one hand, any system of divided power implies the possibility of conflicts over who possesses what powers. Some mode of settling such conflicts is necessary. Secondly, there is an inevitable danger that the separation will be undone in one way or another. For example, in the actual operating English constitution of the eighteenth century the executive possessed the ability to make "side-payments" that allowed it to dominate parliament. The eighteenth century British opposition thinker, John Trenchard, writing as Cato, diagnosed the problem as follows:

What with the crowd of offices in the gift of the crown . . . ; what with the promises and expectations given to those who by court influence, and often by court money, carried their elections; what with luxurious dinners, and rivers of burgundy, champaign, and tokay, thrown down the throats of gluttons; and what with pensions and other personal gratifications; I say, by all these corrupt arts, the representatives of the English people . . . have been brought to betray the people, and to join with their oppressors. So much are men governed by artful applications to their private passions and interest.⁶³

When this happens, the liberty-serving virtues of separated powers are lost. The American states in the past decade had revealed even more direct instances of violation of the separation of powers when, for example, legislatures intervened in pending court cases, or even passed laws overturning the decisions made by courts of last resort, as happened with some frequency. Encroachments on the executive power were also common, although most state executives were

⁶² HAMILTON, *supra* note 37, at 194.

⁶³ JOHN TRENCHARD & GEORGE GORDON, CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 422 (Ronald Hamowy ed., 1995).

so weak it was not always easy to tell an encroachment from business as usual. So, in sum, separation of powers schemes pose problems of both conflict of powers and encroachment, both requiring something like a policeman to deal with.

¶ 61 The attempt to build a free constitution that is "wholly republican" exacerbates the problem and at the same time removes the solution Montesquieu had hit upon. Although the three separated powers possess a formal equality, that is not in fact the case in practice: the legislative power has a certain natural supremacy. It makes the laws on the basis of which the other branches operate, and, according to Montesquieuan theory, one branch of the legislature is necessarily popular, drawn from the great body of the people. The people collectively being the most numerous, wealthy, and ultimately most powerful element in the society, their branch, the legislature, has a natural weight in a separated powers system that reinforces the primacy of the legislative over the other functions. This actual primacy of the legislature is much increased in a wholly republican system because here only the people have a call on political power. In the "wholly republican" version, Madison speculated, what he called "the legislative vortex" is especially prone and capable of drawing to itself the other powers. In part because of the natural advantages of the legislature Montesquieu had posited the British mixed model (rather than a republic) as the only workable version of the free constitution. A hereditary monarchy and a hereditary House of Lords, containing old families and great wealth, could have the political weight to retain their independence.

¶ 62 The wholly republican version of the free constitution took that option off the table—there would be no non-popular branches to contain and constrain the popular branch, and thus to maintain the separation. Madison's proposed solution, as contained in the Virginia Plan, was a Council of Revision—a body sitting atop the pyramid of governmental powers, armed with a qualified veto on the acts of the legislature. The Council was to consist of the executive head (the President) and "some number of the judges."⁶⁴ Madison thought that the executive and the judges together would possess the weight, the competence and the incentives to operate as preservers and umpires of the separation of powers scheme. He feared that unless the two were joined together as he proposed, the function would be ill-done, if done at all. Although tempted to it, the convention ultimately rejected Madison's Council of Revision. So fell the first of Madison's essential institutions.

¶ 63 As is well known Madison's scheme was also a federal scheme. This too was a direct development from Montesquieuan theory. The French thinker had argued that republics, necessarily small and therefore weak relative to non-republican neighbors, were required to federate in order to survive.⁶⁵ The struggle with Britain drove home to the Americans the value of union. Federal systems, which divide powers on a vertical axis, parallel to the horizontal division of separation of powers, raise many of the same issues of conflict and encroachment as the latter do. Madison, going beyond Montesquieu, and building in part on the American experience in the decade since 1776, concluded that one set of parties was advantaged in these conflicts as much as in those arising in the separation of powers—the member states had an inevitable tendency to fly out of the orbit of the general government of the union, as Madison put it in Newtonian planetary

⁶⁴ *Resolution 8 of the Virginia Plan*, in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 21 (Max Farrand ed., 1966).

⁶⁵ MONTESQUIEU, *supra* note 2, at IX₁₋₃, 131-33.

terms. The states normally had both the capability and the incentive to encroach on each other and on the central authorities. The federal system, Madison concluded, needed "an enforcer," too.

¶ 64 Just as with the problem posed by the attempt to construct a free constitution, so with the problem posed by federalism, the decision to have "wholly republican" political systems exacerbated the difficulties. The people were naturally and, Madison feared, perhaps inevitably attached to their states far more than to the union—think of the relative attachments of Americans today to the U.S. as opposed to NATO or the U.N. (Madison, by the way, understood that under some conditions this might change, but the system would always need an umpire and the conditions that might produce a change could come to pass only if the union could survive its early years). Popular attachment to the states would encourage and support the individual states in their natural tendency to self-aggrandizement at the expense of federation partners and the federation authorities.

¶ 65 The most important solution Madison proposed to the centrifugal tendencies of federal systems was a very radical institution: In his original plan he proposed that Congress be armed with an unqualified power to veto all laws of the states, which in Congress' opinion overstepped the bounds of state constitutional power by trenching on the powers of other states or the union itself.⁶⁶ That is, every state would send on to Congress all of its laws for Congress to approve or disapprove, much as Congress sends its laws to the President for his signature. Congress, under this part of Madison's plan, would have the power to veto state laws that encroached on other states in some way, or which trenched on Congress' own powers or sphere of operation. Although Congress was composed of representatives of the people in the states just as much as each state legislature was, Madison counted on the likelihood that the attachments members of Congress would form to their offices in the federation government would supply them with sufficient incentive to resist state encroachments. Moreover, Madison understood well the nature of the collective choice issues involved. Each state acting individually has an incentive to resist the central authorities or to encroach on others, but the group of states as a whole (and thus their representatives gathered in Congress) had an incentive to keep the union together and effective. That Madison's proposal for a negative on the states has been forgotten is proof positive that he was not able to prevail on his fellow delegates to include it in their proposed constitution. Thus fell the second of Madison's essential institutions.

¶ 66 Finally, Madison concluded in an argument that has certainly not been forgotten (although I think often misunderstood) that republican systems have a natural tendency to violate rights that their republican form does not cure, but indeed exacerbates. As Madison argued in Federalist 10 republics have a tendency to faction, that is, to breaking down into groups and interests hostile to the rights of others or the common needs of the community. Montesquieu recognized the problem and for that reason had recommended small, homogeneous, rigorously regulated polities like Sparta as the republican solution to the problem of faction. Many Americans at the time of the founding were profoundly ambivalent toward Montesquieu's solution. Many of the existing states were already far larger and more diverse than Sparta, and even the strongest partisans of republican virtue held back from endorsing the kind of restrictive state this sort of republic had to be.

⁶⁶ *Resolution 6 of the Virginia Plan*, in THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 64, at 21.

¶ 67 Madison thought the issue through more ruthlessly than his contemporaries, many of whom were willing to settle for half-way measures tempered with hope for the best. Madison pushed the analysis further by showing that republican systems, especially smaller ones, are particularly prone to succumb to the evil of majority faction, for the principle of operation of republics, majority rule, acts to empower factious majorities. Madison famously argued that the large, socially, economically and religiously heterogeneous republic could avoid this problem and, almost by magic, produce only good or at least much better majorities (non-factious majorities), than could smaller, more homogeneous republics. Madison applied this thought to his America as follows: the smaller states are more likely to be dominated by factious majorities than the larger union. Congressional majorities are more likely to be just, that is, not to violate rights of others, and to be compatible with the long term common good.

¶ 68 Some scholars have concluded that this analysis must have made Madison a full-scale nationalist, that is, a supporter of transfer of complete sovereignty to the government of the union from the states, or of as much authority as he could get away with transferring. This view profoundly misses Madison's real scheme. Rather than seeking to transfer authority in this way Madison rather sought a policeman, just as he also sought institutions to police the federal system and the separation of powers system. This "umpire" was to intervene and adjudicate, in effect, in disputes between governing majorities in the states and the minorities they might otherwise oppress. Madison did not seek to transfer the bulk of governing authority from the states to Congress, but rather to arm Congress to act the umpire by correcting the states. Here was Madison's most audacious scheme—he wanted Congress, the institution most likely to have non-factious majorities, to possess a veto over all laws in the states, not just those that encroached on the federal system. The aim would be to protect rights by correcting unjust, improvident, overly changeable legislation in the states. This veto also could not be overturned.⁶⁷

¶ 69 Here was another highly creative adaptation of a Montesquieuan idea. In the latter's model of a free constitution, the non-republican elements—monarch and aristocratic upper house—would possess negative powers to thwart potentially oppressive acts of the more popular lower house. Madison saw Congress playing a role in the *de facto* constitution of each state analogous to the role of the monarch in the free mixed regime. This plan seems unwieldy, to say the least, but it was not totally unprecedented, for the Privy Council in England had, before the Revolution, possessed exactly this power *vis-à-vis* the legislation of all the colonies. Nonetheless, Madison's proposed universal negative on state legislation was dropped by the constitutional convention.

¶ 70 Madison saw three great needs in the complex type of political order he and his fellow delegates were putting in place; he proposed three institutions to supply those needs; he saw his fellows reject all three. Perhaps surprisingly, the Supreme Court inherited the task of meeting all three needs, sharing the job of umpire of the separation of powers system with the President via the executive veto. These powers resulted to the court almost, but not quite, by default; it was generally understood at the convention that the court would take on these functions, and the delegates even explicitly added features to their proposed constitution that expedited the judiciary's capacity to fill these three roles. In place of Madison's proposal to use Congress to police the federal system, the convention adopted the supremacy clause, a declaration that the

⁶⁷ See *Madison to Jefferson, 24 October 1787*, in THE PAPERS OF JEFFERSON, *supra* note 60, at 276-279.

Constitution, laws, and treaties of the U.S. are supreme over state constitutions and laws. This provision was too much of a “parchment barrier” for Madison's taste, but the clause explicitly bound state judges to uphold this provision and since state decisions would be appealed to the Supreme Court, the ultimate enforcement of this clause, and thus the ultimate umpiring of the federal system would fall to the U.S. Supreme Court.

¶ 71 Correcting the republican systems in the states also fell to the Supreme Court when the convention substituted for Madison's proposed congressional veto on state laws the provisions of Article I, section 10, prohibiting the states from engaging in a specified set of actions (e.g., impairing the obligations of contract) that had been of particular concern to Madison and others when they thought of rights violations in the states. The enforcement of Article I, section 10 also fell to the judiciary. Madison considered this at best a pale version of what his congressional veto would accomplish: it identified only a few of the abuses of concern and provided a method of enforcement in which he had little faith.

¶ 72 Nonetheless, without anybody quite planning it, the Supreme Court became the recipient of an impressive array of powers, and these were located at strategic choke points in the overall constitutional scheme. The extent and significance of these powers became much greater when the framers of the Bill of Rights gave courts rights-protecting provisions to enforce, and then even more when the framers of the Fourteenth Amendment, building on the general scheme in the original constitution, added substantially to the Court's powers to police the state republics by including provisions securing privileges and immunities, due process and equal protection of the laws within the states. But the original constitution had already sewn up quite large britches for the Supreme Court, independent of this substantial letting out of the seams after the Civil War.

¶ 73 I am not going to attempt to settle the further question, much debated over the course of American history, whether the Supreme Court is nonetheless too big for its large britches. But I will say something about why that perception so frequently recurs. That requires comparing Madison's original proposed three political institutions and practices with the Supreme Court as successor legal institution. Madison's three institutions functioned in a solely negative manner—the council of revision and the two forms of Congressional umpiring power were solely powers to say no to actions taken elsewhere on matters entrusted to others. Secondly, the three institutions were all political in the sense that they were all elective offices, ultimately responsible to the people. Thirdly, all three were political also in the sense that they were not asked to apply legal provisions, but to exercise a kind of judgment typical of political rather than legal decision, and operating in the fluid and less structured context of politics rather than a suit at law. Thus the judiciary came to take a place in this version of modern constitutionalism far different from the place it had in Montesquieu's version. The American version proved to have a more substantial future than Montesquieu's own, in part because it opted for the “wholly republican” form of the free constitution, which even devoted and brilliant Montesquieus like Madison and Tocqueville saw to be the only legitimate or acceptable form in the new era of natural rights and egalitarian politics.

¶ 74 The Supreme Court differs, more or less, on all three grounds. Although it operates primarily in a nay-saying role when it exercises these functions, it does not do so exclusively. When, for example, it fashions remedies, the line between negative and positive powers can become exceedingly blurry, as we have seen in the past several decades with courts running schools and prisons, redrawing electoral districts, and even raising taxes. The Court, furthermore, is not political in the sense that Congress and the Presidency are; indeed it is intentionally

constituted to be the most distant and politically insulated institution of governance in the whole system. Finally, the Supreme Court plays its part only in the course of hearing legal cases and controversies and is bound, at least in theory, to making decisions on the bases of legal rules, not broad political considerations.

¶ 75 Having followed Madison thus far, let us follow him a little further in assessing the odd results of the Supreme Court's coming to sit in the seats of power he had prepared for his quite different policing institutions. Shortly after the convention concluded Madison was asked his opinion of a draft constitution for the new state of Kentucky. He indicated in his reply how little he found congenial the work of the Philadelphia convention: he insisted that the Kentuckians add a Council of Revision to their constitutional planning; again he wished for the executive and judiciary to have a qualified negative on legislative acts. The legislature, by a two-third or three-fourth majority should be able to override the Council's revision. If repassed, he thought "it should not be allowed the judges or the executive to pronounce a law thus enacted unconstitutional and invalid." He was very explicit that this would be superior to the arrangement in the new U.S. constitution. For one, the Council was to act as a check on "precipitate, unjust and unconstitutional legislation," i.e., a much larger, more political range than the power of judicial review officially encompasses. Madison nonetheless conceded that even though not explicitly provided for, the power of constitutional review did inhere in both federal and state courts: "as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character." This acknowledged power did not please him, however: "This makes the judiciary department paramount in fact to the legislature, which . . . can never be proper."⁶⁸

¶ 76 As Madison saw it the impropriety is threefold. First, the court has final authority over the powers of its coequal branches, and thus is, in this sense, not equal but "paramount." Secondly, the courts are the least republican, the least responsible parts of the government; to rely on them is to rely on a force of the type he emphatically rejected in Federalist 51: a "will independent of society." He thought reliance on such a will to be highly illegitimate in a republic, despite the appeal many friends of judicial activism make to Madison's doubts about pure majoritarianism. Madison wanted to correct the evils of majoritarian politics, but only so far as that could be done within a commitment to majoritarianism. Madison thus would not join the judicial activists of today who claim to march in his army and under his banner.

¶ 77 Finally, Madison persists in his view that judicial review not only goes too far, but it also does not go far enough: if the courts stick to their own constitutional power, the power that in turn gives them access to the power of constitutional review, they consider only legal, i.e. narrowly constitutional, issues raised in genuine legal cases. They do not address the over-haste or injustice or foolishness of a law, as Madison's Council of Revision, and his negatives on state laws would.

¶ 78 Madison's misgivings correspond closely to the places where the new American model of modern constitutionalism deviates in its treatment of the judicial power from Montesquieu's model. The Montesquieuan judiciary was not to be part of the scheme of checks and balances, much less supreme over the other branches. The Montesquieuan judiciary was to

⁶⁸ James Madison, *Remarks on Mr. Jefferson's Draught of a Constitution*, in V THE WRITINGS OF JAMES MADISON, 284-294 (1900-1910).

be popular, temporary, and almost invisible. It was most definitely not to place large powers in the hands of separate, irresponsible officials. Finally, Montesquieu saw the judiciary doing its task by scrupulously applying the law. He saw the corrective function to be properly exercised by the non-judicial executive and upper house, operating according to broad-ranging considerations of interest, justice, rationality, and effectiveness.

¶ 79 The first two of Madison's concerns are, of course, familiar material of the debate that almost always swirls around the Supreme Court. When the convention injected the judiciary into the slots devised for more political branches they insured, without realizing it, that the Court would become and remain at the center of just such controversy. More important and more interesting, however, is the way Madison's analysis helps lay bare the deeper anomaly the Supreme Court embodies: it is a legal body, with a certain legal claim (the power of "the last say," as Madison put it) to the power of constitutional review. But the Court's position in the system is more deeply defined by the fact that it is the body entrusted with the three keystone *political* functions within the complex institutional array of the American constitution. There is a built-in disproportion between the political tasks and the legal tools with which these are supposed to be accomplished. The Court faces the choice of sticking to the narrow legal basis, for example, following the rule of the "clear mistake" or applying a strictly originalist approach to cases, or attempting to fulfill the broader, political, trans-legal system needs thrown into its lap. Responding to that dilemma, the Court is constantly driven beyond the bounds of strict legality in order to do its political work, and thus opens itself at frequent intervals to the charge that it has (once again) gotten too big for its admittedly capacious britches.