

# The Mixed Constitution and the Separation of Powers

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The question of whether the American application of the Eighteenth Century doctrine of the separation of powers carried with it any substantial change or development is seldom raised. It is perhaps worthwhile to examine the French and British doctrines, and to determine from this whether the American use of the principle involved any contribution. To state conclusions first, an effort is made here to show that the American Founding Fathers did construct, upon the basis of older materials, at least a new application of the axiom of the separation of powers, if they did not in fact evolve a new doctrine adapted to new circumstances.

The approach to this question which is adopted here is doctrinal rather than historical. There is some differentiation in power and function between the organs of any government. It is probable that without a strong dogmatic foundation the concept of the separation of powers would never have taken on the significance which it did in early American constitutional history. Recent historical discussions of this problem which tend to show the institutional contribution to this interpretation of government and liberty do not in reality solve the issue of doctrinal foundations. If the separation of powers implies a "dynamic equilibrium," the mixed constitution suggests the principle of "static equilibrium" as the guarantor of political stability.<sup>1</sup>

A convenient start for this analysis may be found in the writings of Paul Janet.<sup>2</sup> Taking the principles of Montesquieu as set forth in Book XI of *L'Esprit des lois*, Janet observes that one can discover a free constitution only when there can be no abuse of

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<sup>1</sup>W. S. Carpenter, "The Separation of Powers in the Eighteenth Century," *The American Political Science Review*, XXII (1928), 32. Professor B. F. Wright, Jr., "The Origins of the Separation of Powers in America," *Economica*, No. 40, May, 1933, p. 170, mentions the difference in doctrine between Montesquieu (and *a fortiori* the British constitution) and the Founding Fathers, but instead of accepting an evolution in doctrine he suggests that much of the principle of the separation of powers came from earlier American institutional developments.

<sup>2</sup>Paul Janet, *Histoire de la Science politique dans ses rapports avec la morale* (5th edition), 2 vols. Paris.

power, and in order to prevent abuse power must check power. Thus there should be, on the model of the British constitution, an equilibrium and balance of powers in the state. Montesquieu was the first to see in the separation of powers the primary guarantee of liberty, and in their distribution the true measure of liberty.<sup>3</sup> While there must be a separation of legislative and executive powers, the greatest danger to liberty arises if the judiciary is attached to another power. But between the executive or king and the legislative power or the representatives of the people there is an intermediate power which unites and moderates the two. This is the body of persons who have special privileges in the state, that is, the nobility. The nobility must have a distinct and separate house in the legislature that it may defend its own interest and moderate the constitution.<sup>4</sup>

Janet thus discovers in Montesquieu's conception three sorts of governments and three sorts of powers in the governments. The government may be republican, aristocratic, or monarchic, accordingly as the people, the nobles, or the king govern. But while there may be any one of these forms, there may be a combination of them, that is, the government may be mixed. This is clearly the ancient theory of Aristotle, Polybius, and Cicero. Janet believes that the separation of powers is the fundamental aspect of Montesquieu's theory. Yet one may question this, for a careful reading of Montesquieu might indicate that the two ideas are inextricably interwoven, or, in other words, the separation of powers is but a factor in the construction he made of the idea of mixed government.<sup>5</sup>

In support of his contention, Janet states that in fact the theory of the separation of powers and the concept of mixed government must be regarded as independent principles. The United

<sup>3</sup>*Ibid.*, II, 367.

<sup>4</sup>In Book XI, Ch. VI, Montesquieu observes: "Il y a toujours dans un état des gens distingués par la naissance, les richesses ou les honneurs; mais s'ils étoient confondus parmi le peuple, et s'ils n'y avoient qu'une voix comme les autres, la liberté commune seroit leur esclavage et ils n'auraient aucune intérêt à la défendre, parce que la plupart des résolutions seroient contre eux. La part qu'ils ont à la législation doit donc être proportionné autres avantages qu'ils ont dans l'état: se qui arrivera s'ils forment un corps qui ait droit d'arrêter les entreprises du peuple, comme la peuple a droit d'arrêter les leurs."

<sup>5</sup>Janet, *op. cit.*, II, 370.

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<sup>6</sup>*Ibid.*, II,

<sup>7</sup>Janet, *op. cit.*

States, for instance, has a simple government—republican democracy—and the separation of powers, while Rome had a mixed government but no separation of powers. Montesquieu recognized that the absolute power of the people was not a sufficient guarantee of liberty, and as a check on their absolute power the representatives of the people must not have vested directly in them the executive power of government. For himself, Janet contends that the separation of powers will prevent some abuses, *e.g.*, despotism, but not all of them. With Kant, he sees the final security against abuse in opinion and in the freedom of the press.<sup>6</sup>

Arising from these conceptions, Janet finds two sets of three powers. On the one hand, there is the king, the nobles, and the people; on the other, there is the executive, the legislative, and the judicial. But what has not been generally recognized in the discussions of Montesquieu is that he finds absolutely essential to liberty the existence of a nobility. In fact, it may be said that the whole balance of the constitution depends on the existence of a legislative house of nobles. The essence of the nobility is a system of hereditary privileges, which the peerage is able to defend by having a power of rejection or veto over the representatives of the people. It seems apparent in Montesquieu that although liberty depends on the separation of powers in a political sense, there can be no genuine separation without a mixed form of government. The mixed form of government clearly must be constructed upon the existence of monarchy and a nobility, both of which play a decisive rôle in the state. Their respective rôles are to be played by vesting the executive power in the monarchy and the rights of a strong upper legislative chamber in the nobility, and by giving both the monarch and the nobles a veto against the popular representation. It is obvious that this interpretation of Montesquieu fits the British constitution after a fashion, but hardly the American.

Briefly, the net result of Montesquieu's speculation was to revive the idea of the mixed form of government, and to rejuvenate it by associating it with the idea of the separation of powers.<sup>7</sup> If the American application of the doctrine is nothing but imitation, one must conclude that our presidency is the monarchic element in the federal constitution, and that the senate represents the aristocratic element, or is a copy of the function of the hereditary

<sup>6</sup>*Ibid.*, II, 373.

<sup>7</sup>Janet, *op. cit.*, II, 377.

nobility. Likewise, the Roman consulate might be likened to the monarchy necessary for the mixed constitution. Yet such analogies are indeed remote. The essential element of monarchy, as Montesquieu recognized, was hereditary succession, and the essential element of a nobility which is able to create a balance in the constitution is a body of distinct privileges. As far as the United States is concerned, the presidency lacks the essential features of monarchy, and the senate lacks the essential idea of an aristocracy. If Montesquieu was correct, the disappearance of aristocracy makes liberty virtually impossible since there can be no balance to the constitution without it, and with the sunset of monarchy the vital hereditary executive must pass. It was only upon the assumption that the British constitution might be created in other situations by artificial means that Montesquieu's conception of liberty could survive.<sup>8</sup>

Under these circumstances, it is easy to perceive why the British of the later eighteenth century were pleased with Montesquieu, and why a veritable cult of the British constitution grew up in England as well as on the continent. The "School of Montesquieu" may be called those who follow *L'Esprit des lois* in their admiration for the English system of government. Blackstone, Paley and de Lolme are the leading figures in this short-lived school of eighteenth-century constitutionalism. Blackstone had no political theory, yet as a follower of Montesquieu he gave England the first

<sup>8</sup>A problem of some difficulty for the construction presented in this paper is the relation of Locke to Montesquieu and the American government. It is probable that Locke influenced our ideas of right and the place of the fundamental law, while Montesquieu suggested some of the principles of the distribution of public power. Locke's emphasis on the principle of popular sovereignty and the right of revolution would, in any case, set him off from the conservative ideas of the mixed constitution. Natural rights preserve the liberty of the individual, while the mixed form of government preserves primarily the liberty of orders. Cf. A. R. Lord, *The Principles of Politics*, (Oxford, 1926), pp. 112ff. A. Esmein, *Éléments de Droit constitutionnel français et comparé*, eighth edition (Paris, 1927), Vol. I, p. 496, notes that Montesquieu was influenced by Locke, but that Locke was merely reflecting the British constitution in his discussion of the separation of powers. Esmein discusses the history of the idea of the separation of powers without taking into account the principle of the mixed constitution. *Ibid.*, I, 493-96. Wright, *op. cit.*, p. 169, observes that such thinkers as Harrington, Locke and Blackstone expounded the theory of the separation of powers before Montesquieu. It might be suggested that, for the most part, Montesquieu and his predecessors thought essentially of social rather than political balance in the constitution.

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<sup>11</sup>*Ibid.*,  
<sup>12</sup>*Ibid.*,

systematic analysis of the constitution. There is, however, an essential difference between Blackstone and Montesquieu, for Blackstone declares that the executive or the king must be a part but not the totality of the legislature. It was Montesquieu's opinion that to make the executive even a part of the legislature would mean the end of liberty.<sup>9</sup> They are agreed, however, in ascribing to the executive the function of rejecting or vetoing rather than making determinations of policy. But with Blackstone, the balance of the constitution is found primarily *within* the legislature, since king, lords, and commons were all part of it. As with Montesquieu, the fundamental notion of mutual defense of each part against the others is recognized as the means whereby the balance of the constitution is to be preserved. And as Montesquieu believed, Blackstone considers that titles and ranks are absolutely essential in a well-governed state.

In discussing the British settlement of the seventeenth century, Blackstone is convinced that a true balance between liberty and prerogative has been reached. This was obtained by destroying to a certain extent the prerogative, leaving the people able to defend themselves against its encroachment.<sup>10</sup> Mixed government is not visionary in England; it has been attained. For the executive power of the laws is in a single person, which preserves all the advantages of absolute monarchy; the legislature is entrusted to three distinct powers, each independent of the other: the king, the lords, and the commons, "freely chosen by the people from among themselves." Each branch is armed with a negative power to repel any innovation. But it is most certain that the balance of the constitution comes not from the separation of powers but from the constitutional position of the orders in the state. The separation of powers is but a device whereby the orders may defend themselves.<sup>11</sup> "It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative," and either total union or total separation would produce tyranny.<sup>12</sup> The balance of the constitution has preserved the rights of Englishmen

<sup>9</sup>Montesquieu declared that the executive power ought to have a share in the legislative power by the power of rejecting, but if the prince should have part in the legislature by the power of resolving liberty would be lost.

<sup>10</sup>Sir William Blackstone, *Commentaries on the Laws of England*, Bk. IV, p. 439.

<sup>11</sup>*Ibid.*, Introduction, pp. 50-51.

<sup>12</sup>*Ibid.*, Bk. II, p. 154.



against the encroachments of the prince, as has not been the case on the continent.<sup>13</sup>

Blackstone is particularly happy that republican principles were rejected in the settlement of 1689, and also that no countenance was given the idea of Locke that the overthrow of the constitution might reduce the people "almost to a state of nature."<sup>14</sup> He felicitates the British especially on saving titles and dignities, which prevented a new polity from being formed. The right of the people to elect, depose, or punish magistrates is an extremity which is contrary to the balance of the constitution and which must be avoided.<sup>15</sup>

De Lolme in his book, *The Constitution of England*, which was first published in French in 1770, makes no contribution to the theory of the mixed constitution. He offers an elaborate and sometimes erroneous analysis of the British constitution, but the principle of the balance and equilibrium of orders in the state is hopelessly interwoven with the more modern principle of the preservation of rights by the separation of powers. With Blackstone, he recognizes the king as a part of parliament,<sup>16</sup> and he insists on the independence of the judiciary in its judgments but not on its independence in terms of governmental structure. As an organization, the judiciary must be subordinate and dependent.<sup>17</sup> The balance of the constitution prevents those popular excesses which have marred the earlier republican governments, and this balance consists in an equilibrium between the power of the people and the power of the crown.<sup>18</sup> The legislature likewise must be divided to check the preponderance of the people.<sup>19</sup> The people or the multitude is unable to come to any intelligent or mature resolution, and on this ground a limited and controlled participation is justified.<sup>20</sup>

De Lolme's attack on republican government, which was drawn very largely from Greek and Roman sources, shows that both the

<sup>13</sup>*Ibid.*, Bk. I, p. 127.

<sup>14</sup>Blackstone, *op. cit.*, Bk. I, p. 213.

<sup>15</sup>He refers to the original contract between the prince and subjects which subsists "in all states impliedly, and in our most expressly . . ." Bk. I, p. 233.

<sup>16</sup>J. L. de Lolme, *The Constitution of England*, edited by John MacGregor (London, 1853), p. 56.

<sup>17</sup>*Ibid.*, pp. 120-21.

<sup>18</sup>*Ibid.*, pp. 147-48.

<sup>19</sup>*Ibid.*, pp. 159ff.

<sup>20</sup>*Ibid.*, pp. 172-74.

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mixed constitution and the separation of powers have in mind preventing tyranny and the concentration of power. Yet de Lolme can find security and liberty only in a constitution such as the English in which republicanism is subordinated to the class principle of mixed government, to the concentrated executive power vested in the monarch, and to the division of the legislative power between two houses.<sup>21</sup> The people must elect their representatives rather than having a wild or direct authority in government. The English government is unique in history in that the representatives of the people, because of the constitution, have remained faithful to popular interests; this happy result has been obtained solely by the structure of the government.<sup>22</sup>

Yet it must be recognized that de Lolme saw the final result of the English constitution in the liberty of the subject. This liberty was liberty under law, and the security of the rights of the individual. It was the peculiar genius of the School of Montesquieu to see this liberty as the consequence of the mixed constitution, in which all the parts were equally necessary, but in de Lolme perhaps the strong monarchy, deeply engrained in the hearts of the people, is the most necessary of all.<sup>23</sup> In fact, de Lolme's work may be regarded primarily as a defense of the English monarchy. It is this fact above all else which shows the contrast between these ideas and those which dominated the American leaders of the period of the constitution.<sup>24</sup> It was to be discovered later that these same liberties might flourish to an even greater degree in republican states under the principle of the separation of powers, and from which the elements of the mixed constitution had been eliminated.

Paley must be mentioned in order to foreshadow the transition which was to take place in this body of doctrine. Paley saw in the British constitution a mixed form of government, and he insisted on the balance of the constitution, but he distinguished be-

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<sup>21</sup>de Lolme, *op. cit.*, Bk. II, Ch. X.

<sup>22</sup>*Ibid.*, p. 238.

<sup>23</sup>de Lolme, *op. cit.*, Bk. II, Ch. XVII.

<sup>24</sup>*Ibid.*, p. 320: "From the indivisibility of the governing authority (*i.e.* the executive) in England, a community of interest takes place among all orders of men: and hence arises, as a necessary consequence, the liberty enjoyed by all ranks of subjects. This observation has been insisted on at length in the course of the present work." De Lolme assumes that a strong, united executive can be formed only by having a monarchical form of government.



tween the balance of powers and the balance of interests.<sup>25</sup> The veto of the crown is important in preserving the balance of powers, but the process by which the king, the lords, and the commons, *i.e.*, the three estates, check each other constitutes the balance of interests.<sup>26</sup> It is clear that the separation of powers is coming more to the front as an independent idea, and that the balance of interests is becoming a question of social policy. The theory of checks is applied in fact both to the separation of powers and the orders in the state. In the older theory it should be observed that the separation of powers is primarily a device whereby the orders may check each other. The principle involved was the maintenance of the mixed form of government, and the mixed form was to be maintained by mutual checks, aided by the separation of powers. On the contrary, in Paley the principle of checks is becoming a device for the maintenance of the separation of powers.<sup>27</sup>

<sup>25</sup>William Paley, *The Principles of Moral and Political Philosophy, Works*, Vol. III (Boston, 1811), pp. 379-80. This work was first published in 1785.

<sup>26</sup>The conflict of interest is thus recognized as one of the central forces of politics. But just as in Montesquieu, the conflict is between those who have privileges and those who have not. Paley remarks (*ibid.*, p. 388) that one of the great services of the House of Lords is "to stem the progress of popular fury."

<sup>27</sup>*Ibid.*, Bk. VI, Ch. VII. But see especially *ibid.*, pp. 385ff. Paley has a clear idea of the separation of powers, since he declares: "The first maxim of a free state is, that the law be made by one set of men, and administered by another: in other words, that the legislative and judicial characters be kept separate." Cf. Janet, *op. cit.*, II, 402-403.

Soon after Montesquieu there was a decline in the general admiration of the British constitution. Janet assigns three main causes. In the first place, the administration of Walpole spread the idea that the British constitution was tending to return to absolute monarchy. In the second place, the loss of the North American colonies suggested that England was declining. And, in the third place, the new concept of republican liberty which originated in the United States re-oriented continental thinking in its opposition to despotism. The writings of Thomas Paine and *The Federalist* (which was translated into French in 1792) had a great deal to do with the operation of the last cause. Janet, *op. cit.*, II, 403, 703. The chief impact of the new republican doctrines was to eliminate from the concept of liberty the necessity of monarchy and the function of balance performed by the nobility. As a consequence, liberalism in Europe did not imitate English political ideas until in the nineteenth century when parliamentarism was transplanted. For a somewhat different treatment of the influence of the English constitution in relation to French political thought, see Esmein, *op. cit.*, I, 79-85. Esmein takes the position that Montesquieu understood the essential parliamentary features of the British constitution and that parliamentary government was

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In the light of the preceding discussion, it can be seen that the doctrine of the mixed constitution was inapplicable in the United States. Montesquieu and Blackstone, however, were without doubt the germinal sources of the doctrine of the separation of powers for the Americans. Because Montesquieu had his principles in mind as a counterweight to despotism, and because Blackstone saw in the balance of the constitution a check on the powers of the king, it was natural that the American fear of the tyrannical executive should find confirmation in the doctrine. Of the two primary sources of the doctrine for the United States, it must be apparent that Montesquieu's formulation was more adapted to American needs, since it was at least stated in more general terms.

The American contribution to the principle seems to be, first, a clear detachment of the doctrine of mixed government from that of the separation of powers, and, second, the evolution of the idea of the mixed form of government in the interpretation of politics as a balance of interests or economic forces and classes. The principle of checks and balances was grafted on to the principle of the separation of powers as a means of sustaining the separation, and the principle of the mixed constitution remained in the idea of the necessity of a senate representing the more conservative economic interests in the state. These developments may be seen in the contrasting doctrines of James Madison and John Adams.

Adams' primary concern in his *Defence of the Constitutions of Government of the United States of America* in 1786 was to sustain the British tradition of the mixed form of government. The separation of powers and the check and balance principle are simply subordinate means whereby the mixed form of government, based on the concept of the state as made up of different orders, can be preserved. While the Constitutional Convention was familiar with his ideas, it is difficult to see that they made much headway against the competing ideas of Madison and others. In other words, Adams' theory no doubt showed the necessity of a senate as a matter of economic conservatism without trenching heavily the idea that the separation of powers was the primary requisite for liberty. Adams succeeded in preserving some of the

consciously rejected by most of the French Revolutionary leaders who understood the system. *Ibid.*, I, 240-43. Cf. Carpenter, *op. cit.*, p. 37, for the position that the Framers of the American constitution saw corruption in the British constitution and its deviation from Montesquieu's principles.

elements of the mixed form of government, without, however, convincing the convention of the ineluctable necessity of the recognition of monarchical, aristocratic,<sup>28</sup> and democratic elements in the constitution. What the convention did recognize was the conflict of economic groups, and the danger to conservative interests from democratic attack. Thus the Senate of the United States must be regarded primarily as part of a balance of interests rather than as a part of the separation of powers.<sup>29</sup>

Adams may be said to have advanced three fundamental principles, all of which support his concept, the historic concept of mixed government. He defends the notion of representation, the separation of the three powers of government, and a balance in the magistracy by having three branches, the king or the president, the upper chamber or the senate, and the chamber of representatives. But it is fundamentally clear that there must be orders recognized in the government for the state to be well-governed, and this implied the existence of an aristocracy as a balance to the force of pure democracy. His foundations of aristocracy were wealth, birth, and education. In contrast with the older view which regarded the House of Lords as holding a balance between the commons and the king, Adams viewed the executive or president as holding the balance between the senate and the house.<sup>30</sup>

<sup>28</sup>See Thomas Paine, *The Rights of Man* (1791-1792), Everyman Edition, pp. 62ff, for a criticism of the principle of aristocracy in the British government particularly. On pp. 131ff Paine launches a strong attack against the principles of the mixed constitution. While Paine praises the American constitutions, he rejects the idea of three powers in government. According to his view there are only two: legislative and executive. *Ibid.*, pp. 198, 235.

<sup>29</sup>It must be observed that for the mixed form of government the balance within the legislature is as important as that between the executive and the legislative branches. See John Adams, *Works*, VI, 429.

<sup>30</sup>Adams' analysis of the American constitution in which he finds eight different checks and balances shows clearly his preference for the mixed form and that his interpretation starts from this point of view. See *Works*, VI, 467-68. These checks and balances were: (1) the states and territories against the central government, (2) the house and senate against each other, (3) the president against congress, (4) the judiciary against congress, the president and the state governments, (5) the senate against the president, (6) the people against their representatives, (7) the state legislatures against the United States Senate, (8) and the electoral college against the people. Adams felt that the check of the senate on the president was useless and pernicious. He said further: "... here is a complication and refinement of balances which ... is an invention of our own, and peculiar to us." *Ibid.*,

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Madison's theory of sound government must be examined both from the viewpoint of his fear of the turbulence of democracy and his conception of the separation of powers.<sup>31</sup> In seeking a cure for the evils of factions and the struggle of classes which emerge from divergent economic interests, he not only favors a republican state of large area, but also a balance of interest to be embodied in the senate as a part of the legislature. Here the older concept of mixed government has reached a complete transformation. In the tenth number of *The Federalist*, he declares: "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary operations of the government." The balance of interests is primarily a matter of republican policy; it is a positive principle of good government. His concept of classes is separated entirely from the traditional concept of the function of an aristocracy in the preservation of liberty. The senate serves its purpose in moderating the interaction of the fundamental forces of politics.<sup>32</sup>

On the other hand, the separation of powers was a negative principle, a preventive stratagem whereby the tendency of any part of the government to encroach on the others is eliminated. The separation is a principle of internal constitutional structure; it is an elaboration of devices by which each of the three divisions concerned may defend itself against the others. The check and balance system becomes the cause of the preservation of the separation of powers within the provisions of the constitution itself. On July 19, 1787, Madison reports himself as saying to the Constitutional Convention: "If it be a fundamental principle of free government that the legislative, executive, and judiciary powers should be separately *exercised*, it is equally so that they be *independently* exercised. There is the same and perhaps

p. 421, Adams refers to the "mixture of the three powers" in state government, i.e., the two houses of the legislature and the executive. See also John Dickinson, *Administrative Justice and the Supremacy of the Law* (Cambridge, 1927), p. 83 and note 22.

<sup>31</sup>It may be noted, however, that the rise of the idea of popular sovereignty and national sovereignty assisted in the rejection of the mixed constitution. The separation of powers may be reconciled easily with the idea of the ultimate and unitary power of the people, while the mixed constitution can recognize the power of the people only in a limited sense. Cf. George Jellinek, *Allgemeine Staatslehre*, dritte Auflage (Berlin, 1929), pp. 499-500.

<sup>32</sup>See Carpenter, *op. cit.*, p. 42.

greater reason why the executive should be independent of the legislature, than why the judiciary should: A coalition between the two former powers would be more immediately and certainly dangerous to public liberty." The executive must be a free agency in relation to the legislature.<sup>33</sup>

It is fundamental in the American conception of the separation of powers that the separation be maintained by devices within the Constitution which enable each department to resist the others. The system of checks and balances, drawn from the mixed constitution, is the motivating principle of the separation. *The Federalist* explains that more than a mere paper separation must be provided if a concentration of political power is to be avoided.<sup>34</sup> "But the great security against a gradual concentration of the several powers in the same department," says *The Federalist*, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place."<sup>35</sup> Here it is explained that since the legislature is the predominating branch in republican governments, it must be divided and the modes of election and principles of action made as widely different as possible.<sup>36</sup>

<sup>33</sup>Sixty-ninth Congress, 1st Session, House Document No. 398, "Documents Illustrative of the Formation of the Union of the American States," p. 412.

<sup>34</sup>No. 48.

<sup>35</sup>No. 51. The principle of the separation of powers seems to lead directly to the presidential form of government. There was a strong tendency in France toward what might have become presidential government until the principle of parliamentary government was taken over from the British constitution. Esmein, *op. cit.*, I, 507ff. On p. 530 Esmein denies, however, that parliamentary government violates the principle of the separation of powers. The Swiss federal executive he regards as inspired by the Convention in France and *le Directoire exécutif* of the Constitution of the Year III. *Ibid.*, I, 536.

<sup>36</sup>This explanation of the bicameral legislature must be balanced against the other and more fundamental explanations which have been adverted to already. Cf. Esmein, *op. cit.*, I, 137-41, for a discussion of the motives which led to the formation of second chambers. He believes that federalism is the fundamental explanation of the United States senate. In other words, federal bicameralism may be explained in a number of ways: by state constitutional experience, by the principles of the mixed constitution, by the idea

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In the same number of *The Federalist* (Number 51) an exposition is given of the advantages of federalism in securing moderation in government. In a single republic all the power surrendered by the people is submitted to the administration of a single government, and usurpations are guarded against by a division of the government into distinct and separate departments. In the "compound republic of America" the power surrendered by the people is first divided between two distinct governments, and the portion allotted to each subdivided among the separate departments. Not only will the departments check each other, but the national and local or state governments will also act as mutual hindrances to usurpation. But a further guarantee is to be found in the diversity of interests in the United States, and just as religious rights are protected by the multiplicity of sects so other rights will be protected by the impossibility of a majority combination of interests throughout the country.<sup>87</sup>

The framers added to the principle of checks and balances the idea of judicial review,<sup>88</sup> which theretofore had never been incorporated into any system of government. The judiciary could

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of the separation of powers, or by the concept of the process of politics as economic struggle.

<sup>87</sup>Madison refers to the new American government in *The Federalist* as mixed, but it is clear from the discussion preceding that he meant mixed as between the national and federal or confederate elements in the constitution. This was certainly a novel use of the term "mixed government" and it may have been used with an idea of the propagandist effect the suggestion would have on the American voters of the time. See *The Federalist*, No. XL, in the opening sentence of the number.

In No. 47 of *The Federalist* Madison addresses himself against the charge that there is too much of a blending of the powers of government in the federal constitution. He refutes this argument, not only on the basis of various state constitutions, but also by a particular interpretation of Montesquieu drawn from the British constitution. The result of Madison's argument is in fact to show that there is no conflict between Montesquieu and Blackstone in that the former accepts the membership of the executive in the legislative branch. Madison does not raise the question of similarity or dissimilarity between republican and monarchical and aristocratic institutions. It would seem, then, that he believed the American application of the principle of separation is consistent with the practice and principles of the British constitution.

<sup>88</sup>See Edward S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *The American Historical Review*, XXX (1925), 511-26, for an account of the development of the concept of judicial power in the United States. Esmein, *op. cit.*, I, 375-76, notes that judicial review was specifically



by means of this power prevent any successful attempt on the part of the other branches of the government to deprive it of its constitutional functions. It was generally assumed that the judiciary was the weakest of the three divisions of government. The older concept of the mixed constitution did not generally regard the judiciary as significant in the forces making for a balance in the government. The enormous importance of giving the judiciary an independent realm of action was recognized, but neither in Montesquieu nor in Blackstone is the principle presented that the judiciary must be armed with judicial review in self-defense. The inclusion of the judiciary within the scope of the checks and balances of the constitution is distinctly an innovation in the theory of the separation of powers.<sup>39</sup> The brilliant ability of the American judiciary to defend itself has no doubt been a surprise to members of the higher courts. It was soon discovered under Marshall that the Supreme Court of the United States was not using the principle of judicial review so much to protect the legitimate functions of the judiciary as to carry on the conservative social principles which run throughout the constitution itself. This social conservatism is the political heritage of the mixed constitution, which must be regarded as the eighteenth-century engine *par excellence* for maintaining the historic balance of interests in society.<sup>40</sup>

The political instrument which made it possible to develop the new American interpretation of the older doctrines of constitutional government was the written constitution. Without the written supreme law it would have been possible to establish

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rejected in 1790 by the French Revolutionary leaders because of their distaste for the practices of the *parlements* in verifying laws. Such a position is, in the French view, consonant with the separation of powers. It might be observed likewise that the French system of administrative law rests on the Revolutionary principle of the separation of the judicial and administrative powers. *Ibid.*, *op. cit.*, I, 626-48.

<sup>39</sup>Esmein, *op. cit.*, I, 542 and note 161, denies the view of Duguit that the framers of the Federal constitution made the judiciary independent because of the federal character of the union. Esmein, however, tends to view the position of the American judiciary as a direct outgrowth of Montesquieu. It is obvious that Montesquieu did not have a theory of judicial review even in a germinal sense.

<sup>40</sup>As a generalization it may be said that the fundamental preoccupation of the mixed constitution is to preserve order in the state, while the American separation of powers is primarily concerned with the protection of the rights conceived as fundamental to the individual.

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neither the federal system nor the separation of powers. The new constitutional balance was made feasible by this type of constitution, since the internal constitutional devices for securing the separation of powers were an immediate expression of the importance of the fundamental law.<sup>41</sup>

The new application of the older doctrine was not only adaptation, for it was also the conscious elimination of older ideas. Monarchy and aristocracy,<sup>42</sup> so essential in the French and British doctrines of pre-revolutionary times, find no place in the American scheme. Mixed government as a separate conception gradually passed out of existence, leaving behind its principle of checks and balances, and the notion of the bicameral legislature. It stimulated, however, a line of growth from the concept of the state based on competing orders to competing interests balanced by a senate or upper chamber, and to the principle of economic individualism embodied in the practice of American judicial review. In turn, federalism is discovered to be an aid in preserving the balance of interest, while in the doctrine of the separation of powers the judicial veto is added to the historic vetoes of the executive and the upper chamber. It may be said, further, that we have utilized in the United States the separation of powers to obtain the political benefits of the mixed constitution, for which a democratic state necessarily lacks the social ingredients.<sup>43</sup>

<sup>41</sup>The French evolution, in principle, was similar to that of the United States. Article XVI of the Declaration of the Rights of Man and of Citizens declares: "Every community in which a separation of powers and a security of rights is not provided for, wants a Constitution." Paine, *op. cit.*, p. 97. The French Revolution shows a rejection of the principle of mixed government, that is, the destruction of monarchy and aristocracy, but the retention of the separation of powers as a means by which to preserve rights and liberties. Hence, Montesquieu's ideas suffered modification as a result of the French Revolution as well as the American.

<sup>42</sup>See William H. George, "Montesquieu and de Tocqueville and Corporative Individualism," *The American Political Science Review*, XVI (1922) 10-21; p. 11 gives an interpretation of Montesquieu which emphasizes the corporative character of society rather than simple class privilege. The nobility is viewed as expressing necessary intermediate and subordinate powers. Professor George notes the conflict between Ernest Barker who says that Montesquieu's class divisions are incidental, and Emile Faguet who holds that the central point in Montesquieu is the concept of a hierarchically corporative society made up of *corps intermediares*.

<sup>43</sup>I am indebted to Professor Edward S. Corwin for the final summary of the import of the problem presented in this paper.