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Montesquieu's Mistakes and the True Meaning of Separation

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Abstract—In *The Spirit of the Laws*, Montesquieu concluded that a constitution of liberty could best be achieved, and had been achieved in Britain, by assigning three essentially different governmental activities to different actors. He was wrong. His mistaken conclusion rested on two errors. First, Montesquieu thought that the primary exercise of powers could durably be divided only where those powers differed in kind. Second, Montesquieu failed to recognize the lawmaking character of executive and judicial exposition of existing law. This article analyzes implications of Montesquieu's mistakes for modern claims, both in Britain and in the United States, that liberty and the rule of law are promoted by separating power in certain contexts. In particular, this article questions the British Government's recent claim that the values underlying separation-of-powers theory call for removing ultimate appellate jurisdiction from the House of Lords. It also traces Montesquieu's influence on the American founders' attempt to separate power along essentialist lines, and considers some sub-optimal consequences of that attempt, including the non-delegation quandary and the emergence of an unchecked judicial lawmaker.

'The political liberty of the subject', said Montesquieu, 'is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another'.[1] The liberty of which Montesquieu spoke is directly promoted by apportioning power among political actors in a way that minimizes opportunities for those actors to determine conclusively the reach of their own powers. Montesquieu's constitution of liberty is the constitution that most plausibly establishes the rule of law. Montesquieu concluded that this constitution could best be achieved, and had been achieved in Britain, by assigning three essentially different governmental activities to different actors. He was wrong. His mistaken conclusion rested on two errors. The first of these was theoretical; the second, both empirical and theoretical.

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[1] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Nugent translation) (revised edn, 1873, first published 1748), Bk XI, ch VI, 174.

First, Montesquieu's analysis was informed by the early 18th century orthodoxy that no sovereign power could viably be divided. Montesquieu rightly saw that liberty from the arbitrary exercise of power would be served by apportioning power among multiple actors, but he thought the apportionment sustainable only if along essentialist lines. Lawmaking could be separated from law-executing, but neither of those kinds of power could durably be divided internally. The extent to which actors participated in the exercise of more than one kind of power Montesquieu viewed as a protective qualification to a primary essentialist separation. He failed to see that involving multiple actors in every exercise of power, albeit by permitting actors' individual involvement in the exercise of more than one kind of power, is the true protection against arbitrariness. Checks and balances, not essentialist separations of activities, prevent actors from conclusively determining the reach of their own powers. The critical liberty-promoting criterion for separation is not whether powers differ in *kind*, but whether apportionment will prevent actors from conclusively determining the reach of their own powers.

Second, Montesquieu did not appreciate the nature of the English common law and the mechanism that its doctrine of precedent established for authoritative judicial exposition of existing law. That empirical error caused him to distinguish and to trivialize the English judicial function as merely ad hoc determination of disputed facts. Consequently, Montesquieu failed to recognize the *lawmaking* character of English judicial exposition.

1. *Montesquieu's Theory of Checked Separation*

Along with the title Baron de Montesquieu, Charles Louis de Secondat inherited from his uncle the office of one of the *présidents à mortier* of the *Parlement* of Bordeaux. The *parlement* was primarily an adjudicative body, and the young Montesquieu adjudicated some disputes. While he had abundant appetite for legal theory and had immersed himself in Roman law, he found the task of judging tedious.[2] The French civil law tradition afforded little opportunity for enduring adjudicative creativity, and left Montesquieu with a vision of judging as primarily fact-finding and rote application of settled and transparent rules to the facts found. His office contributed to his scholarship less through what he did in the job than through whom he met in it. Friendships formed, first with the Duke of Berwick and later with Viscount Bolingbroke, English aristocrats exiled for their association with the ousted Stuart monarchy (Berwick was a son of James II). By the time of Montesquieu's extended visit to England between 1729 and 1731, Bolingbroke had been rehabilitated sufficiently to return there, and had become a prolific contributor to debate about the nature of Britain's emerging constitution.

[2] R. Shackleton, *Montesquieu: a Critical Biography* (1961), 17–19.

With the departure of James II in 1688, the enactment of the Bill of Rights of 1689 and the Act of Settlement of 1701, and the union with Scotland in 1707, the kingdom of Great Britain had entered a new constitutional age. The 17th century's power-struggle between the Stuart monarchs and Parliament was over, but what was the true character of the new dispensation? Did monarch and Parliament exercise power as separate coordinates, or had they merged into a single, supreme power? During a long stay that his countryman, Alexis de Tocqueville, was to emulate in America a century later, Montesquieu imbibed the debate, and chose a side.[3] His friend Bolingbroke argued for separate-and-coordinate status, though not consistently, for Bolingbroke's public reasoning was tactical. He was jockeying for influence within a political order dominated by his *bête noire*, Sir Robert Walpole. Montesquieu observed and wrote as an outsider, and sought to advance a coherent and timeless theory of government.

In *The Spirit of the Laws*, Montesquieu purported to describe, in abstract fashion, the system of government that he had witnessed.[4] His famous tripartite categorization of powers and theory of their checked separation appears in a chapter entitled 'Of the Constitution of England'. The 'direct end' of that constitution was, uniquely, 'political liberty', by which Montesquieu meant freedom from the fear that power will be exercised arbitrarily.[5]

'In every government', Montesquieu wrote, 'there are three sorts of power'. The legislative power extended to all lawmaking, including original enactment, amendment, and abrogation.[6] The executive power cleaved in two—execution under international law and execution under domestic law. The former authorized decisions about defence and foreign relations. The latter, which he re-named the power of judging (*puissance de juger*), authorized decisions punishing criminals and resolving disputes.[7] Montesquieu's characterization of executive power addressed only the respects in which execution involved independent decision-making[8]—executing domestic law in the absence of dispute did not rate a mention. Subsequently, however, he re-described the three kinds of power as 'that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals'.[9]

[3] Ibid, 297–301. See also R. Shackleton, 'Montesquieu, Bolingbroke and the separation of powers', 3 *French Studies* 25 (1949); M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967), 72–75. Cf. I. Kramnick, *Bolingbroke and his Circle: The Politics of Nostalgia in the Age of Walpole* (1968), 144–50.

[4] Shackleton, above n 2 at 285: 'the inclusion in *L'Esprit des lois* of the essay on the English constitution involved a physical incorporation of one manuscript, on different paper and in different hands, in the other. . . . [M]ost of the chapter as it now stands was written soon after Montesquieu's return from his travels, and under the immediate inspiration of English political life'.

[5] Montesquieu, above n 1, Bk XI, chs V and VI, 173–74, 185.

[6] Ibid at 173.

[7] Ibid at 173–74.

[8] Cf. John Locke, *Second Treatise of Government (An Essay concerning the True Origin, Extent, and End of Civil Government)*, (Laslett crit. ed. 2nd), 1967 (first published 1690), ch XII ('Of the Legislative, Executive, and Federative Power of the Commonwealth'). Locke's 'federative power' was 'much less capable to be directed by antecedent, standing, positive laws than the executive; and so must necessarily be left to the prudence and wisdom of those whose hands it is in'. See also Shackleton, above n 2 at 286–87.

[9] Montesquieu, above n 1, Bk XI, ch VI, 174.

In Britain, the three kinds of power were exercised primarily by different actors. The monarch had no power to issue unilateral decrees governing future conduct.[10] Holding the legislative power, said Montesquieu, were two Houses of Parliament.[11] Holding the executive power was the monarch.[12] Holding the power of judging were . . . juries.[13]

Montesquieu's distinctive insight, his advance from John Locke's legislative-executive dichotomy,[14] was that adjudicating disputes about relevant facts is a distinct precursor to executing law, and in England that precursor had been put in distinct hands—the hands of juries. That was what made the three functions of legislating, executing and adjudicating fundamentally distinguishable and separable, and why Montesquieu could conclude that their primary exercise in England had been separated. The officers of the monarch executed law, but in the event of dispute about facts, juries were assembled to exercise the power of judging. Judging did not involve elaborating law; it involved deciding who was telling the truth. Judging was distinct from legislating precisely because it did not involve making rules for future cases. Today's jury verdict had no significance for tomorrow's. Applying the law to the facts found by juries was no different from applying the law in circumstances where there was no dispute. In the former case, the actors who applied the law—who executed it—were called judges. In the latter case, where facts were undisputed, courts were uninvolved, and the law was applied—was executed—by other actors. In either case, the actors concerned were officers of the executive government. In either case, their action in executing the law was normally a matter of rote application, having no effect on the content of the law. That understanding appears to have been consistent with Montesquieu's own adjudicative experience in France.

Montesquieu did not acknowledge that English courts might have to resolve disputes about what the law meant. He noted that under monarchies, laws might not be explicit, and then judges might have to 'investigate their spirit'. But the 'nearer a government approaches towards a republic, the more the manner of judging becomes settled and fixed'.[15] The British system of government was well *en route* from monarchy, 'in which a single person governs by fixed and established laws' to republic, 'in which the body, or only a part of the people, is possessed of the supreme power'.[16]

[10] Blackstone later noted that the monarch's power of decree (which he called proclamation) was limited to subordinate provision for implementing enacted law. See I William Blackstone, *Commentaries on the Laws of England* (1765), ch 7, 261.

[11] Montesquieu, above n 1, Bk XI, ch VI, 176–78.

[12] Ibid at 179.

[13] Ibid at 175–76.

[14] See Locke, above n 8, ch XII. Locke's 'federative power' was the external relations aspect of the executive power, and the two were 'hardly to be separated and placed at the same time in the hands of distinct persons'. As to Revolutionary American understanding, see Gordon S. Wood, *The Creation of the American Republic* (2nd edn, 1998), 159.

[15] Montesquieu, above n 1, Bk VI, ch III, 85–86.

[16] Ibid, Bk II ch I, 9.

> In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life are concerned.
>
> At Rome the judges had no more to do than to declare, that the persons accused were guilty of a particular crime, and then the punishment was found in the laws, as may be seen in divers laws still extant. In England the jury give their verdict whether the fact brought under their cognizance be proved or not; if it be proved, the judge pronounces the punishment inflicted by the law, and for this he need only to open his eyes.[17]

Britain's lawmaker was a representative body, and thus 'the national judges are no more than a mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour'.[18] This was as it should be. '[T]hough the tribunals ought not to be fixed, the judgements ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations'.[19] The intellectual energy involved in performing the judicial function lay in deciding the facts. Where that task was separated from the executive—when it was given to juries—use of the term 'judge' to describe the executive officer who applied the law after disputed facts had been resolved was more a matter of courtesy (almost of irony) than of description.

Ongoing ambivalence about whether the professional judges who actually executed the law—applied it to the facts found by juries—were anything other than executive officers can be seen in the American founders' self-conscious choice to permit concurrent holding of judicial and other executive offices under the Constitution.[20] Thus the nation's first three confirmed Chief Justices each, for a time, concurrently served *persona designata* in other executive capacities. John Jay and Oliver Ellsworth were ambassadors to Britain and France respectively in an era when that office truly was extraordinary and plenipotentiary, extending to single-handed negotiation of treaties. And John Marshall, notoriously, doubled as Secretary of State through the twilight of the Adams administration, as Jay had done in the first Washington administration during Jefferson's absence in France.[21]

For Montesquieu, the genius of the British system of government lay in combining separation with supervision.[22]

> [Political liberty] is there only when there is no abuse of power; but constant experience shews us, that every man invested with power is apt to abuse it, and to carry his

[17] Ibid, Bk VI, ch III, 85–86.
[18] Ibid, Bk XI, ch VI, 182.
[19] Ibid at 176. Prominent Revolutionary Americans agreed. See Wood, above n 14, 161, 301–302.
[20] See Steven G. Calabresi and Joan L. Larsen, 'One Person, One Office: Separation of Powers or Separation of Personnel?', 79 *Cornell L Rev* 1045, 1128–31 (1994).
[21] See ibid at 1131–32.
[22] Cf. Michael A. Mosher, 'Monarchy's Paradox' in David W. Carrithers, Michael A. Mosher and Paul A. Rahe (eds), *Montesquieu's Science of Politics* (2001), 163 n 8 (221–22) .

> authority as far as it will go. Is it not strange, though true, to say, that virtue itself has need of limits?
>
> To prevent this abuse, it is necessary from the very nature of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.[23]

Parliament's legislative power was checked by the monarch's power to reject legislation, which protected the separation of legislative and executive power.[24] The monarch's executive power was checked by Parliament, primarily through Parliament's exclusive power to tax and to appropriate the proceeds to finance the executive's activities.[25] Moreover the lawmaker 'has a right and ought to have the means of examining in what manner its laws have been executed'. Though the monarch could not be impeached and tried for misconduct, his officers could be[26]—the lower House of Parliament could impeach them and the upper House could try, convict, and punish them.[27]

In a later discussion of the British party system, Montesquieu observed that the monarch 'is frequently obliged to give his confidence to those who have most offended him, and to disgrace the men who have best served him: he does that by necessity which other princes do by choice'.[28] Why would the monarch be obliged to take counsel from persons whom he did not even like? Montesquieu did not elaborate, but doubtless he was obliquely referring to the nascent convention of cabinet government, by which the monarch exercised his executive powers with the advice and consent of ministers he appointed on the basis that they had the confidence of the House of Commons (that is, on the basis that they could command a working majority of supporters in the Commons, and thus could persuade that body to finance the executive's activities). That allusion did not adequately express the dawning truth of unvaried and complete monarchical compliance with the wishes of such ministers, but de facto subordination of the monarchy could not have been as obvious in the first half of the 18th century as it has become through a further two and a half centuries of consistent practice. During Montesquieu's visit to England, the institutions of monarchy and parliament must still have seemed to regard each other warily, having clashed so often and so violently over the preceding century. Queen Anne's disallowance of the Scottish Militia Bill in 1708 was, after all, as recent as 1984 is now.

Separation of power, then, was less significant in what it bestowed on the designated actors than in what it denied to other actors. Seating the primary

[23] Montesquieu, above n 1, Bk XI, ch IV, 172–73.
[24] Ibid, ch VI, 183. 'The executive power . . . ought to have a share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative'.
[25] Ibid at 183–84.
[26] Ibid at 181.
[27] Ibid at 182. See also I Blackstone, above n 10, ch 2, 150–51, ch 7, 244.
[28] Montesquieu, above n 1, Bk XIX, ch XXVII, 356.

exercise of a power in one actor did not give that actor *carte blanche* in the exercise of the power, it just denied the primary exercise of that power to others.

According to Montesquieu, the purpose of Britain's apportionment of power among multiple actors was to maximize liberty.[29] The more obstacles that lie in the path of any actor's exercise of power, the less likely power is to be exercised, and *a fortiori* the less likely power is to be exercised badly. The more minds that must concur in the constitutionality and virtue of a proposed exercise of power, the more likely that exercise is to be constitutional and virtuous. Apportioning power may promote good faith in its exercise, by resolving conflicts of interest. Apportioning power may prevent any actor from conclusively determining the reach of her own powers. Thomas Jefferson would later observe that 'the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others'.[30] But these desirable ends do not call for apportionment on strictly essentialist lines, and that was not the true nature of apportionment in Britain. Yet Montesquieu chose to pretend that it was, that Britain's constitution separated three essentially different governmental activities and then subjected their performance to supervisory checks designed to protect the primary separation. He could more accurately have characterized the British apportionment of power as providing for multiple actors to participate in every governmental action.

Why was Montesquieu so concerned to distinguish the essences of three governmental activities and to claim that the separation of those activities was the secret of maximized liberty? Why did he not simply say that dividing government power among multiple actors might promote liberty, especially if every exercise of power ultimately depended on the approval of multiple actors? In other words, why did he characterize the British model as a checked separation of different *kinds* of power, rather than simply as power-sharing? The monarch's power to disallow legislation was, after all, qualitatively indistinguishable from, and quantitatively greater than, the voting power of any individual member of Parliament. Why try to distinguish primary exercises of power from supervisory ones? The answer seems to lie in then-prevailing understandings of the nature of political sovereignty. In the pantheon of French political theorists, Montesquieu's most prominent predecessor was Jean Bodin. Montesquieu possessed two copies[31] of *Les Six Livres de la République*, first published in 1576, in which Bodin characterized sovereignty as indivisible. The indivisibility of sovereignty was an unquestioned assumption underlying the scholarship of Johannes Althusius,[32] Hugo Grotius,[33] Thomas Hobbes,[34] Ludolph Hugo[35] and Samuel von Pufendorf. It

[29] Montesquieu, above n 1 at 173–74, 185.
[30] Wood, above n 14 at 453 (quoting Jefferson, *Notes on Virginia* (ed. Peden), 120).
[31] Shackleton, above n 2 at 306–07.
[32] *Politica methodice digesta* (1603).
[33] *De Jure Belli ac Pacis* (1625), Book I, ch 3 § 7; *Apologeticus eorum qui Holandiae praefuerunt* (1640), ch 1.
[34] Leviathan, 1651: 'the rights, which make the essence of sovereignty ... are incommunicable and inseparable' (ch 18).
[35] *De Statu Regionum Germaniae* (1661).

was the foundation of Pufendorf's critique of the Hapsburg Holy Roman Empire, which he condemned as an 'irregular', unsustainable system of government because sovereignty was divided between the emperor and the German princes.[36]

Montesquieu did not question the prevailing orthodoxy that ultimate sovereign power could not be divided without risking chaos.[37] But for Montesquieu, that principle was satisfied by a system that established separate mechanisms for engaging in essentially different governmental activities, so long as for each of those activities, only one ultimate mechanism was available. So long as there was only one ultimate way to make law, there was no risk of legal incoherence. So long as there was only one chief executive, law would be executed consistently. To characterize the British system as sustainably providing for power to be exercised by multiple actors coordinately rather than in hierarchy, Montesquieu thought that he had to characterize the activities of those actors as *essentially* different. The British division of powers was sustainable because it did not provide more than one ultimate way for any particular kind of power to be exercised. Only Parliament possessed the sovereign power to make law, albeit that Parliament was checked in exercise of that power by the monarch. Only the monarch possessed the sovereign power to execute law, albeit that he was checked in the exercise of that power by Parliament.

Was the separated sovereign power of judging comparably checked? Yes. 'It is possible', wrote Montesquieu, 'that the law, which is clear sighted in one sense, and blind in another, might, in some cases, be too severe'. Where on the facts found by juries the law imposed an unduly severe sentence, the House of Lords could exercise an appellate jurisdiction 'to moderate the law in favour of the law itself, by mitigating the sentence'.[38] Apart from ignoring the Lords' jurisdiction to entertain appeals in civil disputes, Montesquieu failed to recognize that the Lords' decisions might *change* the common law. Invoking the monarchical prerogative of clemency was only one of their options.[39] The Lords' appellate jurisdiction was, however, then exercised directly by the House as a whole,[40] not by a committee composed of judicial specialists, the so-called Lords of Appeal in Ordinary, or Law Lords.[41] The speeches through which the lords delivered their

[36] *Introduction to the History of the Principal Kingdoms and States of Europe* (8th edn, 1719), 282: 'Its irregular Constitution of Government is one of the chief Causes of its Infirmity; it being neither one entire Kingdom, neither properly a Confederacy, but participating of both kinds: For the Emperour has not the entire Soveraignty over the whole Empire, nor each Prince in particular over his Territories; and tho' the former is more than a bare Administrator, yet the latter have a greater share in the Soveraignty than can be attributed to any Subjects or Citizens whatever, tho' never so great'. Pufendorf drew an analogy to a building designed in disregard of the 'Rules of Architecture' or which had suffered from 'some great Fault' that had 'been cur'd and made up after a strange and unseemly manner'. *Of the Law of Nature and Nations* (4th edn, 1729), 679.

[37] Montesquieu's critique was of theories of indivisible sovereignty that lacked nuance. See Shackleton, above n 3 at 26.

[38] Montesquieu, above n 1, Bk XI, ch VI, 182.

[39] See, e.g. the *Titus Oates Case*, 10 Howell's State Trials, 1325, 1328; 10 House of Commons Journal 176–77 (June 11, 1689).

[40] R. Stevens, *Law and Politics: The House of Lords as a Judicial Body*, 1800–1976, 1978, 29–30.

[41] See Paul Carmichael and Brice Dickson (eds), *The House of Lords: Its Parliamentary and Judicial Roles* (1999), 107 *et seq*.

decisions were rarely reported.[42] Until the professionalizing of the appellate jurisdiction in the 19th century, 'the House of Lords had made relatively little contribution to the common law of England and only a limited one to equity. Henceforth, with the adequate supply of law lords, there was a much greater opportunity to shape English law....'[43] Nonetheless, the House was, as it remains, 'the supreme court of judicature in the kingdom'.[44] And to the 18th century House of Lords, '[a]ppeals were in every sense a part of the political work of the House, regarded as part of the Blackstonian balance within the political sovereign'.[45]

2. *Britain's Current Reforms*

On June 12, 2003, the British Government announced that it intended to establish a 'new Supreme Court for the United Kingdom',[46] to which the appellate jurisdiction of the House of Lords would be transferred, along with the Law Lords themselves. Legislation to effect the change received royal assent on 24 March 2005.[47] 'The primary objective of the new arrangements is to establish the Court as a body separate from Parliament'.[48] Appointees to the Court, if also members of the House of Lords, will be barred from sitting in the legislative chamber during their tenure on the Court.[49] Citing Article 6 of the European Convention on Human Rights,[50] now incorporated into British domestic law through the Human Rights Act 1998, the British Government has given the following reason for its action.

> [T]he fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature. Looking at it from the other way round, the requirement for the appearance of impartiality and independence also increasingly limits the ability of the Law Lords to contribute to the work of the House of Lords, thus reducing the value to both them and the House of their membership.[51]

The integrity of judging, according to the British Government, is promoted by keeping that activity wholly out of the hands of lawmakers. But is it really? And will the British Government's reforms really achieve a complete separation of judging from lawmaking? The evolution of British constitutional practice during

[42] Stevens, above n 40 at 12.
[43] Ibid at 30.
[44] III Blackstone, above n 10, 1768, ch 4, 56.
[45] Stevens, above n 40 at 13.
[46] Department of Constitutional Affairs Consultation Paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, 2003, ¶1.
[47] Constitutional Reform Act 2005, ss 20–21, 37.
[48] DCA Consultation Paper, above n 46, ¶34.
[49] Constitutional Reform Act 2005. s109.
[50] '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.
[51] Ibid, 1.2. See also Lord Bingham of Cornhill, *A New Supreme Court for the United Kingdom*, The Constitution Unit, Spring Lecture 2002, May 1, 2002, *passim*.

the 18th century established that there was no meaningful separation of executive and legislative power in Britain. Effectively, 'the executive power [is] committed to a certain number of persons selected from the legislative body', a circumstance in which Montesquieu predicted 'there would be an end then of liberty'.[52] Perhaps Montesquieu's analysis was unduly influenced by Bolingbroke's hostility to the inexorable rise of Walpole. In any event, the history of British governance has hardly fulfilled his prediction. Is the cause of liberty any more substantially served by separating the power of judging from that of law-making? And has that separation ever truly been achieved?

3. *The American Separation*

In the document that emerged from Philadelphia in 1787, the American founders adopted a structure of government that, in its provision for checked separation, replicated Montesquieu's account of the British system in all significant ways but one. 'All legislative Powers herein granted' were vested in a bicameral representative body, as Montesquieu had favoured,[53] with states substituted for aristocracy as the interest represented in the upper chamber.[54] 'The executive Power' was vested in an individual, as Montesquieu had recommended,[55] with a president substituted for a monarch.[56]

The legislative power of Congress was checked by a presidential veto that mirrored the British monarch's[57] but which could be overridden by a sufficiently-united legislature.[58] The executive power of the President was checked by Congress's control of the public purse[59] and Congress's power to impeach and convict him and his officers of 'high Crimes and Misdemeanors'.[60] Where the British monarch's appointment of ministers and judges[61] required de facto approval of the House of Commons (mediated through the ministers in the latter case), the President's appointments required approval of the Senate.[62] Moreover, his executive decision-making 'in respect of things dependent on the law of nations'[63] was checked by the powers of declaring war,[64] of consenting to treaties[65] and

[52] Montesquieu, above n 1, Bk XI ch VI, 179.
[53] Ibid at 176–79.
[54] US Const., Art. I § 1.
[55] Montesquieu, above n 1, Bk XI ch VI, 179.
[56] US Const., Art. II § 1.
[57] The British monarch's last exercise of the veto had been Queen Anne's rejection of the Scottish Militia Bill in 1708, but Blackstone gave his readers no reason to doubt the ongoing substance of the monarchical veto power: I Blackstone, above n 10, 1765, ch 2, 149–150, ch 7, 253.
[58] US Const., Art. II § 7 cl. 3.
[59] US Const., Art. I §8 cll. 1 and 2, § 9 cl. 7.
[60] US Const., Art I §2 cl. 5; §3 cl. 6; Art. II § 4.
[61] I Blackstone, above n 10, ch 7, 261–62.
[62] US Const., Art. II § 2 cl. 2.
[63] Montesquieu, above n 1, Bk XI ch VI, 173. Blackstone made clear that war- and treaty-making were still *de jure* prerogatives of the monarch in Britain: I Blackstone, above n 10, ch 7, 242–53.
[64] US Const., Art. I § 8 cl. 11. See M.D. Ramsey 'Textualism and War Powers', 69 *U Chi L Rev* 1543 (2002).
[65] US Const., Art. II § 2 cl. 2.

'[t]o define and punish . . . Offenses against the Law of Nations'[66] that the Constitution invested in legislators.

In explaining the convention's scheme of checked separation, James Madison said: 'The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind'.[67] Noting that '[t]he British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry', Madison explained that Montesquieu

> did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye [namely, Britain], can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.[68]

When the American founders reached '[t]he judicial Power', however, they chose to vest it absolutely in a separate hierarchy of courts.[69] The only influence that the other branches had upon its exercise came through appointing the life-tenured judges and removing them for misconduct.[70] There was no counterpart to the House of Lords' supervision of the British judiciary. Alexander Hamilton argued that 'the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department' was 'a complete security'.[71] When, however, Congress moved to exercise that check against Samuel Chase, an anxious Chief Justice John Marshall wrote to his beleaguered colleague in the following terms:

> According to the antient doctrine a jury finding a verdict against the law of the case was liable to an attaint; & the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment. As, for convenience & humanity the old doctrine of attaint has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.[72]

[66] US Const., Art. I § 8 cl. 10.
[67] Federalist No. 47: 'The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts', New York Packet, Feb. 1, 1788.
[68] Ibid.
[69] US Const., Art. III § 1.
[70] US Const., Art. II §§ 2 cl. 2 and 4.
[71] Federalist No. 81: 'The Judiciary Continued, and the Distribution of the Judicial Authority'.
[72] Marshall to Chase, Jan 23, 1804, reproduced in III Albert J. Beveridge, *The Life of John Marshall* (1919), between 176 and 177. Cf. *Marbury* v *Madison*, 5 US (1 Cranch) 137, 177 (1803).

Participation by legislators in the ultimate exercise of judicial power had American precedents. New York's first state constitution established a final appellate body that included members of the state legislature's upper chamber.[73] Connecticut's final appellate body combined the governor with the upper house.[74] Addressing 'the People of the State of New York', Alexander Hamilton sought to explain the anomaly of investing unchecked judicial power in a court 'composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and in that of the State'.

> To insist upon this point the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably in the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule; yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention.[75]

How was a legislative check on the judiciary any more proximate a violation of the 'celebrated' separation principle than was a legislative check on the executive or an executive check on the legislature? Was the judiciary somehow less in need of supervision? In an earlier paper, Hamilton had argued just that. The judiciary, he contended, 'is beyond comparison the weakest of the three departments of power' and 'can never attack with success either of the other two'. He allowed that 'individual oppression may now and then proceed from the courts of justice', but concluded that 'the general liberty of the people can never be endangered from that quarter, I mean so long as the judiciary remains truly distinct from both the legislature and the Executive'.[76] For these propositions, he cited Montesquieu: 'The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing"'.[77]

But Montesquieu meant the fact-finding function of juries. *That* was indeed politically insignificant. Exercise of *that* judicial power by *that* judiciary matters only to the parties in dispute. The threat to liberty posed by power-holders conclusively determining the substantive criteria for exercising their own powers is, in the case of jury findings, only a threat to the liberty of the parties before the court. Montesquieu thought that even *that* adjudicative power deserved to be checked.

[73] NY Const., Art. XXXII (1777). Cf. Art. III. See also Stevens, above n 40, 13, n 39. Cf. Archives of the State of New Jersey, 1891, First Series, XV, 371 f., quoted in Paul Merrill Spurlin, *Montesquieu in America* (1969), 30.

[74] Stevens, above n 40 at 13, citing Dwight Loomis and J. Gilbert Calhoun, *The Judicial and Civil History of Connecticut*, ch 10.

[75] Federalist No. 81.

[76] Federalist No. 78. In *Plaut* v *Spendthrift Farm*, 514 US 211, 223 (1995), Justice Scalia accurately interpreted Hamilton's reasoning to be that the judiciary was politically insignificant 'because the binding effect of its acts was limited to particular cases and controversies'. The doctrine of precedent makes that proposition untrue.

[77] Ibid, n 1. Montesquieu, above n 1, Bk XI ch VI, 178: 'Of the three powers above-mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two'.

Hamilton's argument that adjudication was less in need of check turned on adjudication having no significance for non-parties.

4. *Montesquieu and Judicial Lawmaking*

'There is no liberty', wrote Montesquieu, 'if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression'.[78] The reason to separate judicial power was to protect the parties in dispute. If the adjudicator could make law, then those parties would be subject to 'arbitrary control', for the adjudicator might change the rules of the fight mid-way. If the adjudicator were an executive officer, then parties in dispute with the executive government might have no recourse. These concerns had indeed fostered the jury system, going back even further than the barons' claim in chapter 39 of Magna Carta to be subject to forfeitures only by the judgment of peers or the law of the land.[79] But the concern for separation from the executive also underlay early 18th century reforms that freed professional judges from the monarch's control. The Act of Settlement of 1701 had transformed the basis of judicial tenure from monarchical pleasure to good behaviour. For the first time, the King's judges were insulated from his whims, and could be removed only through parliamentary address.[80] Bolingbroke, at the promising start of a disappointing political career, had helped prepare and introduce the measure.[81] Of this, Montesquieu made nothing. He did not see that the officers of the British government who applied law to jury findings of fact were doing something significant.

Montesquieu did not understand the nature of the common law. He showed no awareness of the opinion-writing practices of the English judges on which the common law was built and which could readily be turned to exposition of statutes and other authoritative texts. He seems not to have appreciated how the English common law had been formed through deference to precedent. He did not notice the binding nature of precedent within a judicial hierarchy. He did not realize that the exercise of judicial power in one case had implications for other cases; that dispute resolution affected more than the parties before the court; that the doctrine of precedent could turn individual dispute resolution into law of general application. Most critically, he did not see that the doctrine of precedent applied to all judicial interpretation of authoritative texts.

Montesquieu's own limited judicial experience in France had sparked the insight that adjudicative consistency called for those applying law under a monarchy to

[78] Montesquieu, above n 1, Bk XI ch VI, 173.
[79] See IV Blackstone, above n 10, 1769, ch 27, 342–43, ch 33, 407; III Blackstone, 1768, ch 23, 349 *et seq.*
[80] I Blackstone, above n 10, ch 7, 258 (indexed 267) (citing 13 W. III c. 2 and 1 Geo. III c. 23).
[81] Kramnick, above n 3 at 8.

have regard to past applications of that law.[82] But he seems not to have realized that this was the practice of the English courts, and the way in which most English law had been created. In a monarchical system like that of France, Montesquieu saw substantial risk that the law might be uncertain, and that the decisions of the courts might contribute to that uncertainty.[83] But he thought that risk *de minimis* in a quasi-republic, like Britain, in which the people's representatives assembled regularly to legislate.[84]

When Montesquieu spoke of judicial power, or rather, of the 'power of judging', he meant a function wholly shorn of lawmaking potential. It was fact-finding, a precursor to the execution of existing law. When Montesquieu spoke of the legislative power, he meant the power to make law, by whomever held. But resolving disputes may require judicial exposition of existing law. Exposition is elaboration. Elaboration is lawmaking. Why? Because the doctrine of precedent makes it so. If a court uses more words to explain why a statute applies to established facts than the legislator used in the statute, and if courts pay attention to those additional words, then the expounding court has succeeded in supplementing the law. Identical elaborating words could have been included by the original legislator in his authoritative text. If observed and applied by courts, those words are equally law whether they were written by the original legislator or by an embroidering judicial body. Written expositions of legal texts are just an alternative vehicle for expanding the corpus of the law, analogous to the Roman rescripts that Montesquieu condemned as 'a bad method of legislation', but legislation nonetheless.[85] There is nothing that courts can say about the meaning of an authoritative text *ex post* enactment that the text's enacter could not have written in that text *ex ante*.[86] The mission of law is to control the exercise of power through words; if one adds to the words, one adds to the law.

Montesquieu saw none of this. His impoverished account of the judicial power in England treated law as exogenous to the exercise of that power, a pellucid source that unambiguously dictated the consequences of jury fact-findings in every case. The House of Lords might exercise its ameliorative jurisdiction to alter those consequences in individual cases, but the corpus of the law remained untouched. For Montesquieu, judicial decision-making in England left only an inconsequential and patternless array of one-off outcomes, a morass of single instances. That perception alone can explain his trivialization of the judicial function and his disregard of the role of appointed judges as authoritative exponents of both common and statutory law. His focus was solely on the fact-finding function of juries, assembled *ad hoc* and having no influence beyond the case in which they served. He did not critically analyze the function of applying law,

[82] Montesquieu, above n 1, Bk VI ch I, 81.
[83] Ibid at 82.
[84] Ibid, Bk VI, ch III, 85–86; Bk XI, ch VI, 176, 182 (all quoted in section 1, above). See Paul A. Rahe, Forms of Government: Structure, Principle, Object, and Aim, in Carrithers, Mosher and Rahe, above n 22, 80–84.
[85] Ibid, Bk XXIX, ch XVII, 290–91.
[86] Cf. Nicholas Quinn Rosenkranz 'Federal Rules of Statutory Interpretation', 115 *Harv L Rev* 2085 (2002).

nor distinguish its exercise by professional judges from its exercise by other executive officers. The only reason Montesquieu could see why English judges were sometimes called on to apply law was the existence of anterior factual disputes that separate actors (juries) had resolved. That there might be doubt or even dispute about the meaning of British law, Montesquieu did not consider at all.

If Montesquieu had understood that the English courts decided questions of law, and that their answers to those questions *constituted* law, how would he have categorized that function within his tripartite schema? The question surely answers itself. When judges make law, they exercise legislative power. This has four critical implications for applying his theory of checked separation to the judiciary.

A. *Judicial Lawmaking is Not 'Judging'*

An ultimate appellate body that decides only questions of law does not exercise Montesquieu's power of judging at all. It exercises legislative power to decide the question of law, and it exercises executive power when it applies the law to the parties in dispute. If, on the other hand, the ultimate appellate body were to have jurisdiction to decide questions of fact, that is, jurisdiction to substitute its judgment of facts in dispute, then it would possess Montesquieu's power of judging—indeed, it would possess the whole of that power, for an appellate jurisdiction with respect to any question affords the whole adjudicative power with respect to that question. Checks and balances between Congress and President may be distinguished in this regard, for they require cooperative participation in order for a power to be exercised at all. An appellate check on the power to decide a question is an appropriation of the power to decide, not merely a participation in its exercise. At the American founding, Alexander Hamilton encountered this objection to the proposed constitution's vesting of 'appellate Jurisdiction, both as to Law and Fact', in the Supreme Court.[87] That vesting had 'been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact . . . as an implied supersedure of the trial by jury . . . .'[88] Hamilton responded, somewhat lamely, that the words 'do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts'.[89] Through the seventh amendment, the founding generation swiftly confirmed the limited character of appellate review.[90]

If an ultimate appellate body decides only questions of law, vacating and remanding dubious fact-findings for re-adjudication by separate fact-finders (for

[87] US Const., Art. III §2 cl. 2.
[88] Federalist No. 81: The Judiciary Continued, and the Distribution of the Judicial Authority.
[89] Ibid.
[90] US Const., Amdt. VII: 'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. Cf. *New York Times* v *Sullivan*, 376 US 254 (1964).

example, by juries), then Montesquieu's principle of checked separation is not violated.

B. *Twin-Track Lawmakers Endanger Liberty No More than One-Track Lawmakers*

Montesquieu's reason for favouring separation of legislative and judicial power goes unsatisfied regardless of whether the officer who applies law to disputing parties also participates in a legislative body. Montesquieu's reason for favouring separation was that a rule-making judge could change the rules upon seeing who the parties were, producing an arbitrary outcome. The lesson Montesquieu failed to learn about the common law system is that *any* judge may do this—separation from the legislature does not stop the rules being made up by a judge through exposition. Thus separation of those who adjudicate law from formal lawmaking bodies is pointless. Disputing parties have no reason to prefer rules made up by a judge who does nothing else over rules made up by a judge who moonlights in a legislature. In either case the change is retroactive. And either case presents an equal risk of unprincipled discrimination, against which other constitutional safeguards may be necessary. A judge may be as likely to change the rules mid-stream through exposition, and can do so just as readily, whether he also legislates in another way or not.

The best protections from invidiously discriminatory adjudication are recusal rules and the doctrine of precedent ('what I decide today applies to similar stories tomorrow'). A repeat-playing adjudicator need be no less subject to recusal rules, and is no less subject to the doctrine of precedent, because he happens to help make law in a different way (namely, by enacting legislation) in his spare time. Because formal enactment of legislation is not subject to the doctrine of precedent, however, it is an inappropriate vehicle for adjudication, and wise constitution-writers would proscribe its use for that purpose.[91] The doctrine of precedent is what remains of the pre-realist vision of 'fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe'.[92]

Checks and balances promote liberty because they are fashioned on an assumption about human nature that we intuitively and empirically know to be sound. The assumption is that every political actor will seek to maximize his own political influ-

[91] US Const., Art. I § 9 cl. 3; § 10 cl. 1. (Both Congress and state legislatures are prohibited from enacting bills of attainder.)

[92] I Blackstone, above n 10, ch 7, 259: 'Were it [the judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe'. Blackstone elsewhere argued that if 'the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's [sic] own independence, and therewith of the liberty of the subject' (ibid, ch 2, 142). But preserving incentives to enact statutory detail does not require that legislators be kept individually uninvolved in judicial (or other executive) lawmaking. The mere fact that some participants in the legislative enactment process may later participate in judicial (or other executive) exposition of laws does not deprive the legislature as a whole of incentive to enact detailed provisions. Even where the legislature *qua* legislature is empowered to supervise judicial (or other executive) lawmaking, today's legislators still maximize their collective influence on the law by corralling the effective allocation of expository lawmaking power to their successors and by denying those successors precedent for broad delegation.

ence. That assumption is less sordid than it may seem. We draw it first from our own palpable need to have our lives seem as meaningful to us as possible. On that assumption, a dual-track (judicial and legislative) lawmaker has equal incentive to respect *stare decisis* in his judicial capacity as does someone who makes law on the judicial track alone. His incentive is the maximization of his influence on the law.

Every judicial lawmaker maximizes his influence by showing respect for *stare decisis*. Systemic respect for that doctrine is what turns exposition into lawmaking. Regardless of whether or not he also makes law in another way, a judicial lawmaker's expository power turns upon expounding within a system that takes past expositions seriously. Regardless of whether or not he also makes law in another way, a judicial lawmaker will want to maximize his judicial lawmaking power. He does this by promoting through his public reasoning a respect for and deference to *stare decisis* that maximizes the odds of his own expositions being followed. Against this necessary show of respect for *stare decisis*, the influence-maximizing judicial lawmaker will balance his desire to depart from some expositions of his predecessors, a goal he will achieve primarily through dextrous distinguishing and occasionally through the crude mechanism of overruling. That dual-track lawmakers have another way to influence the law may actually make them less inclined to endanger the authority of expositions through 'frequent overruling'.[93] The House of Lords' exercise of appellate jurisdiction certainly comports with this speculation. Until 1966, the Law Lords did not acknowledge that they might ever overrule prior decisions,[94] in striking contrast to the United States Supreme Court's wholesale overruling of *Lochner*-era[95] precedent during the preceding decades.[96] And dual-track lawmakers need be no less able craftsmen of precedent than are solely-judicial lawmakers. As the Law Lords have been for much of their history, dual-track lawmakers may be engaged legislators, who debate merits of legislation and vote on the floor of a legislative chamber, and simultaneously, sophisticated jurists.

C. *Kinds of Power Must be Internally Divided to Prevent Actors from Determining Conclusively the Reach of Their Own Powers*

Separating judges' execution of the law from the executive government matters as much as separating juries' adjudication of facts from that government. Montesquieu did not see this,[97] but Blackstone did:

[93] *Planned Parenthood* v *Casey*, 505 US 833, 866 (O'Connor, Kennedy and Souter, JJ).

[94] *Practice Direction (Judicial Precedent)* [1966] 1 WLR 1234 (HL): 'Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so'.

[95] *Lochner* v *New York*, 198 US 45 (1905).

[96] See, e.g. *West Coast Hotel Co.* v *Parrish*, 300 US 379 (1937) (overruling *Adkins* v *Children's Hospital*, 261 US 525 (1923)); *United States* v *Darby*, 312 US 100 (1941) (overruling *Hammer* v *Dagenhart*, 247 US 251 (1918)); *Brown* v *Board of Education*, 347 US 483 (1954) (effectively overruling *Plessy* v *Ferguson*, 163 US 537 (1896)).

[97] Consistent with his praise for the English separation of fact-finding from execution and the English assignment of the fact-finding function to juries, Montesquieu observed that 'in monarchies' such as France, it was 'a very great inconvenience' for 'ministers of the prince to sit as judges'. Though '[m]any are the reflections that here arise;,

> For this reason, by the statute 16 Car. I. c. 10. which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from the recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.[98]

Montesquieu's perception that sustainable division of power could occur only along essentialist lines obscured the most important way that dividing and sharing power promotes the liberty of the citizen. Dividing and sharing power among actors may prevent an actor from determining conclusively the reach of his own power, regardless of whether the actor's power is of a law-executing or a lawmaking kind. That result depends upon others possessing the power to supervise and check the actor's exercise of power.

Checks and balances may be participatory or expository. Participatory checks and balances, like a chief executive's decision whether to assent to legislation, a legislature's decision whether to endorse executive appointments, or, indeed, the intra-institutional apportionment of power among members of a legislature or a court, make the exercise of power depend upon concerted action by multiple actors. Expository checks and balances, by which actors expound the laws that confer and limit other actors' powers, may similarly be conditions precedent to action[99] or may be triggered by *ex post* challenge to that action. *Ex post* exposition is lawmaking in the course of execution, but the liberty of the citizen is directly promoted by separating that expository lawmaking-in-execution from the lawmaking and executive powers that are the subject of exposition. The critical liberty-promoting criterion for separation is not whether powers differ in *kind*, but whether apportionment will prevent actors from conclusively determining the reach of their own powers.

If the adjudicator of disputes between the executive government and the citizen were not separate from the executive government, then that government would conclusively determine the reach of its powers, and could do as it pleased. If the adjudicator of disputes concerning the reach of a legislative body's powers

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Montesquieu chose only to mention one, and it was not the critical issue of conflict-of-interest: 'There is in the very nature of things a kind of contrast between the prince's council and his courts of judicature. The king's council ought to be composed of a few persons, and the courts of judicature of a great many. The reason is, in the former things should be conducted and undertaken with a kind of warmth and passion, which can hardly be expected, but from four or five men who make it their sole business. On the contrary, in courts of judicature a certain coolness is requisite, and an indifference, in some measure, to all manner of affairs'. Montesquieu, above n 1, Bk VI ch VI, 91. The closest Montesquieu came to the conflict-of-interest point was in observing that the monarch should not *personally* adjudicate: 'In monarchies, the prince is the party that prosecutes the person accused, and causes him to be punished or acquitted; now were he himself to sit upon the trial, he would be both judge and party. . . . Farther, by this method, he would deprive himself of the most glorious attribute of sovereignty, namely, that of granting pardon; for it would be quite ridiculous of him to make and unmake his decisions: surely he would not choose to contradict himself' (ibid, ch V, 88–89).

[98] I Blackstone, above n 10, ch 7, 260.

[99] The jurisdiction of France's Conseil constitutionnel falls within the formal lawmaking process. See John Bell, *French Constitutional Law* (1992), Section 1.3.

were the legislative body itself, voting as it would to make laws, then the legislative body would likewise conclusively determine the reach of its powers, and could do as it pleased. This is not an objection to members of legislative bodies also exercising judicial lawmaking powers, but merely an objection to those bodies having the particular judicial lawmaking power to expound by simple majority the reach of their own legislation-enacting powers.

In fashioning checks and balances to prevent political actors from conclusively determining the reach of their own powers, constitution-makers ultimately run up against the need in every political order for an ultimate, unsupervised lawmaker—a *constitutional* lawmaker, in other words. Being unchecked, the constitutional lawmaker is omnipotent. But that constitutional lawmaker may be configured to minimize the risk it poses to liberty.

D. *Delegations of Any Kind of Power Can and Should be Supervised*

The constitutional source of judicial lawmaking power has a capacity, and perhaps should be understood to have an obligation, to supervise those to whom it has delegated that judicial lawmaking power.

5. *The British Reforms Reconsidered*

Since the Judicature Acts of 1873–75, the English courts have been unambiguously the creatures of legislation. Their power to decide questions of law, and thus to make law, is a delegated lawmaking power, and the delegating lawmaker is Parliament. In expounding law, judges do not fulfil a function separate from lawmaking, but rather, they act as the lawmakers' agents, as needed, in the course of applying law.[100] If the lawmakers could have provided in the text of their law whatever detail the judges' exposition adds, should not the lawmakers also supervise the judicial addition,[101] and edit it where necessary?

The framework for analysis, then, is not separation of *kinds* of power, for the enquiry concerns two subspecies of the same kind of power, two methods of *lawmaking*—formal enactment versus precedent-based elaboration, whether the latter be by reference to exogenous authoritative texts or by reference to texts authoritatively generated within the judicial system. For purposes of its *lawmaking* character, the propensity of adjudication to resolve a dispute between particular parties is irrelevant—an advisory jurisdiction within the courts would raise the same issue. And the issue is the proper method of supervising a delegation of lawmaking power.

[100] A 'faithful agent' characterization of British judges' role is more apt than such a characterization of their American counterparts' exercise of power to interpret statutes, for the Americans receive their expository power not from Congress but directly from 'the People' through Article III of the Constitution. See Section 6 infra. Cf. William N. Eskridge 'All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation', 1776–1806, 101 *Colum L Rev* 990 (2001); John F. Manning 'Textualism and the Equity of the Statute', 101 *Colum L Rev* 1 (2001).

[101] See Nicholas Quinn Rosenkranz, above n 86.

When Parliament delegates lawmaking power to another body, may it also assign into third hands a power to supervise exercise of the delegation? That is, effectively, what Parliament did in 1876 when it confirmed the House of Lords' ultimate appellate jurisdiction atop the newly-reorganized judiciary.[102] And that is what Parliament has long done in relation to other delegations of lawmaking power. When Parliament delegates power to make regulations, ordinances, and by-laws to subordinate agencies and corporations, it often assigns a supervisory power to the monarch (acting, of course, on the advice of ministers who hold the confidence of Parliament)[103] or even to the holder of a particular ministerial office.[104] The supervisor is normally empowered to disallow exercises of the delegated lawmaking power, but there is no reason in principle why she may not be empowered to substitute her own judgment for that of the primary delegate.

Rather than leave supervision of delegated lawmaking solely to Parliament's own cumbersome legislative process, Parliament may assign the task of scrutiny to particular persons who are more directly accountable than is the delegate lawmaker. In the case of lawmaking delegation to executive agencies and corporations, the usual supervisor is a member of Parliament who has been appointed to the ministry because she holds the confidence of Parliament. In the case of lawmaking delegation to the courts, the supervisor is a committee of Parliament, the members of which were appointed to the House of Lords because of their suitability to supervise judicial lawmaking. Their appointment by the monarch reflected a judgment of suitability made by ministers who have Parliament's confidence.

Under the Human Rights Act 1998, the British judiciary is obliged '[s]o far as it is possible to do so' to construe legislation 'in a way which is compatible' with the guarantees of the European Convention on Human Rights.[105] Moreover, the higher courts are empowered to declare acts of Parliament incompatible with the Convention,[106] and such declarations permit ministers to remedy the incompatibility by amending the legislation.[107] In proposing to remove the House of Lords' appellate jurisdiction, the British Government has observed:

> It is essential that our systems do all that they can to minimise the danger that judges' decisions could be perceived to be politically motivated. The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues and more aware of the anomaly of the position whereby the highest court of appeal is situated within one of the chambers of Parliament.[108]

[102] Appellate Jurisdiction Act 1876.

[103] See, e.g. s 23 of the Municipal Corporations Act 1882, discussed by Lord Russell of Killowen, CJ, in *Kruse* v *Johnson* [1898] 2 QB 91.

[104] See, e.g. s 115 of the Public Health Act 1848, considered in *Marshall* v *Smith* (1873) 8 CP 416.

[105] Human Rights Act 1998, s 3.

[106] Ibid, s 4.

[107] Ibid, s 10.

[108] Department of Constitutional Affairs Consultation Paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, 2003, ¶2.

The British Government does not explicate the evil of political motivation. The corrupting influence of political patronage is no more likely to be felt when judicial lawmakers sit with life tenure in the House of Lords than when they sit in a separate Supreme Court. If anyone were irrationally to suspect it more, the remedy is education, not the indulgence of delusions.[109] But if by political motivation the British Government means policy choice among competing human interests, then the presence of that phenomenon in the process of judicial lawmaking is not just likely, it is certain. And that is so regardless of institutional design.

The lawmaking to which the courts are summoned by the Human Rights Act differs from the lawmaking in which they have always engaged not in the extent to which it rests on policy choice, but in the extent to which that policy choice is transparent and likely to evoke public controversy. Adjudicating the apportionment of powers under devolution legislation may prove similarly controversial.[110] Yet Parliament, as ultimate lawmaker, retains the capacity to resolve all policy controversy through its own legislative choices.[111] Where Parliament has delegated lawmaking policy choice to the courts, there is no principled reason for Parliament not to supervise courts' exercise of the delegated lawmaking power through a suitably-constituted committee. And that is precisely what Parliament currently does. When Parliament debates whether its laws should change in response to a judicial decision that those laws are incompatible with the judges' exposition of the European Convention on Human Rights, should the judges' presence be viewed as a constitutional infirmity? Might it not be a constitutional strength? In exercising the delegated lawmaking authority to decide questions of law, an ultimate appellate body has no more need of separation from the delegating lawmaker than does a minister in exercising the delegated lawmaking authority to make regulations.[112] Ministers' participation in parliamentary debate is universally considered a virtue, one of the checks on their exercise of delegated powers. Why should judges' participation be viewed differently? The intuitive objection seems to owe more to aesthetics than to political principle.

Montesquieu's only reasons for separating judicial power concerned the protection of litigants. As Lord Hobhouse observed in his supplementary response to the British Government's Consultation Paper, the separation that truly makes a difference to litigants is the separation between judiciary and executive, to the extent that adjudication involves 'making determinations in favour of or against the

[109] Conversely, the corrupting influence of election campaign contributions is no less likely to be felt by judicial lawmakers who have been elected to judicial office than it is by judicial lawmakers who have been elected to legislative bodies. There is no principled reason for a political system not to incorporate equally-elaborate measures to guard against bribery of judges and to guard against bribery of legislators.

[110] See Scotland Act 1998, §§ 33, 102, 103, Sch VI; Government of Wales Act 1998, Sch VIII; Northern Ireland Act 1998, §§ 11, 81, 82, Sch X. Constitutional Reform Act 2005, s. 37(4).

[111] Blackstone even found support in the writings of Sir Edward Coke for the conclusion that Parliament was omnipotent. See I Blackstone, above n 10, ch 2, 156.

[112] See, e.g. *May* v *Beattie* [1927] 2 KB 353 (discussing a minister's regulation-making power, subject to parliamentary disallowance, under the London Traffic Act 1924).

Executive'.[113] *That* is the separation that prevents those who hold the force of the community from conclusively determining their power to use that force against citizens. As his Lordship implied, the right recognized by Article 6 of the European Convention on Human Rights to have rights and liabilities adjudicated by 'an independent and impartial tribunal established by law' really concerns independence from the executive; no body 'established by law' is truly independent of the lawmaker.

6. *The American Experience*

The United States Constitution recognizes as ultimate lawmaker not a Parliament, but 'the People'.[114] Seizing on the Lockean proposition that all government depends on the tacit consent of the governed, who are ultimately sovereign,[115] the American founders contrived to convene the sovereign people for long enough to create an ultimate law.[116] That law purported to divide power along essentialist lines among three branches of a new government. But that law also purported to divide power in a way that Montesquieu and other Enlightenment scholars had thought unsustainable.[117] The powers to make and to execute law were each internally divided between the new government and existing state governments. The durability of that division was doubted, even by its principal proponents at Philadelphia.[118] Its prospects for endurance depended on protective

[113] Lord Hobhouse of Woodborough, Supplementary Response to the Government's consultation paper on Constitutional reform, November 7, 2003, D.1.

[114] US Const., Preamble.

[115] John Locke, *Second Treatise of Government*, above n 8, ch VII ('Of Political or Civil Society'). See also Johannes Althusius, *Politica methodice digesta* (1603); Jean Jacques Rousseau, *Du Contrat social ou Principes du droit politique* (1762).

[116] James Wilson most famously articulated this explanation of the process of deliberation and adoption during a speech at the Pennsylvania Ratification Convention on December 1, 1787, recorded in II Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* (2nd edn, 1836), 443 *et seq.* It was the reason that the Federal Convention referred the proposed constitution to especially-chosen conventions rather than to the state legislatures, in disregard of Art. XIII of the Articles of Confederation: see James Madison's arguments for doing so and the resolution of the convention in II Max Farrand (ed.), *The Records of the Federal Convention of 1787* (2nd edn, 1937), 93 and 476 (Madison's notes) and 665. See also Wood, above n 14, 524–36; Bruce Ackerman, *We the People: Foundations* (1991).

[117] See section 1, above. For Montesquieu, the virtue of a *république fédérative* lay in the extent to which it could overcome disadvantages of the small scale to which he believed republican government was inevitably confined. His conclusion that a truly republican government could endure only over a small space of territory necessarily implied that the federation of republican governments that he had in mind could not amount to a republican government over the whole. See Montesquieu, above n 1, Bk IX ch 1, 145. In a *foedus* (treaty)-based constitutional order, ultimate lawmaking and law-executing powers stayed in the member states, from which the federal actor's powers were delegated. That had been the character of American governance under the Articles of Confederation. Speaking of American governance under the Constitution, Alexis de Tocqueville observed: 'Here the term Federal Government is clearly no longer applicable . . . : a form of government has been found out which is neither exactly national nor federal; but no further progress has been made, and the new word which will one day designate this novel invention does not yet exist'. I Alexis de Tocqueville, *Democracy in America* (Reeve transl., 3rd edn, 1838), 186.

[118] In Hamilton's words: 'The general power whatever be its form if it preserves itself, must swallow up the State powers otherwise it will be swallowed up by them. . . . Two Sovereignties can not co-exist within the same limits' (address to the Convention, June 18, 1787, in I Farrand, above n 116, 287 (Madison's notes).) At the 1787 Convention, Madison was content to say: 'Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts. the people would not be less free as members of one great Republic than as members of thirteen small ones. . . . Supposing therefore a tendency in the Genl. Government

mechanisms set forth in the text that created it. Congress's laws would be supreme over the laws of the states, but to be enacted, those laws had to pass a Senate chosen by state legislatures, and to be successfully executed, those laws had to conform to a life-tenured judiciary's exposition of the Constitution's division of powers.

In the exercise of '[a]ll legislative Powers herein granted',[119] Congress has been held to have no authority even to supervise judicial and other executive exposition of its own acts, for Congress is not the source of the courts' and executive's expository power.[120] That lawmaking power is directly delegated by the People.[121] The People delegated '[t]he judicial Power' to courts in words that clearly embraced deciding questions of law.[122] Congress's power to regulate the Supreme Court's appellate jurisdiction[123] does not let Congress take to itself the exercise of judicial lawmaking power.[124] Under current doctrine, once Congress has settled on the words of an act and has passed that act, Congress loses all control over the law of that act. If Congress is dissatisfied with the executive-implemented and judicially-elaborated law of its acts, recourse lies only through further direct Congressional lawmaking. The Constitution thus has been treated as dividing lawmaking power between the enacters of authoritative texts and those called upon to implement, or to resolve later disputes concerning the meaning of, those authoritative texts. The difference between *ex ante* exposition (through statutory detail) and *ex post* exposition (through regulations or opinions resolving disputes) is not substantive, it is merely contextual.[125] The power of articulating law straddles its formal enactment, but that formality affords a deceptively-plausible criterion for apportioning the power.

Articles II and III of the United States Constitution have effectively been held to achieve not a *separation* of distinguishable *kinds* of power within Montesquieu's tripartite schema, but a *segmentation* of one kind of power among actors. When the Constitution invests Congress with power to enact laws, the President with power to implement laws, and the Supreme Court with power to adjudicate disputes as to law or fact arising under those laws, the document *segments* the exercise of lawmaking power into enactment and expository phases. Its implied definition of legislative power in Article I is narrower than Montesquieu's,

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to absorb the State Govts. no fatal consequence could result'. (June 21, 1787, in ibid, 357–58 (Madison's notes). See also Madison's speech on June 29: ibid 471 (Yates's notes, corroborated by King's notes at 477 and by Madison's modification of his own notes by reference to Yates's at 464 (see n 2 on the page).) In a letter to W.C. Rives dated October 21, 1833, however Madison impugned the accuracy of Yates's notes in relation to that speech: III ibid 521–24.

[119] US Const., Art. I § 1.

[120] See, e.g. *I.N.S.* v *Chadha*, 462 US 919 (1983).

[121] US Const., Art. III.

[122] Ibid, § 2 cl. 2: 'the supreme Court shall have appellate Jurisdiction, both as to Law and Fact'.

[123] Ibid.

[124] See *Plaut* v *Spendthrift Farm*, 514 US 211, 219–223 (1995); Wood, above n 14, 453–63.

[125] Cf. *Cooper* v *Aaron*, 358 US 1, 18 (1958): '[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States'.

though still essentialist, while its implied definitions of judicial and other executive power reach an enquiry that Montesquieu failed to contemplate adequately. The segment of lawmaking power that is exercised when the executive chooses to expound the meaning of uncontested existing law in the course of executing that law is assigned to the executive branch.[126] And the segment of lawmaking power that is exercised in the course of deciding disputes about the meaning of existing law is assigned exclusively to a class of adjudicators. In their hands it is mixed with the fact-finding function that Montesquieu called the power of judging. Article III judges thus have a share in all three of Montesquieu's powers—finding facts, articulating law, and executing the law so articulated on the facts so found. As other actors enjoy pieces of these powers in other contexts, the theory of checked separation is arguably not violated, as Madison and others explained to the founding generation.[127]

A. *Essentialist Separation: Unnecessary and Unaccomplished*

Though the American founders implicitly differed from Montesquieu's classification of legislative, executive and judicial powers, theirs, like his, was essentialist, not institutional.[128] Some commentators have contended that when, for example, Congress explicitly delegates rulemaking power to an executive department, the power so delegated is, *ipso facto*, executive power.[129] Montesquieu conceived that government involved three essentially different activities, and observed that human wellbeing might be promoted by assigning those activities to different actors. Those propositions preceded his written exploration of British institutions. Within the structure of his argument, the configuration of British governance served only to show that his theory of liberty-maximizing government could be implemented. Lawmaking does not cease to be lawmaking because the person who does it wears a label other than lawmaker. Likewise, when the American founders assigned *'[a]ll* legislative Powers', *'the* executive Power' and *'the* judicial Power',[130] to Congress, President, and courts respectively, they did not think that they were being tautologous. They thought they were investing three

[126] Even when law is undisputed, executing it may involve public reasoning about its meaning that effectively expands the corpus of the law. See 'Symposium: Executive Branch Interpretation of the Law', 15 *Cardozo L Rev* 21–523 (1993); Michael Stokes Paulsen 'The Most Dangerous Branch: Executive Power to Say What the Law Is', 83 *Geo LJ* 217 (1994); Steven G. Calabresi 'Government Lawyering: The President, the Supreme Court, and the Constitution', 61 *Law & Contemp Prob* 61 (1998). Judicial choice to defer to such executive expositions (see *Chevron U.S.A.* v *Natural Resources Defense Council*, 467 US 837 (1984)) comports with judicial enforcement of regulations adopted by the executive pursuant to explicit Congressional delegations of rulemaking power.

[127] See Federalist No. 47 (Madison); IV Elliot's Debates, above n 116, 121–122 (Davie, North Carolina). Montesquieu, however, thought liberty would be lost if 'the same person' possessed 'a share in both' the affirmative exercise of legislative power and the affirmative exercise of executive power. See Montesquieu, above n 1, Bk XI ch VI, 179.

[128] See *Hayburn's Case*, 2 US (2 Dall.) 408 (1792).

[129] See *I.N.S.* v *Chadha*, 462 US 919, 951, 953 n 16 (1983) (Burger, CJ, opinion of the Court); Eric A. Posner and Adrian Vermeule 'Interring the Nondelegation Doctrine', 69 *U Chi L Rev* 1721, 1723 (2002). Cf. Larry Alexander and Saikrishna Prakash 'Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated', 70 *U Chi L Rev* 1297 (2003).

[130] US Const., Arts. I §1, II §1, III §1.

powers with differing *a priori* natures in particular institutional actors. The design of those actors did not affect the *natures* of the powers that they received. On the contrary, the natures of the powers to be invested determined the founders' institutional design.[131]

The Constitution's essentialist separation has proved unworkable under even a narrow conception of legislative power that distinguishes explicit Congressional delegation of rulemaking power from executive and judicial exposition of existing law. That distinction, which the Supreme Court's 'segmentation' vision of the Constitution seems to call for, is formal, not substantive, for executive exercise of explicitly-delegated rulemaking power and executive exposition of existing law may each produce identically-worded regulation. In Justice Scalia's words,

> [t]he whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.[132]

Unsurprisingly, the Supreme Court has waved through explicit Congressional delegations of rulemaking power to executive departments and agencies. In doing so, Justice Blackmun observed: '[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives'.[133] Yet the Court has balked at devices deployed by Congress to supervise the conduct of executive departments and agencies.[134] As that mix of outcomes reveals, the Court's concern is not simply *delegatus non potest delegare*, though Congress, unlike the British Parliament, is *de jure* a delegate of lawmaking power. The Court's perplexity derives mainly from the Constitution's essentialist separation of lawmaking from law-executing.[135]

The Supreme Court has failed to articulate coherent principles that define Congress's ability both to delegate lawmaking power and to supervise departments' and agencies' exercise of power. That failure reflects the inaptitude of the Constitution's essentialist separation of powers. Unlike Montesquieu, the more insightful among the American founders understood the lawmaking aspects of execution, albeit especially of *judicial* execution.[136] And unlike Montesquieu, the

[131] See section 3, above.

[132] *Mistretta* v *United States*, 488 US 361, 417 (1989) (Scalia, J, dissenting).

[133] *Mistretta* v *United States*, 488 US 361, 372 (1989) (Blackmun, J, opinion of the Court).

[134] 'Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto'. *INS* v *Chadha*, 462 US 919, 953 n 16 (1983) (Burger, CJ, opinion of the Court).

[135] 'The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government'. *Mistretta* v *United States*, 488 US 361, 371 (1989) (Blackmun, J, opinion of the Court).

[136] See Federalist No. 37 (Madison) and Federalist No. 22 (Hamilton).

American founders thought that dividing lawmaking power might actually work and was worth trying. Yet in fashioning their new federal government, they deferred to Montesquieu's essentialism. Their vision of relevant political principles was inadequately integrated.[137]

Montesquieu had thought himself hamstrung by the indivisibility of sovereignty when proposing a liberty-promoting separation of powers. The American founders' division of legislative and executive powers between national and state governments defied claims that those powers could not be internally divided. Yet if those powers *could* be internally divided, then every division of powers could have been directly keyed to promoting liberty and the rule of law. Every division of powers could have been directly designed around the simple criterion that political actors should not conclusively determine the reach of their own powers.

Comparative constitutional experience since 1787 demonstrates that an essentialist separation between all lawmaking on one hand and all law-executing on the other is neither sufficient nor necessary to promote liberty and the rule of law. Moreover, such a separation is not actually attainable. Founding era constitutive documents, such as the Massachusetts Constitution of 1780, proclaimed an essentialist principle that was both impossible and a false fit for the object they sought to achieve,[138] and Montesquieu was the culprit. Liberty and the rule of law are, however, served by any and all checks and balances that minimize opportunities for political actors to determine conclusively the reach of their own powers. Those values are furthered, not undermined, by Congress's deployment of devices less cumbersome than formal enactment to supervise the exposition of its existing acts. The extent of intra-institutional checking and balancing within a multi-member, multi-chamber legislature supports letting Congress supervise exercise of the expository lawmaking powers that it effectively delegates. Congress could be allowed to supervise at least executive exposition of its acts[139] without simultaneously second-guessing executive and judicial judgments concerning the constitutionality of those acts.

To the extent that liberty and efficiency considerations may be in tension, Congress is aptly situated to strike the best balance between them when deciding whether and how to supplement the Constitution's scheme of checks and balances. Given the American founders' reasons for separating power through the Constitution, constitutionally-mandated checks and balances should be understood as minimum requirements, not as the expression of some optimal and unalterable accommodation of liberty and efficiency interests. The Constitution separates power

[137] Conflation of political theories that were not fully compatible was widespread feature of discourse in Revolutionary and Founding era America. See, e.g. Wood, above n 14 at 450.

[138] Mass. Const. 1780, Part the First, Art. XXX: 'In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men'.

[139] Article III's vesting of the judicial power in one *Supreme* Court more clearly precludes Congress from second-guessing that Court's determinations of matters within the judicial power.

to promote liberty, not efficiency, except so far as the instrumental rule-of-law value serves both ends. Liberty is furthered by any and all Congressional choices to divide Congressionally-delegated powers more than the Constitution requires.

When we call institutions 'legislative', 'executive', and 'judicial', we identify a dominant characteristic of what each institution does, not an exclusive one. In truth, each institution is engaged in both lawmaking and law-executing, and our descriptions have become for us shorthand for the ways in which the respective institutions perform those tasks. Our essentialist descriptions have, however, helped obscure the central importance of subjecting every institution, every political actor, to checks and balances in respect of both the lawmaking and law-executing aspects of what they do.

B. *Lawmaking Segmentation and the Limits of Supervision*

Under Article III, the United States Supreme Court's unsupervised lawmaking power extends beyond the law of Congress's acts to the law of the Constitution.[140] The constitutional text that most firmly undergirds the Court's power to expound constitutional meaning was inserted very late in the life of the Philadelphia Convention, and Madison's notes suggest that its significance was not well appreciated. The draft that had been reported by the Committee of Detail on August 6, more than two months into the Convention, seemed not to empower the Court to decide constitutional questions. The proposed Court's jurisdiction was to extend 'to all cases arising under laws passed by the Legislature of the United States' and to a range of cases and controversies defined by specific subject matter or party, but the Court's power to decide controversies between states did not include power to decide controversies concerning territory or jurisdiction.[141] In respect of those sensitive questions, the Senate was empowered to establish ad hoc tribunals to resolve particular disputes.[142] On August 24, the provision for ad hoc tribunals was struck out as, in John Rutledge's words, 'rendered unnecessary by the National Judiciary now to be established',[143] and on August 27, three weeks before the convention's conclusion, 'Docr. Johnson moved to insert the words "this Constitution and the" before the word "laws"'.[144] Madison's notes then record the following:

[140] Cf. The executive's power to expound the law of the Constitution in the course of deciding how to act: see Frank H. Easterbrook 'Presidential Review', 40 *Cas W Res* 905 (1990); 'Symposium: Executive Branch Interpretation of the Law', 15 *Cardozo L Rev* 21–523 (1993); Gary Lawson and Christopher D. Moore 'The Executive Power of Constitutional Interpretation', 81 *Iowa L Rev* 1267 (1996); Dawn E. Johnsen 'Presidential Non-enforcement of Constitutionally Objectionable Statutes', 63 *Law & Contemp Prob* 7 (2000). *That* constitutional law-making power is supervised by a combination of electoral accountability and judicial review, backed by Congress's power of impeachment.

[141] II Farrand, above n 116, 186–87 (Madison's notes).

[142] Ibid, 183–85.

[143] Ibid, 401 (Madison's notes).

[144] Ibid, 430 (Madison's notes). The convention also agreed that day without recorded discussion to a motion by Madison and Gouveneur Morris explicitly adding controversies to which the United States was a party to the Court's jurisdiction.

> Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—[145]

Whatever did this mean? Perhaps it provides early support for a political question doctrine.[146] But a distinction between constitutional concepts suitable for judicial exposition and constitutional concepts inherently unsuitable for such exposition would surely have provoked more discussion. If his audience thought Madison was proposing a *subject*-based restriction on judicial expository power, why did they not debate and settle upon a textual formula to express that restriction? More likely, given Madison's regard for Montesquieu's characterization of powers, the reference to 'Judiciary nature' was meant and understood to condemn advisory opinions. The text's explicit confinement of jurisdiction to 'cases' and 'controversies'[147] supported 'it being generally supposed'[148] that such opinions were not authorized. Madison probably meant that the federal courts should be limited to adjudicating genuine disputes between parties-in-interest.

Why was Madison averse to advisory opinions? An instinctive objection may have been to the judicial lawmaking that they involve. Advisory opinions concerning the law of the Constitution would be beyond the power of Congress to remedy.[149] But the lawmaking that occurs when a court gives an advisory opinion is substantively identical to the lawmaking that occurs when a court publishes its reasons for deciding actively-disputed questions of law the way it did. In each case, the court makes law through exposition. Exposition is elaboration, and elaboration is lawmaking. The abstract form of advisory opinions just renders their lawmaking character more transparent. What evil did Madison think he was guarding against when he sought to limit judicial exposition of the Constitution to adjudicating genuine disputes? Did he think that he was somehow confining the consequences of judicial exposition to the parties in dispute? Had the issue of who should have ultimate responsibility for expounding the Constitution come to the Convention's attention earlier in the proceedings, perhaps the delegates' reflection on the subject would have prompted them to establish an appellate check on and supervision of the

[145] Ibid.

[146] See *Coleman* v *Miller*, 307 US 433 (1939); *Nixon* v *United States*, 506 US 224 (1993). Cf. *Baker* v *Carr*, 369 US 186 (1961).

[147] US Const., Art. III § 2 cl. 1.

[148] II Farrand, above n 116, 430 (Madison's notes).

[149] Advisory opinions generated within the executive that establish norms governing executive conduct are, by contrast, subject to supervision through judicial review.

constitutional lawmaking that is an inevitable concomitant of deciding constitutional disputes.[150]

During the public debate over ratification in New York State, Alexander Hamilton robustly countered the complaint that such a check was needed. His antifederalist opponents had identified the constitutional flaw.

> The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.[151]

Hamilton responded that legislators who had passed unconstitutional laws would not be 'disposed to repair the breach in the character of judges'.[152] That fact certainly counted against letting a legislature supervise constitutional review of its own laws. A simple legislative override would indeed subvert 'the general theory of a limited Constitution'.[153] But did it follow that life-tenured judicial lawmakers were best left unsupervised? Under the general theory of a limited Constitution, would those judicial lawmakers not then be rendered constitution-makers?

Hamilton deprecated the enquiry. The 'supposed danger of judiciary encroachments on the legislative authority' was 'in reality a phantom'.[154] In his famous phrase, the judiciary would 'have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments'.[155] This was, of course, nonsense, and his ensuing citation of Montesquieu a mischievous exploitation of the French theorist's inadequate understanding of common law adjudication and of the doctrine of precedent. Unless in a perverse or nullifying mood, *juries* have only judgment, for their factfinding has no significance beyond the outcome for the parties before them, and the legal rules applied to their factfinding are exogenously established. *Judges* have will. Through their articulations of legal principle and their exposition of authoritative

[150] Though judicial supremacy flowed from the Constitution's creation of an unchecked judiciary, that consequence was far from universally appreciated at the Founding. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Larry D. Kramer 'Foreword: We the Court', 115 *Harv L Rev* 4 (2001); Barry Friedman 'The History of the Countermajoritarian Difficulty, PartOne: The Road to Judicial Supremacy', 73 *NYUL Rev* 333 (1998).

[151] Federalist No. 81. See also Brutus, Nos. 12 and 15, in II Herbert J. Storing, *The Complete Antifederalist*, 423–6, 437–442 (1981).

[152] Ibid.

[153] Ibid.

[154] Ibid.

[155] Federalist No. 78.

legal text they will the law into being, as surely as legislators do when they vote on bills. A common law adjudicator may wield the doctrine of precedent very wilfully indeed. And in a system that apportioned legislative and executive powers within a national government and between that government and state governments, the only alternative to according force to judicial exercises of will would be civil war. The system deferred to no other will for determining the reach of Congress's power. Each of the branches and levels of government would have their capacity to act held hostage to the will of the judges, unchecked.[156] Only through the appointments process and the impeachment power could holders of elective office influence the shape of the judicial will, and those were hardly apt vehicles for the task. Anyone who understood the nature of common law adjudication, particularly application of the doctrine of precedent to judicial interpretation of authoritative texts, should have realized that they were establishing an institution where it would someday be said: 'five votes can do anything around here'.[157]

Hamilton belittled the fear that 'courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature'. The possibility 'if it prove any thing, would prove that there ought to be no judges distinct from that body'. The judges' constitutional duty would be 'to declare all acts contrary to the manifest tenor of the Constitution void'.[158] But Hamilton offered no criteria for interpretive orthodoxy, for legitimate exposition, beyond his allusion to 'the manifest tenor' of the Constitution. His examples of constitutional limitations[159] that judges would conclusively apply were, like those given by Marshall in *Marbury* v *Madison*,[160] familiar and apparently definite concepts in respect of which judicial mis-application of text would be so clear as to be bad behaviour warranting impeachment. Of the judicial power to exercise will in resolving textual vagueness and ambiguity, Hamilton said nothing. If the tenor of the Constitution were not 'manifest', if it were truly disputed, then Hamilton offered no reason to think that it would be determined by anything but an exercise of judicial will. In arguing for lifetime judicial appointments, Hamilton claimed that great legal expertise was required for appointment, because '[t]o avoid arbitrary discretion in the courts, it is indispensable that they

[156] Even a libertarian claim that unsupervised judicial exposition of constitutional norms will necessarily produce fewest operative laws—if any of three separate sets of minds think a possible law would violate constitutional norms, then no such law will be enacted *and* successfully executed — fails in relation to any constitutional scheme under which the judicial power extends to expounding constitutional *duties to act* and enjoining compliance. See, e.g. the *German Abortion Cases*, 39 BverfGE 1 (1975) and 88 BverfGE 203 (1993) (Constitutional Court of the Federal Republic of Germany) (translated excerpts in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, 1997) 335–356); the *Hungarian Benefits Case*, 4 E. Eur. Case Rep. Const. L. 64 (1997) (Constitutional Court of Hungary).

[157] Attributed to Justice William J. Brennan: Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* (1996), 6; James E. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Supreme Court* (1995), 54, quoting Nat Hentoff 'Profiles: The Constitutionalist', *New Yorker*, March 12, 1990, 45, 60.

[158] Federalist No. 78.

[159] Ibid: 'no bills of attainder, no ex-post-facto laws, and the like'.

[160] 5 US (1 Cranch) 137, 179 (1803). Marshall's deft self-denial of power to issue writs of mandamus asserted in the mildest manner imaginable the Court's capacity to determine conclusively the reach of its own powers (ibid, 173–180).

should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and . . . the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them'.[161] Like Montesquieu, but without Montesquieu's excuse, Hamilton, and later Marshall, publicly characterized judicial application of law as syllogistic.[162]

At the Philadelphia Convention, Hamilton had advocated lifetime appointments for obvious policymakers, namely the president and members of the upper chamber, aspiring to imitate Montesquieu's account of the British system as closely as possible. At Philadelphia he had been alone in seeking such a New World aristocracy.[163] But through the judicial branch, he was able to achieve precisely what he had sought—a power of almost-ultimate lawmaking for an elite cadre of lifetime appointees.

How might the People, as true ultimate lawmakers, have established a constitutional supervisor for the courts? The House of Lords' appellate jurisdiction was the model of their heritage, and should have seemed more relevant to the American situation then than it does now. During the ratification period, James Iredell showed that he understood British constitutionalism to have an ultimate common law foundation,[164] reflecting the view expressed in the 17th century by Sir Edward Coke that the authority of statutes was itself a principle of the common law, a principle that might yield to other fundamental principles of common law in some circumstances.[165] The House of Lords' appellate check on the power of common law courts to expound the governing principles of the British constitution could thus have been seen as true counterpart to any American appellate check upon the Article III courts' power to expound the governing principles of the United States Constitution. But an appellate check on the power to decide a legal question is an appropriation of the expository power, not merely a participation in its exercise. Conferring ultimate appellate jurisdiction on a legislative body, or on a representative subset of that body, inevitably

[161] The Federalist No. 78.

[162] Pre-realist visions of the common law denied the centrality of judicial will to formation of that law. Common-law adjudication was supposed to be constrained by judicial deference to an ethereal corpus of principle revealed, not constituted, by the historic cumulation of judicial writings. (See *Black and White Taxicab and Transfer Co.* v *Brown and Yellow Taxicab and Transfer Co.*, 276 US 518, 533 (1928) (Holmes, J); *Guaranty Trust Co.* v *York*, 326 US 99, 101–102 (1945) (Frankfurter, J).) Appealing to that Platonic vision, Hamilton contended that judicial exposition of a new, and newly-authoritative, text would somehow be congruently constrained.

[163] I Farrand, above n 116, 288–89. '"The gentleman from New York is praised by all, but supported by no gentleman", observed Dr. William Samuel Johnson' (Charles Warren, *The Making of the Constitution* (1928), 228 (citing King's notes)).

[164] In 1787, Iredell wrote the following in private correspondence: 'Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people' (Griffith J. McRee, *2 Life and Correspondence of James Iredell* (1857), 172 (emphasis in original)). See Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in *Jesting Pilate* (1965); 203–213; Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72.

[165] See *Dr. Bonham's Case*, 8 Coke Rep. 107 (1610).

renders it judge of its own powers, and thus functionally omnipotent. That is no objection to the jurisdiction of the House of Lords, because Parliament's omnipotence has become the grundnorm of British governance anyway. The British, through centuries of practice, established Parliamentary supremacy. The Americans, with one round of voting, established Judicial supremacy. Montesquieu would have shaken his head at both outcomes.

Could the founding generation have created a government in which three branches were kept truly co-equal?[166] Yes. But to do so they would have had to establish a mechanism for supervising judicial lawmaking more closely and consistently than they and their successors could ever have hoped to do through Article V's amendment procedure. No representative subset of Congress, voting by simple majority, was suitable for the task. But perhaps a superset, or a subset voting by super majority, would have been. The Constitution at the Founding called for state legislatures to choose the Senate.[167] It also enabled three quarters of the states to amend its terms.[168] A super majority of three quarters of the Senate might have been thought a sufficient proxy for the amendment process to serve as a safeguard against judicial overreaching. The People, having delegated judicial lawmaking power to the courts, could have supervised the exercise of that power through an appropriately-fashioned super majority of their representatives in the other branches of government.[169] Just as the British Parliament, through the agency of the Lords' appellate committee, closely and consistently supervises those to whom it has delegated judicial lawmaking power , so the American People, through the agency of a super majority of their representatives, might have more closely and consistently supervised those to whom they had delegated judicial lawmaking power. Had a Senate super majority been so empowered, the evolving appellate procedures of the House of Lords would probably have been emulated, including its shift toward use of committees and its publication of reasoning.[170] Though reversal by such a super majority would have been rare, the risk of its occurrence might well have had a salutary influence on the temperament of America's judicial lawmakers.

[166] Angered by Chief Justice John Marshall's conduct of Aaron Burr's treason trial, Thomas Jefferson wrote: 'If a member of the Executive or Legislature does wrong, the day is never far distant when the people will remove him. They will see then and amend the error in our Constitution, which makes any branch independent of the nation. They will see that one of the great co-ordinate branches of the government, setting itself in opposition to the other two, and to the common sense of the nation, proclaims immunity to that class of offenders which endeavours to overturn the Constitution, and are themselves protected in it by the Constitution itself; for impeachment is a farce and will never be tried again. If their protection of Burr produced this amendment, it will do more good than his condemnation would have done' (letter to William Branch Giles, April 6, 1807, excerpted in V. Dumas Malone, *Jefferson and His Time (Jefferson the President Second Term 1805–1809)* (1974), 305).

[167] US Const., Art. I § 3 cl. 1.

[168] US Const., Art. V.

[169] See John O. McGinnis and Michael B. Rappaport 'Supermajority Rules as a Constitutional Solution', 40 *Wm & Mary L Rev* 365 (1999).

[170] See Stevens, above n 40 at 12.

7. *Conclusion*

In the century that followed Montesquieu's publication of *The Spirit of the Laws*, the principle of British parliamentary supremacy progressed from widely-held constitutional suspicion to universally-acknowledged constitutional verity. Montesquieu's vision of checked separation, as a description of the British system, proved inapposite. Yet the institutional guise of separation remains in the respect that Montesquieu cared about most, namely, that between executive and legislature. If an un-bookish alien were invited to walk around the government buildings of London and Washington and were then asked which government looked more likely to conform to Montesquieu's theory, he might still pick the British, whose ostensible chief executive continues to occupy a vast palace, her crest adorning the great executive office buildings of Whitehall, while the American CEO sits in a southern plantation house. Britain's new Supreme Court, or rather, the grand and freestanding structure it will doubtless occupy, will further assist in misleading our alien visitor. But it will not separate power in any way that Montesquieu would have valued, nor in any way that we should value now.