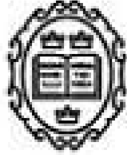

OXFORD JOURNALS
OXFORD UNIVERSITY PRESS

The Zenith of Separation of Powers Theory: The Federal Convention of 1787

Author(s): Ann Stuart Diamond

Source: *Publius*, Summer, 1978, Vol. 8, No. 3, Dimensions of the Democratic Republic: A Memorial to Martin Diamond (Summer, 1978), pp. 45-70

Published by: Oxford University Press

Stable URL: https://www.jstor.org/stable/3329709

REFERENCES
Linked references are available on JSTOR for this article:
https://www.jstor.org/stable/3329709?seq=1&cid=pdf-reference#references_tab_contents
You may need to log in to JSTOR to access the linked references.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Oxford University Press is collaborating with JSTOR to digitize, preserve and extend access to *Publius*

JSTOR

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

The Zenith of Separation of Powers Theory: The Federal Convention of 1787*

Ann Stuart Diamond
American Enterprise Institute for Public Policy Research

Power naturally grows . .. because human passions are insatiable. But that power alone can grow which already is too great; that which is unchecked; that which has no equal power to control it.[1]

Government regarded as a piece of machinery, instead of a natural growth, is naturally valued in proportion to its capacity for favouring progress. The weights are represented by the different powers in the system. The ruler . . . is always trying to increase the strength of the executive, and the people to diminish it. The problem is to equalise the two forces . . . Power, wealth, and position tend to concentrate themselves; but a skilful legislator may reduce the conflict to a perpetual drawn battle, and a perfect constitutional government will resemble the celebrated situation in Sheridan's 'Critic' where the three duellists each threaten each other with drawn swords, and each is unable to strike. *The ideal state is a permanent deadlock.*[2]

Everyone knows how seldom men think exactly alike on ordinary subjects; and a government constructed on the principle of assent by all its parts, would be inadequate to the most simple operations. The notion of a complication of counterchecks has been carried to an extent in theory, of which the framers of the constitution never dreamt.[3]

[1] John Adams, quoted at the head of Chapter 1 in Richard Hofstadter, *The American Political Tradition* (New York: Vintage Books, 1959), p. 3.

[2] A paraphrase of Delolme by Sir Leslie Stephen, in *History of English Thought* (Harbinger Books edition; New York: Harcourt, Brace & World, Inc., 1962) II, pp. 179-180. Emphasis mine.

[3] Justice Gibson, *Eakin* v. *Raub*, 12 Sergeant and Rawle (Pennsylvania Supreme Court) 330 (1825) at 351.

**This paper was originally delivered at the October 1973 Midwest meeting of the Eighteenth Century Studies' Society. I wish to thank Charles Hyneman, George Carey, Robert Russell, and William Schambra for reading the manuscript and making helpful comments. The debt which the entire enterprise owes to the scholarship and teaching of Martin Diamond is incalculable. On this point, the footnotes as originally written long before his untimely death are preserved.*

©PUBLIUS, The Journal of Federalism, The Center for The Study of Federalism, Summer 1978

This content downloaded from 149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

I

The Federal Convention of 1787 is the supreme moment in the history of separation of powers, both as a theory and as an arrangement of government. Never before had men tried to construct *de novo* a government of such principles.[4] The previous example the world had of such governments, the government of Great Britain, was the result of chance and growth. For this reason the debates of the Convention are not only invaluable to the study and understanding of the separation of powers, but they are the logical beginning point for a profound consideration of the true meaning and the significance of this important idea. The principles held by this remarkable company of men, the issues raised, and the problems solved, cover the total range of the necessary inquiry into separation of powers.

Misconceptions of the separation of powers are coeval with its zenith. Some commentators, even the most thoughtful, believe that separation of powers is a sacrifice of the capacity to govern in order to secure more important (to the Framers, or to James Madison) ends. Those ends are described variously as the securing of liberty, antimajoritarian, or protecting against the tyranny of government. A corollary to this view is the opinion that separation of powers is synonymous with checks and balances, and in some modern commentators, the opinion that the American Constitution creates a government of branches locked in perpetual tension, a system of deadlock. The understanding that I present here is quite different.

The separation of powers was designed to secure liberty by entrusting to the general government vast powers, made safe to the people by dividing them, according to function, among three branches. The Framers understood that liberty was as much endangered by too little government as by too much. This division of powers was to make possible their effective use and to this end constitutional means (checks) were provided for each political branch (legislative and executive).[5] The purpose of a check, as we shall see, was to *prevent* deadlock, not to create it. The three branches were quite unequal in powers, and balance, in the American constitutional system, was confined to the legislative branch: bicameralism.

[4] Although most state governments after independence embodied a form of separation of powers, they were not created from scratch, but consisted of modified colonial institutions, with an occasional new one added.

[5] I use political here as did the Framers.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

Perhaps the misconceptions are due to John Adams and his writings on balanced government (and his self-admitted confusion), or to Thomas Jefferson and his misunderstanding of the design of the Constitution:

> Our country has thought it proper to distribute the powers of its government among three *equal* and independent authorities constituting each *a check upon one or both of the others* in all attempts to impair its constitution . . . The Constitution 'meant that its co-ordinate branches should be checks upon each other.'[6]

Certainly it is both instructive and discouraging that James Madison himself was not able, at the Federal Convention, to convince most of his fellow delegates with his own, deeper knowledge of the imperatives of the separation powers theory, in the several extensive discussions of the proposed Council of Revision. His failure is a measure of the difficulty faced by all students of this theory in American Constitution.

I will concentrate here on two essential errors of understanding or analysis that have been made since 1787. The following summary of them is simplified and does not attempt to be comprehensive but rather to suggest the persistent difficulties. Although I treat them as distinct views they are often found in the same commentators.

THE ADAMS FALLACY

The first difficulty is that of treating separation of powers in the American political system as a form of balanced government. Balanced government is a venerable conception which teaches that liberty and stability are best protected by a government in which all of the powers of government are divided between the three orders or estates in society, the royalty, the nobility, and the commons. Two elements are crucial for our purposes here: the three orders must genuinely exist in the political community, and secondly, there is no concern with dividing the powers of government according to *function*. Many Americans agreed that this excellent government was to be found in England, but all at the Federal Convention also agreed that it could not be transplanted to America, because the necessary conditions were lacking and the "genius of the people" was against it.[7] A good deal of the confusion can doubtless be accounted for by the fact that in England at this time the arrangement of government

[6]Quoted in Henry S. Commager, *Majority Rule and Minority Rights* (Gloucester, Mass.: Peter Smith, 1958), pp. 31, 32. Emphasis mine.

[7]Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1967), pp. 70-77, 273-282.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

was undergoing a transition from balanced government to separation of powers. John Adams embodies this misunderstanding and indeed, may be the reason for its persistence in students of the American system. Adams' work, *History of the Principal Republics in the World*, "A Defense of the Constitutions of the Government of the United States of America," was published in 1786 and is wrongly supposed to have influenced deliberations at the Convention.[8] Adams himself never clearly made the distinction between a balanced government and the separation of powers in the American Constitution; furthermore he was aware of his difficulty, according to the historian, Bernard Bailyn. He writes that Adams tried "to define republicanism so as to accommodate the balance of the English constitution without 'either an hereditary king or an hereditary nobility,' " and that Adams concluded he " 'never understood' what a republican government was." Bailyn explains Adams' confusion as due to the fact that "[t]hroughout . . . he was grappling with the problem of recreating the 'equipoised' balance of the English constitution in the circumstances of the American states."[9] This is the heart of the balanced government error, or "Adams Fallacy."

A representative (and exceedingly influential) contemporary example of the Adams Fallacy is Richard Hofstadter's *The American Political Tradition*. His first chapter presents a theory of the principles of the Founding and of the Constitution. This theory consists of the "Fallacy," of the idea that the Framers were basically motivated by a fear of democracy *per se*, and of a description of federalism, representation, and an aristocratic branch of the legislature (the Senate), as devices to check and control various interests. "What the Fathers wanted was known as 'balanced government,' an idea at least as old as Aristotle and Polybius."[10] Adams and his *Defense* are

[8]There is no evidence for this. Yet Richard Hofstadter writes in *The American Political Tradition* (New York: Vintage Books, 1959): "The third advantage of the government the Fathers were designing was pointed out most elaborately by John Adams in the first volume of his *Defense* . . . which reached Philadelphia while the Convention was in session and was cited with approval by several delegates." Hofstadter's verification of this is a quote from a letter of Benjamin Rush "*often in the company of the delegates*" (emphasis mine) praising the book and the diffusion of its excellent principles "among us." Rush was no more a delegate to the Convention than was Adams; although when the latter was in England there are those who think he was present at the designing of this new government. See footnote 12. There is no reference to John Adams or his work at the Convention. The only evidence Hofstadter finds is this letter which does *not* say that several delegates cited Adams' *Defense* with approval. The letter itself can be found in Max Farrand, ed., *The Records of the Federal Convention of 1787*, Vol. III (New Haven: Yale University Press, 1966), p. 33. The letter is quoted in Hofstadter on p. 10.

[9]Bailyn, *Ideological Origins*, pp. 282, 283, fn. 50.

[10]Hofstadter, *American Political Tradition*, pp. 3-17.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

essential to Hofstadter's analysis of the work and the intentions of the Framers at the Constitutional Convention. Among others who have used Adams similarly are Vernon Parrington in *Main Currents in Modern Thought* (Vol. I), Thomas M. Cooley, *Principles of Constitutional Law* (Chapter VII), and to some extent the popularized account of the Convention found in Catherine Drinker Bowen, *Miracle at Philadelphia*. Hannah Arendt in *On Revolution* tells us that "the separation or the balance of powers" is found as early as Aristotle and Polybius, and she directs us to John Adams for understanding.[11]

I hope it will become clear in this study that separation of powers in the Constitution is not balanced government. But the wistful longing to associate John Adams and his ideas with that towering enterprise—the Constitutional Convention—does not die.[12]

THE DEADLOCK SYNDROME

The second fundamental misconception is represented by the quotation from Leslie Stephen, at the beginning of this article, describing the theories of Delolme. It is an extreme form of a group of theories of the separation of powers whose central characteristic is the notion of deadlock. All of these analyses emphasize checks and balances and pay less attention to the separation of powers as such. Mildly put forward in Andrew McLaughlin, *A Constitutional History of the United States*, this view achieves vitriolic completeness in the work of James McGregor Burns, *The Deadlock of Democracy*. Earlier, Henry S. Commager chastises the Framers thus:

> So fearful were they of governmental tyranny that even where they granted to government certain necessary powers they put obstacles in the way of the effective exercise of these powers. They set up not only boundaries to government but impediments in government. Thus they not only made it difficult for government to invade fields denied to it, but they made it difficult for government to operate at all. They created a system where deadlock would be the normal character of the American government . . . .[13]

[11] Hannah Arendt, *On Revolution* (New York: The Viking Press, 1965), pp. 149-151.
[12] The following appeared in the October 13, 1973 *New Republic* in the TRB column:

> On an impulse I turned to *Miracle at Philadelphia* by Catherine Drinker Bowen, telling how they wrote the Constitution . . . There was James Madison, "no bigger than half a piece of soap," his friends said; they called him Jemmy. There was old Ben Franklin, who met guests under a mulberry tree . . . . There was obstinate John Adams, with his prismatic integrity . . . .

[13] Commager, *Majority Rule*, p. 7.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

One dimension, then, of the deadlock syndrome is the view that excessive fear of tyranny and concern for liberty (especially in the form of property rights) resulted in a government so checked and circumscribed that it cannot function. Secondly there is the somewhat Jeffersonian notion of three equal branches amply armed with checks on each other; a view that depends on the idea that none of the three branches was supreme over the others. Indeed the supremacy of any one branch (especially the legislative) is deemed incompatible with separation. Speaking of the state governments and of the principle of separation of powers in general McLaughlin writes,

> It is true that in some instances, perhaps commonly, they were really desirous of asserting the supremacy of the legislative branch, but the idea of separation and distinction was in some instances brought fairly clearly to light.[14]

An infinite number of attacks on the American constitutional system is based on this analysis, including the charge that it prevents the majority from ruling and amounts to a minority veto on policy, *any* policy. Thus it is used by Robert Dahl in *A Preface to Democratic Theory,* and is found in a benevolent form (in contrast to Dahl), in Alexander Bickel's *The Supreme Court and the Idea of Progress*. This understanding of separation of powers/checks and balances is so widespread that it would be justifiable to say that all those who do not assimilate the theory in the American constitution to balanced government accept the deadlock syndrome: friend and foe alike. Some who see balanced government also see deadlock. One important purpose of this study is to show that every part of the deadlock syndrome is built on an error. Separation of powers theory may well be the most misunderstood part of the Federal Convention's deliberations and of the American Constitution.

The theory, as it emerges in the debates at the Convention, attracts our attention from the beginning, for the Virginia Plan is an outline of such a design for government. In order to arrive at a definition of the theory we must look at the terms of the debate over the form of the proposed government, and at the Virginia Plan in contrast to the then existing Confederal Congress. The Virginia Plan, introduced in the first days of the Convention, proposed a national legislature "impowered to enjoy the Legislative rights vested in Congress," [of the Confederation] a national executive, and a national judiciary.[15] The executive was likewise to have the executive rights

[14] Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: Appleton-Century-Crofts, Inc., 1935), p. 116.

[15] Farrand, *Federal Records of 1787*, I, p. 21.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

vested in Congress. This indicates that to the Framers the Confederal Congress was not a mere "diplomatic body" as John Adams had written, but some sort of government, if impotent. And this impotence was directly related to unseparated powers. Secondly, the language of the Virginia Plan refers to 'rights' which were commonly understood as legislative or executive *by their nature*, and not to undifferentiated governmental powers which can be defined one or the other way depending on convenience or utility. Thus we find a rejection of one sort of *government* for another—a preference for the separation of powers structure for what it thereby makes possible. For there were other alternatives, and therefore the choice of separation of powers was quite deliberate.

One significance of the willingness to make this change is expressed at the Convention in these words of Pierce Butler on May 30:

> (After some general observations) he concluded by saying that he had opposed the grant of powers to Congress heretofore, because the whole power was vested in one body. The proposed distribution of the powers into different bodies changed the case, and would induce him to go great lengths.[16]

By contrast, Dickenson proposed amending the present Confederation by considering which legislative powers, which judicial powers, and which executive powers they ought to vest in that body in order to make it "adequate to the objects for which it was instituted."[17] Fundamentally, the problem with the Confederal Congress was not that it lacked power, but that it could not use the power it had. Madison argues in *Federalist* No. 38 that the states had trusted the Confederal Congress with dangerous power—partially because it resided in a single body.[18] Charles Pinckney's draft of a plan for a new government, apparently presented to the Convention on May 29, said:

> In a gov't where the liberties of the people are to be preserved and the laws well administered, the executive, legislative and judicial should ever be separate and distinct . . . The Confederation seems to have lost sight of this wise distribution of the powers of government and to have concentred the whole in a single unoperative body, where none of them can be used with advantage or effect.[19]

[16] Ibid., I, p. 34.
[17] Ibid., I, p. 42.
[18] Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Clinton Rossiter (New York: The New American Library, 1961), pp. 238-240. See also Randolph's speech in Farrand, *Federal Records of 1787*, I, p. 256.
[19] Farrand, *Federal Records of 1787*, III, p. 108.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

We can see that the preference for the separation of powers structure is due not only to the desire to have and to preserve liberty, but so to constitute a government with great powers that it can effectively legislate, and its laws can be "well-administered." A careful reading of the debates does not support the view that separation of powers was for the purpose of frustration and rendering the government inoperative (as was the Confederal Congress) solely in order to protect liberty. Both Madison and Pinckney contrast separation of powers with the Confederal Congress in regard to the greater possibilities for the use of powers in the former arrangement, and not, as the common understanding goes, as a means for checking and thwarting the *exercise* of powers.

For greater clarity of understanding I propose to discuss separation of powers apart from checks, and then consider a third category, balance. I believe this will be truer to the Framers' conception.[20] The problem can now be defined more precisely: What was the meaning of separation of powers as understood and applied at the Federal Convention; how is that theory related to a system of checks; to what extent must we accept the traditional association of check with balance?

II
SEPARATION OF POWERS IN THEORY

An important preconception which was part of the separation of powers theory at the Convention was the conviction that government could be divided into three functional powers: legislative, executive, and judicial. No one at the Convention denied this point of view; it might be described as a given, as part of the intellectual baggage which every delegate brought with him to Philadelphia. The view included the opinion that certain powers were *by their nature* executive, legislative, or judicial. Not all agreed which powers were which, but none disagreed with the basic outlook. One can certainly make a case that the conception of a functional division of powers does not require certain powers to be intrinsically of one or the other type. Nevertheless this view was commonly held by the Framers, and proved to be a handicap to working out separation of powers in

[20] An illuminating example of the confusion of separation of powers with checks and balances is in the Clinton Rossiter edition of *The Federalist*, just cited. Checks and balances are only mentioned once in the entire *Federalist*, in referring to bicameralism (see *Federalist* No. 9). At the Federal Convention the phrase "checks and balances" does not seem to appear as such at all. Nonetheless, Rossiter had no difficulty in finding nine separate references to it in the *Federalist* papers. This problem will be considered in the third section of the article.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

practice. There was frequent disagreement as to which powers were of what nature, departures from a strict allocation principle had to be explained and justified, and the battle was occasionally lost. But it is essential to understand that the delegates to the Convention passed judgment according to a pure separation theory. This theory was an ideal type by which proposals were judged and then incorporated or rejected.[21]

There were numerous attempts to define powers by their nature. On June 1 James Wilson said:

> He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace etc. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.[22]

Madison also made an attempt to define executive powers and proposed that the Virginia Plan read "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers (not Legislative nor Judiciary in their nature) as may from time to time be delegated by the national Legislature."[23] The section from "and to execute" was rejected as superfluous by the majority of the delegates, leaving in substance the Wilson definition. Wilson's opinion that the powers of war and peace were legislative powers (in addition to the general power of making laws), and, (on September 6) that the power of making treaties, which were to be the laws of the land, also, met with no disagreement.[24]

The issue of the nature of judicial power is a more subtle one and cannot be isolated from the question of what a judiciary, in a separation of powers structure, ought properly to do. Thus the question of what constituted powers of a judicial nature was submerged into the issue of the utility and propriety of involving the judicial branch in legislation before it came before them in the form of a case or controversy. This manifested itself in the recurrent issue of a Council of Revision. The members of the Federal Convention failed to agree

[21] The most important example of such a rejection is the Council of Revision. This was Madison's major defeat at the Convention after the federal issue, and will be considered in detail.

[22] Farrand, *Federal Records of 1787*, I, pp. 65-66.

[23] Ibid., I, p. 67.

[24] Farrand, *Federal Records of 1787*, II, p. 522.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

on the answer, and rejected such a body—which is to say that they opted for a narrower definition of judicial power in their scheme. Yet all agreed that the judicial power meant expounding the laws, defined in Johnson's (contemporary) Dictionary as to explain or to interpret, an important power nonetheless.

In rejecting a Council of Revision the Convention was refusing to involve the judicial power in legislation prior to cases that would arise under general laws. Thus, when President Washington asked the Supreme Court for an advisory opinion, it refused and has maintained that tradition. In addition, it was never proposed at the Convention that the court have a general right of judicial review of national legislation, and hence, never rejected. John Marshall resolved that question in 1803. The paradox is that the rejection of a Council of Revision (on the grounds that it involved the judiciary in policy) opened the way for Marshall's—the Federalist party's—doctrine. Instead of an association of the judiciary in the drafting of sober and constitutionally sound legislation, we have a doctrine (judicial review) which, in its operation, makes the judiciary, instead of the legislature, paramount in our system of the separation of powers. Yet legislative supremacy was clearly the intention of the Framers. I use this language (legislative supremacy) in the sense that it is used by Justice Gibson in *Eakin* v. *Raub,* in the hope of symbolizing all the complexity and subtlety of legislative preeminence in the American Constitutional order. [25]

Independence was a second major problem under the separation of powers theory generally. Madison explained that the departments must not only be separate, they must be and remain, independent of each other. [26] As he understood it, independence made it possible to maintain the separation:

> If it be essential to the preservation of liberty that the Legisl; Execut; & Judiciary powers be separate, it is essential to a maintenance of the separation that they should be independent of each other. [27]

[25] "Legislation is essentially an act of sovereign power; but the execution of laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise. The very definition of law, which is said to be 'a rule of civil conduct, prescribed by the *supreme* power in the state,' shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by the prescribed rules: it is so. But it is, nevertheless, the power of the people, and sovereign so far as it extends. . . . Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative organ is superior to every other, inasmuch as the power to will and to command, is essentially superior to the power to act and to obey." 12 Sergeant and Rawle (Pennsylvania Supreme Court) 330 (1825) at 350,351.

[26] Farrand, *Federal Records of 1787,* II, pp. 34, 56.

[27] Ibid., II, p. 34.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

To know what constituted independence and how to create it were equally difficult problems. There was much disagreement on these points, a good deal of which was never resolved during the Convention. In general all agreed that an executive chosen by the legislature was not independent.[28] Dickenson suggested that although the departments ought to be made as independent as possible, "a firm Executive could only exist in a limited monarchy."[29] The final decision to provide for the choice of the executive indirectly by popular vote, using the device of electors, secured independence both from the legislature and from the states.[30] This motive appears to be as important as that of having an executive popularly elected in order to represent the whole people.[31] In fact the Convention believed that the people were to be directly represented in the House of Representatives; the first opinions on this subject, of men such as Madison and Wilson, amounted to saying that only the house should be *directly* chosen by popular election.[32] Wilson later included the executive in this principle, but again, primarily for the purpose of independence.

Once the executive is chosen, there is still the problem of how to maintain executive independence. Proposals varied all the way from giving the office an absolute veto over legislation to associating the executive with the judiciary in a qualified veto (or revisionary power).[33] The veto was conceived as a self-defensive power, to enable the executive to protect itself against the possibility that the "Legislature can at any moment sink it into nonexistence."[34] The Council of Revision proposed in the Virginia Plan was primarily to prevent immoderate and/or unconstitutional legislation. The two objects of the veto, self-defense and decent laws, are not simply identical, but

[28] Ibid., I, p. 86; II, p. 31.
[29] Ibid., I, p. 86.
[30] Ibid., I, p. 69.
[31] An additional and exceptionally important reason for electors which is outside the scope of this study was to prevent corruption. The Framers did not believe that direct popular election in the whole country was technically possible.

[32] Farrand, *Federal Records of 1787*, I, pp. 49-50. Perhaps another reason for the confusion that suggests to some that the Framers were talking about balanced government, is this notion of direct and indirect. Actually in the American system there are three ways of collecting a national majority, all legitimate: directly, by population (but in districts), as with the House of Representatives; indirectly, by states as with the Senate; and directly/indirectly in the case of the President. In the latter case a national majority is collected federally, that is, state by state. See Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington, D.C.: American Enterprise Institute, 1977), pp. 6-13.

[33] Farrand, *Federal Records of 1787*, I, pp. 110, 138-9, II, pp. 78, 77. See also the original Virginia Plan.

[34] Ibid., I, p. 98, Wilson speaking.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

various members of the Convention supported them simultaneously in the discussions. It is instructive to note that the Council of Revision, which would have associated the executive and the judiciary in a veto over *proposed* legislation, was rejected primarily because the majority of delegates, early in the proceedings, judged that it violated the canons of separation of powers. It was this doctrinaire conception of the theory that led many members to regard the final arrangement of a qualified veto for the executive, with two-thirds legislative override, as basically self-defensive. Thus understood, rather than as a quasi-legislative device to produce decent legislation, it is less violative of separation of powers theory. Or so reasoned many of the members of the Convention, other than Wilson, Madison, Gouverneur Morris, and Hamilton.

Those who resisted an absolute executive veto when it was proposed on June 4 did so for two reasons: they feared too much executive power and the resulting possibility of abuse, and they expressed a distaste for the appearance of setting the executive power so blatantly over the legislature.[35] When it was proposed, by way of modification, that the veto be simply suspensory, this too was rejected, unanimously.[36] Finally, Gerry of Massachusetts suggested what was to be the final provision: the suspensory veto, exercised by the executive alone, with the two-thirds legislative override. This was accepted. But for Madison and Wilson the issue was not dead, and they proposed again and again that the judiciary be associated with the executive in a revision of proposed laws. Each time, with much debate, it was rejected.[37] Each time the argument against was that such a Council violated separation of powers and that the judges had, in the nature of things, the power of expounding the laws and ought not to be involved in policy or in legislating. No one, however, argued that the executive power was of such a nature that he ought not to have any form of a veto over legislation. Probably the failure of the Convention to provide, in this manner, for a process of securing sound and constitutional legislation, created the conditions and opportunity for something other than the appearance of legislative supremacy. My argument is (this repeats earlier observations about the Council of Revision and judicial review) that the Convention's failure, because of separation of powers theory, to adopt a Council of Revision, opened the way to the development of a kind of judiciary problematic in a democratic republic. While these men acted on

[35]For an example see the discussion in Farrand, *Federal Records of 1787*, I, pp. 97-104.
[36]Ibid., I, p. 103.
[37]Farrand, *Federal Records of 1787*, I, pp. 108, 144; II, pp. 75-77, 138-139.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

behalf of fidelity to legislative supremacy and to the separation of powers theory, their overly doctrinaire conception may have made possible the circumventing of the former and prevented instituting a subtle and more profound form of the latter.[38]

This argument—whether or not a Council of Revision violated separation of powers—occurred again and again throughout the Convention. Madison could not answer the charge satisfactorily, not because the argument was unanswerable, but because his (and Wilson's) was a more profound understanding, and his failure thus to teach and to convince was a decisive defeat for him.

The most illuminating exchange involving these principles occurred on July 21. Once more Wilson proposed to add the judiciary to the executive in the exercise of a revisionary power. He gave the following reasons. The Judiciary ought to have an opportunity for protesting "encroachments on the people as well as on themselves," more explicitly, for throwing its weight along with the executive, against "unjust," "unwise," "dangerous" or "destructive" laws. Madison supported Wilson and added his reasons in this order: to enable the judiciary to defend itself from legislative encroachment, to bolster the executive in its exercise of the veto ("revisionary power"), and to be useful to the legislature in securing "a consistency, conciseness, perspicuity and technical propriety in the laws, qualities peculiarly necessary; and yet shamefully wanting in our republican codes." Finally, such an arrangement would benefit the community as a check against "unwise and unjust" laws.[39] Objections at this time turned, again, on the impropriety of associating judges in policy (for policy-making is a legislative power), and the danger of making executive or judiciary too strong in relationship to the legislature. Finally before going down again to defeat, Madison desperately fell back almost totally on the self-defensive argument: the necessity of this means in order to maintain separation and independence in practice. Madison tried to explain that if combining the executive and judiciary violated the maxims of separation of powers, than giving the veto to the executive alone violated them also. We must remind ourselves that the view which triumphed on this occasion relied heavily upon the illusion that a suspensory veto in the executive did not violate the separation of powers, because it did not improperly involve the executive in the legislative function, it merely defended against encroachments on the executive power.[40]

[38] See Madison's June 6 speech in Farrand, *Federal Records of 1787*, I, pp. 138-139.

[39] Farrand, *Federal Records of 1787*, II, pp. 74-75.

[40] If this explanation of the course of events at the Convention seems to involve some sleight of hand, then the impression is a correct one. The arguments against the Council of

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

Further consideration of the problem of independence occurred when Madison proposed that members of the legislature be prevented from holding offices created by that body during their time of service in it, and one year after. Some argued that this would still allow too much executive influence.[41] The final decision to limit office-holding only during membership in the legislature represents the more liberal view, and the acceptance of Madison's argument (also Wilson's) that liberality is necessary in order to attract men of the first rank into public office. Independence is also at issue in the consideration of permanent tenure for the judiciary, impeachment procedures, appointment of the judiciary, and whether or not the vice president ought to preside over the Senate.[42]

The final conception embodied in the Constitution can now be summarized. Independence for the executive is secured by a qualified veto over legislation, and providing for his impeachment by the House of Representatives does not violate that independence, so long as the executive is eligible for re-election.[43] Had the executive been limited to a specified number of terms, impeachment by the legislature (impeachment by the judiciary had been rejected since it was appointed by the executive) would have made him their captive.[44] Furthermore, the selection of the executive by popular vote, using the device of an electoral college, makes possible his choice independently of the legislature (except when there is no majority of electoral college votes.)

Independence for the judiciary is satisfied by permanent tenure. The judiciary's nonpolitical character is apparent in that it is not independently appointed, it has no control over its own salary and it

Revision contradict many other actions taken at the Convention, beginning with the executive veto itself, which clearly gives to that officer legislative powers, as does his association in the treaty power, (as Madison argues and defends in the *Federalist* papers); and many important powers given to the Senate are executive. Madison's failure to persuade his colleagues about the Council of Revision may have convinced him of the need to make the strongest possible case for blending and mixing in order actually to achieve and to maintain separation. The key to the rejection of the Council, to my mind, lies in the Convention's conception of the judicial power: non-political, impartial, and emphatically *not* a third political branch. In no sense can the arrangement of a Council of Revision be considered the forerunner of, or an argument for, judicial review of national legislation. It is its very opposite, for its crucial provision rested on judicial involvement *before* legislation became the law of the land, and therefore preserved legislative supremacy.

[41] Farrand, *Federal Records of 1787*, I, pp. 391-394.

[42] Ibid., II, p. 43; II, p. 66; II, pp. 82-83; II, p. 537.

[43] Farrand, *Federal Records of 1787*, II, pp. 63-69, 499,511-516.

[44] Note here that the 22nd Amendment is a violation of the delicate structure of the Constitution, which created the right amount of tension between the executive and legislative departments.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

was given no power in the Constitution analogous to the executive veto or to the legislative powers which keep that body independent of the executive in turn.[45] The judiciary's mode of appointment however—nomination by the executive, consented to by the Senate—avoids strict legislative or executive control of the composition of the Supreme Court.[46]

Legislative independence is achieved by giving to that body control over its internal organization and officers as well as the credentials of its members, providing immunity for speeches in Congress and from certain kinds of arrest, prohibiting the holding of other offices during a legislative term of service, and by arrangements for liberal stipends free from executive influence.

Before turning to checks, and to balance, it is necessary to consider the ends sought by means of the principle of the separation of powers, and the definition of the theory as it emerged from the Federal Convention. One object was to reduce the danger of the power of government to liberty, by not lodging executive and legislative powers wholly in the same body.[47] But could this not have been accomplished by giving to several governing bodies portions of the three kinds of powers? Why define and distribute powers by their nature, as was done in 1787? Pinckney's "well-administered" laws appears to be the only reasonable explanation. Something more than liberty was wanted—decent governing, sound legislating, fair and impartial judging. Implicit here is the belief that kinds of power are best exercised by particular kinds of bodies: general laws come most satisfactorily from a representative assembly whose members must live under the laws they have passed,[48] administration is best performed by a single executive who is then responsible for those whom he appoints and for the quality of administration performed, and legal controversies are best settled by a body of judges who are professionally knowledgeable and allowed to apply that knowledge free from coercion or political influence.

[45] These criteria follow Madison's from his discussion in *Federalist* No. 51.

[46] Farrand, *Federal Records of 1787*, II, pp. 82-83.

[47] Ibid., I, pp. 256, 421; II, 30, 34, 35. See also letter from James Madison to Thomas Jefferson of October 24, 1787.

[48] "This [that the supreme power of the commonwealth will arbitrarily dispose of the estates of subjects] is not much to be fear'd in Governments where the Legislative consists, wholly or in part, in Assemblies which are variable, whose Members upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest." John Locke, *The Second Treatise of Government*, ed. Peter Laslett, (London: The Cambridge University Press, 1963), p. 379.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

Returning to the other object of the separation of powers structure, we can observe that political liberty meant something to the Framers other than the mere absence of governmental restraint. However, this is a difficult and subtle point. Admittedly to some liberty simply meant no governmental involvement with religion, speech, press, and property. At the same time many of the same men believed (or understood) that too little government (weak, unable to act) could result in anarchy and thus in desperation lead to despotism, which all knew was totally destructive of liberty.[49] This explains the division of function based on the nature of the power: in order to achieve another kind of protection for liberty, to increase the possibility of decent and effective government. The simplistic traditional view of the separation of powers must be opposed by the Framers' more profound one. The proposition that government is the only threat to liberty fails utterly to understand modern democracy, its potentialities, and its dangers. Although decent and effective government may not be the same as wise government, effective government does prevent that fatal step from anarchy to an acceptance of tyranny. The Framers found the means to entrust vast powers to a popular government and to make their exercise safe to liberty.

In order to be separate, branches or departments had to be independent, but not equally powerful, not three branches in a kind of perpetual tension, a tension brought about because the same amount of power had been given to each. The American Constitution creates three *coordinate* branches. Coordinate means of the same rank, not of the same weight or power; it refers to three equally *national* branches. The legislature was created supreme (or preeminent), the executive and judiciary were genuinely independent of it and were given sufficient strength to resist being overawed by it. Independence, as Madison explained in *Federalist* No. 48, meant drawn from different sources, and having as little agency in the execution of the powers of the other branches, as possible.[50] And as we shall now see, independence included the principle of checking, which properly understood was not intended, nor does it amount to, deadlock.

[49] See Madison's remarkable letter to Jefferson of October 17, 1788 on this point.

[50] The president's source is the people through the medium of electors, the House's source is the people in their states according to population, the Senate's source was the state legislatures (regarded as excessively democratic at the time), and the Court's source was combined executive and Senate appointment. In every instance the choice is out of the body of the people; there is no connection in the Constitution between wealth, position, hereditary privilege, and any branch of government. The latter is the essence of balanced government and is wholly absent from the American constitutional system.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

III
THE THEORY OF CHECKS

The relationship between the theory of the separation of powers and the theory of checks at the Federal Convention is complicated. To begin with it was not what most commentators have thought it to be, separation of powers signifying "checks and balances," or as J. M. Burns puts it, "a balance of checks."[51] I argue here that it is both necessary and useful to separate checks from balance, and only thus are we enabled to see the constitutional arrangement properly. This view of checks is vital to understanding the system as it took shape in 1787.

Defining check is surprisingly difficult. If one accepts the view that a check is anything that impedes the expression of the popular will, then one is in tune with the contemporary understanding of our frame of government. This theory goes as follows. The Framers established what was at one and the same time a government in which the three branches were approximately equal in power (hence check and balance produces deadlock), and yet in which it came to be possible for the executive to predominate, or depending on the observer, the Supreme Court. Thus we must first contend with a conception which wrongly supposes that the three branches of the national government were designed with equal governing powers.

> But *suppose* all to be of equal capacity, in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be co-ordinate. It is not easy, however, to comprehend how the power which gives law to all the rest, can be of no more than equal rank with one which receives it, . . .[52]

Three *independent* and *coordinate* branches were brought into being in 1789 with the ratification of the Constitution. The confusion

[51] Farrand has no reference to "checks and balances" or to checks alone, although he has an extremely complete index—103 pages. He has approximately 43 references to separation of powers in his Notes, and 5 cross references. As previously pointed out, the Rossiter edition of *The Federalist* has references to both, although the phrase "balances and checks" is only used once in the work, in *Federalist* No. 9 ("legislative balances and checks"). Under "separation of powers" Rossiter refers the reader to "checks and balances." J. M. Burns has one reference to separation of powers of virtually no content, and many to "checks and balances," ending with an admonition to "see also Madisonian system!" *Deadlock of Democracy* (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1964). A cursory check of a number of American government textbooks reveals relative few references to separation of powers as such, in some cases none, and more frequent references (in those texts which discuss the device at all) to checks and balances.

[52] Justice Gibson, *Eakin* v. *Raub*, at 350.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

occurs because of the word coordinate, because of theories of balanced government, or because of a failure to see that devices to prevent legislative *tyranny* are not the same as hostility to democracy itself.

The second part of the theory, which, depending on the observer, sees either the presidency or the judiciary predominant, or able to predominate (aside from the internal contradiction between three equally powerful branches and one predominant branch), is equally false. Both errors—the error of supposing three equally powerful branches and the error of supposing a dominant executive or judiciary—are based on the same failure (or unwillingness) to recognize legislative supremacy, both as established by the Constitution, and as necessary in a representative democracy. In the words of James Wilson:

> According to (Mr. Gerry) it [the Council of Revision] will unite the Executive & Judiciary in an offensive & defensive alliance agst. the Legislature .... To the first gentleman the answer was obvious; that the joint weight of the two departments was necessary to balance the single weight of the Legislature ....[53]

Aside from the evidence in the debates themselves at the Federal Convention, in *The Federalist,* and in the Constitution—all of which might be called empirical evidence—there is the theoretical/historical evidence which is that popular sovereignty and self-government have always been synonymous with legislative supremacy or with a legislature simply. The form of government established by the Constitution of 1787 was one in which the legislature was preeminent because it was a representative democracy.[54]

We are taught that the Framers arranged a government with three equal branches that produces deadlock in order to institutionalize an anti-democratic bias: a fear of popular majorities and a desire to protect property. However, this theory continues, the Constitution permits or allows (even invites) democratization by means of the triumph of the executive or the judiciary over the other two branches. In fact this, it is said, is just what has happened. The

[53]Farrand, *Federal Records of 1787,* II, p. 79.

[54]Locke, who was not a democrat, provides interesting support for this: In all cases, whilst the Government subsists, the Legislative *is the Supreme power.* For what can give laws to another, must needs be superiour to him: and since the Legislative is no otherwise Legislative of Society, but by the right it has to make Laws for all the parts and for every Member of the Society, prescribing Rules to their actions ... the Legislative must needs be the Supreme, and all other Powers in any Members or parts of the Society, derived from and subordinate to it. See *The Second Treatise,* pp. 185-6.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

anti-democratic Constitution was democratized by means of one or the other of two anti-democratic devices: a powerful presidency, or the supremacy of the Supreme Court. What can one say about an interpretation which relies on an "imperial" executive or a permanently-tenured high court as its radically democratic features?[55] Recognition of the fact of legislative supremacy not only corrects the mistake about three equally powerful branches, or about executive and judicial supremacy, it reveals the true intent of the Framers with regard to democracy, their commitment to popular self-government, embodied in the Constitution.[56]

Using this understanding, we can define and understand checks. Checks were intended, first, to maintain the separation of the three departments in practice, and second, to enable the executive and judiciary, by means of their *constitutional* powers, so to moderate the law-making process that sounder legislation would result. *Ultimately checks were to operate to prevent deadlock.* The political departments (the executive and the legislative) were given the constitutional means to resist encroachments in order that, once those means were exhausted, governing would and could take place.[57] If there were no constitutionally provided modes of self-defense then the branches would be likely to resort to extra-constitutional means at such times, which would destroy the Constitution and thereby the form of government. The notion that the Congress was given powers to frustrate the President and prevent the government from acting is to understand the constitutional system backwards.

In order to learn how the Framers used checks in their design we must recall their view that governmental powers are by their *nature* legislative, executive, or judical. A check given to one department or branch in order that it can defend itself cannot be a power which that department already legitimately possesses in the nature of things. To give it more of its own kind of power would not increase the ability of a department to check another branch. Instead, the

[55]Put another way, how can we take seriously an analysis that, refusing to believe legislative supremacy, attacks the Framers for creating an undemocratic government, and then turns eagerly to such an executive or judiciary as its democratizing devices?

[56]This is easy to say and to build on now that we have the benefit of the work of Martin Diamond, especially his seminal article, "Democracy and the Federalist: A Reconsideration of the Framers' Intent," *American Political Science Review* LIII, no. 1 (March 1959): 52-69.

[57]Madison writes in *Federalist* No. 51, "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the *necessary constitutional means* and personal motives to resist encroachments of the others," pp. 321-2. Emphasis mine.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

likelihood of a disastrous confrontation between branches would increase, producing, indeed, a stalemate or deadlock. Suppose a situation without checks in which the legislature enacted laws and the executive, in disagreement, refused to execute them. Government would reach an impasse and grind to a halt. But when the executive has a veto over legislation and the legislature has a carefully defined impeachment power the following would (and does) take place. The legislature passes a law about which the executive has serious reservations as to constitutionality, or soundness.[58] The president vetoes it; the legislature then proceeds to pass it again, this time by the necessary extraordinary majority. The executive branch has had its say, and is now faced with the fact that there was sufficient popular support for the law that it was passed over the veto. The president is prevented from seeking to resort to extra-constitutional means of resistance because of the vast popular opinion against him (making the likelihood of his success at this minimal), and by the impeachment power which the legislature can use if he resorts to illegal means of resistance. So he accedes to the will of an extraordinary majority of the legislature. On the other hand, had it failed to pass the bill over his veto, the legislature would have had to accept the fact that lacking the necessary popular support, it must accept the executive veto, and either redraft the law, or move on to other matters. In neither case does the government stop. Instead, the Framers wisely avoided such an outcome and where checks were instituted they mix or blend other kinds of powers, with the twofold consequence of checking (or moderating), and avoiding the collapse, due to the inability to act, of government.[59]

Checks were only given to the two political branches; the judiciary does not have a check provided in the Constitution. Once the fact of legislative sovereignty is understood, and checks, balance, and the errors of contemporary analyses are seen in the proper light, it becomes clear why the Constitution does not give to the Supreme Court the general power of judicial review of national laws, for judicial power is nonpolitical and impartial—a special kind of power. There were two reasons for the creation of a national judiciary (instead of using the existing state judicial systems): uniformity of laws, one national law for all (instead of thirteen different interpretations of the meaning of national legislation); and constituting the Supreme

[58] Evidence suggests that our earliest presidents believed they could only veto a law on the grounds of unconstitutionality.

[59] Farrand, *Federal Records of 1787*, II, p. 77.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

Court as the court of last resort in questions about the federal relationship.

Some of the Framers thought that the Court might, in cases of a clear conflict with express prohibitions in the Constitution, set aside legislation which did that prohibited thing. Examples are *ex post facto* laws, violation of *habeas corpus*, or prohibitions against bills of attainder, all recognized as judicial questions by their very nature. The common law judiciary had traditionally upheld these rights; they had developed as common law maxims.[60] A second group would be cases involving the judicial power itself, for example, an attempt by Congress to tamper with the court's original jurisdiction, or with permanent tenure. James Madison, among others, expected the Court to defend itself in such cases.[61] The Court, in declaring that a law was a bill of attainder (as English courts did) and thus prohibited by the Constitution would not prevent the legislature from acting on a particular subject matter, instead it would require that the legislation be drawn with greater technical care. And this is far removed from the modern exercise or theory of judicial review as we have come to know it. The former does not set the Court above the legislature and the executive (we do well to remember that when the Court invalidates legislation it is voiding the act of both political branches) on matters of public policy.

We also have powerful evidence for this interpretation of the Court's presumed authority from the fact that an extraordinary majority of the Framers refused to allow the Court to be associated with the executive in the Council of Revision, or to allow the court to be brought into the legislative process at any point before legitimate judicial questions were raised in the form of cases or controversies. Both denials were based on the conviction that the judicial power ought not to be associated in the formation of policy, or in the process of legislating generally. One cannot assume, without express evidence, that the majority which rejected this role for the Court on the grounds of impropriety, would have intended the Court, instead, to have a general power of judicial review of national legislation, in other than the sense outlined above.

> In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the

[60]Notice that Alexander Hamilton in *Federalist* No. 78, and John Marshall in *Marbury* v. *Madison* use these very examples of the kinds of constitutional provisions warranting judicial review.

[61]Farrand, *Federal Records of 1787*, II, p. 430.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

> courts are generally the last in making the decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper.[62]

Checks can be distinguished from devices that create independence of the branches, inasmuch as checks are for the purpose of maintaining the separation in practice. The mode of choosing a branch was necessary to its independence, but it was not a check. A check enabled a department (I am using these terms interchangeably, although department is the older term) to defend itself and incidentally to act so as to produce better public policy. It is important to emphasize this point: checks were not designed (nor do they operate) to institute a "harmonious system of mutual frustration," but to provoke improved legislating and to prevent stalemate, in a manner wholly compatible with the democratic form and its democratic spirit.[63]

Exactly what were the checks relied upon by the Framers; what is the relationship to balance and to the separation of powers? In the American constitutional arrangement, the executive veto, shared Senate powers in the areas of foreign policy and appointments, and the impeachment power are checks. This illustrates the criteria previously established, that checks are powers given to a department not included in its normal grant, according to function. The executive veto is an excellent example of a check which enables the executive to defend himself and is conducive to more sensible legislation, at the same time that it prevents deadlock. Once all the constitutional means of acting on a particular piece of legislation have been exhausted, government continues.

The shared Senate powers also have a multiple purpose, because they are designed both for the above reasons and in order to strengthen the executive as a counterweight against a rambunctious legislature. Advice and consent in appointment matters is more of an executive power than is involvement in treaties, because there were those, including Wilson, who argued at the Convention that the powers of war and peace were legislative powers.[64] The impeachment

[62] Letter from James Madison to John Brown, October, 1788, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1900), V, p. 294.

[63] This understanding, absolutely essential to studying the work of the Framers, and which distinguishes American government from all other previous democratic forms, has been lost to our contemporaries. It is central to the work of Martin Diamond on the Founding, where I learned it.

[64] See Farrand, *Federal Records of 1787*, I, pp. 65, 66; also above.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

power, which amounts to bringing charges and conducting a trial, is a judicial power, given to the legislature as a whole as a check on both the executive, and the judiciary. It is a check in the most primitive sense, designed not to influence the quality of governing, but to remove men from office who have abused their public trust. The commitment of an impeachment power to the legislature is another empirical proof that the system is one of legislative preeminence, inasmuch as no member of Congress can be impeached or removed from office by the other two departments. Only it, or the electorate, can do that.

What then is the proper relationship of checks to separation of powers? The two conceptions are not merely synonymous. Separation of powers is perfectly possible without checks—without checks the arrangement would work almost exactly as many critics charge it does now! It would almost certainly be a system of complete frustration, each department possessing all available powers of its particular nature and refusing to cooperate with the other branches in case of disagreement, in a total absence of any constitutional mode to resolve the impasse. In such cases the executive would probably follow an historic practice and take to the field, raise an army, and solve his problems *ultra vires*. Checks are a principle incorporated in separation of powers in order to maintain the separation (the consequence of the executive raising an army would surely be to take over the legislature by force) by keeping the branches independent, to guard against hastily passed, badly considered laws, and ultimately to remove bad persons from office, all the while preventing governmental deadlock. Separation of powers theory does not require any of these arrangements, but one may well question how long a republican government would have lasted without them.

IV
BALANCE

In order to consider the meaning of balance in the American Constitution we must have the following texts before us:

> The science of politics, however, like most other sciences, has received great improvement ... The regular distribution of power into distinct departments; the introduction of legislative balances and checks; . . . [65]

> Mr. Randf. observed .... that the general object was to provide a cure for

[65] Alexander Hamilton in *The Federalist*, p. 72.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

> the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought agst. this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.[66]

> Mr. Randolph said he could not then point out the exact number of Members for the Senate, but he would observe that they ought to be less than the House of Commons. He was for offering such a check as to keep up the *balance*, and to restrain, if possible, the fury of democracy. He thought it would be impossible for the State Legislatures to appoint the Senators, because it would not produce the check intended. The first branch should have the appointment of the Senators, and then the check would be compleat.[67]

The balance which we will speak of here is not the equation used by Wilson (see June 1 quote above) that the joint weight of the executive and judical branches is necessary to balance the weight of the legislature. Neither is it the balance referred to by Madison (in the same consideration of the Council of Revision on July 21) when he said, "But experience has taught us a distrust of that security [a Constitutional discrimination of the departments on paper]; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper."[68]

In both cases the rejected Council of Revision is at issue; aside from the remarks at the beginning of this section I can find no other sense in which balance is mentioned in connection with the government at the Federal Convention. Balance used in discussing the Council of Revision in no way supports the contemporary understanding of a balance of checks, since it is a case of two departments balancing one department, and both checking, thereby, the legislature—rather than the other way around.

The only appropriate way to approach balance is by means of the remarks of Hamilton, and Randolph, as quoted. They point us to the Senate, which I suggest is the only true balancing device to be found in the American constitutional system. The Framers understood that in a democratic government the legislature would be the branch most likely to overawe the other two, and would incline toward hasty and immoderate legislation. In order to guard against this tendency, they

[66] Edmund Randolph, May 31; the version of his speech in Madison's Notes, Farrand, *Federal Records of 1787*, I, p. 51.

[67] Pierce's version of the same speech, p. 58. Emphasis mine.

[68] Ibid., II, p. 77.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

created the Senate as a balance against the more directly popular House. Thus the legislative power was divided, and it was distributed between two very different kinds of bodies, with differing powers and terms of office and (originally) different means of selection. And although today the Senate and House are both popularly elected, the constituency of each is unlike the other and this fact has a significant influence upon the character of the two bodies. When Randolph speaks of "the democracy," he is referring to the directly popular House, believed by all to be *the* radically democratic element in the new government.

Hamilton is distinguishing separation of powers from "legislative balances and checks" (bicameralism), and from the independent tenure of the judiciary, in the quotation from *Federalist* No. 9. All parts of the constitutional system, these are distinct devices that cannot be understood so long as they are mistaken for each other. Balance was introduced into the frame of government by the creation of the Senate, with some agency in executive powers. The Senate was *the* device relied upon by the Framers to prevent the abuse of legislative powers.[69] In the language of Justice Gibson:

> The notion of a complication of counter-checks has been carried to such an extent in theory, of which the framers of the constitution never dreamt. When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; . . .[70]

The Senate was to participate fully in the appointive power and in treaty making. Contrary to the view of many presidents, the Senate role was to be that of a partner, not a rubber stamp, where it was given a share in executive powers. In a different sense from our previous understanding of check, the Senate was to check and to balance the House—merely passing legislation through two different bodies serves as an immense barrier to rash actions. But if the two bodies are differently constituted and one of them has some special executive powers, the checking and balancing are even more effective.

There is no other attempt at balance in the American system. This becomes apparent only by isolating the different elements: separa-

[69] Farrand, *Federal Records of 1787*, II, p. 52.
[70] *Eakin* v. *Raub*, at 351.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms

tion of powers, checks, and balance. To construct a popular government with balance, or equal power among the branches, would be inappropriate; it would cancel the preeminence of the popular, lawmaking branch, the legislature. Balanced government, on the other hand, is not an attempt to set the *powers* of government into a balanced relationship, but rather an arrangement in which the different *classes* making up a particular political society are balanced against each other.[71] A wholly popular government, such as that in the United States, in which the holders of executive, legislative, and judicial power are all drawn from the same source—the people—could not balance the powers of government (there being no preexisting social classes) without destroying or neutralizing legislative supremacy.

Because so many modern students of American government and the Constitution do not adequately understand separation of powers, checks, balance, legislative sovereignty, or the nature of judicial power, they have little appreciation of the complexity and subtlety of the work of the Framers. Consequently, they criticize the wrong things; they seek to change the wrong things. But most dangerously of all, by failing to appreciate how the system works they take for granted its results and foolishly believe that Americans can continue to have the most stable and democratic government in the world, while seeking to remove the very devices that create democracy and stability. For these reasons the appropriate place to begin to recapture the understanding of the Framers, the theories they applied, the means they used, and the results they expected, is in the debates of the Federal Convention. Accordingly, this study of one important theory at the Convention is such a beginning.

[71] For 17th and 18th century theories of balanced government, see John Adams, *History of the Principal Republics in the World* (3 vols.), I (London: John Stockdale, 1794), pp. 100, 159ff. See also Bailyn, *Ideological Origins*, pp. 67-76.

This content downloaded from
149.10.125.20 on Thu, 24 Mar 2022 23:32:42 UTC
All use subject to https://about.jstor.org/terms