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## Montesquieu's Mistakes and the True Meaning of Separation

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Claus:



## **Public Law and Legal Theory Research Paper Series**

**September 2004**

### **Montesquieu's Mistakes and the True Meaning of Separation**

**Laurence Claus**

## MONTESQUIEU'S MISTAKES AND THE TRUE MEANING OF SEPARATION

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Laurence Claus<sup>1</sup>

“The political liberty of the subject,” said Montesquieu, “is a tranquility 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.”<sup>2</sup> 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 fundamentally 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.

First, Montesquieu’s analysis was informed by the early eighteenth-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

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<sup>1</sup> Associate Professor of Law, University of San Diego. I am grateful for valuable comments from Larry Alexander, Alex Papaefthimiou, Jeffrey Pojanowski, Nicholas Quinn Rosenkranz, Steven Smith, and participants in a colloquium at the University of Illinois College of Law.

<sup>2</sup> Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Nugent translation), rev’d ed., 1873 (first published 1748), Bk XI, Ch. VI, 174.

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 separation 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 trivialize the English judicial function as merely the ad hoc determination of disputed facts. Consequently, Montesquieu failed to recognize the *lawmaking* character of English judicial exposition.

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 nondelegation quandary and the emergence of an unchecked judicial lawmaker.

## 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.<sup>3</sup> The French civil law tradition afforded little opportunity for 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 so 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.

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 seventeenth 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.<sup>4</sup> 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

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<sup>3</sup> Robert Shackleton, *Montesquieu: a Critical Biography*, 1961, 17-19.

<sup>4</sup> *Id.*, 297-301. See also Robert Shackleton, *Montesquieu, Bolingbroke, and the separation of powers*, *French Studies*, 1949; M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 1967, 72-75. Cf. Isaac Kramnick, *Bolingbroke and his Circle: The Politics of Nostalgia in the Age of Walpole*, 1968, 144-150.

abstract fashion, the system of government that he had witnessed.<sup>5</sup> 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.<sup>6</sup>

"In every government," Montesquieu wrote, "there are three sorts of power." The legislative power extended to all lawmaking, including original enactment, amendment, and abrogation.<sup>7</sup> The executive power cleaved in two – execution under international law and execution under domestic law. The former authorized decisions about defense and foreign relations. The latter, which he re-named the power of judging (*puissance de juger*), authorized decisions punishing criminals and resolving disputes.<sup>8</sup> Montesquieu's characterization of executive power addressed only the respects in which execution involved independent decisionmaking<sup>9</sup> – 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

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<sup>5</sup> Shackleton, op cit n. 3, 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."

<sup>6</sup> Montesquieu, op cit n. 2, Bk XI, Chs. V and VI, 173-74, 185.

<sup>7</sup> Id., 173.

<sup>8</sup> Id., 173-74.

<sup>9</sup> Cf. John Locke, *Second Treatise of Government (An Essay concerning the True Origin, Extent, and End of Civil Government)*, (Laslett crit. ed. 2<sup>nd</sup>), 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, op cit n. 3, 286-87.

individuals.”<sup>10</sup>

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.<sup>11</sup> Holding the legislative power, said Montesquieu, were two Houses of Parliament.<sup>12</sup> Holding the executive power was the monarch.<sup>13</sup> Holding the power of judging were ... juries.<sup>14</sup>

Montesquieu’s distinctive insight, his advance from John Locke’s legislative-executive dichotomy,<sup>15</sup> 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 activities 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

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<sup>10</sup> Montesquieu, *op cit* n. 2, Bk. XI, Ch. VI, 174.

<sup>11</sup> 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, 261.

<sup>12</sup> Montesquieu, *op cit* n. 2, Bk. XI, Ch. VI, 176-78.

<sup>13</sup> *Id.*, 179.

<sup>14</sup> *Id.*, 175-76.

<sup>15</sup> See Locke, *op cit* n. 9, 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*, 2<sup>nd</sup> ed., 1998, 159: “However we may refine and define, there is no more than two powers in any government, viz. the power to make laws, and the power to execute them; for the judicial power is only a branch of the executive, the CHIEF of every country being the first magistrate.” [Four Letters on Interesting Subjects (Phila., 1776), 21.] Even John Adams in 1766 ... regarded ‘the first grand division of constitutional powers’ as ‘those of legislation and those of execution,’ with ‘the administration of justice’ resting in ‘the executive part of the constitution.’ [Boston Gazette, Jan 27, 1766, Adams, ed., Works of John Adams, III, 480-482.]”

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.” 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.”<sup>16</sup>

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

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<sup>16</sup> Montesquieu, *op cit* n. 2, Bk. II Ch. I, 9.

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.<sup>17</sup>

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."<sup>18</sup> 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."<sup>19</sup> 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

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<sup>17</sup> Id., Bk. VI, Ch. III, 85-86.

<sup>18</sup> Id., Bk. XI, Ch. VI, 182.

<sup>19</sup> Id., 176. Revolutionary Americans agreed. "As Jefferson said to Pendleton in 1776, in relation to the legislator the judge must 'be a mere machine.' The people's making of law would dispense mercy and justice 'equally and impartially to every description of men,' while, as any radical Whig knew, the dispensations of 'the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man.' [Jefferson to Pendleton, Aug. 26, 1776, Boyd, ed., Jefferson Papers, I, 505.]" (Wood, op cit n. 15, 161.) "If the spirit of the law had to be considered, said the author of *The People the Best Governors*, then it should be done only on appeal to the representatives of the people. If the judges 'put such a construction on matters as they think most agreeable to the spirit and reason of the law ..., they assume what is in fact the prerogative of the legislature, for those that made the laws ought to give them a meaning when they are doubtful.'" (Id., 301-302.)

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.<sup>20</sup> 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 (right up to the midnight) of the Adams administration, as Jay had done in the first Washington administration during Jefferson’s absence in France.<sup>21</sup>

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

[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 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.<sup>22</sup>

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<sup>20</sup> See Steven G. Calabresi and Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 *Cornell L. Rev.* 1045, 1128-1131 (1994).

<sup>21</sup> See *id.*, 1131-1132.

<sup>22</sup> Montesquieu, *op cit* n. 2, Bk. XI, Ch. IV, 172-173.

Parliament's legislative power was checked by the monarch's power to reject legislation, which protected the separation of legislative and executive power.<sup>23</sup> 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.<sup>24</sup> 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<sup>25</sup> – the lower House of Parliament could impeach them and the upper House could try, convict, and punish them.<sup>26</sup>

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."<sup>27</sup> 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*

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<sup>23</sup> Id., 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."

<sup>24</sup> Id., 183-84.

<sup>25</sup> Id., 181.

<sup>26</sup> Id., 182. Blackstone similarly observed that Parliament could check the monarch's exercise of executive prerogatives through its power to impeach those on whose advice executive powers were improvidently exercised: I Blackstone, op cit n. 11, 150-151, 244.

<sup>27</sup> Montesquieu, op cit n. 2, Bk. XIX, Ch. XXVII, 356.

subordination of the monarchy could not have been as obvious in the first half of the eighteenth 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.

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 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.<sup>28</sup> 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."<sup>29</sup> 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

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<sup>28</sup> Montesquieu, *op cit* n. 2, 173-74, 185.

<sup>29</sup> Wood, *op cit* n. 15, 453 (quoting Jefferson, *Notes on Virginia*, ed. Peden, 120).

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?<sup>30</sup> 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? Why try to distinguish primary exercises of power from participatory 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<sup>31</sup> 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,<sup>32</sup> Hugo Grotius,<sup>33</sup> Ludolph Hugo<sup>34</sup> and Samuel von Pufendorf. It was the foundation of Pufendorf's critique of the Hapsburg Holy Roman Empire, which he condemned

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<sup>30</sup> The libertarian claim that separating those who exercise executive and judicial *kinds* of power from legislative bodies 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*, 2<sup>nd</sup> ed., 1997, 335-356); the Hungarian Benefits Case, 4 E. Eur. Case Rep. Const. L. 64 (1997) (Constitutional Court of Hungary).

<sup>31</sup> Shackleton, *op cit* n. 3, 306-7.

<sup>32</sup> *Politica methodice digesta*, 1603.

<sup>33</sup> *De Jure Belli ac Pacis*, 1625, Book I, Ch. 3 § 7; *Apologeticus eorum qui Hollandiae praefuerunt*, 1640, Ch. 1.

<sup>34</sup> *De Statu Regionum Germaniae*, 1661.

as an “irregular,” unsustainable system of government because sovereignty was divided between the emperor and the German princes.<sup>35</sup>

Montesquieu did not question the prevailing orthodoxy that ultimate sovereign power could not be divided without risking chaos. 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 of lawmaking, albeit that Parliament was checked in exercise of that power by the monarch. Only the monarch possessed the sovereign power of executing 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

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<sup>35</sup> Introduction to the History of the Principal Kingdoms and States of Europe, 8<sup>th</sup> ed, 1719, 282: “Its irregular Constitution of Government is one of the chief Causes of its Infirmary; it being neither one entire Kingdom, neither properly a Confederacy, but participating of both kinds: For the Emperour has not the entire Sovereignty 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 Sovereignty 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, 4<sup>th</sup> ed, 1729, 679.

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.”<sup>36</sup> 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.<sup>37</sup> The Lords’ appellate jurisdiction was, however, then exercised directly by the House as a whole,<sup>38</sup> not by a committee composed of judicial specialists, the so-called Lords of Appeal in Ordinary, or Law Lords.<sup>39</sup> The speeches through which the lords delivered their decisions were rarely reported.<sup>40</sup> Until the professionalizing of the appellate jurisdiction in the nineteenth 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... .”<sup>41</sup> Nonetheless, the

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<sup>36</sup> Montesquieu, *op cit* n. 2, Bk. XI, Ch. VI, 182.

<sup>37</sup> See, e.g., the Titus Oates Case, 10 Howell’s State Trials, 1325, 1328; 10 House of Commons Journal 176-77 (June 11, 1689).

<sup>38</sup> Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976*, 1978, 29-30: “In 1834 the Lords for the last time decided an appeal without any law lord present; [n. 126: ... The common law judges attended and gave their opinions, and then the lay peers present spoke and voted. ...] in 1844 the convention that lay lords never vote was established. ... By the late thirties there were seven law lords – that is, former Lord Chancellors or ennobled judges; a ‘professional’ court was at last possible. The definition of a law lord was still vague, but the duty of the lay lord was increasingly clear: he was to be a nonvoting member of the quorum in appellate hearings.”

<sup>39</sup> See Paul Carmichael and Brice Dickson, eds., *The House of Lords: Its Parliamentary and Judicial Roles*, 1999, 107 et seq.

<sup>40</sup> Stevens, *op cit* n. 38, 12: “At the end of the seventeenth century the publication of Showers’ Reports was held a breach of privilege, and as late as 1762 a similar threat was made when a text writer wished to cite decisions of the House. The first regular reports were those published by Josiah Brown late in the eighteenth century, but they were far from perfect since they largely ignored the reasoning in the speeches.”

<sup>41</sup> *Id.*, 30.

House was, as it remains, “the supreme court of judicature in the kingdom.”<sup>42</sup> And to the eighteenth-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.”<sup>43</sup>

## 2. Britain’s current reforms

On June 12, 2003, the British Government announced that it intends to establish a “new Supreme Court for the United Kingdom,”<sup>44</sup> to which the appellate jurisdiction of the House of Lords will be transferred, along with the Law Lords themselves. “The primary objective of the new arrangements is to establish the Court as a body separate from Parliament.”<sup>45</sup> 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.<sup>46</sup> Citing Article 6 of the European Convention on Human Rights,<sup>47</sup> now incorporated into British domestic law through the Human Rights Act 1998, the British Government has given the following reason for its plan.

[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,

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<sup>42</sup> III William Blackstone, *Commentaries on the Laws of England*, 1765, 56.

<sup>43</sup> Stevens, *op cit* n. 38, 13.

<sup>44</sup> Department of Constitutional Affairs Consultation Paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, 2003, ¶1.

<sup>45</sup> *Id.*, ¶34.

<sup>46</sup> *Id.*, ¶36.

<sup>47</sup> “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. ...”

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.<sup>48</sup>

By parity of reasoning, the office of Lord High Chancellor is to be abolished. No longer will a position exist that empowers its holder concurrently to preside in the House of Lords, to sit in the Cabinet, and to adjudicate appeals. Abolition will, according to the office's final occupant, "put the relationship between the executive, the judiciary and the legislature on a modern footing, and clarify the independence of the judiciary."<sup>49</sup> The chancellorship, almost as old as the monarchy,<sup>50</sup> held during its long history by such luminously independent spirits as Thomas à Becket<sup>51</sup> and Thomas More,<sup>52</sup> source of Equity and precursor in power to the modern ministry, will cease.

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 the eighteenth 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

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<sup>48</sup> Id., 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*.

<sup>49</sup> Lord Falconer of Thoroton, Foreword to Department of Constitutional Affairs Consultation Paper, *Constitutional Reform: reforming the office of the Lord Chancellor*, 2003.

<sup>50</sup> 1 Lord Campbell, *Lives of the Lords Chancellors*, 4<sup>th</sup> ed. (revised), 1874, 1-31.

<sup>51</sup> See *id.* 61-99.

<sup>52</sup> See 2 Campbell, *op cit n.* 50, 1-85.

selected from the legislative body," a circumstance in which Montesquieu erroneously predicted "there would be an end then of liberty."<sup>53</sup> Is the cause of liberty any more substantially served by separating the power of judging from that of lawmaking? 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 ways but one. "All legislative powers herein granted" were vested in a bicameral representative body, as Montesquieu had favored,<sup>54</sup> with states substituted for aristocracy as the interest represented in the upper chamber.<sup>55</sup> "The executive Power" was vested in an individual, as Montesquieu had recommended,<sup>56</sup> with a president substituted for a monarch.<sup>57</sup>

The legislative power of Congress was checked by a presidential veto that mirrored the British monarch's<sup>58</sup> but which could be overridden by a sufficiently-united legislature.<sup>59</sup> The executive power of the President was checked by Congress's control

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<sup>53</sup> Montesquieu, *op cit* n. 2, Bk. XI Ch. VI, 179.

<sup>54</sup> *Id.*, 176-79.

<sup>55</sup> U.S. Const. Art. I § 1.

<sup>56</sup> Montesquieu, *op cit* n. 2, Bk. XI Ch. VI, 179.

<sup>57</sup> U.S. Const. Art. II § 1.

<sup>58</sup> 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 William Blackstone, *Commentaries on the Laws of England*, 1765, 149-150, 253.

<sup>59</sup> U.S. Const. Art. II § 7 cl. 3.

of the public purse<sup>60</sup> and Congress's power to impeach and convict him and his officers of "high Crimes and Misdemeanors."<sup>61</sup> Where the British monarch's appointment of ministers and judges<sup>62</sup> 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.<sup>63</sup> Moreover, his executive decisionmaking "in respect of things dependent on the law of nations"<sup>64</sup> was checked by the powers of declaring war,<sup>65</sup> of ratifying treaties,<sup>66</sup> and "[t]o define and punish ... Offenses against the Law of Nations"<sup>67</sup> 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."<sup>68</sup> 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

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<sup>60</sup> U.S. Const. Art. I §8 cl. 1 and 2, § 9 cl. 7.

<sup>61</sup> U.S. Const. Art. II § 4.

<sup>62</sup> I Blackstone, *op cit n.* 11, 261-262.

<sup>63</sup> U.S. Const. Art. II § 2 cl. 2.

<sup>64</sup> Montesquieu, *op cit n.* 2, 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, *op cit n.* 11, 242-253.

<sup>65</sup> U.S. Const. Art. I § 8 cl. 11. See Michael D. Ramsey, Textualism and War Powers, 69 U.Chi. L. Rev. 1543 (2002).

<sup>66</sup> U.S. Const. Art. II § 2 cl. 2.

<sup>67</sup> U.S. Const. Art. I § 8 cl. 10.

<sup>68</sup> 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.

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."<sup>69</sup>

When the American founders reached "[t]he judicial Power," however, they chose to vest it absolutely in a separate hierarchy of courts.<sup>70</sup> The only influence that the other branches had upon its exercise came through the blunt instruments of appointing the life-tenured judges and removing them for misconduct.<sup>71</sup> 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."<sup>72</sup> 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 attain; & 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 attain has yielded to the silent, moderate but not

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<sup>69</sup> Id.

<sup>70</sup> U.S. Const. Art. III § 1.

<sup>71</sup> U.S. Const. Art. II §§ 2 cl.2 and 4.

<sup>72</sup> Federalist No. 81: "The Judiciary Continued, and the Distribution of the Judicial Authority."

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.<sup>73</sup>

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.<sup>74</sup> Connecticut's final appellate body

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<sup>73</sup> 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 U.S. (1 Cranch) 137, 177 (1803).

<sup>74</sup> N.Y. Const. Art. XXXII (1777): "... [A] court shall be instituted for the trial of impeachments, and the correction of errors, under the regulations which shall be established by the legislature; and to consist of the president of the senate, for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them; except that when an impeachment shall be prosecuted against the chancellor, or either of the judges of the supreme court, the person so impeached shall be suspended from exercising his office until his acquittal; and, in like manner, when an appeal from a decree in equity shall be heard, the chancellor shall inform the court of the reasons of his decree, but shall not have a voice in the final sentence. And if the cause to be determined shall be brought up by writ of error, on a question of law, on a judgment in the supreme court, the judges of that court shall assign the reasons of such their judgment, but shall not have a voice for its affirmance or reversal." Cf. Art. III: "...[T]he governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; for which, nevertheless they shall not receive any salary or consideration, under any presence whatever. And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto

combined the governor with the upper house.<sup>75</sup> 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

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in writing, to the senate or house of assembly (in which soever the same shall have originated) who shall enter the objection sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.” See also Stevens, *op cit* n. 38, 13, n. 39: “In New Jersey, the Governor in Council became the Court of Appeal of last resort. This latter arrangement was presumably influenced by the appellate jurisdiction of the Privy Council.” This was despite earlier colonial protest against the concurrent occupation of legislative and judicial offices. In 1744, four years before *The Spirit of the Laws* appeared, the New Jersey House of Assembly resolved “That it is the opinion of this Committee [committee of the whole House], that it is inconsistent with that Freedom and priviledge [sic] the people of this colony (by their happy Constitution have a right to enjoy) that the same person should be Chief Justice at the same Time one of his Majesty’s Council in this Colony.” Archives of the State of New Jersey, 1891, First Series, XV, 371 f., quoted in Paul Merrill Spurlin, *Montesquieu in America*, 1969, 30.

<sup>75</sup> Stevens, *op cit* n. 38, 13, citing Dwight Loomis and J. Gilbert Calhoun, *The Judicial and Civil History of Connecticut*, Ch. 10.

account alone to be less eligible than the mode preferred by the convention.<sup>76</sup>

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.”<sup>77</sup> 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.’”<sup>78</sup>

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 in dispute. Montesquieu thought that even *that* adjudicative power deserved to be checked. Hamilton’s argument that adjudication was less in need of check turned on adjudication having no significance for non-

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<sup>76</sup> Federalist No. 81.

<sup>77</sup> Federalist No. 78. In *Plaut v. Spendthrift Farm*, 514 U.S. 211, 223, 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.

<sup>78</sup> *Id.*, n. 1. Montesquieu, *op cit* n. 2, 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 ... .”

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.”<sup>79</sup> 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 to 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.<sup>80</sup> But the concern for separation from the executive also underlay early eighteenth-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 behavior. For the first time, the King’s judges were insulated from his whims, and could be removed only through parliamentary impeachment.<sup>81</sup> Bolingbroke,

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<sup>79</sup> Montesquieu, op cit n. 2, Bk. XI Ch. VI, 173.

<sup>80</sup> See IV Blackstone, op cit n. 11, 342-343, 407; III Blackstone, 349 et seq.

<sup>81</sup> I Blackstone, op cit n.11, 258 (indexed 267):“our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot now alter but by act of parliament. [page footnote: 2 Hawk. P.C. 2] And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III c. 2. That their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III c. 23 ... the judges are continued

at the promising start of a disappointing political career, had helped prepare and introduce the measure.<sup>82</sup> 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 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 have regard to past applications of that law.<sup>83</sup> But he seems not to have realized that this was the practice of the English courts, and the way in which most English law

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in their offices during good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats) and their full salaries are absolutely secured to them during the continuance of their commissions: his majesty having been pleased to declare, that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown."

<sup>82</sup> Kramnick, op cit n. 4, 8.

<sup>83</sup> Montesquieu, op cit n. 2, Bk. VI Ch. I, 81: "[I]n monarchies there must be courts of judicature; these must give their decisions; the decisions must be preserved and learned, that we may judge in the same manner to-day as yesterday, and that the lives and property of the citizens may be as certain and fixed as the very constitution of the state."

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.<sup>84</sup> But he thought that risk *de minimis* in a quasi-republic, like Britain, in which the people's representatives assembled regularly to legislate.<sup>85</sup>

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

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<sup>84</sup> Id., 82: "In proportion as the decisions of the courts of judicature are multiplied in monarchies, the law is loaded with decrees that sometimes contradict one another; either because succeeding judges are of a different way of thinking, or because the same causes are sometimes well, and at other times ill defended; or, in fine, by reason of an infinite number of abuses, to which all human regulations are liable. This is a necessary evil, which the legislator redresses from time to time, as contrary even to the spirit of moderate governments. For when people are obliged to have recourse to the courts of judicature, this should come from the nature of the constitution, and not from the contradiction or uncertainty of the law." Montesquieu did not notice that the doctrine of precedent had been adopted by the English courts to remedy such contradictions and uncertainties.

<sup>85</sup> Id., Bk. VI, Ch. III, 85-86; Bk. XI, Ch. VI, 176, 182 (all quoted in Section 1, *supra*.)

bad method of legislation,” but legislation nonetheless.<sup>86</sup> 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*.<sup>87</sup>

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 decisionmaking 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, 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.

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<sup>86</sup> “The Roman emperors manifested their will like our princes, by decrees and edicts; but they permitted, which our princes do not, both the judges and private people to interrogate them by letters in their several differences [i.e. disputes]; and their answers were called rescripts. The decretals of the popes are rescripts, strictly speaking. It is plain, that this is a bad method of legislation. Those who thus apply for laws are improper guides to the legislator; the facts are always wrongly stated. Julius Capiltolinus says, that Trajan often refused to give this kind of rescripts [sic], lest a single decision, and frequently a particular favour, should be extended to all cases. Macrinus resolved to abolish all those rescripts; he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his complement with them.” *Id.*, Bk. XXIX, Ch. XVII, 290-91.

<sup>87</sup> Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085 (2002).

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.<sup>88</sup> 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... .”<sup>89</sup> 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.”<sup>90</sup> Through the seventh amendment, the founding generation swiftly

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<sup>88</sup> U.S. Const. Art. III §2 cl. 2.

<sup>89</sup> Federalist No. 81: The Judiciary Continued, and the Distribution of the Judicial Authority.

<sup>90</sup> *Id.*

confirmed the limited character of appellate review.<sup>91</sup>

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

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<sup>91</sup> U.S. 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 U.S. 254 (1964).

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.<sup>92</sup> 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.”<sup>93</sup>

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 influence. 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*

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<sup>92</sup> U.S. Const. Art. I § 9 cl. 3; § 10 cl. 1. (Both Congress and state legislatures are prohibited from enacting bills of attainder.)

<sup>93</sup> I Blackstone, op cit n. 11, 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.” (Id., 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 corraling the effective allocation of expository lawmaking power to their successors.

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."<sup>94</sup> 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,<sup>95</sup> in striking contrast to the United States Supreme Court's wholesale overruling of *Lochner*-era<sup>96</sup> precedent during the preceding decades.<sup>97</sup> And dual-track lawmakers need be no less able craftsmen of precedent than are solely-judicial lawmakers. As the Law Lords have

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<sup>94</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (O'Connor, Kennedy, and Souter, JJ.)

<sup>95</sup> Practice Direction (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.): "... 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."

<sup>96</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>97</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)); *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); *Brown v. Board of Education*, 347 U.S. 483 (1954) (effectively overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

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,<sup>98</sup> but Blackstone did. "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

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<sup>98</sup> 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," 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, *op cit* n. 2, 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. (*Id.*, Ch. V, 88-89.)

state.”<sup>99</sup>

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 sign 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<sup>100</sup> 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 were the

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<sup>99</sup> I Blackstone, *op cit* n. 11, 260.

<sup>100</sup> The jurisdiction of France’s Conseil constitutionnel falls within the formal lawmaking process. See John Bell, *French Constitutional Law*, 1992, Section 1.3.

legislative body itself, or some subset of that body, 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, or subsets of those bodies, having the particular judicial lawmaking power to expound 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.<sup>101</sup> If the lawmakers could have

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<sup>101</sup> 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*

provided in the text of their law whatever detail the judges' exposition adds, should not the lawmakers also supervise the judicial addition,<sup>102</sup> 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.

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.<sup>103</sup> 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)<sup>104</sup> or even to the

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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).

<sup>102</sup> See Nicholas Quinn Rosenkranz, *op cit n.* 87.

<sup>103</sup> Appellate Jurisdiction Act 1876.

<sup>104</sup> See, e.g. § 23 of the *Municipal Corporations Act 1882*, discussed by Lord Russell of Killowen, C.J., in *Kruse v. Johnson* [1898] 2 Q.B. 91, which empowered local corporations to make by-laws, but provided that no by-law would come into force "until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those forty days the Queen, with the advice of her Privy Council, disallows a proposed by-law or part thereof, such by-law, or such part, shall not come into force, and the Queen may, within the

holder of a particular ministerial office.<sup>105</sup> 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.<sup>106</sup> Moreover, the higher courts are empowered to declare acts of Parliament incompatible with the Convention,<sup>107</sup> and such declarations permit ministers to remedy the incompatibility by amending the legislation.<sup>108</sup> In proposing to remove the House of Lords' appellate jurisdiction, the British

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forty days, enlarge the time within which the by-law shall not come into force."

<sup>105</sup> See, e.g., § 115 of the Public Health Act 1848, considered in *Marshall v. Smith* (1873) 8 C.P. 416, which empowered local boards of health to make by-laws, but provided that those by-laws would "not be of any force or effect unless and until the same be submitted to and confirmed by one of Her Majesty's principal secretaries of state, who is hereby empowered to allow or disallow the same, as he shall think proper."

<sup>106</sup> Human Rights Act 1998 § 3.

<sup>107</sup> *Id.*, § 4.

<sup>108</sup> *Id.*, § 10.

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.<sup>109</sup>

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.<sup>110</sup> 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

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<sup>109</sup>Department of Constitutional Affairs Consultation Paper, Constitutional Reform: A Supreme Court for the United Kingdom, 2003, ¶2.

<sup>110</sup> 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.

controversial.<sup>111</sup> Yet Parliament, as ultimate lawmaker, retains the capacity to resolve all policy controversy through its own legislative choices.<sup>112</sup> 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.<sup>113</sup> 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

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<sup>111</sup> See Scotland Act 1998 §§ 33, 102, 103, Schedule VI; Government of Wales Act 1998 Schedule VIII; Northern Ireland Act 1998 §§ 11, 81, 82, Schedule X. The Law Lords currently adjudicate devolution issues as members of the Judicial Committee of the Privy Council. The British Government proposes to transfer that jurisdiction to the new Supreme Court. (See Department of Constitutional Affairs Consultation Paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, 2003, ¶21.) The current Law Lords oppose that proposal because the Judicial Committee more readily accommodates ad hoc participation by judges from the devolved jurisdictions. (Law Lords' response to the Government's Consultation Paper on *Constitutional Reform: A Supreme Court for the United Kingdom*, October 27, 2003, ¶ 9.)

<sup>112</sup> Blackstone even found support in the writings of Sir Edward Coke for the conclusion that Parliament was omnipotent. See I Blackstone, *op cit* n. 11, 156.

<sup>113</sup> See, e.g., *May v. Beattie* [1927] 2 K.B. 353 (discussing a minister's regulation-making power, subject to parliamentary disallowance, under the London Traffic Act 1924).

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 Executive.”<sup>114</sup> *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.”<sup>115</sup> Seizing on the Lockean proposition that all government depends on the tacit consent of the governed, who are ultimately sovereign,<sup>116</sup> the American founders contrived to convene the sovereign people for long enough to create an ultimate law.<sup>117</sup> That law purported to divide power along

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<sup>114</sup> Lord Hobhouse of Woodborough, Supplementary Response to the Government’s consultation paper on Constitutional reform, November 7, 2003, D.1. Hobhouse concluded that “[i]t is a serious flaw in the Consultation Paper that, insofar as it adopts any constitutional principle, it appears to choose the doctrine of the separation of powers,” which he described as “a doctrine based on a mistaken analysis of the British constitution developed by French thinkers in the 18<sup>th</sup> century.” ( *Id.*, D2.) The Lord Chancellor’s concurrent capacities to sit in the Cabinet and in the Lords’ Appellate Committee does, however, deserve criticism for its potential to prejudice litigants where the Executive is, directly or indirectly, a party-in-interest.

<sup>115</sup> U.S. Const. Preamble.

<sup>116</sup> John Locke, *Two Treatises of Government*, 1690. See also Johannes Althusius, *Politica methodice digesta*, 1603.

<sup>117</sup> 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*, 2<sup>nd</sup> ed.,

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.<sup>118</sup> 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.<sup>119</sup> Its prospects for endurance depended

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1881, 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*, 2<sup>nd</sup> ed., 1937, 93 and 476 (Madison's notes) and 665. See also Wood, op cit n. 15, 524-536; Bruce Ackerman, *We the People: Foundations*, 1991.

<sup>118</sup> See Section 1, supra. 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, op cit n. 2, Bk.IX Ch 1, 145: "If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection. ... The evil is in the very thing itself, and no form can redress it. It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic." 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 translation), 3<sup>rd</sup> ed., 1838, 186.

<sup>119</sup> 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 Sovereignities can not co-exist within the same limits." (Address to the Convention, June 18, 1787, in I Farrand 2<sup>nd</sup> ed., op cit n. 117, 287 (Madison's

on protective 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,"<sup>120</sup> Congress has no authority even to supervise the courts' exposition of its own acts, for Congress is not the source of the courts' expository power. That judicial lawmaking power is directly delegated by the People.<sup>121</sup> The People delegated "[t]he judicial Power" to courts in words that clearly embraced deciding questions of law.<sup>122</sup> Congress's power to regulate the Supreme Court's appellate jurisdiction<sup>123</sup> does not let Congress take to itself the exercise of judicial lawmaking power.<sup>124</sup> 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 judicially-elaborated law of its acts, recourse lies only through further direct Congressional lawmaking.

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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 to absorb the State Govts. no fatal consequence could result." (June 21, 1787, in *id.*, 357-358 (Madison's notes). See also Madison's speech on June 29: *id.* 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).) In a letter to W.C. Rives dated October 21, 1833, Madison impugned the accuracy of Yates's notes in relation to that speech: III *id.* 521-524.

<sup>120</sup> U.S. Const. Art. I § 1.

<sup>121</sup> U.S. Const. Art. III.

<sup>122</sup> *Id.*, § 2 cl. 2: "... the supreme Court shall have appellate Jurisdiction, both as to Law and Fact..."

<sup>123</sup> *Id.*

<sup>124</sup> See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219-223; Wood, *op cit n. 15*, 453-463.

The Constitution thus divides lawmaking power between the enactors of authoritative texts and those called upon 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 opinions resolving disputes) is not substantive, it is merely contextual. The power of articulating law straddles its formal enactment, but that formality affords a ready criterion for apportioning the power.

Article III of the United States Constitution achieves 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 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, though still essentialist, while its implied definition of judicial power reaches an enquiry that Montesquieu failed to contemplate adequately. 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.<sup>125</sup> 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,

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<sup>125</sup> The parallel 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. 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. L.J.* 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 U.S. 837 (1984)) mirrors judicial enforcement of regulations adopted by the executive pursuant to explicit Congressional delegations of rulemaking power.

the theory of checked separation is arguably not violated, as Madison and others explained to the founding generation.<sup>126</sup>

**(a.) Essentialist Separation: Unnecessary and Unaccomplished**

Though the American founders implicitly differed from Montesquieu's classification of legislative and judicial powers, theirs, like his, was essentialist, not institutional.<sup>127</sup> Some academic 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.<sup>128</sup> 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,"<sup>129</sup> to Congress, President, and courts respectively, they did not think that they were being tautologous. They thought they were investing three powers with differing *a priori* natures in particular institutional

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<sup>126</sup> See Federalist No. 47 (Madison); IV Jonathan Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2nd ed., 1888, 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, *op cit* n. 2, Bk. XI Ch. VI, 179.

<sup>127</sup> See *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

<sup>128</sup> 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).

<sup>129</sup> U.S. Const. Arts. I §1, II §1, III §1.

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.<sup>130</sup>

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 exposition of existing law. This distinction, which the Constitution seems to make, is formal, not substantive, for executive exercise of explicitly-delegated rulemaking power and executive exposition of existing law may each produce identically-worded regulation. Unsurprisingly, the Supreme Court has waded through explicit Congressional delegations of rulemaking power to executive departments and agencies.<sup>131</sup> Yet the Court has balked at devices deployed by Congress to supervise the conduct of executive departments and agencies.<sup>132</sup> 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.<sup>133</sup>

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<sup>130</sup> See Section 3, *supra*.

<sup>131</sup> "[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." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). (Blackmun, J., opinion of the Court.)

<sup>132</sup> "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 U.S. 919, 953 n. 16 (1983). (Burger, C.J., opinion of the Court.)

<sup>133</sup> "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). (Blackmun, J., opinion of the Court.) "The 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

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.<sup>134</sup> And unlike Montesquieu, the 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.<sup>135</sup>

Montesquieu had thought himself hamstrung by the indivisibility of sovereignty when proposing a liberty-promoting separation of powers. The American founders' division of legislative

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specificity or generality of its statutory commands, to determine – up to a point – how small or how large that degree shall be.” *Id.*, 417. (Scalia, J., dissenting.)

<sup>134</sup> “Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. ... All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds fresh embarrassment. The use of words is to express ideas. ... But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.” (Federalist No. 37 (Madison).) “Laws are a dead letter without courts to expound and define their true meaning and operation.” (Federalist No. 22 (Hamilton).)

<sup>135</sup> Conflation of political theories that were not fully compatible was widespread feature of discourse in Revolutionary and Founding era America. For example: “Without being fully aware of the significance of what they were doing, the opponents of the new Constitution [of Pennsylvania of 1776] mingled Addison’s defense of mixed government with Montesquieu’s reference to separation of powers as the most authoritative indictment of the unicameralism of the Pennsylvania legislature they could find.” (Wood, *op cit* n. 15, 450.)

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,<sup>136</sup> and Montesquieu was the culprit. Liberty and the rule of law are, however, aptly served by any and all constitutional 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 its explicit delegations of rulemaking power.

### **(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.<sup>137</sup> The constitutional

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<sup>136</sup> 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."

<sup>137</sup> 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*

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.<sup>138</sup> In respect of those sensitive questions, the Senate was empowered to establish ad hoc tribunals to resolve particular disputes.<sup>139</sup> 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,"<sup>140</sup> 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'."<sup>141</sup> Madison's notes then record the following:

Mr Madison doubted whether it  
was not going too far to extend the  
jurisdiction of the Court generally to cases  
arising Under the Constitution, &

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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.

<sup>138</sup> II Max Farrand (ed.), *The Records of the Federal Convention, 1911*, 186-7 (Madison's notes).

<sup>139</sup> *Id.*, 183-5.

<sup>140</sup> *Id.*, 401 (Madison's notes).

<sup>141</sup> *Id.*, 430 (Madison's notes). The convention also agreed that day without recorded discussion to a motion by Madison and Gouverneur Morris explicitly adding controversies to which the United States was a party to the Court's jurisdiction.

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 Doctr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature - <sup>142</sup>

Whatever did this mean? Perhaps it provides early support for a political question doctrine.<sup>143</sup> But a distinction between constitutional concepts suitable for judicial exposition and constitutional concepts inherently unsuitable for such exposition would surely have provoked more discussion. 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. 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.<sup>144</sup> 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

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<sup>142</sup> Id.

<sup>143</sup> See *Coleman v. Miller*, 307 U.S. 433 (1939); *Nixon v. United States*, 506 U.S. 224 (1993). Cf. *Baker v. Carr*, 369 U.S. 186 (1961).

<sup>144</sup> Advisory opinions generated within the Executive that establish norms governing executive conduct are, by contrast, subject to supervision through judicial review.

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 constitutional lawmaking that is an inevitable concomitant of deciding constitutional disputes.<sup>145</sup>

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

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<sup>145</sup> Though judicial supremacy flowed from the Constitution's creation of an unchecked judiciary, this consequence was far from universally appreciated at the Founding. See Larry D. Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4 (2001); Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U.L.Rev. 333 (1998).

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.<sup>146</sup>

Hamilton responded that legislators who had passed unconstitutional laws would not be “disposed to repair the breach in the character of judges.”<sup>147</sup> 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.”<sup>148</sup> 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.”<sup>149</sup> 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.”<sup>150</sup> 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.

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<sup>146</sup> Federalist No. 81.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Federalist No. 78.

Through their articulations of legal principle and their exposition of authoritative 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. 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."<sup>151</sup>

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."<sup>152</sup> 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<sup>153</sup> that judges would conclusively apply were, like those given by Marshall in

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<sup>151</sup> 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.

<sup>152</sup> *Federalist No. 78*.

<sup>153</sup> *Id.*: "no bills of attainder, no ex-post-facto laws, and the like."

*Marbury v. Madison*,<sup>154</sup> familiar and apparently definite concepts in respect of which judicial mis-application of text would be so clear as to be bad behavior 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 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.”<sup>155</sup> Like Montesquieu, but without Montesquieu’s excuse, Hamilton, and later Marshall, publicly characterized judicial application of law as syllogistic.<sup>156</sup>

At the Philadelphia Convention, Hamilton had advocated lifetime appointments for obvious policymakers, namely the president and members of the upper chamber, aspiring to imitate the British system as closely as possible. At Philadelphia he had been alone in

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<sup>154</sup> 5 U.S. (1 Cranch) 137, 179 (1803). Marshall’s skillful 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. (Id., 173-180.)

<sup>155</sup> The Federalist No. 78.

<sup>156</sup> 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 body of principle revealed, not constituted, by the historic body of judicial writings. (See *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J.); *Guaranty Trust Co. v. York*, 326 U.S. 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.

seeking such a New World aristocracy.<sup>157</sup> 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 than it does now. During the ratification period, James Iredell showed that he understood British constitutionalism to have an ultimate common law foundation,<sup>158</sup> reflecting the view expressed in the seventeenth 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.<sup>159</sup> 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

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<sup>157</sup> I Farrand, *op cit n.* 138, 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).)

<sup>158</sup> 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.

<sup>159</sup> See *Dr. Bonham's Case*, 8 Coke Rep. 107 (1610).

body, or on a representative subset of that body, inevitably 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?<sup>160</sup> 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.<sup>161</sup> It also enabled three-quarters of the states to amend its terms.<sup>162</sup> 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

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<sup>160</sup> 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 endeavors 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.)

<sup>161</sup> U.S. Const. Art. I § 3 cl. 1.

<sup>162</sup> U.S. Const. Art. V.

supervised the exercise of that power through an appropriately-fashioned super majority of their representatives in the other branches of government.<sup>163</sup> 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.<sup>164</sup> 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.

## 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 c.e.o. sits in a southern plantation house. Britain's new Supreme Court, or rather, the grand and freestanding structure it will doubtless

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<sup>163</sup> See John O. McGinnis and Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 *Wm. & Mary L. Rev.* 365 (1999).

<sup>164</sup> See Stevens, *op cit* n. 38, 12.

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.