The FRAMING and RATIFICATION of the CONSTITUTION

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THE CONSTITUTION AND THE SEPARATION OF POWERS

EDWARD J. ERLER

> *"If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be* separately *exercised; it is equally so that they be* independently *exercised."*
>
> James Madison[1]

During the framing and ratification of the Constitution, there was no political opinion more widely accepted than that which proclaimed the separation of powers to be an essential ingredient of constitutional government. James Madison reflected the universality of this opinion when he wrote in *The Federalist* that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons" than this "essential precaution in favor of liberty." The Framers of the Constitution were virtually unanimous in accepting Madison's statement in *The Federalist* #47 that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." If, indeed, the proposed Constitution did evidence a design or a tendency to such an accumulation of powers—as some Anti-Federalists alleged—Madison conceded that "no further arguments would be necessary to inspire a universal reprobation of the system."

While there was general agreement that a separation of powers was essential for the rule of law, the precise form the separated powers should assume in the new Constitution provoked vigorous debate. In the view of the leading Federalists, it was not enough to provide a negative check upon the powers of government; it was also necessary to provide for energetic government. Theophilus Parsons, in his influential *Essex Result*, published in 1778, wrote that "the principles of a free republican form of government" require "modelling the three branches of the supreme power in such a manner, that the government might act with the greatest vigour and wisdom, and with the best intention." The three departments should also "retain a check upon the others, sufficient to preserve it's independence."

The whole object of such "modelling" was, of course, to serve the leading republican principle that "no member of the state should be controuled by any law, or be deprived of his property, against his consent." [2] In a word, the separation of powers held out the prospect that constitutional government could be nontyrannical government as well as good government.

Madison and most of the leading Federalists maintained that by itself the representative principle was insufficient. While a "dependence on the people is, no doubt, the primary control on government," Madison wrote, "experience has taught mankind the necessity of auxiliary precautions." Separation of powers—and its attendant checks and balances—was the central constitutional precept embodied in the new Constitution. Separation of powers, of course, is essentially a modern doctrine, one of those principles Hamilton listed as being either among "the wholly new discoveries" or those which "have made their principal progress towards perfection in modern times." [3] The Anti-Federalist "Centinel," although maintaining that "the highest responsibility is to be attained in a simple structure of government," nonetheless concurred with Hamilton, calling the separation of powers "the chief improvement in government in modern times." Although the idea of the separation of powers as a constituent element of constitutional government was not unknown either to the ancients or to the moderns, the version of that doctrine propounded in the American Constitution is unique in that it was intended to operate in an *unmixed* regime. As M. J. C. Vile correctly notes, "The division of functions between agencies of government who will exercise a mutual check upon each other *although both are elected, directly or indirectly, by the same people,* is a unique American contribution to modern constitutional theory." [4]

In *The Federalist* #47 Madison wrote that "the oracle who is always consulted and cited" on the subject of the separation of powers 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." Indeed, Montesquieu's great work on politics, *The Spirit of the Laws,* published in 1748, was the source most cited by both proponents and opponents of the Constitution. Given the weight of Montesquieu's authority, therefore, it was necessary for Madison and the Federalists to understate their disagreements—and thereby overstate their agreements—with him. Like all oracular interpretations, Madison's discussion of Montesquieu concealed as much as it revealed. *The Federalist,* I believe, presents, if not the first full-scale account of the separation of powers, then certainly the first full-scale republican account. And, if it is true, as W. B. Gwyn remarks, that the doctrine of the separation of powers had republican origins, then certainly *The Federalist* must be credited with the first complete and definitive account of that doctrine.[5]

Montesquieu's famous discussion of the separation of powers in Book

XI, Chapter 6, of *The Spirit of the Laws* is brief and seems almost to be out of place in the economy of the work, since it occurs in the chapter on "The Constitution of England" but does not purport to be an accurate account of that system. At any rate, Montesquieu prefaced his remarks on the separation of powers with a definition of the "political liberty of the citizens." This is, he wrote, "a tranquility of mind arising from the opinion each person has of his safety." This "tranquility" is to be found "only where there is no abuse of power." And it is in the prevention of the abuse of power that the separation of powers becomes the central institution of "moderate government":

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, 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.

The Framers of the American Constitution were mindful of the fact that Montesquieu's major contribution to the separation of powers "doctrine" was the addition of an independent judiciary.

Prior to Montesquieu, the modern separation of powers theory—including that of John Locke—extended only to the legislative and executive departments; judicial power was seen as a part of executive power, the application of law in particular cases.[6] Montesquieu's attempt to distinguish judicial power is somewhat ambiguous in that it appears to be more of an attempt to "disguise" judicial power than to distinguish it. Even though Montesquieu remarks that the power of judging is "in some sense nothing," it

> ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires. By this method the power of judging, *so terrible to mankind*, not being annexed to any particular state or profession, becomes, as it were, *invisible and nothing*. People have not then the judges continually present to their view; they fear the office, but not the magistrate [L'Esprit des Lois XI, 6, emphasis added].

This power of judging was to be exercised by juries drawn periodically from the people, and in the exercise of the jury function the people were themselves to be judges. Juries would continually emerge from the people and then dissolve back into the mass of society. Since no magistrate exercised this "terrible power" directly, its influence would thereby be almost "invisi-

ble." It remained for the Framers of the American Constitution to complete the establishment of an independent judicial power by transforming Montesquieu's jury system into a judiciary and juries into judges.

The principal reason that Montesquieu's doctrine of the separation of powers was in need of modification, however, was that it rested on the mixed regime principle. As Thomas Pangle notes, "Montesquieu still believed that the competition which keeps powers limited requires a real class division among the citizenry."[7] Like Locke before him, Montesquieu sought to distribute the powers of government among different classes—monarchy, aristocracy, and democracy. The legislative function was to be divided between the democracy and a hereditary nobility with the executive branch held by the monarchy. The natural class antagonisms that pre-existed in society would thus be reflected on the level of government, preventing one class from dominating the government.

This balanced or mixed government would provide the stability or moderation necessary for the rule of law and prevent government from becoming too powerful. It was therefore a system that looked not primarily to the protection of the rights and liberties of individuals but to the protection of the rights and liberties of the various classes. Montesquieu may have alluded to this when he wrote that "the three powers can be well distributed with regard to the liberty of the constitution, although they are not so well distributed with regard to the liberty of the citizen" (L'Esprit des Lois XI, 18). As Martin Diamond cogently noted,

> the mixed regime was . . . defended, partly, as a barrier against oppression by one class of another—not, be it noted, as a protection of the liberties of individuals—and it was further defended, even more importantly, on the ground that by bringing together two partial conceptions of justice, statesmanship could hope to achieve a complete justice by harmonizing these opposing conceptions. Thus, in the mixed regime, rival claims regarding justice were in the very structure of the system.[8]

For Montesquieu, constitutional government—and hence the rule of law—was rooted in the class-based structure of society itself. Without this agency, it would be impossible to contrive an effective separation of powers because there would be no "rival claims regarding justice" among an undivided people which could serve as the source of the checking function that the separation of powers was designed to provide.

This class structure was, of course, lacking in America. There was no hereditary nobility and no prospect of creating one. Indeed, the Constitution's prohibition against the creation of titles of nobility was considered to be "the cornerstone of republican government," because, Alexander Hamilton wrote in *The Federalist* #84, as long as titles of nobility are "excluded there can never be serious danger that the government will be any other than that of the people." Almost everyone recognized that a class-based

constitutional arrangement was contrary to the "genius of the American people." Several delegates to the Constitutional Convention noted the inappositeness of predicating a separation of powers upon class. Charles Pinckney, for example, remarked that, although he believed the "Constitution of G. Britain" to be the best in existence,

> it might easily be shown that the peculiar excellence, the distinguishing feature of that Governmt. can not possibly be introduced into our System —that its balance between the Crown & people can not be made a part of our Constitution.—that we neither have or can have the members to compose it, nor the rights, privileges & properties of so distinct a class of Citizens to guard.—that the materials for forming this balance or check do not exist. . . .

It was thus necessary to find a republican substitute for the mixed regime principle. This substitute was found in the constitutional system of checks and balances, and in the manner in which all the powers of government were derived "directly or indirectly from the great body of the people" (*The Federalist* #39). It was, of course, a task of particular delicacy to determine the precise configuration the constitutional system was to assume, and it was here that the bulk of the debate over the separation of powers took place during the founding period.

In *The Federalist* #47 Madison noted that one of the "principal objections" levied against the Constitution "by the more respectable adversaries" was that it had so blended and intermingled the powers of government as "to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts." An "Officer of the Late Continental Army" expressed a widely held Anti-Federalist opinion when he wrote that "The LEGISLATIVE and EXECUTIVE powers are not kept separate as every one of the American constitutions declares they ought to be; but they are mixed in a manner entirely novel and unknown, even to the constitution of Great Britain." "Cincinnatus" wrote in a similar vein, citing Montesquieu and Jean Louis DeLolme as his authority: "It would have been proper, not only to have previously laid down, in a declaration of rights, that these powers should be forever separate and incommunicable; but the frame of the proposed constitution, should have had that separation religiously in view, through all its parts. It is manifest this was not the object of its framers, but, that on the contrary there is a studied mixture of them." And "Federal Farmer," who conceded the necessity of some mixing and balancing of the powers of government, nevertheless contended that the particular admixture represented in the Constitution had a dangerous tendency toward the accumulation of executive power. Republican government, he maintained, did not need such a complicated system of checks and balances: "Where the members of the government, as the house, the senate, the executive, and judiciary, are strong and complete, each in itself, the

balance is naturally produced, each party may take the powers congenial to it, and we have less need to be anxious about checks, and the subdivision of powers." The mixed system contemplated in the Constitution would, "Federal Farmer" alleged, establish a dangerous "new species of executive."

What Madison understood, and the Anti-Federalists did not, was that checks and balances, entailing the extensive sharing of constitutional power, was made necessary by the republican principle itself, a principle that did not give constitutional status or recognition to class. Checks and balances, of course, are superfluous in a mixed regime. It is not necessary to contrive defensive mechanisms for the different branches of government because those defenses will be supplied by the competing class interests. The Anti-Federalists interpreted Montesquieu's "pure theory" of the separation of powers as if it had been intended for a republic rather than a mixed regime. Madison thus had to modify Montesquieu to make his "doctrine" of the separation of powers compatible with the principles of an "unmixed" regime.

> [I]t may clearly be inferred that Montesquieu could not have meant that the legislative, executive, and judiciary ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, . . . 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.

The Anti-Federalists rigorously held to the traditional view that the principal purpose of the separation of powers was to augment legislative power against the prerogatives of executive power. They were never able to reconcile themselves to the idea of energetic government—energy and liberty were simply irreconcilable. For the Anti-Federalists, liberty could exist only within the interstices of the *exceptions* to sovereign power, never in its vigorous exercise, however well constructed government might be to control the abuse of power. Thus the Anti-Federalists tended to regard constitutions as little more than extended bills of rights. They still adhered to the older notion that the mass of sovereign power always resided in the government and that the people's liberties depended upon the extent to which they could carve out exceptions to that mass of sovereign prerogative. Thus Magna Carta and the English Bill of Rights were models for the Anti-Federalists. But these great documents were the source of the "historic" rights of Englishmen, whereas the American Constitution claimed to rest on natural rights—the necessary incidents of "the laws of Nature and Nature's God." The doctrine of natural rights derived legitimate government from the consent of the governed, not from history. The radical core of the American Revolution was precisely this change from historical rights to natural rights.

Hamilton argued in *The Federalist* #84 that those who supported the inclusion of a bill of rights in the Constitution mistook the nature of the government contemplated by that instrument. However impolitic Hamilton's argument may have been, he was correct in principle. The government established by the new Constitution, Hamilton argued, was a government whose sovereignty was limited to the accomplishment of certain specified objects. It did not have the prerogative of regulating "every species of personal and private concerns." Thus the people's liberties did not reside in the narrow sphere of excepted power; rather, the power of government depended upon positive delegations of power from the people. "Here," Hamilton noted, "in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations." Because the new form of government contemplated the sovereignty of the people, the Federalists maintained that the calculus of separated powers had changed. Executive power now had to be augmented to serve as a check against the prerogatives of legislative power.

The Anti-Federalist reliance on legislative power was connected to the small republic argument of Montesquieu. "Centinel" proclaimed "the form of government, which holds those entrusted with power, in the greatest responsibility to their constituents, the best calculated for freemen. A republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided; in such a government the people are the sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its ruin." Citing Montesquieu as his authority, "Centinel" concluded that "it will not be controverted that the legislative is the highest delegated power in government, and that all others are subordinate to it." According to "Federal Farmer," a "fair representation" of the people was therefore the essential guarantee of republican principle. "A full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled—a fair representation, therefore, should be so regulated, that every order of men in the community, according to the common course of elections, can have a share in it."

With a virtuous citizenry there is little need for complicated schemes of separated powers because the principle of representation itself will insure the enactment of just policies. But as *The Federalist* #35 countered, not only is this argument for proportional representation "altogether visionary" in the sense that the legislature could never be sufficiently numerous to represent the "interests and feelings of every part of the community," it also fails to account for the possibility that legislative power itself could be a source of danger to republican liberty. A virtuous citizenry may be necessary for republican government, but, as Hamilton argued in the New York ratifying

convention, it is also necessary to rely on "auxiliary" institutions that connect "the virtue of . . . rulers with their interest." And once the principle of separation is conceded to be necessary to republican government, it is no longer possible to adhere to the proposition that republican government must be simple government. As Hamilton continued his description of the new Constitution, he remarked that "in the form of this government . . . you find all the checks which the greatest politicians and the best writers have ever conceived. . . . The organization is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success."

The Anti-Federalist view was represented in most of the state constitutions prior to 1787. Charles Thatch accurately described the situation when he wrote that "in actual operation, these first state constitutions produced what was tantamount to legislative omnipotence. . . . Separation of powers, whatever formal adherence was given the principle in bills of rights, meant the subordinate executive carrying out the legislative will."[9] The example of the state governments was a great concern to the members of the Constitutional Convention. James Wilson inquired: "Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the legislative authority be not restrained, there can be neither liberty nor stability."

The state constitutions contained strong commitments to separation of powers. The Massachusetts constitution of 1780 best illustrates:

> 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.

But the framers of the state constitutions did not take adequate measures to establish in practice what they conceded to be necessary in theory. As Madison remarked in *The Federalist* #48, "in no instance has a competent provision been made for maintaining in practice the separation delineated on paper." The principal reason for this, according to Madison, was that the framers of the state constitutions were so preoccupied with curtailing "the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority," that they failed to foresee "the danger from legislative usurpations." These "legislative usurpations," Madison laconically notes, "must lead to the same tyranny as is threatened by executive usurpations."

In a republic there is no analogy between the power of a monarch and the power of an elected magistrate—a powerful executive was not, as many opponents of energetic government claimed, "the foetus of monarchy." In a

monarchy, executive power is indeed the source of danger. But in a republic, where the executive is carefully limited and the legislature "is inspired by a supposed influence over the people" and possesses "an intrepid confidence in its own strength," the legislature possesses a natural advantage over the other branches. It is against the "enterprising ambition" of the legislative department, Madison concludes, "that the people ought to indulge all their jealousy and exhaust all their precautions." The particular danger of legislative supremacy to republicanism is that the legislature is the natural representative of majority faction, the disease "most incident to republican government." The principal defect of the state governments was not, of course, their lack of an effective separation of powers, but the smallness and lack of diversity that allowed their legislatures to be dominated by majority factions. Separation of powers is only an "auxiliary" consideration.

In *The Federalist* #48, Madison described the twofold character of an effective separation of powers: first, it is necessary to discriminate "in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary"; the second and "most difficult task" is to devise a means of providing "some practical security for each, against the invasion of the others." It is significant that Madison does not say here that the theoretical discrimination of the various powers according to their nature is an easy task, only that providing "practical security" is the "most difficult." The reason is that in *The Federalist* #37 he had already made the case for the difficulty of the classification of the various powers according to their nature.

> 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. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

We learn in *The Federalist* #51 that the task of providing "practical security" consists "in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The "constitutional means" comprise the various modes of mixing and interblending the different powers of government that we have come to know as checks and balances. The argument for checks and balances, then, depends, in no small measure, on the fact that there is some indistinctness in the nature of the powers to be separated. The fact that by nature the powers are indistinct makes it appear that their combination can also be "natural."

The practice of the separation of powers depends upon the fact that the legislative, executive, and judicial powers can be blended and intermingled in a manner consistent with republican principles. As Madison remarked in

The Federalist #48, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The "great problem to be solved," then, is not a theoretical but a practical one; or at least it is a problem in which nature (the indistinct nature of the powers to be separated) lends itself fully to the support of practice. We would not add, however, that this is an instance where it is necessary for practice to inform theory.

Practice requires something more than mere "parchment barriers." Yet, this is the "security which appears to have been principally relied upon by the compilers of most of the American constitutions." Parchment barriers will be inadequate to resist "the encroaching spirit of power" by the "more powerful members of the government" against the "more feeble." And as Madison was fond of remarking, "the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The predominance of the legislative branch is natural in any popular form of government; it results from the fact that the legislature is the most immediate representative of sovereign power, the people. It derives advantages from other sources as well: besides the fact that the legislature will have exclusive "access to the pockets of the people," it has "constitutional powers . . . at once more extensive and less susceptible of precise limits." From this latter circumstance, "it can, with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

It is not possible, however, "to give to each department an equal power of self-defense." Since the "legislative authority necessarily predominates" in republican government, this "inconveniency" is met by dividing the legislature into rival branches. The "weakness of the executive may require, on the other hand, that it should be fortified." The "natural defense" appears "at first view" to be an absolute veto. The absolute veto, however, may be inconsistent with the principles of republican government; more important, an absolute negative might not be as frequently exercised as the qualified veto. The nature of republican government and the necessity of an energetic executive seem therefore to require the qualified veto. The other "constitutional means" possessed by the executive, such as the power to propose legislation, the appointment of judges, and the power of pardon, are designed to fortify the executive branch against the legislative. This scheme of checks and balances is designed to make the different branches independent, so that independence can serve as the means of defense for the weaker branches against the stronger. Throughout the construction of the executive branch the principle that guided the Framers of the Constitution was to combine, "as far as republican principles will admit, all the requisites to energy."

This principle is well illustrated by Hamilton's discussion of the treaty-

making power. Acknowledging that objections had been made on the ground of "the trite topic of the intermixture of powers," Hamilton defended the Constitutional Convention's decision to place the treaty-making power in the executive "by and with the advice and consent of the Senate." Hamilton remarks that "the particular nature of the power of making treaties indicates a peculiar propriety in the union." The nature of this power, Hamilton maintained in *The Federalist* #75, is more legislative than executive, "though it does not seem strictly to fall within the definition of either of them." The "objects" of treaty making "are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department."

Hamilton here alludes to Locke's distinction between "federative power" and "executive power." The federative power, according to Locke, is concerned with "all the Transactions, with all Persons and Communities without the Commonwealth" and is therefore "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, to be managed for the public good." Locke calls this "Federative" power "natural," because it corresponds "to the Power every Man naturally had before he entred into Society." Even though the executive and federative powers are by nature distinct, "yet they are always almost united" in the same person. But, as Hamilton admits, the republican principle demands that federative power—at least insofar as it involves treaty making—be divided between the executive and the Senate. To have entrusted the power of making treaties solely to the President would have been "utterly unsafe and improper."

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

Entrusting the treaty-making power solely to the Senate, on the other hand, "would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations." The union of the treaty-making power in the executive and the Senate is thus made necessary by the nature of the powers involved and the nature of republican principles.

There were several proposals at the Constitutional Convention to have the President elected by the legislature. But, as James Wilson argued, such a mode of selecting the executive would render it "too dependent to stand as the mediator between the intrigues & sinister view of the Representatives

and the general liberties & interests of the people." Wilson's view was seconded by Gouverneur Morris, who charged that "If the Executive be chosen by the Natl' Legislature, he will not be independent of it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence." The leading architects of Article II were well aware of the fact that, in Hamilton's terms, "energy in the executive is the leading character in the very definition of good government," although Madison always referred to "energy in government" as being essential to "the very definition of good government."

In the Constitutional Convention Madison failed in his attempt to persuade the delegates to adopt another "auxiliary precaution" that he regarded as essential in translating the theory of separation into secure practice, a Council of Revision. This council would have been composed of the executive and a specified number of Supreme Court justices. Its function would have been to provide a "Revisionary check on the Legislature" through the prior review of legislative proposals. It would, Madison argued, provide a defensive mechanism against "Legislative encroachments" for both the executive and the judicial branch. Madison regarded the defeat of the revisory council and his failure to secure a national veto on state legislation as his two greatest defeats in the convention.

The Council of Revision was rejected because many delegates believed that this intermixture would violate the separation of powers, primarily because it would give the judiciary a double check on legislative power, once as part of the revisory power and again in the normal course of judicial review of legislation. James Wilson countered this argument, arguing that the council would give the Supreme Court a proper role in policy determination.

> It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law.

A majority of the convention reasoned that such a mixture would make "statesmen of the Judges," thus setting them up—instead of the legislature—as the guardians of the rights of the people. Most delegates seemed to believe that republicanism demanded that the judiciary not be involved in policymaking, because policymaking involves more than the exercise of judgment. There is, of course, some question as to whether the council would have genuinely contributed to executive independence, or whether it would have only served to strengthen judicial power at the expense of

executive power. In the latter case, the council would have failed to provide an effective check on legislative omnipotence.

The natural superiority of the legislative branch also made it necessary for the Framers to construct an independent judiciary. A "complete independence of the courts of justice" was necessary to insure the legislature's —and the people's— adherence to the Constitution in those instances where it is inspired by an intrepid sense of its own strength to ignore the Supreme Law of the land. An independent judiciary is therefore necessary in order to place the courts in the role "as the bulwarks of a limited Constitution against legislative encroachments." This is the main reason that the independence of the judiciary depends upon the permanent tenure of judges, which "must soon destroy all sense of dependence on the authority conferring" the appointments. Richard Epstein recently remarked that "the judiciary is on a long leash at the edge of the strictly republican regime, reflecting the hope that good government can promise repose and tranquility to every individual man." [10] The only thing that saves the judiciary from being that un-republican "will independent of society" that Madison warns against in *The Federalist* #51 is the fact that the judiciary has no will— only judgment.

This independence does not, however, "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by fundamental laws rather than by those which are not fundamental" (*The Federalist* #78). This idea of an independent judiciary as the bulwark of a limited constitution received its greatest explication in Chief Justice Marshall's opinion in *Marbury v. Madison* (1803). There is some doubt, however, whether the Framers of the Constitution or Marshall would endorse the present-day version of judicial review. Today's version casts the Supreme Court in the role "as ultimate interpreter of the Constitution" in all matters involving the separation of powers (*Baker v. Carr*, 1962). This notion of judicial supremacy renders the Court too prone at times to confuse the Constitution with constitutional law. The Supreme Court has gone so far as to imply— supposedly relying on Marshall's argument in *Marbury*— that its *interpretations* of the Constitution are "the Supreme Law of the land" (*Cooper v. Aaron*, 1958). Marshall, however, had argued that "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

In addition to providing the "constitutional means" for maintaining the independence of the branches of government, it is also necessary to provide the requisite "personal motives." For, without personal motives, there is the danger that government will not be energetic, that those who occupy the

various constitutional offices will not employ the "constitutional means" of independence that are attached to their office. In a mixed regime, the motives for independence are provided by the rival claims and interests of the different classes in society. Republican government must replace class motives with personal ones. Madison remarks that "ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." It is in this manner that interest and public spiritedness are combined so that "the private interest of every individual may be a sentinel over the public rights." These are in some sense, Madison laconically remarked in *The Federalist* #51, "inventions of prudence."

The great problem in arranging a separation of powers in a popular government is in devising a method of introducing different interests into the government. Discussing the Virginia Constitution in the *Notes on the State of Virginia,* Jefferson noted that "The senate is, by its constitution, too homogeneous with the house of delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description. . . . We do not therefore derive from the separation of our legislature into two houses, those benefits which a proper complication of principles is capable of producing." The result is that "all the powers of government, legislative, executive and judiciary, result to the legislative body," thus forming an "elective despotism." The Constitution supplied "a proper complication of principles" by the use of differing modes of election. By deriving power from the people by means of different channels—directly or indirectly—different interests can be introduced into the level of government and serve as the basis for the ambitions and personal motives of those who occupy the various offices of government.

The Senate, for example, is ultimately responsible to the majority of society, but it is a different majority than the one that elects both the House of Representatives and the President; and the different branches are responsible not only to majorities derived in different ways but to majorities formed at different times. Presumably, in a large, diverse republic majorities formed at different intervals will express different views and interests. With these "transient" majorities being the most characteristic feature of modern republicanism, the government is free to represent the public good.[11]

The Federalist's explication of the separation of powers proceeds in terms of interest and ambition rather than virtue. As Hamilton wrote, the "best security for the fidelity of mankind is to make their interest coincide with their duty. Even the love of fame, the ruling passion of the noblest minds," would be insufficient for ensuring an energetic executive where there is no immediate prospect for enhancing one's reputation. The language of interest does not deny the possibility—or even the necessity—of virtue or public spiritedness. But *The Federalist* is "disposed to view human nature as it is, without either flattering its virtues or exaggerating its

vices. . . ." There is no doubt that the Framers placed ultimate reliance on the "genius of the people of America" for the success of the experiment in republicanism. The honor of human nature—"the principles of the Revolution"—demanded such reliance. But the Framers were always mindful of the necessity of "auxiliary" precautions to account for the "ordinary depravity of human nature."

Republican government in which the separation of powers is to be the practical guarantee of liberty must be energetic government. But as some observers have pointed out, the term "energy"—only recently having made its way into political discourse from physics—is neutral with respect to forms of government. An energetic executive can be either a monarch or a republican executive. Energy is not identical with virtue, although the two are not necessarily incompatible. With a properly constructed government, however, energy can be the source of republican virtue. Without the proper constitutional forms the connection between energy and virtue will be less certain: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."

The great object of republican statesmanship is to insure not only that government will be energetic, but also that the objects of ambition are the objects worthy of "the noblest minds." The love of fame partakes of the same neutrality as "energy." As Abraham Lincoln pointed out in his Lyceum Speech in 1838, "Towering genius disdains a beaten path. . . . It thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving freemen." When such genius springs up in the midst of self-governing society, Lincoln noted, it will require a united people attached to the Constitution and the laws to be able to frustrate his designs.

Since energy and ambition are ambiguous springs to public spiritedness, the structure of government must be designed to insure that both will be directed to the public good. This is the reason that "ambition must be made to counteract ambition." The honor and ambition of those who occupy the constitutional offices will only be served when the nation prospers. Thus it is not so much the virtue of the rulers as the virtue of constitutional forms that insures the public good. The noblest minds will not be the product of a noble class. The various constitutional offices will be open to talent, but those who occupy the offices will not be the products of talented classes—their motives will be personal, not derived from class interests. The people will choose those who are most qualified for office, and their virtue—and perhaps their spiritedness—will be reflected in those whom they elect. Madison made this illuminating remark in the Virginia ratifying convention: "I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. . . . If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue,

or put confidence in our rulers, but in the people who are to choose them."

Republics can invite ambitious men to fill their constitutional offices because there are constitutional devices—most particularly the separation of powers which has now received its principal perfection in the American Constitution—to insure that however ambitious rulers might be, they will be confronted not only by the ambitions of other constitutional officers but ultimately by the ambition of the people. The people, in choosing their constitutional officers, are thus not merely deferring to the greater virtue of their representatives. As Madison remarked, "those ties which bind the representative to his constituents are strengthened by motives of a more selfish nature. His pride and vanity attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions." The people's ambitions are derived from the "manly spirit" of the revolution, a spirit "which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it." This is the ultimate ground of republican government, and all other considerations—however important they may be—are merely auxiliary.