

American Separation of Powers: How the Architects of the U.S. Constitution Strategically Developed Montesquieu's Constitutionalism

Christopher Putney
University of Texas at Austin

Abstract:

Anti-Federalist opponents of the Constitution offered numerous, and at times, even contradictory criticisms of the draft as it emerged from Philadelphia in 1787. In spite of the apparent heterogeneity of these constitutional criticisms, there are those writers, that because of the seriousness of their arguments, warranted a direct response by probably the most influential work on the U.S. Constitution then or since: *The Federalist*. I argue that what James Madison heralds as Montesquieu's "sacred maxim of free government," and as an "invaluable precept in the science of politics," is ultimately redefined in the Madisonian defense of the Constitution. Though Madison begins with an invocation of Montesquieu's theory of how government power ought to be organized in a "free government," his treatment of the separation of powers principle turns out to supply a significantly modified version of Montesquieu's constitutional teaching. I demonstrate that Madison's rendering of Montesquieu in defense of the proposed Constitution not only appropriates Montesquieu's terminology, but strategically develops a revised conception of separation of powers.

Introduction

It may be fair to contend, as many Federalists did in the 1780's, that Anti-Federalist writers "shared no common principles, that their arguments canceled each other out," and, that "[Anti-Federalists] did not, finally, even agree unanimously in opposing the adoption of the

Constitution” (Storing and Dry 2006). However, one of the most persistent of the Anti-Federalist critiques (offered in more or less the same form) by various writers, was taken up by James Madison in *The Federalist*, and replied to forcefully in essays 47, 48 and 51 (Hamilton, Madison, and Jay 2003). Writing as “Publius,” Madison’s rendition of this criticism is as follows: “One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct (Hamilton, Madison, and Jay 2003).

Some Anti-Federalists, according to Madison, claim that the Constitution under consideration neglects an “*essential* precaution in favor of liberty,” and worse, one recommended “most effectually [by] the celebrated Montesquieu,” the “oracle who is always consulted and cited on this subject.”¹ In Madison’s telling, Anti-Federalists view “the structure of the [proposed] federal government” as having a “dangerous tendency to an accumulation of all powers, legislative, executive, and judiciary,” thereby violating Montesquieu’s theory of the separation of powers.²

In this essay I argue that what Madison heralds as Montesquieu’s “sacred maxim of free government,” is ultimately redefined in the strategic articulation *The Federalist’s* defense of the Constitution provides. I will attempt to show that Madison’s constitutional blueprint actually builds upon, and develops Montesquieu’s conception of the separation of powers. In this sense the Constitution is indeed “chargeable” with violating Montesquieu’s maxim, at least to the extent that it institutionally “blends” the “three great” powers within and among its branches.³ Though Publius claims “the maxim on which [the Anti-Federalist critique] relies has been totally misconceived and misapplied,” it is Madison’s attempt at

¹ *Ibid.*

² *Ibid.* Emphasis added.

³ *Ibid.*

“correcting” this misconception, that will supply his modified version of it. I will first consider key passages from Montesquieu’s discussion of this subject in *The Spirit of the Laws* to bring out the main features of his theory. Then I will compare Madison’s (purportedly more accurate) rendering of Montesquieu, in order to reveal exactly how his revisions create subtle, yet meaningful, differences between the two thinkers’ conceptions of the separation of powers as a principle of constitutional design.

Montesquieu’s Separation of Powers Principle and Political Liberty

What both sides of the ratification debate call Montesquieu’s “maxim” is really a principle distilled from his broader discussion of related subjects in Book Eleven of *The Spirit of the Laws* (Montesquieu 1989). These subjects include the three “sorts” of power found in all governments, their purposes (i.e., what governmental functions they serve), and finally, the relationship between how these powers are constituted in a government’s institutions, and the status of its subjects’ “political liberty.”⁴ Chapter Five, in spite of its brevity, provides an important starting point for Montesquieu’s subsequent discussion of power’s role in a government’s constitution, and it is necessary to consider a few of its insights.

Consider his assertion that “Though all governments have the same general end [of] preservation...each [also] has another particular object,” for it raises two issues at once.⁵ The first is whether the notion of “preservation” refers to a government’s *self*-preservation (i.e., its mere survival), the preservation of the lives of its citizens, or both. Montesquieu does not specify here, but instead draws our attention to the latter, and seemingly more relevant part of this statement. This is the notion that aside from whatever sort of preservation all governments pursue as a “general,” or more basic end, specific

⁴ Montesquieu, *supra* at Bk. 11, chaps. 4-6.

⁵ *Ibid.*

governments also possess an additional aim more unique to their regime. Montesquieu then offers examples of governments characterized by their secondary, but apparently more “direct” ends: “Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles,” and so on.⁶ Immediately after these examples, it becomes clear both why Montesquieu offers this manner of characterizing regimes, and which one he supposes will best illustrate the meaning of “political liberty in a constitution,” i.e., how the separation of powers should operate in a “free” regime.⁷ Accordingly, we are told that to “discover” political liberty, “no great labour is requisite,” because “England has for the direct end of *its* constitution political liberty.”⁸

Montesquieu’s reverent appraisal of England’s constitution identifies it as a model for how the “three sorts” of government power—the “legislative,” “executive,” and the “judiciary”—can all be institutionally arranged in a government to pursue political liberty as its end.⁹ Political liberty is the concept that will animate the rest of Montesquieu’s elaboration of his constitutional theory in Chapter Six.

We are lead by his assertions then, to ask exactly what Montesquieu means by political liberty, and whether its relationship to the constitution of England can really reveal the necessity, or advantages, of Montesquieu’s principles of constitutional design. Montesquieu’s answer seems to be that because England has liberty “for the direct end of its constitution,” the “principles on which [its] liberty is founded; if they are sound” will also reveal a view of liberty “in its highest perfection.”¹⁰ We might infer then, that by choosing to examine the constitution of England, which has for its government’s “direct end” political liberty, Montesquieu is really seeking to make “the principles on which” England’s liberty is “founded,” synonymous

⁶ *Ibid.*, See chap. 4-5

⁷ *Ibid.*

⁸ *Ibid.* Emphasis added.

⁹ *Ibid.*, at chap. 4-6.

¹⁰ *Ibid.*, at chap. 5

with his own constitutional principles. This is a rhetorical strategy, which, because of its veneration for a specific government's purported constitutional qualities—in this case England's—will also be able to provide approval of the separation of powers as Montesquieu enumerates it. In other words, “liberty in its highest perfection” will itself be made synonymous with Montesquieu's theory of separation of powers, to the extent that the “principles” taken up by his examination of England's government, are indeed “sound.”

At the center of Montesquieu's theory, is this idea of “political liberty.”¹¹ The terms “liberty” and “political liberty” are used interchangeably in Montesquieu's discussion, and what they describe seems to require three essentials. The first is the absence of power's “abuse,” or its “arbitrary” exercise by those in government. Though its effects are not themselves explicitly defined, arbitrary abuse of power is apparently still detectable by the “oppression,” “violence,” and “tyrannical laws” it generates.¹²

The second essential derives from the first, and is the protection of a citizen's physical “safety” from the harm posed by these threats. The third requisite for political liberty very much depends on the satisfaction of the first two, and is a citizen's “tranquility of mind arising from” the absence of “violence and oppression,” in other words, the citizen's self-awareness of his own safety.¹³ Though Montesquieu's claim “[that] Political liberty is to be found *only* when there is no abuse of power” may appear a straightforward conclusion deduced from these insights, we soon learn that the concept of “power” is itself an important feature. This is because the significance Montesquieu attaches to the term will clarify how the separation of powers embodies a government being “so constituted” as to protect political liberty.

¹¹ *Ibid*

¹² *Ibid.*, at chap. 6.

¹³ *Ibid.*

The word “power,” in Montesquieu’s usage, really refers to one, or to all, of the “three *sorts* of power” found “In every government.”¹⁴ These powers are distinguished according to what functions they provide in the rudimentary operations of governmental institutions, and it is important to briefly state what they are. Per Montesquieu’s description, the legislative power (at a basic level) “enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted,” which is to say, (as one might predict) that the legislative power is the power to *make* a nation’s laws, to legislate.¹⁵ The executive power appears to serve both foreign policy, and national security functions, as it “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”¹⁶

The third and final power, the judiciary, fulfills the private and public judicatory needs of a polity, as it “punishes criminals, or [legally] determines the disputes that arise between individuals.”¹⁷ Montesquieu follows his definition of political liberty as “no abuse” of any, or, of all three of these powers, with an important caveat: “But constant experience shows us that *every man* invested with power is apt to *abuse it*, and to carry his authority *as far as it will go*.”¹⁸ Though at first glance this may appear an expression of Montesquieu’s cynicism about Man’s natural drive for power inflamed by access to political office, it is actually his foundational understanding of power laid bare. This conception of power understands it as having a corrupting effect on individuals who wield it. This means that the “abuse” of power by office-holders will take place to whatever extent it is permitted, and accordingly, to the detriment of the subjects’ political liberty. Once installed in government then, an individual’s aptness to abuse power seems to entail the *maximization* of that power and its reach. This

¹⁴ *Ibid.* Emphasis added.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.* Emphasis added

concept will serve as the theoretical keystone capable of locking together the rest of this chapter's insights into the principle of constitutionalism for which Montesquieu is so widely known.

Montesquieu's discussion of political liberty provides its meaning primarily by considering the sources and consequences of its annihilation. This is because such a consideration leads to the institutional solution to civil strife Montesquieu has in mind. He is almost repetitious in tracing out various scenarios in which the three powers are not arranged in favor of a "subject's" political liberty, but all of these amount to essentially the same effect. In other words, they all amount to how political liberty is *lost or threatened* by civil strife, and how the separation of powers provides an effective remedy.

Consider again Montesquieu's claim that the "political liberty of the subject" is the "tranquillity of mind arising from the opinion each person has of his safety."¹⁹ This comment illuminates the core of the relationship between a citizen and his government's institutional structure. On the one hand, it conjures a vision of government constituted—which is to say, institutionally configured—to ensure that each individual "need not be afraid of another," though in an admittedly vague fashion.²⁰ On the other hand, and perhaps more importantly, it implies how unfavorable an image opposite this scenario will be.²¹

Even one of Montesquieu's numerous examples following this point, demonstrates what citizens can expect from a government when it is *not* "so constituted": "there is no liberty, if the judiciary power be not *separated* from the legislative and executive. Were [the judiciary] 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."²² Montesquieu insists, if a citizen's life is threatened by

¹⁹ *Ibid.*, at chap. 6.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.* Emphasis added.

“arbitrary” control when two powers are joined in, or exercised by, one source, his liberty is also threatened because it is (at least partially) composed of the self-awareness he has of his own safety.²³ In almost circular fashion, both the citizen’s life and his political liberty are destroyed the very moment power’s use becomes arbitrary.

This is because both the actual safety of his person (threatened by “violence and oppression” at the hands of state actors), and his confidence in its protection by government (his “tranquility of mind”), are jeopardized when “the *same* man or the *same* body” exercises more than one of the “three powers” (Montesquieu 1989; Pettit 1997). By framing “every man” as possessing an aptitude for the exploitation and abuse of power, Montesquieu captures two important problems at the same time, both of which are tended to by the separation of powers. The first is the perennial problem of controlling government power when men vested with it have such a tendency to maximize its exercise “as far as it will go,” i.e., to abuse it. The other issue is that the civil strife generated by power’s abuse is a serious threat to the political liberty of citizens.

Montesquieu provides other examples of the ways in which the political liberty of subjects is threatened. However, the central constitutional teaching he elaborates is brief, and it forms the crucial link between the separation of powers and a subject’s political liberty. The core insight: “To prevent [its] abuse, it is *necessary* from the very nature of things that *power should be a check to power.*”²⁴ We might infer then, that power should be institutionally arranged, or approximated, in a government’s constitution to “check” itself, because of Man’s natural tendency to abuse it. What Montesquieu labors to make clear, is that because of power’s corrupting effects, i.e., in order to “prevent [its] abuse,” institutional arrangements should not only keep the three powers distinct in terms of the sources that exercise them, but that

²³ *Ibid.*

²⁴ *Ibid.* Emphasis added.

such a “separation” should also pit institutional partisans against each other to provide these checks.

This insight reveals why the English Constitution (as he characterizes it) is to Montesquieu, the “mirror of political liberty”, namely, because of the specific manner in which its governmental institutions *position* the officials bent on the maximized exercise of given legislative, executive, or judiciary functions, counteractively. In other words, it is the limitation of these powers by the tension-ridden, counter-balanced relationship each institutional “partisan” has with the other, that the separation of powers “should naturally form a state of repose.”²⁵

It is through a legislature’s power of “resolving” (“the right of ordaining [laws] or...amending what has been ordained by others”), or by the executive power of “rejecting” (“the right of annulling a resolution”), that, according to Montesquieu, the separation of powers keeps the three powers in tension with each other because the control of each belongs to a distinct source. The three powers becoming a check to each other will, in this fashion, “neutralize” the dangers to political liberty posed by power’s corrupting effects on individuals, before they can materialize into power uniting in “one place” (Lowenthal 1972; Manent 1996).

If Montesquieu’s claim is true, that the loss of political liberty results from power’s abuse, then the separation of powers can be reasonably regarded as a guiding principle for configuring the governmental institutions of “free” regimes. This is what Publius’s defense of the Constitution’s “structure” in *Federalist* Nos. 47, 48, and 51, will claim to accomplish against the Anti-Federalists’ charge that it defies Montesquieu’s teaching. If Madison’s argument is successful, he will have effectively modified the separation of powers as a principle of constitutional design, and in such a way that the Constitution will emerge from his discussion an embodiment, rather than a violation, of it.

²⁵ *Ibid.*

Publius' Strategic Appropriation of Montesquieu's Maxim in The Federalist

In turning to the first of these essays, we notice immediately what Publius hopes will be visible in his discussion: That the “oracle” Montesquieu's theory of separation of powers is held by the Constitution's proponents to be a “political truth...stamped with the authority” of liberty's “enlightened patrons”—and that “this invaluable precept in the science of politics” is thus the principle by which to constitute a “free” government.²⁶

But in the same essay, Publius also claims that Montesquieu's “political maxim” made visible in his iteration of England's constitutional properties, has been “totally misconceived” by Anti-Federalist critics, and in some cases, by authors of certain state constitutions as well. Consequently, the “political apothegm” that “the legislative, executive, and judiciary departments ought to be separate and distinct,” has also been *misapplied* in the operation of various state governments, in citizens' understandings of Montesquieu's admiration for the constitution of England, and perhaps most importantly, in Anti-Federalists' appraisals of the proposed Constitution.

Madison's attempt at “correcting” the misconception of Montesquieu's maxim begins with the Anti-Federalist critique he cites: “One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct...[and that] The several departments of power are distributed and blended in such a manner as [to cause] the accumulation of power[.] [N]o regard, it is said, seems to have been paid to this essential precaution in favor of liberty.”²⁷

Publius's brief description of his opponents' criticism begins a careful rhetorical process that will span essays 47-51 of *The Federalist*.

²⁶ Madison, *supra* at 297.

²⁷ *Ibid.*

Madison's mention of this criticism is really an attempt to conjure some of the most recognizable components of Montesquieu's separation of powers theory, and to invoke its credibility by doing so. Let us consider the more obvious examples of this tactic.

First, notice the way Madison chooses to formulate "the political maxim": the legislative, executive, and judiciary "departments ought to be separate and distinct." It indicates that Montesquieu's claim that the "three sorts of power" are found in all governments will not be debated in Madison's argument. At least at this point in Publius' discussion, these three powers will still be theoretically distinguished according to what functions they provide in the actual rudimentary operations of government's institutions. That government's power is categorized by its intended "legislative, executive, and judiciary" functions then, is satisfactorily echoed in Madison's rendering of Montesquieu's maxim as it appears here.

Second, notice Publius' comment that the maxim, or principle, of separation of powers acts as an "essential precaution in favor of liberty," as it also quite plainly implies that Madison and Montesquieu are in agreement on another important point. This is the notion that the end of "free" government—government properly "constituted"—is political liberty. As we have also seen, this method of constituting "free" government, the separation of powers, is necessary because "constant experience [has shown] that *every man* invested with power is apt to abuse it, and to carry his authority *as far as it will go*," i.e., to destroy liberty.²⁸ And liberty, as Montesquieu discusses it, is only "achieved when government [is] so constituted as one man need not be afraid of another," which is really to say, when a citizen need not fear suffering power's abuse. Such an understanding is not challenged in Publius' allusion to it, when he says, "that [three] departments ought to be separate and distinct."

Finally, we can infer that what Madison more explicitly mentions—"the *accumulation* of power" in government results in the

²⁸ Montesquieu, *supra* at chap. 6.

loss of liberty—is itself drawn from, and in line with, Montesquieu's teaching. Madison's argument that this notion is common to the "oracle" and to the Constitution is most apparent when compared to Montesquieu's own words. Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many...may justly be pronounced *the very definition* of tyranny."²⁹ This claim bears a striking resemblance, unsurprisingly, to Montesquieu's assertion that "There would be an end to everything, were the same man, or the same body...to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."³⁰ It is clear even from these several observations that Madison's citation of Montesquieu's maxim indeed recalls some of the most recognizable components of Montesquieu's separation of powers theory.

Were it not for his rhetorical sleight of hands, the theoretical implications for the way Madison carefully words this maxim would likely reveal his deeper political motives for proclaiming the separation of powers "label" for the Constitution. Consider again, Madison's familiar formulation of the maxim: "the legislative, executive, and judiciary departments ought to be separate and distinct." The core of Montesquieu's separation of powers theory, encapsulated succinctly in one of his most famous pronouncements, reveals Madison's subtle modification. Montesquieu: "When the legislative and executive *powers* are united in the *same person*, or in the *same body* of magistrates, there can be *no liberty*."³¹ In his own version of the "maxim" Madison replaces the word "powers" found in Montesquieu's phrase ("When the legislative and executive *powers* are united") with the term "departments." This is particularly noteworthy, because while slight, this modification is significant as it begins (and provides for) what will appear steadily throughout the remaining essays: Madison's revised

²⁹ Madison, *supra* at 297.

³⁰ Montesquieu, *supra* at chap. 6

³¹ *Ibid.*

conception of the separation of powers appropriate to the Constitution's "blended" institutional structure. Though Madison claims to provide "the real meaning annexed to that maxim by its author," this revision of Montesquieu's idea can be more accurately characterized as setting the stage for the further meaning Madison intends to inject into it.

As we will see, the Constitution's institutional design (delineated in these essays) will intentionally, and strategically, "blend" Montesquieu's various *powers* between and within each branch of the government, thus maintaining that each *department* need not be "wholly unconnected with [the] other."³² This is the sense in which Madison's treatment will build on Montesquieu's theory, modify it, and develop its insights in the complicated institutional architecture the Constitution describes.

The only way out of the Anti-Federalist "charge" it seems, that "the federal constitution [allows] the accumulation of power, or...a mixture of powers, having a dangerous tendency to such an accumulation," is for Publius to effectively commandeer the separation of powers' principal source of credibility, Montesquieu, and to reshape his readers' conception of it.

"[The] charge cannot be supported," Madison contends, because "the maxim on which it relies has been *totally* misconceived and misapplied."³³ Framing the Anti-Federalist charge that the Constitution violates the separation of powers as the simple misapplication of a misconception, advantageously positions Publius for his counterargument. His distillation of Montesquieu's teaching into a slightly modified version of the popular maxim situates Madison to erect, from the ground up, a "corrective" understanding of what has been misconceived and misapplied by the Constitution's opponents. His method for performing this feat, will be to remedy citizens' misunderstandings of Montesquieu's (now altered) maxim, first, by

³² Madison, *supra* starting at 305.

³³ *Ibid.*, 297.

appropriating a few of his remarks on the constitution of England. More than a benign tour through one of Montesquieu's famous passages central to his theory, this is really Madison's attempt to ensure that his argument can truly claim the "oracle" as its source of theoretical credibility. Such an attempt becomes more pronounced when he offers that his examination will provide the "real" meaning of Montesquieu's separation of powers principle, located by Montesquieu as we have seen, in his account of England's constitutional principles.

Notice first Publius' explanation that his treatment of Montesquieu's model will help us "to investigate the *sense* in which the preservation of liberty requires that the three great departments of power should be separate and distinct."³⁴ Though this comment may appear as another example of Publius' reassurance of his fidelity to Montesquieu, it is curious because of what it implies, and what it presupposes. It implies that the "sense in which" political liberty is preserved by "the three great departments of power [remaining] separate and distinct" is not obvious, even in spite of the veneration for the theory expressed by Federalists and Anti-Federalists alike.

It also seems to presuppose that what Publius has just discerned in his slightly altered version of Montesquieu's maxim—that the separation of powers between distinct *departments* preserves liberty—will itself require further explanation to remedy its misapplications. Publius may more readily show then, the reflection of his tweaked maxim in Montesquieu's own "mirror of liberty." His careful observation of Montesquieu's model: "On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are *by no means totally separate and distinct* from each other[.]"³⁵

Madison adds other similar examples of the British Constitution's decidedly interconnected institutions and actors, all of which, seem to amount to the same finding: The way in which power

³⁴ *Ibid.*

³⁵ *Ibid.*, 298-300.

is *realistically* structured in England's constitution (i.e., how the government of England the nation, actually operates), is nowhere close to as distinguished, or as institutionally unblended as Montesquieu's discussion claims.

This too, is curious however, considering that Montesquieu's appraisal of England's constitution was itself mainly an appraisal of his own theory, and one facilitated by the idealized model he describes. We can infer then, that just as Montesquieu chose the constitution of England because of its capability to deliver a view of liberty "in its highest perfection," Publius has chosen Montesquieu, his maxim, and in this case the very same demonstrative model of it, to achieve as much for the Constitution. Immediately after reporting these "facts, by which Montesquieu was guided," Madison forms his subtle, yet significant inference regarding England's constitution:

"[Montesquieu] did *not* mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, 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."³⁶

Publius indicates what Montesquieu apparently "did not mean" first: that even with "political liberty" as its constitution's "direct end," England's (real) government admits a degree of "control," or, connection between departments. The central reason for this is that though Madison begins with Montesquieu's theory's basic components, he is really seeking to revise its effectual meaning so that the Constitution's institutional blending of the three powers among its branches (making them "by no means totally separate and distinct") can be vindicated. This Publius does, that we may "better" assess both the "meaning" of Montesquieu's theory, and accordingly, the rest of

³⁶ *Ibid.*, at 298-99.

his strategic development of it.

Notice too, that Publius' inspection of "the example in [Montesquieu's] eye" seems to conclude by reformulating the maxim he had previously modified—and in a fashion more true to his overall task of vindicating his version of separation of powers. Again, in clarifying the "meaning" Montesquieu purportedly intended by his example, Madison claims, "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." In this expression, the separation of powers is thought not only to provide for liberty so long as *departments*—as opposed to power's functions themselves—remain separate in a constitution, but to strategically blend the three powers among "distinct" institutions in a calibrated, i.e., limited, manner.

This idea leads us to assume that if preventing the exercise of the "whole power of one department" by the "same hands" is the more accurate "meaning" of the separation of powers principle, then measured "portions" of power, or specific legislative, judiciary, and executive functions, might also be blended (i.e., shared) among different institutional partisans to some unspecified degree. In making this point, Madison does not apparently depart from Montesquieu's central constitutional insight, that the "abuse" of power by office-holders will take place to whatever extent it is permitted—and accordingly, to the detriment of the subjects' political liberty, thus requiring checks—but instead uses its reasoning to pursue the same end in a different institutional manner.

Madison indicates an (apparently) elusive institutional "middle-ground" concerning the proper extent to which power, which, because of its "encroaching spirit," can be "distributed and blended" in the "structure of the federal government," to ensure against the "accumulation of *all* powers" in the same hands.³⁷ Overall, Madison's efforts in essay No. 47 accomplish two important things. On the one

³⁷ *Ibid.*

hand, they appear to exploit one conventional reading of Montesquieu, which is to say, the view that Montesquieu perceived the constitutional characteristics of England's government as a historically accurate example of the separation of powers in action—as having “political liberty” as its constitution’s “direct end.” On the other hand, or, as a result, Madison is able to revise Montesquieu’s appraisal so that it sufficiently reflects this proper institutional blending of powers. These considerations also lay the theoretical groundwork for the remainder of Publius’ defense of the Constitution’s structure in essay Nos. 48 and 51.

In essay No. 48, Madison’s earlier points about the extent to which “departments” can be constituted so that the three powers, if properly blended, will possess “partial” agency or control over “the acts” of one another, are all reemphasized. The method for this, as I’ve indicated, is the analysis of “the constitutions of the several States” initiated in essay No. 47. Publius carefully explicates various constitutional provisions and operations of New York, New Jersey, Delaware, Georgia, North Carolina, South Carolina, Virginia, and Maryland, all in order to further demonstrate his critics’ misapplication of Montesquieu’s maxim. His examples in the latter part of No. 47 are numerous and detailed, and his findings are repetitive. They also do the majority of the explanatory work necessary to what No. 48 more or less restates with confidence, and more sharply. Essay No. 48 then, can be better understood in light of Publius’ use of state constitutions as examples of the application and misapplication of Montesquieu’s teaching in certain state governments. Publius’ view “that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers” in some state constitutions, appears persuasive by the time his somewhat exhaustive analysis closes.³⁸ It will suffice to draw on only one of these examples to see what he means to convey.

³⁸ *Ibid.*, See generally, 297-305.

His careful manner of presenting the way Massachusetts's constitution has conceived of the separation of powers (even citing language from the document) presents it as a testament to Madison's ideal "mixture of powers" visible in the proposed Constitution's structure: "The constitution of Massachusetts has observed a sufficient...caution, in expressing this fundamental article of liberty. It declares 'that 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.' This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not *in a single point* violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted."³⁹

The first thing apparent in this excerpt, is that Montesquieu's maxim has been articulated in what earlier, Madison has called an "unqualified" manner, that is, in a clear and unambiguous fashion. Notice the exact wording of the State's provision for protecting the separation of powers principle, as it is itself repetitive: "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." The reiteration that each department should, quite emphatically stated, *never* exercise any of the other powers in the operation of the government indeed appears loyal to "the doctrine of Montesquieu," as Madison calls it here. That Madison wants to make Massachusetts's constitution a testament to his own admittedly "qualified" separation of powers, is visible in his emphasis that its Montesquieuian "declaration...is not in a single point violated by the plan of the convention." However, such

³⁹ *Ibid.*, at 301.

a declaration hardly seems characteristic of the “partial mixture” of powers between and within departments Madison has located in other states’ constitutions, and which he will also defend further in essay No. 51.

The fact that Madison characterizes such an unambiguously *separate* expression of the separation of powers principle in Massachusetts’s actual governmental operations as “[going] *no farther* than to prohibit any one of *the entire departments* from exercising the powers of another department,” is extraordinary, not only because it retroactively legitimates his earlier appraisal of England’s constitution, where the exercise of “the *whole* power of one department” decisively becomes the maxim’s “meaning,” but also because it affords the “partial mixture” of powers attributed to Massachusetts⁴⁰ to be more perfectly realized in the Constitution’s three branches.

Essay No. 48, as I’ve said, seems to more directly state the conclusions of Madison’s analysis from the one preceding it. He seems confident that his discussion has rectified likely misconceptions of Montesquieu’s maxim—that it has revised their understandings of the separation of powers. Recall his previously stated task: “[To show that] the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author,” (visible by his rendering of Montesquieu’s view of the British constitution), “nor by the sense in which it has hitherto been understood in America,” (the various blended state constitutions).⁴¹ He also indicates as much with his claim that “It was shown in the last paper that the political apothegm...does *not* require that the [three] departments should be wholly unconnected

⁴⁰ *Ibid.*, Notice his examples of this mixture: “The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches.”

⁴¹ *Ibid.*, at 304.

with each other.”⁴² Thus when Madison claims that “unless these departments be so far connected and blended as to give to each a constitutional control over the others,” he also alludes to the many cases in which mere “demarcation on parchment” has failed to prevent the undesirable encroachment and concentration of power in state governments.⁴³

Cultivated in a subtle rhetorical manner over the course of essay Nos. 47 and 48, Publius’s modified version of Montesquieu’s theory is finally pronounced outright in order to demonstrate the somewhat striking proposition, “that 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.”⁴⁴ This proposition is striking first, in light of what Montesquieu’s own axiom (here again, “the maxim”) actually states: “[That] When the [three] powers are *united* in the *same person*, or in the *same body* of magistrates, there can be no liberty.”⁴⁵ Political liberty is impossible, Montesquieu urges, when the institutional “places” in government are not separate as *sources* of power’s exercise, regardless of whether it be a legislative, executive, or judiciary function performed. However, Madison’s discussion has contended, after revising the maxim’s wording and applying its modified meaning to the states, that there is an institutional equilibrium of sorts—however elusive—concerning the proper extent to which power can be “distributed and blended” in the “structure of the federal government.” The epitome of this mean between “too great a mixture” leading to the “accumulation of all powers” in the same hands, and “the degree of separation which the maxim requires,” as essay No. 51 labors to demonstrate, is the Constitution’s “blended” institutional structure.⁴⁶

⁴² *Ibid.*, at 305.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Montesquieu, *supra* at chap. 6

⁴⁶ Madison, *supra* at 297. See generally, Essay No. 47.

The Core Constitutional Project of *Federalist* No. 51: Effectuating Institutional Dynamism

In probably the most famous essay in *The Federalist* concerning the Constitution's institutional framework (No. 51), and hence, where Madison's version of the separation of powers is best articulated, the development of Montesquieu's insights is also most visible. It is worth considering first, its title: "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments."⁴⁷ As will become clearer in this essay, this sentence encapsulates the complicated mixture of indispensable similarities—and significant differences—between Montesquieu's separation of powers principle, and, the Constitution for which Madison appropriated the phrase.

Unlike essays 47 and 48, Madison begins this essay with a question: "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution?"⁴⁸ We have learned from his earlier distillation of Montesquieu's thought, that because of power's corrupting effects, or in Montesquieu's words, in order to "prevent [its] abuse," institutional arrangements should not only keep the three powers distinct in terms of the sources that exercise them, but that such a "separation" should also pit institutional partisans against each other to provide checks between the legislative, judiciary, and executive powers.⁴⁹ After all, Publius has not "denied that power is of an encroaching nature." Madison's presentation of Montesquieu's teaching—that these three powers are put in tension with one another by the separation of powers' ability to "neutralize" power's corrupting effects and preserve liberty—has indeed been paid homage to.

⁴⁷ *Ibid.*, 317.

⁴⁸ *Ibid.*

⁴⁹ Montesquieu, *supra* at chap. 4.

Recall Publius's earlier discussions, alluded to by this question, as they emphasized that Montesquieu's principles and the Constitution *both* reflect the notion that "free" government should be constituted—which is to say, institutionally configured—to ensure that each individual "need not be afraid of another."⁵⁰ That the nation needs an "expedient...for maintaining in *practice* the necessary partition of power among the several departments" is an important reference to Madison's earlier presentations of these insights. It also recalls both Madison's discussion of how power should be "partition[ed]"—his intentionally vague "blended" institutional scheme—as well as his modified maxim from which he derives such a concept. Madison's immediate answer to his own question connects these allusions to this essay's subject matter: "The only answer that can be given is, that...[because] exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."⁵¹

By identifying the inadequacy of "exterior provisions" (whatever they may be), Madison quite plainly frames the "interior structure of the government," which is to say its constitution, as the "expedient" inquired about in his question. Thus, by alluding to his earlier vindication of Montesquieu's "power [becoming] a check to power," as well as the *internal* structural manner in which this feat is accomplished, his chosen title can be understood with full force. The "necessary partition of power" in the Constitution—i.e., the "proper checks and balances"—is an institutional *process* facilitated (or "furnished") by the very structure of the new government itself. Indeed, the manner in which Montesquieu's theory positions government officials counteractively, as we've seen, is due to their

⁵⁰ *Ibid.*, at chap. 6. See also, Madison, *supra* at 298-99 (No. 47) on political liberty.

⁵¹ See generally, Madison, *supra* at 317-22. (No. 51)

predictable desire for the maximized (tyrannical) exercise of given legislative, executive, or judiciary functions. Montesquieu is, after all, explicit about the *general* institutional image in his mind, at least concerning how the three powers will counteract one another: “The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative...Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic.”⁵²

Montesquieu seems to think that the “despotic” exercise of power can be prevented by constitutional officers possessing a “right” to reject (or restrain) the actions of one another. But this is *not* precisely what Publius means by the “interior structure of the government...[through its departments’] mutual relations...keeping each other in their proper places.”⁵³ What Madison has in mind is more dynamic and complicated.

Contrary to Montesquieu's teaching, the Constitution's blending of various legislative, executive, and judiciary powers will effectually mean that the three powers will be institutionally placed—“united”—in the *same* person, [and] in the *same* body.”⁵⁴ Moreover, “the *means* of keeping each [part] in their proper places,” or, the institutional arrangements of the three branches, are not primarily designed to prevent the accumulation of three powers in one place, but to harness the “encroaching nature” of power (through this internal structure) that it may be utilized to check itself effectively, *and* provide “energetic” government.⁵⁵ It is in this sense, that beyond Publius' careful manner of revising readers' conceptions of Montesquieu's theory, he really develops his own. Whereas in Montesquieu's thinking, the “three powers should naturally form a state of repose or inaction,”

⁵² Montesquieu, *supra* at chap. 6.

⁵³ Madison, *supra* at 318.

⁵⁴ Montesquieu, *supra* at chap. 6.

⁵⁵ Madison, *supra* at 29, 82, 103, 143, 148-53, 164-65, 220-23, for mentions of “energetic” government.

or, that they will act as mutually limiting checks between legislative, executive, and judiciary branch partisans, Madison's version of separation of powers will more effectively *utilize* power's corrupting effects.

Madison goes on to spell out exactly what these "means" of effectuating checks and balances are in the new Constitution: "The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the *necessary constitutional means and personal motives* to resist encroachment of the others."⁵⁶ This highly consequential statement reveals what Publius signifies when he claims that "ambition must be made to counteract ambition," and that "[t]he interest of the man must be connected with the constitutional rights of the place."⁵⁷ The Constitution's framework provides a matrix of offices and departments institutionally biased towards serving their own varying public ends, and it does so by way of each branch's own formal and informal institutional resources. By "distributing and blending" powers among the various departments of the government's branches (among the structure's occupants and office-holders), the separation of powers "divid[es] and arrange[s] the several offices in such a manner as that each may be a check on the other." These "ends" are visible in various governmental priorities: things like popular will, deliberation on public policy, and republican representation (all served best by a legislative body); protection of individual rights and the constitutionality of government action (served best by a judiciary); and national security (best served by an energetic executive). These "ends" are discernable through constitutional "rights" and "prerogatives" expressed and implied through the language of the Constitution—whose wording strategically assigns authority to different branches and departments.

This is not to say that various branches and departments shouldn't be concerned with more than one essential area of the public

⁵⁶ *Ibid.*, 318-19.

⁵⁷ *Ibid.*

good—surely the executive should be concerned with rights, and the legislators with security—but more that a kind of institutional dynamism, or, an energetic disputation between officers, should pervade the system. This arrangement is geared towards “furnishing the proper checks and balances” within the government by inciting its officers to openly contest each other’s exercise of power. Even the most familiar examples of this kind of institutional dynamism demonstrate what Madison calls “[The] policy of supplying, by opposite and rival interests, the defect of better motives.”

The executive power is given a “qualified” negative on the legislative body, or a presidential veto. The Senate, a part of the legislative branch, is a judicial body when trying members of the executive or judicial branches. The judges that make up the judicial branch itself are appointed by the executive department, pending the confirmation of the Senate, and removable by the same authority if an official’s behavior warrants it. The new government’s internal structure then, is capable in Madison’s account, of inducing the translation of governmental officers’ personal ambitions into public-regarding behavior, i.e., the pursuit of these public ends for which each branch is suited. Government power organized in strategically arranged, interrelated structures, in this way, ensures the proper checks and balances necessary to accommodating the dynamic concerns of the people, specifically because of how (*where*) the Constitution places these institutional biases.

Such a “translation” is possible because of the system’s ability to procure rhetorical and institutional “gestures” from officer-holders, or on-going “responses” from other governmental actors, ideally in the form of constitutional arguments (Tullis 1987; 2009). Consider a familiar example of this interaction: Because both the Senate and the president are given constitutional authority for involving the nation’s military in armed conflict—for declaring and conducting war—both branches will, or should, contest how these related legislative or executive powers are exercised. And this in a manner that will attempt to better convince the public of their own constitutional authority to

act, or at the very least, to contest the decisions of their institutional counterparts. Institutional structure, because it is predicated on the “self-preservation” of an office-holder’s institutional/personal ambitions—and at the same time catalyzed, or prompted, by competition with other institutional actors—can ultimately produce this kind of translation-response phenomenon.

Office-holders and office-seekers alike would have to behave, in public rhetoric, and in their institutional posts, in ways conducive to the public’s well being, regardless of their deeper (i.e., ambition-driven) motives in doing so. In *The Federalist’s* account, a balanced competition between actors and offices will convert otherwise threatening individual “private interest and passion” into behavior beneficial to the regime.

Conclusion

Prompted by the Anti-Federalists’ charge that the Constitution violates Montesquieu’s separation of powers maxim, Publius provides a diagnostic assessment of their “misconception,” and “misapplication” of Montesquieu’s constitutional principle. In Madison’s account, the Anti-Federalists’ errors have occurred for three main reasons. First, they do not admit enough of “a partial mixture of powers” within and between a constitution’s departments, to the degree necessary, or “essential,” to a “free government.” This we have seen in Publius’ examination of the constitution of England and certain state constitutions. Second, Publius also makes clear that in some cases, the states have had “too great of a mixture...and even an actual consolidation, of the different powers” in one institutional center, indicating as well, the failure of “mere parchment barriers.”⁵⁸

The third reason for the maxim’s misapplication, as it turns out, is that it fails to give “Departments [sufficient] control over each other,” through “supplying, by opposite and rival interests, the defect

⁵⁸ Madison, *supra* at 297-310.

of better motives.” The remedy for these issues provided by Publius amounts to a detailed defense of the proposed Constitution’s institutional structure. Ultimately, these essays comprise Madison’s development of Montesquieu’s insights into a modified version of the separation of powers. Such a system, once in motion, demonstrates not only efficient checks and balances on and between power’s centers, but also a unique institutional configuration of competing incentives. While guilty of the Anti-Federalist charge of blending the three powers within the Constitution’s structure, Madison’s institutional configuration is actually more capable of producing competent representative government, because of its ability to induce dynamic contestation between office holders.

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