



ADEF 2017-2018

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1. Separation of Powers & The American Revolution

1.1 Thomas Paine, Common Sense

About this Text

We tend to think of the separation of powers as a quintessentially American idea. In fact, though, not everyone embraced the idea at the time of the American Revolution. In this excerpt from *Common Sense*, Thomas Paine praises the virtue of simplicity in all things, including government. He argues accordingly for a simple government consisting of one legislative assembly that chooses a very limited number of what we might think of as executive officials. To this basic simplicity, Paine contrasts the complexity of the British constitution, which divides and separates power. The British may *claim* that this complexity protects liberty checking any tendency towards accumulating too much power in any one place, but Paine thinks otherwise.

Common Sense was published anonymously in January 1776. By then, open hostilities had been underway between colonists and the British army and Navy for nine months, since the battles of Lexington and Concord and the ‘shot heard round the world’ in April 1775. Many if not most colonists, though, had yet to embrace the idea of independence, with the Continental Congress still appealing to King George III to check what they described as an abusive Parliament. In *Common Sense*, Paine has plenty of criticism for Parliament, but he attacks George III as well. Indeed, he rejects the entire British Constitutional system.

Thomas Paine

excerpts from *Common Sense* ([source](#))

OF THE ORIGIN AND DESIGN OF GOVERNMENT IN GENERAL,
WITH CONCISE REMARKS ON THE ENGLISH CONSTITUTION.

Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse,

the other creates distinctions. The first a patron, the last a punisher.

Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries by a government, which we might expect in a country without

government, our calamity is heightened by reflecting that we furnish the means by which we suffer. Government, like dress, is the badge of lost innocence; the palaces of kings are built on the ruins of the bowers of paradise. For were the impulses of conscience clear, uniform, and irresistibly obeyed, man would need no other lawgiver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other case advises him out of two evils to choose the least.

Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expence and greatest benefit, is preferable to all others.

“Society in every state is a blessing, but government even in its best state is but a necessary evil.”

Stop & Think

Paine makes a great deal of the distinction between society and government, praising the former and calling the later a “necessary evil.” *Does this distinction make sense today?*

In order to gain a clear and just idea of the design and end of government, let us suppose a small number of persons settled in some sequestered part of the earth, unconnected with the rest, they will then represent the first peopling of any country, or of the world.

In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto, the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief of another, who in his turn requires the same. Four or five united would be able to raise a tolerable dwelling in the midst of a wilderness, but one man might labour out of the common period of life without accomplishing any thing; when he had felled his timber he could not remove it, nor erect it after it was removed; hunger in the mean time would urge him from his work, and every different want

call him a different way. Disease, nay even misfortune would be death, for though neither might be mortal, yet either would disable him from living, and reduce him to a state in which he might rather be said to perish than to die.

Thus necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessings of which, would supersede, and render the obligations of law and government unnecessary while they remained perfectly just to each other; but as nothing but heaven is impregnable to vice, it will unavoidably happen, that in proportion as they surmount the first difficulties of emigration, which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness, will point out the necessity, of establishing some form of government to supply the defect of moral virtue.

Some convenient tree will afford them a State-House, under the branches of which, the whole colony may assemble to deliberate on public matters. It is more than probable that their first laws will have the title only of Regulations, and be enforced by no other penalty than public disesteem. In this first parliament every man, by natural right, will have a seat.

But as the colony increases, the public concerns will increase likewise, and the distance at which the members may be separated, will render it too inconvenient for all of them to meet on every occasion as at first, when their number was small, their habitations near, and the public concerns few and trifling. This will point out the convenience of their consenting to leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those who appointed them, and who will act in the same manner as the whole body would act were they present. If the colony continue increasing, it will become necessary to augment the number of the representatives, and that the interest of every part of the colony may be attended to, it will be found best to divide the whole into convenient parts, each part sending its proper number; and that the elected might never form to themselves an interest separate from the electors, prudence will point out the propriety of having elections often; because as the elected might by that means return and mix again with the general body of the electors in a few months, their fidelity to the public will be secured by the prudent reflexion of not making a rod for themselves. And as this frequent interchange will establish a common interest with every part of the community,

they will mutually and naturally support each other, and on this (not on the unmeaning name of king) depends the strength of government, and the happiness of the governed.

Here then is the origin and rise of government; namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz. freedom and security. And however our eyes may be dazzled with show, or our ears deceived by sound; however prejudice may warp our wills, or interest darken our understanding, the simple voice of nature and of reason will say, it is right.

I draw my idea of the form of government from a principle in nature, which no art can overturn, viz. that the more simple any thing is, the less liable it is to be disordered;

“the more simple any thing is, the less liable it is to be disordered”

and the easier repaired when disordered; and with this maxim in view, I offer a few remarks on the so much boasted constitution of England. That it was

noble for the dark and slavish times in which it was erected, is granted. When the world was over run with tyranny the least remove therefrom was a glorious rescue. But that it is imperfect, subject to convulsions, and incapable of producing what it seems to promise, is easily demonstrated.

Absolute governments (tho’ the disgrace of human nature) have this advantage with them, that they are simple; if the people suffer, they know the head from which their suffering springs, know likewise the remedy, and are not bewildered by a variety of causes and cures. But the constitution of England is so exceedingly complex, that the nation may suffer for years together without being able to discover in which part the fault lies, some will say in one and some in another, and every political physician will advise a different medicine.

Stop & Think

Notice that pain praises simplicity in general while acknowledging that absolute governments are themselves simple. *Do you think he would prefer the the simplicity of an absolute government to the complexity of the English government? Why or why not?*

I know it is difficult to get over local or long standing prejudices, yet if we will suffer ourselves to examine the component parts of the English constitution, we shall find them to be the base remains

of two ancient tyrannies, compounded with some new republican materials.

First.—The remains of monarchical tyranny in the person of the king.

Secondly.—The remains of aristocratical tyranny in the persons of the peers.

Thirdly.—The new republican materials, in the persons of the commons, on whose virtue depends the freedom of England.

The two first, by being hereditary, are independent of the people; wherefore in a constitutional sense they contribute nothing towards the freedom of the state.

To say that the constitution of England is a union of three powers reciprocally checking each other, is farcical, either the words have no meaning, or they are flat contradictions.

To say that the commons is a check upon the king, presupposes two things:

First.—That the king is not to be trusted without being looked after, or in other words, that a thirst for absolute power is the natural disease of monarchy.

Secondly.—That the commons, by being appointed for that purpose, are either wiser or more worthy of confidence than the crown.

But as the same constitution which gives the commons a power to check the king by withholding the supplies, gives afterwards the king a power to check the commons, by empowering him to reject their other bills; it again supposes that the king is wiser than those whom it has already supposed to be wiser than him. A mere absurdity!

There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the business of a king requires him to know it thoroughly; wherefore the different parts, by unnaturally opposing and destroying each other, prove the whole character to be absurd and useless.

Some writers have explained the English constitution thus; the king, say they, is one, the people another; the peers are an house in behalf of the king; the commons in behalf of the people; but this hath all the distinctions of a house divided against itself; and

though the expressions be pleasantly arranged, yet when examined they appear idle and ambiguous; and it will always happen, that the nicest construction that words are capable of, when applied to the description of some thing which either cannot exist, or is too incomprehensible to be within the compass of description, will be words of sound only, and though they may amuse the ear, they cannot inform the mind, for this explanation includes a previous question, viz. How came the king by a power which the people are afraid to trust, and always obliged to check? Such a power could not be the gift of a wise people, neither can any power, which needs checking, be from God; yet the provision, which the constitution makes, supposes such a power to exist.

But the provision is unequal to the task; the means either cannot or will not accomplish the end, and the whole affair is a *felo de se*; for as the greater weight will always carry up the less, and as all the wheels of a machine are put in motion by one, it only remains to know which power in the constitution has the most weight, for that will govern; and though the others, or a part of them, may clog, or, as the phrase is, check the rapidity of its motion, yet so long as they cannot stop it, their endeavors will be ineffectual; the first moving power will at last have its way, and what it wants in speed is supplied by time.

That the crown is this overbearing part in the English constitution needs not be mentioned, and that it derives its whole consequence merely from being the giver of places and pensions is self-evident, wherefore, though we have been wise enough to shut and lock a door against absolute monarchy, we at the same time have been foolish enough to put the crown in possession of the key.

The prejudice of Englishmen, in favour of their own government by king, lords and commons, arises as much or more from national pride than reason. Individuals are undoubtedly safer in England than in some other countries, but the will of the king is as much the law of the land in Britain as in France, with this difference, that instead of proceeding directly from his mouth, it is handed to the people under the more formidable shape of an act of parliament. For the fate of Charles the first, hath only made kings more subtle—not more just.

Wherefore, laying aside all national pride and prejudice in favour of modes and forms, the plain truth is, that it is wholly owing to the constitution of the people, and not to the constitution of the

government that the crown is not as oppressive in England as in Turkey.

An inquiry into the constitutional errors in the English form of government is at this time highly necessary, for as we are never in a proper condition of doing justice to others, while we continue under the influence of some leading partiality, so neither are we capable of doing it to ourselves while we remain fettered by any obstinate prejudice. And as a man, who is attached to a prostitute, is unfitted to choose or judge of a wife, so any prepossession in favour of a rotten constitution of government will disable us from discerning a good one.

“... it is wholly owing to the constitution of the people, and not to the constitution of the government that the crown is not as oppressive in England as in Turkey.”

Stop & Think

Paine argues that the “constitution of the people” of England saves them from the oppression that the “Constitutional errors in the English form of government” would allow or at least not prevent. *What do you think he means by the ‘constitution of the people?’ Does the constitution of the people exist prior to and separate from the form of government? Does this distinction between the constitution of the people and the constitution of the form of government make sense in the United States today?*

1.2 John Adams, Thoughts on Government

About This Text

John Adams wrote *Thought on Government* in 1776, while serving in the Continental Congress. Like Paine, Adams was a strong advocate for independence. Unlike Paine, Adams found much to admire in the British constitution, including the kind of “complexity” derided by Paine. This difference is on display in the excerpts below, as Adams adamantly rejects a single legislative assembly as dangerous to liberty and virtue. Adams isn’t just making a theoretical point here. He wrote *Thoughts on Government* as part of his response requests from multiple colonies for his advice about constitution writing. Independence, after all, meant more than breaking away from Britain. It also meant forming new governments for what would become the American states. Adams—and many of his colleagues—considered this work every bit as important as writing the *Declaration*. In *Thoughts on Government*, Adams begins by asserting that only a republican form of government will do, then argues that in a proper republican government, power must be divided among different institutions or else the people “cannot be long free.”

John Adams

excerpts from *Thoughts on Government* ([source](#))

As good government, is an empire of laws, how shall your laws be made? In a large society, inhabiting an extensive country, it is impossible that the whole should assemble, to make laws: The first necessary step then, is, to depute power from the many, to a few of the most wise and good. But by what rules shall you chuse your Representatives? Agree upon the number and qualifications of persons, who shall have the benefit of choosing, or annex this priviledge to the inhabitants of a certain extent of ground.

The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections. Such regulations, however, may be better made in times of greater tranquility than the present, and they will spring up of themselves naturally, when all the powers of government come to be in the hands of the people’s friends. At present it will be safest to proceed in all established modes to which the people have been familiarised by habit.

A representation of the people in one assembly being obtained, a question arises whether all the powers of government, legislative, executive, and judicial, shall be left in this body? I think a people cannot be long free, nor ever happy, whose government is in one Assembly.

My reasons for this opinion are as follow.

“I think a people cannot be long free, nor ever happy, whose government is in one Assembly.”

1. A single Assembly is liable to all the vices, follies and frailties of an individual. Subject to fits of humour, starts of passion, flights of enthusiasm, partialities of prejudice, and consequently productive of hasty results and absurd judgments: And all these errors ought to be corrected and defects supplied by some controuling power.
2. A single Assembly is apt to be avaricious, and in time will not scruple to exempt itself from burthens which it will lay, without compunction, on its constituents.
3. A single Assembly is apt to grow ambitious, and after a time will not hesitate to vote itself perpetual. This was one fault of the long parliament, but more remarkably of Holland, whose Assembly first voted themselves from annual to septennial, then for life, and after a course of years, that all vacancies happening by death, or otherwise, should be filled by themselves, without any application to constituents at all.
4. A Representative Assembly, altho’ extremely well qualified, and absolutely necessary as a branch of the legislature, is unfit to exercise the executive power, for want of two essential properties, secrecy and dispatch.
5. A Representative Assembly is still less qualified for the judicial power; because it is too numerous, too slow, and too little skilled in the laws.
6. Because a single Assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour.

But shall the whole power of legislation rest in one Assembly? Most of the foregoing reasons apply equally to prove that

“the legislative power ought to be more complex”

the legislative power ought to be more complex—to which we may add, that if the legislative power is wholly in one Assembly, and the executive in another, or in a single person, these two powers will oppose and

enervate upon each other, until the contest shall end in war, and the whole power, legislative and executive, be usurped by the strongest.

Stop & Think

Notice that in the preceding paragraph Adams explicitly embraces greater complexity. *How do you think Paine, with this professed love of simplicity, might respond to the particular points Adams makes against a simple single assembly?*

The judicial power, in such case, could not mediate, or hold the balance between the two contending powers,

because the legislative would undermine it. And this shews the necessity too, of giving the executive power a negative upon the legislative, otherwise this will be continually encroaching upon that.

To avoid these dangers let a [distinct] Assembly be constituted, as a mediator between the two extreme branches of the legislature, that which represents the people and that which is vested with the executive power.

Let the Representative Assembly then elect by ballot, from among themselves or their constituents, or both, a distinct Assembly, which for the sake of perspicuity we will call a Council. It may consist of any number you please, say twenty or thirty, and should have a free and independent exercise of its judgment, and consequently a negative voice in the legislature.

These two bodies thus constituted, and made integral parts of the legislature, let them unite, and by joint ballot choose a Governor, who, after being stripped of most of those badges of domination called prerogatives, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature. This I know is liable to objections, and if you please you may make him only President of the Council, as in Connecticut: But as the Governor is to be invested with the executive power, with consent of Council, I think he ought to have a negative upon the legislative. If he is annually elective, as he ought to be, he will always have so much reverence and affection for the People, their Representatives and Councillors, that although you give him an independent exercise of his judgment, he will seldom use it in opposition to the two Houses, except in cases the public utility of which would be conspicuous, and some such cases would happen.

In the present exigency of American affairs, when by an act of Parliament we are put out of the royal protection, and consequently discharged from our allegiance; and it has become necessary to assume government for our immediate security, the Governor, Lieutenant-Governor, Secretary, Treasurer, Commissary, Attorney-General, should be chosen by joint Ballot, of both Houses. And these and all other elections, especially of Representatives, and Councillors, should be annual, there not being in the whole circle of the sciences, a maxim more infallible than this, "Where annual elections end, there slavery begins."

These great men, in this respect, should be, once a year

"Like bubbles on the sea of matter borne, They rise, they break, and to that sea return."

This will teach them the great political virtues of humility, patience, and moderation, without which every man in power becomes a ravenous beast of prey.

This mode of constituting the great offices of state will answer very well for the present, but if, by experiment, it should be found inconvenient, the legislature may at its leisure devise other methods of creating them, by elections of the people at large, as in Connecticut, or it may enlarge the term for which they shall be chosen to seven years, or three years, or for life, or make any other alterations which the society shall find productive of its ease, its safety, its freedom, or in one word, its happiness.

A rotation of all offices, as well as of Representatives and Councillors, has many advocates, and is contended for with many plausible arguments.

It would be attended with many advantages, and by a sufficient number of characters, of different characters, and of different characters, which would be a great objection to the objection.

"A rotation of all offices, as well as of

to it. These persons may be allowed to serve for three years, and then excluded three years, or for any longer or shorter term.

Representatives and Councillors, has many advocates, and is contended for with many plausible arguments."

Stop & Think

Adams here calls for a "rotation in offices," to be produced by annual elections and a kind of term limits. *How do these proposed institutional arrangements for electing government officials relate to the general idea of separation of powers? If power is sufficiently separated inside the government, why would we need to worry so much about how officials are chosen to serve in that government?*

Any seven or nine of the legislative Council may be made a Quorum, for doing business as a Privy Council, to advise the Governor in the exercise of the executive branch of power, and in all acts of state.

The Governor should have the command of the militia, and of all your armies. The power of pardons should be with the Governor and Council.

Judges, Justices and all other officers, civil and military, should be nominated and appointed by the Governor, with the advice and consent of Council, unless you choose to have a government more popular; if you do, all officers, civil and military, may be chosen by joint ballot of both Houses, or in order to preserve the independence and importance of each House, by ballot of one House, concurred by the other. Sheriffs should be chosen by the freeholders of counties—so should Registers of Deeds and Clerks of Counties.

All officers should have commissions, under the hand of the Governor and seal of the Colony.

The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The Judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention. Their minds should not be distracted with jarring interests; they should not be dependant upon any man or body of men. To these ends they should hold estates for life in their offices, or in other words their commissions should be during good behaviour, and their salaries ascertained and established by law. For misbehaviour the grand inquest of the Colony, the House of Representatives, should impeach them before the Governor and Council, where they should have time and opportunity to make their defence, but if convicted should be removed from their offices, and subjected to such other punishment as shall be thought proper.

2. Harmony and Division in Ancient Greek Thought

2.1 Plato, Republic

About This Text

Though more formal theorizing about the separation of executive, legislative and judicial powers will emerge in early modern European thought, questions about harmony, unity and division in political life go back to ancient Athens in the 5th century B.C.E. Here, then, we turn to excerpts from Plato's *Republic*. The *Republic* reports a conversation between Socrates and several of his young followers (including Plato's brothers) as the group searches for an understanding of justice. To understand justice in the individual soul, Socrates argues, we must first understand justice in the city. In the passage below, Socrates describes justice as a proper ordering of the city, in which every group in the city performs its proper task and only its proper task. Plato, that is, sees justice as involving a division of civic and political labor. Note, though, that far from involving conflict or competition, this kind of division produces perfect harmony in the just city.

Plato

excerpts from *Republic* ([source](#))

Translated by Benjamin Jowett

Book IV

Why, my good sir, at the beginning of our enquiry, ages ago, there was justice tumbling out at our feet, and we never saw her; nothing could be more ridiculous. Like people who go about looking for what they have in their hands—that was the way with us—we looked not at what we were seeking, but at what was far off in the distance; and therefore, I suppose, we missed her.

What do you mean?

I mean to say that in reality for a long time past we have been talking of justice, and have failed to recognise her.

I grow impatient at the length of your exordium.

Well then, tell me, I said, whether I am right or not: You remember the original principle which we were always laying down at the foundation of the State,

**“one man should practise one thing only,
the thing to which his nature was best
adapted”**

that one man should practise one thing only, the thing to which his nature was best adapted;—now justice is this principle or a part of it.

Yes, we often said that one man should do one thing only.

Quick Explainer

Plato here reminds the reader that early in the process of describing the perfectly good and just city, Socrates and his friends had introduced the ideas of division of labor and specializations. What started as a way to ensure that the city had all the material goods it required now becomes the foundation of justice in the city.

Further, we affirmed that justice was doing one’s own business, and not being a busybody; we said so again and again, and many others have said the same to us.

Yes, we said so.

Then to do one’s own business in a certain way may be assumed to be justice. Can you tell me whence I derive this inference?

I cannot, but I should like to be told.

Because I think that this is the only virtue which remains in the State when the other virtues of temperance and courage and wisdom are abstracted; and, that this is the ultimate cause and condition of the existence of all of them, and while remaining in them is also their preservative; and we were saying that if the three were discovered by us, justice would be the fourth or remaining one.

That follows of necessity.

If we are asked to determine which of these four qualities by its presence contributes most to the excellence of the State, whether the agreement of rulers and subjects, or the preservation in the soldiers of the opinion which the law ordains about the true nature of dangers, or wisdom and watchfulness in the rulers, or whether this other which I am mentioning, and which is found in children and women, slave and freeman, artisan, ruler, subject,—the quality, I mean, of every one doing his own work, and not being a busybody, would claim the palm—the question is not so easily answered.

Certainly, he replied, there would be a difficulty in saying which.

Then the power of each individual in the State to do his own work appears to compete with the other political virtues, wisdom, temperance, courage.

Yes, he said.

And the virtue which enters into this competition is justice?

Exactly.

Let us look at the question from another point of view: Are not the rulers in a State those to whom you would entrust the office of determining suits at law?

Certainly.

And are suits decided on any other ground but that a man may neither take what is another's, nor be deprived of what is his own?

Yes; that is their principle.

Which is a just principle?

Yes.

Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?

Very true.

"Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?"

Think, now, and say whether you agree with me or not. Suppose a carpenter to be doing the business of a cobbler, or a cobbler of a carpenter; and suppose them to exchange their implements or their duties, or the same person to be doing the work of both, or whatever be the change; do you think that any great harm would result to the State?

Not much.

But when the cobbler or any other man whom nature designed to be a trader, having his heart lifted up by wealth or strength or the number of his followers, or any like advantage, attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other; or when one man is trader, legislator, and warrior all in one, then I think you will agree with me in saying that this interchange and this meddling of one with another is the ruin of the State.

Most true.

Seeing then, I said, that there are three distinct classes, any meddling of one with another, or the change of one into another, is the greatest harm to the State, and may be most justly termed evil-doing?

Precisely.

And the greatest degree of evil-doing to one's own city would be termed by you injustice?

Certainly.

“when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just”

This then is injustice; and on the other hand when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just.

I agree with you.

Stop & Think

Plato argues here that varying human abilities and talents require a sharp division of labor, not only economically but socially and politically as well. To stray from this proper division of labor would be unjust. *What do you think is the strongest counterargument to the claims Plato makes about justice in the passage? What assumptions about human nature does Plato make and how might a critic of Plato’s respond? What might be an argument for justice that rejects a social and political division of labor?*

2.2 Aristotle, Politics

About This Text

Aristotle, Plato's most famous student, agreed with his teacher on many things. In general, though, Aristotle's surviving works demonstrate a greater willingness to engage with the messy realities of politics of the world around us. This is certainly true if we compare Aristotle's *Politics* to Plato's *Republic*. Where Plato devotes nearly all his energy to describing the perfectly just soul and city, Aristotle offers a nuanced exploration of the actually existing types of regimes. In the excerpt below, Aristotle does turn to consider the question of the best possible type of regime, but notice that he does so with one foot still rooted firmly in empirical reality. Most notably, he begins by positing the unavoidable presence of socioeconomic and so political divisions between the rich, the poor, and those who fall in "the mean." As you read, pay particular attention to the role these divisions play in Aristotle's arguments about oligarchy and democracy, and think about how Aristotle's analysis of political conflict might relate to (and differ from) the idea of separation of powers.

Aristotle

excerpts from *Politics* ([source](#))

Translated by Benjamin Jowett

Book IV, Chapter XI

We have now to inquire what is the best constitution for most states, and the best life for most men, neither assuming a standard of virtue which is above ordinary persons, nor an education which is exceptionally favored by nature and circumstances, nor yet an ideal state which is an aspiration only, but having regard to the life in which the majority are able to share, and to the form of government which states in general can attain. As to those aristocracies, as they are called, of which we were just now speaking, they either lie beyond the possibilities of the greater number of states, or they approximate to the so-called constitutional government, and therefore need no separate discussion. And in fact the conclusion at which we arrive respecting all these forms rests upon the same

grounds. For if what was said in the *Ethics* is true, that the happy life is the life according to virtue lived without impediment, and that virtue is a mean, then

the life which is in a mean, and in a mean attainable by every one, must be the best. And the same principles of virtue and vice are characteristic of cities and of constitutions; for the constitution is in a figure the life of the city.

“the life which is in a mean, and in a mean attainable by every one, must be the best”

Quick Explainer

In the *Nicomachean Ethics*, Aristotle lays out his understanding of virtue as a mean between extremes. The virtue of moderation is particularly central to his argument. Broadly speaking, moderation in anything (eating, say) falls between the extremes of ‘too little’ and ‘too much.’ All the moral virtues, according to Aristotle, take this basic form. Thus courage is a mean between rashness and cowardice. Aristotle now brings this thinking about the mean to his examination of the best form of regime.

Now in all states there are three elements: one class is very rich, another very poor, and a third in a mean. It is admitted that moderation and the mean are best, and therefore it will clearly be best to possess the gifts of fortune in moderation; for in that condition of life men are most ready to follow rational principle. But he who greatly excels in beauty, strength, birth, or wealth, or on the other hand who is very poor, or very weak, or very much disgraced, finds it difficult to follow rational principle. Of these two the one sort grow into violent and great criminals, the others into rogues and petty rascals. And two sorts of offenses correspond to them, the one committed from violence, the other from roguery. Again, the middle class is least likely to shrink from rule, or to be over-ambitious for it; both of which are injuries to the state. Again, those who have too much of the goods of fortune, strength, wealth, friends, and the like, are neither willing nor able to submit to authority. The evil begins at home; for when they are boys, by reason of the luxury in which they are brought up, they never learn, even at school, the habit of obedience. On the other hand, the very poor, who are in the opposite extreme, are too degraded. So that the one class cannot obey, and can only rule despotically; the other knows not how to command and must be ruled like slaves. Thus arises a city, not of freemen, but of masters and slaves, the one despising, the other envying; and nothing can be more fatal to friendship and good fellowship in states than this: for good fellowship springs from friendship; when men are at enmity with one another, they would rather not even share the same path. But a city ought to be composed, as far as possible, of equals and similars; and these are generally the middle classes.

Wherefore the city which is composed of middle-class citizens is necessarily best constituted in respect of the elements of which we say the fabric of the state naturally consists. And this is the class of citizens which is most secure in a state, for they do not, like the poor, covet their neighbors’ goods; nor do others covet theirs, as the poor covet the goods of the rich; and as they neither plot against others, nor are themselves plotted against, they pass through life safely. Wisely then did Phocylides pray- ‘Many things are best in the mean; I desire to be of a middle condition in my city.’

“the city which is composed of middle-class citizens is necessarily best constituted”

Stop & Think

Aristotle starts from the assumption that there will always be some citizens who are very rich and some who are very poor. *Do you think this is a reasonable assumption to make? Why or why not?*

Thus it is manifest that the best political community is formed by citizens of the middle class, and that those states are likely to be well-administered in which the middle class is large, and stronger if possible than both the other classes, or at any rate than either singly; for the addition of the middle class turns the scale, and prevents either of the extremes from being dominant. Great then is the good fortune of a state in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy, or a pure oligarchy; or a tyranny may grow out of either extreme- either out of the most rampant democracy, or out of an oligarchy; but it is not so likely to arise out of the middle constitutions and those akin to them. I will explain the reason of this hereafter, when I speak of the revolutions of states. The mean condition of states is clearly best, for no other is free from faction; and where the middle class is large, there are least likely to be factions and dissensions. For a similar reason large states are less liable to faction than small ones, because in them the middle class is large; whereas in small states it is easy to divide all the citizens into two classes who are either rich or poor, and to leave nothing in the middle. And democracies are safer and more permanent than oligarchies, because they have a middle class which is more numerous and has a greater share in the government; for when there is no middle class, and the poor greatly exceed in number, troubles arise, and the state soon comes to an end. A proof of the superiority of the middle class is that the best legislators have been of a middle condition; for example, Solon, as his own verses testify; and Lycurgus, for he was not a king; and Charondas, and almost all legislators.

Stop & Think

There is a great deal of talk about the middle class in the contemporary United States. In surveys, most people describe themselves as belonging to the middle class, and political rhetoric is full of praise for the middle class. *How do contemporary discussions of the middle class compare to the way in which Aristotle describes the middle class?*

These considerations will help us to understand why most governments are either democratical or oligarchical. The reason is that the middle class is seldom numerous in them, and whichever party, whether the rich or the common people, transgresses the mean and predominates, draws the constitution its own way,

“the middle class is seldom numerous ... and whichever party, whether the rich or the common people, transgresses the mean and predominates, draws the constitution its own way”

and thus arises either oligarchy or democracy. There is another reason- the poor and the rich quarrel with one another, and whichever side gets the better, instead of establishing a just or popular government, regards political supremacy as the prize of victory, and the one party sets up a democracy and the other an oligarchy. Further, both the parties which had the supremacy in Hellas looked only to the interest of their own form of

government, and established in states, the one, democracies, and the other, oligarchies; they thought of their own advantage, of the public not at all. For these reasons the middle form of government has rarely, if ever, existed, and among a very few only. One man alone of all who ever ruled in Hellas was induced to give this middle constitution to states. But it has now become a habit among the citizens of states, not even to care about equality; all men are seeking for dominion, or, if conquered, are willing to submit.

What then is the best form of government, and what makes it the best, is evident; and of other constitutions, since we say that there are many kinds of democracy and many of oligarchy, it is not difficult to see which has the first and which the second or any other place in the order of excellence, now that we have determined which is the best. For that which is nearest to the best must of necessity be better, and that which is furthest from it worse, if we are judging absolutely and not relatively to given conditions: I say ‘relatively to given conditions,’ since a particular government may be preferable, but another form may be better for some people.

Stop & Think

Consider what Plato and Aristotle have to say about divisions of various sorts in the city. *Recalling Paine and Adams, do Plato and Aristotle fall closer to Paine’s praise for “simplicity” or Adams embrace of “complexity”?*

3. Unity and Faction in the Republican Tradition

3.1 Machiavelli, Discourses

About this Text

In *Thoughts on Government*, from which we previously had an excerpt, John Adams firmly asserts that the only good government is *republican* government. In 1776, that was in some ways still a controversial position; by 1787—when the U.S. Constitution was written—it was taken for granted by most Americans. The word “republic” comes from the Latin *res publica*, meaning “the public thing” (though some scholars trace the roots of republicanism to Greece and Aristotle). Theorists in the republican tradition of political thought thus argued that politics was about creating, nurturing and protecting that which held the citizens together as a public or community. We generally think of republicans, that is, as concerned first and foremost with the common good. In that context, classical republicans most often described division or “faction” in the body politic as a threat to civic harmony and so to the common good. By contrast, in the excerpts below, Machiavelli argues that factional division is in fact necessary to republican liberty—or at least that it was in Rome.

Machiavelli

excerpts from *Discourses on Livy* ([source](#))

BOOK I, CHAPTER IV: THAT DISUNION OF THE PLEBS AND THE ROMAN SENATE MADE THAT REPUBLIC FREE AND POWERFUL

I do not want to miss discoursing on these tumults that occurred in Rome from the death of the Tarquins to the creation of the Tribunes; and afterwards I will discourse on some things contrary to the opinions of many who

“Rome was a tumultuous Republic”

say that Rome was a tumultuous Republic and full of so much confusion, that if good fortune and military virtue had not supplied her defects, she would have been

inferior to every other Republic.

I cannot deny that fortune and the military were the causes of the Roman Empire; but it indeed seems to me that this would not happen except when military discipline is good, it happens that where order is good, (and) only rarely there may not be good fortune accompanying. But let us come to the other particulars of that City. I say that those who condemn the tumults between the nobles and the plebs, appear to me to blame those things that

were the chief causes for keeping Rome free, and that they paid more attention to the noises and shouts that arose in those tumults than to the good effects they brought forth, and that they did not consider that in every Republic there are two different viewpoints, that of the People and that of the Nobles; and that all the laws that are made in favor of liberty result from their disunion, as may easily be seen to have happened in Rome, for from Tarquin to the Gracchi which was more than three hundred years, the tumults of Rome rarely brought forth exiles, and more rarely blood. Nor is it possible therefore to judge these tumults harmful, nor divisive to a Republic, which in so great a time sent into exile no more than eight or ten of its citizens because of its differences, and put to death only a few, and condemned in money (fined) not very many: nor can a Republic in any way with reason be called disordered where there are so many examples of virtue, for good examples result from good education, good education from good laws, and good laws from those tumults which many inconsiderately condemn; for he who examines well the result of these, will not find that they have brought forth any exile or violence prejudicial to the common good, but laws and institutions in benefit of public liberty. And if anyone should say the means were extraordinary and almost savage, he will see the People together shouting against the Senate, The Senate against the People, running tumultuously throughout the streets, locking their stores, all the Plebs departing from Rome, all of which (things) alarm only those who read of them; I say, that every City ought to have their own means with which its People can give vent to their ambitions,

and especially those Cities which in important matters, want to avail themselves of the People; among which the City of Rome had this method, that when those people wanted to obtain a law, either they did some of the things mentioned before or they would not enroll their names to go to war, so that to placate them it was necessary (for

**“every City ought to have their own means
with which its People can give vent to
their ambitions”**

the Senate) in some part to satisfy them: and the desires of a free people rarely are pernicious to liberty, because they arise either from being oppressed or from the suspicion of going to be oppressed. And if these opinions should be false, there is the remedy of haranguing (public assembly), where some upright man springs up who through oratory shows them that they deceive themselves; and the people (as Tullius Cicero says) although they are ignorant, are capable of (appreciating) the truth, and easily give in when the truth is given to them by a trustworthy man.

Stop & Think

Consider how Machiavelli understands the relationship between the people and the nobles in Rome in the context of what Plato and Aristotle have to say about divisions within the city. *Why does Machiavelli think it is both necessary and desirable to have divisions and ‘tumult?’ How would Plato and Aristotle respond?*

One ought therefore to be more sparing in blaming the Roman government, and to consider that so many good effects which came from that Republic, were not caused except for the best of reasons: And if the tumults were the cause of creation of Tribunes, they merit the highest praise, for in addition to giving the people a part in administration, they were established for guarding Roman liberty, as will be shown in the next chapter.

3.2 Rousseau, On Social Contract

About This Text

Like most in the republican tradition, and unlike Machiavelli, Rousseau argued that factional conflict was dangerous to a republic. In *On Social Contract*, Rousseau argues that to be legitimate political power must be exercised in accord with the general will, which we might think of as analogous to the common good or “public thing.” The general will comes into being when individuals form a community, and the general will is expressed by the people gathered in a deliberative assembly. In the passage below, Rousseau argues that the general will is “indivisible.” To imagine the general will divided among different individuals or groups is to imagine it as something other than truly *general*. Far from preserving the republic, as Machiavelli argued, divisions or factions destroy the general will and so destroy the republic itself. Machiavelli and Rousseau, then, offer two different republican visions, one which welcomes division or faction, one which portrays division or faction as an existential threat. In the American context, Madison’s argument in *Federalist #10* that factions are dangerous but unavoidable forms part of the backdrop to his particular version of the separation of powers.

Rousseau

excerpts from *On Social Contract* ([source](#))

Translated by C.D.H. Cole

BOOK II

1. THAT SOVEREIGNTY IS INALIENABLE

THE first and most important deduction from the principles we have so far laid down is that the general will alone can direct the State according to the object for which it was instituted, i.e., the common good: for if the clashing of particular interests made the establishment of societies necessary, the agreement of these very interests made it possible. The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist. It is solely on the basis of this common interest that every society should be governed.

I hold then that Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power indeed may be transmitted, but not the will.

“the Sovereign ... cannot be represented except by himself”

Stop & Think

The *Declaration of Independence* says that certain rights are “inalienable,” meaning that they cannot be given away by or taken away from individuals. *What do you think Rousseau means when he says that the Sovereignty cannot be alienated? How does this inalienability of the general will relate to the fact that it cannot be “represented?”*

In reality, if it is not impossible for a particular will to agree on some point with the general will, it is at least impossible for the agreement to be lasting and constant; for the particular will tends, by its very nature, to partiality, while the general will tends to equality. It is even more impossible to have any guarantee of this agreement; for even if it should always exist, it would be the effect not of art, but of chance. The Sovereign may indeed say: “I now will actually what this man wills, or at least what he says he wills”; but it cannot say: “What he wills tomorrow, I too shall will” because it is absurd for the will to bind itself for the future, nor is it incumbent on any will to consent to anything that is not for the good of the being who wills. If then the people promises simply to obey, by that very act it dissolves itself and loses what makes it a people; the moment a master exists, there is no longer a Sovereign, and from that moment the body politic has ceased to exist.

This does not mean that the commands of the rulers cannot pass for general wills, so long as the Sovereign, being free to oppose them, offers no opposition. In such a case, universal silence is taken to imply the consent of the people. This will be explained later on.

2. THAT SOVEREIGNTY IS INDIVISIBLE

SOVEREIGNTY, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general; it is the will either of the body of the people, or only of a part of it. In the first case, the will, when declared, is an act of Sovereignty and constitutes law: in the second, it is merely a particular will, or act of magistracy — at the most a decree.

But our political theorists, unable to divide Sovereignty in principle, divide it according to its object: into force and will; into legislative power and executive power; into rights of taxation, justice and war; into internal administration and power of foreign treaty. Sometimes they confuse all these sections, and sometimes they distinguish them; they turn the Sovereign into a fantastic being composed of several connected pieces: it is as if they were making man of several bodies, one with eyes, one with arms, another with feet, and each with nothing besides. We are told that the jugglers of Japan dismember a child before the eyes of the spectators; then they throw all the members into the air one after another, and the child falls down alive and whole. The conjuring tricks of our political theorists are very like that; they first dismember the Body politic by an illusion worthy of a fair, and then join it together again we know not how.

This error is due to a lack of exact notions concerning the Sovereign authority, and to taking for parts of it what

are only emanations from it. Thus, for example, the acts of declaring war and making peace have been regarded as acts of Sovereignty; but this is not the case, as these acts do not constitute law, but merely the application of a law, a particular act which decides how the law applies, as we shall see clearly when the idea attached to the word law has been defined.

“whenever Sovereignty seems to be divided, there is an illusion”

If we examined the other divisions in the same manner, we should find that, whenever Sovereignty seems to be divided, there is an illusion: the rights which are taken as being part of Sovereignty are really all subordinate, and

always imply supreme wills of which they only sanction the execution.

Stop & Think

Suppose Rousseau were to study the political system of the United States by carefully reading the U.S. Constitution. *Where would Rousseau say sovereignty should be located in the U.S.? Where would he say it is in fact located? Would he critique the Constitution for trying to divide sovereignty?*

4. The English Context

4.1 Hobbes, Leviathan

About This Text

Thomas Hobbes lived through the English Civil War. The long and bloody struggle between the parliament and crown motivated and shaped his political ideas. In *Leviathan*, Hobbes famously imagines human beings in a state of nature where life is “solitary, poor, nasty, brutish and short.” People will, Hobbes argues, quickly flee such a terrible condition, creating for their own protection a mighty Sovereign. If it is to save human beings from their own nature, the sovereign must have nearly total power, must never be question and, Hobbes argues in the passage below, must possess “indivisible” rights. Hobbes, that is to say, is no fan of the idea of separated political powers.

Hobbes

excerpts from *Leviathan* ([source](#))

CHAPTER XVIII. OF THE RIGHTS OF SOVERAIGNES BY INSTITUTION

The Act Of Instituting A Common-wealth, What

A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, Every One With Every One, that to whatsoever Man, or Assembly Of Men, shall be given by the major part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that Voted For It, as he that Voted Against It, shall Authorise all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.

Quick Explainer



This is the image found on the frontispiece of *Leviathan*. The figure with the sword and scepter is the Sovereign. The body of the Sovereign consists of the multitude of individuals who have, by surrendering their rights and powers, created the Sovereign as a unified, nearly all powerful entity that each agrees to obey in all things.

These Rights Are Indivisible

These are the Rights, which make the Essence of Sovereignty; and which are the markes, whereby a man may discern in what Man, or Assembly of men, the Sovereign Power is placed, and resideth. For these are incommunicable, and inseparable. The Power to coyn Mony; to dispose of the estate and persons of Infant heires; to have praeemption in Markets; and all other Statute Praerogatives, may be transferred by the Sovereign; and yet the Power to protect his Subject be retained. But if he transferre the Militia, he retains the Judicature in vain, for want of execution of the Lawes; Or if he grant away the Power of raising Mony; the Militia is in vain: or if he give away the government of doctrines, men will be frighted into rebellion with the feare of Spirits. And so if we consider any one of the said Rights, we shall presently see, that the holding of all the rest, will produce no effect, in the conservation of Peace and Justice,

“A kingdome divided in it selfe cannot stand”

the end for which all Common-wealths are Instituted. And this division is it, whereof it is said, “A kingdome divided in it selfe cannot stand:” For unlesse this division preceede, division into opposite Armies can

never happen. If there had not first been an opinion received of the greatest part of England, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre; first between those that disagreed in Politiques; and after between the Dissenters about the liberty of Religion; which have so instructed men in this point of Sovereign Right, that there be few now (in England,) that do not see, that these Rights are inseparable, and will be so generally acknowledged, at the next return of Peace; and so continue, till their miseries are forgotten; and no longer, except the vulgar be better taught than they have hetherto been.

Stop & Think

Hobbes' English is a bit challenging. So, take a minute and identify 2 or 3 specific arguments he makes against dividing sovereign rights or power. *How compelling are these arguments in the context of the widespread embrace of separation of powers in the United States today?*

4.2 Locke, Second Treatise of Government

About this Text

John Locke wrote nearly 50 years after Hobbes at the time of the “Glorious Revolution” of 1688. His *Two Treatises of Government* offered a vision of properly limited government that worked to protect individual liberty. In making this argument, Locke drew on a vision of the state of nature that, far from the violent state of war imagined by Hobbes, was generally peaceful. The absence of government being “inconvenient,” though, Locke argued that people would move into civil society, but only if they retained their rights and governmental power was strictly limited. This doesn’t mean that Locke was in favor of ‘democracy.’ In fact, he supported the rise of William and Mary as the new British monarchs. Unlike Hobbes, though, Locke insists in the passage below that in all “well-framed governments” the “Legislative and Executive Power are in distinct hands.” Locke, that is, imagined a version of the separation of powers in a limited monarchy.

Locke

Excerpts from *Second Treatise of Government* ([source](#))

143. The *Legislative* Power is that which has a right to *direct* how *the Force of the Commonwealth* shall be employ’d for preserving the Community and the Members of it. But because those Laws which are constantly to be Executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the *Legislative* should be always in being, not having always business to do. And because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order’d Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons

“it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them”

who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.

144. But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution*, or an attendance thereunto: Therefore 'tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.

150. In all Cases, whilst the Government subsists, the *Legislative is the Supream Power*. For what can give Laws to another, must needs be superiour to him: and since the Legislative is no otherwise Legislative of the Society, but by the right it has to make Laws for all the parts and for every Member of the Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed, the *Legislative* must needs be the *Supream*, and all other Powers in any Members or parts of the Society, derived from and subordinate to it.

Stop & Think

What does Locke mean by “the Legislative of the Society?” Why does he think it “must needs be the Supream” power?

159. Where the Legislative and Executive Power are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power. For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it. Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require: nay, 'tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, viz. That as much as may be, *all* the Members of the Society are to be *preserved*.

Stop & Think

What is Locke's basic argument for separation of powers?

5. The "Celebrated Montesquieu"

5.1 Montesquieu, Spirit of the Laws

About this Text

As we have seen, the tradition of political thinking drawn upon by the architects of the United States' political system was centrally concerned with questions regarding unity and division in the political community and with the concentration or distribution of political power. When Madison and others talked specifically about the doctrine of "separation of powers," though, they had in mind first and foremost the French thinker Montesquieu. In the passage below, Montesquieu discusses separation of powers in the context of the Constitution of England.

Montesquieu

Excerpts from *Spirit of the Laws* ([source](#))

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

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

"When the legislative and executive powers are united in the same person, or

apprehension may be that the same day will see the execution of the laws made by him, and he may tyrannical manner.

**in the same body of magistrates, there
can be no liberty”**

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.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Stop & Think

Montesquieu links separation of powers to liberty. How does his argument here compare to Machiavelli's argument about 'tumults' and liberty? To Locke's argument for separation of powers?

The judiciary power 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 judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

In accusations of a deep and criminal nature, it is proper the person accused should have the privilege of choosing, in some measure, his judges, in concurrence with the law; or at least he should have a right to except against so great a number that the remaining part may be deemed his own choice.

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will.

But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations.

The judges ought likewise to be of the same rank as the accused, or, in other words, his peers; to the end that he may not imagine he is fallen into the hands of persons inclined to treat him with rigor.

If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behavior, there is an end of liberty; unless they are taken up, in order to answer without delay to a capital crime, in which case they are really free, being subject only to the power of the law.

But should the legislature think itself in danger by some secret conspiracy against the state, or by a correspondence

with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while, to preserve it forever.

And this is the only reasonable method that can be substituted to the tyrannical magistracy of the Ephori, and to the state inquisitors of Venice, who are also despotic.

As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbors than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper that in every considerable place a representative should be elected by the inhabitants.

The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.

“The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit”

It is not at all necessary that the representatives who have received a general instruction from their constituents should wait to be directed on each particular affair, as is practised in the diets of Germany.

True it is that by this way of proceeding the speeches of the deputies might with greater propriety be called the voice of the nation; but, on the other hand, this would occasion infinite delays; would give each deputy a power of controlling the assembly; and, on the most urgent and pressing occasions, the wheels of government might be stopped by the caprice of a single person.

When the deputies, as Mr. Sidney well observes, represent a body of people, as in Holland, they ought to be accountable to their constituents; but it is a different thing in England, where they are deputed by boroughs.

All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.

One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach. For though few can tell the exact degree of men’s capacities, yet there are none but are capable of knowing in general whether the person they choose is better qualified than most of his neighbors.

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.

In such a state there are always persons distinguished by their birth, riches, or honors; but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.

Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose.

The body of the nobility ought to be hereditary. In the first place it is so in its own nature; and in the next there must be a considerable interest to preserve its privileges—privileges that in themselves are obnoxious to popular envy, and of course in a free state are always in danger.

But as a hereditary power might be tempted to pursue its own particular interests, and forget those of the people, it is proper that where a singular advantage may be gained by corrupting the nobility, as in the laws relating to the supplies, they should have no other share in the legislation than the power of rejecting, and not that of resolving.

By the power of resolving I mean the right of ordaining by their own authority, or of amending what has been ordained by others. By the power of rejecting I would be understood to mean the right of annulling a resolution taken by another; which was the power of the tribunes at Rome. And though the person possessed of the privilege of rejecting may likewise have the right of approving, yet this approbation passes for no more than a declaration, that he intends to make no use of his privilege of rejecting, and is derived from that very privilege.

The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.

Stop & Think

Montesquieu continues along similar lines, reflecting on the details of various constitutions and the implications for thinking about separation of powers. *Which of the specific details the preceding paragraphs seems most interesting or relevant to the U.S. Constitution and U.S. political practice?*

6. Madison on Separation of Powers

6.1 Madison, Federalist 51

About This Text

We'll conclude our August on campus discussions by returning to a familiar text: Federalist 51, reconsidering Madison's arguments against the backdrop of the foregoing thinkers, from Plato to Montesquieu.

Madison

Federalist 51 ([source](#))

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

To the People of the State of New York:

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? The only answer that can be given is, that as all these 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. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that

“each department should have a will of its own”

each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this

principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative,

and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.

Stop & Think

Why does Madison think each ‘department’ or branch “should have a will of its own?” How does he propose to give each department or branch its own will?

Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”

Stop & Think

What does Madison have in mind when he says that “ambition must be made to counteract ambition?” How does this relate to the idea of separation of powers?

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see

it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test. There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the

“society itself will be broken”

society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested

combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

Quick Explainer

Notice that the idea of a broken society links back to Madison's argument in Federalist 10 that the ultimate solution to factional conflict is to have a multitude of factions competing with one another in a large (or 'extended') republic. Here Madison sounds more like Machiavelli than like Rousseau.

This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the **republican cause**, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the **federal principle**.

Publius.