

1. The Classic Concept: An Architecture for Learning

Abstract: *This chapter describes how the classic American separation of powers between the legislative, executive and judicial branches was not a 'pure' system but combined the principle of separation with the principle of checks and balances. It discusses the view of human nature, its mix of the good and the bad put forward by Montesquieu and adopted by the Founding Fathers which underlay the need for checks and balances. It describes how the Founding Fathers turned to representative government in order to ensure that decisions were made by those with knowledge and understanding. The analysis characterises the architecture as a architecture for learning based on its open ended approach to the tasks of government, the non-hierarchical relationships it established between the different branches and its sparing approach to declarations of rights. It points to two important accompanying principles; the distinction between justice and government law and the need to address income inequalities.*

Key words: *The enlightenment, human nature, custom, representative government, principles of justice, rights, inequalities/faction*

In November 1787 James Madison proclaimed that the American people had '*reared the fabrics of government which have no model on the face of the globe*'.¹ The draft of the US constitution enshrining the principle of the separation of powers had been agreed in Sept. 1787 and was ratified in 1788. During this process, between 1 February and 8 February 1788, Hamilton, Jay and Madison, the authors of The Federalist Papers, published four papers (47-51) setting out the structure and rationale for the separation of powers contained in the proposed constitution.² In the first of these four papers, Madison referred to Montesquieu as '*the oracle*' on the subject. At the core lay a proposition about human nature, '*Ambition must be made to counteract ambition*'.³

This chapter first sets out the main institutional features of this classic separation of powers. It describes how it was not a 'pure' system but was combined with the twin principle of checks and balances. It turns secondly, to examine, through the eyes of the authors of The Federalist, the assumptions about human nature and politics which underly the twinning and where the debt to Montesquieu is again profound. It also looks at further assumptions supporting the separation of powers, notably the relationship between justice and the law that coloured perceptions about the role of the people and defined the place for rights. The chapter looks thirdly at why it is appropriate to characterise the separation of powers as an architecture for learning.

Finally, the analysis identifies the two pivotal features of the classic model that have given it longevity as an architecture for learning and enable it still to stand comparison with newer democratic architectures. Its inherent strength comes from the focus on what would now be called the cognitive dimension of politics and the non-hierarchical treatment of the connections between the different core functions of government. It is precisely this non-hierarchical treatment of relationships between the branches that has been challenged in recent times by the politicisation of the constitutional review function of the judiciary. The further weakness of the separation of powers is associated with the process of change – the separation of powers seems to build in conflict and policy gridlock.

THE INSTITUTIONAL PROVISIONS FOR THE SEPARATION OF POWERS

The separation

A ‘pure’ tripartite separation of powers between legislature, executive and judiciary has been defined in the following terms: *‘To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other the branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct’*.⁴ The provisions of the American constitution on the separation of powers are shown in the box below in the light of this benchmark.

Box 1.1: The separation of powers in the American constitution

Art I. Section 1: *‘All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’*

Art. II. Section 1: *‘The executive Power shall be vested in a president of the United States. He shall hold his Office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows...’*

Art. III. Section1: *‘The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.’*

The Judges, both of the supreme and inferior Courts, shall hold their Office during good Behaviour...'

The departure from the 'pure'

The provisions shown in the box above aim at a substantial degree of differentiation and separation. However, the provision of Article III on the structure of the judiciary already departs from a 'pure' separation and allows a role for Congress.

There are other provisions where the Constitution deliberately allows for interconnections between the branches. The President has a role in the legislative process through the power to refer back to Congress and veto legislation unless the veto is overridden by a 2/3 majority in each house (Art. I Sect. 7). The President can also recommend measures to Congress (Art. II Sect. 3). Conversely, Congress is linked to the Presidency. Article II Section 4 provides for the impeachment of a President and Vice President for '*Treason, bribery, and other high crimes and misdemeanours*' and Article I hands the responsibility for the impeachment process to the House of Representatives and the Senate. The President's power to make Treaties (Art. II Sect. 2) requires the advice and consent of the Senate and a two-third vote in favour by the Senate. Equally notable is the President's role in respect to the judiciary where the President is empowered to appoint judges to the Supreme Court (Art. II Sect. 2), again with the advice and consent of the Senate and needing a 2/3 majority for approval.

Checks and balances

The reason for this departure from the 'pure' is that the American model comingled a second principle alongside separation - the idea of checks and balances.⁵ The Founding Fathers were afraid of a President with charisma who might begin to act like an English monarch. Hamilton wrote: '*History will teach us ... that of those men who have overturned the liberty of republics, the greatest number have begun their career by paying an obsequious court to the people: commencing demagogues, and ending tyrants*'.⁶ They were also afraid that the people could misuse legislative power. Finally, they were afraid that law would not stand for justice but simply become an instrument of the new federal government and potentially used, either by an overambitious President, or by Congress, to achieve dominance.

They found the answer to their fears in the division of the main functions and powers of the new government between the different branches, combined together with carefully chosen links that would provide checks and balances on those powers. Federalist Paper 51 states that the separation of powers must be achieved '*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*'⁷. Madison interpreted Montesquieu's advocacy of a separation of powers, not as implying complete separation, but meaning that the whole power of one branch should not be exercised by those with the whole power over another. According to Madison '*he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other*'.⁸ Indeed, Montesquieu had himself argued in favour of a veto power of the executive over the legislature and for the legislature to be able to impeach the executive.⁹

We can think of the separation of powers by itself, on a stand-alone basis, in strictly functional terms - the advantages of specialisation in carrying out the tasks of government. However, the departure from the 'pure' and the twinning with the idea of checks and balances had much wider implications for the architecture. Kyritsis characterises the checks and balances by distinguishing between the aims of the different branches in exercising control over each other, discouraging encroachment by, or on, others, and the idea of a system that offers generalised supervision.¹⁰ From this perspective, the introduction of the principle of representative government can be viewed as a key element in control and the introduction of judicial review as the key element in generalised supervision.

At a more fundamental level the co-mingling of separation with the idea of checks and balances takes us directly into the assumptions about human nature and the way in which its good side and bad side connected to social and political association that lay behind separation.¹¹ In their assumptions about human nature the Founding Fathers also borrowed heavily from Montesquieu.

HUMAN NATURE AND THE SEPARATION OF POWERS

The Montesquieu legacy

The Founding Fathers openly acknowledged their debt to the thinking of Charles-Louis de Secondat, Baron de Montesquieu, normally referred to as Montesquieu.¹² The debt is particular evident to Montesquieu's *The Spirit of Laws* (1748) where the separation of powers is laid out in Book XI. John Adams, Thomas Jefferson and James Madison, each absorbed its main messages as did many others of their generation. Although Book XI on the separation of powers can be read on its own, it rests on a basis of thinking about human nature, the motivation behind social and political association, and the sources and role of law. The institutional provisions for separation reflect these underlying assumptions about human nature and how people behave in political association.

The underlying normative assumptions first appear in Montesquieu's writing in the *Persian Letters* written 22 years earlier than *The Spirit of Laws*, in 1726. The *Persian Letters* is one of the foundational texts of what is labelled as the 'enlightenment' – a term referring to thinkers, mainly from the eighteenth century, who turned away from religious accounts of the person, society, and forms of government, to establish secular accounts. Thus, they looked for an account of the person that did not assume that all were 'sinners', for an account of individual life goals not expressed mainly in terms of a pilgrimage to rewards in a promised after-life, for an account of cooperative social ties not dependent on membership in a community of fellow-believers, to forms of government whose legitimacy did not rely on the sanction and blessing of the church and to an account of the law based on a human and social rationale rather than divine revelation. Montesquieu himself retained his religious belief. Adam Smith also found reasons to believe in a benign deity. But no doubt, they, and fellow members of the enlightenment, would be shocked to see how in today's world, those with religious authority, misuse that authority to gain political power and manipulate it for their own ends in the secular world.

The significance of the *Persian Letters* is that Montesquieu pointed to secular reasoning as the basis for understanding the range of questions from a conception of human nature to the motivation to form political and social associations and to how people would behave in political association. The pathway to a secular understanding was conveyed in letter form between visitors from Persia to France to try to avoid arousing the antagonism of either the church or the monarchical government of his time. His Persian visitor reflects, '*I have often tried to decide which government was most in conformity with reason*' (Letter 80) and writes

'Even if there were no God, we should nonetheless still love justice' (Letter 83). His Persian visitor also states, *'It is for ordinary legislators to suggest laws for the regulation of human societies'* (Letter 97) and declares *'Society is based on mutual advantage'* (Letter 76). This aim to separate a secular understanding of the social, the political and the law from religious reasoning and to base a secular understanding on human nature and mutual advantage, reappears, without the allegorical framing, in *The Spirit of Laws*.¹³

Laws and the natural sciences

Many of the enlightenment thinkers looked to the natural sciences, and in particular to the example of Isaac Newton, as inspiration to look for analogous 'laws', or principles, that could be applied to political and social organisation. In the Persian Letters, Montesquieu refers to the inspiration of Newton (Letter 97). In the vein of Newton, in the Spirit of Laws, Montesquieu claimed to *'have laid down the first principles, and have found that the particular cases follow naturally from them'*.¹⁴

The one area where Montesquieu postulated a direct relationship between the natural sciences and social and political character was in respect of the influence of geography and climate on societies.¹⁵ This purported relationship between geography and social and political organisation appears early in The Federalist Papers. In Paper 2, John Jay argues that in its physical and geographical features the United States constituted one connected country. According to him this suited one united people. *'Providence has been pleased to give this one connected country to one united people ... This country and this people seem to have been made for each other'*.¹⁶

Jay made this connection for two reasons. First, he was arguing in the Paper against those in favour of splitting up the confederacy into several associations of states rather than combining under one federal system. Secondly, he and his fellow authors were well aware that Montesquieu had argued that democracy was possible only in small societies.¹⁷ According to Montesquieu *'It is natural to a republic to have only a small territory; otherwise it cannot long subsist'*.¹⁸ Hamilton argued that Montesquieu allowed for the possibility of scaling up in the case of what he termed a 'Confederate Republic'.¹⁹ Madison contended further that democratic government based on representation rather than direct participation in a popular assembly allowed for a republic to be extended over a large region.²⁰ But Jay also wanted to

show that the physical conditions themselves favoured scaling up and would themselves support American democracy in a much larger social and political setting.

Although Montesquieu postulated a direct relationship between the natural sciences and the social sciences in respect of geography and climate, his approach to the separation of powers rested mainly, and much more importantly, on his understanding of human nature and the way in which human nature accounts for our social and political practices.²¹ He wrote, *'The government most conformable to nature, is that whose particular disposition best agrees with the humour and disposition of the people in whose favour it is established'*.²² He was not alone in trying to establish this connection with human nature. Around the same time (1762) Adam Smith was lecturing to his students on his 'didactic' method. He explained how his own account of human nature aimed to find fundamental principles of human nature analogous to the principles followed by Newton in the natural sciences and from which our social practices could be seen to flow.²³

The Founding Fathers shared Montesquieu's attempt to rest social and political structures on the principles of human nature.²⁴ Hamilton asserts in Paper 31 that *'In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend'*.²⁵ They also looked to Montesquieu's account of human nature in framing the separation of powers. A famous passage in Federalist Paper 51 states *'What is government itself but the greatest of all reflections on human nature?'*²⁶

Human nature

In his account of human nature and its relation to social and political association, Montesquieu rejected the idea that people were inherently innocent – the starting point associated with Rousseau. He equally rejected the idea that people were predominantly aggressive and predatory as assumed by Hobbes.²⁷ War, according to Montesquieu, is what emerges *after* societies have been formed.²⁸ He suggested instead that we should recognise the mix of traits in the individual, both good and bad.

In the Persian Letters Montesquieu painted this mix in terms of a conflicting pull between selfish emotions and feelings of 'virtue'.²⁹ In the Letters Montesquieu recounted a parable about an imaginary society of 'Troglydites' to argue the case for the importance of public

virtue and social equity.³⁰ In *The Spirit of Laws* he also argued that a sense of 'virtue' was essential in a democracy and defines 'virtue' as a constant preference of public to private interest'.³¹ At the same time, he condemned the negative influence of pride and its related vices.

The authors of *The Federalist* also recognised this mix in human nature. In Paper 6, Hamilton refers to men as '*ambitious, vindictive and rapacious*'.³² In Paper 37, Madison refers to '*Sense, perception, judgement, desire, volition, memory and imagination*' and to the elusive boundaries between the different qualities of the human mind.³³ Paper 55 asserts, '*As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence*'.³⁴ It was this characterisation of the mix of qualities in human nature, good and bad, that permeates the rationale for the separation of powers as set out in *The Federalist*. Checks and balances are needed to be circumspect against the 'rapacious' and the 'vindictive' and to draw on the good – our sense of judgement about the public interest.³⁵

The starting point that people contained within themselves both good and bad qualities, provided a general justification for thinking that rules of behaviour would be needed to harness and restrain behaviour in civil and political association. But in order to establish what kinds of rules would be needed, Montesquieu and his fellow thinkers of the enlightenment, had to provide an account of how people with both good and bad traits would come together in civil association and how the good qualities in human nature would be able to predominate over the bad in a political association.

Incentives to form social links

In 1756 Adam Smith wrote a letter to the *Edinburgh Review* on the obscure topic of 'the sentiment of existence'. It reflected a dispute between himself and Rousseau on the process of socialisation. For Rousseau, education in social norms was essential. For Adam Smith the basic qualities of human nature – our desire to win the esteem of others, our innate feelings of sympathy for others and our ability to put ourselves in someone else's shoes – all would promote a process of socialisation.

Montesquieu stood in the middle of this debate. He thought that education was important.³⁶ But at the same time, Montesquieu saw virtue as '*a sensation, and not a consequence of acquired knowledge*'.³⁷ In the Persian Letters he had referred to it as a natural quality and an instinct.³⁸ Anticipating Smith, he also referred to '*the noble feeling of emulation*' as a socialising trait (Letter 89). Moreover, Montesquieu suggested that even undesirable character traits could perform a useful socialising role.³⁹ In *The Spirit of Laws*, he commended vanity in particular as advantageous to government. Among the '*numberless benefits*' resulting from vanity he listed industry, arts, politeness, and tastes.⁴⁰ The authors of *The Federalist* reflected Montesquieu's position. Even the bad could be harnessed to good purpose.⁴¹

Custom

Montesquieu made a major distinction between government law, custom, manners, and morality. He believed that government should not interfere in customs and manners. Customs could be changed by people themselves, while manners related to '*interior conduct*'.⁴² For Montesquieu, informal social norms in the shape of 'custom' played a critical role in shaping social relations and did not depend on law and legal conventions but on our feelings. It is the running theme of the Persian Letters where he states, '*Of all forms of power, it is the one that is misused the least ... It is the only one which does not depend on conventions established by Society*' (Letter 129).

However, for the Founding Fathers, with the important exception of the common law tradition carried over from the British inheritance, 'custom' provided little guide. The country was new, the experiment in representative government was new, the design of the rules was new. As Hamilton wrote in Paper 9, '*The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behaviour; the representation of the people in the legislature by deputies of their own election; these are wholly new discoveries*'.⁴³ This difference meant that the Founding Fathers looked towards the institutional provisions of separation and checks and balances for assuring the public good instead of to custom.

The position of the Founding Fathers on the limited relevance of custom was echoed later by Jeremy Bentham. Bentham's objection to custom was that it was likely to be invoked to

protect privileged interests rather than to serve the general interest. His follower Mill shared this objection. He wrote, *'the despotism of custom is everywhere the standing hindrance to human advancement'*.⁴⁴ However, Mill's main objection was that custom and habit represented *'magical influence'* or opinion unsupported by reasons. As a result, custom reflected only *'liking'* something rather than giving reasons to prefer one mandate to another. *'An opinion on a point of conduct, not supported by reasons, can only count as one person's preference; and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one'*.⁴⁵ The authors of The Federalist anticipated Mill's insistence on the importance of reason and were particularly concerned to harness the power of reason in political association.

It was this basic approach, that human nature, both good and bad traits, could be harnessed for the general good of society by a well-designed political architecture, without the guidance of custom, but with the help of checks and balances that would promote reason, that was carried over into the account of political association given by the authors of The Federalist and that underlay the institutional provisions for the separation of powers. In Paper 15 Hamilton wrote, *'Why has government been instituted at all? Because the passions of men will not conform the dictates of reason and justice, without constraint'*.⁴⁶

Behaviour in political association

In accepting that human nature mixed both good and bad, the authors of The Federalist acknowledged, like Montesquieu, that in politics, questionable motives could serve positive purposes. Personal vanity, the desire for public recognition and the esteem of others could all motivate citizens to seek elective office, while at the same time their desire for re-election would make them attentive to what their constituents wanted.⁴⁷ According to Paper 57, *'Duty, gratitude, interest, ambition itself are the chords by which they [members of the House of Representatives] will be bound to fidelity and sympathy with the great mass of the people'*.⁴⁸

In the eyes of the authors of The Federalist the key question was how to ensure that alongside the emotional side of political behaviour, reason and the search for understanding would dominate the making of policy choices. It was about how to ensure that the less desirable motivations to participate in politics, such as the desire for power, did not overwhelm the need for policy choices to be made in a fully considered way for the public

good. The problem was stated in Paper 6 by Hamilton: *'Has it not ... invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general and remote considerations of policy, utility, or Justice?'*⁴⁹ Madison in particular attributed the corrosive effect on the public interest of 'faction' to the passions. *'By a faction I understand a number of citizens ... who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community'*.⁵⁰

Reason, representation, and the law

In the promotion of reasoning in democratic societies, Montesquieu had argued for the importance of the representative principle. He stated, *'The great advantage of representatives is their being capable of discussing affairs. For this the people collectively are extremely unfit'*.⁵¹ In addition, the authors of The Federalist draw attention to the additional protection given by structuring representation in different ways in the different branches. They maintained that the different methods of selection of the House, Senate and Presidency and their different terms of office would all lead to 'care and judgement' in the selection processes. They were designed to produce representatives with greater knowledge and better information rather than those subject to 'temporary prejudices' and 'momentary desires'.⁵² In addition, larger electorates for federal bodies would be less vulnerable to 'sinister design' and would work against the selection of 'unworthy candidates'.⁵³ The principle of representative government was thus a deliberate attempt to control what were seen as the risks of popular government and to entrench reason rather than sentiment and passion into the making of laws.

According to the authors of The Federalist, the independence of the judiciary also offered a special protection against the misuse of law-making powers. The doctrine had an earlier history in pre-democratic times as a way to make kingship more effective. Montesquieu recognised the advantages of specialisation in the different branches of government but argued that democratic government did not consist of 'unrestrained freedom'. In order to achieve this restraint, he saw an independent judiciary as a check against the other branches: *'To prevent the abuse of power, tis necessary that by the very disposition of things power should be a check to power'*.⁵⁴ The authors of The Federalist saw the need for an independent

judiciary from the same perspective. Judicial independence stood as a guard against the interpretation of laws to their own advantage by either the legislature or executive.

Modern theories of deliberative democracy sometimes suggest that the separation of powers is about reconciling the contradictory claims of individual autonomy and collective autonomy.⁵⁵ However, for Montesquieu and the Founding Fathers the contradiction was within human nature in the tension between passion and reason. This affected individuals in the context of collective behaviour as well as in their individual behaviour. The individual and the collective were to be seen together. The separation of powers and checks and balances responded to this view of human nature.

Supporting assumptions

The twin principles of the separation of powers and checks and balances did not stand on their own. They were accompanied by supporting principles with their own normative rationale. First and foremost, was a fundamental distinction made by Montesquieu between the principles of justice and the content of government laws. No doubt in his role as a President of the Bordeaux Parlement (1716-1748) he had observed the conflict between law and justice in many forms. This approach led to what can be characterised as a 'sparing' approach to the role of rights in anchoring the principles of justice. Equally important, it led the Founders to place the judicial branch, as the 'weakest branch' in charge of the general supervision of the constitution. Secondly, both Montesquieu and the authors of The Federalist saw a need to address the wider social setting for the separation of powers and to tackle inequalities of wealth and representation.

DISTINGUISHING BETWEEN JUSTICE AND GOVERNMENT LAW

The independence of the judiciary served a fundamental ethical purpose as a way of protecting the normative foundation of law outside politics. Montesquieu had written, *'Before laws were made, there were relations of possible justice... We must therefore acknowledge relations of justice antecedent to the positive law by which they are established'*.⁵⁶ He referred to law governing the relations between the governors and the governed as '*politic law*'.⁵⁷ The authors of The Federalist equally recognised the potential

and actual divide between law, as determined by those in power, and justice: *'Justice is the end of government'*, declares Paper 51.⁵⁸

Like Montesquieu, who referred to the judicial branch as *'in some measure next to nothing'*, the authors of The Federalist regarded the Judiciary as the weakest branch. This had the virtue of meaning it would not be a threat to the other branches. By contrast, placing the judicial function in either the legislature or Executive branches would, according to the Founders, represent a huge threat to liberty by confusing the principles of justice with government law making. Quoting Montesquieu⁵⁹ in Paper 78, Hamilton agrees that *'there is no liberty, if the power of judging be not separated from the legislative and executive powers'*.⁶⁰

The issue crystallised in relation to responsibility for the overall supervision and interpretation of the constitution. The Founding Fathers wanted each branch of government to respect the limits of its role.⁶¹ At the same time, they saw a need for general supervision. Hence In paper 78 Hamilton asserted *'The interpretation of the laws is the proper and peculiar province of the courts. A constitution is ... a fundamental law. It therefore belongs to them to ascertain its meaning'*.⁶² As a final protection, the interpretation of the law would rest in the hands of the special skills of trained lawyers rather than elected politicians.⁶³

The separation of powers recognised that the moral sources of the law lie outside politics. The morality of law can be attributed to universally shared human qualities or to widely shared legal judgements and practices. But, in either case, in recognising that the principles of justice were antecedent to government, and in distinguishing between constitutional law and ordinary legislation, the Founders aimed to establish that the new system of government would stand for government under the law rather than allow the law to simply become an instrument of government.

RIGHTS AND THE ROLE OF THE PEOPLE

The draft American constitution was criticised at the time for the absence of any statement of rights as an additional protection and check against the abuse of power. It deliberately differed from the example set in the French revolution which placed rights at the head of constitution making.⁶⁴ George Mason, the author of Virginia's constitution and declaration of rights, and Thomas Jefferson led the opposition to the exclusion of a declaration of

rights.⁶⁵ Jefferson wrote to Madison stating that '*A bill of rights is what the people are entitled to against any government, general or particular, and what no government should refuse, or rest on inference*'.⁶⁶

Montesquieu's concern about assertions of rights had been that government law would extend into areas where it was not needed, diminish the private sphere and the powers better reserved to the people themselves, and potentially erode the moral basis of law from its sources outside government law. He also drew attention to the need to respect what is now referred to as the 'inner morality' of the law – those qualities such as intelligibility, simplicity, and consistency.⁶⁷ Rights appear to be both simple and consistent but are neither.

The authors of The Federalist also wished to limit government law to where it was really necessary. According to them, a statement of rights was not needed. John Jay acknowledged early in Paper 2 that for any system of government to have the necessary powers '*The people must cede to it some of their natural rights*' (p. 5). But according to Hamilton in Paper 94 the constitution as a whole stood for the protection of rights and specific rights lay, reserved and implicit, with the people themselves.⁶⁸

As implied by Hamilton, the underlying question was about how to define the role of the people in the constitution. The consent of the people was needed to approve the constitution as a whole. In approving the framework, the people also gave their consent to the system for making laws. However, the task of making specific laws was entrusted to (hopefully) wiser representatives rather than to the people. While in any diversified society not all people will consent to every legislative action, the proposed reliance on representatives introduced uncertainty and arguably lacked sufficient reason for the people to identify with it. The inclusion of rights as amendments in the Bill of Rights can thus be seen as providing the way to reduce uncertainties and give the sense of identity with the system of representation necessary to ensure passage of the constitution itself.⁶⁹ This approach to rights as a means to express identity marked a very different conception of rights compared with rights seen as expressing the will of the people.⁷⁰

As an expression of identity, the approach to the expression of rights remained sparing. The Bill of Rights provided for procedural rights in the form of freedom of speech, assembly and religion (First Amendment) the now notorious right to bear arms (Second Amendment) and

the right to a private sphere where people were secure in person, house, papers and effects (Fourth Amendment). Other rights mainly concerned the procedures of the law. The ninth amendment reaffirmed the importance of implied or reserved rights: *'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'*

In taking this principled but sparing approach to assertions of rights, the separation of powers is distinguished in later discussion from today's leading alternative democratic architecture where rights play a central role in guiding many of our critical choices.

INEQUALITIES IN THE WIDER SOCIAL SETTING

There was a second principle supporting the separation of powers that was important both to Montesquieu and the authors of The Federalist. It was about the need for fairness. They connected fairness in terms of income and wealth to fairness in terms of representation.

In respect of income inequalities, Montesquieu had argued in favour of reducing inequalities in a democracy and keeping them within limits.⁷¹ Madison restated this requirement in blunt terms. He affirmed in Paper 10 that monied interests, the results of unequal distribution of property and other interests had to be regulated and *'forms the principal task of modern legislation'*.⁷² The separation of powers thus did not just involve the procedural values of the Bill of Rights but the Founders also assumed the need to address income and wealth inequalities affecting the way the constitution worked.

In respect of inequalities in representation the concern of the authors of The Federalist centred on what they termed 'faction'. Faction referred to those agricultural businesses, propertied and commercial interests that the Founding Fathers felt had become too powerful at the state level in the Confederacy. Madison wrote, *'Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction'*.⁷³ The founders looked to the scaling up of political architecture into what the authors of The Federalist referred to variously as a *'compound republic'*, *'the enlargement of the orbit'* of government, and a *'Firm Union'* to diminish faction. In a large political union, the power of a few monied interests would be diluted amidst a multiplicity.

In practice 'scaling up' has not worked. A multiplicity of factional interests have transferred their focus to the federal level. Their presence can be seen as the symptom and acceptable face of a pluralist society. However, it is difficult to dispute the continued weight of monied and business interests. The continuing importance of the need to address the connection between inequalities in income and wealth to inequalities in representation as a necessary accompaniment to the separation of powers sometimes seems to be a forgotten part of the design. Nedelsky attributes the problem, not to neglect, but to what she asserts was a fundamental contradiction between the aim of the Founding Fathers to protect property and the need to address inequalities stemming from the unequal division of property.⁷⁴ The approach of the Founding Fathers to inequalities is discussed further in the context of the next chapter. They did not see a fundamental contradiction but a tension to be resolved by recognising a co-dependency.

AN ARCHITECTURE FOR LEARNING

The separation of powers taken as a whole, together with its twin principle of checks and balances and its supporting assumptions, is best characterised as an architecture for learning. It represented a new form of representative government facing new challenges in an uncertain world. The Founders hoped decisions would be taken by those with knowledge and understanding but emphasised the uncertainties of the circumstances in which the new republic was born and the need to learn quickly from mistakes and to be able to face unknown future challenges.

The Founding Fathers wanted this learning and adaptation to take place within the framework they had provided rather than through frequent periodic changes in the rules themselves. In this desire they resisted the views of Jefferson, both that it should be capable of amendment in the light of experience and on the principled ground that one generation could not bind another. Jefferson believed that at a minimum the constitution should be revisited every generation at the end of nineteen years.⁷⁵ The authors of *The Federalist* opposed any such provision. According to them it would introduce a basic instability into the arrangements. It would undermine the status of the constitution as a body of fundamental laws standing above ordinary laws. They wanted adaptation to take place within the rules without the need for frequent constitutional amendments and change.

The authors of The Federalist argued that what was more important was for wise representatives to be able to correct ordinary laws in the light of experience and better understanding of the questions involved. Jay stated in Paper 3 that *'the people of any country ... seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests'*.⁷⁶ Paper 53 asserts, *'Improvements on the first draughts will every year become easier and easier'*.⁷⁷ In addition to this capacity to remedy past mistakes, Hamilton stressed the importance of the capacity of government to allow for future developments: *'Nothing ... can be more fallacious than to infer the extent of any power ... from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies as they may happen, and as these are illimitable in their nature, it is impossible safely to limit that capacity'*.⁷⁸

It is from this perspective that we can view the character of the American constitution as about how the new republican democracy would have the capacity to learn as it grew in maturity and experience.⁷⁹ Herbert Simon states, *'Understanding systems, especially systems capable of understanding problems in new task domains, are learning systems'*.⁸⁰

An epistemic view of democratic design has been criticised on the grounds that it sets a standard more fundamental than democracy itself.⁸¹ The Founding Fathers did not recognise a conflict or hold that epistemic values outranked democratic values. For them, their new system of government and its need to learn and promote learning about critical choices ahead, went hand in hand. According to Herbert Simon the search for discovery *'may also provide the most suitable model for the social design process'*.⁸² Among other modern democracy theorists Vincent Ostrom also reflects this perspective: *'If societies of men are to constitute systems of governance from reflection and choice, those societies are required to establish a culture of inquiry rather than a culture of command and control dominated by those engaged in the art of manipulation'*.⁸³

A key to the learning process lay in the open-ended nature of the policy aims of the new system. The Founders were concerned with the primary powers of institutions rather than with the specificities of precise policy making.⁸⁴ Their perspective is not always understood. Eoin Carolan asserts that the simplicity of the design and open texture makes it problematic to apply and that it is indeterminate in both objectives as well as in detail.⁸⁵ However, the

Founding Fathers in relying on learning processes very deliberately avoided a detailed elaboration of the goals of the new republic and the sparing approach to the enumeration of rights, referred to earlier, was part of this restraint. In commenting on the aims of the Founding Fathers, Herbert Simon draws attention to the importance of their modest policy goals and the importance of designing without final goals. *'The success of planning on such a scale may call for modesty and restraint in setting the design objectives and drastic simplification of the real-world situation'*.⁸⁶ At the same time, checks and balances kept law makers from taking advantage of this open-ended construction to pursue power for their own ends. It was an architecture designed for learning within the rules.

LONGEVITY: THE PIVOT POINTS

Just how far the separation of powers remains a form of democratic architecture suited to social learning, relevant to today's world and able to stand comparison with alternative and newer approaches, hinges on two features in the original design. First, is the attention given to human nature and what would now be called the cognitive dimension of political association. Secondly, is the way in which institutional linkages between the main branches of government were conceived in non-hierarchical ways. At the same time there are weaknesses associated with each.

The cognitive dimension and political change

The architecture of the separation of powers had one fundamental strength as an architecture for learning. It focussed explicitly on how to bring reasoning and understanding into the making of critical choices. The authors of *The Federalist* gave full weight to the role of emotional or associative logic in social and political ties. They recognised that the feelings that accompanied political behaviour had positive features as well as negative. At the same time, they wanted reason to prevail in making considered choices.

The reliance of the Founding Fathers on elected representatives for this purpose has not stood the test of time. The vanity and ambition of politicians speak across the ages. With few exceptions, their knowledge and informed expertise do not. The aim itself cannot be faulted. The aim is now approached through the harnessing of knowledge and expertise in independent or semi-independent bodies outside the institutions of central government and

elected bodies. As discussed in the next chapter, this new structure is still consistent with a revised separation of powers.

Despite the attention given to the cognitive, the process of making laws under the separation of powers can be criticised from a different perspective. The separation of powers builds conflict into the legislative process and this can be seen as leading to gridlock and the risk of policy stasis. The Founding Fathers maintained that delay was a price worth paying. Hamilton wrote, *'In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority'*.⁸⁷ How far this acceptance of the risks of policy stasis is a weakness is discussed in *Chapter 7* in relation to the legislative decision processes of other alternative architectures.

Non-hierarchical institutional linkages

The architecture of the separation of powers had a second fundamental strength as an architecture for learning of continuing relevance and applicability today. The linkages recognised that while each branch had its own role to play in the making of critical choices, nevertheless, the different contributions they made to decision taking still needed to be able to be brought together. The key feature is that these relationships between the branches were established on a largely non-hierarchical basis relying on mutual checks, respect and reciprocity.⁸⁸ The continuing advantages of this for a resilient democratic system of government are also discussed later in *Chapter 7*.

The weakness associated with the linkages involved in the departure from the pure separation of powers is associated with the judicial function and in particular with the responsibility given to the judiciary for the supervision of the constitution.⁸⁹ When we look at recent history, we see a story where the interconnections between the branches have politicised the judicial function. Impeachment no longer shows Congress in the light of a judicial tribunal but reinforces its image as a forum for partisanship. Appointments to Federal Courts are also politicised by national politics. Above all, the appointment process to the Supreme Court has become the setting where political inclinations and ideology triumph over other forms of qualification to the highest court.⁹⁰ According to critics, politicisation

risks undermining the standing of the judiciary in general and the legitimacy of Supreme Court rulings in particular. It effects both the institutional independence of the judicial branch and its 'decisional independence' in the making of particular rulings.⁹¹ It undermines the separation of powers.

Despite these perceived sources of weakness in the original design it remains the case that the focus on the cognitive dimension of policy making and the conception of non-hierarchical linkages between the branches continue as a fundamental source of strength.

Any general assessment of the architecture for American democracy has to acknowledge its compromise over slavery whose legacy endures to this day. In Federalist Paper 54 it is stated that the constitution viewed slaves '*in the mixed character of persons and of property*'⁹² and as inhabitants but not free inhabitants.⁹³ Allowing political compromise to stand above justice was eventually to contribute to a breakdown in constitutional government, to the Civil War and to the Civil War Amendments to the constitution that banned slavery (Thirteenth Amendment, 1865), the Fourteenth amendment on federal debt (now still relevant in relation to the debt ceiling) and gave the right to vote regardless of race, colour or any previous condition of servitude (Fifteenth Amendment, 1869). These amendments can be regarded as a refounding moment in terms of the principles of representation and arguably helped to lay the basis for the subsequent expansion in the role of government in the later nineteenth century.⁹⁴ The treatment of slavery in the original architecture of the separation of powers remains a fundamental flaw with continuing aftershocks today. However, it is a vast topic on its own and therefore is not discussed within the limits of this book.

The next chapter selects for examination key changes in the economic, social and political context since the classic model was established. Changes in the tasks and instruments of government and the growth of regulation as a tool of government require that we redefine the separation of powers to take account of this expanded role of government. The development of research into cognition and behaviour provides a new perspective on the question faced by the Founding Fathers about how to bring together the institutions we look to for reason and understanding with the passions and feelings we bring to politics. At the

same time, the warnings given by Montesquieu and the authors of The Federalist on the need to address inequalities have also become of central importance.

¹ The Federalist, Paper 14, p. 66.

² Grofman et al. refer to The Federalist papers as the original 'statement of purpose' by which the framers of the constitution promoted its ratification (2014, p. 8). Loughlin (2022, p. 2) also refers to the Federalist Papers as the 'True foundational text of constitutionalism'.

³ The Federalist, Paper 51, p. 264.

⁴ Vile 1967, p. 13.

⁵ Ibid. p. 113.

⁶ The Federalist Paper 1, p. 3.

⁷ The Federalist, Paper 51, p. 264.

⁸ Federalist Paper 47, p. 246.

⁹ Montesquieu 1748/1977, p. 206 and 210.

¹⁰ Kyritsis 2017, p. 52.

¹¹ Morgan states that Montesquieu '*discussed different types of government, each with a principle or actuating force proper to it, and two divisions of liberty: the constitutional and the personal. He proceeded to relate all these to one another*' (1948, p. 6).

¹² For an account of Montesquieu's life see Shackleton 1961.

¹³ See Montesquieu 1748/1977, p. 219 and 321.

¹⁴ Montesquieu 1748/1977, p. 91.

¹⁵ Ibid. p. 105. See also Book 14.

¹⁶ The Federalist, Paper 2, p. 6.

¹⁷ See The Federalist, Paper 9, p. 38.

¹⁸ Montesquieu 1748/1977, p. 176.

¹⁹ The Federalist, Paper 9, p. 38-9.

²⁰ The Federalist, Paper 13, p. 62-3.

²¹ Montesquieu 1748/1977, p. 100.

²² Ibid. p. 104.

²³ See Adam Smith's Lectures on Rhetoric and Belles Lettres (1762) for an account of his 'didactic method'.

²⁴ Ostrom states of the authors of The Federalist: '*One of their first assumptions is the proposition that individuals are the basic units to be considered in the design of political institutions*' (1971/1987, p. 35).

²⁵ The Federalist, Paper 31, p. 147.

²⁶ The Federalist, Paper 51, p. 264.

²⁷ Montesquieu 1748/1977, p. 102.

²⁸ Ibid. p. 103.

²⁹ Montesquieu 1721/1973, Letter 10.

³⁰ Montesquieu 1721/1973, Letters 11-14.

³¹ Montesquieu 1748/1977, p. 118 and p. 130.

³² The Federalist, Paper 6, p. 20.

³³ The Federalist, Paper 37, p. 179.

³⁴ The Federalist, Paper 55, p. 286.

³⁵ Grofman et al. (2014, p. 40) state that '*Overall we see a situation in which it is clear that Madison is arguing that flaws in human nature lead to challenges for governing and that the most efficacious way to ameliorate these challenges is through proper institutional design*'.

³⁶ Montesquieu 1748/1977, p. 130.

³⁷ Ibid. p. 132-3.

³⁸ Montesquieu 1721/1973, Letter 50.

³⁹ Because Montesquieu did not insist that people were above all rationalist with a mathematical character of mind, Stark regards him as a predecessor of romanticism. According to Stark, reasonableness for Montesquieu meant in accordance with common sense, with the demands for human kindness and compassion and appropriate and purposive for a given situation (Stark 1960/2013 p. 198).

⁴⁰ Montesquieu 1748/1977, p. 291. By contrast, Max Weber defines vanity as 'self-intoxication' and likely to lead politicians to lack objectivity and to irresponsibility (Weber 1948/91, p 116).

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- ⁴¹ Among modern theorists Herbert Simon emphasises the importance of emotions: *'Reason taken by itself is instrumental. It can't select our final goals, nor can it mediate for us in pure conflicts over what goals to pursue'* (Simon 1983, p. 106).
- ⁴² Ibid. p. 290 and 292.
- ⁴³ The Federalist, Paper 9, p. 37.
- ⁴⁴ Mill 1859/2001, p. 99.
- ⁴⁵ Mill 1859/2001, p. 13.
- ⁴⁶ The Federalist, Paper 40, p. 71-2.
- ⁴⁷ The Federalist, Paper 57, p. 292.
- ⁴⁸ The Federalist, Paper 57, p. 293.
- ⁴⁹ The Federalist, Paper 6, p. 22.
- ⁵⁰ The Federalist, Paper 10, p. 42.
- ⁵¹ Montesquieu 1748/1977, p. 204.
- ⁵² See The Federalist Paper 27 (p. 130-1) in regard to the Senate and Paper 35 (p. 166-8) in regard to the House. See also Paper 39 by Madison on the virtues of the different methods of election (p. 191-2).
- ⁵³ The Federalist, Paper 10, p. 46.
- ⁵⁴ Montesquieu 1748/1977, p. 200.
- ⁵⁵ Möllers (2013) interprets the links in terms of mediating contradictory claims between individual and collective autonomy. From a different perspective, Carolan (2009) also looks to state structures to balance the individual and the collective.
- ⁵⁶ Montesquieu 1748/1977, p. 99.
- ⁵⁷ Ibid. p. 103.
- ⁵⁸ Paper 51, p. 267.
- ⁵⁹ Ibid. p. 202.
- ⁶⁰ The Federalist, Paper 78, p. 396.
- ⁶¹ Referred to in the next chapter as 'departmentalism'.
- ⁶² Ibid. p. 397.
- ⁶³ The Federalist, Paper 81, p. 412.
- ⁶⁴ Marshall 1994, p. 17-45.
- ⁶⁵ See Knight (1990) on George Mason.
- ⁶⁶ Letter dated 20 December 1787 (Peterson 1977, p. 430).
- ⁶⁷ Montesquieu 1748/1977, p. 376. See also Fuller (1969/1977) for an influential statement on the inner morality of the law.
- ⁶⁸ Among recent theorists Richard Bellamy distinguishes between the task of providing for a fundamental structure for law making and the role of rights in addressing the substance of law (Bellamy 2007, p. 15).
- ⁶⁹ Rizzo (2021, p. 210) contends that abstract rules provide the key to dealing with complexity but that they also have to pass the test of consent when under conditions of uncertainty people do not know in advance whether they will be winners or losers.
- ⁷⁰ Loughlin 2022, p. 6-8.
- ⁷¹ Montesquieu 1748/1977, p. 136.
- ⁷² The Federalist, Paper 10, p. 43.
- ⁷³ Ibid. p. 41.
- ⁷⁴ Nedelsky 1990.
- ⁷⁵ See Letter to Madison, 6 September 1789 (Peterson 1977, p. 449).
- ⁷⁶ The Federalist, Paper 3, p. 9.
- ⁷⁷ The Federalist, Paper 53, p. 275.
- ⁷⁸ The Federalist, Paper 34, p. 160.
- ⁷⁹ From a language and communication perspective, Cameron notes that *'the advantage of the separation of powers is that it enables patterns of collective action involving adaptation and deliberate improvement that would otherwise be infeasible'* (2013, Chapter 1 (online)).
- ⁸⁰ Simon 1969/2019, p. 100. See also Simon 1983 where he states that divisionary arrangements may provide some protection against neglecting or ignoring relevant facts and values (1983, p. 87).
- ⁸¹ Brettschneider 2007, p. 24.
- ⁸² Ibid. p. 162.
- ⁸³ Ostrom 1997, p. 11. Baumgartner and Jones also reflect this duality: *'The framers thought this structure could help deter tyranny. We think today it acts to stimulate the supply of policymaking information'* (2005, p. 286).
- ⁸⁴ Ceaser 1986, p. 178.

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- ⁸⁵ Carolan (2009). Elkin (2006, p. 119-120) also criticises the constitution as being insufficient for the task because of its silences.
- ⁸⁶ Simon 1969/2019, p. 141. Heche notes, '*the separation of powers has proved durable because it has been adaptable*' (1994, p. 134).
- ⁸⁷ Hamilton, The Federalist, Paper 70, p. 360.
- ⁸⁸ Ostrom notes that '*The American theory of the limited constitution implies that no "governmental" authority has the last say*' (1971/1987, p. 70).
- ⁸⁹ Ostrom also states that a constitution that limits powers '*cannot rely upon the expediency of vesting "ultimate authority" or the "last say" with any particular body*' (ibid. p. 67).
- ⁹⁰ For a discussion of attempts to stack the Court with political appointees prior to Trump see Hall (2000).
- ⁹¹ For the distinction and a discussion of decisional independence see Gerangelos (2009).
- ⁹² The Federalist, Paper 54, p. 278.
- ⁹³ Ibid. p. 280.
- ⁹⁴ For Loughlin (2022, chapter 8) it marks the point where the US constitution became reinterpreted as a project for social integration.