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Montesquieu's Theory of Government and the Framing of the American Constitution

Matthew P. Bergman*

I. INTRODUCTION

We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and other customs.

Thus when a prince would make great alterations in his kingdom, he should reform by law what is established by law, and change by custom what is settled by custom.¹

Two hundred and forty years after Montesquieu admonished rulers to respect the natural divisions of authority within their societies, his work continues to guide politicians and jurists alike. In *Mistretta v. United States*,² the United States Supreme Court held that the sentencing guidelines for federal convicts promulgated by the United States Sentencing Commission were constitutional despite the fact that Article III federal judges were members of the Commission. This holding has had broad contemporary significance. Courts throughout the nation had taken opposite views on the constitutionality of the guidelines, resulting in a plethora of inconsistent and constitutionally suspect criminal sentences. Yet, even in the midst of an opinion suffused with such contemporary import, the Supreme Court

* Law Clerk to Judge Bobby R. Baldock, U.S. Court of Appeals, Tenth Circuit. B.A. Reed College (1986); J.D. Northwestern School of Law, Lewis & Clark College (1989). I am grateful to John C. Pock for first exposing me to Montesquieu and helping me pursue this project. I also would like to thank Peter Nycum and James Huffman for their helpful comments, Doris J. Brook for her help with translation, and the library staff of Lewis & Clark Law School.

1. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 298 (T. Nugent 1949).
2. 488 U.S. 361 (1989).

invoked the authority of Montesquieu, an eighteenth century French legal theorist:

While we recognize the continuing validity of Montesquieu's admonition: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul" . . . because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial branch.³

A close reading of many of the Supreme Court's most significant decisions reveals that Montesquieu's influence prevails some two hundred and forty years after the publication of his *The Spirit of the Laws*.⁴ Montesquieu was cited by the Supreme Court in both *Bowsher v. Synar*,⁵ which struck down the Gramm-Rudman deficit reduction bill as an unconstitutional delegation of legislative power, and *Buckley v. Valeo*,⁶ a case upholding the constitutionality of the Federal Election Commission. The Supreme Court also invoked Montesquieu's authority in *I.N.S. v. Chadha*,⁷ a decision that struck down the legislative veto of administrative decisions.⁸ Although Montesquieu is usually remembered for his discussion of the separation of powers, in the last half century the Supreme Court has also relied upon his authority on such issues as perjury,⁹ treason¹⁰ and the Smith Act.¹¹ State courts have cited Montesquieu on such topics as domestic relations,¹² perjury,¹³ penal reform,¹⁴ and voluntary intoxication.¹⁵ Indeed, the Court of Appeals for the District of Columbia discussed Montesquieu's theories in connection with the impeachment of a federal judge.¹⁶

Despite these numerous citations, however, Montesquieu remains an enigmatic figure in American legal education. Although courts generally acknowledge his influence on the Constitution, the nature

3. *Id.* at 394.

4. MONTESQUIEU, *supra* note 1.

5. 478 U.S. 714, 721 (1986).

6. 424 U.S. 1, 120 (1976) (per curiam) (discussing James Madison's reliance on Montesquieu in THE FEDERALIST NO. 47).

7. 462 U.S. 919, 999 n.25 (1983) (White, J., dissenting).

8. See also *In re Sealed Case*, 838 F.2d 476, 516 (D.C. Cir. 1988) (Appointment of independent special prosecutor held to be an unconstitutional violation of the separation of powers), *rev'd*, 108 S. Ct. 2597 (1988).

9. *Bronston v. United States*, 408 U.S. 352, 360 (1973), *rev'd*, 487 U.S. 654 (1988).

10. *Cramer v. United States*, 325 U.S. 1, 24 (1945) (The treason clause of the Constitution embodies every precept suggested by Montesquieu).

11. *Scales v. United States*, 367 U.S. 203, 266 (1961); *Dennis v. United States*, 341 U.S. 494, 590 n.5 (1951) (Douglas, J., dissenting).

12. *Warren v. Hart*, 747 P.2d 511, 514 n.1 (Wyo. 1987).

13. *State v. Olson*, 92 Wash. 2d 134, 139, 594 P.2d 1337, 1340 (1979).

14. *Smith v. State*, 41 Md. App. 297, 289, 398 A.2d 426, 434 (1979).

15. *Parker v. State*, 7 Md. App. 167, 176 n.1, 254 A.2d 381, 387 n.1 (1969).

16. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1443 (D.C. Cir. 1987); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1106 (D.C. Cir. 1985).

and extent of his contributions remain untold. Montesquieu is perfunctorily cited in connection to Madison's separation of powers discussion in *The Federalist No. 47*;¹⁷ yet the context in which this quote arose remains ambiguous. Conventional wisdom has confined Montesquieu's influence to the separation of powers, ignoring his greater influence in theorizing the relationship between republican government and republican political culture.

Part II of this paper chronicles Montesquieu's life and evaluates his jurisprudence, emphasizing his treatment of law and culture and the dialectical relationship between the two phenomena. Part III of this paper traces Montesquieu's influence in America from the colonial period through the early 1800s, and demonstrates how Montesquieu provided theoretical grounding for popular political sentiments in opposition to the English Monarchy and later influenced the framing of the United States Constitution. This section also illustrates how Montesquieu influenced the ratification debate by providing intellectual ammunition to both sides of the struggle. Part IV demonstrates Montesquieu's influence upon Hamilton, Jefferson, Madison and Adams from their early infatuation with his theories in the pre-revolutionary era to their more critical approach after the formation of the new republic. Finally, Part V discusses several early Supreme Court cases which cite Montesquieu, as examples of his continuing and eclectic influence. Part VI concludes by commenting on Montesquieu's continuing and future impact on American jurisprudence.

This paper does not attempt to provide an exhaustive history of the intellectual origins of the Constitution, for such an endeavor would in itself constitute a separate study.¹⁸ Rather, the paper will summarize Montesquieu's theories and chronicle their implementation across the American continent. By clarifying Montesquieu's theories and demonstrating their application during the formative years of the republic, this paper seeks to restore the ideas of this great thinker to contemporary legal and political discourse. While the specific content of Montesquieu's analysis is dated, his theory of natural government can provide guidance to the contemporary quandary over the proper role of government in the regulation of our daily lives.

17. THE FEDERALIST NO. 47, at 323-31 (J. Madison) (J. Cooke ed. 1961); see *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (per curiam) (discussing James Madison's reliance on Montesquieu's theories).

18. For a superb treatment of this subject, see F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985).

II. MONTESQUIEU: LIFE AND THEORY

A. *Life & Times*

Charles-Louis de Secondat was born to a Bordeaux family of magistrates, soldiers and ecclesiastics on January 18, 1689.¹⁹ Preparing for a career as a magistrate, Charles-Louis studied Roman, French, and local law at the University of Bordeaux, and received his degree in 1708.²⁰ The following year he consummated his Enlightenment rationality by composing an essay which argued that the "heathen philosophers did not deserve eternal damnation."²¹ After further study in Paris, Charles-Louis was appointed to the Bordeaux Parlement as a Councilor in 1714. Even at this early stage he was an uncommonly well-educated lawyer.²²

Following his uncle's death in 1716, Charles-Louis inherited not only the title Montesquieu, but also an income, and the judicial post of *President a Mortier* of the Bordeaux Parlement.²³ Although the Parlements of the Ancient Regime performed some administrative functions, their primary role was judicial.²⁴ Montesquieu presided over the criminal division — Tournelle — of the Parlement throughout his eleven year tenure.²⁵ As part of his duties, he supervised the prison system, participated in torture — a routine part of criminal investigation — and sentenced prisoners to the standard punishments of execution, deportation, and service in the galleys.²⁶ Partially as a result of this experience, Montesquieu would later become a firm advocate of criminal law reform.²⁷

Although he retained his interest in the law, Montesquieu grew bored with its day-to-day administration; he especially disliked procedure.²⁸ Moreover, other concerns competed for his intellectual attention. The same year Montesquieu assumed his judicial post he was elected to the Bordeaux Academy of Science.²⁹ Soon his scientific interests outweighed his devotion to the law. While still a practicing judge, he published papers on physics, physiology, geology, and other natural science topics, including the origin of the echo and the anat-

19. I. BERLIN, *MONTESQUIEU* 269 (1955); J. SHKLAR, *MONTESQUIEU* 1 (1987).

20. J. SHKLAR, *supra* note 19, at 2.

21. A. SOREL, *MONTESQUIEU* 10 (Anderson trans. 1969).

22. J. SHKLAR, *supra* note 19, at 2.

23. *MONTESQUIEU*, *supra* note 1, at x. *Presidents a Mortier*, named for their red hats, were nine magistrates on the second rung of the Parlement. J. SHKLAR, *supra* note 19, at 4. All offices except the presidency were bought, sold, leased or inherited. *Id.*

24. I. COX, *MONTESQUIEU AND THE HISTORY OF FRENCH LAWS* 55 (1983).

25. J. SHKLAR, *supra* note 19, at 5.

26. *Id.*

27. *Id.* See also W. BONGER AN INTRODUCTION TO CRIMINOLOGY 30-34 (1936).

28. *Id.* See J. SHKLAR, *supra* note 19, at 5.

29. I. R. ARON, *MAIN CURRENTS IN SOCIOLOGICAL THOUGHT* 63 (1968).

omy of the kidney.³⁰ A bitter critic of the religious intolerance and military aggression carried out under the regime of Louis XIV,³¹ Montesquieu presented essays to the Academy on public finance, universal monarchy, and the decline of the Spanish Empire,³² in addition to his scientific works. Montesquieu's early identification as a man of sciences would prove central to his later development as a political theorist.³³

In 1721, Montesquieu made his literary debut with the publication of *The Persian Letters*, a work comprised of a satirical evaluation of French society through the eyes of two fictional Turkish travelers. *The Persian Letters* made Montesquieu instantly famous. Although the book had been published anonymously, his authorship was not much of a secret.³⁴ While the work was well-received, Montesquieu's tolerant view of Judaism was criticized by the clergy.

A disaffected aristocrat, Montesquieu sold his judicial office in 1725, giving up the life of a provincial magistrate for the literary glamor of Paris.³⁵ The year 1728 saw Montesquieu's election to the Academe Francaise, although he was first required to affirm that *The Persian Letters* was not a blasphemous book.³⁶ He spent the following year travelling in Austria, Germany, Hungary, and Italy, meeting with local economic and political elites.³⁷ Montesquieu then spent two years in England conducting an intensive study of English political institutions. He became acquainted with many Whig leaders, observed sessions of the House of Commons, and maintained an active correspondence with David Hume.³⁸ In 1731, Montesquieu was elected to the Royal Society.³⁹

30. MONTESQUIEU, *supra* note 1, at xi.

31. J. SHKLAR, *supra* note 19, at 17-18.

32. *Id.* at 16.

33. Professor Shklar explains:

The very core of [Montesquieu's] political theory depended on ideas about the ways in which the physical environment, especially the climate, impinges upon human character and political institutions, and he built from the first out of materials he had gathered in his reading of the works of physicians. It was they who gave his mind its particular cast. Like them he wanted to develop a science capable of identifying and describing the course of diseases, except that he was looking not at physical illnesses but at social collapse and the deadly condition of despotism.

Id. at 12.

34. *Id.* at 19.

35. *Id.* at 20.

36. *Id.*

37. *Id.*

38. MONTESQUIEU, *supra* note 1, at xii.

39. J. SHKLAR, *supra* note 19, at 21.

Montesquieu's experiences in England radicalized him. He discovered that the rule of law and political freedom were practical possibilities, and Bourbon absolutism was not inevitable.⁴⁰ In 1734, Montesquieu published *Considerations sur la grandeur at la decadence des Romains*, which analyzed the decline of the Roman Empire.⁴¹ His thesis was that Rome fell when its legal institutions reached a level of sophistication that could not be supported by its primitive religious system.⁴² This work was to be an important precursor to *The Spirit of the Laws*.

As a result of his previous publications, Montesquieu was widely known and respected when *The Spirit of the Laws* was first published in 1748. The result of twenty years of preparation, *The Spirit of the Laws* combined Montesquieu's entire intellectual experience as a judge, scientist, novelist, historian and traveller.⁴³ It was intended as a "scientific study of government, encompassing the whole length and breadth of history and accounting for all the factors affecting the political life of man."⁴⁴ Montesquieu's work was hailed as the first systematic treatise on politics since Aristotle. All French intellectuals became familiar with the book, and twenty-two editions were published within two years.⁴⁵

Many felt that *The Spirit of the Laws* broke with earlier tradition by studying the laws of different nations without reference to morality or metaphysics.⁴⁶ Consequently, it was attacked at the Sorbonne, and the French Assembly of Bishops threatened to ban the work. For reducing laws to their purely human causes, "Montesquieu was accused of atheism, of deism, of not having mentioned original sin [and of] having condoned polygamy."⁴⁷ Helvetius and Voltaire also criticized the book as a partisan defense of aristocratic privilege,⁴⁸ although the former defended Montesquieu against attacks from the Church.

In answer to his Jesuit and Jansenist critics, Montesquieu published *Defense of the Spirit of the Laws* in 1750.⁴⁹ He explained that he had not sought to belittle morality, but rather to separate theology

40. *Id.*

41. See Oak, *Montesquieu's Religious Ideas*, 14 J. HIST. OF IDEAS 548, 548-51 (1953).

42. *Id.*

43. See J. SHKLAR, *supra* note 19, at 67 ("When one reads all of Montesquieu's published and unpublished writings from beginning to end, one realizes that he had been working on his masterpiece, THE SPIRIT OF THE LAWS, all his life.").

44. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 76 (1967).

45. A. SOREL, *supra* note 21, at 162, 168.

46. M. WADDICOR, MONTESQUIEU AND THE PHILOSOPHY OF NATURAL LAW 16 (1970).

47. L. ALTHUSSER, POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, HEGEL AND MARX 21 (B. Brewster trans. 1972).

48. MONTESQUIEU, *supra* note 1, at xiii.

49. L. ALTHUSSER, *supra* note 47, at 22.

from political history.⁵⁰ For example, Montesquieu acknowledged that polygamy was theologically abhorrent, but defended his toleration of the practice as the result of factual, not moral, considerations. Two years after publishing *Defense of the Spirit of the Laws* he died in Paris.

B. *The Spirit of the Laws*

1. Social Theory

Although an amateur scientist, Montesquieu was primarily a lawyer, and *The Spirit of the Laws* "bears the marks of his profession."⁵¹ Combining his profession with his vocation, Montesquieu sought to invent a science of government consistent with Cartesian and Newtonian physics.⁵² As a search to integrate empirical and normative analysis, *The Spirit of the Laws* is widely acknowledged as the first major work of social science.⁵³

The Spirit of the Laws is not a mere compilation of the law, but rather an entirely new method of approaching jurisprudence.⁵⁴ Montesquieu sought to look beyond laws themselves and evaluate the social factors that gave them meaning and effect, and in so doing effectuate the wise exercise of governmental power. His goal was therefore threefold: 1) to define the structure of law and to classify the entire array of social norms to reveal the legal structure of a given society; 2) to demonstrate through historical analysis the dynamic relationship between social norms and laws; and 3) to alert his countrymen to the dangers of despotism and foster the liberalization and humanizing of the law in every area of social life.⁵⁵

To Montesquieu, "[l]aws are the necessary relations arising from

50. *Id.*

51. I. COX, *supra* note 24, at 3.

52. According to Sir Isaiah Berlin:

[Montesquieu] speaks as if, for the first time in human history, he had uncovered the fundamental laws which govern the behaviour of human societies, much as natural scientists in the previous century had discovered the laws of the behaviour of inanimate matter. He speaks of the genesis of legal systems, but he obviously means something far wider: the entire, institutional framework within which specific human societies live; not merely their systems of law, but the patterns . . . of their political, religious, moral, and aesthetic behaviour.

I. BERLIN, *supra* note 19, at 271.

53. See L. ALTHUSSER, *supra* note 47, at 20.

54. See M. RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 57 (1977).

55. See J. SHKLAR, *supra* note 19, at 69.

the nature of things."⁵⁶ These relationships, when analyzed systematically, combine to form the type of government best suited to a particular nation. Thus, Montesquieu asks jurists to look beyond the written law to social, political, economic, cultural and geographical exigencies that determine the spirit of nations. Only by appreciating these relationships can governmental power be wisely exercised; only by appreciating the "spirit" of laws can their letter be enforced.⁵⁷

Montesquieu's *Weltanschauung* reflects an ordered universe governed by rational laws discoverable through reason.⁵⁸ He thus presumes underlying, enduring, and collaborative relationships beneath the chaos of human events.⁵⁹ Justice, to Montesquieu, is implicit within his jurisprudence, not simply some abstract philosophical concept. Neither does a theory of natural rights figure in his analysis.⁶⁰ Rather, for Montesquieu, law and justice are inseparable; one necessarily implies the other.⁶¹

Unlike Hobbes, Montesquieu never conceded a pre-social condition of man, and accordingly rejected a contractual theory of social relations.⁶² Man, in the state of nature, uniformly seeks society; the social instinct is innate within humanity.⁶³ While Hobbes saw man's natural state as brutish, Montesquieu saw the social condition of man as preeminent; the state of war only results from the breakdown of the pre-existing social state.⁶⁴ Moreover, Montesquieu rejected Hob-

56. MONTESQUIEU, *supra* note 1, Bk. I, Ch. 1, at 1. Bereft of theistic content, this relativist definition of law elicited the opprobrium of religious authorities when THE SPIRIT OF THE LAWS first appeared. See M. WADDICOR, *supra* note 46, at 181.

57. Montesquieu explains:

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

They should be in relation to the nature and principle of each government: whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.

They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

These relations I shall examine, since all these together constitute . . . Spirit of the Laws.

MONTESQUIEU, *supra* note 1, Bk. I, Ch. 2, at 6.

58. S. MASON, MONTESQUIEU'S IDEA OF JUSTICE 234-35 (1975).

59. H. MERRY, MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT 60 (1970).

60. S. MASON, *supra* note 58, at 256.

61. See J. SHKLAR, *supra* note 19, at 72.

62. See M. RICHTER, *supra* note 54, at 68; S. MASON, *supra* note 58, at 213 (basic tendency of Montesquieu's social theory anti-contractualist).

63. See L. LEVIN, THE POLITICAL DOCTRINE OF MONTESQUIEU'S ESPRIT DES LOIS: ITS CLASSICAL BACKGROUND 48 (1973).

64. See R. SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 262 (1961).

bes' view of the law as the mere command of the sovereign; law is preexistent and superordinate to political law.⁶⁵

For Montesquieu, the criterion of proper government is not, as with Plato, a transcendent idea of good, but rather an empirical sense of social relations. Laws must be sociologically and culturally relevant for the particular society and cannot be transplanted from one nation to another.⁶⁶ Montesquieu explicitly denied that any particular form of government is required by nature; every government is a unique product of its natural and social environment.⁶⁷ From this relativistic frame of reference, he sought to prove the impossibility of a universal governmental solution to social problems.⁶⁸

2. Spirit of Nations

According to Montesquieu, mankind is influenced by various factors: climate, religion, laws, maxims of government, precedents, morals, and customs.⁶⁹ These form a general "spirit of nations."⁷⁰ Every society is thus characterized by a particular spirit, that force which animates men to function harmoniously.⁷¹ This doctrine of national spirit gives coherence to *The Spirit of the Laws* by connecting Montesquieu's divergent discussion of climate, geography, economics, and religion with his analysis of governmental structure and political liberty. Therefore, Montesquieu's most important and valuable idea is the connection he established between the forms of governmental power on one hand, and the style of social relations on the other.⁷²

I have not separated the political from the civil institutions, as I do not pretend to treat of laws, but of their spirit; and as this spirit consists in the various relations which the laws may bear to different objects, it is not so much my business to follow the natural order of laws as that of these relations and objects.⁷³

While accepting a Cartesian proof of God's existence,⁷⁴ for Montesquieu, religion is a natural phenomenon brought about by natural causes. Appreciating the psychological impulses behind religious af-

65. See J. SHKLAR, *supra* note 19, at 71.

66. H. MERRY, *supra* note 59, at 66-67.

67. *Id.* at 45.

68. See I. BERLIN, *supra* note 19, at 280.

69. MONTESQUIEU, *supra* note 1, Bk. XIX, Ch. 4, at 293.

70. *Id.*

71. R. ARON, *supra* note 29, at 19.

72. *Id.* at 27.

73. MONTESQUIEU, *supra* note 1, Bk. XXV, at Ch. 9-11.

74. *Id.* at 556.

firmation,⁷⁵ Montesquieu regarded religion as a major social force giving rise to a national spirit.⁷⁶ As a result of this approach, he adopted a utilitarian view of religion, seeing it as a functional prerequisite to any society's existence.⁷⁷ Montesquieu sharply distinguished the political realm from the religious. Political laws, according to Montesquieu, are made to direct the will, whereas religion is created to influence the heart.⁷⁸ All political vices, he explained, "are not moral vices; and all moral [vices] are not political vices."⁷⁹ This utilitarian view of religion gives rise to Montesquieu's powerful advocacy of religious tolerance.⁸⁰ Intolerance destroys the social utility of religion by loosening its naturally unifying force.⁸¹

3. Principle of Government

Montesquieu's greatest contribution to the character of modern political theory is his identification of every government's own principle spirit or passion.⁸² Montesquieu understood the vital relationship between the cultural organization of a society on one hand and its form of government on the other.

There is this difference between laws and manners, that the laws are most adapted to regulate the actions of the subject, and manners to regulate the actions of the man. There is this difference between manners and customs, that the former principally relate to the interior conduct, the latter to the exterior.⁸³

Every society is hence characterized by a particular governing sentiment from which no political structure can long deviate. Montesquieu understood that governments survive only so long as they remain in conformity with the underlying spirit of the nation.

Laws are established, manners are inspired; these proceed from a general spirit, those from a particular institution: now it is as dangerous, nay more so, to subvert the general spirit as to change a particular institution.⁸⁴

75. *Id.* Bk. XXV, at Ch. 9-11.

76. H. MERRY, *supra* note 59, at 115.

77. Montesquieu's earliest work, DISSERTATION SUR LA POLITIQUE DES ROMAINS DANS LAT RELIGION, read before the Bordeaux Academy, opened with the statement: "It was neither fear nor piety which established religion among the Romans, but the necessity of all societies to possess one." See Oak, *supra* note 41, at 548-49.

78. *Id.*

79. MONTESQUIEU, *supra* note 1, Bk. XIX, at Ch. 2. This refusal to subordinate material and political facts to religious and moral principles or abstract notions of natural law constitutes Montesquieu's great theoretical revolution. See L. ALTHUSSER, *supra* note 47, at 30.

80. In THE PERSIAN LETTERS, Montesquieu defended the Jewish faith against religious persecution. Although he regarded the Talmud and Cabala as absurd, he appreciated the Jewish contribution toward monotheism and derided their barbaric treatment by both religious and secular authorities. See P. KRA, RELIGION IN MONTESQUIEU'S LETTRES PERSANES 101 (1970).

81. Oak, *supra* note 41, at 549; S. MASON, *supra* note 58, at 127.

82. H. MERRY, *supra* note 59, at 373.

83. MONTESQUIEU, *supra* note 1, Bk. XIX, Ch. 16, at 300.

84. *Id.*, Bk. XIX, Ch. 12, at 297-80.

A political regime endures only as long as the necessary sentiment remains in the people. Once the principle of government is abrogated, the political system ceases to function.

When once the principles of government are corrupted, the very best laws become bad, and turn against the state: but when principles are sound, even bad laws have the same effect as good; the force of the principle draws everything to it.⁸⁵

Montesquieu therefore urged that political structure reflect the sociological and psychological exigencies within the particular society through the sociologically relevant distribution of power.⁸⁶

It is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principle of government; for we do nothing so well as when we act with freedom, and follow the bent of our natural genius.⁸⁷

By subordinating government to the general spirit of nations, Montesquieu posited a limiting force—like gravity—upon the acts of governing officials.⁸⁸ This principle can be seen in Montesquieu's discussion of the proper role of education in the society:

That the laws of education should relate to the principle of each government has been shown. . . . Now the same may be said of those which the legislator gives to the whole society. The relation of laws to this principle strengthens the several springs of government; and this principle derives thence, in its turn, a new degree of vigor. And thus it is in mechanics, that action is always followed by reaction.⁸⁹

Positive law, therefore, operates in a dialectical relationship with the spirit of a nation; one can never deviate too far from the other lest the social order be upset.

Should there happen to be a country whose inhabitants were of a social temper, open-hearted, cheerful, endowed with taste and facility in communicating their thoughts; who were sprightly and agreeable; sometimes imprudent, often indiscreet; and besides had courage, generosity, frankness, and a certain notion of honor, no one ought to endeavor to restrain their manners by laws, unless he would lay a constraint on their virtues.⁹⁰

Therein lies the source of Montesquieu's conservatism, that there exists certain unbending constraints upon a government's ability to

85. *Id.*, Bk. VII, Ch. 11, at 116.

86. Sorel explains that, for Montesquieu,

there is no sort of constitution which is, in itself, superior to others. There are conditions of existence, public and private morals, a national spirit, a general tendency, to which every constitution is subordinate. The best and most legitimate for each nation is that which is most appropriate to the character and tradition of the people for which it was designed.

A. SOREL, *supra* note 21, at 89.

87. MONTESQUIEU, *supra* note 1, Bk. XIX, Ch. 5, at 294.

88. See S. MASON, *supra* note 58, at 201.

89. MONTESQUIEU, *supra* note 1, Bk. V, Ch. 1, at 40.

90. *Id.*, Bk. XIX, Ch. 5, at 294.

effectuate change within society.⁹¹ Like Burke, Montesquieu argued that certain sociological exigencies could change only through time, and that the governmental reformer who did not respect this truth was certain to fail. Therefore, while Montesquieu's specific recommendations were liberal, the implications of his broader theory were fundamentally conservative.⁹²

4. Three Types of Government

Montesquieu divided governments into republics, monarchies, and despotisms.⁹³ He then subdivided republics into democracies and aristocracies. A republican government is one "in which the body, or only a part of the people, is possessed of the supreme power; monarchy, that in which a single person governs by fixed and established laws; despotic government [is] that in which a single person directs everything by his own will and caprice."⁹⁴

Montesquieu categorized these three types of government, not according to their structure, but rather by their legitimating principles derived from the general spirit of the particular nation. Relying upon classical Athens as his model,⁹⁵ Montesquieu categorized virtue as the governing principle of republican governments. The fragility of republican constitutions require that republican government rely on the habits and attitudes of the citizenry for support.⁹⁶ Because the people are entrusted with the execution of the laws, Montesquieu explained that their civic virtue provides the only force behind the laws' authority:

There is no great share of probity necessary to support a monarchical or despotic government. The force of laws in one and the prince's arm in the other, are sufficient to direct and maintain the whole. But in a popular state, one spring more is necessary, namely virtue.

For it is clear that in a monarchy, where he who commands the execution of the laws generally thinks himself above them, there is less need of virtue than in a popular government, where the person intrusted with the execution of the laws is sensible of his being subject to their direction.⁹⁷

Where the republican government takes the form of democracy, Montesquieu added frugality as a governing prerequisite. Otherwise, personal ambition would prevail over the spirit of equality and subvert the principle of democratic government.⁹⁸ For this reason, Montesquieu argued that republican governments can only exist in small

91. See S. MASON, *supra* note 58, at 201 ("the practical expression of Montesquieu's sociological thesis seems inevitably restricted to an empirical conservatism").

92. See M. RICHTER, *supra* note 54, at 101.

93. MONTESQUIEU, *supra* note 1, Bk. II, Ch. 2, at 8.

94. *Id.*

95. J. SHKLAR, *supra* note 19, at 76.

96. *Id.* at 79.

97. MONTESQUIEU, *supra* note 1, Bk. III, Ch. 3, at 20.

98. *Id.* at 21.

territories.⁹⁹ In contrast, where the republican government is aristocratic, the virtuous sentiment need only manifest itself among the governing nobility. Montesquieu favored this form of government as more "vigorous" than democracy.¹⁰⁰

While a virtuous love of the law forms the governing principle of republican government, in a monarchy, the laws are themselves virtuous. Hence, Montesquieu described the governing principles in monarchies as an honorific acknowledgement of the royal origin of laws, and not, as in republics, a virtuous adherence to them. Nevertheless, laws in monarchical governments maintain an identity separate from the sovereign, for an independent body of law forms the only guard against despotism.¹⁰¹

Finally, Montesquieu ascribed fear as the governing principle of despotic governments. Because the despot operates without any reservoir of popular will, it is only the fear of his power that compels obedience. Thus, the despot prevails only insofar as he is feared:

A moderate government may whenever it pleases, and without the least danger, relax its springs. It supports itself by the laws, and by its own internal strength. But when a despotic prince ceases for one single moment to uplift his arm, when he cannot instantly demolish those whom he has intrusted with the first employments, all is over: for fear, the spring of this government, no longer subsists, the people are left without a protector.¹⁰²

While Montesquieu undertook his study with admirable neutrality, he evidenced a clear bias against despotism.¹⁰³ To the extent that *The Spirit of the Laws* had a political purpose, it was to prevent France from degenerating into despotism, an eventuality he both feared and foresaw.¹⁰⁴

5. The English Constitution and the Separation of Powers

Although Montesquieu is most famous for the separation of powers doctrine,¹⁰⁵ this theory can be traced to classical times. Aristotle understood the divergence between making law and implementing law, and articulated a crude separation between the legislative and execu-

99. *Id.*, Bk. IX, at Ch. 1.

100. *Id.*

101. Montesquieu feared that France would degenerate into a Spanish style despotism, and saw the independent Parlements as the primary bulwark against that eventuality. See J. SHKLAR, *supra* note 19, at 81, 83.

102. *Id.* at 26.

103. M. WADDICOR, *supra* note 46, at 105-06.

104. J. SHKLAR, *supra* note 19, at 81-83; A. SOREL, *supra* note 21, at 117.

105. I. BERLIN, *supra* note 19, at 268.

tive branches of government.¹⁰⁶ The separation of powers theory was also articulated in England during the civil war and the interregnum. Following the restoration, the theory was expressed in demands for a "balanced constitution."¹⁰⁷ A concept of separation of powers is also contained in the writings of Locke, although he clung to the Aristotelian division between executive and legislative.¹⁰⁸

Although Montesquieu did not invent the separation of powers doctrine, he was the first to comprehend a distinct and independent judiciary.¹⁰⁹ He popularized the trinity between the executive, legislative, and judicial branches of government, and transposed separation of powers from the realm of theory to the practice of government.¹¹⁰

The essence of Montesquieu's separation of powers doctrine is not separation of powers in the judicial sense but rather the balance of social powers as a condition for political liberty.¹¹¹ "Liberty," for Montesquieu, was not independence or license but rather a person's security in his life and property.¹¹² Although he possessed great faith in the power of legal systems to mold the public character, he was sufficiently aware of the social necessity of placing the essential components of the government in bodies representative of interests in society.¹¹³ Therefore, Montesquieu's three branches of government represent three distinct sources of legal authority.¹¹⁴ In advocating tripartite government, Montesquieu urged that governmental institutions conform to this natural division between the functions of creating law, enforcing law, and adjudicating disputes arising under the law.

Montesquieu derived his separation of powers theory from the English Constitution. However, the England he describes in Chapter Six of Book IX is an imaginary, "ideal-typical" country.¹¹⁵ For the England that Montesquieu observed intertwined the powers of government, with the legislative branch endowed with supreme authority.¹¹⁶ Montesquieu thus transformed the English idea of mixed government from a partisan position to a universal criterion of constitutional government.

Montesquieu saw three distinct forms of law, each corresponding to

106. See THE POLITICS OF ARISTOTLE, Bk. II, Ch. 8 (Barker trans. 1962).

107. M.J.C. VILE, *supra* note 44, at 53-54.

108. *Id.* at 56.

109. MONTESQUIEU, *supra* note 1, at Ivii.

110. M. RICHTER, *supra* note 54, at 88.

111. R. ARON, *supra* note 29, at 30.

112. MONTESQUIEU, *supra* note 1, Bk. XI, at Ch. 3.

113. M.J.C. VILE, *supra* note 44, at 86-87, 94.

114. H. MERRY, *supra* note 59, at 357.

115. M.J.C. VILE, *supra* note 44, at 84-85.

116. A. McLAUGHLIN, THE COURTS, THE CONSTITUTION AND PARTIES 52-54 (1912).

a separate governmental function. The law of nations consists of the power to promote public security, conduct foreign relations, and declare war. It rests with the executive. The political law consists of the power to make temporary or permanent laws and rests with the legislature. Finally, the civil law consists of the power to adjudicate civil and criminal matters and rests with the judiciary.¹¹⁷ In the phrase for which he is most often quoted, Montesquieu warned that these separate governmental functions remain separate and distinct:

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

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹¹⁸

In addition to advocating the separation of governmental powers, Montesquieu recognized that only through a system of "checks" can this separation be maintained.¹¹⁹ Montesquieu favored an absolute check upon the legislature through an executive veto. However, under his theory, the legislature enjoys no commensurate check over the executive, it merely maintains the right to force the executive to disgorge information on the manner in which its laws are executed.¹²⁰ Montesquieu justified this disparity in power with the notion that the executive powers have "natural limits," functionally defined, beyond which it cannot encroach. In contrast, as the maker of political laws, the legislature "might arrogate to itself what authority it please [which] would soon destroy all the other powers."¹²¹ Montesquieu also advocated an internal check within the legislative function through a bicameral legislature in which the nobility occupies the upper house and the commoners the lower one.¹²² This would assure that those "persons distinguished by their birth, riches, or honors" are situated to "check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs."¹²³ He explained:

Here, then, is the fundamental constitution of the government we are treating

117. MONTESQUIEU, *supra* note 1, Bk. XI, Ch. 6, at 151-52.

118. *Id.* at 151-52.

119. M. RICHTER, *supra* note 54, at 91-92.

120. MONTESQUIEU, *supra* note 1, Bk. XI, Ch. 6, at 155-56.

121. *Id.*

122. *Id.* at 155.

123. *Id.*

of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive powers as the executive is by the legislative. These three powers should naturally form a state of repose or inaction but as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.¹²⁴

6. Judicial Power

Montesquieu's treatment of the judiciary requires further elaboration, given its later development in the New World. While remaining separate and distinct from the other two powers, Montesquieu urged that the judicial power not be vested within a "standing senate."¹²⁵ Rather, he proposed that the judiciary be drawn from the people for "only so long as necessity requires."¹²⁶ "By this method", he argued, "the judicial power, so terrible to mankind" will not be "annexed to any particular state or profession."¹²⁷

While endowing the judicial branch with significant powers, Montesquieu argued that "national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."¹²⁸ He therefore totally rejected any interpretative role for the independent judiciary.

[T]hough 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 a society, without exactly knowing the nature of their obligations.¹²⁹

Bereft of any interpretative role, Montesquieu's judges are consigned to a highly formalistic, mechanical method of jurisprudence.¹³⁰ This accounts for Montesquieu's failure to see any necessity for professional judges.

Montesquieu further sought to remove all personal variation from the judicial office so as to force the population to revere the law in the abstract, rather than the particular judge.¹³¹ Montesquieu also combined the roles of judge and juror by rendering his judicial tribunals the finders of both law and fact. These hybrid magistrates are to be "drawn from the same social rank of the accused, or, in other words, his peers."¹³² Thus, legislators accused of misconduct need not "demean" themselves before their "inferiors," but may be impeached before the upper chamber.¹³³ In addition, in serious crimi-

124. *Id.* at 160.

125. *Id.* at 153.

126. *Id.*

127. *Id.*

128. *Id.* at 154.

129. *Id.* at 153.

130. I. BERLIN, *supra* note 19, at 290.

131. MONTESQUIEU, *supra* note 1, Bk. XI, Ch. 6, at 158-59.

132. *Id.*

133. *Id.* at 159.

nal trials the accused should have some privileges in choosing his judges, or at least removing certain members from the tribunal.¹³⁴

Under Montesquieu's formation, the judiciary is not given any power over the other two branches.¹³⁵ As the mere mouthpieces of the law, the courts are not in a position to "check" the acts of the other two branches, nor is there any need for a check upon such a mechanistic judiciary. Montesquieu thus predates *Marbury v. Madison*,¹³⁶ from a theoretical as well as chronological standpoint. On the other hand, Montesquieu treated the judiciary's power as analytically commensurate to that of the legislative and executive branches. His criticism of the Roman Constitution, lacking a separate judiciary,¹³⁷ attests to the importance he attached to the judicial function. Thus, although Montesquieu's judiciary lacked the power later attributed to it by Chief Justice Marshall, *The Spirit of the Laws* nevertheless firmly affixed the trinity of executive, legislative and judicial powers into the parlance of modern political thought.¹³⁸ How this trinity was adapted to the political realities of the new world is the subject of the next section.

III. MONTESQUIEU IN AMERICA

A. Pre-Revolutionary Influences

1. English Transition

The Spirit of the Laws was widely circulated in England immediately following its publication, and was translated into English several years later. The feature of Montesquieu that most appealed to English political thinkers was his independent judiciary.¹³⁹ *The Spirit of the Laws* influenced Blackstone, who unhesitatingly accepted Montesquieu's separation of powers doctrine.¹⁴⁰ However, Blackstone also "domesticated" Montesquieu by grafting his independent judiciary into the English common law tradition. Under Blackstone's reformulation, Montesquieu's independent but emasculated judiciary was transformed into a body of professional jurists with power to interpret, as well as articulate, the law.¹⁴¹ This en-

134. *Id.* at 153.

135. See M.J.C. VILE, *supra* note 44, at 93.

136. 5 U.S. (1 Cranch) 137 (1803).

137. MONTESQUIEU, *supra* note 1, Bk. XI, at Ch. 11-19.

138. *Id.*, at 88.

139. See F. FLETCHER, MONTESQUIEU AND ENGLISH POLITICS 137 (1939).

140. *Id.* at 138.

141. See M.J.C. VILE, *supra* note 44, at 104.

larged judicial role would be important in fashioning Montesquieu's interpretations in America.¹⁴²

2. Montesquieu in Colonial America

Throughout the late colonial period, Montesquieu was widely read among American Intelligentsia.¹⁴³ Booksellers' advertisements reveal that Americans had abundant opportunities to purchase Montesquieu's books, the most prominent being *The Spirit of the Laws*. The first known advertisement for an English translation of *The Spirit of the Laws* appeared in 1762 in an Annapolis newspaper.¹⁴⁴ The New York Society Library purchased a copy in 1773.¹⁴⁵ Montesquieu was also incorporated into the curricula of leading American universities. In 1756 the College of Philadelphia included *The Spirit of the Laws* among its recommended readings for seniors.¹⁴⁶ Subsequently, Princeton and Yale adopted Montesquieu into their curricula, with Harvard and Brown following suit in the early 1780s.¹⁴⁷

Despite the relatively restricted distribution in private libraries and universities, Montesquieu was widely popularized in colonial newspapers.¹⁴⁸ Choice selections from *The Spirit of the Laws* and *The Persian Letters* were printed as filler in local Gazettes, exhibiting uniform respect for Montesquieu's work.¹⁴⁹ Most of the newspaper citations of Montesquieu during the colonial period were directly or indirectly connected with the subject of liberty and the separation of powers, with three times as many references to Book XI of *The Spirit of the Laws* than to any other section.¹⁵⁰

Montesquieu's separation of powers principle also figured into a 1762 dispute among Massachusetts legislators over whether judges could concurrently serve as legislators.¹⁵¹ An opponent of a bill proscribing dual office-holding argued that Montesquieu's separation of powers principle only applied when the majority of inhabitants in any one branch of government dominated the other. Because only a few judges sat in the commonwealth's legislature, the doctrine was not offended.¹⁵² During the French and Indian War, Montesquieu's

142. *Id.* at 105.

143. See generally P. SPURLIN, MONTESQUIEU IN AMERICA 176-180 (1940).

144. *Id.*

145. *Id.* at 177-79.

146. *Id.* at 177-78.

147. *Id.* at 178.

148. *Id.* at 72-87. See also F. McDONALD, *supra* note 18, at 66 (Montesquieu's analysis of republican principles reached a much wider audience than college curriculums).

149. P. SPURLIN, *supra* note 143, at 93; W. CARPENTER, THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT 51 (1930) (the writings of Montesquieu were accepted in America as "political gospel").

150. P. SPURLIN, *supra* note 143, at 133.

151. M.J.C. VILE, *supra* note 44, at 129-130.

152. *Id.*

authority was also invoked in sermons extolling English liberty with its balanced Constitution in contrast to French tyranny.¹⁵³

B. *Montesquieu and the American Revolution*

In the rancorous years before the Declaration of Independence, Montesquieu's discussion of the English Constitution was taken as a model from which the actual politics of Parliament could be contrasted.¹⁵⁴ Indeed, according to Professor McDonald, "American republicans regarded selected doctrines of Montesquieu as being virtually on par with Holy Writ."¹⁵⁵ While Blackstone was also frequently cited, he was not relied on for the separation of powers concept.¹⁵⁶ Indeed, where sources were named, Montesquieu surpassed Locke in actual inches quoted, comparing favorably with Blackstone.¹⁵⁷

It was thought that Montesquieu's discussion in Book XI depicted the political relationships in England, although this notion had "little basis in fact."¹⁵⁸ Nevertheless, on the American side of the Atlantic, the disparity between Montesquieu's political model and the English political reality was not perceived.¹⁵⁹ Indeed, it was precisely because the colonists believed that Parliament's conduct upset the balance of the English Constitution that their political instincts were outraged.¹⁶⁰ This helps explain why Montesquieu's theories were more widely accepted by Colonial thinkers than among their contemporaries in the mother land.¹⁶¹

153. 1 E. CORWIN, CORWIN ON THE CONSTITUTION 130 (1981).

154. See M.J.C. VILE, *supra* note 44, at 127-35.

155. F. McDONALD, *supra* note 18, at 80.

156. P. SPURLIN, *supra* note 143, at 136-37.

157. *Id.* at 157-58.

158. See W. CARPENTER, *supra* note 149, at 49.

159. Professor Carpenter argued:

Across the black morass of English political corruption the principles of Montesquieu loomed to American statesmen all the more vividly. The doctrine of the separation of powers and the system of checks and balances appeared not only correct as theories but also fitted in with colonial experience.

Id. at 51.

160. *Id.* at 57.

161. According to Professor Fletcher:

Almost at the very moment when Bentham was busy in England denying, as against Blackstone and Rousseau, that the social law had any relation whatsoever with natural law, it was being affirmed with cataclysmic emphasis in America that the relation between them was so close that, when social law tries to break away from its first parent, Nature, it must at all costs be brought back to it.

F. FLETCHER, *supra* note 139, at 203.

In 1774, William Bradford wrote to James Madison from the First Continental Congress in Philadelphia. He wrote that the delegates consulted Montesquieu in spelling out the rights of the colonists with respect to the English Parliament. Indeed, according to Bradford, the delegates selected Carpenters Hall as a meeting place due to its extensive library, and frequently invoked Montesquieu in their addresses.¹⁶² Delegates to the Second Continental Congress such as Franklin, Jefferson, Sam and John Adams, Richard Henry Lee, and Dr. Witherspoon were also acquainted with Montesquieu.¹⁶³

With the growing estrangement from England, colonists recognized the irreconcilability between Montesquieu's separation of powers doctrine and the Parliamentary system of checks and balances propounded by British loyalists.¹⁶⁴ After Thomas Paine exposed the English system of checks and balances as a farce in his pamphlet *Common Sense*, Americans recognized the separation of powers as the primary guardian of liberty.¹⁶⁵ While these political sentiments existed independently of Montesquieu's doctrine, *The Spirit of the Laws* allowed for the transmutation of partisan grievances into a coherent and respectable body of political doctrine.¹⁶⁶ It is therefore not surprising that Montesquieu's influence can be seen in the Declaration of Independence.

During the war years, one finds scant reference to Montesquieu.¹⁶⁷ However, having already influenced the thinking of the Founding Fathers, Montesquieu would re-emerge after the war as a major inspiration in the construction of the newly independent republic.

IV. MONTESQUIEU'S INFLUENCE ON THE CONSTITUTION

A. *Influence on the Framers*

Most of the leading political figures during the Revolutionary and Constitutional period were well acquainted with Montesquieu. He was featured in the private libraries of such figures as John Adams, Benjamin Franklin, and George Mason.¹⁶⁸ John Marshall, who did

162. Bradford wrote:

The Congress sits in the Carpenter's Hall in one room of which the City Library is kept [and] of which the Librarian tells me the Gentlemen make great [and] constant use. by which we may conjecture that their measures will be wisely planned since they debate on them like philosophers; for by what I was told Vattel, Barlemaqui, Locke [and] Montesquieu seem to be the standar[d]s to which they refer either in settling the rights of the Colonies or when a dispute arises on the Justice or propriety of a measure.

1 THE PAPERS OF JAMES MADISON 126-27 (Rutland ed. 1983).

163. P. SPURLIN, *supra* note 143, at 144.

164. See F. McDONALD, *supra* note 18, at 82.

165. *Id.* at 84.

166. *Id.*

167. P. SPURLIN, *supra* note 143, at 158.

168. *Id.* at 57.

so much to define the newly-ratified Constitution, purchased a copy of *The Spirit of the Laws* in 1785.¹⁶⁹

Montesquieu influenced James Madison as well. After graduating from Princeton in 1771, Madison returned for further study. He studied the writings of Montesquieu minutely as they formed the basis of President Witherspoon's classroom lectures.¹⁷⁰ Like Montesquieu, Madison combined his interest in politics with profound insight into human nature, reasoning primarily from historical analogy.¹⁷¹ Madison's interest in Montesquieu extended beyond separation of powers to the underlying relationship between the spirit of nations and the nature of government.¹⁷²

Although influenced by Montesquieu, Madison was willing to criticize him even at this early date. Upon his election to the Continental Congress in 1779, Madison concerned himself with the depreciation of paper currency caused by the Revolutionary War. In an essay entitled *Money*, which appeared in the *National Gazette* sometime between September 1779 and March 1780, Madison criticized Montesquieu's theory of money.¹⁷³ Contrary to Montesquieu's assertion in Book XX of *The Spirit of the Laws*, Madison argued that money only represents the exchange value of a particular item, not its absolute value.¹⁷⁴ Nevertheless, as will be demonstrated below, Montesquieu continued to influence Madison's thinking throughout his political life.

Thomas Jefferson's relationship with Montesquieu was more problematic. While he initially favored Montesquieu, his views changed radically after 1790.¹⁷⁵ Jefferson read Montesquieu in the course of his legal education.¹⁷⁶ Between 1774 and 1776, he read and abstracted chapters from *The Spirit of the Laws* in his *Common Place Book*.¹⁷⁷ Jefferson devoted twenty-eight pages of his book to Montesquieu, more than any other writer.¹⁷⁸ Jefferson extracted sentences, axioms, and definitions from almost every book and chapter of *The*

169. 1 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 185 (1916).

170. W. CARPENTER, *supra* note 149, at 74.

171. *Id.* at 75.

172. See J. MADISON, *THE SPIRIT OF GOVERNMENTS, 14 PAPERS OF JAMES MADISON* 233-34 (1792).

173. 1 *THE PAPERS OF JAMES MADISON*, *supra* note 162, at 306-07.

174. *Id.*

175. G. CHINARD, *PENS'ÉES CHOISIES DE MONTESQUIEU TIR'ÉES DU "COMMON-PLACE BOOK" DE THOMAS JEFFERSON* 19 (1925).

176. G. CHINARD, *THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM* 33 (1929).

177. See G. CHINARD, *THE COMMON PLACE BOOK OF THOMAS JEFFERSON* 9 (1926).

178. *Id.* at 31.

Spirit of the Laws. Significantly, however, he made no excerpts from the famous discussion of the English Constitution in book XI.¹⁷⁹

In Montesquieu, Jefferson found a clear definition of popular sovereignty. The order of Montesquieu's forms of government — democratic republic, aristocratic republic, monarchy, and despotism — precisely reflected Jefferson's governmental preference.¹⁸⁰ He saw how democracy prospers and is corrupted, as well as the dangers of permanent standing armies. He reproduced Montesquieu's theory of federal republics and commented favorably on Montesquieu's religious tolerance.¹⁸¹ Finally, Jefferson was influenced by Montesquieu's discussion of the principle of governments, particularly the necessity of virtue in republics. Referring to Montesquieu, Jefferson wrote:

He considers political virtue or the *Armor Patriae* as the energetic principle of a democratic republic; moderation, that of an aristocratic republic; honor, that of a limited monarchy; and fear, that of a despotism; and shews that every government should provide that its energetic principle should be the object of the education of its youth That its laws also should be relative to the same principle. In a democracy, equality and frugality should be promoted by the laws, as they nurse the *Armor Patriae*¹⁸²

Jefferson read in Montesquieu that, because people exercise sovereignty through votes, the right of suffrage is fundamental to democratic republics.¹⁸³ Early in his life, he favored governance by aristocracy.¹⁸⁴ However, when Jefferson abandoned his aristocratic predilections shortly before the Declaration of Independence, his devotion to Montesquieu required that he advocate universal suffrage as well.¹⁸⁵

At age eighteen, Alexander Hamilton wrote:

Apply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Barlemaqui, I might mention other excellent writers on this subject, but if you attend diligently to these you will not require any others.¹⁸⁶

Hamilton later relied on these writers in his contribution to the *Federalist Papers*.

179. *Id.* at 36.

180. D. MALONE, *JEFFERSON THE VIRGINIAN* 177 (1948).

181. Professor Chinard states:

Everywhere in *Spirit of Laws* [Jefferson] found illustrations of the theory which he maintained all his life that laws and constitutions are variable and changing and must be altered in accordance with climate, local conditions, and new circumstances. He even went one step further than Montesquieu in his relativism, when he proclaimed that a generation had no right to bind by laws the following generation.

G. CHINARD, *supra* note 177, at 37.

182. *Id.* at 259.

183. D. MALONE, *supra* note 180, at 178.

184. *Id.*

185. *Id.*

186. 1 *THE PAPERS OF ALEXANDER HAMILTON* 86 (H. Syrett ed. 1962).

At the age of twenty-four, John Adams wrote in his diary:

I have began to read *Spirit of Laws*, and have resolved to read that work through in order and with attention. I have hit upon a project that will secure my attention to it, which is to write, in the margin, a sort of index to every paragraph.¹⁸⁷

The following day Adams noted that, true to his intention, he read 100 pages of *The Spirit of the Laws*.¹⁸⁸ Seventeen years later, after the Declaration of Independence, Adams invoked Montesquieu's principle of government in a letter to a friend, lamenting the lack of republican virtue in the nation. He feared that the colonialists had become so corrupted by the principle of monarchy that they would be unable to manifest the requisite frugality and virtue to sustain a republican form of government. Though he does not cite Montesquieu by name, the philosopher's influence can clearly be seen in Adam's lamentation:

The Spirit of Republican Government is as little understood in America as its spirit is felt. Ambition in a Republic is a great Virtue, for it is nothing more than a Desire to Serve the Public and promote the Happiness of the People, to increase the Wealth, the Grandeur, and Prosperity of the Community. This Ambition is but another name for public Virtue, and desires to increase the Wealth, the Grandeur, and the Glory of an Individual, at the Expense of the Community, it is a heinous Vice We, in America are so contaminated, with the Selfish Principles of Monarchy, and with that bastard, corrupted Honour, that Monarchy inspires, that We have no Conception, no Imagination, no Dream of the Passions and Principles, which support Republics.¹⁸⁹

It is significant that in this letter Adams retains Montesquieu's dictum that virtue is necessary for the maintenance of republican governments. As will be demonstrated below, by the time of the Constitutional Convention Adams changed his view on this question.

B. Montesquieu at the Constitutional Convention

The years between 1776 and 1787 saw Montesquieu's greatest influence in America, for "[b]y the opening of the Constitutional Convention in 1787, *The Spirit of Laws* had become an 'American' classic."¹⁹⁰ Unlike the colonial period, when Montesquieu was primarily quoted on the English Constitution, newspapers cited him on numerous topics including liberty, commerce, and the nature of laws appropriate to republics, as well as the separation of powers.¹⁹¹ Newspaper articles of this period frequently emphasized virtue as a

187. See P. SPURLIN, *supra* note 143, at 88.

188. *Id.*

189. 5 THE PAPERS OF JOHN ADAMS 163 (Taylor ed. 1983).

190. See P. SPURLIN, *supra* note 143, at 177.

191. *Id.* at 176.

prerequisite to a republican form of government.¹⁹² Through popularization, Montesquieu had materially harmonized the sentiments of the day into a coherent philosophy.

Montesquieu also influenced the formation of the various state constitutions.¹⁹³ Jefferson evinced Montesquieu's influence in his revision of Virginia's criminal code.¹⁹⁴ Among the delegates to the Convention, Montesquieu's writings were taken as "political gospel."¹⁹⁵ Many such delegates read Montesquieu as preparatory material.¹⁹⁶ Indeed, besides studying Montesquieu himself, Madison translated sections of *The Spirit of the Laws* for George Washington.¹⁹⁷ Washington's notes reveal that he also studied Montesquieu in preparation for the Convention.¹⁹⁸

Montesquieu was the most frequently cited name in the establishment of the three branches of government. However, the Convention delegates drew more deeply on Montesquieu, albeit without specific attribution, in their conviction that their Constitution conform to what they called the genius of the American people.¹⁹⁹ The Framers sought a moderate government congruent with the spirit of the nation; a government not imposed from above but framed in accordance with socio-cultural imperatives.²⁰⁰

On June 1, the delegates debated the powers and terms of office to be accorded to the executive branch of government. Some favored a joint executive made up of several persons, while others argued for a single executive patterned after the "monarchy" model. Wilson spoke in favor of the latter:

We must consider two points of Importance existing in our Country —the extent and manners of the United States— the former seems to require the vigor of Monarchy, the manners are ag[ainst] a King and are purely republican —Montesquieu is in favor of confederated Republicks— I am for such a confed[eration] if we can take for its basis liberty, and can ensure a vigorous execution of the Laws.²⁰¹

This quote suggests that the Framers were guided by Montesquieu's

192. *Id.* at 171.

193. *Id.* at 16.

194. THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM, *supra* note 176, at 93-94.

195. 1 M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 44 (1913).

196. P. SPURLIN, *supra* note 143, at 184.

197. *Id.* at 90.

198. *Id.*

199. F. McDONALD, *supra* note 18, at 213 ("[I]f the delegates were agreed upon any of Montesquieu's teachings, it was that government must be suited to the manners, customs, and social institutions of a people"); *see also* W. SOLBERT, THE FEDERAL CONSTITUTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES xxxviii (1958).

200. *See* A. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM 148-53 (1988).

201. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 71 (1911).

concept of a "spirit of nations" as much as his specific governmental prescriptions.

Throughout the convention, delegates argued whether the states were to be represented proportionally by population or by states. This conflict, which threatened to scuttle the entire convention, juxtaposed principles of democratic republicanism against the proposed federal Constitution. Hamilton resolved this dispute through skillful reliance on Montesquieu's discussion of the Achaean and Lycian confederacies of classical Greece. Utilizing this classical model, Hamilton found historical precedent for the federal system framed within the proposed Constitution.²⁰² Madison also invoked the Lycian League in a June 20 debate, stressing its system of proportional representation and noting that Montesquieu approved of the arrangement.²⁰³ This historical comparison would remain important during the ratification process.

Montesquieu was again invoked on June 23 in a debate over whether legislators should be remunerated. Madison argued that some monetary inducement was necessary to assure that the best men served in government. Butler disagreed, arguing that "[t]he great Montesquieu says, it is unwise to entrust persons with power, which by being abused operates to the advantage of those entrusted with it."²⁰⁴ Madison responded that although he recognized the danger expressed by Butler, practicality dictated that legislators be remunerated, despite the potential for abuse. Moreover, the high honor of national service would also act as a disincentive for such venality.²⁰⁵

Prior to the Philadelphia Convention of 1787, the separation of powers principle had been central to the establishment of the governments of Virginia, Maryland, and North Carolina. Combined with a doctrine of checks and balances, it had become a staple of the American political creed. Like Montesquieu, the framers saw the separation of powers as much more than political subdivision. As a result, they sought to accommodate the political structure to the social structure so as to assure a "natural" balance of social forces.²⁰⁶

202. See F. McDONALD, *supra* note 18, at 286; W. BENNETT, *AMERICAN THEORIES OF FEDERALISM* 70-71 (1964).

203. 1 M. FARRAND, *supra* note 201, at 497.

204. *Id.* at 391.

205. *Id.* at 392.

206. As Professor Hofstadter explained:

What the Fathers wanted was known as "balanced government", an idea at least as old as Aristotle and Polybius. This ancient conception had won new

On July 17, Madison invoked this principle in opposing a motion by Doctor McClurg that the executive be elected by the legislature.

If it be essential to the preservation of liberty that the Legis[ative], Execut[ive] and Judiciary powers be separate, it is essential to a maintenance of the separation that they should be independent of each there. The executive [could] be independent of the Legislature [sic], if dependent on the pleasure of that branch for a re-appointment. Why was it determined that the Judges should hold their places by such a tenure? Because they might be tempted to activate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the makers of laws; [and] then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.²⁰⁷

Madison went on to explain that a union between the executive and legislative powers is far more dangerous than one between the judiciary and legislature, correctly noting that Montesquieu only stressed a separation between the former.²⁰⁸ The following day, Hamilton also invoked Montesquieu in a major address to the convention, stressing the inadequacy of the Confederacy and discussing the new constitutional plan. His notes contain references to Montesquieu on the danger of standing armies, the English Constitution, the need for checks and balances between social factions, and the principle of government.²⁰⁹

While the Framers sought to pattern the American Constitution on

sanction in the eighteenth century, which was dominated intellectually by the scientific work of Newton, and in which mechanical metaphors sprang as naturally to men's minds as did biological metaphors in the Darwinian atmosphere of the late nineteenth century. Men had found a rational order in the universe and they hoped that it could be transferred to politics, or as John Adams put it, that governments could be "erected on the simple principles of nature." Madison spoke in the most precise Newtonian language when he said that such a "natural" government must be so constructed "that its several constituent parts may, by their mutual relations be the means of keeping each other in their proper places." A properly designed state, the Fathers believed, would check interest with interest, class with class, faction with faction, and one branch of government with another in a harmonious system of mutual frustration.

R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 8-9 (1948).

207. 2 M. FARRAND, *supra* note 201, at 34.

208. *Id.* at 34-35.

209. Hamilton's truncated notes read:

Here I shall give my sentiments of the best form of government — not as a thing attainable by us, but as a model which we ought to approach as near as possible. British Constitution best form. Aristotle - Cicero-Montesquieu - Neckar. Society naturally divides itself into two political divisions - the *few* and the *many*, . . . If [in] the hands of both, they will tyrannize over the few. It ought to be in the hands of both; and they should be separated. This separation must be permanent. Representation alone will not do. Demagogues will generally prevail. And if separated, they will need a mutual check. This check is a monarch. Each principle ought to exist in full force, or it will not answer its end.

Id. at 308-09.

the English model, there were three divergent interpretations of the English Constitution, each stemming from different legal theorists: Blackstone, Montesquieu, and Hume.²¹⁰ Blackstone's model provided for an intermixing of governmental power, while Hume believed that social stability was attained institutionally through a system of checks and balances with little regard to social mores.²¹¹ In contrast, Montesquieu and Bolingbroke favored a strict separation of autonomous powers patterned in accordance with the spirit of the nation.²¹² Ultimately, this model was rejected in favor of a modified system of checks and balances in which power was exercised through an interactive relationship between the three branches of government. Montesquieu's specific separation of powers principle did not prevail at the convention, but neither did Hume's, since the Constitution did not conform to the British model.²¹³ However, as Professor McDonald explained, Montesquieu's overall theoretical model was vindicated the day the new Constitution was announced.²¹⁴

C. *Montesquieu and the Ratification Debate*

1. Republican Government in Large Territory

Central to the Antifederalists' opposition to the centralization of power in the proposed Constitution was the idea that republican governments only thrive in small territories with a small, homogeneous population.²¹⁵ Montesquieu's statement in Book XIX of *The Spirit of the Laws*—that republican governments only flourish in small territories—was frequently cited by the Antifederalists to support their contention that no universal system of law could reconcile the particular interests and disparate customs of the American states.²¹⁶

210. F. McDONALD, *supra* note 18, at 209.

211. *Id.* at 210-12.

212. *Id.*

213. *Id.* at 258-60.

214. *Id.* at 260 ("[I]n an ultimate sense the Constitutions did reflect a Montesquiesan principle perhaps the most fundamental of them all: it provided for a government that would itself be governed by laws, and by laws that conformed to the genius and circumstances of the people.").

215. C. KENYON, *THE ANTIFEDERALISTS* xxxix (1966).

216. Professor Kenyon wrote:

[The Antifederalists'] fundamental principle was the belief that republican government could not be extended over a large geographical area with a numerous and heterogeneous population. In this belief they appeared to be sustained by the lessons of history and by the authority of reputable political theorists. . . . They frequently referred to the opinion of Montesquieu, drawing together that theorist's specific dictum on the incompatibility of republicanism with largeness and his more general principle that a people's form of

In *The Federalist No. 9*, Hamilton responded to these criticisms by suggesting that the Antifederalists “seem not to have been appraised of the sentiments of that great man expressed in another part of his work.”²¹⁷ Hamilton pointed out that the proposed Constitution maintained independent state governments, and therefore did not create the danger that Montesquieu had warned against in Book XIX. Because every state could maintain governance over its individual characteristics, the federal system preserved the unique qualities of each state without imposing unnecessary uniformity.²¹⁸ Hamilton then noted the comparison between the proposed federal system and the Lycian Confederacy, which Montesquieu had praised as “a model of an excellent Confederate Republic.”²¹⁹ He advanced similar arguments while defending the proposed Constitution at the New York ratifying convention:

Mr. Chairman, it has been advanced as a principle that no government but a despotism can exist in a very extensive country. This is a melancholy consideration indeed. If it were founded on truth, we ought to dismiss the idea of republican government, even for the state of New York. This idea has been taken from a celebrated writer, who, by being misunderstood, has been the occasion of frequent fallacies in our reasoning on political subjects. But the position has been misapprehended; and its application is entirely false and unwarrantable: It relates only to democracies, where the whole body of the people meet to transact business; and where representation is unknown This application is wrong, in respect to all representative governments; but especially in relation to a confederacy of states, in which the supreme legislature has only general powers, and the civil and domestic concerns of the people are regulated by the laws of the several states.²²⁰

For Hamilton and his fellow federalists, Montesquieu’s dictum that republican government flourishes in small territories was not incorrect, but only misunderstood by Antifederalists who cited the theorist out of context.

2. Principle of Republican Government

The Antifederalists used Montesquieu’s principle of government in attacking the deceptive manner in which the proposed Constitution

government must be adapted to their physical circumstances, their customs, laws habits, mores, and general character.

Id. at cvi.

217. THE FEDERALIST NO. 9, at 52 (A. Hamilton) (J. Cooke ed. 1961).

218. Hamilton stated:

The definition of a *Confederate Republic* seems simply to be an “assemblage of societies,” or an association of two or more States into one State. The extent, modifications and objects of the Federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished, so long as it exists by a Constitutional necessity for local purposes, though it should be in perfect subordination to the general authority of the Union, it would still be, in fact and in theory, an association of States, or a confederacy.

Id. at 55.

219. *Id.* at 56.

220. 5 THE PAPERS OF ALEXANDER HAMILTON 99-100 (H. Syrett ed. 1962).

was adopted. Writing in the *Massachusetts Centennial* in January 1788, an anonymous author regarded the underhanded manner of bringing forth a new Constitution as an ominous harbinger of life under the proposed federal system. He saw the federal system as a despotic encroachment of power upon the virtuous principle of republican government existing in the States:

M. Montesquieu in his 'Spirit of Laws' . . . says, "As *virtue* is necessary in a *republick*, and *honour* in a monarchy, so *fear* is necessary in a *despotick* government. . . ." Thus has a declaration been made in Pennsylvania in favor of a government which substitutes *fear* for *virtue*, and reduces men *from rational beings* to the level of brutes; and if the citizens of Massachusetts are disposed to follow the example, and *submit their necks to the yoke*, they must expect to be governed by the *whip* and *goad*.²²¹

William Grayson, a prominent lawyer, advanced a more sophisticated application of Montesquieu's principle of government in opposing Virginia's ratification of the Constitution. He argued that the proposed Constitution established a static principle of government which was unlikely to withstand the test of time. Pointing to the dynamic state of the American republic, Grayson argued that the spirit of the nation was bound to change. It is therefore unwise, he argued, to impose a static principle of government at this infant stage of the American experience:

We are yet too young to know what we are fit for. The continual migration of people from Europe, and the settlement of new countries on our western frontiers, are strong arguments against making new experiments now in government. When these things are removed, we can, with greater prospect of success, devise changes. We ought to consider, as Montesquieu says, whether the construction of the government be suitable to the genius and disposition of the people, as well as a variety of other circumstances.²²²

Grayson combined Montesquieu's principle of government with his separation of powers notion and argued that the two were in conflict. Invoking Montesquieu, he suggested that the principle of republican government conflicted with the structure of the proposed federal system.²²³

221. C. KENYON, *supra* note 215, at 124-25 (emphasis in original).

222. *Id.* at 282.

223. Grayson opined:

What, sir, is the present Constitution? A republican government founded on the principle of monarchy, with the three estates. It is like the model of Tacitus or Montesquieu? Are there checks in it, as in the British monarchy? There is an executive fetter in some parts, and as unlimited in others as a Roman dictator. A democratic branch marked with the strong features of aristocracy, and an aristocratic branch with all the impurities and imperfections of the British House of Commons, arising from the inequality of representation and want of responsibility Do we love the British so well as to imitate their imperfections? . . . Are not all defects and corruption founded on an

In his *Defense of the Constitutions of Government of the United States of America*,²²⁴ John Adams found a similar disjuncture between Montesquieu's principles of government and the proposed federal Constitution. Adams argued that, contrary to Montesquieu's assertion, virtue exists in all types of government and not just in republics. Moreover, a republic is governed, not only by virtue, but through fear and honor as well. Ever the cynic, Adams denied that a society can be built on virtue, and accordingly found Montesquieu's principles of government inapplicable to the proposed Constitution. Rather, he suggested that it was the combination of virtue, honor and fear in the proposed Constitution that rendered it worthy of public support.²²⁵

Adams retained a lifelong fear of the multitude. He worried that the rabble were incapable of manifesting the necessary restraint on their avaricious impulses to possess the virtue which Montesquieu held to be the basis of democratic governments. "Such severe frugality," he argued, "such perfect disinterestedness in public characters, appear only, or at least most frequently, in aristocratical governments."²²⁶ Therefore, while deferential toward Montesquieu's contribution, Adams denied that his abstract principles of government bore any application to current political reality.

Must we bow with reverence to this great master of laws, or may we venture to suspect that these doctrines of his are spun from his imagination? Before he delivered so many grave lessons upon democracies, he would have done well to have shown when or where such a government existed. Until some one shall attempt this, one may venture to suspect his love of equality, love of frugality, and love of the democracy, to be fantastical passions, feigned for the regulation and animation of a government that never had a more solid existence than the flying island of Lagado.²²⁷

Although Adams dispensed with Montesquieu's principle of republican government, many proponents of the Constitution did not. Montesquieu was widely cited on this and other subjects in the various

inequality of representation and want of responsibility? How is the executive? Contrary to the opinion of all the best writers, blended with the legislative. We have asked for bread, and they have given us a stone.

Id. at 284.

224. 6 THE WORKS OF JOHN ADAMS (C. Adams ed. 1851).

225. Adams wrote:

It is not true, in fact, that any people ever existed who loved the public better than themselves, their private friends, neighbors, [etc.], and therefore this kind of virtue, this sort of love, is as precarious a foundation for liberty as honor or fear; it is the laws alone that really love the country, the public, the whole better than any part; and that form of government which unites all the virtue, honor, and fear of the citizens in a reverence and obedience to the laws, is the only one in which liberty can be secure, and all orders and ranks, and parties, compelled to prefer the public good before their own; that is the government for which we plead.

Id. at 208.

226. *Id.* at 22.

227. *Id.* at 210.

state ratification debates.²²⁸

Unlike Adams, Madison maintained that there were distinct principles unique to republican forms of government in accordance with Montesquieu's dictum. In *The Federalist No. 39*, Madison argued that the proposed Constitution best conformed to the republican spirit of the American nation. While not specifically cited, Montesquieu's influence is clear:

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention therefore be found to depart from republican character, its advocates must abandon it as no longer defensible.²²⁹

In defending the power of the federal government to put down insurrections in the states pursuant to Article IV, Section 4 of the proposed Constitution, Madison invoked Montesquieu's principles of government. He argued that under the federal Constitution the states share a common republican principle. Accordingly, "as long . . . as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution."²³⁰ When the states become threatened by non-Republican principles, the unity of the whole is threatened and military force is justified.

What is significant here is that Madison envisioned the federal system as an ideological confederation; a unity of ideas. Federalism is based on a common principle shared among the states. By urging citizens to adopt the proposed Constitution, Madison urged them to accept certain principles of republican governance and acknowledge certain socio-cultural uniformity amidst their disparate state interests. Thus, while states were free to differ over the implementation of republican government, the principle of republican government, as described by Montesquieu, provided that the unitary whole be

228. See P. SPURLIN, *supra* note 143, at 205-06.

229. THE FEDERALIST NO. 39, at 250 (J. Madison) (J. Cooke ed. 1961).

230. Madison stated:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained.

Id. at 291.

greater than the sum of the disparate parts.²³¹

3. Separation of Powers

Although Montesquieu's separation of powers principle had been invoked by the Framers at the Constitutional Convention, the Antifederalists also made effective use of the theory. Pointing to the intermixing of some governmental functions among the various branches of the proposed Constitution, the Antifederalists argued that this deviated from the pure separation of powers doctrine allegedly advanced by Montesquieu.

In an essay entitled *Pennsylvania and the Federal Constitution*,²³² published in December 1787, two writers inveighed against the assignment of impeachment powers to the Senate. Such an arrangement, the authors argued, invested the legislative branch with "judicial power" in violation of Montesquieu's famous dictum:

As the Senate judges on impeachments, who is to try the members of the Senate for abuses of this power! And none of the great appointments to office can be made without the consent of the Senate. Such various, extensive, and important powers combined in one body of men, are inconsistent with all freedom; the celebrated Montesquieu tells us, that 'when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty' The president general is dangerously connected with the Senate . . . which will destroy all independency and purity in the executive department; and having the power of pardoning without the concurrence of a council; he may screen from punishment the most treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate.²³³

Viewing these criticisms in context, they are not without substantial merit. In a Senate composed of twenty-six members, the danger of a majority of fourteen joining into a faction was considerable. It must be remembered that, prior to *Marbury v. Madison*, the concept of judicial review was absent from these authors' political consciousness. Accordingly, in their eyes, there was no "check" upon a junta

231. This view of a national society of societies can be seen in the remarks of James Bowdoin, Jr. at the Massachusetts ratifying convention.

It was the answer of *Solon's* when he was asked what kind of a constitution he had constructed for the Athenians, that he prepared as good a constitution of government as the people would bear; clearly intimating that a constitution of government should be relative to the habits, manners, and genius of the people intended to be governed by it. As the particular state governments are relative to the manners and genius of the inhabitants of each state, so ought the general governments to be an assemblage of the principles of all the government; for, without this assemblage of the principles, the general government will not sufficiently apply to the genius of the people confederated; . . . it must necessarily fail in its execution because, agreeable to the idea of *Solon*, the people would not bear it. . . . Baron Montesquieu observes, that all governments ought to be relative to their particular principles

P. SPURLIN, *supra* note 143, at 209-10 (emphasis in original).

232. THE ANTIFEDERALISTS, *supra* note 215, at 53.

233. *Id.*

of Senators bullying an impeachment-fearful executive into subverting constitutional principles.

In response to these well-founded criticisms, Madison invoked Montesquieu's separation of powers dictum to the proposed federal Constitution. Madison explained:

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.²³⁴

Madison then argued that the British Constitution formed the basis of Montesquieu's separation of powers principle:

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal Bard as the perfect model from which the . . . epic art were to be drawn . . . so this great political critic appears to have viewed the constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system.²³⁵

Looking at the actual British Constitution of the 1640s, Madison found no pure separation of powers; instead, governmental functions intermixed. Given Montesquieu's approval of the British system, Madison reasoned that he must have been thinking of something less than a pure separation of powers when he announced his famous dictum:

From these facts, by which Montesquieu was guided it may clearly be inferred, that in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates', or 'if the power of judging be not separated from the legislative and executive powers' he did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning . . . can amount to no more than . . . that where the power of one department is exercised in the same hands which possesses the *whole* power of another department, the fundamental principles of a free Constitution are subverted.²³⁶

234. THE FEDERALIST NO. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

235. *Id.* at 324-325. There is reason to believe that Madison was somewhat disingenuous here. A dispassioned reading of Book XI, Chapter 6 suggests that Montesquieu's use of the English constitution does not rise to Homeric proportions. While entitled "On the Constitution of England," the section is more a general application of Montesquieu's theory than a specific treatment of the English political system. Moreover, Montesquieu clearly stated that the actual political system in England does not necessarily conform to his description: "It is not my business to examine whether the English actually [enjoy] this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further." MONTESQUIEU, *supra* note 1, Bk. XI, Ch. 6, at 162. Madison thus appears to be overstating Montesquieu's reliance on the English Constitution in forming his separation of powers theory.

236. THE FEDERALIST NO. 47 at 325-26 (emphasis in original). This statement suggests a different reading of THE FEDERALIST NO. 47 than is commonly given by federal courts faced with a separation of powers question. Most courts quote Madison's use of

Through this effective use of syllogism, Madison invoked Montesquieu's authority, not for a *pure* separation of powers with which he is commonly associated; but rather in favor of a modified, incomplete, separation of governmental powers.

While Madison could finesse the theoretical issue of whether Montesquieu advocated a complete or partial separation of powers, the substantive fears of a Senatorial junta subverting constitutional liberties remained unanswered. Given the power of the Senate to impeach the executive, what was to keep a faction of legislators from intimidating the executive into surrendering his Constitutional prerogative? The answer lies in the concept of judicial review expressed by Hamilton in *The Federalist No. 78*. Hamilton argued that the lifetime tenure of federal judges during good behavior provides an effective bulwark against encroachments by the legislative branch.²³⁷ Hamilton cited Montesquieu's dictum that the judiciary is the least powerful of the three branches of government. Accordingly, "so long as the judiciary remains truly distinct from both the legislative and the executive liberty can have nothing to fear from the judiciary alone."²³⁸ To Hamilton, an independent and life-tenured judiciary therefore forms a "citadel of the public justice and the public security."²³⁹

Hamilton reasoned that because the legislature derives its power from the Constitution, "[n]o legislative act . . . contrary to the Constitution, can be valid."²⁴⁰ Accordingly, judicial review is necessary to assure that the legislative body does not exceed its constitutional authority.

It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is for more rational to suppose that the courts were designed to

Montesquieu to support a "pure" separation of powers. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *INS v. Chadha*, 462 U.S. 919, 999 (1983). However, insofar as these citations seek to invoke Madison's authority, they are completely out of context. Madison was using that very quote from Montesquieu to argue against a pure separation of powers. THE FEDERALIST NO. 47 cannot be read to support decision such as *Bowsher v. Synar*, in which the Supreme Court struck down the Gramm-Rudman scheme on the basis of a minor technicality that the U.S. Treasurer was an executive appointment.

237. Hamilton explained:

The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

THE FEDERALIST NO. 78, at 522 (A. Hamilton) (J. Cooke ed. 1961).

238. *Id.* at 523.

239. *Id.* at 524.

240. *Id.*

be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial power to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former.²⁴¹

Beginning with Montesquieu's premise that liberty depends upon a separation of governmental powers, Hamilton reached the inescapable conclusion that this separation can only be maintained through an independent, life-tenured judiciary vested with the power to strike down unconstitutional dictates of the legislature. While this concept of judicial review finds little textural support in *The Spirit of the Laws*, it was discovered by 1788 that, in order to maintain to coherence of Montesquieu's trinity of government, such review was a logical necessity.²⁴² Montesquieu and Hamilton saw the same governmental principle effectuated by an independent judiciary even if they accorded different powers to their judges. Montesquieu understood that, by forming a bulwark between the people and their government, an independent judiciary served as the guarantor of moderate government. Hamilton felt that an independent judiciary, acting as a check upon popular government, would preserve individual rights. Thus, while they differed in their means, Montesquieu and Hamilton worked toward the same ends.²⁴³

241. *Id.* at 525 (emphasis in original).

242. Professor Corwin explained how Montesquieu's separation of powers concept led inexorably to an independent judiciary with the power to check legislative enactments, despite the fact that such power was not envisioned in *THE SPIRIT OF THE LAWS*:

The Constitutional Fathers seized with avidity upon Montesquieu's picture of a constitution, whose well devised checks kept the organs of government most normally in a 'state of reposed or inaction.' The federal government was balanced against the states and these against the government; each portion of a triple-branched legislature was set against the others; the people were made a curb upon their representative and they upon the people. It was then but a step farther, and a very rational one, to set the judiciary against the legislature. . . .

2 E. CORWIN 36-37 (1981).

243. See A. COHLER, *supra* note 200, at 168.

V. MONTESQUIEU AND THE NEW REPUBLIC

A. *Montesquieu and the Supreme Court*

In the early years of the American Republic, Montesquieu was often cited for authority in judicial opinions. In the 1784 case of *Talbot v. Commanders and Owners of Three Brigs*,²⁴⁴ the Pennsylvania High Court of Errors was faced with a jurisdictional dispute over whether Pennsylvania had admiralty jurisdiction to resolve a dispute over three ships captured during the Revolutionary War. Citing Montesquieu's discussion of international relations, the court concluded that admiralty fell under the law of nations and thus the Pennsylvania court had properly exercised its jurisdiction.²⁴⁵

In *Cooper v. Telfair*,²⁴⁶ the United States Supreme Court faced a challenge to a Georgia bill of attainder confiscating the estate of Basil Cooper, an exiled loyalist. Cooper contended that because he had never been tried and convicted of treason by a court of law, the bill constituted a legislative usurpation of judicial authority violative of Montesquieu's dictum that judicial and legislative powers be kept separate and distinct.²⁴⁷ The Supreme Court rejected this argument, holding that because no court had jurisdiction over the exiled Cooper, the Georgia legislature had properly acted within its powers.²⁴⁸ Montesquieu was also cited by the Supreme Court in *Fletcher v. Peck*²⁴⁹ for the proposition that legislatures maintain the power to dispose of land.

In *Brown v. United States*,²⁵⁰ the Supreme Court was faced with a challenge to the seizure of timber belonging to a British subject after the declaration of The War of 1812. The plaintiff cited Montesquieu, who favored the British practice of not seizing enemy property before determining how the enemy would treat the property of British subjects.²⁵¹ Chief Justice Marshall agreed, holding that a declaration of war by Congress does not, in itself, provide the legal basis for seizure of enemy property.²⁵² However, writing in dissent, Justice Story argued that the seizure was proper. He distinguished Montesquieu by pointing out that the British law of warfare only applied where the foreign subject was on British soil; here the owner of the timber was in Britain at the time of seizure.²⁵³ Thus, sixty-five years

244. 1 U.S. 95 (1784).

245. *Id.* at 106.

246. 4 U.S. (4 Dall.) 14 (1800).

247. *Id.* at 17-18.

248. *Id.* at 18-19.

249. 10 U.S. (6 Cranch) 87 (1810).

250. 12 U.S. (8 Cranch) 110 (1814).

251. *Id.* at 114.

252. *Id.* at 129.

253. *Id.* at 143.

after *The Spirit of the Laws* was published, Montesquieu remained strong enough as a legal authority that a Supreme Court Justice elected to distinguish his precepts from the facts of a particular case rather than contravene them directly.

Besides his law of nations, Montesquieu was also cited by the Supreme Court in *Johnson v. M'Intosh*²⁵⁴ to the effect that because Indians remained in the state of nature they were incapable of conveying estates in land.²⁵⁵ Finally, in the 1823 case of *Green v. Biddle*,²⁵⁶ the plaintiffs invoked Montesquieu's authority and argued that a particular statutory construction of a real estate dispute would discourage industry and agriculture.²⁵⁷ While the Supreme Court was not swayed by this argument, it is nevertheless significant that litigants regarded Montesquieu's jurisprudence as persuasive authority on questions other than the separation of powers or the law of warfare.

B. Montesquieu's Decline & America's Maturation

While the previous section illustrates that Montesquieu continued to be invoked in the years after ratification, his precepts gradually evolved from political gospel to persuasive authority. The fact that Montesquieu was so effectively invoked by both sides of the ratification debate necessarily damaged his authoritative power in current political matters. It is therefore not surprising that in the years following ratification, Montesquieu's influence declined among American political thinkers.

The most profound critic of Montesquieu in the post-ratification period was Thomas Jefferson. While Montesquieu had greatly influenced Jefferson in his early years, Jefferson's opinion of the theorist changed radically after 1790.²⁵⁸ In 1810, Destutt de Tracy, a French republican intellectual, sent Jefferson a manuscript of a critical com-

254. 21 U.S. (8 Wheat) 543 (1823).

255. *Id.* at 567 n.a, 570 n.a.

256. 21 U.S. (8 Wheat) 1 (1823).

257. In arguing that Virginia property law covered estates established when Virginia ceded Kentucky, the plaintiffs stated:

The system of legislation now in question, does but follow the maxims laid down by Montesquieu, that the laws should encourage industry; that the more climate, and other circumstances, tend to discourage the cultivation of the earth, the more should the legislator excite agriculture; and that those laws which tend to monopolize the lands, and take from individuals the proprietary spirit, augment the effect of those unfavourable circumstances.

Id. at 36.

258. G. CHINARD, *supra* note 175, at 19.

mentary on *The Spirit of the Laws*. Jefferson translated the work into English and arranged for its publication in America.²⁵⁹ To protect de Tracy from Napoleonic persecution, *A Commentary and Review of Montesquieu's Spirit of Laws* was published anonymously.²⁶⁰ Jefferson's critical introduction to the monograph stands in marked contrast to his earlier infatuation with the theorist and his work.²⁶¹

Montesquieu's immortal work on the *Spirit of Laws*, could not fail, of course, to furnish matter for profound consideration. I have admired his vivid imagination, his extensive reading, and dextrous use of it. But I have not been blind to his paradoxes, his inconsistencies, and whimsical combinations. And I have thought the errors of his book, the more important to be corrected, as its truths are numerous, and of powerful influence on the opinions of societies.²⁶²

In a subsequent letter to de Tracy, Jefferson is even more critical of Montesquieu:

I had, with the world, deemed Montesquieu's work of much merit; but saw in it with every thinking man, so much paradox, of false principle and misapplied fact, as to render its value equivocal on the whole.²⁶³

Jefferson's changed opinion of Montesquieu can be attributed in part to his tendency later in life to "burn his old idols."²⁶⁴ Perhaps more important was Jefferson's presence in France as ambassador at the very time when French political thinkers with whom Jefferson closely associated were castigating Montesquieu as an Anglophile.²⁶⁵ Moreover, given Jefferson's critical attitude toward the British, it is hardly surprising that Jefferson regarded Montesquieu's treatment of the English Constitution as overly deferential.²⁶⁶ Finally, upon Jefferson's return to America, his political enemies frequently cited Montesquieu.²⁶⁷

However, much of the explanation for Jefferson's disaffection with Montesquieu would properly seem to rest with Montesquieu's theories per se. While often cited on the virtue of republican governments, Montesquieu was, essentially, a Burkean conservative who eschewed radical change and favored aristocratic principles of gov-

259. D. MALONE, *THE SAGE OF MONTICELLO* 208-209 (1981).

260. *Id.*

261. *Id.*

262. D. DE TRACY, *A COMMENTARY AND REVIEW OF MONTESQUIEU'S SPIRIT OF LAWS* (T. Jefferson trans. 1811).

263. 11 *THE WORKS OF THOMAS JEFFERSON* 181 (Ford ed. 1905) (letter to de Tracy, January 26, 1811).

264. G. CHINARD, *supra* note 175, at 19.

265. *See supra* note 177, at 34-35.

266. *Id.* at 33. *See also* D. MALONE, *JEFFERSON THE VIRGINIAN*, *supra* note 180, at 176 (Jefferson revolted against Montesquieu because of his affinity for the British monarchy and conviction that republicanism only survives in small territories).

267. *See, e.g.*, 9 *THE WORKS OF THOMAS JEFFERSON supra* note 263, at 220-21 (letter to Nathaniel Niles, March 22, 1801) (criticizing Montesquieu's dictum that republican government cannot thrive in large territories).

ernment over democratic republicanism.²⁶⁸ Given Jefferson's vigorous support for the French Revolution and "The Rights of Man," as well as his conviction that one generation had no right to bind the next generation through its laws, it is understandable that he would find his philosophy somewhat removed from Montesquieu's.

Although Madison did not repudiate Montesquieu as completely as Jefferson did, he did grow critical of the theorist in the years following ratification. In his anonymous Helvidius essay published in 1783, Madison criticized President Washington's declaration of neutrality in the French-English War as an affront to the separation of powers. In preparing a gentle critique of Washington's action, Madison sent a draft of his essay to Jefferson, requesting that the latter check his Montesquieu citations as they had been written from memory.²⁶⁹ When the essay was printed, it revealed a more jaundiced view of Montesquieu than Madison had presented in *The Federalist No. 47* five years earlier:

Writers such as Locke and Montesquieu, who have discussed more particularly the principles of liberty and the structure of government, lie under the same disadvantage of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period. Both of them too are evidently warped by a regard to the particular government of England, to which one of them owed allegiance, and the other professed an admiration bordering on idolatry. Montesquieu, however, has rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class.²⁷⁰

John Adams also expressed a more critical view of Montesquieu in the years following ratification. As an old man, he discovered a volume of Condorcet in his library belonging to James Madison. Adams took the occasion to discuss Condorcet and his contemporaries. He praised the "original genius" of those philosophers while at the same time criticizing the simplicity of their political models.²⁷¹ Yet the pragmatic politician in Adams also appreciated the political genius of Montesquieu and his contemporaries. While history and philosophy have proven the flaws of Montesquieu's analysis, sixty years after first reading *The Spirit of the Laws*, Adams still appreciated the genius of the work:

I am not an implicit believer in the inspiration or infallibility of Montesquieu.

268. See M. RICHTER, *supra* note 54, at 101.

269. 15 THE PAPERS OF JAMES MADISON 59 (letter to Thomas Jefferson August 12, 1793).

270. *Helvidius No. 1, The National Gazette*, Aug. 24, 1793, reprinted in 15 THE PAPERS OF JAMES MADISON at 266-68.

271. 10 THE WORKS OF JOHN ADAMS 256-57 (Adams ed. 1856).

On the contrary, it must be acknowledged, that some . . . have detected many errors in his writings. But all their heads consolidated into one mighty head would not equal the depth of his genius, or the extent of his view. Voltaire alone excels or equals him. When a writer on government disposes, sneers, or argues against mixed governments, of a balance in government, he instantly proves himself an ideologian. To reason against a balance, because a perfect one cannot be composed or eternally preserved, is just as good sense as to reason against all morality, because no man has been perfectly virtuous.²⁷²

With the exception of Jefferson, there was no profound hostility toward Montesquieu—only a less reverent view of him. Much of this change can be attributed to the passage of time. Montesquieu published *The Spirit of the Laws* in 1748, having attained political maturity during the reign of Louis XIV. The Europe on which he based his observations accepted the divine right of kings as standard political cant. Therefore, in the revolutionary period after 1789, Montesquieu's observations appeared dated, and his precepts of government anachronistic.

On a deeper level, in the years after ratification one finds more self-assuredness among American political thinkers than in the Colonial or Revolutionary periods. The Framers had, after all, crafted their own self-sustaining system of government and were therefore less in need of outside authority to justify political events. While still revered as a great thinker, Montesquieu's theories have been largely incorporated within the American political structure; far stronger testimony to his greatness than all the verbal plaudits laid upon him in earlier years combined.

Montesquieu's lasting influence was not his partisan proscriptions or empirical findings. Rather, as James Madison explained, Montesquieu is honored for providing western civilization with a new system for understanding the interrelationships between law, politics, culture and society:

Montesquieu was in politics not a Newton or a Locke, who established immortal systems, the one in matter, the other in mind. He was in his particular science what Bacon was in universal science. He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.²⁷³

VI. CONCLUSION

This discussion has demonstrated that Montesquieu's influence upon the Framers of the American Constitution extended far beyond the separation of powers principle. Indeed, the strict separation of powers enunciated in *The Spirit of the Laws* was belied by the American practice of judicial review which, since *Marbury v. Madison*, has become an integral component of our political system. Judicial re-

272. *Id.*

273. *The Spirit of Governments*, 14 THE PAPERS OF JAMES MADISON *supra* note 162, at 233.

view, as practiced in the United States, is more representative of Hume's discussion of checks and balances than Montesquieu's analysis in *The Spirit of the Laws*.

This focus on Montesquieu's separation of powers dictum not only obfuscates his more important contributions, it substantively misstates his position. Montesquieu's oft-cited dictum that liberty depends upon a separation of governmental powers, quoted by Madison in *The Federalist No. 47*, does not advocate a total separation of governmental structures, but rather a separation of the disparate functions. Montesquieu himself endowed the legislature with the judicial function of adjudicating criminal misconduct by legislators. Moreover, Madison's invocation of Montesquieu in *The Federalist No. 47* was in response to antifederalist criticisms that the new Constitution violated Montesquieu's separation of powers principle. Madison correctly argued that Montesquieu did not require that all structures of government be kept separate and distinct.²⁷⁴

Montesquieu's greater influence was teaching the Framers that any system of laws rests, ultimately, upon the social customs of the society being governed. In the rancorous years leading up to the Declaration of Independence, Montesquieu legitimized colonists' perceived disassociation between British law and American custom. After the Revolution, when entrusted with creating their own legal structure, the Framers remembered Montesquieu lesson subordinating their legal structure to the governing spirit of the American nation. The resiliency of their Constitution, two hundred years after its ratification, is proof of the Framers' accurate reading of Montesquieu's dicta.

In the current legal environment, Montesquieu's analysis of the relationship between law and culture can help explain the ongoing legal wrangle over issues such as school prayer and abortion, and hopefully lead to a more harmonious resolution of such conflicts.

274. Montesquieu provides no authority for recent decisions such as *Bowsher v. Synar*, 478 U.S. 714, 732 (1986), in which the Court struck down the Gramm-Rudman bill merely because the treasurer, entrusted with the non-discretionary obligation of cutting the budget once the target was not reached, was an executive officer. Under Gramm-Rudman, the respective functions of the legislature and the executive branch remained distinct; neither Montesquieu nor Madison would have been offended. Similarly, in *United States v. Mistretta*, 488 U.S. 61 (1984), the fact that federal judges sat on the sentencing commission would not, from a structural standpoint, contravene Montesquieu's theoretical framework. However, a functionalist argument that the presence of judges on the sentencing commission or a judges' implementation of the sentencing guidelines somehow interferes with their constitutional function as neutral and detached magistrates might be more compelling from a Montesquieuan perspective.

Framed in Montesquieu's terminology, attempts by the Supreme Court to construct value-neutral principles for adjudicating issues of deeply held religious conviction are consigned to failure as legal encroachments upon social custom. Where a court acts in contravention to the collective conscience of sizeable portions of the population, Montesquieu teaches that social strife is inevitable. From this perspective, it is understandable that Supreme Court decisions such as *Baker v. Carr*²⁷⁵ and *Brown v. Board of Education*,²⁷⁶ which assigned legal rights to individuals, although momentous in their impact, have been largely accepted by the populace; decisions implicating fundamental values such as *Engel v. Vitale*²⁷⁷ and *Roe v. Wade*²⁷⁸ remain the fodder of social disruption.

Applying Montesquieu's analysis to current legal conflicts over ultimate values will produce a more modest assessment of what the legal system can accomplish; law can change what was established by law, but custom must be left to change custom. Value conflicts in American society should be adjudicated in the forum in which values are made: family, neighborhood, religious organizations, trade unions, community, school, and media. The legal system should recuse itself from adjudicating value conflicts, confining its emphasis to protecting the rights of citizenship and similar legally created entitlements.²⁷⁹ Such Montesquieuan deference to the habits of the heart of the American people is sure to produce short term disappointment among those who seek to improve society through judicial channels. However, just as the Framers' trust in Montesquieu helped assure the resiliency of their Constitution throughout two-hundred years of tumult and strife, so today will social comity be preserved so long as jurists heed Montesquieu's dictum and respect the natural divisions of authority within their particular societies.

275. 369 U.S. 186 (1962) (affirming one-man, one-vote principle as constitutionally mandated by the fourteenth amendment).

276. 347 U.S. 483 (1954) (striking down separate but equal doctrine as constitutional justification of racial segregation).

277. 370 U.S. 421 (1962) (holding non-denominational school prayer unconstitutional establishment of religion in violation of the first amendment).

278. 410 U.S. 113 (1973) (affirming constitutional right to abortion during first trimester of pregnancy).

279. See J. ELY, *DEMOCRACY AND DISTRUST* (1986).