

MONTESQUIEU'S  
COMPARATIVE POLITICS  
AND THE  
SPIRIT OF AMERICAN  
CONSTITUTIONALISM

ANNE M. COHLER  
Iowa



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## MODERATE AND FREE GOVERNMENT: THE UNITED STATES CONSTITUTION

Those who proposed the Constitution of the United States saw the problem of legislation in much the same terms as Montesquieu had. First, the free government they pursued was moderate government, government under law, whose activities would be directed by the ends of that government, rather than limited government, government whose purposes would be limited to guaranteeing or promoting natural rights. The problem was not to limit sovereignty, but to shape its use. Second, they thought that they were facing a situation in which moderate government must be based on the many, must be republican, and could only be achieved through representation. They were Montesquieu's modern legislators, faced with a situation in which the virtues required for good government—both among the rulers and the ruled—could not safely, without despotism, be developed directly. Better, then, James Madison suggests in *Federalist* number 10, that we should do our best to ensure indirectly that the population be shapeless, that it have neither a regular majority nor a regular minority. To be moderate, such a government must somehow be given an orderly life of its own. To be free, that orderly life must somehow encourage or require the deliberation characteristic of free men governing themselves. Here we have reached the third point—namely, that the structure of the government must be relied upon to give the government its character and purpose; the separation of power and the balance of power must control, educate, and direct political action.

We shall now take up these three topics, using primarily *The Federalist* and Madison's notes on the Constitutional Convention as our sources. Madison, as well as many of the others, read and admired both Montesquieu and many people who were influenced by him, particularly the Scots of the Scottish Enlightenment. These facts, in themselves, demonstrate nothing about influence,

because these persons certainly read many other things. What I would like to do here is to measure the points of similarity and suggest that this match between Montesquieu and the considerations of the Constitutional Convention and in *The Federalist* not only makes the argument for Montesquieu's influence but also helps us to achieve a better understanding of the relation between the topics that the delegates considered.

The presentation of the argument for the constitution in *The Federalist* follows a pattern that Montesquieu could well have suggested. First, *The Federalist* takes up the need for union, a union as energetic and powerful as the proposed one. Circumstances both require and make possible such a government. The circumstances considered are the institutions and life of Americans in 1787 and the foreseeable future, not those of men in nature. Americans require a powerful free government, but not one that is explicitly limited by the natural rights of individuals. Second, that government is to proceed by representation in such a way that the character and actions of the representatives will not be directly dependent on those of the population. Third, the representation is to be divided, balanced, and checked so that the government will be moderate—and free—that is, stay within the bounds appropriate for this free government. The character of that freedom and thus of the forms appropriate to it are the topics here.

## MODERATION

The propositions "that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose, which is itself incapable of limitations" (*Fed.* no. 31) run throughout the first thirty-six papers of *The Federalist*. In these papers, the need to provide for the common defense brings along an array of powers to the federal government, particularly the power to raise and maintain an army and the power to tax directly. Given the limitless possibilities for actions that the government might need to take, its powers must be just as limitless. But this proposition is coupled with the argument that

adherence to this principle will encourage adherence to the law, "that nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breasts of rulers towards the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable" (*Fed.* no. 25). No disjunction is envisioned between a governmental power that has no formal limits and one that observes the law. That is, *The Federalist* sought a government that was moderate in Montesquieu's sense, a government that will follow the laws, that will stay within the bounds implied by its purposes as it deals with the circumstances that affect it.

This moderate government had to be republican, not monarchical or mixed. The assessment that the new government had to be republican was based on an analysis of the character, or the genius, of the people, about which there was little disagreement. Madison simply remarked that "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" (*Fed.* no. 39). Americans begin with the assumption that mankind's capacity for self-government must be the basis of their government. The English had demanded that a body of the legislature be formed on this basis, but the Americans demand that the whole government be formed upon it. The American circumstance gives force to that demand and the assumption on which it is based. The population has no shape that can be used to give shape to a government; it has no king, nobility, or commons. In arguments over the suitability of using England as a model during the Constitutional Convention, it was often said that England was of limited use as an example because it was a mixed government, based on ranks and orders that had existed for a long time.<sup>1</sup> Even if monarchical, aristocratic, or democratic tendencies existed within the state or if they always existed in all govern-

ments, they had not come to offer a sufficient shape to the population to make such mixing possible.<sup>2</sup> In addition, one criticism was to point out that a proposal might lead to the development of a nobility and a people as distinct bodies. Thus, more than one office could not be held by one person; and although sumptuary laws designed to keep the appearance of equality were admired, they were put aside with little conversation.<sup>3</sup> A nobility, and thus a monarch, were prohibited. The consequence of ending British rule, forbidding the development of a nobility and a monarchy, and not encouraging the development of an egalitarian democratic citizenry was to leave the population formless, without any distinctive orders. America had to become explicitly the popular government that Montesquieu saw lying behind the English government, with its radically weakened orders.

In *Federalist* number 10, Madison defends the very formlessness of the American population as the condition of republican politics, arguing that the very size of the United States would encourage its continuation by making difficult the most likely formation, that of democratic majorities. But Madison's remarks in the Constitutional Convention make it clear that he saw the distinction between the northern and the southern states—that is, between societies based on slavery and those based on the work of free men—as central to the country at the time of the Constitution. In a late effort to establish representation in proportion to the population, he says: "It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination."<sup>4</sup> Slavery produces an inherited, stable distinction between people which is quite contrary to the assumption that no permanent distinctions existed in the underlying population upon which this moderate republic was to be built. One is led to wonder whether Madison thought that the union and its size could overcome the distinction caused by slavery.

Let us turn briefly to the Lockean prerogative to clarify the distinction between this moderate government based on mankind's capacity for self-government and a limited government based on a notion of equal natural right. "This power to act

according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called 'Prerogative'." <sup>5</sup> Locke goes on to say that in the infancy of governments, almost all of government was prerogative. The law of a country, then, is a kind of codification from experience of the judgments about the proper applications of natural right in the circumstances of a particular country. The best rulers present the greatest dangers to the law and Locke offers no remedy other than the appeal to heaven, or the sense of the majority that they are weary of such rule. <sup>6</sup> There is no suggestion here, as there was in *The Federalist*, that the law could somehow contain the responses to extraordinary circumstances. If the law is to be able to contain and even shape the responses to these unforeseen events, it must hold within itself some principles of action, or purposes, that can direct its response to every circumstance. To obey that law—to be moderate—is to act according to those principles, or purposes, in any circumstance.

In this moderate government, the character of the government is primarily thought to be a result of the government itself. The character of the people is such that the government must be based on a general assumption that mankind is able to govern itself. The population is and must remain structured, so that the generality of that assumption is not contradicted by the development of orders or of a constant majority. But there is no effort to turn that people into a citizenry. Although the characteristics of the citizenry—of the voting public—are touched upon, they remained peripheral to the discussions of the shape of the American government. This concern for the underlying shape of the population, the lack of direct concern with a citizenry, and ultimately an interest in the effect that the government will have on the population characterize the approach to legislation that Montesquieu proposes for moderate governments in the modern situation.

The discussions of citizenship—of the suffrage—in a government based on the people take place only indirectly (*Fed.* no. 52). <sup>7</sup> The census that is to establish the number of people to be divided by the proportional representation in the House of Representatives; the criteria for voting for members of the House of Representatives, the only officers who were to be directly elected; and the addition of new states—all raised the issue of who was to be

considered a citizen. The question of the census was considered in the context of a discussion of whether to apportion representation by some measure of wealth or by population. The agreement to count "other persons" as three-fifths of ordinary persons was interpreted by some as a compromise with the view that wealth was to be included in the criteria for establishing the basis for representation. <sup>8</sup> A brief discussion of the possibility of limiting the suffrage for members of the House of Representatives to freeholders raised sore issues, including that of counting a slave as three-fifths of a person, late in the convention, when these issues seemed to have been settled. <sup>9</sup> Finally, an objection to admitting new states on equal grounds with the old in unlimited numbers was met with the observation that their inhabitants would be "our children & our grand Children"; so that objection was not revived. <sup>10</sup>

The shape of political life—its kind of moderation and its purpose—was not thought to be a direct consequence of things external to the political organization itself, neither of the principle that governments are properly limited to certain activities nor of the character and principles of the citizenry. Rather, the Constitution seems to have been based on an assertion that limits engender distrust for the law and that care must be taken to see to it that the population acquire no set shape or characteristics that would lead to or require expression in the political life. In a country such as America, where the basis for government is assumed to be popular, only representation makes it possible for a moderate political life to take a particular direction.

## REPRESENTATION

"The true distinction between these [ancients] and the American Governments lies *in the total exclusion of the people in their collective capacity* from any share in the *latter*, and not in the *total exclusion of the representatives of the people*, from the administration of the *former*" (*Fed.* no. 63). Here, representation must bear the entire burden of giving shape and therefore moderation to the government. The intermediate powers of the monarchy have altogether disappeared. The sovereignty of the monarch was exercised only

through those intermediate powers. In England the representatives of the people were limited by the remaining nobles and "les grands," but in America the sovereignty of the people was to be exercised only through its representatives. The government was to be purely republican.

The way the distinction between reason and passion is drawn in *The Federalist* offers an understanding of the purpose for the distance that this representation creates between the represented and the representative institutions. In *Federalist* number 10, Madison argues that the large size of the new union and its representative structure will control the effects of factions. Factions are understood to be "a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (*Fed.* no. 10). The passions of the public are thought to act more effectively in groups of a certain size. They cannot move easily across a vast country, and they cannot move as efficiently in a smaller group, although even the small House envisioned in 1787 was suspect: "The truth is that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob" (*Fed.* no. 55).<sup>11</sup> Passions affect groups of men in the same way. The danger is in having passions make groups with identical views, in having them sweep across a democratic assembly: "When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same" (*Fed.* no. 50). The passions tend to cause unanimity, but reason divides men.

This view of the relation between passion and reason in politics runs quite counter to the most frequently encountered enlighten-

ment view in which the private interests and the passions divide men who would be unified, and even unanimous, if their prejudices did not obscure the reasonable view, which was assumed to be singular. Reason in *The Federalist* does not seem to be an abstract truth to which everyone should aspire. Here, as in Montesquieu, the passions lead to unanimity, to despotism. This reason, like Montesquieu's spirit and the deliberation of monarchies, points toward particular purposes and action, not directly to the universal and the divine. Size, representation, and the division of powers—all serve to break up the unanimity that is the result of the passions and to encourage the variety of reason—that is, to discourage tyranny or despotism and to encourage liberty. The government was sufficiently buffered that it had the possibility of developing a life and a spirit of its own that would ensure its moderation and give it character and purpose.

A look at the way the Constitutional Convention resolved its most famous disagreement—that between the big and the small states over whether the states should be represented equally or in proportion to their population—will clarify the extent to which it was thought that a government formed by representatives was a consequence of the organization of the institutions—the separation and balance of powers—not a result of the relation between the representatives and the represented.

The dangers envisioned—foreign intervention, foreign alliances, smaller confederacies, wars among the states, the destruction of commerce—would be a consequence both of the failure of the convention to come up with an adequate plan for union and of a union that relied upon the enforcement of general laws upon recalcitrant state governments. Such enforcement would amount to war and thus would lead to all the evils that follow from the end of the union. Somehow, enforcement, both executive and judicial, had to be localized and individualized, either by creating federal enforcement institutions that would be capable of acting on individuals and federal courts that would have jurisdiction over offenses against that administration of the laws or by using state administrations and state courts or by using a combination of the two.

It was very difficult to imagine how to establish an upper house,

a senate, in a union based either upon individuals or upon representation from each state in proportion to its population.<sup>12</sup> The view that such a body was necessary to check the passions of the electorate as those passions swept uniformly over the body politic and to restore the diversity of genuine political debate (*Fed.* no. 50) did not indicate a way to create such an institution in a society that had no nobility and had no intention of encouraging the development of one. The Virginia Plan—the first proposal before the convention—resolved this difficulty by suggesting that the second branch should be elected by the first from nominations made by the state legislatures. That proposal does not seem to have been seriously considered by the convention. One suspects that this was because such layering would have removed the second house too far from the people whom its members were to represent and because the arrangement would have violated the view that separation of powers could only be achieved when each power had an independent basis or source for that power. That is, the convention was not as willing as were the authors of the Virginia Plan to extend the distance between the people and their representatives. But if members of the second chamber were to be elected by the state legislatures, it became difficult to imagine how this would produce a smaller deliberative body than the House. The constant juggling of figures at the Constitutional Convention indicated how difficult it would be to produce a smaller body in which each state would have at least one member and in which the number of members from each state would be proportioned by its population.

All these problems paved the way for compromise, but no compromise would have been possible if the convention had been full of men who thought that the character of the government was a direct consequence of the way in which the representation was organized. William Paterson of New Jersey, who presented the New Jersey Plan, which settled representation equally among the states, used a notion of representation early in the Convention that suggests the understanding on which compromise could be reached. According to Madison's notes, Paterson said: "It has been said that if a Natl. Govt. is to be formed so as to operate on the people and not on the States, the representatives ought to be

drawn from the people. But why so? May not a Legislature filled by the State Legislatures operate on the people who chuse the State Legislatures? or may not a practicable coercion be found."<sup>13</sup> Paterson's own notes for his speech put the matter thus: "Will the Operation of the natl. Govt. depend upon the Mode of Representation. — No — it depends upon the Quantum of Power lodged in the leg. ex. and judy. Departments — it will operate individually in the one Case as well as in the other."<sup>14</sup> Although Paterson's is the clearest expression of the opinion that the way in which the new national government can be expected to operate is an altogether different question from the way it is related to the people, some implicit opinion of this sort must underlie the compromise that made the new government possible.

In his introduction to the discussion of the institutions of the new government, Madison puts the issue as one between the institutions that are essential for the requisite stability and energy in a government and those that are due to liberty and to the republican form (*Fed.* no. 37). Adherence to republican form does not seem necessarily to either increase or decrease the possibility of a stable and energetic government. He ends by limiting the name republican to the government that "derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behaviour" (*Fed.* no. 39). The particular method—through the states, individual votes, or appointment by representatives of the people—does not seem to matter. Thus, Madison can go on to call the proposed government partly national and partly federal and the result of a compromise, without compromising the energy and stability of the resulting national government.<sup>15</sup>

Here we have a view of the situation of the legislator like that envisioned in *The Spirit of the Laws*. Moderated, ordered rule is the aim. But the passions move the democratic base, and rule in the United States is to be republican, to have its ground in that base. One can hope that in America the base is so big that it cannot move as a whole. This fear of the simple, direct rule of the passions—of despotisms, whether democratic or princely—is shared with Montesquieu. So, here, representation is not designed

to reflect the opinions of the people directly. Rather, the distance from the population, which is made possible by representation, is the source of popular moderate government.

### LIBERTY

Although American government was established on the basis of the understanding that only self-government was honorable, it is only the government itself that made it possible to engage in that activity. The spirit of the people took shape within the divided and balanced governmental institutions. The division of powers was intended both to break up the unanimity of the democratic passions and to be the mechanism that would give the government a life of its own. By breaking up the passions, the division of powers serves, as do size and representation, to curb the virtually random wills or desires that pass through a democratic populace, making it as much a despot as a single man when he imposes his momentary whims on a people. In this sense it ensures moderation. But *The Federalist* did not stop with this moderation; the government was further designed to promote good government. The question remains of the content of that government and its relation to liberty. In England, Montesquieu says the division of powers has created a liberty that is a result of balanced passions and leads to action in no particular direction. That division was ordered in respect to the problems of government so that when it was forced by circumstances to move and to rule, it did so coherently. That is, the balances were constructed with reference to the problems of rule, as we have seen. Here it seems that the American government is being designed to go further in this latter direction than Montesquieu's English government—American liberty is meant not only to control the passions for the sake of moderation and liberty and to try to ensure some coherence in the rule itself but also to direct action and to teach something about the character of good government. In the American republic, as in Montesquieu's monarchy, one's honor comes to be identified with one's place, and finally, perhaps habit will lead to character.

The structure of the division of power that was proposed in the Constitutional Convention was not and could not be based on a

division into ranks and orders of the people. A division of power that does not rely upon a division in the people is characteristic of republican rather than monarchical moderation. But the manner in which republican power is divided points toward the kind of republican government. In order to understand the purpose of those who wrote the constitution for this republican government, we should, following Montesquieu, inquire into the shape of the division of power: the sources of division, the grounds for attachment to the government or some part of it, and the effect of the division itself.

The first and most evident way of separating the branches of the government is for them to have different origins. The executive and the two branches of the legislature have different modes of origin in the people. Only the independence of the judiciary is to be ensured more by the conditions of its existence than by those of its appointment. It is hard to understand how these different modes of election by a formless population could produce representatives who would be peculiarly interested in or able to perform their tasks. In addition, there is no reason to believe that they will rest even somewhat content with the portion of governing they were elected to do. To the extent that they consider themselves the representatives of the people, they will tend toward expanding their realm to the whole of ruling. This predisposition of the representatives of the people to think of themselves as the whole of government is also one of the grounds for the expectation that the branches will compete with each other for influence over governmental activities. Republican government requires something more than different sources in the people to produce a government of divided and balanced power, rather than one of competing democracies.

A different notion of separate powers shaped the Virginia Plan, in which all of the other offices of the government derived directly or indirectly from a House of Representatives whose membership was to be proportional to the population and was to be elected directly by the people. George Washington's one public remark at the convention was, on the last day, to speak in favor of a motion to decrease the maximum size of a district for the House of Representatives.<sup>16</sup> This concern about the House of Representatives as the popular body was shared by Alexander Hamilton

and Madison, who often remarked in *The Federalist* that the legislature was potentially the most influential branch, whose first office was in the House.<sup>17</sup> This could be an effort to increase the influence of the large states or to establish greater democracy. This could also be the result of a lingering view that the House would be *the* elected body, which survived the formation of a constitution in which the president, the Senate, and the House were separated by their varied sources of election from the people as well as by their tasks. This suggests that these men's view of the Constitution had its source in their understanding of the Virginia Plan. There the structure required for separate powers depended not upon separate sources in the people, but upon the internal shape of the powers of the government themselves.

A look at the proposal in the Virginia Plan that there be a council of revision—a council, made up of members of the executive branch and the judicial branch, that was to have a veto on legislation—will shed some light on the Federalists' view of how the powers could be kept separate. Madison brought up this suggestion a number of times during the convention, in spite of the fact that it never was given serious consideration. Madison's argument was that executive and judicial activities are similar in ways that make it important for the similarity to be recognized institutionally, so that these activities can be effectively separated from each other. Both the executive branch and the judicial branch are to enforce the laws, whether generally upon the people as a whole or upon specific offenders. Neither is likely to enforce laws that it disagrees with unless it knows that those laws have substantial support in the other branches of the government. These possibilities can all be weighed, or tried out, in a council of revision.<sup>18</sup> "Judicial self-restraint" can be seen as a rule that says that the judiciary should act as if there were a council of revision, as if it should not oppose the overwhelming opinion of the executive or the legislature. In this view, the branches of government are kept separate by acknowledging and giving an appropriate shape to the points at which their tasks overlap. These conjunctions are ordinarily called "balances."

Balanced and separated powers can be distinguished. They operate separately in a monarchy, in which separate powers, whatever their purposes, are easy to maintain because those who

participate in them are separated by the principle of inheritance. Balancing, or adjusting, relations among those powers is difficult in a monarchy because the members of each branch are not at all interchangeable. They are bred to their place. Montesquieu's discussion of the separation of powers in England takes both these points of view: the House of Lords relies upon inheritance to separate it, and people are assumed to move between support for the executive and support for the legislature, depending upon the advantage they can expect at any time. These two branches share powers. This alternation is balanced by the stability of the House of Lords. In a republic, the separation of power can only be maintained through sharing in parts of ruling and through the tension that results from that sharing. Madison writes: "I shall undertake in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional controul over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained" (*Fed.* no. 48). In sum, in the American republic, the separation of powers has to be maintained through their controls over one another—that is, through the aspects of governing that they share.

We are accustomed to speak of the "checks and balances" of our Constitution, but it is useful to consider the possibility of distinguishing between the two. "Checking" at the Constitutional Convention seems to have referred to relations between the two chambers of the legislature—that is, to relations between the more immediate representatives of the people. This seems to have been the customary usage at the convention, but Hamilton remarked that "a democratic assembly is to be checked by a democratic senate and both these by a democratic chief magistrate."<sup>19</sup> These checks are related to the popular passions that are opposed to the reasonable views of political action. They are designed to check those passions, both as they move from the people to the legislature or the executive and as they act within the legislative bodies themselves.<sup>20</sup> Hamilton says that "gentlemen differ in their opinions concerning the necessary checks from the different estimates they form of the human passions."<sup>21</sup> These checks, then, serve to stop the passions of the public or of the legislatures when they are acting as democratic publics. These aspects of this



government of checks and balances are what produce a stalemate, although perhaps a stalemate between the democratic passions is enough to give some room for the development of reasoned opinions, for deliberation.

In order to examine this last possibility, we need to return specifically to the understanding of the way the officers in the government will act within the structure of the government. Security for the balance of powers, or for the separation of powers, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place" (*Fed.* no. 51). If ambition is to counteract ambition and defend the separation of power, the ambition of the man must be attached to—that is, identified with—the power and the status of the branch of government of the office he holds. Hamilton's argument that the officers of the new national government will not bother with the things that are in the province of state governments makes clear his view that the powers of the new government are required in order to attract the ambitious men to its working and its defense.

The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to these objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing

to the dignity, to the importance, or to the splendor of the national government. (*Fed.* no. 17)

There is no guarantee that in other times, when other opinions reign, ambition will not become attached to these objects as well. But the point is that the purposes and powers of government itself are what attract the ambitious.

Ambition, once attracted, is schooled by the institution that attracted it and by the one that it serves, as is the case with the honor of the nobility in a monarchy. Both ambition here and honor in Montesquieu imply an impulse to think very well of oneself, and to be thought very well of by others, an impulse that is virtually without content. Ambition in a monarchy is transformed into honor as men demand recognition for the preferences and distinctions to which they are born (3.7). Here, Hamilton seems to presume that ambition attaches itself most easily, most naturally, to political action and particularly to political action that involves the evident use of power. Montesquieu says that honor's shape—that is, the things considered honorable—was a consequence of the education that began as one entered the world (4.2). The ranks of the nobility taught the noblemen and their followers how they ought to value themselves, taught them an array of rules about proper behavior which could even lead them to disobey the prince in order to defend their honor. In England, according to Montesquieu, the legislative and the executive offered no direction to those who adhered to them, so that the government's end was liberty in the sense of the government's offering no shape for men's lives; the men were uneasy, uncertain about their place and character. In the American republic, the government itself, and particularly its branches, attract the ambitious men and give shape to their ambition. When the government is said to be based on "that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government" (*Fed.* no. 39), the ambitious are challenged to follow this notion of honor and to try to perform this feat, to succeed in this experiment.

The American division of power is explicitly functional; it is based upon the different processes that are a part of any rule—

namely, making a rule, enforcing that rule, and judging those who offend against it. What Locke calls the federative power and what Montesquieu calls the execution of the law of nations here is absorbed altogether into the general notion of rule. The explicit separation of judging from executing and then the investment of that judging in a body of judges—a judiciary—distinguishes this division of power first from Locke and then from Montesquieu. Once the division of powers is seen as the separating out of parts of a single function, then each branch of government can be shaped from the point of view of performing its function well; each branch can be held responsible for its part in prudential government; and the whole can be seen, not as a result of competing parts, but as the whole of rule. In *The Federalist*, the ends of this government are said to be both justice and the common good, with justice being understood as the protection of the minority and with the common good being understood as something like what we have called good government, or the capacity to act on the genuine interests of the whole.<sup>22</sup> However, these ends are to be brought about for Americans by their own actions; Americans are to learn to act and to act within a government that constrains them to provide these ends for themselves. That lesson and that practice are embedded in the division of powers. Let us now take a brief look at the three branches of government from this point of view.

The House of Representatives, as the most numerous and directly elected branch, is the most subject to the democratic passions. It can either participate in the passions sweeping the nation, or those passions can be generated within the microcosm of democracy that is any assembly (*Fed.* no. 55). The House must, therefore, be checked by the Senate; the House itself must be kept to a reasonable size; and its internal structure must be such that representatives can become legislators. "No man can be a competent legislator who does not add to an upright intention and a sound judgment, a certain degree of knowledge of the subjects on which he is to legislate" (*Fed.* no. 53). So, the members must be elected for more than one year—two in this instance—and must be eligible for reelection. "A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly

masters of the public business, and perhaps not unwilling to avail themselves of those advantages" (*Fed.* no. 53). The knowledge of local interests and circumstances does not need to extend any further than the extent to which they are related to the national government (*Fed.* no. 56), and each representative will have to acquire much information about all the other states (*ibid.*). It seems likely that those who are distinguished as representatives will themselves be somewhat distinguished and that in each case a representative's "pride and vanity attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions" (*Fed.* no. 57). Republican government presupposes not only depravity but also the "other qualities in human nature, which justify a certain portion of esteem and confidence" (*Fed.* no. 55). In the House, it seems that provisions are made to check the most egregious democratic passions, to give a reason for proud and ambitious men to think themselves appreciated in this government, and then to provide the space required for good legislation. The notion seems to be that the men, once they have been started by their vanity or pride, will move into these positions and take up the aspect of rule available to them and will learn to use it if need be.

The Senate was conceived as a step further along this same path. It moved further in the direction of supporting those aspects of deliberation over legislation that require a greater extent of information and stability of character, wisdom, knowledge of the means by which that object can be obtained, permanence, the order and stability that makes a government truly respectable (*Fed.* no. 62), and a due sense of the national character, in defense of the people against their own temporary delusions (*Fed.* no. 63). These characteristics are to be encouraged by the criteria of age and length of citizenship, by the duration in office and by the rotation of election, and by the smaller size of the body itself, as well as by the relation with the executive in foreign affairs and appointments. The Senate's power to try cases of impeachment is grounded in this greater capacity for serious deliberation. "The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the

judges, as in common cases serve to limit the discretion of courts in favor of personal security" (*Fed.* no. 65). Here the things that made the House work as a deliberative body are intensified, thus producing a space for genuine respectability to take hold, while the Senate is defended against its worst tendencies. There is, again, the notion that men exist who have the character to do that job, either as a result of their prior education or of the education that comes from holding offices defined in terms of rule—that is, from trying to act within a political space that gives them a chance to learn to deliberate by doing so, by trying out the avenues that are opened, and by coming against those that are closed.

In thinking about the presidency, it is helpful to remember that executing the law is closer to judging than it is to legislating. Both executive and judicial functions enforce the laws that are enacted by the legislature. Their proper interest in the law is in the consequences that its enforcement will have on the country or on the law itself. This perspective helps to explain the demand at the convention both for democratic election and for independence from direct electoral constraints. Thus, Hamilton could suggest, at the convention, an executive elected for life and, in *The Federalist*, could defend a process in which the "sense of the people" is filtered through the men who are most capable of analyzing the qualities adapted to the station (*Fed.* no. 68). He goes on to say:

Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. (*Fed.* no. 68)

As for judges, independence assures that the president will be remote from the democratic passions, but "the best security for the fidelity of mankind is to make their interest coincide with their duty." This is true for the "love of fame, the ruling passion of

the noblest minds" (*Fed.* no. 72). If men are not given the space to finish what they have begun, "the most to be expected from the generality of men, in such a situation, is the negative merit of not doing harm instead, of the positive merit of doing good" (*ibid.*). The combination of unity, duration, adequate provision for support, and competent powers is conducive to energy in the executive, "a leading character in the definition of good government" (*Fed.* no. 70). The executive will act, he will move energetically, if his task and powers are defined so that there is space for him to act. The preeminent men who are chosen are to be given the scope that their ambition requires; otherwise, their best cannot be expected and their worst may well be feared.

A judiciary of judges who hold the office for some time is necessitated by the existence of a constitution. Once a constitution exists which is distinguished from ordinary laws passed by the legislature, the possibility of a conflict between the two kinds of laws emerges. "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" (*Fed.* no. 78). The interpretation of the laws is the province of the judges, not of juries, so the judges become an important part of the constitutional balance here, although they were not in Montesquieu's England. To get men with the courage and knowledge required to perform these functions, the independence of the judiciary must be assured by tenure for good behavior. The check on the judiciary's misuse of this virtually unlimited charge is that they depend upon the executive and the legislature for enforcement. They have no force or will; they simply have judgment (*Fed.* no. 78). In the cases of both the executive and the judiciary, there seems to be an idea that the space for political action will itself be attractive to the ambitious, even to those whose ambition is appropriate to the job, and that the checks will protect the country from the ambition of bad, or even of incompetent, men.

The division of powers in the United States Constitution can be said to be aimed toward liberty in a variety of senses. First, the constitutional structure provides a kind of liberty for those involved in it. The structure keeps them from going too far, from

doing things against the fundamental law and thus making others do things against it; and it leaves them a space within which to act freely. In Montesquieu's account of English liberty, that space had no particular shape—that is, no specific kind of activity was preferred by the constitution. The politically active citizens who were not in the House of Lords switched their allegiance from the executive to the legislature as the changing circumstances seemed to them to warrant such action. In the United States Constitution, liberty as an end is understood somewhat differently. The division of powers is based on a separation of the functions of rule. The balance is between those who are engaged in each function and who see themselves and their honor, or vanity, in terms of the actions of the branch of government performing that function. Balance is achieved through that identification, as in a monarchy, rather than through changing sides, as in Montesquieu's version of the English constitution. Liberty, in the United States Constitution, can be seen, not as an absence of direction, but as self-government. Rule by those who are to be ruled—that is, self-government—is divided, balanced, checked, and put back together in a constitution whose end can be best described as deliberation, as that self-government itself.

The question remains of the relation between these representative political institutions and the population at large. Montesquieu called this the liberty of the citizen; Hamilton called it limited government. The separation must be maintained between a formless population and a representative government whose shape is defined by the needs of rule itself. The issue here is the safety of the citizens or, as Hamilton put it, the danger that the legislature will go beyond its bounds. The judiciary serves to protect the citizens from this overreaching, just as, in Montesquieu, the independence of the judiciary is the requirement for moderate government. The issues here are first those of habeas corpus, bills of attainder, the definition of treason, jury trials in criminal cases—all of which were in the original constitution before the Bill of Rights was added. In Montesquieu, the freedom to write, to speak, and to think is an extension of this first line of protection. For Montesquieu, the most dangerous crimes, those against the country itself, or against religion, raise the possibility of infinite prosecutions unless the prosecutions for political acts

are defined carefully as for acts, not thoughts, and those against religion are left to the religions themselves. One cannot go in search of crimes that cannot be seen in public without endangering the security of the citizenry. In this sense the Bill of Rights is an amplification of the rights that already exist in the Constitution, as Hamilton claimed, and could in principle be read back into them as circumstances required. From another, a more Madisonian, point of view, keeping the government from a direct concern with questions of opinion and religion can make it less likely that those issues will divide the population into groups or factions that would make governing more difficult.

In sum, the shape of the representative institutions—the division of powers—offers an environment within which both political education and deliberation can take place, protected both from the passions of the population and from those of the representative bodies themselves. Various questions come to mind as a consequence of seeing the Constitution in this context. Tocqueville came to the United States in the years before the Civil War, and he raised the question of the character of a people whose regime neither supported nor tolerated any systematic distinctions.<sup>23</sup> For Tocqueville, the representative institutions were one among a variety of institutions and practices that exercised in Americans the capacity for self-government, giving them all a way to exercise their freedom. The ubiquity of the habit of governing oneself, particularly in small matters, makes it possible for representative government to work. The entire political education is not thought to take place within the division of powers. Once civil war had broken out, it would no longer do to hope that slavery could be dealt with indirectly; the national government had to insist on some national terms for citizenship, on equality. That is, the Civil War marked the failure and raised the possibility of a transformation in the structure of this moderate, representative government of divided powers. The question then becomes the manner and the extent to which that event and the resultant amendments to the Constitution transformed the government. The issue that endures is the extent to which it is possible, or even desirable, to maintain the distance between governing and sovereignty, between deliberation and rule.