CHAPTER 7
Distribution of Powers

§ 517. IN surveying the general structure of the constitution of the United States, we are naturally led to an examination of the fundamental principles, on which it is organized, for the purpose of carrying into effect the objects disclosed in the preamble. Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, viz. the executive, the legislative, and the judicial powers. The manner and extent, in which these powers are to be exercised, and the functionaries, in whom they are to be vested, constitute the great distinctions, which are known in the forms of government. In absolute governments the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic Aristocracy. If they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute Democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or republic, if it is delegated by election, and is not hereditary. In mixed monarchies and aristocracies some of the functionaries of the legislative and judicial powers are, or at least may be, hereditary. But in a representative republic all power emanates from the people, and is exercised by their choice, and never extends beyond the lives of the individuals, to whom it is entrusted. It may be entrusted for any shorter period; and then it returns to them again, to be again delegated by a new choice.

§ 518. In the convention, which framed the constitution of the United States, the first resolution adopted by that body was, that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."[1] And from this fundamental proposition sprung the subsequent organization of the whole government of the United States. It is, then, our duty to examine and consider the grounds, on which this proposition rests, since it lies at the bottom of all our institutions, state, as well as national.

§ 519. In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should for ever be kept separate and distinct. And accordingly we find it laid down with emphatic care in the bill of rights of several of the state constitutions. In the constitution of Massachusetts, for example, it is declared, that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and judicial powers, or either of them; to the end it may be a government of laws and not of men."[2] Other declarations of a similar character are to be found in other state constitutions.[3]

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§ 520. Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object, and extent of the maxim, and of the reasoning, by which it is supported. The remarks of Montesquieu on this subject will be found in a professed commentary upon the constitution of England.[4] "When," says he, "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 the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man, or the same body, whether of the nobles, or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[5]

§ 521. The same reasoning is adopted by Mr. Justice Blackstone, in his Commentaries.[6] "In all tyrannical governments," says he, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power, which he, as legislator, thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject." Again; "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, by, but not removable at, the pleasure of the crown, consists one main preservative of the public liberty; which cannot long subsist in any state, unless the administration of common justice be in some degree separated from the legislative, and also the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."[7]

§ 522. And the Federalist has, with equal point and brevity, remarked, that "the accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny.[8]

§ 523. The general reasoning, by which the maxim is supported, independently of the just weight of the authority in its support, seems entirely satisfactory. What is of far more value than any mere reasoning, experience has demonstrated it to be founded in a just view of the nature of government, and the safety and liberty of the people. And it is no small commendation of the constitution of the United States, that instead of adopting a new theory, it has placed this practical truth, as the basis of its organization. It has placed the legislative, executive, and judicial powers in different hands. It has, as we shall presently see, made their term of office and their organization different; and, for

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objects of permanent and paramount importance, has given to the judicial department a tenure of office during good behavior; while it has limited each of the others to a term of years.

§ 524. But when we speak of a separation of the three great departments of government, and maintain, that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist.[9] It was obviously the view taken of the subject by Montesquieu and Blackstone in their Commentaries; for they were each speaking with approbation of a constitution of government, which embraced this division of powers in a general view; but which, at the same time, established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British constitution will at once convince us, that the legislative, executive, and judiciary departments are by no means totally distinct, and separate from each other. The executive magistrate forms an integral part of the legislative department; for parliament consists of the king, lords, and commons; and no law can be passed except by the assent of the king. Indeed, he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can, to a limited extent, impart to them a legislative force and operation. He also possesses the sole appointing power to the judicial department, though the judges, when once appointed, are not subject to his will, or power of removal. The house of lords also constitutes, not only a vital and independent branch of the legislature, but is also a great constitutional council of the executive magistrate, and is, in the last resort, the highest appellate judicial tribunal. Again; the other branch of the legislature, the commons, possess, in some sort, a portion of the executive and judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the house of lords sits as a grand court of trials for public offenses. The powers of the judiciary department are, indeed, more narrowly confined to their own proper sphere. Yet still the judges occasionally assist in the deliberations of the house of lords by giving their opinions upon matters of law referred to them for advice; and thus they may, in some sort, be deemed assessors to the lords in their legislative, as well as judicial capacity.[10]

§ 525. Mr. Justice Blackstone has illustrated the advantages of an occasional mixture of the legislative and executive functions in the English constitution in a striking manner. "It is highly necessary," says he, "for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of 'the legislative. The total union of them, we have seen, would be productive of tyranny. The total disjunction of them, for the present, would, in the end, produce the same effects by causing that union, against which it seems to provide. The legislative would soon become tyrannical by making continual encroachments, and gradually assuming to itself the rights of the executive power, etc. To hinder, therefore, any such encroachments, the king is, himself a part of the parliament; and, as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting, rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong; but merely of preventing wrong from being done. The

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crown cannot begin of itself any alterations in the present established law; but it may approve, or disapprove of the alterations suggested, and consented to by the two houses."[11]

§ 526. Notwithstanding the memorable terms, in which this maxim of a division of powers is incorporated into the bill of rights of many of our state constitutions, the same mixture will be found provided for, and indeed required in the same solemn instruments of government. Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws. The house of representatives is a grand inquest for accusation; and the senate is a high court for the trial of impeachments. The governor, with the advice of the executive council, possesses the power of appointment in general; but the appointment of certain officers still belongs to the senate and house of representatives. On the other hand, although the judicial department is distinct from the executive and legislative in many respects, either branch may require the advice of the judges, upon solemn questions of law referred to them. The same general division, with the same occasional mixture, may be found in the constitutions of other states. And in some of them the deviations from the strict theory are quite remarkable. Thus, until the late revision, the constitution of New York constituted the governor, the chancellor, and the judges of the Supreme Court, or any two of them with the governor, a council of revision, which possessed a qualified negative upon all laws passed by the senate and house of representatives. And, now, the chancellor and the judges of the Supreme Court of that state constitute, with the senate, a court of impeachment, and for the correction of errors. In New Jersey the governor is appointed by the legislature, and is the chancellor and ordinary, or surrogate, a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the branches of the legislature. In Virginia the great mass of the appointing power is vested in the legislature. Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.[12]

§ 527. It would not, perhaps, be thought important to have dwelt on this subject, if originally it had not been made a special objection to the constitution of the United States, that though it professed to be founded upon a division of the legislative, executive, and judicial departments, yet it was really chargeable with a departure from the doctrine by accumulating in some instances the different powers in the same hands, and by a mixture of them in others; so, that it, in effect, subverted the maxim, and could not but be dangerous to the public liberty.[13] The fact must be admitted, that such an occasional accumulation and mixture exists; but the conclusion, that the system is therefore dangerous to the public liberty, is wholly inadmissible. If the objection were well founded, it would apply with equal, and in some cases with far greater force to most of our state constitutions; and thus the people would be proved their own worst enemies, by embodying in their own constitutions the means of overthrowing their liberties.

§ 528. The authors of the Federalist thought this subject a matter of vast importance, and accordingly bestowed upon it a most elaborate commentary. At the present time the objection may not be felt, as possessing much practical force, since experience has demonstrated the fallacy of the suggestions, on which it was founded. But, as the objection may be revived; and as a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government, it may not be without use to recur to some of the reasoning, by which those illustrious statesmen, who formed the constitution, while they admitted the general truth of the maxim, endeavored to prove, that a rigid adherence to it in all

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cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties. The proposition, which they undertook to maintain, was this, that "unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation, which the maxim requires, as essential to a free government, can never in practice be duly maintained."[14]

§ 529. It is proper to premise, that it is agreed on all sides, that the powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.[15] Power, however, is of an encroaching nature, and it ought to be effectually restrained from passing the limits assigned to it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others. Is it sufficient to declare on parchment in the constitution, that each shall remain, and neither shall usurp the functions of the other? No one, well read in history in general, or even in our own history during the period of the existence of our state constitutions, will place much reliance on such declarations. In the first place, men may and will differ, as to the nature and extent of the prohibition. Their wishes and their interests, the prevalence of faction, an apparent necessity, or a predominant popularity, will give a strong bias to their judgments, and easily satisfy them with reasoning, which has but a plausible coloring. And it has been accordingly round, that the theory has bent under the occasional pressure, as well as under the occasional elasticity of public opinion, and as well in the states, as in the general government under the confederation. Usurpations of power have been notoriously assumed by particular departments in each; and it has often happened, that these very usurpations have received popular favor and indulgence.[16]

§ 530. In the next place, in order to preserve in full vigor the constitutional barrier between each department, when they are entirely separated, it is obviously indispensable, that each should possess equally, and in the same degree, the means of self-protection. Now, in point of theory, this would be almost impracticable, if not impossible; and in point of fact, it is well known, that the means of self-protection in the different departments are immeasurably disproportionate. The judiciary is incomparably the weakest of either; and must for ever, in a considerable measure, be subjected to the legislative power. And the latter has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources, by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation, and the property of the people. It can grant, or withhold supplies; it can levy, or withdraw taxes; it can unnerve the power of the sword by striking down the arm, which wields it.

§ 531. De Lolme has said, with great emphasis, "It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can duly do by successive steps, (I mean subvert the laws,) and through a longer, or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and if I may be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and even is more easily so, when undivided. The legislative,

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on the contrary, in order to its being restrained, should absolutely be divided."[17]

§ 532. The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and the dread of the royal prerogative, which was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined, as it was, with an hereditary authority, and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny, as is threatened by executive usurpations. The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But, who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves, as by others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions, which actuate the multitude; yet not go numerous, as to be incapable of pursuing the objects of its passions by means, which reason prescribes; it is easy to see, that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department, that the people may well indulge all their jealousy, and exhaust all their precautions.[18]

§ 533. There are many reasons, which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive, and less capable of being brought within precise limits, than those of either of the other departments. The bounds of the executive authority are easily marked out, and defined. It reaches few objects, and those are known; It cannot transcend them, without being brought in contact with the other departments. Laws may check and restrain, and bound its exercise. The same remarks apply with still greater force to the judiciary; The jurisdiction is, or may be, bounded to a few objects or persons; or, however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only upon rights and cases, as they are brought by others before it. It can do nothing for itself. It must do every thing, for others. It must obey the laws; and if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is for ever varying its means and its ends. It governs the institutions, and laws, and public policy of the country. It regulates all its vast interests. It disposes of all its property. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devises of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It molds at its pleasure almost all the institutions, which give strength, and comfort, and dignity to society.

§ 534. In the next place, it is the direct, visible representative of the will of the people in all the changes of times and circumstances. It has the pride, as well as the power of numbers.[19] It is easily moved and steadily moved by the strong impulses of popular reeling, and popular odium. It obeys,

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without reluctance, the wishes and the will of the majority for the time being. The path to public favor lies open by such obedience; and it finds not only support, but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated, and its arm strengthened by the countenance, and the courage of numbers. These views are not alone those of men, who look with apprehension upon the fate of republics; but they are also freely admitted by some of the strongest advocates for popular rights, and the permanency of republican institutions.[20] Our domestic history furnishes abundant examples to verify these suggestions.[21]

§ 535. If, then, the legislative power possesses a decided preponderance of influence over either or both of the others; and if, in its own separate structure, it furnishes no effectual security for the others, or for its own abstinence from usurpations, it will not be sufficient to rely upon a mere constitutional division of the powers to insure our liberties.[22]

§ 536. What remedy, then, can be proposed, adequate for the exigency? It has been suggested, that an appeal to the people, at stated times, might redress any inconveniences of this sort. But, if these be frequent, it will have a tendency to lessen that respect for, and confidence in the stability of our constitutions, which is so essential to their salutary influence. If it be true, that all governments rest on opinion, it is no less true, that the strength of opinion in each individual, and its practical influence on his conduct, depend much upon the number, which he supposes to have entertained the same opinion.[23] There is, too, no small danger in disturbing the public tranquility by a frequent recurrence to questions respecting the fundamental principles of government.[24] Whoever has been present in any assembly, convened for such a purpose, must have perceived the great diversities of opinion upon the most vital questions; and the extreme difficulty in bringing a majority to concur in the longsighted wisdom of the soundest provisions. Temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, and ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment, and seduce the understanding. It will probably be found, in the history of most conventions of this sort, that the best and soundest parts of the constitution, those, which give it permanent value, as well as safe and steady operation, are precisely those, which have enjoyed the least of the public favor at the moment, or were least estimated by the framers. A lucky hit, or a strong figure, has not infrequently overturned the best reasoned plan. Thus, Dr. Franklin's remark, that a legislature, with two branches, was a wagon, drawn by a horse before, and a horse behind, in opposite directions, is understood to have been decisive in inducing Pennsylvania, in her original constitution, to invest all the legislative power in a single body.[25]

In her present constitution, that error has been fortunately corrected. It is not believed, that the clause in the constitution of Vermont providing for a septennial council of censors to inquire into the infractions of her constitution during the last septenary, and to recommend suitable measures to the legislature, and to call, if they see fit, a convention to amend the constitution, has been of any practical advantage in that state in securing it against legislative or other usurpations, beyond the security possessed by other states, having no such provision.[26]

§ 537. On the other hand, if an appeal to the people, or a convention, is to be called only at great distances of time, it will afford no redress for the most pressing mischiefs. And if the measures, which are supposed to be infractions of the constitution, enjoy popular favor, or combine extensive private interests, or hare taken root in the habits of the government, it is obvious, that the chances

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of any effectual redress will be essentially diminished.[27]

§ 538. But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintaining, or restoring the constitutional equilibrium of the government. The remarks of the Federalist, on this subject, are so striking, that they scarcely admit of abridgment without impairing their force: "We have seen, that the tendency of republican governments is to aggrandizement of the legislature at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their professions. The former are generally objects of jealousy; and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal weight with the people, and that they are more immediately the confidential guardians of their rights and liberties. With these advantages it can hardly be supposed, that the adverse party would have an equal chance of a favorable issue. But the legislative party would not only be able to plead their case most successfully with the people; they would probably be constituted themselves the judges. The same influence, which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men, who had been, or who actually were, or who expected to be, members of the department, whose conduct was arraigned. They would consequently be parties to the very question to be decided by them."[28]

§ 539. If, then, occasional or periodical appeals to the people would not afford an effectual barrier against the inroads of the legislature upon the other departments of the government, it is manifest, that resort must be had to some contrivances in the interior structure of the government itself, which shall exert a constant check, and preserve the mutual relations of each with the other. Upon a thorough examination of the subject, it will be found, that this can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for. Each department should have a will of its own, and the members of each should have but a limited agency in the acts and appointments of the members of the others. Each should have its own independence secured beyond the power of being taken away by either, or both of the others. But at the same time the relations of each to the other should be so strong, that there should be a mutual interest to sustain. and protect each other. There should not only be constitutional means, but personal motives, to resist encroachments of one, or either of the others. Thus, ambition would be made to counteract ambition; the desire of power to check power; and the pressure of interest to balance an opposing interest.[29]

§ 540. There seems no adequate method of producing this result but by a partial participation of each in the powers of the other; and by introducing into every operation of the government in all its

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branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been found, by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the legislative power upon the executive has been in like manner applied, by giving the latter a qualified negative upon the former; and a guard against executive influence and patronage, or unlawful exercise of authority, by requiring the concurrence of a select council, or a branch of the legislature in appointments to office, and in the discharge of other high functions, as well as by placing the command of the revenue in other hands.

§ 541. The usual guard, applied for the security of the judicial department, has been in the tenure of office of the judges, who commonly are to hold office during good behavior. But this is obviously an inadequate provision, while the legislature is entrusted with a complete power over the salaries of the judges, and over the jurisdiction of the courts, so that they can alter, or diminish them at pleasure. Indeed, the judiciary is naturally, and almost necessarily (as has been already said) the weakest department.[30] It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, or appoint to offices. It is never brought into contact with the people by the constant appeals and solicitations, and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its rigid justice and impartiality give it no claims to favor, however they may to respect. It stands solitary and unsupported, except by that portion of public opinion, which is interested only in the strict administration of justice. It can rarely secure the sympathy, or zealous support, either of the executive, or the legislature. If they are not (as is not infrequently the case) jealous of its prerogatives, the constant necessity of scrutinizing the acts of each, upon the application of any private person, and the painful duty of pronouncing judgment, that these acts are a departure from the law or constitution, can hare no tendency to conciliate kindness, or nourish influence. It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity, which demonstrates, how slow popular leaders are to introduce checks upon their own power; and how slow the people are to believe, that the judiciary is the real bulwark of their liberties. In some of the states the judicial department is partially combined with some branches of the executive and legislative departments; and it is believed, that in those cases, it has been found no unimportant auxiliary in preserving a wholesome vigor in the laws, as well as a wholesome administration of public justice.

§ 542. How far the constitution of the United States, in the actual separation of these departments, and the occasional mixtures of some of the powers of each, has accomplished the objects of the great maxim, which we have been considering, will appear more fully, when a survey is taken of the particular powers confided to each department. But the true and only test must, after all, be experience, which corrects at once the errors of theory, and fortifies and illustrates the eternal judgments of nature.

§ 543. It is not a little singular, however, (as has been already stated,) that one of the principal objections urged against the constitution at the time of its adoption was this occasional mixture of powers,[31] upon which, if the preceding reasoning (drawn, as must be seen, from the ablest

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commentators) be well founded, it must depend for life and practical influence. It was said, that the several departments of power were distributed, and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of the other parts. The objection, as it presents itself in details, will be more accurately examined hereafter. But it may here be said, that the experience of more than forty years has demonstrated the entire safety of this distribution, at least in the quarter, where the objection was supposed to apply with most force. If any department of the government has an undue influence, or absorbing power, it certainly has not been either the executive or judiciary.

FOOTNOTES

1. Journals of Convent, 82, 83, 129, 207, 215.

2. Bill of Rights, article 30.

3. The Federalist. No. 47. -- It has been remarked by Mr. J. Adams, that the practicability of the duration of a republic, in which there is a governor, a senate, and a house of representatives doubted by Tacitus, though he admits the theory to be laudable. Cunotas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicrae forma laudari facilius quam inveniri, vel si evenit, haud diuturna esse potest. Tacit. Ann. Iib. 14. Cicero asserts, "Statuo esse optime constitutam rempubicam, quae ex tribus generibus illis, regali, optimo, et populari, modice confusa" Cic. Frag. de Repub.[a] The British government perhaps answers more nearly to the form of government proposed by these writers, than what we in modern times should esteem strictly a republic.

a. 1 Adams's Amer. Constitutions, Preface, 19.

4. Montesquieu, B. 11, ch. 6.

5. Mr. Turgot uses the following strong language: "The tyranny of the people is the most cruel and intolerable, because it leaves the fewest resources to the oppressed. A despot is restrained by a sense of his own interest. He is checked by remorse or public opinion. But the multitude never calculate; the multitude are never checked by remorse, and will even ascribe to themselves the highest honor, when they deserve only disgrace." Letter to Dr. Price.

6. 1 Black. Comm. 146.

7. 1 Black. Comm. 269. See l Wilson's Law Lectures, 394, 399, 400, 407, 408, 409; Woodeson's Elem. of Jurisp. 53, 56. -- The remarks of Dr. Paley, on the same subject, are full of his usual practical sense. "The first maxim," says he, "of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends. Whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, they must be applied by the other, let them affect whom they will. "For the sake of illustration let it be supposed, in this country, either that, parliaments being laid aside, the courts of Westminster Hall made their own laws; or, that the two hoses of parliament, with the king at their head, tried and decided causes at their bar. It is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is, without any known pre- established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives, to which they owed their origin. These dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals, upon whom its acts will operate; it has no cases or parties before it; no private designs to serve: consequently, its resolutions will be suggested by the consideration of universal effects and tendencies, which always produce impartial, and commonly advantageous regulations. When laws are made, courts or justice, whatever be the dispo-sition of the judges, must abide by them; for the legislative being necessarily the supreme power of the state, the judicial and every other power is accountable to that: and it cannot be doubted, that the persons, who possess the sovereign authority of government, will be tenacious of the laws, which they themselves prescribe, and sufficiently jealous of the assumption of

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dispensing and legislative power by any others." Paley's Moral Philosophy, B. 6, ch. 8.

8. The Federalist, No. 47; Id. No. 22. See also Gov. Randolph's Letter, 4 Elliot's Deb. 133; Woodeson's Elem. of Jurisp. 53, 56. -- Mr. Jefferson, in his Notes on Virginia,[b] has expressed the same truth with peculiar fervour and force. Speaking of the constitution of government of his own state, he Says, " all the powers of government, legislative executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of a despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those, who doubt it, turn their eyes on the republic of Venice. An elective despotism is not the government we fought for; but one, which should not only be founded on free principles, but in which the powers of, government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others " Yet Virginia lived voluntarily under this constitution more than fifty years;[c] and, not withstanding this solemn warning, by her own favorite statesman, in the recent revision of her old constitution and the formation of a new one, she has not in this respect changed the powers of the government. The legislature still remains with all its great powers. No person, however, has examined this whole subject more profoundly, and with more illustrations from history and political philosophy, than Mr. John Adams, in his celebrated Defense of the American Constitutions. It deserves a thorough perusal by every statesman. Milton was an open advocate for concentrating all powers, legislative and executive, in one body; and his opinions, as well as those of some other men of a philosophical cast, are sufficiently wild and extravagant to put us upon our guard against too much reliance on mere authority.[d]

b. Jefferson's Notes, p. 195.

c. See 2 Pitkin's Hist. 293, 299, 300.

d. See 1 Adams's Def. of Amer. Const. 365 to 371.

9. The Federalist, No. 42.

10. The Federalist, No. 47; De Lolme on the English Constitution, B. 2, ch. 3.

11. 1 Black. Comm. 154.

12. The Federalist. No. 47, 48.

13. 1 Amer. Museum, 536, 549, 550; Id. 553; 3 Amer. Museum, 78, 79.

14. The Federalist, No. 48.

15. The Federalist, No. 48.

16. The Federalist, No. 48. See also The Federalist, No. 38, 42.

17. De Lolme, B. 2, ch. 3.

18. The Federalist, No. 48, 49.

19. "Numerous assemblies," says Mr. Turgot, "are swayed in their debates by the smallest motives."

20. See Mr. Jefferson's very striking remarks in his Notes on Virginia, p. 195, 196, 197, 248. In December, 1776, and again, June, 1781, the legislature of Virginia, under a great pressure, were near passing an act appointing a dictator. Ib. p. 207.

21. The Federalist, No. 48, 49.

22. See Jefferson's Notes on Virginia, 195, 196, 197.

23. The Federalist, No. 48.

24. The Federalist, No. 48, 50.

25. 1 Adams's American Constitutions, 105, 106.

26. The history of the former constitution of Pennsylvania, and the report of its council of censors, shows the little value of provisions of this sort in a strong light. The Federalist, No. 48, 50.

27. The Federalist, No. 50.

28. The Federalist, No. 48. -- The truth of this reasoning, as well as the utter inefficacy of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution.[e]

e. The Federalist, No. 50. See 2 Pitkin;s Hist. 305, 306.

29. The Federalist, No. 48, 50, 51.

30. Montesq. Spirit of Laws, B. 11, Ch. 6.

31. The Federalist, No. 47; Id. 38.

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