MONTESQUIEU'S DAY IN COURT: RECOVERING A CLASSICAL UNDERSTANDING OF SEPARATED POWERS

The Supreme Court has developed an increasingly pronounced reliance on Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, as an authoritative voice on American constitutional structure. But the Montesquieu who appears in the *United States Reports* is not the complex, empirical sociologist who authored *The Spirit of Laws* in 1748.[1] This Note argues that neither of the Court's principal approaches to separation of powers — formalism and functionalism — fully engages with the intellectual tradition each claims to inherit from Montesquieu.[2]

The formalist approach treats Montesquieu's maxims as categorical rules demanding firm barriers between the three branches of government[3] when he never argued for such an approach. The functionalist approach, though closer to the mark,[4] fails to grapple with two features of constitutional development that make Montesquieu's specific prescriptions structurally inapt.[5] *First*, his separation of powers was built atop Polybius's theory of mixed government, which balanced distinct

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[1] *See* BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., Batoche Books 2001) (1748).

[2] *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2–4, 6, 10–11, 38, 83, 105 (2d ed. 1998) (distinguishing the "'pure doctrine' of the separation of powers," *id.* at 13, from the theory of mixed government and noting that "[a]lthough [Montesquieu] used the idea of mixed government he did not allow it to dominate his thought," instead "articulat[ing] the elements of the constitution in a different way" to allow "a clearer view" of the functional divisions of government to emerge, *id.* at 105). This Note's claim is about the limits of Montesquieu's authority, not whether formalism lacks independent textual or structural foundations. The Vesting Clauses, the Constitution's enumerated-powers design, and accountability-based structural arguments supply ample, independent grounds for formalist conclusions that don't depend on Montesquieu. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943–46, 1958 (2011).

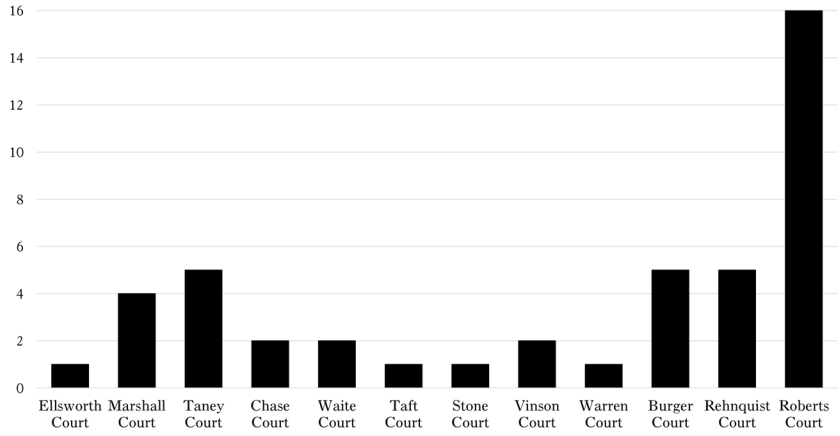
[3] *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117, 2131–32 (2024) (relying in part on Montesquieu for the proposition that the judiciary's adjudication of traditional common law content "cannot be shared with the other branches," *id.* at 2131, because "there is no liberty if the power of judging be not separated from the legislative and executive powers," *id.* (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003))); Bowsher v. Synar, 478 U.S. 714, 721–22 (1986) (invoking "the famous warning of Montesquieu," *id.* at 721, to support the Court's conclusion that the Constitution "provide[s]" for "separate and wholly independent" branches of government, *id.* at 722).

[4] *See* INS v. Chadha, 462 U.S. 919, 999 n.25 (1983) (White, J., dissenting) (observing that "Madison emphasized that the principle of separation of powers is primarily violated 'where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department'" and Montesquieu "did not mean 'that these departments ought to have no *partial agency* in, or . . . *control* over[,] the acts of each other'" (quoting THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison))).

[5] *Cf.* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 804 (2021) (Roberts, C.J., dissenting) (warning that "[a]ny lessons that we learn from the common law [of England], however, must be tempered by differences in constitutional design").

social classes through distinct institutions.[6] The American Constitution has no formal mechanism for class representation. *Second*, Montesquieu envisioned a judiciary that was "in some measure next to nothing"[7] — a set of temporary factfinding panels, not the permanent, powerful institution now policing the boundaries of the other branches and adjudicating public law disputes against the government itself.[8] Both sides invoke Montesquieu; neither has undertaken the sustained engagement with *The Spirit of Laws* needed to illuminate how his thought bears on contemporary structural questions.

FIGURE 1: NUMBER OF CASES CITING OR QUOTING MONTESQUIEU



These points carry increasing practical significance. The Court's invocations of Montesquieu have grown more frequent and consequential,[9] even as constitutional structure has drifted further from the

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[6] *See* 3 POLYBIUS, THE HISTORIES bk. VI, ch. 5, §§ 11–13, at 295–99 (W.R. Paton trans., 1966) (c. 150 B.C.) (describing the Roman mixed constitution as combining monarchical, aristocratic, and democratic elements).

[7] MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 177.

[8] *See id.* at 175 ("[T]he tribunals ought not to be fixed . . . ."); *id.* at 173 (judicial power is limited to "determin[ing] the disputes that arise between individuals").

[9] *See* Figure 1. This data was obtained by searching "Montesqu!" in Westlaw's U.S. Supreme Court Database. For a list of these cases, see Appendix, HARV. L. REV., https://harvardlawreview.org/print/vol-139/montesquieus-day-in-court-appendix [https://perma.cc/WLY8-VKMJ]. *See also* Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1376 (1998) (noting that "virtually all references" to philosophers in the Court's "nineteenth[-]century" opinions "were to Montesquieu, whose *L'Esprit des Loix* was repeatedly cited for propositions of limited government, balance of powers, and the need for virtuous citizens"); Noah A. Rosenblum, Essay, *History and Fetishism in the New Separation of Powers Formalism*, 173 U. PA. L. REV. 2151, 2154, 2181 (2025) (contending that "despite" the Court's "grounding these" recent pro-formalism changes to the separation-of-powers doctrine in "a

arrangements he described.[10] Recovering the historical Montesquieu also carries particular significance for originalist methodology, which claims to reconstruct the Founders' intellectual world.[11] If originalism demands fidelity to Founding-era understandings, it requires grappling with the thinker the Founders most frequently consulted[12] — and with what he actually wrote, not the simplified maxims modern doctrine has substituted for his thought.

This Note proceeds in four parts. Part I demonstrates that Montesquieu was an empiricist in the Aristotelian tradition, not a formalist — recovering his inductive methodology and its implications for constitutional interpretation. Part II identifies the structural transformations rendering his specific prescriptions inapplicable: the disappearance of class-based bicameralism, the transformation of judicial power, and the emergence of public law jurisdiction nowhere contemplated in his framework. Part III argues that Montesquieu's actual views counsel against the very formalism now practiced in his name and may support institutional arrangements — such as independent agencies — that formalists attack. Part IV considers why understanding Montesquieu matters for originalist methodology. A conclusion follows.

I.

The Court's separation-of-powers doctrine is organized around a familiar (albeit contested[13]) axis: formalism versus functionalism.[14] Both sides invoke Montesquieu, but in ways revealing more about the Court's own commitments than his.

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gloss of Montesquieu's arguments, Montesquieu himself is nowhere to be found," *id.* at 2154); *cf.* Cass R. Sunstein, Essay, *Administrative Law's Grand Narrative*, 77 ADMIN. L. REV. 291, 293–96 (2025) (identifying the Court's increasing reliance on separation-of-powers principles as part of the "Grand Narrative," which posits "successive breaches of Articles I, II, and III," *id.* at 296).

[10] *Compare, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing Montesquieu for flexible separation), *and infra* section I.B, pp. 1943–45, *with* SEC v. Jarkesy, 144 S. Ct. 2117, 2131–32 (2024) (citing Montesquieu for rigid separation), *and infra* section I.A, pp. 1942–43. Because pivotal separation-of-powers cases tend to call for Montesquieu's authority, it is unsurprising that citing him has become table stakes for today's most structurally consequential opinions — decisions whose significance extends considerably past the narrow question this Note addresses. *Cf.* Sunstein, *supra* note 9, at 298–306 (summarizing "the largest developments in the field" of administrative law, *id.* at 298).

[11] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (stating originalism "requires immersing oneself in the political and intellectual atmosphere of the time").

[12] *See* Hugo Toudic & Céline Spector, *Montesquieu and* The Federalist*: A Contested Legacy at the American Founding*, 22 EARLY AM. STUD. 80, 81 n.1 (2024) (noting Montesquieu was the Founding Era's "most widely cited political thinker").

[13] *See, e.g.*, Alex Zhang, *Separation of Structures*, 110 VA. L. REV. 599, 606 n.31, 613 & nn.66–67 (2024).

[14] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORN. L. REV. 488, 489 (1987); Manning, *supra* note 2, at 1950–52, 1958–61.

A. The Formalist Montesquieu

Formalist opinions deploy Montesquieu as a source of categorical rules.[15] The method is remarkably consistent: A passage from Book XI, Chapter 6, usually filtered through Hamilton's *Federalist No. 78* or Madison's *Federalist No. 47*, is applied as though it were a constitutional command. Two passages comprise the formalist canon's core. The first warns that concentrating legislative and executive authority in one set of hands generates tyranny — the same body making the law will enforce it oppressively.[16] The second extends the principle to judicial power: When judges also legislate or execute laws, citizens face the arbitrary will of those adjudicating their claims.[17] These passages recur across a line of cases stretching from *Myers v. United States*,[18] through *Clinton v. City of New York*,[19] to *SEC v. Jarkesy*,[20] always deployed as proof that the Constitution mandates strict separation betwixt the branches.[21]

But as Madison demonstrated in *Federalist No. 47* — which hailed "the celebrated Montesquieu" as "[t]he oracle who is always consulted and cited on this subject"[22] — this reading strips Montesquieu's observations from their context. Madison explained that Montesquieu never intended the departments "to have no *partial agency* in, or no *control*

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[15] *See, e.g.*, *Jarkesy*, 144 S. Ct. at 2131–32; Patchak v. Zinke, 138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissenting); Bank Markazi v. Peterson, 578 U.S. 212, 238 (2016) (Roberts, C.J., dissenting); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 116–17 (2015) (Thomas, J., concurring in the judgment) (citing VILE, *supra* note 2, at 63–64); Stern v. Marshall, 564 U.S. 462, 483 (2011); Clinton v. City of New York, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 241–42 (1995) (Breyer, J., concurring in the judgment); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 824 (1987) (Scalia, J., concurring in the judgment); Bowsher v. Synar, 478 U.S. 714, 721–22 (1986); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 388 (1866) (Miller, J., dissenting) ("The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in [*Federalist No. 78*], says that he agrees with the maxim of Montesquieu, that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting THE FEDERALIST NO. 78, *supra* note 3, at 465 (Alexander Hamilton))).

[16] *See* MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 173 (warning "there can be no liberty" when "legislative and executive powers are united in the same person").

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

[18] 272 U.S. 52 (1926).

[19] 524 U.S. 417 (1998).

[20] 144 S. Ct. 2117 (2024).

[21] *See, e.g.*, *Myers*, 272 U.S. at 116; cases cited *supra* note 15. Writing to his brother about Justice Brandeis's anticipated *Myers* dissent, Chief Justice Taft dismissed Senate constraints on removal as mere protection for "the obnoxious person." WALTER STAHR, WILLIAM HOWARD TAFT: A GREAT AMERICAN LIFE (forthcoming Nov. 2026) (manuscript at 645) (on file with the Harvard Law School Library). Yet for Montesquieu, that obnoxious person might be liberty's necessary counterweight. *See infra* notes 118–19, 128 and accompanying text. *But see infra* note 80 and accompanying text.

[22] THE FEDERALIST NO. 47, *supra* note 3, at 298 (James Madison).

over, the acts of each other."[23] To conclude as much, Madison went to the source: He examined the English constitution, where the branches Montesquieu praised were substantially intermingled.[24] The King, acting "alone," promulgated legislation through treatymaking; the House of Lords exercised legislative as well as judicial power via appellate review "in all" cases besides impeachment (where it held original jurisdiction); and judges were "so far connected with the legislative" branch that they "often" participated in legislative "deliberations" alongside lawmakers.[25] Montesquieu nonetheless pronounced this arrangement the constitution of liberty.[26] Madison's conclusion was straightforward: Montesquieu's maxim prohibits only vesting "the *whole* power of one department" in hands already holding "the *whole* power of another"[27] — not partial overlap nor the kind of functional sharing formalists now find intolerable.[28]

Indeed, even leading scholars of classical legal theory like Professor Adrian Vermeule have acknowledged Montesquieu's discussion of executive power is ambiguous on the questions most important to executive unitarians — his equation of one branch of executive power with judging, together with uncertainty about whether domestic regulatory functions fall within his conception of executive authority, leaves the text genuinely indeterminate on the questions formalists treat it as resolving.[29] If the canonical passages cannot answer even the threshold question of what Montesquieu meant by executive power, extracting from it a categorical mandate for particular institutional arrangements overreads the text.

B. The Functionalist Reading

Functionalist opinions, by contrast, hew closer to Montesquieu's text.[30] They acknowledge strict separation is neither possible nor desirable,

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[23] *Id.* at 299.

[24] *Id.* at 298–99 (examining the English constitution, which "was to Montesquieu what Homer has been to the didactic writers on epic poetry," *id.* at 298).

[25] THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison).

[26] MONTESQUIEU, *supra* note 1, bk. XI, ch. 5, at 173 ("One nation there is also in the world that has for the direct end of its constitution political liberty.").

[27] THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison).

[28] *See* Rosenblum, *supra* note 9, at 2181 ("Far from requiring a perfect separation of powers, Montesquieu demanded mixing.").

[29] *See* Adrian Vermeule, *"Some Ordering and Moderating Power": The Unitary Executive as the Guardian of Public Liberty*, SUBSTACK: NEW DIGEST (Nov. 19, 2025), https://thenewdigest.substack.com/p/some-ordering-and-moderating-power [https://perma.cc/AGW9-FUSP] (acknowledging Montesquieu's discussion of executive power in *The Spirit of Laws* "can be confusing if read with modern assumptions" and produces "a kind of stalemate — especially for those who draw upon Montesquieu's writings solely as evidence of the putative original understanding of the constitutional scheme").

[30] *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); Buckley v. Valeo, 424 U.S. 1, 120–21 (1976) (per curiam) ("James Madison, writing in the Federalist No. 47, defended the work of the

reading Montesquieu's warnings as concerns about concentrated power, not as mandates for categorical interbranch boundaries. Take *Loving v. United States*,[31] for instance. There, the Court rejected a nondelegation challenge partly because "a 'hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively'"[32] — a view Montesquieu had introduced through the Framers.[33] Other examples abound. Justice Blackmun upheld the Sentencing Commission in *Mistretta v. United States*,[34] while "recogniz[ing] the continuing vitality of Montesquieu's admonition" against commingling *whole* powers, reasoning the Constitution doesn't require airtight compartmentalization.[35] In *Nixon v. Administrator of General Services*,[36] the Court quoted Madison's qualification approvingly.[37] Justice White's dissent in *INS v. Chadha*[38] concluded (as Madison did) that "the oracle of the separation doctrine, Montesquieu,"[39] never meant branches should "have no *partial agency* in, or *control* over the acts of each other."[40]

Montesquieu's own words confirm the functionalist instinct. He recognized that governmental powers, though distinct, "have need of a regulating power to moderate them"[41] and are "forced to move . . . in concert."[42] The judicial power — which, "in general . . . ought not to be united with any part of the legislative" — should nonetheless be subjected, "in some cases," to legislative review when specific applications of "the law . . . might" prove "too severe."[43] And in cases where an individual "entrusted with the administration of public affairs may infringe the rights of the people, and be guilty of crimes," Montesquieu also saw fit for the legislature to criminally convict the accused.[44]

Framers against the charge that these three governmental powers were not *entirely* separate from one another in the proposed Constitution. He asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct." *Id.* at 120 (footnote omitted).).

31 517 U.S. 748 (1996).

32 *Id.* at 756 (quoting *Buckley*, 424 U.S. at 121).

33 *See* THE FEDERALIST NO. 47, *supra* note 3, at 298–300 (James Madison).

34 488 U.S. 361 (1989).

35 *Id.* at 394; *id.* at 381 (acknowledging the Constitution does not require "hermetic division among the Branches"); *id.* at 380 ("[T]he Framers did not require — and indeed rejected — the notion that the three Branches must be entirely separate and distinct.").

36 433 U.S. 425 (1977).

37 *Id.* at 442–43 & n.5 (stating that Madison and Montesquieu endorse "the more pragmatic, flexible approach" to separation of powers, *id.* at 442, that only prohibits the commingling of "*whole*" powers, *id.* at 442 n.5 (quoting THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison))).

38 462 U.S. 919 (1983).

39 *Id.* at 999 n.25 (White, J., dissenting).

40 *Id.* (quoting THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison)).

41 MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 177.

42 *Id.* at 181; *see* Rosenblum, *supra* note 9, at 2181 & n.211.

43 MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 180.

44 *Id.* at 180–81.

Indeed, Montesquieu "never used the word separation."[45] He instead spoke of a "certain distribution" of powers, a phrase suggesting calibration and balance, not hermetic division.[46] On his view, "two goals" were served by distributing rather than "strictly separat[ing]" the government's three powers: *first*, "the ability" for power to effectively "check power," and *second*, "by means of this very check, it permitted moderation in the government."[47] This is a vision of coordinate powers in dynamic interaction, not sealed compartments with categorical boundaries.[48]

C. The Aristotelian Methodology

The formalism-functionalism debate has obscured something more fundamental about Montesquieu's intellectual project: its Aristotelian character. Understanding this methodology matters not only because it reveals what Montesquieu actually argued but because it bears directly on how his thought should inform constitutional interpretation. *The Spirit of Laws* was greeted upon publication "as the first systematic treatise on politics since Aristotle"[49] — a comparison as methodologically precise as it was flattering. As Professor Céline Spector has demonstrated, Montesquieu's approach owed a specific debt to Aristotle's *Politics*: Both works catalogue and compare actually existing governments in lieu of deriving institutions from abstract premises.[50]

The parallel runs deep. Aristotle collected and analyzed 158 Greek city-state constitutions;[51] Montesquieu ranged across Europe, Asia, and the Americas.[52] Aristotle distinguished constitutional forms by their

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[45] Toudic & Spector, *supra* note 12, at 95.

[46] *Id.* (observing Montesquieu "never used the word *separation* but instead referred to a 'certaine distribution des trois pouvoirs' (certain distribution of the three powers)"). *But see* MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 173 (arguing "there is no liberty, if the judiciary power be not separat*ed* from the legislative and executive" (emphasis added)).

[47] Toudic & Spector, *supra* note 12, at 95.

[48] *See* VILE, *supra* note 2, at 103–04.

[49] *Id.* at 84 (describing *The Spirit of Laws*' reception as "not a desiccated, boring treatise for the expert alone, but rather as a work the brilliant style of which made it an object of attention for all educated men").

[50] Céline Spector, *Aristotle*, A MONTESQUIEU DICTIONARY (Sep. 2013), https://dictionnaire-montesquieu.ens-lyon.fr/en/article/1734044400/en [https://perma.cc/76KR-RTJY] ("For Montesquieu as for Aristotle, the art of politics must be understood *in situ*.").

[51] *See* Fred D. Miller, Jr., *Aristotle's Philosophy of Law*, *in* 6 A HISTORY OF THE PHILOSOPHY OF LAW FROM THE ANCIENT GREEKS TO THE SCHOLASTICS 79, 79 (Fred D. Miller, Jr. & Carrie-Ann Biondi eds., 2d ed. 2015).

[52] *See, e.g.*, MONTESQUIEU, *supra* note 1, bk. VI, ch. 20, at 109 (fathers punished for children's crimes in China and Peru); *id.* bk. XXIII, ch. 13, at 443 (fish diet as cause of "infinite" population in Japan and China); *id.* bk. VI, ch. 16, at 107 (distinguishing robbery from murder: China punishes only murderers severely; Russia punishes both alike, so robbers "always murder"); *id.* bk. X, ch. 16, at 168 (prince maintains independent bodyguard in India, Turkey, and Japan); *id.* bk. XI, ch. 5, at 172–73 (cataloguing each nation's animating principle — Rome dominion, Sparta war, Marseilles commerce, China "public tranquillity," Rhodes navigation, Poland "independence of individuals," *id.* at 172); *id.* bk. XII, ch. 29, at 226 (sacred texts as governing rule: Koran, Zoroaster, Veda, Chinese

internal logic and social conditions;[53] Montesquieu did the same, adding "the quality of [a nation's] soil, . . . the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds[,] . . . the religion of the inhabitants, . . . their inclinations, riches, numbers, commerce, manners, and customs" to the causal inventory, concluding that laws "should be adapted in such a manner to the people for whom they are framed *that it should be a great chance if those of one nation suit another*."[54] Professor Iain Stewart's analysis shows both thinkers combined a commitment to the division of governmental labor with attention to the distribution of political power, though Montesquieu recast Aristotle's entirely political framework in legal terms.[55] And, as Professor Keegan Callanan establishes, this was no casual resemblance: Montesquieu directly appropriated Aristotle's concept of *the regime* as the organizing principle of political life and his method of analyzing how regime types shape citizens' character.[56]

The contrast with the natural law school sharpens the point. Grotius, Pufendorf, and their successors worked deductively — inferring universal legal rules from abstract reason and a hypothesized social contract.[57] Writing in this *Review*'s pages 110 years ago, Professor Eugen Ehrlich — widely regarded as the founder of "the discipline of the

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"classic books"); *id.* bk. XIII, ch. 11, at 238 (contrasting customs enforcement: Turkey single duty; China ignores non-merchant baggage; Mongol territory doubles duty instead of confiscating; Japan makes customs fraud "a capital crime" to bar foreign contact); *id.* bk. XVII, ch. 2, at 291 (Cold climates produce "vigour of body and mind" and "bravery" sufficient for inhabitants of those climates "to maintain their liberties"; hot climates yield despotism — "This has also been found true in America; the despotic empires of Mexico and Peru were near the Line, and almost all the little free nations were, and are still, near the Poles."). *But see, e.g.*, ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 234 (1961) ("Whenever [Montesquieu] wants to support a strange opinion, he quotes you the practice of Japan or of some other distant country, of which he knows nothing." (alteration in original) (quoting JAMES BOSWELL, THE TOUR TO THE HEBRIDES 209 (G.B. Hill & L.F. Powell eds., 1950))).

53 *See* Miller, *supra* note 51, at 88 (discussing "the fruit of Aristotle's extensive empirical study of existing city-states"); *id.* (explaining Aristotle's belief that "the legislator for the best constitution must possess broad knowledge of human cultures and be able to adapt the laws to variable social contexts").

54 MONTESQUIEU, *supra* note 1, bk. I, ch. 3, at 23 (emphasis added).

55 *See* Iain Stewart, *Men of Class: Aristotle, Montesquieu and Dicey on "Separation of Powers" and "the Rule of Law*," 4 MACQUARIE L.J. 187, 199 (2004).

56 *See* KEEGAN CALLANAN, MONTESQUIEU'S LIBERALISM AND THE PROBLEM OF UNIVERSAL POLITICS 32–34 (2018); Nathan J. Pinkoski, *Montesquieu's Liberalism and the Problem of Universal Politics*, BRYN MAWR CLASSICAL REV. (2019) (reviewing CALLANAN, *supra*), https://bmcr.brynmawr.edu/2019/2019.10.02/ [https://perma.cc/NVC9-NCQJ].

57 *See* Enrico Pattaro, *Preface* to 6 A HISTORY OF THE PHILOSOPHY OF LAW FROM THE ANCIENT GREEKS TO THE SCHOLASTICS, *supra* note 51, at xv, xv ("This procedure was common to the entire modern school of natural law." (quoting Andrea Padovani & Peter G. Stein, *Preface* to 7 THE JURISTS' PHILOSOPHY OF LAW FROM ROME TO THE SEVENTEENTH CENTURY, at xi, xv (Andrea Padovani & Peter G. Stein eds., 2007))); *id.* (natural law theorists "forsook all interpretive activity," as, for them, "the source of law no longer lay in the *Corpus Iuris*" but in "the 'nature of things'" — abandoning "three centuries" of textual "exegesis" for deduction from abstract reason (quoting Padovani & Stein, *supra*, at xv)).

sociology of law"[58] — identified Montesquieu as fundamentally opposed to that tradition. Where natural law theorists postulated uniform principles valid everywhere and always, Montesquieu insisted that law varies with its conditions.[59] Ehrlich traced this orientation to Montesquieu's early natural-history training, which instilled the habit of working with principles "not contrived *a priori*" but "derived from facts he collected, scrutinized, and turned over in his mind."[60] Over a decade, Montesquieu gained practical experience serving as an appellate judge (formally, *président à mortier*, because of the attendant headwear) in the Parlement of Bordeaux,[61] although Robert Shackleton records that he "was not a great magistrate" and "was indeed unhappy in court;"[62] his real education instead took place at the Academy of Bordeaux, whose culture of "[e]xperimentalism and hatred of the *a priori*"[63] drove Montesquieu to "rigorous and ruthless" work — vivisecting frogs under a microscope, drowning ducks and geese[64] — that would ultimately shape his approach to *The Spirit of Laws*.[65] Professor Émile Durkheim made the same case in his 1892 Latin thesis, claiming Montesquieu as a founder of social science: the first thinker to study legal institutions as empirical phenomena shaped by discoverable social forces rather than as deductions from first principles.[66]

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[58] *See Eugen Ehrlich*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Eugen-Ehrlich [https://perma.cc/R6F6-J435].

[59] *See* Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 583 (1916) (arguing Montesquieu stood "in strict contradiction to the law-of-nature school," which posited "a uniform, everlasting law to be inferred . . . from a supposed contract . . . essentially identical throughout the whole world"). Montesquieu instead taught "that law depends on multifarious conditions and varies at once with these conditions." *Id.* *But see* Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022, at 13:33 ET), https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html [https://perma.cc/Z2TR-HXBH] (contending classical legal "theory does not even purport to specify the particular institutional rules of any given polity, but leaves those to determination within that polity — first at the level of constitutional law (written and unwritten), and then at successively more specific levels of legislation, administrative action, and judicial application to particular cases").

[60] Ehrlich, *supra* note 59, at 587.

[61] SHACKLETON, *supra* note 52, at 15.

[62] *Id.* at 18.

[63] *Id.* at 23.

[64] *Id.* at 24.

[65] *See id.* at 252 ("Montesquieu sought . . . to link [natural law] with natural science."); *id.* (renowned scientist's contemporaneous comparison of Montesquieu with Isaac Newton).

[66] *See* ÉMILE DURKHEIM, MONTESQUIEU AND ROUSSEAU: FORERUNNERS OF SOCIOLOGY 2 (Ralph Manheim trans., 1960) (characterizing Montesquieu as first to "lay" the "groundwork" for the "science" of sociology by turning away from "the discovery of unquestionable truths" and focusing instead on empirical observation of different societies); *id.* at 48 ("Montesquieu reverts, to a certain extent — but only to a certain extent — to the older conception of social science. Sometimes, to be sure, he is not far from confusing natural laws with rules prescribing proper conduct. But he is far from following in the footsteps of the ancient philosophers who ignore nature as it is and set up another nature of their own."); LOUIS ALTHUSSER, POLITICS & HISTORY 17 (Ben Brewster trans., 1972) ("It is a received truth that Montesquieu is the *founder of political science*."); *id.* at 19–20 (comparing "Montesquieu with the theoreticians who preceded him," *id.* at 20).

The constitutional implications are considerable. An Aristotelian political scientist does his work by cataloguing existing arrangements and identifying the conditions under which they promote or undermine liberty.[67] Montesquieu went further. In fact, Montesquieu's empiricism ran so deep that he declined to be bound by *his own* typologies. Despite organizing *The Spirit of Laws* around republics, monarchies, and despotisms, he described England — conventionally classed as a monarchy — as a nation where the republic concealed itself beneath monarchical forms.[68] The remark is a small but telling piece of evidence: The thinker that formalists claim as an intellectual ancestor treated his own categories as descriptive conveniences to be overridden when functional reality warranted, not as binding classifications dictating legal consequences. Accordingly, when formalists draw categorical imperatives from Book XI, Chapter 6, they are reading Aristotle as though he were Plato — converting empirical observation into ideal form.[69]

D. Observation, Not Prescription

The Aristotelian character of Montesquieu's enterprise is further confirmed by the inductive structure of *The Spirit of Laws* itself. The work catalogs an extraordinary range of factors shaping legal systems: climate, geography, commerce, religion, population, and customs.[70] Montesquieu illustrated the dangers of ignoring these factors through examples of failed legal transplantation: Cretan theft laws that worked harmoniously when brought to Sparta proved incoherent when carried further to Rome, where they bore no relationship to Rome's existing civil-law framework.[71] And Montesquieu was candid about his enterprise's limits, acknowledging uncertainty about whether England actually enjoyed the liberty its laws were designed to produce and declaring it sufficient to examine the legal framework without enquiring further.[72] As Ehrlich expressed it, Montesquieu concerned himself with "what really is," not "what should be."[73] The lesson Montesquieu drew from studying Crete's laws in Sparta and Rome was simple: Legal

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[67] *See* ARISTOTLE, POLITICS bk. IV, ch. 1, 1288b10–41, §§ 1–6, at 154–56 (Ernest Barker trans., Oxford Univ. Press 1948) (c. 384 B.C.) (arguing political science must "not only . . . study the ideally best constitution" but "also . . . study the type of constitution which is practicable," by which Aristotle meant "the best for a state under *actual conditions*," *id.* § 6, at 155 (emphasis added)); *see* Spector, *supra* note 50.

[68] *See* MONTESQUIEU, *supra* note 1, bk. V, ch. 19, at 84; Vermeule, *supra* note 29, at n.4 (discussing Montesquieu's classification of England).

[69] *See* Spector, *supra* note 50 (For Montesquieu and Aristotle, "[a]nalysis of the plurality of existing governments takes precedence over a universalist and abstract approach.").

[70] *See* MONTESQUIEU, *supra* note 1, bk. I, ch. 3, at 23; sources cited *supra* note 52.

[71] MONTESQUIEU, *supra* note 1, bk. XXIX, ch. 13, at 613.

[72] *Id.* bk. XI, ch. 6, at 183 ("It is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further.").

[73] Ehrlich, *supra* note 59, at 584.

arrangements cannot be abstracted from the conditions sustaining them.[74] Extracting universal rules from Montesquieu's catalogue of sociopolitical arrangements, then, does not merely misread the conclusion; it misconceives the enterprise.

E. Liberty as Effect, Not Form

Montesquieu's Aristotelian methodology culminates in a functional rather than formal definition of political liberty — and inasmuch as he prescribed at all, Montesquieu did so to advance this conception.[75] Liberty, according to the oracle, is not a particular institutional arrangement but a felt condition: the "tranquillity of mind arising from the opinion each person has of his safety," achieved when government is constituted such that no individual fears another.[76] Professor Laurence Claus confirms this reading. Montesquieu's appeals to essentialism — his insistence on dividing governmental powers along categorical lines — obscured the functional "criterion" that actually animated his framework: "not whether powers differ in *kind*, but whether apportionment will prevent actors from conclusively determining the reach of their own powers."[77] That is a test of effects, not forms.[78] Thus, in the final analysis, Montesquieu's vast enquiry into the conditions that promote liberty distills to a simple prescription: "[P]ower should be a check to power."[79]

Montesquieu applied this functional logic of liberty to the specific question of how executive officers should be organized. In a passage Vermeule recently unearthed from Montesquieu's *Pensées* (a collection of largely unpublished writings unnoticed in legal literature), Montesquieu posited an inverse relationship between magisterial autonomy and citizens' liberty: Where magistrates are "free" in the sense of autonomous from superior authority, the people they regulate are correspondingly less free; where magistrates are "enslaved" by subordination to an

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[74] *See* MONTESQUIEU, *supra* note 1, bk. XXIX, ch. 14, at 613 ("[W]e must not separate the Laws from the Circumstances in which they were made.").

[75] *See, e.g.*, VILE, *supra* note 2, at 88 ("Montesquieu was concerned with the control of arbitrary power . . . ."); *id.* at 92–93 (England as utopia); SHACKLETON, *supra* note 52, at 269 (tracing Montesquieu's "hatred of despotism" and finding that "[f]rom his earliest to his latest writings [Montesquieu] never expresses a contrary view").

[76] MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 173.

[77] Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 436 (2005).

[78] True, Claus measures the effect at the level of the governors, but the tranquility it produces for the governed is the same effect, just measured from the other side of the coin. *Cf., e.g.*, *infra* note 80 and accompanying text; *supra* note 21 and accompanying text.

[79] MONTESQUIEU, *supra* note 1, bk. XI, ch. 4, at 172 ("[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.").

overarching Executive, the conditions for public liberty are most favorable.[80] The observation is characteristically empirical — drawn from "an analysis of the" English and Dutch "pathologies,"[81] not deduced from first principles — and it evaluates institutional arrangements by their consequences for the governed. Whatever one concludes about Montesquieu's specific prescription, the passage further establishes that he approached executive design through the same consequentialist lens this Note has identified in his treatment of the balance of powers.

II.

Even functionalists who correctly identify Montesquieu's methodology face a problem their jurisprudence has not adequately addressed: His framework was built for a constitutional order that no longer exists.[82] Three of its features — the class-based structure inherited from Polybius, the conception of judicial power as invisible and negligible, and the complete absence of public law adjudication — fit poorly with modern American constitutionalism.

A. The Polybian Inheritance

Montesquieu's balance of powers wasn't conjured from first principles. It transformed a received tradition. Polybius, writing on the rise of Rome in the second century B.C., theorized that simple constitutional forms are inherently unstable — monarchy degenerating into tyranny, aristocracy into oligarchy, democracy into mob rule — in a recurring cycle he called anacyclosis.[83] Rome escaped this fate, Polybius argued, by combining all three elements into a single system, so that each would

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[80] Vermeule, *supra* note 29 (recovering *Pensée* 751 and observing Montesquieu's "striking thought," namely, "a kind of tradeoff in constitutionalism, between the 'slavery' of magistrates and the liberty of the citizens").

[81] *Id.*

[82] *See, e.g.*, U.S. CONST. amend. XVII (abolishing appointed Senate); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 804 (2021) (Roberts, C.J., dissenting) (observing that "[t]he structure and function of eighteenth-century English courts were in many respects *irreconcilable* with" America's tripartite constitutional scheme (emphasis added)).

[83] 3 POLYBIUS, *supra* note 6, bk. VI, ch. 2, § 4, at 275 (describing anacyclosis — the cycle by which "[m]onarchy first changes into its vicious allied form, tyranny; and next, the abolishment of both gives birth to aristocracy. Aristocracy by its very nature degenerates into oligarchy; and when the commons inflamed by anger take vengeance on this government for its unjust rule, democracy comes into being; and in due course the licence and lawlessness of this form of government produces mob-rule to complete the series. The truth of what I have just said will be quite clear to anyone who pays due attention to such beginnings, origins, and changes as are in each case natural."); *see* Marshall Davies Lloyd, Polybius and the Founding Fathers: The Separation of Powers (Sep. 22, 1998) (unpublished manuscript), https://mlloyd.org/mdl-indx/polybius/polybius.htm [https://perma.cc/368R-LMRN] (describing Polybius's "cycle of gradual decline which he calls *anacyclosis*"); Miller, *supra* note 51, at 87 (describing Aristotle's six basic constitutional forms: Kingship/Tyranny; Aristocracy/Oligarchy; Polity/Democracy).

restrain the excesses of the others.[84] The key mechanism was not the separation of governmental functions but the balancing of social forces: The Consuls (who possessed "almost uncontrolled" power when prosecuting wars) represented monarchical authority;[85] the unelected Senate (which, among other powers, exclusively controlled "the treasury, all revenue and expenditure") depended on aristocratic deliberation;[86] and the popular Assemblies (which served as "the only court which may try on capital charges" and "most important of all . . . deliberate[d] on the question of war and peace")[87] stood for democratic participation.[88]

The Founders knew this tradition well. Adams devoted sustained attention to Polybius in his *Defence of the Constitutions*.[89] Indeed, classical references at the Constitutional Convention were so pervasive that "Franklin rose in despair" when "[t]he Convention threatened to degenerate into a classical meeting."[90] Montesquieu, calling Polybius "[t]hat judicious writer,"[91] retained his class dimension throughout Book XI[92]: "[P]ersons distinguished by their birth, riches, or honours," Montesquieu maintained, should not "be confounded with the common people"[93] — a proposition both he and the Founders thought would be well served by bicameralism.[94] And as Professor Maurice J.C. Vile has noted,

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[84] *See* 3 POLYBIUS, *supra* note 6, bk. VI, ch. 5, §§ 15–18, at 303–11 (arguing Rome's greatness derived from its combination of all three simple forms into a single system).

[85] *Id.* § 12, at 297, 299.

[86] *Id.* § 13, at 299.

[87] *Id.* § 14, at 301, 303.

[88] *Id.* §§ 15–17, at 303–09 ("explain[ing] how each of the three parts [the Consuls, Senate, and Assemblies] is enabled, if they wish, to counteract or co-operate with the others," *id.* § 15, at 303, via overlapping control over military affairs, public finance, the administration of justice, and lawmaking procedures); *see also id.* § 18, at 309–11 ("Such being the power that each part has of hampering the others or co-operating with them, their union is adequate to all emergencies, so that it is impossible to find a better political system than this," *id.* § 18, at 309, "because any aggressive impulse is sure to be checked and *from the outset each estate stands in dread of being interfered with by the others*," *id.* § 18, at 311 (emphasis added).).

[89] *See* 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 169, 171–76 (1794) (expressing a "wish to assemble together the opinions and reasonings of philosophers, politicians, and historians, who have taken the most extensive views of men and societies, whose characters are deservedly revered, and whose writings were in the contemplation of those who framed the American constitutions," declaring "that all these characters are united in Polybius," *id.* at 169, and devoting sustained analysis to Polybius's account of Rome's mixed constitution).

[90] Lloyd, *supra* note 83 (quoting Gilbert Chinard, *Polybius and the American Constitution*, 1 J. HIST. IDEAS 38, 48 (1940)).

[91] MONTESQUIEU, *supra* note 1, bk. IV, ch. 8, at 54.

[92] *See, e.g.*, *id.* bk. XI, ch. 17, at 193 ("So great was the share the senate took in the executive power, that, as Polybius informs us, foreign nations imagined that Rome was an aristocracy." (footnote omitted)).

[93] *Id.* bk. XI, ch. 6, at 177; *see id.* ("The legislative power is therefore committed to the body of the nobles . . . .").

[94] *See id.* (arguing aristocrats ought to "form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs"); 1 THE FOUNDERS'

Montesquieu's references to the "three powers" sometimes meant the King, Lords, and Commons — *i.e.*, the Polybian social estates of the one, the few, and the many — instead of the functional triad of powers distributed among the legislature, executive, and judiciary.[95]

B. The Invisible Judiciary

Montesquieu described the judiciary in terms bearing no discernible relationship to modern American practice. Of the three governmental powers, he wrote, "the judiciary is in some measure next to nothing," leaving only two (executive and legislative) that truly counted in his mind.[96] He envisioned not professional judges but temporary tribunals composed of laypeople, assembled for particular cases and dissolved once their work was complete.[97] Judges were to function as nothing more than the inert media through which legislative language passed — "mere passive beings, incapable of moderating either [the law's] force or rigour."[98]

CONSTITUTION 312 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that "no political authority was invoked more often than 'the celebrated Montesquieu'" by early Americans); *id.* ("Separation of powers here reinforces or even merges into balanced government. . . . Thanks to bicameralism, the licentiousness of the many and the encroachments of the few are alike checked. The nobility mediate between a potentially overbearing lower house and the executive.").

95 *See* VILE, *supra* note 2, at 59.

96 MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 177.

97 *Id.* at 174–75 ("The judiciary power . . . should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires." (footnote omitted)); Manning, *supra* note 2, at 1995 n.281 ("Montesquieu had thought the judicial power would be exercised by ad hoc juries . . . . " (citing VILE, *supra* note 2, at 113–14)).

98 MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 180 ("[T]he national judges are no more than the mouth that pronounces the words of the law . . . ."); *see* VILE, *supra* note 2, at 98 (tracing "[t]his mechanical view" of judging to Lilburne and Harrington and observing Montesquieu's "insistence that in republics the judges must abide by the letter of the law," because judicial discretion would "expose" citizens "to the danger that the private opinions of the judges might render the laws uncertain, and that people would then live in society 'without exactly knowing the nature of their obligations'" (quoting MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 175)); SHACKLETON, *supra* note 52, at 18 ("Nowhere [in his judicial writings] is there any trace of a personal opinion of Montesquieu."). *But see* Lukas van den Berge, *Montesquieu and Judicial Review of Proportionality in Administrative Law: Rethinking the Separation of Powers in the Neoliberal Era*, 10 EUR. J.L. STUD. 203, 205 & nn.7–8, 209–13, 209 nn.17–18 (2017) (arguing that even though popular American, Dutch, and French accounts understood Montesquieu to propose this mechanical view, his "*bouche de la loi*," *id.* at 210, metaphor doesn't entail judging-as-mechanics but instead emphasizes that judges, relative to the legislature and executive, perform independent tasks). Resolving this interpretive dispute is beyond this Note's scope, but suffice it to say that van den Berge reinforces this Note's central claim on both descriptive and normative grounds. *Id.* at 206 ("Contrary to widespread belief, the *trias politica* as an ideology of disjointed powers and separate domains cannot be traced back to Montesquieu's own writings, but only to their philosophical rebuttal and inaccurate reception in subsequent times."); *id.* at 233 ("Only a constitution that is permeated with the idea of force and counterforce (*le pouvoir arrête le pouvoir*), envisioning the *trias politica* as a precarious balance in which none of the actors claims the final say, will ultimately deliver the checks and balances that we need in modern society.").

Claus identified the underlying error: Montesquieu equated the entire judicial function with the factfinding work of juries — similar to Guernsey's modern-day Jurats[99] — failing to grasp that English courts elaborated legal rules through their decisions.[100] He understood neither the common law nor precedent's binding force within a judicial hierarchy.[101] Claus poses the uncomfortable counterfactual: Had Montesquieu appreciated that English judges both found facts *and made law*, his framework would have required classifying judicial lawmaking as an exercise of legislative power — a conclusion that in turn collapses the tripartite scheme from within.[102]

The American judiciary that emerged could hardly be more distant from this vision. From *Marbury*'s establishment of judicial review to *Chevron*'s recent overruling, federal courts have exercised powers Montesquieu never contemplated.[103] Hamilton began this transmutation in *Federalist No. 78*, appropriating Montesquieu's vocabulary of judicial weakness while simultaneously embracing a judiciary vested with the power to pronounce legislative acts unconstitutional.[104] Vile documents the intellectual pathway through Blackstone, who served as "the essential" intermediary between Montesquieu's conception of judging and Chief Justice Marshall's practice of the same.[105] But the distance between Montesquieu's "next to nothing" and the modern judiciary's constitutional supremacy is not a gap formalist doctrine can bridge by citation alone.

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[99] *See The Jurats of the Guernsey Royal Court (Jurés-Justiciers de la Cour Royale) are Judges of Fact*, ROYAL CT. GUERNSEY, https://www.guernseyroyalcourt.gg/article/3089/Jurats [https://perma.cc/7MF8-ZM6A] ("There is no jury system in Guernsey. The Jurats act as a jury, and are judges of fact in both civil and criminal cases.").

[100] Claus, *supra* note 77, at 420, 422 (arguing Montesquieu believed "[j]udging did not involve elaborating law; it involved deciding who was telling the truth," *id.* at 422, and he therefore "distinguish[ed] and . . . trivializ[ed] the English judicial function as merely ad hoc determination of disputed facts," *id.* at 420).

[101] Toudic & Spector, *supra* note 12, at 101 n.68 ("According to Claus, 'Montesquieu did not understand the nature of the Common law' and did not notice the binding nature of precedent within a judicial hierarchy." (quoting Claus, *supra* note 77, at 431)). Claus argues this was both theoretically and empirically erroneous: Montesquieu assumed sovereign power could not be divided except along essentialist lines and failed to observe how English courts actually operated. *See* Claus, *supra* note 77, at 425–26.

[102] Claus, *supra* note 77, at 433.

[103] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261–62, 2273 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Sunstein, *supra* note 9, at 302 ("*Loper Bright* should be seen as our *Marbury*.").

[104] THE FEDERALIST NO. 78, *supra* note 3, at 464–65 (Alexander Hamilton) (arguing the judiciary "will always be the least dangerous to the political rights of the Constitution" because it possesses "neither FORCE nor WILL but merely judgment," *id.* at 464).

[105] VILE, *supra* note 2, at 114; *see* PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 6 (2003) (tracing how "Montesquieu's notion of subtle judges" paradoxically "liberalized law and judging" beyond their intended roles); *id.* at 25 ("Montesquieu's judges . . . lack a power of judicial review.").

C. The Missing Jurisdiction

A third structural gap has received less attention but is equally consequential. Montesquieu's definition of judicial power is strikingly narrow: The magistrate "determines the disputes that arise *between individuals*."[106] Absent entirely is any role for the judiciary in disputes between the citizen and the state — what modern lawyers call public law. Montesquieu's judiciary cannot review executive action, cannot invalidate legislation, and cannot police turf disputes between the political branches. By omitting all internal executive acts from judicial cognizance, Montesquieu leaves the boundary between executive authority and judicial power gravely indeterminate.[107]

But the gap between Montesquieu's judiciary and America's runs deeper than jurisdiction. Professor Michael Zuckert catalogued four fundamental points of divergence: Montesquieu's judiciary "is essentially the jury"; it operates "via strict subordination" to legislative text rather than "pass[ing] judgment on the laws" themselves; it "is eminently a popular branch," unlike today's branch staffed by elite lawyers; and it "plays no part in the scheme of checks and balances," whereas the American judiciary became "the granddaddy of all checking institutions."[108] The Convention inverted every one of these features, "turn[ing] the jobs" of three separate institutions "over to the judiciary" and arming it with the very powers Montesquieu denied it[109] — producing what Professors Nikolas Bowie and Daphna Renan call a "juristocratic separation of powers."[110] Hugo Toudic and Céline Spector confirm: Montesquieu "had no notion of the judiciary serving as a constitutional court."[111] Instead, "[t]he honor of that innovation is generally held to belong to the Americans."[112]

III.

The structural gaps identified in Part II don't render Montesquieu irrelevant. Much can be gained by reprising his method of enquiry and his animating commitment to dispersing authority as liberty's best safeguard. Invoking his authority, however, requires acknowledging the distance between his framework and modern practice.

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106 MONTESQUIEU, *supra* note 1, bk. XI, ch. 6, at 173 (emphasis added).

107 VILE, *supra* note 2, at 95.

108 Michael Zuckert, *Natural Rights and Modern Constitutionalism*, 2 NW. J. INT'L HUM. RTS. 1, § 3, para. 1 (2004).

109 *Id.* § 3, para. 8.

110 *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2025 (2022) (emphasis omitted) (explaining that Montesquieu and others "first popularized the separation of the legislative, executive, and judicial powers" in systems whereby branches "enforced [their] own prerogatives through political negotiation and statecraft").

111 Toudic & Spector, *supra* note 12, at 100.

112 Zuckert, *supra* note 108, para. 1.

A. Independent Agencies and the Logic of Nondelegation

Consider independent agencies — the perennial target of the Court's formalist revival.[113] For Montesquieu, distributing powers served a functional purpose: preventing tyranny through the checking of power by power.[114] But for the Court's new formalism, as Professor Noah Rosenblum argues, separation has become "a sacred practice" valued for its own sake.[115] Yet even the First Congress didn't follow formalist orthodoxy: Professor Christine Chabot documents seventy-one sets of statutory provisions (from that Congress) inconsistent with conventional, originalist accounts of unitary executive power.[116]

Independent agencies, vested with regulatory authority and partially insulated from presidential control, can plausibly be understood as more faithful to Montesquieuian principles than the formalist alternative. By distributing regulatory authority across institutional actors with different constituencies and incentive structures, such agencies replicate "the checking" the Polybian-Montesquieuian tradition was designed to achieve.[117] The formalist demand for a unitary executive branch answerable only to the President thus "paradoxically"[118] consolidates power in the manner Montesquieu found most dangerous.[119] As

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[113] *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); Sunstein, *supra* note 9, at 299.

[114] *See supra* section I.B, pp. 1943–45.

[115] Rosenblum, *supra* note 9, at 2184 ("For Montesquieu, separation of powers was a principle of institutional design; in the new formalism, it is a sacred practice."). *Cf.* Sunstein, *supra* note 9, at 306 (observing Grand Narrative's power lies in "its simplicity" and "narrative resonance" — "a familiar tale of a rise (the founding), a fall (the New Deal), and a possible redemption" (footnotes omitted)).

[116] Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 133 (2022).

[117] *See* VILE, *supra* note 2, at 19, 102–06 (explaining Montesquieu's "transformation of the theory of mixed government . . . into a set of checks and balances in a system of agencies separated on a functional basis," *id.* at 105–06, served to prevent tyranny through institutional fragmentation).

[118] Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2470 (2017) (emphasis omitted) (quoting JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938)).

[119] *See id.* at 2467–70 (discussing how modern-day administrative processes may properly be seen as *more* faithful to Polybius's and Montesquieu's balance of powers theory); *id.* at 2470 ("The creation of administrative power may be the means for the preservation of that balance, *so that paradoxically enough*, though it may seem in theoretic violation of the doctrine of the separation of power, *it may in matter of fact be the means for the preservation of the content of that doctrine*." (emphasis partly omitted) (quoting LANDIS, *supra* note 118, at 1)); *id.* ("The underlying instinct is to recreate original checks and balances in new forms. That instinct ultimately flows, via Montesquieu, from the balance-of-powers tradition in political thought."); van den Berge, *supra* note 98, at 203, 207, 227–33 ("Ironically, Montesquieu's *Spirit of the Laws* provides a conceptual understanding of the three branches' interrelation that may offer a viable way forward for a system of review of government actions that is more responsive to the needs of modern times." *Id.* at 207). *But see* Vermeule, *supra* note 29 (recovering Montesquieu's unpublished (and therefore "non-originalist") warning that without a paramount executive — an "ordering and moderating power" (quoting MONTESQUIEU, MY THOUGHTS, pensée 751, at 223 (Henry C. Clark ed. & trans., 2012)) — subordinate magistrates become "petty tyrants" exercising a dispersed authority more corrosive of

Vermeule rightly observes, separation of powers and the unitary executive thesis concern analytically distinct questions: the former addresses *horizontal* distribution among the branches, the latter *vertical* hierarchy within the executive.[120] Montesquieu's warnings about concentrated power in Book XI speak to the horizontal question. They don't resolve the vertical one. A court invoking separation of powers to mandate presidential control over subordinate officers thus deploys a principle designed for one problem to answer another.

Similar reasoning applies to the nondelegation doctrine. A judicially enforced prohibition on legislative delegation — one that finds no textual basis in the Constitution and relies on maxims Montesquieu never intended as rules[121] — would amount to "siding with the Anti-Federalists" against the institutional choices the Framers actually made.[122] On Montesquieu's own terms, the question isn't whether a delegation transgresses a categorical boundary but whether the particular delegation at issue leaves authority effectively checked. And as the next section demonstrates, that enquiry requires empirics.

B. The Empirical Question

Montesquieu didn't pronounce a particular configuration correct in the abstract; he examined whether arrangements actually produced liberty.[123] The implication for modern courts is that institutional design presents an empirical question, not a taxonomic one. The enquiry asks whether a given arrangement forestalls the dangerous concentration of

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liberty than concentrated rule (quoting MONTESQUIEU, *supra*, pensée 655, at 205)). The argument deserves serious engagement, but its force depends on institutional context: The Dutch magistrates Montesquieu described temporarily exercised essentially unsupervised authority. *See* HERBERT H. ROWEN, THE PRINCES OF ORANGE 148–62 (1988) (magistrates "were little local absolutists," *id.* at 151). Modern independent agencies, by contrast, operate within a web of constraints like legislative oversight, budgetary control, and judicial review — constraints distinguishing them from the provincial magistracies Montesquieu condemned and that provide precisely the "ordering and moderating" function he thought necessary albeit through different institutional means. Vermeule, *supra* note 29 (quoting MONTESQUIEU, *supra*, pensée 751, at 223).

120 Vermeule, *supra* note 29. *But see, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191–92 (2020) (treating separation of powers and unitary executive control as mutually reinforcing instead of analytically distinct enquiries).

121 *See, e.g.*, CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1493–94 (2024) (Alito, J., dissenting) ("Under this interpretation, the Clause imposes no temporal limit that would prevent Congress from authorizing the Executive to spend public funds in perpetuity. Contra, Montesquieu, The Spirit of the Laws, bk. XI, ch. VI, p. 160 (O. Piest ed., T. Nugent transl. 1949) (warning that a legislature will lose its power of the purse if it passes an appropriation that lasts 'forever')."); Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 725–26, 741 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 350–55 (2021); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722, 1740–41 (2002) ("The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory." *Id.* at 1722).

122 Eggert, *supra* note 121, at 741; *see* Mortenson & Bagley, *supra* note 121, at 350–55.

123 *See supra* sections I.D–E, pp. 1948–50.

authority — measured by its effects on the governed, not by reference to labels.

This empirical orientation demands engagement with institutional reality over theoretical doctrinal purity. Does an independent agency, insulated from direct presidential control, diffuse authority in ways that promote liberty? Does the combination of rulemaking and adjudicative functions within a single body generate the kind of concentrated power Montesquieu warned against, or does it operate under sufficient constraints — judicial review, congressional oversight, budgetary cotrol — to prevent abuse? These are questions of empirical fact and institutional design, not ones resolvable by merely looking to the form a particular power takes.[124]

Consider, for instance, the arrangement invalidated in *Jarkesy*: the SEC's exercise of adjudicative authority over civil penalties.[125] The formalist majority, relying in part on Montesquieu, treated the combining of prosecutorial and adjudicative functions as a *per se* separation-of-powers violation.[126] A Montesquieuian analysis would ask a different question — whether the arrangement, in practice, concentrated unchecked authority in ways that threatened the liberty of the governed. The answer is not obvious. SEC administrative proceedings are subject to appellate judicial review, governed by the Administrative Procedure Act's procedural protections, constrained by congressional oversight of the agency's budget and jurisdiction, and limited by due process requirements the agency cannot waive.[127] Whether these constraints suffice is debatable, but it is an empirical debate about institutional design — precisely the kind of enquiry Montesquieu's method demands and precisely the kind formalism forecloses.[128]

Madison's own treatment of Montesquieu illustrates the approach. Even Madison's sharpest critique — his 1793 "Helvidius" essays, which accused both Locke and Montesquieu of being "evidently warped by a regard to the particular government of England" — was confined to the narrow question of whether treaty and war powers are executive or

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[124] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 520–22 (2010) (Breyer, J., dissenting).

[125] *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2126 (2024).

[126] *Id.* at 2131–32.

[127] *Id.* at 2155, 2159 & n.4 (Sotomayor, J., dissenting); *see* Steadman v. SEC, 450 U.S. 91, 96–97 (1981).

[128] *Cf., e.g.*, Vermeule, *supra* note 118, at 2468–72 (reading Landis as situating independent agency tribunals within Montesquieu's balance-of-powers tradition: concentrated corporate power — analogized to the Stuarts' sovereignty — demands a new institutional counterweight, and such tribunals (subject to Article III review) supply it while fulfilling their "ultimate purpose of counterbalancing presidential power," *id.* at 2472, via "*a rough process of institutional optimization*," *id.* at 2471 (emphasis added)); Vermeule, *supra* note 29 (Montesquieu comparing empirical conditions of Dutch liberty with and without Stadholders).

legislative.[129] On the general separation principle, by contrast, Madison's praise was unqualified: Montesquieu's contribution lay in "enforcing the reasons and the importance of avoiding a confusion of the several powers of government," rather "than by enumerating and defining the powers which belong to each particular class."[130] The distinction is telling. Madison read Montesquieu as a thinker who explained *why* power must be dispersed, not as one who specified *how* to achieve that aim, let alone in the contingent institutional circumstances of a nascent America. The modern Court has inverted that emphasis.

IV.

The conclusions above carry particular implications for originalist methodology, which claims to recover (and ground interpretation in) the intellectual context in which the Constitution was ratified.[131] While the historical record is too rich for this Note to fully canvass, the portions surveyed here confirm that the Founding generation engaged seriously with Montesquieu, understood his empirical character, and, taking seriously his admonition not to mechanically transplant laws from Crete to Rome, adapted his prescriptions to American conditions.[132] For starters, Montesquieu was the most frequently cited European thinker in American political writings between 1760 and 1805, appearing more often than Locke, Blackstone, or any other secular authority.[133] He permeated the Federalist Papers, the Anti-Federalist writings, and the Convention debates.[134] Both Federalists and Anti-Federalists claimed Montesquieu for their side[135] — itself evidence of sustained, interpretive engagement with his life's work.

Madison's treatment in *Federalist No. 47* remains the paradigm: He examined Montesquieu's source, analyzed the English constitution, and concluded that the maxim prohibited only the concentration of "*whole* power[s]."[136] Governmental practice "in the early republic" was, as Rosenblum establishes, "flexible and pragmatic, without a clear line

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[129] James Madison, Letters of Helvidius No. 1 (Aug.–Sep. 1793), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 138, 144 (Gaillard Hunt ed., 1906).

[130] *Id.*

[131] *See* Scalia, *supra* note 11, at 856–57.

[132] *See* Toudic & Spector, *supra* note 12, at 100–04 (arguing both Madison and Hamilton simultaneously relied on and transformed Montesquieu's ideas); Vermeule, *supra* note 59 (circumstantial institutional specification).

[133] Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 189–95 (1984).

[134] *See* Toudic & Spector, *supra* note 12, at 81–84 (discussing Federalist and Anti-Federalist treatment of Montesquieu); Lloyd, *supra* note 83 (recounting Montesquieu's influence on Convention delegates).

[135] *See* Toudic & Spector, *supra* note 12, at 100–04; 1 THE COMPLETE ANTI-FEDERALIST 95 (Herbert J. Storing ed., 1981).

[136] THE FEDERALIST NO. 47, *supra* note 3, at 299 (James Madison); *see id.* at 301–03.

separating powers from each other."[137] Indeed, Madison's own survey of state constitutions found no instance in which strict separation was actually maintained.[138] And Chabot's documentation of seventy-one First Congress statutes inconsistent with unitary executive orthodoxy, together with Professors Julian Davis Mortenson and Nicholas Bagley's analysis of the post roads debates as incompatible with a strong-form nondelegation doctrine, confirms the pattern.[139] Recovering the historical Montesquieu, Rosenblum therefore argues, "point[s] away from the Court's new separation of powers formalism on the Court's own terms."[140]

One might object that the Founders explicitly departed from Montesquieu on judicial power, creating a permanent judiciary with authority to review the constitutionality of legislation. This is true — and the departure was knowing. Hamilton borrowed Montesquieu's language of judicial passivity,[141] while authorizing a judicial role that was anything but. The resulting synthesis was distinctively American: neither pure Montesquieu nor pure rejection, but a creative transformation of his principles for a society the Founders understood to differ from his. Modern courts should approach his work with comparable sophistication.[142]

CONCLUSION

The Supreme Court has made Montesquieu a regular presence in separation-of-powers disputes, but it hasn't reckoned with what he actually wrote. Formalists invoke him as a Platonic idealist when he was an Aristotelian empiricist. Functionalists haven't addressed how far modern institutions have drifted from Montesquieu's: The class-based legislature is gone, judicial power has been transformed beyond recognition, and public law adjudication has emerged from whole cloth.

None of this makes Montesquieu irrelevant. His central insight — liberty requires fragmenting and precariously balancing authority against itself — remains as vital as ever. And his Aristotelian method provides a model for more rigorous constitutional analysis than either formalist deduction or functionalist improvisation.

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137 Rosenblum, *supra* note 9, at 2173 (describing the Founders' "high tolerance for cross-branch engagement").

138 *See* THE FEDERALIST NO. 47, *supra* note 3, at 303–08 (James Madison) (surveying state constitutions and finding no instance of strict separation in actual practice); VILE, *supra* note 2, at 254–56.

139 Chabot, *supra* note 116, at 133; Mortenson & Bagley, *supra* note 121, at 350–55.

140 Rosenblum, *supra* note 9, at 2185.

141 *See* THE FEDERALIST NO. 78, *supra* note 3, at 464 (Alexander Hamilton) (insisting judiciary possesses "neither FORCE nor WILL but merely judgment").

142 For a recent, nuanced appeal to Montesquieu, see *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628, 683 n.2 (2026) (Thomas, J., dissenting) (observing that Montesquieu, among others, "distinguished the three core functions of government from the institutions that would exercise them in any given polity.").

But citation carries responsibilities. Courts invoking Montesquieu should engage with his text, acknowledge the distance between his framework and modern institutions, and recognize his method counsels against the very formalism claiming his authority. Montesquieu's concern was preventing the accumulation of arbitrary power, not enforcing a rigid tripartite architecture — and arrangements distributing authority across multiple centers of accountability may serve his purposes better than concentrating executive power in a single pair of hands.

Montesquieu's own warning about uprooting laws from their native conditions applies with particular force to the transplantation of his own maxims: "[W]e must not separate the Laws from the Circumstances in which they were made."[143] The Montesquieu who emerges from careful reading is more useful than the mechanical oracle that modern jurisprudence has constructed — and recovering him would bring the Court closer to the tradition it rightly claims to honor.

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[143] MONTESQUIEU, *supra* note 1, bk. XXIX, chs. 13–14, at 613; *see also* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 804–05 (2021) (Roberts, C.J., dissenting) (cautioning against transplanting English common law remedies into Article III analysis under the U.S. Constitution because the two nations' Founding-era separations of powers reflected a "difference in organization" that in turn "yielded a difference in operation" for their courts' respective jurisdictions, *id.* at 804).