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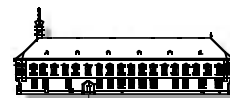
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Montesquieu's So Called 'Separation of Powers' in the Context of the History of Ideas

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INTRODUCTION

In this paper I shall attempt to justify three hypotheses: (i) that the mixed constitution and the separation of powers are merely different aspects of the same phenomenon; (ii) that a mixed constitution with separation of powers has assumed different guises in intellectual and constitutional history; and (iii) that its core substance remains unaltered nonetheless.

I shall begin with Montesquieu, then take two steps back to James Harrington and Donato Giannotti, and finally move on to the Founding Fathers of the American Constitution. In the course of this trajectory I shall disregard other important documents on mixed constitutions and the separation of powers. In other words, I shall focus on a few 'selected highlights'.

MONTESQUIEU, 1748

For thirty years I have been waging a fruitless battle against the mistaken notion that government is equal to the executive and that parliament is equal to the legislature. These are misconceptions because there exists no political regime based on the separation of powers in which all executive power, but no other power, is in the hands of the government, while all legislative power, but no other power, is in the hands of parliament. It is incumbent upon the government not only to act as the executive, but also to lead and guide the state. By laying the groundwork for legislation, the government also has a share in legislative power. Parliament routinely has functions other than purely legislative ones, notably in matters of elections and foreign policy. Through its controlling function in relation to the government, it also shares in executive power. This line of argument momentarily seems to convince my students, but before long they revert to their habitual terminology, speaking of the executive when they mean to refer to the government and of the legislature when they mean to refer to parliament. What is the cause of this? On the one hand, the indoctrination that they receive in their high-school civics classes and on

the other, the mistaken notions that my colleagues in the law faculty continue to propagate at every opportunity.

Montesquieu is not blameless in the matter. He was, in truth, inclined to use the terms ‘powers’, ‘functions’, and ‘departments’ interchangeably. He was not a stickler for conceptual consistency: his purpose was not to provide his public with reading material, but to give them food for thought (Montesquieu, 1748, XI, 20). Nevertheless, his terminological vagueness has subsequently induced superficial readers, particularly those with only a second-hand acquaintance with his work, to propagate the doctrine of a strict separation of powers, the legislative power being attributed to parliament, the executive power to the government, and the judicial power to the courts. Montesquieu did not have this in mind at all. Indeed, he never used the term ‘separation of powers’. Rather, he cautiously referred to a “certain distribution of powers” (Montesquieu, 1748, XII, 1),¹ as well as “balancing” (Montesquieu, 1748, XI, 18), “controlling” (Montesquieu, 1748, XI, 4), “tempering”, and “combining” powers (Montesquieu, 1748, V, 14). In his model of a liberal political order, the three powers are sometimes separated and sometimes combined.

Montesquieu combined three powers, three social forces, and seven governmental branches.² In his writings, he expounds the view that each state has three powers: “legislative power”, “executive power”, and “judicial power”. In line with his English model, the people, the hereditary nobility, and the hereditary monarch are identified as the three social forces. The seven branches are the electorate, the lower house of parliament, the jury, the upper house of parliament, the upper court, the king, and the ministers (Table 1). Montesquieu subdivided the three powers into several competencies, bundled together individual competencies from two or three powers, and attributed one such bundle

1. See also vol. XI, pp. 7, 14 (Title), 20.

2. See Riklin (1989).

of competencies to each of the various branches and social forces. From the seemingly simple but in fact highly complex chapter on England in *De l'esprit des lois* (Montesquieu, 1748, XI, 6) we can deduce the main rules provided by his model for the purpose of getting all the different components to work in concert:

Powers Social Forces	Legislative power	Executive power	Judicial power
People (voting population)	Lower Chamber	Lower Chamber	Lower Chamber Jury
Nobility	Upper Chamber	Upper Chamber	Upper Chamber Nobility Court
King	King	King Ministers	***

Table 1 Montesquieu's Mixed Constitution and Division of Power

Rule 1: No two, let alone all three powers should ever be under the sole control of a single social force or governmental branch.

Although the legislative power is concentrated primarily in the hands of two social forces, the people and the nobility—that is, in the two-chamber parliament—the king participates in legislation (“*prend part à la législation*”) through his legislative veto. Conversely, the parliament shares executive power by overseeing the proper execution of laws by the government and by exercising its right to call ministers to account.

Rule 2: None of the three powers should be entrusted exclusively to a single social force or governmental branch.

Legislation is distributed among all three social forces and three branches of government; executive power also rests in the hands of all three social forces and four branches of government, while judicial power rests with two social forces and four branches of government.

Rule 3: Each social force must have a share in the three powers

commensurate with the extent to which it is subject to that power.

The king has no share in judicial power, but nor is he subject to it.

Rule 4: The general will is formed, not on the basis of equality among individuals, but rather on the basis of the equality and independence of each social power, irrespective of the number of its members.

The king, who is just one individual, and the nobility, which constitutes only a minority, cannot be overruled by the majority of the people and its representatives.

This summarises what Montesquieu really had in mind. Montesquieu was concerned not so much with ensuring the separation of powers as with creating a subtle network of separation and mixing, of ‘checks and balances’, that is, of restraints, counterweights, and balances.

The mixed constitution is part and parcel of this model of the division of powers. A mixed constitution in its most general definition implies the institutional combination of monocratic, oligocratic, and/or democratic elements, in which all the social forces have a say. Hannah Arendt speculates that Montesquieu might not have been familiar with the idea of a mixed constitution (Arendt, 1963, 195). In Robert Shackleton’s view, Montesquieu never envisaged the English constitution as a *mixed state* (Shackleton, 1961, 298f). Both these views are certainly wrong. Montesquieu explicitly mentions the idea of a mixed constitution in his work in several places (Montesquieu, 1748, XI, 8, 12).³ While he does not specifically mention mixed constitutions in his chapter on England, there is no question that it satisfies all the criteria of a *mixed government*: the monocratic element is embodied by the king, the oligocratic element by the upper chamber, and the democratic element by the lower chamber, the juries, and the electorate.

3. See also Montesquieu, ‘Pensées’, in *Oeuvres complètes*, vol. 2, p. 441.

HARRINGTON, 1656

In his chapter on England, Montesquieu mentions two English authors in connection with mixed constitutions: Algernon Sidney and James Harrington. He has a favourable view of the first author, but not of the second. Here and elsewhere he has no good word for Harrington, whom he accuses of having nothing but the English republic in mind (Montesquieu, 1748, XXIX, 19) and of seeking political freedom all over the heavens, instead of looking for it right under his nose in the traditional English constitution: “*il a bâti Chalcédoine, ayant le rivage de Byzance devant les yeux*” (Montesquieu, 1748, XI, 6). Harrington does not deserve the first reproach, as he is one of the few authors, either before or since, to have delved extensively into the intellectual and constitutional history of other countries. As for Montesquieu's puzzling second reproach, we must consult Herodotus: the Persian general Megabazos is said to have remarked that the Chalcedonians, who built their city before the Byzantines, must have been blind to have chosen a bad site for their city when a more attractive one was still vacant (Herodotus, IV, 144, vol. 1, 307).

Montesquieu's partially unfair and partially sibylline attacks on Harrington begin to make sense when we examine the contrasting concepts of mixed constitutions favoured by the two thinkers. Let us examine for this purpose a passage in *De l'esprit des lois* in which Montesquieu undoubtedly had Harrington in mind, without explicitly mentioning him (Montesquieu, 1748, XI, 8). Montesquieu wrote that, after the fall of the Roman Empire, the free German tribes had developed a political system in which a representative popular assembly mingled aristocratic and monarchic elements. This “Gothic government” had subsequently spread throughout Europe. By combining the civic freedom of the people with the prerogatives of the nobility, the clergy, and the king, it had attained an unprecedented ‘well-tempered harmony’. Out of the evildoings of a conquering people there thus sprang the best conceivable

form of government.

It was precisely against this corrupt, diseased, and absurd “Gothic regime” that Harrington had taken up arms (Harrington, 1656, 161, 164, 191). With bitter irony he compared this alleged masterpiece of modern wisdom to a perpetual “wrestling match”, in which might made right (Harrington, 1656, 196). He abhorred all the monarchic regimes of his time and in particular rejected those whose constitution combined a monarch and an upper and lower chamber, such as the one that prevailed in England before and after the Interregnum (1649–60). Both Montesquieu and Harrington advocated a mixed constitution with division of power; but the former, like Sidney, argued for a constitution based on heredity, while the latter favoured one based on property. Harrington was not blind, as Montesquieu supposed; he merely differed in his views from his French critic.

James Harrington, more than almost any other political thinker, can be aptly characterized as the spokesman for a mixed constitution with separation of powers because he explicitly linked the two concepts.⁴ In a key passage in *Oceana*, he declared:

wherefore as those two orders of a commonwealth, namely the senate and the people, are legislative, so of necessity there must be a third to be executive of the laws made, and this is the magistracy; in which order with the rest, being wrought up by art, the commonwealth consisteth of the senate proposing, the people resolving, and the magistracy executing, whereby partaking of the aristocracy as in the senate, of the democracy as in the people, and of monarchy as in the magistracy, it is complete.

(Harrington, 1656, 174)

This succinct formula for a mixed constitution seductively echoes Polybios and *The King's Answer to the Nineteen Propositions* (1642). It should not be taken too literally, however, and each notion must be carefully interpreted in context.

4. See Riklin (1998).

In Harrington's blueprint, the term "monarchy" has been almost totally dissociated from the usual meaning of the word. His model republic comprises neither a hereditary nor an elected monarch, nor even a head of government. Instead, the government consists of a 49-member directorate, which in turn is composed of several collegial committees, and its activities are in turn coordinated by collegial organs, the *Signoria* and the State Council.

The "magistracy" is chosen by the senate from its own ranks; it is in fact a select committee of the "aristocracy". What Harrington has in mind is not a hereditary aristocracy, but an elected one, chosen by all from the few, that is, by all property owners from the minority of those with the greatest wealth. Harrington justifies this differentiation of voting rights to the "wealthy" by claiming that only educated and well-travelled people who are not obliged to work for their income would have the requisite qualities for statesmanship. For that same reason, all citizens would vote directly or indirectly for the best of the "wealthy" to serve in the senate, and the senate in turn would select the magistracy from its own ranks. Those selected in this manner could be said to form a "natural aristocracy" dispersed over the entire nation.

The term "the people", as used by Harrington, does not comprise all adult subjects of the country, but only male property owners. In this terminology, "the people" refers indiscriminately to all male property owners and to those among them chosen by all of them as representatives to the popular chamber. To prevent confusion, the concept of "the people" should be viewed in its narrower sense of "popular chamber". Harrington's "democratic" element in the mixed constitution is thus a democracy of male property owners. This arrangement of active and passive voting rights seems restrictive from our contemporary perspective, but in Harrington's time it represented an expansion of political rights. In contrast to the tripartite concept of a mixed constitution in Polybios and *The King's Answer*, Harrington's model republic represents a bipartite, property-based aristo-democracy.

At the same time, Harrington's model incorporates a peculiar form of

the separation of powers. Only two functions are mentioned in the key passage: the legislative and the executive. Dogmatic jurists might well deplore the absence of a judiciary and historians the absence of a foreign-policy function. In truth, Harrington did not in any way eliminate independent courts, but for him the highest court is part and parcel of the popular chamber, and hence judicial power has no separate existence.

Legislative power is subdivided into deliberation and decision-making, the first sub-function being assigned to the Senate and the second to the popular chamber. Harrington provides a functional, organizational, and personal separation between legislative deliberation and legislative decision-making. Legislation, it is true, is not confined to a narrow area of law-making, but encompasses levying of taxes and a stance on major foreign- and security-policy issues. Foreign policy is not entrusted to the government, as it was later by Locke and Montesquieu, but is divided between the government and the parliament. The latter has additional functions besides legislation, taxation, and foreign policy: in particular, recruitment and selection for specific offices. There is no control function, due to the rapid rotation of magistrates.

Harrington's terminology, like that of most subsequent authors, seduces the reader into assuming that the task of the government is limited to the execution of laws. From a broader perspective, however, it becomes clear that the government and, within the government, the Signoria and the State Council—or, in emergency situations, the "Junta"—steer the entire domestic- and foreign-policy process before, during, and after its parliamentary phase: through agenda-setting, prior to deliberations in the senate, through active participation in the senate debates, through preparation of the senate bills, and its transmission to the popular chamber, and finally, through the execution of the resolutions of the popular chamber. The government thus plays not only an executive but a leading role.

Harrington's mixed constitution with separation of powers rests on two social forces: the wealthy and the middle class. The natural aristocracy, which is generated among the rich, is entrusted with the leading of the

republic, the electing of the magistracy, and the preparation and execution of decisions. The middle class has the strongest voice in all elections, except the election of the magistracy. With respect to legislative, financial, foreign-policy, and security-policy decisions in the popular chamber, power is allocated in such a way that the middle class, again, is the predominant social force. The same is true for the ultimate decisions in the realm of jurisdiction. Harrington's purpose in dividing power between the two social forces is to prevent both a tyranny of the wealthy minority and a tyranny of the middle-class majority. His mixed constitution with separation of powers is a democracy of all male property owners guided by a natural aristocracy.

Thus, there are six functions to be distinguished in the decision-making process of Harrington's model republic (Table 2): all property owners vote for representatives, the magistracy acts as leader, the senate deliberates, the popular chamber decides, the magistracy executes, and the courts adjudicate. As to their subsidiary functions, the senate shares in the execution of the decisions made by the popular chamber, which is also the supreme court.

Table 2 *Harrington's Mixed Constitution and Separation of Powers*

	Property owners (all)	Magistracy (few - natural aristocracy)	Senate (few - natural aristocracy)	People's chamber (many)	Courts
Elect	*				
Lead		*			
Deliberate			*		
Decide				*	
Execute		*	°		
Adjudicate				°	*

* Primary function.

° Subsidiary function.

GIANNOTTI, 1534

Montesquieu presented the English mixed constitution in the new light of a division of power. In his model republic, Harrington explicitly linked a mixed constitution with the separation of powers. The Florentine political thinker Donato Giannotti implicitly included separation of powers in his *stato misto* (Riklin, 1997, 53–62).

The mixed constitution proposed by Giannotti for a restructured and improved Florentine Republic rests on three social forces (Table 3). The *Grandi* (that is, the nobility and men of wealth) can fulfil their striving for *grandezza* either in the office of the *Gonfaloniere*—that is, as *Principe*—or in the *Collegio* that assists the *Gonfaloniere* (monocratic element). The *Mediocri* (that is, the middle class) can satisfy their desire for *onore* in the Senate (oligocratic element). Finally, the *Popolari* (that is, the lowest class of property owners) can quench their thirst for *libertà* in the Grand Council (democratic element). The have-not *Plebei* do not expect to participate in the power structure and are content to be left in peace.

The most original feature in Giannotti's model republic is the nature of the separation of powers (Giannotti, 1534, II, 3, 16; III, 5–13; 1552, 453)—see Table 4. Giannotti distinguished between four governmental functions: elections, legislation, foreign policy, and administration of justice. Interestingly, he divided the decision-making process into three phases: *Consultazione* (preliminary deliberation), *Deliberazione* (decision), and *Esecuzione* (execution). Finally, he established the principle that *Consultazione* and *Esecuzione* were to be left in the hands of the few, while *Deliberazione* was to rest in the hands of the many. However, it was permissible—or even appropriate—to entrust the execution of the legislative and foreign-policy decisions to the same

Social Forces	Interests	Organs	Mixed constitution
<i>Plebei Popolari Mediocri Grandi</i>	Peace	–	–
<i>Popolari Mediocri Grandi</i>	Peace Liberty	Grand Council	Democratic Element
<i>Mediocri Grandi</i>	Peace Liberty Honour	Senate	Oligarchic Element
<i>Grandi</i>	Peace Liberty Honour Greatness	<i>Collegio Principe</i>	Monocratic Element <i>Esecuzione</i>

Table 3 *Giannotti's Mixed Constitution*

Functions	Stages	<i>Consultazione</i>	<i>Deliberazione</i>	<i>Esecuzione</i>
Elections		Nominators Senate	Grand Council	–
Foreign Policy		<i>Collegio Dieci</i>	Senate Grand Council	<i>Dieci</i>
Legislation		<i>Collegio Senate</i>	Senate Grand Council	<i>Signoria Magistrati</i>
Jurisdiction		<i>Conservatori Proposti</i>	<i>Quarantia</i>	<i>Magistrati</i>

Table 4 *Giannotti's Separation of Powers*

committees that had handled the preliminary deliberations for the decisions.

Giannotti did not pull this innovative model of the separation of powers out of a hat. His idea was derived from existing constitutions of Italian Renaissance republics. However, he did improve and generalise on the basis of what he saw around him. It seems to me that Giannotti's doctrine of the separation of powers is more realistic and more practicable than Montesquieu's. First of all, it postulates foreign policy as an independent function along with legislation. Montesquieu, on the other hand, unrealistically viewed foreign policy as the execution of international law and thus simply assigned it to the government (Montesquieu 1748, XI, 6). Montesquieu's oversimplified formulation had the unhappy consequence that, in keeping with the American constitution of 1789, most later constitutions neglected to spell out clearly the division of authority between the government and parliament concerning foreign policy, or, if they did so, it was usually an unequal division in which parliament was the loser.

A second respect in which Giannotti's doctrine of the separation of powers is more realistic and more practicable than Montesquieu's is its clear designation of the government's leadership and executive role. Montesquieu is silent about the preparation of laws and other decisions—he disregards the decision-making process. His doctrine of the division of power is structure-oriented, whereas Giannotti's is process-oriented.

Misguided by Montesquieu, most written constitutions put too much trust in the legislative capacity of parliaments and give them too little say in foreign affairs.

THE FOUNDING FATHERS OF THE AMERICAN CONSTITUTION AROUND 1787

Had Harrington, Montesquieu, and the American Founding Fathers been familiar with Giannotti's concept of the separation of powers, their ideas

might have developed along different lines. The Founding Fathers took their lead mainly from Montesquieu, occasionally from Harrington, and not at all from Giannotti. The chapter on England in *De l'esprit des lois* was seen as a veritable fount of wisdom for the separation of powers, though its proper interpretation was a matter of sharp dispute. Some took the same text to mean a strict *separation* of powers; others interpreted it as a moderate *division*.

The argument about the proper interpretation of Montesquieu goes back to the colonial period: for instance, in anonymous newspaper controversies in the *Boston Gazette* in 1763 and, ten years later, in the *Maryland Gazette* (Spurlin, 1940, 105–114). In 1780, the Massachusetts *Declaration of Rights* demanded a strict separation of the legislative branch from the executive and judicial branches (Jefferson, 1787, 120, 210). The Philadelphia Convention for its part agreed on a moderate version in the constitution drafted by it in 1787. The President's share in legislative power was recognized in the form of a legislative veto. Both the President and the Senate were granted some influence over the judiciary by virtue of their right to select the Supreme Court justices.

The Anti-Federalists were up in arms against this mixing of powers. They insisted that there be at least a stricter, if not a strict separation. Centinel demanded "the compleat separation" (Storing, 1981, II, 151), William Penn "the absolute division" (Storing, 1981, III, 174), and a countryman from Dutchess County insisted that the three power be "entirely" separated (Storing, 1981, VI, 62). The Federalists viewed this as an incorrect reading of Montesquieu. James Madison rightly pointed out that Montesquieu had not meant that the three departments should be completely excluded from any share in or control over the decisions of any other department. Montesquieu's doctrine of the division of power really implied that the whole power of one department and the whole power of a different department should never be entrusted to the same persons (*The Federalist Papers*, no. 47).

Federalists and Anti-Federalists cited the 'French oracle' with reference not only to the horizontal, but also to the vertical federal

division of power (Storing, 1981, II, 110, 368; VI, 90 [footnote b]). However, on this score, each of the two sides relied on a different text and drew on different passages from *De l'esprit des lois*. The Anti-Federalists supported their advocacy of a confederacy by citing Montesquieu's comment that a republic could flourish solely in a small territory (Montesquieu, 1748, VIII, 16). The Federalist Alexander Hamilton, on the contrary, upheld the concept of a federal state in the draft of the constitution by citing the next chapter in *De l'esprit des lois* (*The Federalist Papers*, no. 9), in which Montesquieu argues, probably under the influence of Johannes Althusius (Althusius, 1614, IX, 9–11), that small states suffer from a lack of external power, while large states are threatened by internal corruption. Montesquieu thus claimed that a federal republic avoided this dilemma by a vertical division of power that secured both the external strength of a large state and the lesser proclivity towards corruption of a small state (Montesquieu, 1748, IX, 1).

A majority of the Federalists believed that the mixed constitution could be replaced by a separation of powers. James Madison credited America with having discovered the foundation for an unmixed republic covering an extensive territory (*The Federalist Papers*, no. 14). He was not reluctant, however, to apply the concept of a mixed system to the federal division of power (*The Federalist Papers*, nos. 39 and 51). Clearly, his objections to the mixed constitution had narrowed down to the hereditary feature embodied in the English model. Thomas Paine in particular launched a virulent attack against this ailing English system. In several vitriolic pages, he derided the English mixed constitution so highly praised by Montesquieu as “an imperfect everything, cementing and soldering the discordant parts together by corruption, to act as a whole” (Paine, 1791, 140f). Both Paine and Madison took no notice of the significant number of non-hereditary mixed constitutions in the history of constitutions and political ideas, in particular old-testament Israel,

Departments Social forces and forms of government		Legislative (branches)	Executive	Judiciary
Electorate (elects minimally the House of Representatives, maximally also the Senate and the President) <i>Representatives</i>	<i>One Monarchic</i>	<i>President Proposals Veto</i>	<i>President also foreign affairs</i>	<i>President Nomination of justices Pardon</i>
	<i>Few Aristocratic</i>	<i>Senate Proposals</i>	<i>Senate Impeachment</i>	<i>Supreme Court Judgements Senate Impeachment</i>
	<i>Many Democratic Veto</i>	<i>House of Representatives Proposals</i>	<i>House of Representatives Impeachment</i>	<i>Grand Juries Verdicts House of Impeachment</i>

Table 5 John Adams' Mixed Constitution and Separation of Powers

Athens, and Geneva, as well as Plato's, Aristotle's, Thomas Aquinas', and Burlamaqui's conceptions. Nor did they recognize that James Harrington had characterized his status-based, purely representative, and large-scale republic as a mixed constitution that included a separation of powers.

John Adams' case is exceptional.⁵ Of all the American Founding Fathers he followed most closely in Harrington's footsteps. Most significant is the fact that he took over Harrington's concept of a "natural aristocracy", distinguishing it from an "artificial", hereditary aristocracy. Adams viewed both his own preliminary draft and the resulting American Constitution as a mixed constitution with separation of powers, in which there were three social forces, three political entities, three departments, and three legislative branches (Table 5).

5. See Riklin (1991).

TERTIUM COMPARATIONIS: MIXED CONSTITUTION WITH SEPARATION OF POWERS

Let us now return to our initial hypotheses. Giannotti presented his proposal for a constitution as a *stato misto*, but it included a separation of powers. Harrington explicitly linked the two concepts. Montesquieu presented an idealized model of mixed government in England in the modern guise of the division of power, though elsewhere he also viewed the “Gothic” regime and the Roman Republic as mixed constitutions. John Adams interpreted the American Constitution as a mixed constitution with separation of powers, while James Madison apparently reduced the mixed constitution to its hereditary version derived from England and was therefore under the impression that he had substituted for it the concept of a moderate division of power.

In their true light, mixed constitution and separation of powers are facets of the same phenomenon, but each concept entails a different focus and a different chain of thought. Where the focus is on the concept of a mixed constitution, the social system is perceived as a triad of the ‘one–few–many’ or its dyadic variants—but it necessarily implies the separation of powers. When the focus is on the separation of powers, the logical structure is reversed: the outcome of the separation of powers is mixed government. All practical applications of the separation of powers are structural variants of the ‘one–few–many’ model, whether they be hereditary, property-based, or unrestricted. There can be neither a mixed constitution without separation of powers nor the converse.

In any case, it is reductionist to characterise a political order as a mixed constitution with separation of powers. The implementation of these concepts throughout the history of ideas and the history of constitutions is inseparable from the specific historical setting. Giannotti’s model was geared to a city republic with a population of less than 100,000, where it was feasible to let all active citizens participate in the Grand Council. Harrington’s and Montesquieu’s models, as well as the

American Constitution, were meant to be applied to large countries numbering several million inhabitants, demanding a representative form of the democratic element. Montesquieu's hereditary constitutional monarchy must be weighed against Harrington's property-based republic. The American republic was property-based as well, inasmuch as the right to vote hinged on skin colour and property ownership.

Wilfried Nippel rightly stresses the extent to which political concepts such as the mixed constitution with separation of powers are shaped by very different ideological and historical premises (Nippel, 1985, 213, 221f). It is nevertheless misleading to let the concept of the mixed constitution with division of power be completely amalgamated with the ideological-historical context. No matter how much is relativised, there remains a substantial unalterable element, to wit, the distribution of all political power among various authorities, organs, and social forces. Montesquieu claimed that his model's goal was the securing of political freedom. His formulation is still valid today: because human beings who exercise power are inclined to abuse it when no limits are encountered, "*il faut que, par la disposition des choses, le pouvoir arrête le pouvoir*" (Montesquieu, 1748, XI, 4). The hard core of the mixed constitution with separation of powers is that power be distributed so as to guarantee a liberal political order. This order differs fundamentally from a despotism in which power is concentrated either in the hands of a single ruler or in the hands of a minority or a majority. To that extent, the concept of the mixed constitution with separation of powers is and continues to be no mere matter of terminology: it is a program.

SUMMARY

The mixed constitution and the separation of powers are two different

ways of looking at the same phenomenon. Montesquieu presented an idealised version of the English constitution in the modern guise of the division of power, yet this model contains all the characteristics of a mixed government. James Harrington, for his part, explicitly linked mixed government and separation of powers; he insisted, however—contrary to Montesquieu—that mixed government be based on property, not on heredity. Donato Giannotti envisaged his constitutional project as a *stato misto*, in which a separation of powers was included implicitly and in a manner that was more realistic and practicable than Montesquieu's. For the American Founding Fathers, Montesquieu was the very fountainhead of the separation of powers. Federalists and Anti-Federalists vied with each other concerning the correct interpretation of the great French thinker's intentions. The Federalist James Madison defended the draft of the Philadelphia constitution by pointing out that Montesquieu had not envisaged an absolute, but a moderate separation of powers. The majority of the American Founding Fathers considered mixed government to be obsolete since they reduced it to the hereditary version prevailing in England. John Adams was an exception. Like Harrington, he linked the separation of powers with a mixed constitution of a non-hereditary type.

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