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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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The Separation of Powers. Prologue in the 18th century: from Montesquieu to Madison

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

The Separation of Powers.

Prologue in the 18th century: from Montesquieu to Madison

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> Art. 16. **"**Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution"
> *Déclaration des droits de l'homme et du citoyen, 1789*
>
> Art. 1: legislative powers; art. 2: the executive power; art. 3: the judicial power
> *American Constitution, 1787*

The separation of powers, which since the American Constitution has taken the canonical form of the trinity: legislative, executive, judicial, is inscribed in the founding texts of modern constitutionalism [1]. The expression, however, like many other terms in our political and constitutional vocabulary, is polysemous and inevitably ambiguous.

From a conceptual point of view, it is first necessary to distinguish between, on the one hand, classification (presumed to be descriptive) of *functions*, which are exercised by political authority (national and possibly supranational), and, on the other hand, the attribution of the supreme legislative [2] function to a *plurality* of agents, organs, instances

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[1] Carl Schmitt, in his description of the constitutional state of the Weimar Republic (*Verfassungslehre*, section 15, Berlin, Duncker & Humblot, p. 182, 1928), considers the separation of powers to be one of the fundamental principles "*des rechtstaatlichen Bestandteils einer modernen freiheitlich-bürgerlichen Verfassung*." A good contemporary reference on the subject in general is the volume by CH. MOELLERS, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford, Oxford University Press, 2013.

[2] The thesis that the legislative function/authority is superior to others dates back to Jean Bodin and has been generally accepted by the doctrine of separation of powers.

or institutions [*corps, branches, Organe*], which it is clearer to define as *divided power*. In Article 16 of the French Declaration of Rights, it is written that in a society where the separation of powers is not defined, there is no constitution [3], where the ambiguity of the plural powers, which indicates both the functions and the division of the legislative, is evident (as, for example, in the first French constitution of 1791 where the legislative is attributed to the *Assemblée législative* and the king, holder of the veto).

The distinction of functions that are exercised by the government of a political community, in the broad sense of the term government, goes back in Western political thought at least to Aristotle. The latter in Book IV of his *Politics* distinguished: the three parts [functions] of *all* political regimes, which are, according to him, that exercised by the deliberative body (*to bouleuomenon*), that relating to political-administrative offices (*to peri tas archas*), and the judicial function, which consists in the saying of justice (*to dikazon*). [4] But we can also think of the medieval *gubernaculum - iurisdictio* dichotomy (Henry de Bracton).

In Aristotle's case we are dealing with a classification that does not discriminate between different regimes. In fact, it is orthogonal to the taxonomy of the latter. However, in the normative evaluation of the different regimes (*politeiai*) there appears a trait that will be typical of classical European political culture [5], which considers better or at least preferable - from the normative and realistic point of view - the forms of *mixed regimes*, in the language of the Stagirite the *memigmene politeia* - the mixed constitution, in the

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[3] Here the last term clearly has a normative and prescriptive meaning.

[4] τρία μόρια τῶν πολιτειῶν πασῶν· τὸ βουλευόμενον· τὸ περὶ τὰς ἀρχάς· τὸ δικάζον. (*Politica* IV 4, 1290b 21 ff).

[5] Which seems to be absent in Chinese culture, see P. SANTANGELO, *L'impero del mandato celeste. La Cina nei secoli XIV-XIX*, Roma-Bari, Laterza, 2014.

pre-18th century sense of the term constitution; which is why it is preferable to speak of mixed regime, which translated the Greek term *politeia* better than government or constitution - if we think of the conception of the latter term that has been imposed since the end of the 18th century [6]. It is not necessary to specify here the details of the centuries-old doctrine of mixed regime that has run through all Western thinking on good government, from Polybius to Cicero, from Thomas Aquinas to Machiavelli [7] and all the way to Montesquieu. However, it is worth noting, going back to the previous question, that since the 17th century the analysis of the functions of the state has been subject to different classifications and differences even in terms of their number: three in Montesquieu, four in Locke (legislative, executive, federative and royal prerogative) [8], two in Rousseau (legislative and executive). More recently, five as in the constitution of the Republic of China (Taiwan) inspired by Sun Yat-sen (1866 -1925), where the functions (in Mandarin *yuan*) are: the legislative, the executive, the judicial, the examination of civil servants, and the control of the other functions.

Still on the topic of classification/distinction of functions, Rudolf Smend's article published during the Weimar Republic, *Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform* [9], remains of particular relevance, in which the author argues when talking about the executive, that it is necessary to distinguish *Verwaltung*,

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[6] It is clear, for instance, that when the Greek Polybius speaks in Book VI of the Histories of *Romaion politeia* he was not referring to any rigid written text as the American constitution will be.

[7] I can refer the reader on this point to the article, " Machiavelli and Aristotle. The anatomies of the city," in History of European Ideas, Volume 35, Issue 4, December 2009, pp. 397-407.

[8] See the volume by M. ROSTOCK, *Die Lehre von der Gewaltenteilung in der politischen Theorie von John Locke*, Meisenheim am Glan, Verlag Anton Hain 1974 and P. PASQUINO and A. KRUTONOGAYA, « John Locke on Judicial Power »; in *Les usages de la séparation des pouvoirs*, Paris, 2008, p. 69-82, P. PASQUINO, « Locke on King's Prerogative»; in *Political Theory*, March 1998, p. 198-208 – and more in general for other modern doctrines: M.J.C. VILE, *Constitutionalism and the separation of powers*, Liberty Fund, 1967.

[9] Tübingen, J.C.B. Mohr, 1923, republished in: *Staatsrechtliche Abhandlungen*, Berlin, Duncker und Humblot, 1968, p. 68-88.

that is, administration in the sense of state bureaucracy from *politische Gewalt*, the roughly equivalent of what we call the function of political decisions making. [10]

The reason why reference has been made here to the doctrines of mixed regime is because this itself, which I have designated by the expression *divided power* – by opposition to monist forms of the exercise of authority – was decisive for the emergence of the doctrine called separation of powers in modern constitutionalism. In the *Federalist Papers*, on which in a moment, reference is made to *the celebrated Montesquieu* [11] as the inspirer of the American version of the separation of powers, which will take the name of checks and balances.

It is in fact Ch. 6 of Book XI of the *Esprit des lois* that is mostly considered the canonical text and the starting point of the modern doctrine of the separation of powers. It is, as has been pointed out by historians of political-constitutional thought, a complex text that was and is the subject of countless interpretations over the course of nearly three centuries and still in contemporary academic debate [12]. Here I shall confine myself to expounding the reading in my opinion most persuasive of the text in question, which takes into

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[10] See: E. CHELI, *Atto politico e funzione d'indirizzo politico*, Milano, Giuffrè, 1961 (rist. 1968). As to the theory of executive power are still relevant two classical books: J. NECKER, *Du pouvoir exécutif dans les grands États*, Paris, Plassan, 1792 and J. BARTHELEMY, *Le role du pouvoir exécutif dans les républiques modernes*, Paris, Giard et Brière, 1906.

[11] #78, footnote 1. The American debate between federalists and anti-federalists regarding the theses of the author of the Esprit des lois was particularly concerned with the federal structure of the political system, but Montesquieu's influence was also decisive, notably for James Madison, in relation to the issue we are interested in here.

[12] See especially the comments by CH. EISENMANN, « L'Esprit des lois et la séparation des pouvoirs » in *Mélanges R. Carré de Malberg*, Paris, Duchemin, 1933, pp. 165-192 and « La pensée constitutionnelle de Montesquieu » *La pensée politique et constitutionnelle de Montesquieu*, edited by B. Mirkine-Guetzevitch and H. Puget, Paris, *Recueil Sirey du Bicentenaire de l'Esprit des lois, 1748*-1948, 1952, pp. 133-160, published also in *Écrits de théorie du droit, de droit constitutionnel et d'idées politiques*, edited by Ch. Leben., Paris, Éditions Panthéon-Assas, 2002 ; L. ALTHUSSER, *Montesquieu, la politique et l'histoire* (1959), Paris, PUF, 1964; M. TROPER, *La Séparation des pouvoirs et l'histoire constitutionnelle française* (first edition 1973), Paris, Librairie générale de droit et de jurisprudence, 1980.

account those to which reference has been made, with a point of view that is here that of its *Wirkungsgeschichte* (reception), rather than the strictly historical-contextual one, I shall therefore not focus on what Montesquieu intended to do in the mid-18th century by writing his masterwork (published in 1748), but, taking into consideration its effects on modern constitutionalism, I will try to show (briefly) the cornerstones of Montesquieu's doctrine (although he never literally uses the expression *the separation of powers* as such) and what structure he helped lay as the foundation of the modern liberal state.

The oft-quoted chapter begins with a list of the functions of the state that echoes, but does not reproduce, that of John Locke:

Il y a, dans chaque état, trois sortes de pouvoirs ; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil.

In the next sentence, however, the author presents a different classification or rather a redefinition of the previous one:

Par la premiere, le prince ou le magistrat fait des loix pour un temps ou pour toujours, & corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisieme, il punit les crimes, ou juge les différends des particuliers. On appellera cette derniere la puissance de juger ; & l'autre, simplement la puissance exécutrice de l'état.

Here, then, appears the trinity of functions that even today is generally associated with liberal-democratic state regimes.

The following text specifies three elements of what, simplifying and considering the two dimensions that must be distinguished, we call the separation of powers: 1) the rejection

of the joint exercise of the three functions by a same organ, 2) the distribution of legislative power among various subjects, 3) the independence of judicial power. [13]

Three theses underlie Montesquieu's normative-prescriptive theory that he attributes to the English constitution [14], a model of limited government and divided power that the author opposes to absolute monarchy (under which he had lived most of his life), the regime he calls *despotism*. Specifically:

(a) The independence of the judiciary, which is both a function and an authority without a will of its own (but the expression *la bouche de la loi* is ambiguous and can be interpreted in different ways [15]), but which is presented primarily as a function that must be protected from interference by the other two, particularly the legislative (an original thesis compared with Locke and also later with Rousseau and much of the constitutional doctrine of the French Revolution [16])

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[13] "Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté ; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des loix tyranniques, pour les exécuter tyranniquement.
Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative, & de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire ; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur.

Tout seroit perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs ; celui de faire des loix, celui d'exécuter les résolutions publiques, & celui de juger les crimes ou les différends des particuliers".

[14] On Montesquieu and the English constitution, from a historical point of view, see the important study by L. LANDI, *L'Inghilterra e il pensiero politico di Montesquieu*, Pavia, CEDAM, 1981. Here I can only mention that in the 18th century the power of *common law* courts was very important and that the practice of *judge-made law*, to which Montesquieu does not refer in Chapter 6 of Book XI, was widespread.

[15] As to some aspects of the debate concerning this question see: in C. SPECTOR, « La bouche de la loi ? Les figures du juge dans L'Esprit des lois », in *Montesquieu Law Review*, 2015, n°3, p. 87-102.

[16] On the conception of the legislative power in the French Revolution see my article "Nicolas Bergasse and Alexander Hamilton: the role of the judiciary in the separation of powers and two conceptions of

(b) Second, the analytically distinct functions of the state are not to be exercised by the same organ cumulatively, but they are not completely separated (assigned to different organs), however, since the executive, for example, participates - through the right of veto - in the legislative function. Separation, therefore, rather than being rigid does not exclude *partial overlapping* at all, as Charles Eisenmann has well shown, which functions as an internal limit to the exercise of supreme power

(c) Third and most important for the thesis I wish to expound here, the supreme power, the legislative, as just mentioned, is to be exercised in a divided form, not monist/monocratic, by different and distinct organs, in our contemporary language, which leads the model back to the Aristotelian tradition, shared on this point by the 'author of the Spirit of Laws when he speaks in Chapter 6 of Book XI of the Constitution of England. Indeed, the legislative function is exercised in the English constitutions by the three constituent parts of the community (the Aristotelian *mere tes poleos*): the Commons, the Lords and the King – the English expression speaks of the *King in his Parliament*. The passage on the specific role given to the nobility (the House of Lords) is particularly clear on this point:

“Il y a toujours, dans un état, des gens distingués par la naissance, les richesses ou les honneurs : mais, s’ils étoient confondus parmi le peuple, & s’ils n’y avoient qu’une voix comme les autres, la liberté commune seroit leur esclavage, & ils n’auroient aucun intérêt à la défendre ; parce que la plupart des résolutions seroient contre eux. La part qu’ils ont à la législation, doit donc être proportionnée aux autres avantages qu’ils ont dans l’état ; ce qui arrivera, s’ils forment un corps qui ait droit d’arrêter les entreprises du peuple, comme le peuple a droit d’arrêter les leurs. Ainsi, la puissance législative sera confiée &

constitutional order”, in *Rethinking the Atlantic world*: *Europe and America in the age of democratic revolutions*, edited by M. Albertone, New York, Palgrave Macmillan, 2009, pp. 80-99.

au corps des nobles, & au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblées & leurs délibérations à part, & des vues & des intérêts séparés."

Montesquieu's divided power is, therefore, at the same time the anti-absolutist theorization of modern constitutionalism, but also one of the last expressions of the anatomy of the city also of Aristotelian origin according to which the city - the political community - is not composed of individuals equal in their rights, but, as Montesquieu still argues, of actors differing not only in their interests (as in any political community) but even in their nature (*enantia*, opposites, said Aristotle) and in their rights.

This model of mixed regime [17], however, was not compatible with the conception that slowly emerged in particular in France and the United States in the second half of the 18th century, thanks to the doctrines of natural rights, the origin of which goes back to Thomas Hobbes, who shared nonetheless Bodin's violent attack on the mixed regime tradition [18]. Indeed, from a logical point of view, a society without qualities - by which I mean a society of equal members from the point of view of political rights - is not compatible with a power divided among parts of the city that are legally and not just sociologically or ideologically different in nature.

It is necessary to insist that the classical view of divided power presupposed unequal natural components: the *gnorimoi* and the *demos* in Aristotle – more or less the upper classes and the lower-middle classes, in contemporary language – the grandees and the popolo in Machiavelli's *Discourses on Livy* – that is, the *arti maggiori* and the *arti minori* in the Florence of his time -, or the Communes, the Lords and the Monarch in England,

[17] MONTESQUIEU, *Pensées*, n. 1744, writes that the English constitution is « une monarchie mêlée, comme Lacédémone [...] fut une aristocratie mêlée » and Rome « une démocratie mêlée » (*Esprit des lois*, XI, 11).

[18] See *Les Six Livres de la République* (1576), book II, chapter 1 : *De toutes sortes de républiques en général, et s'il y en a plus que trois.*

les etats du royaume in France before absolutism, the *Staende* in the German territorial states.

The decisive contribution of the doctrine of divided power consistent with an anatomy of the city that assumes citizens with equal rights (compatible with and foundational to modern constitutionalism) is largely the result of the reflection and concrete political contribution of a member of the Convention in Philadelphia, the young James Madison [19].

The conceptual and cultural revolution introduced by the American constitution aimed to reproduce the polyarchy of the anti-monocratic mixed regime within a new order that revolutionizes the classical anatomy of the political community and which Madison calls *republic*, an order which rejects the king and the nobility, those "*gens distingués par la naissance, les richesses ou les honneurs*" of which Montesquieu spoke in the chapter on the constitution of England.

The solution as we know consisted in the distribution of the sovereign function, which Madison calls the legislative *vortex*, [20] among three elective branches, all of them accountable to the electoral body, to which the constitution attributed the exercise of the supreme authority to say the law: the House of Representatives, the Senate and the president of the Republic, holder of the veto against the decisions of Congress.

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[19] See notably in the *Federalist Papers* the sections 47-51 and the article by B. MANIN, « Checks, balances and boundaries: the separation of powers in the constitutional debate of 1787 », in *The Invention of the Modern Republic*, edited by B. Fontana, Cambridge, Cambridge University Press, 1994, pp. 27-62.

[20] *Federalist Papers* # 48: "*The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex*". Alexander Hamilton (*Federalist Papers*, # 71) comes back to the question stressing that: "*The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by example, in some preceding numbers*" (he is referring to the sections 48 and 49 written by Madison).

In the Section 39 of the canonical commentary of the U.S. Constitution, that needs to be quoted in full for it is there that Madison precisely defines the *republican* constitutional order of the United States, we read:

"What, then, are the distinctive characters of the *republican form*? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions. If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, *a government which derives all its powers directly or indirectly from the great body of the people*, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the

United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character."[21]

Pro tempore elections, rather than cooperation among orders or sections of society, are now the basis for the exercise of divided authority and the legitimacy of representative government. One exception to this principle concerns - in the following part of the quoted text - "*the members of the judiciary department*." For the constitution allows that these "*are to retain their offices by the firm tenure of good behavior*."

A theme to which Madison returns in section 51 of the *Federalist Papers* where we read:

"Some deviations [...] from the principle [of electoral authorization] must be admitted. In the constitution of the judiciary department in particular, it may be inexpedient to insist rigorously on the principle; firs, because peculiar qualifications being essential in the members, the primary consideration ought to be select that mode of choice, which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them."

So far the classical doctrine of divided power in a society without qualities, that is, ranks, orders and hierarchies of law assumed as natural. However, Richard Pildes and Daryl Levinson showed a few years ago in an important article [22] that the emergence of political parties able of controlling the three organs that jointly exercise the legislative function can undo the countervailing power mechanism envisioned by Madison. The idea of a constitutional order that simultaneously prevents a monocratic form of authority and ensures the stability of the system by virtue of a kind of homeostatic balance among the organs exercising political power is found to be undermined. This difficulty, which

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[21] Italics mine.

[22] « Separation of Parties, Not Powers », *Harvard Law Review*, vol. 119, June 2006, pp. 2311-2386.

emerges whenever a *divided government* [23] does not exist in the United States, appears most clearly in parliamentary systems where the relationship between the executive and the legislature cannot easily be characterized as that of a checks and balances structure, since the executive is accountable to parliament, which can recall it whenever it wishes, and in some constitutional systems the executive can dissolve parliament.

Looking, finally, at the political-constitutional systems of the 21st century, it seems necessary to rethink the doctrine of separation of powers and divided power if one takes into account a twofold circumstance. On the one hand, the growth of executive power vis-à-vis legislative assemblies - both in presidential systems (think of the role of the presidency in the United States) and in parliamentary systems. On the other, the emergence after World War II of constitutional courts, which in liberal democracies play the role of co-legislator. So that political power is distributed between organs that are directly or indirectly elected and inevitably subordinated in the short run to the will of the majority of voters (*shortermism*) and organs, such as the Constitutional Courts that are free from such concern. Finally, within the framework of the European Union, political-legislative power is divided between and exercised by the now semi-sovereign member states and the organs of the Union. As well as to some extent in cohabitation with international institutions and powers outside the old monopoly and control of nation states. These are all avenues of research that this issue of the journal helps to explore.

[23] A term that refers to situations where the three bodies holding the legislative function are not controlled by the same party.