Current controversies over presidential power suggest that significant separation of powers depends on the existence of some effective counterweight to the executive ruler, which in turn presupposes a disposition to restrain the ruler that does not come from the ruler himself. One might conclude that schemes for separation of powers grow out of either a fundamental opposition to ruling or at least a preference for recourse against the ruler. Such was James Madison’s opinion: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”  

This opinion has been questioned by defenders of parliamentary government, who support the fusion of powers in the cabinet, and by critics of the American Constitution, who find its checks and balances unnecessary and productive of undemocratic and ineffective government.  

This formulation of the separation of powers was suggested to me by Joseph Cropsey.

— W. B. Gwyn, Tulane Studies in Political Science, Volume IX, Department of Political Science (New Orleans: Tulane University, 1965). Pp. vii, 159. $3.00

expressed concern over the extent of executive power and have advocated a Congressional reclamation of the legislative function and a substantial part of the war-making power.\(^5\) Constitutional controversies over executive power always include a theoretical inquiry as well as a practical political struggle. Is the President a mere executive subordinate to the Congressional legislators, or is he an executive ruler whose power is limited only by carefully drawn statutes regarding taxing and spending? If the answer lies somewhere between these extremes, how can we distinguish the spheres of legislative supremacy from those of executive independence? The difference between a unitary executive and a bicameral legislature consisting of 535 lawmakers indicates the relationship between the separation of powers and modern representative government. Different distributions of power among the different branches of government affect the degree of popular participation in government. Hence understanding the separation of powers requires an understanding of the purpose of modern representative government. An examination of the origin and foundation of the separation of powers must therefore include some discussion of the original understanding of representative government if it is to shed light on current constitutional controversies.

Such an examination is contained in the works of W. B. Gwyn and M. J. C. Vile. Both place the origin of the doctrine in the English Civil War period, 1642-60, when the collapse of monarchy gave rise to a formulation of shared governmental power which differed from mixed government or mixed monarchy. Gwyn limits himself primarily to the period from 1650-1750, although he closes with a brief discussion of the American Constitution. In his preface, he says: "It seemed to me necessary before judging the validity and value of the doctrine to ascertain what it meant to those who developed it." Identifying his approach with political scientists who "have become aware of the importance of political culture, the body of ideas, attitudes and values in a society which condition the way in which political power is exercised,"\(^6\) Gwyn intends to reconstruct the political culture of the past through popular political literature. His examination includes Locke, Montesquieu, and Rousseau, whose works "are viewed not in isolation but rather as

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\(^6\) Gwyn, p. v.
part of a tradition of constitutional thought," in which they "take on meanings very different from those usually attributed to them." 7 Gwyn describes his method as combining analysis of various meanings of the separation of powers with "a study of the evolution of the political doctrine." 8 He does not explain how a study of the writings of Locke, Montesquieu, and Rousseau by themselves differs from a study of them as part of a tradition of constitutional thought. His reference to political culture suggests that Gwyn prefers to study the uncommon thoughts of first-rate thinkers in light of the common thoughts of many second-rate thinkers. Whether he is correct in doing this depends on what an unhistorical study of first-rate thought reveals about political culture in general and the separation of powers in particular.

Vile's book covers the development of constitutional thought from seventeenth century England and eighteenth century France and America to the present, including his own theory of constitutionalism. His opening statement justifies the scope of the work and explains the connection between institutions and values, or ends.

The history of Western political thought portrays the development and elaboration of a set of values—justice, liberty, equality, and the sanctity of property—the implications of which have been examined and debated down through the centuries; but just as important is the history of the debates about the institutional structures and procedures which are necessary if these values are to be realized in practice, and reconciled with each other.

Vile acknowledges the dependence of institutional study on the values which those institutions intend to support. He defines constitutionalism as "the advocacy of institutional arrangements, on the grounds that certain ends will be achieved in this way...." Vile calls this constitutionalism an empirical political theory "which overtly recognizes the importance of certain values and of the means by which they can be safeguarded." If political institutions are constructed to secure certain aims, or values, a writer's approach to those values will affect his approach to the institutions supporting them. How does Vile’s political theory approach the study of values, and hence institutions?

However strong the urge toward objectivity on the part of the student of politics, it is impossible for his work to be wholly detached

7 Ibid.
8 Ibid., p. vi.
9 Vile, p. 1.
from the problem of what is a "just," desirable, or "efficient" political system, for the work must inevitably reveal the values that infuse the politics of the countries he studies and the results which their political systems produce.  

If rational inquiry into political aims or values is impossible, political thought, concerning either institutions or values, cannot claim serious attention. Since it is not autonomous, it must be dependent on something irrational: either random individual desires or forces in the environment. Vile favors the latter explanation. "The history of the doctrine . . . can tell us much about the forces that gave it birth and shape. . . ." His argument for the relevance of a doctrine that undergoes continuing change in content is that the history of institutional thought reveals "the continuity of political thought, and of the needs of political man. . . ." The separation of powers involves "a division of power and a separation of function." It "finds its roots in ancient constitutionalism"; it "became a central feature of a system of limited government in the seventeenth century"; and while it "has obviously to be reformulated if it is to serve as an instrument of modern political thought, [still] it can only be rejected altogether if we are prepared to discard also the values that called it into being." Strangely, Vile never examines the meaning of those values which he associates with the doctrine. Furthermore, when he returns to the values in his final chapter, Vile changes his original list without comment. Justice, liberty, equality, and sanctity of property are converted into justice, "democracy" (his quotes), and efficiency. He then adds social justice as the new value of the twentieth century." The change may indicate more than an adaptation to changing needs. The only defense of values that does not succumb to the forces of history is one which takes thought seriously; and the only way to ascertain if ideas are capable of an independent influence on history is to try to understand first-rate thinkers as they understood themselves.

Both Gwyn and Vile define the separation of powers with reference, to the rule of law, legislation and execution, and political liberty. In part one I will try to demonstrate that the ideas they as-

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10 Ibid., p.8.
" Ibid., p.11
12 Ibid., p. 2.
10 Ibid., p.7.
associate with the doctrine are distinctively modern; that is, they differ from the classical and medieval political thought of Aristotle and Marsilius. Second, while I agree with Gwyn and Vile that these ideas arose in the seventeenth century in England, I find them together as a doctrine in Locke's Second Treatise and not in the Interregnum writers whom they cite. Those writers do not advocate government limited to securing civil peace and secular freedom and they are recognizably monarchists or republicans. Locke's argument for limited government was accompanied by a synthesis of the partisan republican and monarchal formulations of governmental powers. In part two I will examine the formulations of Montesquieu and the American founders. Both Gwyn and Vile find two doctrines of government in Montesquieu: separation of powers and balanced or mixed government. Montesquieu's description of the powers and their distribution in government suggests that the components of separating and balancing must be viewed together. The American founders contributed an elective unitary executive with extensive powers, an elective form of bicameralism, and an independent judicial branch with the power of review over the other two branches of government. This new form of republican government resembled England's limited monarchy more than seventeenth century republicanism. Hence, the separation of powers, as developed by Locke and Montesquieu and revised by the Americans, led to the subsumption of the monarchy-republic division under the term representative government. In part three I will examine Vile's account of the development of the separation of powers in the nineteenth and twentieth centuries, as well as his own constitutionalism. Vile notes a new a definition of political freedom, which contributed to new views of constitutionalism. In part four I will suggest how a study of the origins and foundations of the separation of powers can instruct us about representative government in general and the American Constitution in particular.

I

Gwyn defines the separation of powers as a doctrine that "incorporates an analysis of governmental 'powers,' or functions" and prescribes "certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends."\(^{15}\) Gwyn classifies different versions of the doctrine according to the

\(^{15}\) Gwyn, p. 5.
different reasons given for the separation. The clearest summary of these versions is given at the end of the work.

1. to create greater governmental efficiency;
2. to assure that statutory law is made in the common interest;
3. to assure that the law is impartially administered and that all administrators are under the law;
4. to allow the people's representatives to call executive officials to account for the abuse of their power; and
5. to establish a balance of governmental powers."

Although each does not correspond to a specific structure of government, Gwyn identifies the first four versions primarily with seventeenth century republican writers and the fifth with monarchy and eighteenth century writers. For all but the efficiency version of the doctrine, the aim is to maintain civil liberty and avoid tyranny.

Vile constructs an ideal type pure doctrine of the separation of powers "with the complicating factors of related theories removed."

A "pure doctrine" of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State. 16

Vile notes that the division of governmental agencies into two branches in the seventeenth century and three in the eighteenth century, when the judicial branch was added, remains important today since "different sets of values [are] embodied in the procedures of the different agencies, and in the representation of varying interests in the branches." 17 The key element of the doctrine is the classification of tasks of government into three specific functions. Each branch performs only one function. According to the pure doctrine that Vile constructs, this limitation produces negative checks on the

16 Ibid., pp. 127-8.
exercise of power. In practice, however, such an arrangement approaches legislative supremacy; thus, in order to retain a balance, different branches share one or more functions. England's balanced constitution and America's system of checks and balances illustrate this partial separation of powers.

Both Gwyn and Vile agree that the separation of powers is different from mixed government. The former doctrine divides governmental functions among parts or branches and does not have an explicit class basis, while the latter recognizes major class divisions within society and assigns each class a place in government. Gwyn says that the earliest proponents of the separation of powers were republicans who advocated unicameralism and were not concerned with balance in government. While Vile agrees with Gwyn that "the theory of mixed government is logically quite distinct from the doctrine of the separation of powers," he views the newer doctrine as an adaptation of the older one to a new situation which no longer supported hereditary privilege.

Both authors find major connections between the separation of powers and classical political philosophy. While Gwyn distinguishes Aristotle's discussion of regimes and parts of government from the separation of powers, he identifies the seventeenth century views of political liberty, popular sovereignty, and the rule of law with that of Aristotle and Cicero. Vile notes differences between Aristotle's political science and the separation of powers but he still considers Aristotle's rule of law the source for the modern doctrine. He cites the Greek notion of a divinely inspired lawmaker to explain the difference between Aristotle’s and the modern rule of law. This is inadequate since Aristotle does not consider the rule of law a distinctive regime. Since the rule of law includes the rules determining who a citizen is, and since a citizen's characteristic act is participation in government, the most important laws define citizenship by describing the qualification for and manner of filling offices. Hence there is a different rule of law for every different regime. The only apparent exception is the absolute rule of one man, but in a strict sense this is not political rule since a political association presupposes citizens and a citizen is one who has the right to hold office. In addition, for Aristotle the standard for law is natural.

19 Ibid., p. 33. See also Gwyn, p. 26.
21 Vile, p. 33.
22 Gwyn, pp. 8-9, 12.
23 Vile, pp. 21-22.
justice, rather than human agreement; hence he is not unsympathetic to the rule of the best man. Precisely because law is judged by a standard of natural justice, which is based on man’s nature and its potential for good or evil, Aristotle recognizes that some rare men are a law unto themselves and should rule. Furthermore, Aristotle does not insist on the legitimacy of only one form of government. His flexibility is based on the exacting requirements of actualizing the best possible regime. Some contributions maintain the regime, others maintain its excellence.  

Vile acknowledges a close connection between "modern theories of law and sovereignty and the emergence of the concepts of legislative, executive, and judicial functions of government"; however, he does not consider this contrast between ancient and modern theories of law and justice incompatible with his evolutionary view of thought. "When the concept of law as a relatively unchanging pattern was later replaced by the idea of a system of law subject to human control, then the basis of a twofold division of the functions of government was ready at hand." This is inadequate since Aristotle, and Plato, regarded law as man-made. The difference between their view and the modern view concerns the standard for law, justice, and its relation to human nature. First-rate thinkers disagree over whether men are by nature political or not and whether justice is choiceworthy for its own sake or not. If this disagreement is the result of genuine rational inquiry, the replacement of one view by another cannot be explained passively, e.g., as an evolution determined by forces which change the environment. Vile’s account of the change may be consistent with his view of thought, but the writers whose thought he describes did not share this view and Vile does not begin to refute them.  

Another difference between Aristotle’s political science and the separation of powers concerns the parts of government. Aristotle’s deliberative, magistrative, and judicial parts cannot be identified with functions since their content varies with the regime. In democracies all citizens deliberate on all issues; in a qualified democracy, they deliberate for some purposes-appointing and examining magistrates, enacting laws, and deciding on issues of war and peace-and choose magistrates to deliberate on others.  

26 Ibid.
citizens deliberate only in respect to war and peace and the examination of magistrates, and the power on other issues is given to magistrates chosen by election, the regime is an aristocracy. We note that lawmaking constitutes only a part of the supreme power of government, and the content of the deliberative and magistrative elements varies with the regime. The magistrative element is not functionally different from the deliberative since Aristotle says,

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the title of magistracy should, on the whole, be reserved for those [offices] which are charged with the duty, in some given field, of deliberating, deciding, and giving instructions—more especially with the duty of giving instructions which is the special mark of the magistrate.
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The magistrates deliberate also, and when a deliberative body decides, it gives instructions. The two elements may correspond to Aristotle’s two kinds of offices—continuous and discontinuous—which related to the definition of citizenship and which also varied with the regime.

Nor is Vile’s thesis concerning the continuity of political thought established from the medieval period, although he cites a passage in The Defender of the Peace as evidence that Marsilius placed supreme power in the people. The passage begins with a reference to Aristotle, which Vile does not mention, and suggests a combination of democracy and aristocracy. Marsilius later withdraws this hint of popular sovereignty when, again following Aristotle, he analogizes the heart in an animal to government in a state: as the first formed part, it is “nobler and more perfect in its qualities and dispositions than the other parts,” because it is the power and instrument by which other parts are formed. The government is sovereign, not the people.

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28 Ibid., pp. 190-191.
29 Ibid., p. 195.
30 Ibid., pp. 93-4.
31 Vile, p. 27.
32 Marsilius of Padua: The Defender of the Peace, ed. Alan Gewirth (New York: Columbia University Press, 1951), 2 vols. Volume II, Discourse I, pp. 45, 63-4. I was directed to this passage by Leo Strauss’s essay on Marsilius, in Leo Strauss and Joseph Cropsey, eds., The History of Political Philosophy (Chicago: Rand McNally, Second Edition, 1972). Strauss contends that Marsilius’s populist thesis is provisional and due to his anti-clericalism, and that his anti-clericalism is not identical to the secularism of modern constitutionalism. Marsilius teaches only that “the Christian human legislator, not as Christian but as human legislator, may use coercion against heretics and infidels in this world.” Strauss and Cropsey, p. 264. He cites the follow-
I am trying to suggest that the separation of powers is distinctively modern, as both Gwyn and Vile say, precisely because it is a doctrine of government rooted in a distinctively modern-anti-classical-view of law and justice; this modern view rejects the classical view of a natural order which human intelligence is capable of discerning and in accordance with which men may, and therefore should, act. The classical view of nature supports a hierarchically ordered polis ruled by the wise. The modern view opposes any notion of ruling. As Harvey C. Mansfield, Jr. has pointed out, in the modern conception of representative government, "the people are a whole having no ruling part. Everyone belongs to the people. The people themselves are not potentially a ruling part, and they cannot be divided into ruling and ruled parts." Gwyn and Vile cite political writings of the English Civil War period as first examples of the separation of powers. In response to Charles I's description of the Constitution as a mixture of absolute monarchy, aristocracy, and democracy, monarchists attempted to establish limits on the king's powers by differing "Nomothetical or Archetechtonic" power from "Gubernative or Executive" power. They also discouraged the king from exercising his prerogative to veto laws. The major writers cited for their exposition of the separation of powers, however, are republicans. Gwyn concentrates on John Lilburne, leader of the Levellers, Vile on Marchamont Nedham, who supported the Instrument of Government, the written Cromwellian Constitution of 1653-60.

Gwyn finds four of his five versions of the separation of powers in Lilburne's writings. In England's Birth-Right, Lilburne argues that members of Parliament should be prohibited from holding any place of profit in the Commonwealth. Two reasons are given: if they had these offices, members of Parliament would "set up an interest of their own, destructive of that common Interest and Freedoms whereof the poorest free man in England ought to be possessor";


35 Vile discusses Charles Herle and Philip Hunton, pp. 39-42; Gwyn discusses Hunton only and does not refer to the veto, p. 31.
and, if lawmakers are law executors, "a man may spend both long time, and all he hath besides, before ever he can get any Justice against them, yes, and it may be, beyond the loss of his life." Although these reasons are somewhat similar and advance the same proposition, Gwyn labels one a common interest version of the separation of powers and the other an accountability version. In another of Lilburne's pamphlets Gwyn finds a third version which he calls the rule of law. The difference between the accountability and the rule of law versions "is that the one is concerned with maintaining government under law while the other is concerned with holding individual members of the government accountable for violations of the law or the common interest." From the context, Lilburne's rule of law calls for an independent determination of guilt or innocence, or what we would call judicial independence. This valid distinction between accountability and rule of law suggests that Gwyn could have dropped common interest as a separate version. Without considering the non-institutional requirement of virtuous men, either the political or the judicial check should secure legislation in the common interest.

In the second Agreement of the People, which Gwyn calls the "first written constitution to describe the institutional arrangements believed to satisfy the demands of the [separation of powers] doctrine," a single representative assembly was given all political power except that which was prohibited to it by the Agreement. The Assembly would appoint a Council of State "for the managing of public affairs" and would "act and proceed . . . according to such Instructions and Limitations as the Representatives shall give, and not otherwise." A separate prohibition on Assembly interference with execution of the laws does not conflict with these instructions since it referred to what we would call judicial activity and not administration.

A constitution proposed by the Army officers and presented to the Commons in 1649 resembled the Agreement of the People but the Levellers rejected it because the Assembly was limited to meeting only the first six months in every two-year period, unless called into emergency session by the Council. A third Leveller Agreement proposed annual elections and Assembly sessions of at least four months, after which it could, at its discretion, "adjourn from two months to two months." Lilburne argued in another pamphlet that

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36 Quoted by Gwyn, pp. 39-40.
37 Ibid., p. 44.
38 Quoted in ibid.
Parliament should manage its affairs "by Committees of short con-
tinuence, and such as may be frequently and exactly accountable for
the discharge of their Trusts." 39 Not only must the Assembly have
powers to direct the affairs of government and to control the officers
of government, it must be in session frequently and be in control of
its sessions, and it apparently should not entrust government to a
unitary executive department.

Gwyn points out that the Leveller doctrine makes no reference
to checks and balances and assumes the subordination of execution
to law-making. Furthermore, their "accountability version of the
separation of powers left no room for allowing the executive to
to check the legislature." 90 Still, the Assembly's powers were not lim-
ited to one function and were extensive enough to make it supreme.
Except for the judicial power, which the Levellers placed in pop-
ular juries, the Assembly controlled the administration of govern-
ment, including foreign policy. One wonders how this formulation
of republican government contains a genuine separation of powers.

To demonstrate his balancing version of the separation of pow-
ers, Gwyn quotes a passage from A True State of the Case of the
Commonwealth, the official defense of the Instrument of Govern-
ment, which includes reference to mixed monarchy as well as sepa-
ration of powers.

If war there be, here is the unitive virtue (but nothing else) of mon-
archy to encounter it; and here is the admirable counsel of aristoc-
racy to manage it: if peace be, here is the industry and courage of
democracy to improve it. And whereas in the present constitution,
the legislative and executive powers are separated, the former be-
ing vested in a constant succession of Parliaments elective by the
people, the latter in an elective Lord Protector and his successors
assisted by a Council. ... 91

Gwyn credits this pamphlet with setting "a pattern for later state-
ments of the separation of powers, which henceforth was almost
always linked in British thought with the theory of mixed monar-
chy." 42

In Vile's opinion the Instrument of Government, and Nedham's
A True State of the Case of the English Commonwealth, presented
"the doctrine of the separation of powers standing on its own feet,
claiming to be the only true basis for a constitutional govern-

39 Quoted in ibid., p. 47.
90 Ibid., p. 48.
41 Ibid., p. 64. See note 47 for discussion of correct title.
93 Ibid., p. 65.
ment." Vile suggests that the separation was more apparent than real, but fails to tell us just how "apparent" it was, since Oliver Cromwell controlled the army and exercised one man rule until his death in 1657. Still, on paper the Protector's participation in legislation was limited to a twenty day suspensive veto. Vile notes that the Protecor "was given power to pass ordinances between the sittings of Parliament, and in practice this gave him the power to rule without Parliament's prior consent." Apparently Gwyn chose an atypical passage to quote from the Instrument, since Vile maintains "it was almost completely stripped of the paraphernalia of mixed government. . . ." The Protector had a limited power of dissolution and Parliament had to be called at least once every three years. A Council of State had part of the legislative power and members of the legislature could be placed on the Council. Vile considered this the "major aspect of the Instrument that clashed with the doctrine of the separation of powers. " Although power is distributed differently in the Agreement of the People and the Instrument of Government, it is not clear that either Constitution is based on a separation of powers doctrine. There is more evidence for the doctrine and the form of government that accompanies it in Locke's Second Treatise and the Revolution of 1688.

Like Hobbes, Locke derives the source and object of government from the pre-political natural equality of all men in their right to life. Locke differs from Hobbes on the scope and organization of
governmental power. He introduces the rule of law as a limitation on the government's authorization. Government must act according to its trust: the publicly promulgated laws and the common power must be directed to the preservation of men's property, i.e., their life, liberty, and estate. The people's power to dissolve a government which acts contrary to its trust is a pre-political power, and it will normally lead to war since the government is not likely to agree with the popular judgment and abdicate. To maintain limited government, Locke introduces a division between the legislative and executive powers of government. Both Gwyn and Vile find the separation of powers in Locke. Vile says Locke "did not maintain the pure doctrine of the separation of powers, but combined it with other elements of his theory that modify it very considerably," and which produced a "partial separation of functions." Since Locke's distribution of political powers is based on distinct powers of government, rather than an explicit discussion of monarchy or republicanism, and since the division supports government limited to securing the rights of life, liberty and estate, I think that his version is a more genuine doctrine than anything presented in the Interregnum period.

Vile notes the importance of Locke's executive power, which "take[s] into account the different nature of the internal and external responsibilities of the government." Without mentioning monarchy Locke gives the executive sole control of the sword, which includes a complete power in foreign affairs, unrestrained by previous laws. Yet, the supreme power of the Commonwealth is the legislative, which defines the form of government and is "sacred and unalterable in the hands where the community have once placed it." Vile has these statements in mind when he says that Locke reconciled legislative supremacy with separation of powers.

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50 Peter Laslett and Franz Neumann both deny that Locke presents a doctrine of the separation of powers. See Laslett's edition of Locke's *Two Treatises*, pp. 131-133, and Neumann's edition of Montesquieu's *Spirit of the Laws*, pp. Lv-Lvii. [For full publication data, see below notes 54 and 73.] Vile refers to Laslett's contention and responds by distinguishing the pure doctrine from a modified doctrine. Vile, p. 58.

Gwyn surveys the literature on this question, citing Neumann and Laslett among others. He also devotes an appendix to refuting, persuasively I believe, Laslett's contention that Locke's attitude in a practical matter involving the separation of powers revealed his lack of concern for such a doctrine. See Gwyn, p. 70 and Appendix II.

51 Vile, p.58.
52 Ibid., p. 66.
53 Ibid., p.60.
54 John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), Sections 132, 134; pp. 400, 401. All citations are to the Second Treatise. The page references are to the Mentor Paperback version of this edition.
55 Vile, pp. 58, 62-3.
Gwyn finds the efficiency version in the first two sentences and the rule of law version in the rest of the following passage:

The Legislative Power is that which has a right to direct how the Force of the Commonwealth shall be imployed for preserving the Community and the Members of it. But because those Laws which are constantly to be Executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the Legislative should be always in being, not having always business to do. And because it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the Legislative Power is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws; which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publlick good.

But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual Execution, or an attendance thereunto: Therefore 'tis necessary there should be a Power always in being, which should see to the Execution of the Laws that are made, and remain in force. And thus the Legislative and Executive Power come often to be separated.

Gwyn notes that Locke's rule of law argument contains the reason for the separation of functions and the manner in which the separation is achieved. To assure legislation for the common interest, lawmakers "should return to private life to experience the consequences along with other members of their society." Gwyn notes a difference between Locke's advocacy of short legislative sessions and the earlier republican arguments.

Locke appears to have believed that because members of the legislature held the supreme governmental power, they would while in session possess executive power as well. Unlike earlier republican writers, he found it difficult to conceive of the legislature being supreme but being at the same time limited by a higher constitution to operating only through general rules or as a special court to try delinquent officials.

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56 Locke, Section 143, pp. 409-410; Section 144, p. 410.
57 Gwyn, p. 75.
58 Gwyn, p. 76.
Locke also argues against a one-man legislature, since in that case the supreme power would always be active, or "in being," and would necessarily possess the supreme Executive power too. 59 Gwyn comments:

If the legislature "naturally" possessed executive power whenever it met, it would also violate the separation of powers whenever it chose to exercise the latter power during its meetings. We seem to be left with the strange conclusion that men are secure and free only when their legislatures, themselves necessary for security and freedom, are not in session."

Gwyn may find Locke's argument confusing because Locke refuses to associate himself completely with either the republicans or the monarchists of the Interregnum. For example, while he acknowledges that Locke's view of legislative supremacy required short sessions to secure the separation of powers, Gwyn wonders that Locke did not consider the alternative of mixed monarchy, advocated by L'Estrange in 1660, which would not require short legislative sessions. Why didn't Locke take this up in chapter twelve, since he mentions mixed monarchy in chapter thirteen? 61 In that chapter, entitled, "Of the Subordination of the Powers of the Commonwealth," Locke says that when the executive is vested in a single person who also shares in the legislative, that person "in a very tolerable sense may also be called supreme." 62 This form of mixed monarchy is assimilated to the principle of consent of the governed and legislative supremacy. The separation of powers provides the vehicle for this synthesis of the older views of republic and monarchy.

We may summarize Locke's argument as follows. Men are secure and free if their legislature, which includes a popular branch, does not assume direct responsibility for government; that task requires the firmness and energy of a unitary branch which possesses the collective force of the community. So as not to alarm anyone, and to remain consistent with the doctrine of consent, we will call this the executive branch, after the function of executing the laws. The legislative branch legitimates the government and provides an institutional check on the "executive." The ultimate reliance must be the people's right of revolution.

60 See Locke, Section 153, p. 415.
60 Gwyn, p. 76.
61 Ibid.
62 Locke, p. 414, Section 151.
With short legislative sessions, the executive will have to exercise his prerogative in internal as well as foreign affairs. The necessary law may not be on the books or an exceptional circumstance may necessitate ignoring a law for the public good. Locke first defines prerogative as "a power in the hands of the Prince to provide for the public good, in such cases which depending upon unforeseen and uncertain occurrences, certain and unalterable laws could not safely direct. . . ." When he repeats this definition in the chapter on prerogative Locke substitutes executive power for prince. The directly political language is thus replaced with the indirectly political language of the separation of powers.

Gwyn finds Locke’s view on prerogative "very similar to that of the defenders of the king’s dispensing power during the 1680’s." The difference concerned who should decide in a dispute between the king and the people; L’Estrange said the king was the better judge and Locke said the people shall judge, referring to the pre-political natural right of revolution. I think Gwyn understimates the significance of such a difference when he concludes that Locke’s views on prerogative, or dispensation, were inappropriate as a defense of the Revolution of 1688.

Vile comes closer to the truth about Locke when he says:

Locke, with the restored monarchy in mind, gave a share in the exercise of the legislative function to the King, and it is here that he made use of Hunton’s ideas in order to raise the executive branch from a position of subordination to a status co-ordinate with the representative parts of the government.

Hunton wrote a Treatise on Monarchy and advocated mixed monarchy. Locke constructs a moderated monarchy without using the language of monarchy; instead he describes his government in terms of legislative and executive powers. Vile prefers to call the king’s negative participation in lawmaking "the basis of the theory of the balanced constitution, a theory which we may label as a partial separation of functions."

In summary, both Gwyn and Vile bring their own analytical frameworks to their examinations of Locke’s Second Treatise. They

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63 Ibid., Section 158, p. 420.
64 Gwyn, p. 79.
66 Gwyn, p. 81.
67 Vile, p. 64.
68 Ibid., p.66.
find references to legislative and executive power in the Interregnum writers and they find them in Locke. But terms themselves do not constitute a doctrine. If the separation of powers doctrine classifies political powers in a manner that checks power and secures individual liberty, it is hard to find a completed doctrine in the vague references to legislative and executive power in the Interregnum writers. The references are vague because serious political issues remain in dispute; they include religion and monarchy versus republican government. Locke’s discussion of the powers of government was more extensive than earlier accounts and deemphasized the monarchy-republic division. Replacement of division over regime, which produced violent civil war, with division over legislative and executive power supports the establishment of limited government. By limited, or representative, government I mean a government whose authority is derived from consent and limited to securing the rights of life, liberty, and estate. No man or group of men have a natural right to rule and hence government does not impose a comprehensive form on civil society. Government by divine right attempts to rule and thus contrasts with non-partisan toleration. The Revolution of 1688, not the Civil War, introduced this secular and representative principle into English Government. Only when government ceases to rule men in the decisive respect, to form their character, can a doctrine of different powers of government be substituted for conflicting claims to rule.6

II

According to Madison, in the Federalist, Montesquieu is “the oracle who is always consulted and cited” on the subject of the separation of powers. While he may not have been the author of “the political maxim that the legislative, executive, and judicial departments ought to be separate and distinct,” Montesquieu “has the merit at least of displaying and recommending it most effectively to the attention of mankind.” Gwyn begins his study by pointing out that Americans since the Federalist have tended to identify the separation of powers with checks and balances. According to Gwyn, balance of powers among different branches of government is but one of five distinct reasons for separating powers, and hence it is but

7 Federalist 47, p. 313.
one of five versions of the doctrine. Vile distinguishes both the checks and balances of the American Constitution and the balanced government of the eighteenth century English Constitution from the complete functional separation of his pure doctrine. Montesquieu’s account of the separation of powers, and generally of republican government and the English Constitution, set the framework for the American debate on the meaning of republican government as well as the separation of powers.

Compelled to justify the Constitution’s division of power in terms of the separation of powers, Madison said that Montesquieu did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

According to Centinel, a leading Pennsylvania Anti-Federalist, checks and balances could only succeed where there were different orders of men in society, such as hereditary nobility and hereditary monarchy. Thus the Constitution’s checks and balances could not succeed because no such orders existed in America.

The interpretations of Madison and Centinel appear to confirm Vile’s distinction between the pure doctrine and checks and balances and Gwyn’s account of different versions of the doctrine. I believe a better interpretation of Montesquieu and the American founders would concentrate on the relationship between the separation of powers and the republic-monarchy division. Montesquieu added the judicial power and reduced, further than Locke did, the difference between republics and monarchies. The Federalists completed the task by using the powers and the elective principle to transform the meaning of republicanism. The Anti-Federalists objected to this transformation and hence opposed the Constitution.

Montesquieu’s discussion of the separation of powers is presented in Book XI, Chapter 6 of his *Spirit of the Laws*, in which he describes England as the only nation “that has for the direct end of its constitution political liberty.” Montesquieu defines liberty as a

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right of doing what the laws permit and indicates that it is not re-
stricted to republics nor is it necessarily found there. Although
Montesquieu discusses republics, monarchies, and despotisms in
terms of the principles, or passions, which guide them, he does not
identify England, a "republic disguised under the form of a monar-
chy," with any specific principle.

All the passions being unrestrained, hatred, envy, jealousy, and an
ambitious desire of riches and honors, appear in all their extent;
were it otherwise, the state would be in the condition of a man
weakened by sickness, who is without passions because he is with-
out strength.

Montesquieu relies not on virtue, which "has need of limits," but
on institutions of separated and balanced political power which are
sensitive to popular needs but removed from popular administra-
tion. With the proper distribution of the three powers, the moral
foundation of government becomes avarice and ambition.

Montesquieu's doctrine of the powers begins with a formulation
similar to Locke's and then introduces the judicial as a separate
power.

In every government there are three sorts of power: the legisla-
tive; the executive in respect to things dependent on the law of
nations; and the executive in regard to matters that depend on the
civil law.

By virtue of the first, the prince or magistrate enacts temporary
or perpetual laws, and amends or abrogates those that have been
already enacted. By the second, he makes peace or war, sends or
receives embassies, establishes the public security, and provides
against invasions. By the third, he punishes criminals, or deter-
mines the disputes that arise between individuals. The latter we
shall call the judiciary power, and the other simply the executive
power of the state.

Executive power seems confined to foreign affairs, since, as Vile
points out, "he does not make it at all clear that the power to estab-

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Thomas Nugent (New York: Hafner Publishing Company, 1949), Book V, Chapter
19, p. 68. For other references to England that reflect this mixture, see Book XII,
Chapter 19, p. 199 and Book XIX, Chapter 27, p. 312.
74 Ibid., Book XIX, Chapter 27, p. 308.
75 According to David Lowepthal, "Each man's sense of self-interest supports his
love of liberty and his patriotism." Montesquieu, in *History of Political Philosophy*,
ed. by Leo Strauss and Joseph Cropsey (Chicago: Rand McNally, 1972), Second
76 Montesquieu, Book XI, Chapter 6, p. 151.
lish the public security’ has any internal connotation. Two pertinent passages on the powers of government must be quoted extensively. In the first we note that Montesquieu expands executive power to include internal as well as foreign affairs. In the second he refers to different powers.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

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

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

Gwyn says Montesquieu employed the rule of law version of the separation of powers in the first passage and balanced government in the second. Vile says Montesquieu combined the pure doctrine with "the ideas of mixed government and checks and balances." Examining Montesquieu’s frame of government, we see how his two formulations of powers must be viewed together. His object is similar to Locke’s: to overcome the monarchy-republic division.

Representation increases the capacity of the legislature to discuss public affairs and thus constitutes a major improvement over ancient republics. Representatives ought to be chosen by the people.

77 Vile, p.86.
78 Montesquieu, pp, 151-52.
79 Ibid., p.160.
80 Gwyn, pp. 109-10; Vile, p.90.
in their districts but the people should not share in government otherwise. The nobles should have a share in legislation in a separate house of the legislature. The executive must be a monarch and he needs to have a check on the legislative branch because otherwise it would become despotic.\textsuperscript{81} Since execution has narrow limits, the legislature does not need a similar check on the executive. The executive also regulates the time the legislature meets. While the person of the executive may not be held accountable to the legislature, his ministers may be examined and punished.\textsuperscript{2} Thus impeachment, a judicial activity, is carried on by the legislature. While Gwyn does not cite this as an example of his accountability version of the separation of powers, it is essentially what he means by it. Hence Gwyn’s accountability version includes a sharing of functions even when balancing power is not explicitly mentioned.

Montesquieu favors popular juries so that judicial power may become “invisible” and no longer be “terrible to mankind”; people will “fear the office but not the magistrate.”\textsuperscript{83} While discussing the Roman Constitution, Montesquieu says: “It is necessary to observe that the three powers may be very well distributed in regard to the liberty of the constitution, though not so well in respect to the liberty of the subject.”\textsuperscript{84} The separation of the judicial power has nothing to do with the balance of power among the branches of government; it protects against government’s lawless activity against individuals.\textsuperscript{85} Montesquieu’s doctrine of the separation of powers thus contains two components; one secures political liberty in relation to the constitution; the other secures it in relation to the subject.\textsuperscript{86} This distinction is not the same as Gwyn’s distinction between reasons for the separation of powers and reasons for balanced government. The separation of legislative and executive powers includes balancing, since some powers are classified legislative or executive for the sole purpose of constructing a balance so the constitution can preserve liberty. Gwyn seems to acknowledge this point when he says that “a separation of powers can be maintained only if accompanied by a system of checks and balances.”\textsuperscript{87} The executive veto and accountability of the executive’s ministers reveal

\textsuperscript{81} Montesquieu, Book XI, Chapter 6, p. 157.
\textsuperscript{82} Ibid., p. 158.
\textsuperscript{83} Ibid., p. 153.
\textsuperscript{84} Ibid., p. 177. Book XI, Chapter 18, p. 177.
\textsuperscript{85} Thomas Pangle makes this point in his Ph.D. dissertation on Montesquieu (University of Chicago, Department of Political Science, 1972), to be published in 1973 by the University of Chicago Press. See his chapter on the Liberal Republic.
\textsuperscript{86} Gwyn, p. 111.
how the separation of powers is "upheld and modified" by the balance of power and the latter is "limited in its operations" by the former.\footnote{ibid., p. 112.}

Montesquieu described the English Constitution as follows:

As there are in this state two visible powers—the legislative and executive—and as every citizen has a will of his own, and may at pleasure assert his independence, most men have a greater fondness for one of these powers than for the other, and the multitude have commonly neither equity nor sense enough to show an equal affection to both.\footnote{Montesquieu, Book XIX, Chapter 27, p. 307.}

I think he intended to utilize the abstract and functionally incomplete classification of the powers of government to explain and justify the new liberal republic with its monarchical executive. The framers of the American Constitution drew on this formulation and completed the task, begun by Locke, of subsuming the monarchy-republic division under the broader term representative government.

The Federalists defined republican government with reference to popular election to political office. Then they equated popular election with representation, which permitted them to defend the Constitution against charges that the small number of representatives in the national government would come from the upper classes and thus produce aristocracy or monarchy.\footnote{See Federalist 10, 39, 57 and Hamilton’s speech in the New York State Ratification in Jonathan Elliot, Debates on the Adoption of the Federal Constitution, Rev. Ed., 5 volumes (Philadelphia: J. B. Lippincott Company) II, 251, 256-7. Hereafter cited as Elliot. Madison’s remark that the purpose of representation is to remove the people, in their collective capacity, from government comes straight from Montesquieu. Compare Federalist 63, p. 413 with Montesquieu XI-6, p. 155.}

The Anti-Federalists drew on Montesquieu’s account of the traditional small republic to attack the Constitution. In their view election did not suffice for genuine representation, which had to incorporate the major classes or interests of the community in order to secure the confidence of the people.\footnote{See Richard Henry Lee, Letters of the Federal Farmer in Empire and Nation, Forrest McDonald, ed., (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1962), II, p. 98. See also Brutus # 1 (Robert Yates). The definitive edition of the Anti-Federalist writing has been edited by Herbert J. Storing and will be published by the University of Chicago Press in 1974.} This division of opinion over the best form of republican government explains different views concerning the scope of the national government’s authority and the organization of political
power into different branches. The Constitution’s ratification signified not only the victory of the extended republic, but also the victory of what Corwin called the "quasi-monarchical" view of executive power.  

In Gwyn’s judgment, the Americans adopted the balancing version of the separation of powers. According to Vile, American constitutionalism developed from mixed government in the colonial period, to the pure doctrine in the early period of the state constitutions, to checks and balances in the Federal Constitution, and back to simple government with Thomas Jefferson and John Taylor’s conceptions of republicanism.

The difficulty with Vile’s pure doctrine is that it assumes what no separation of powers writer says, namely that all the powers of government can be unequivocally classified on the basis of two or three distinguishable functions. Madison alerts us to this difficulty in the Federalist, but he follows Montesquieu’s construction and assumes the existence of "three great provinces" of government. Perhaps the Pennsylvania Constitution of 1776, which had a unicameral legislature and a plural executive, and which Vile has difficulty distinguishing from "complete legislative supremacy or a system of gouvernement d'assemblée," exemplifies a popular version of republican government rather than the pure doctrine of the separation of powers. Vile himself suggests this possibility. Discussing the power of appointment of the executive, he says: "The apparent need for independence on the part of the executive suggested . . . that there was more to his function than the automatic application of law. . . ." The appointment power, the number of magistrates, and the organization of the legislature are important components of a constitutional structure which the functional division between lawmaking and execution does not cover. We cannot automatically classify appointment as a legislative or executive function, nor do the functions tell us how many offices or how many legislative bodies to have. Vile acknowledges these limitations when he notes that the treaty-making power and the war power "did not fit easily into the over-simple categories of the new approach. These questions of governmental powers and structure all become intelligible when related to the monarchy-republic division. Vile approaches this point when he characterizes the American constitution to the separations of powers as follows:

93 Federalist 37, p.229.  
94 Vile, pp. 137, 142.
The history of the constitutional doctrine in the decade between the Constitution of Georgia and the Federal Convention is, in part at least, the history of the search for a rationale for dealing with the former prerogatives of the Crown. 95

Several passages in the Federalist reveal how this "rationale" was related to republican government. Madison says that "in republican government, the legislative authority necessarily predominates." In addition, in a "representative republic, where the executive magistrate is carefully limited, both in the extent and in the duration of its power," the legislative power, if exercised by a single assembly, will constitute the source of danger: it will be inspired by its popular support and confident of its strength, yet small enough to act; and its powers are more extensive "and less susceptible of precise limits" than other powers. Finally, Hamilton tells enlightened friends of republican government to hope that a vigorous executive is not inconsistent with the genius of republican government, since "energy in the executive is a leading character in the definition of good government." 96

While some of the most instructive passages in the Federalist on the separation of powers pertain to a defense of bicameralism 97 the presidency stands at the apex of the modern, or extended republican version of the separation of powers. 98 A review of the construction of the presidency reveals how a new form of republican government depended on a formulation of executive power approaching that of Locke and Montesquieu. In his book, The Creation of the Presidency, Charles Thach notes that the two major sources for the fram-

95 Ibid., p. 143.
96 Federalist, 51, p. 338; 48, pp. 322-23; 70, p. 454.
97 Federalist 51, 63.
98 I do not consider this point inconsistent with Martin Diamond's argument that the institutional checks of federalism and the separation of powers depend, for their efficiency, "upon a prior weakening of the force applied against them, upon the majority having been fragmented or deflected from its `schemes of oppression'." Diamond "The Federalist" in Morton J. Frisch and Richard G. Stevens, eds. American Political Thought: The Philosophic Dimensions of American Statesmanship (Charles Scribner's Sons New York, 1971), p. 66. In another work, Diamond says "The representative legislature is the very essence of the democratic republican idea. Possessing most of the great powers of government and intimately connected with the interests and opinions of local constituencies, the lawmaking body was thought to have the advantage in conflicts with the other branches. Martin Diamond, Winston Mills Fisk, Herbert Garfinkel, The Democratic Republic, Second Edition (Chicago, Ill.: Rand McNally, 1970), pp. 106-7. Our disagreement here, if one exists, concerns the Constitution's effect on the distribution of power among the legislative and executive branches. When a national government covering the extent of territory and population of an expanding United States of America is given extensive power, it is not unreasonable to look to the unitary executive for the requisite energy in government.
ers were the New York Constitution and the national experience under the Articles of the Confederation. In the New York Constitution, the executive power was vested in a Governor who had sufficient powers to assert his control over the administration of government and to prevent the legislature from establishing separate councils.\(^9\) Hence the New York executive was both separate from and equal to the legislative branch. In national affairs, "the separate executive, so far as one had evolved, had come into being under the law." That is, "the tendency in the national field was more toward separation than equality."\(^{100}\)

Several delegates in the Federal Convention considered an energetic executive incompatible with republican government. James Wilson's motion for a unitary executive elicited objections from Roger Sherman and Edmund Randolph. Sherman's statement that the executive magistracy was "nothing more than an institution for carrying the will of the legislature into effect," and therefore the legislature should be at liberty to appoint and control the executive, and to "appoint one or more as experience might dictate," complemented Randolph's objection to unity as "the foetus of monarchy." Sherman's statement about the executive magistrate does not apply to monarchy but to republican government. Wilson argues only that the executive power includes executing the laws and appointing officers "not appertaining to and appointed by the legislature."\(^{101}\) He does not mention foreign affairs and he does not say that the appointing power is executive in nature. Madison, who disagreed with Sherman about legislative supremacy, still doubted that republican government could sustain an energetic executive. His argument for the proposed Council of Revision was that a republican executive could not defend himself against the legislature without the assistance of the judiciary.\(^{102}\) This proposal was voted down, either because a majority of the framers thought the executive would be strong enough, or because they did not want the judges examining laws on two different occasions.

An energetic executive would need to control administration and direct foreign affairs in addition to being unified, independent-

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ly elected, eligible for reelection, and having a qualified veto on legislation. As the earliest modes of electing the president would have subordinated the executive branch to the legislature, so the earliest distribution of powers would have made the senate the chief organ of foreign relations.\textsuperscript{94} The report of the Committee of Eleven on September 4 not only contained the electoral college provision for election, but transferred the powers of appointment and treaty-making, formerly in the senate, to the executive. The _senate's participation, a majority consent necessary for appointments and two-thirds for treaties, did not seriously affect the president's control of administration. This point was confirmed by the First Congress's decision on the removal power, made in connection with their construction of the major departments of government. Madison argued that the Constitution vested the executive power in the president and that appointment was an executive power. Since removal was incidental to appointment, the senatorial participation in appointment was an exception to be construed narrowly. Hence the president alone, by virtue of his executive power, possessed the power to remove any officer he appointed, with or without the consent of the Senate.\textsuperscript{95}

When Congress's enumerated power to make war came under discussion on August 17, Charles Pinckney argued that the senate should exercise the power. Pierce Butler thought that even the senate was too large a body to exercise this power and that the president should have it, since he "will not make war but when the nation will support it."\textsuperscript{106} Then Madison and Elbridge Gerry moved to replace the word "make" with "declare," "leaving to the executive the power to repel sudden attacks. Roger Sherman preferred "make" to "declare," "the latter narrowing the power too much." Gerry took exception to Butler's suggestion, saying he "never expected to hear in a republic a motion to empower the executive alone to declare war." Oliver Ellsworth at first opposed the change:

There is a material difference between the cases of making war, and making peace. It should be more easy to get out of war, than into it. War also is a simple and overt declaration. Peace [is] attended with intricate and secret negotiations.\textsuperscript{107}

\textsuperscript{94} Thach, op. cit., pp. 114-39.
\textsuperscript{95} See Annals, Volume I, pp. 481-2, quoted in Thach, pp. 151-2. Jefferson joined in this opinion concerning the president's control of administration. See Thach, p. 162.
\textsuperscript{106} Farrand, Volume II, p. 318.
\textsuperscript{107} Ibid., p. 318-9.
Madison explains, in a note, that Ellsworth gave up his objection when Rufus King explained that "make' war might be understood to ‘conduct’ it which was an executive function." George Mason opposed giving the war power to the executive but favored the change to "declare." After the change was approved, by a vote of 7-2, Butler "moved to give the legislature power of peace, as they were to have that of war," and this was unanimously defeated. As a result, framers of a republican government acknowledged the power to conduct war as an executive function and lodged that power in a single man whose mode of election and tenure made him independent of the legislature.

Vile says that the pure doctrine "depended upon an intellectual distinction" rather than the opposition of power with power, as did mixed government, and "once this fact was clearly grasped, the constitutionalists of America turned to their experience of the balanced constitution for the solution to their problems." This interpretation does not do justice to the genuine political controversy concerning the application of the separation of powers to republican government.

The Constitution was opposed as inconsistent with republican government because of the powers it lodged in the national government and also because of the power it gave to the senate and the president. The Anti-Federalists argued that insufficient powers were in the hands of the people, or their genuine representatives. With the Constitution ratified, what Locke and Montesquieu started was near completion. First monarchy had been moderated or liberalized. Now republics had been made extensive and capable of energetic administration. A distinction remained: England had a hereditary nobility and hereditary offices, including the executive; American government was "wholly popular," as Madison described it,

Perhaps the stability and reverence supplied by hereditary king and nobility has been, to some extent, supplied to American government by another departure from Locke and Montesquieu. The es-

\[^{10}\] Vile, p. 146.
\[^{108}\] Federalist 14, p. 81.
\[^{110}\] This broader term reflects the change in republican government and it was used by Madison in The Federalist and Hamilton in the New York Ratification Convention. See Federalist 63, p. 413; II Elliot 333.259.
tablishment of an independent judiciary with the power of review over all federal laws, as well as the ministerial acts of the executive department, also depends on an imprecision in the functional divisions of political powers. Justice Marshall's argument, taken from Hamilton, that the Constitution is law-supreme because of its popular mode of ratification but essentially law-and that the peculiar province of the judiciary is to interpret law overlooks the difference between lawmaking and the establishing of a frame of government which includes three separate and coordinate branches of government. 111 An alternative to the Hamilton-Marshall interpretation identifies three constitutional spheres and leaves the final decision within each sphere to the respective branches. Evidence concerning the framers' understanding of judicial review is inconclusive. William Winslow Crosskey interprets the passages cited in behalf of review as confining the power to a limited judicial defense against encroachment from the other branches. 112 In light of Justice Marshall's famous statement in the Bank case that "it is a constitution we are expounding," in which great outlines are marked and "minor ingredients which compose those objects [must] be deduced from the nature of the objects themselves," 113 our final judgment on judicial review may also have to turn on our interpretation of representative government.

Finally, we must consider Jefferson's later views on the separation of powers and republican government, since Vile cites them to support his contention that the pure doctrine was revived after the Federalist period. 114 Jefferson accepted checks and balances in 1782, when he criticized Virginia's Constitution for permitting all power to result in the legislature, and in 1787, when he approved of the executive's veto in the Constitution. 115 Vile cites Jefferson's letters to

111 Compare Federalist 78, pp. 505-6 with Marbury v Madison 1 Cranch 137, (1803), 177-178.
113 McCulloch v Maryland, 4 Wheaton 316, 407 (1819).
114 Vile, pp. 161-75.
John Taylor to show that by 1816 Jefferson "came to accept the pure doctrine of the separation of powers as the only basis of a desirable constitution." 116 Jefferson defined republic as "a government by its citizens in mass, acting directly and personally, according to rules established by the majority," 117 but he acknowledges that the nearest approach to this in a large country is government by representatives, either instructed or chosen for short terms. While he finds "much less of republicanism than ought to have been expected" 118 in the Virginia and the national governments, Jefferson does not advocate eliminating the separate executive and judicial branches. To understand his republicanism, which consistently emphasized civic virtue and opposed energetic government, we must turn to two letters he "wrote in 1823. In the first, he describes the advantages of modern over ancient republics in a manner similar to The Federalist:

Modern times have the signal advantages, too, of having discovered the only device by which these rights can be secured, to wit: government by the people, acting not in person, but by representatives chosen by themselves, that is to say by every man of ripe years and sane mind, who either contributes by his purse or person to the support of his country. u9

In his second letter, Jefferson explains his views on natural divisions among a people and he relates it to the organization of government in the United States. He describes two natural parties, which he calls Whig and Tory but which exist in all countries regardless of names: "The sickly, weakly, timid man, fears the people, and is a Tory by nature. The healthy, strong and bold, cherishes them, and is formed a Whig by nature." In the current division (1823): "The Tories are for strengthening the Executive and General Government; the Whigs cherish the representative branch, and the rights reserved by the States, as the bulwark against consolidation, which must immediately generate monarchy." 120 Jefferson did not want to eliminate the Tory party nor its natural home, the more permanent institutions of power in the Constitution, the executive

116 Vile, p. 165.
117 Jefferson, Selected Writings, p.670.
119 Ibid., p.672.
119 Letter to Monsieur A. Coray, October 31, 1823; in ibid., p. 711, cf. Federalist 10, 14, and 63. Jefferson goes on to say that America perfected representation by not introducing hereditary institutions; compare this to James Wilson’s speech of November 24, in the Pennsylvania Ratification Convention, in McMaster and Stone, pp. 222-3.
and the judiciary. Impartial to the natural parties and fervently opposed to party organizations, Jefferson founded the first political party in America to rid the country of monarchy. In his essay on Jefferson’s political thought, Harvey Mansfield, Jr. explains why:

The natural tory party has its legitimate representative in the monarchical power of modern republican government, and precisely because the tories do have this representative, they need not fear republican government and the people who support it. If they do fear the people nevertheless, if a natural tory such as John Adams or even George Washington receives the office, or if an Alexander Hamilton manages it, then the people may need to give the monarchical power to a partisan republican.

Jefferson’s republicanism depends on the people’s capacity for selecting the “natural aristoi” and gives preferred position to the natural party which has confidence in the people, but it is not based on a homogeneous society or a simple government. The people choose the legislators and their executive, but not their judges. A Constitution, even if renewed each generation, still restrains the government. Jefferson’s republicanism is not without its balance of classes and balance of powers. Jefferson would have agreed with Federalist James Wilson’s contention that the Constitution, “in its principles . . . is purely democratical; varying indeed, in its form, in order to admit all the advantages, and to exclude all the disadvantages which are incidental to the known and established constitutions of government.”

As representative government starts from a consent to government in order to secure natural rights, and as the free development of different faculties produces divisions between rich and poor, few and many, the difference between the Federalists and the Anti-Federalists, and then the Jeffersonians, turns on how such a government should be organized and what was most needful for it to succeed: popular participation or effective administration. The separation of powers supports representative government by channeling and limiting political divisions into debates on the scope of the different branches’ powers. One position on representative government, associated with Jefferson, favors the more popular branches of government such as state and local governments or the


122 McMaster and Stone, p. 231, speech of November 24 in the Pennsylvania Ratification Convention.
national legislature; the other position, associated with Hamilton, favors the less popular branches, such as the presidency and the supreme court.

III

While Hobbes, Locke, and Montesquieu considered themselves founders of representative government, Vile views modern constitutionalism and the separation of powers as evolving out of social movements. Vile identifies two periods of social movement. In the first, from 1640 to 1848, the separation of powers "was eminently suited to the needs of the rising middle class," which needs included "wrestling privileges from king and nobles." This explains the similarity of the English, American, and French Revolutions and the constitutional thought accompanying them.

The period of constitutional thought from 1640 to 1848 has within it, therefore, an essential unity, a unity based upon the development in these three countries of the same social groups, cherishing similar values; and, in particular, holding the same view of the nature of political liberty." The second period began with the French Revolution of 1848, which "revealed new social and political movements that were to change drastically the environment in which constitutional theory must operate." This second period, which leads to a new value and threatens the separation of powers, is characterized by a new view of political freedom.

Freedom from restraint alone was no longer enough. The idea that the State should concern itself with creating the environment in which its people would be free to live and develop a full life (whatever that might mean) came to dominate more and more the thought of the nineteenth and twentieth centuries. Such a philosophy of freedom had, however, little in common with the motives of the pure doctrine of the separation of powers, the whole concern of which was essentially negative in its conception of a constitutional provision for liberty.

Vile's subordination of political or constitutional thought to social movements distorts it. The important theoretical issue between

123 Vile, p. 99.
124 Ibid., p. 100.
126 Ibid., p. 211.
modern natural right and the historical school is resolved without argument in favor of evolution. For example, the American founders held political equality as a self-evident truth based on human nature. Vile calls this the "negative conception" of freedom and he associates it with the pure doctrine of the separation of powers. The Americans, however, did not adhere to the pure doctrine's "intellectual distinction between the functions of government." The two views of freedom differ not as negative and positive conceptions but as a view of right based on a fixed human nature and a view of historical progress based on an evolving nature.

Whatever influence Vile accords to thought seems to be negative. His account of the French Revolution emphasizes theoretical principles "which had had little or no institutional reality in pre-revolutionary experience," and social conditions. He attributes the force of the pure doctrine of the separation of powers to Rousseau's influence, although he acknowledges that the revolutionaries had to reinterpret Rousseau's ideas of legislation by the general will and government to apply them to assembly and king or directory. Vile contrasts the American and French Revolutions:

In America the Revolution was wholly successful, monarchy and aristocracy were routed, and many of those men of wealth and status in the community who were in 1776 caught up in the onrush of democratic fervour became in a few months or years the spearhead of a movement to moderate that democracy. There was no longer anyone on the Right to fight; the only danger was from the Left, and an excess of democracy could best be combated by reintroducing a constitution of balanced powers. In France, however, the Revolution was never complete, never wholly successful, and could not be. The threat of monarchical and aristocratic privilege remained, and the theory of checks and balances must inevitably be associated with it. So

Tocqueville emphasized the good fortune of Americans for having the results of a democratic revolution without having had to suffer through a revolution. Vile assumes that political outcomes are determined by social forces and that political thought is a mere tool for rationalization. The American Constitution's success cannot be

127 Ibid., p.146.
129 Vile, p. 181.
130 Ibid., p.199.
explained without reference to the virtues of an unusual political elite. The founders' contribution included application of the separation of powers to a people who would not tolerate hereditary institutions. The failure of the French Revolution may be explained partly by the old order's intransigence, but the new rulers were not as well trained in the science of representative government as were their American counterparts.

In England, Parliamentary government arose when political power was transferred from the hereditary monarch to the leader of the majority party in the House of Commons. Walter Bagehot characterizes the English system as "a fusion" of legislative and executive power.

Either the cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It was made but it can unmake; it was derivative in its origin, but it is destructive in its action.  

Bagehot criticizes the competitor, the Presidential system with its separation of powers. "The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to act without responsibility. ..." According to Vile, Bagehot's description of the English Constitution as a fusion of powers is a misrepresentation. Bagehot's own account of the cabinet implied a partial separation of powers: "The balance of power between cabinet and parliament depended on a differentiation of functions, and upon a distinction also of personnel, for although ministers were also members of parliament their numbers were small ... and they were swamped by the large proportion of the legislature which had no official place or interest." As the Americans added checks and balances to a partial separation of powers, the English converted the balanced constitution into parliamentary government. Each theory draws on a functional distinction and balance. The balance in the new parliamentary government is between government and parliament, not legislature and executive. These modifications were necessary "to suit the new conditions."

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133 Ibid., p. 15.
134 Vile, p. 222.
135 Ibid., p. 213.
Vile's later comparison between the parliamentary and the presidential forms of the separation of powers and representative government emphasizes the distinction between "rules of behavior, internal to the group concerned," and "external rules imposed by law." As long as an aristocracy governed in England internal codes of behavior would restrain the overlap of personnel and functions in the cabinet. The founders of the American Constitution knew that enlightened statesmen such as themselves would not continue to govern by popular deference, and so they constructed significant institutional checks of power against power.

Notwithstanding the defense of the American Constitution's checks and balances, Vile welcomes the Progressive Movement in America, as "another of those great democratic revolts against power and privilege which had characterized the modern world since the midseventeenth century." Woodrow Wilson and Frank Goodnow oppose institutional checks and balances and support the functional division between politics and administration. In his essay on "The Study of Administration," Wilson argues that the field of administration is completely independent of politics: "through its greater principles [administration] is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress." Wilson apparently considered these truths, whose content he does not discuss, as settled and unambiguous as the object of private administration: the acquisition of wealth. Vile shows how the politics-administration distinction collapsed when Frank Goodnow failed to explain what part of the executive's duties is subordinate to politics and what part is administrative and therefore independent of politics. Goodnow defines the parts of administration which are unconnected with politics as "fields of activity of a semi-scientific, quasi-judicial and quasi-business or commercial character." Hence both Wilson and Goodnow would remove economic issues from politics, the regulation of which the Federalist considered "the principal task of modern legislation."

Vile presents his own constitutionalism as an empirical theory of institutions compatible with behavioralism. Taking his cue from

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136 Ibid., p. 324.
137 Ibid., p. 264.
140 See Federalist 10, p. 56.
Almond and Coleman's separation of function from structure,\(^4\) Vile says our understanding of legislatures includes a procedure of collective deliberation which implies a democratic value as well as a rule-making function. "It is this connection between functions, procedures, and values which we must explore." The threefold functional division did not work because the activities of judges and administrators reveal the necessary "multifunctionality" of political structures.\(^1\) Vile introduces four primary functions: rule making, rule application, rule interpretation, and the discretionary function. The discretionary power is what Locke called prerogative and both he and Montesquieu associated it with the executive. Vile says legislatures are authoritative rule-makers, although they are not the only rule-making body. These functional distinctions appear in America and England, with this difference: "In Britain consultation about proposed legislation takes place almost exclusively before its introduction into Parliament, whereas in America it still takes place within Congress."\(^3\) The separation of powers persists in British constitutionalism: holders of places of profit are excluded from the Commons, and the number of ministers sitting in the Commons is small. Rule-making is shared by ministers, civil servants, and members of the House of Commons, but informal rules set limits on the sharing since the Commons is recognized as the authoritative agency of rule-making. The British version of sharing power depends on deference to an elite.\(^4\) The judge's activity, rule-interpretation, is characterized more by a special procedure than a special function, one which aims at protecting the rights of the accused. This resembles Montesquieu's account of the separation of the judiciary and the importance of popular juries.

In addition to his primary functions, which concern the government's relations to its citizens, Vile identifies two secondary functions, which concern the relation of government to itself: control and coordination. Control refers to the checks on abuses of power; coordination is the major function of the twentieth century, as more tasks are assigned to government. Vile relates the functions to different structures and different values. The two principles of organization, hierarchy and collegium, reflect the distinction between monarchy and democracy. The different structures evolve with demands


\(^{42}\) Vile, p.318.

\(^{43}\) Ibid., p.322.

\(^{44}\) Ibid., pp. 323-5.
for certain values. Representation is emphasized in the popular rule-making branches while efficiency is emphasized in the rule-application or executive departments. The connection between the organizational structure, functions, and values is the basis for the "indestructible quality" of the separation of powers.

Vile's final component is process, which stands for "the whole complex of political activity," the stable patterns of behavior and the small eddies of activity. Procedures are the patterned activity which takes place within a given structure. The requirements of balance, or control, and coordination, suggest a small number of structures and procedures, but more than one. Vile identifies his three values-efficiency, democracy, and justice-with three different procedures of the three different institutional structures of government: executive, legislative, and judicial.

The difficulty concerns social justice, the new value, which Vile describes in terms of economic stability and prosperity for all. Measures needed to achieve these aims have "entrenched upon democratic controls and judicial procedures, and they demanded far more coordination of government action than in the past." The mass-based political party has been the structure and coordination has been the function whereby this value has been realized. Older values, with their corresponding structures and functions, have been subordinated to the new and Vile concludes that "any facile view of the separation of powers is dead." Aside from whether a facile view of the separation of powers was ever accurate, Vile's comments about social justice and coordination cut deeper. He is not merely suggesting that the relationship between "functional intentions, organizational structure, and the values implicit in procedures" is more complex than it was. Rather his book concludes with a warning that excessive support for social justice, and the hierarchical structures needed to realize it, threatens all other values and structures of government. Apparently the separation of powers is not indestructible.

IV

The works of Gwyn and Vile contain a thorough and careful account of the origins and foundation of the doctrine of the separa-
tion of powers. Their studies assist our understanding of representa-
tive government by directing us to the changes in political thought and political practice that took place in seventeenth cen-
tury England. Their examination of the political writings of the Interregnum shows that Locke did not invent the terms legislative and executive and that monarchists and republicans formulated different accounts of political powers. I am not persuaded, however, that a doctrine of the separation of powers can be found in these writings. Gwyn and Vile define the doctrine with reference to politi-
cal liberty, by which they understand secular individual freedom. I think this view of the object of government, rooted in the natural right teachings of Hobbes and Locke, was not established until the Glorious Revolution of 1688. Such a government must agree to lim-
it political controversy to different opinions concerning the main-
tenance of peace and securing of rights. The controversy surround-
ing the Civil War involved religion and monarchy. As the principle of toleration subordinates religion to civil peace, so the doctrine of the separation of powers minimizes the distinction between monar-
chy and republic. The Interregnum writers may refer to powers but they are clearly monarchists or republicans. (The Instrument of Government is only an apparent exception, as it never accurately described the Cromwellian Constitution.) Representative govern-
ment has the natural right of self-preservation at its foundation; the separation of powers provides the materials for its edifice. The divi-
sion between monarchy and republic is subordinated to the re-
quirements of consent of the governed and the nature and distribu-
tion of political powers.

If we consider the difficulty of classifying political powers by legislative and executive functions, and if we assume that Locke and Montesquieu were aware of this when they discussed executive pow-
er, we may conclude that they thought representative government needed a monarchical element and that the separation of powers was the device for establishing it in a non-partisan manner. What Locke and Montesquieu began the Americans brought to a conclu-
sion. Republican government was redefined to favor a large territory and population and an independent unitary executive with powers making him co-equal to the legislature. Locke and Montesquieu may not have supported the attrition of the English Constitution’s hereditary branches, but Vile’s discussion of parliamentary govern-
ment reveals the persistence of unity in the executive and a separate legislative body.
My disagreement with Gwyn and Vile on the origin and nature of the separation of powers is related to different assessments of political thought and its relation to human history. Gwyn says that he set out to explain the doctrine and that others, digesting his study, could then criticize it, having understood "the key concepts of liberty, tyranny, human nature, and the public interest as they were understood by the proponents of the doctrine." 150 He explains the English writers' excessive criticism of French government in terms of "the late seventeenth and early eighteenth century view of man as predominantly an irrational creature. ..." 151 Quoting from Algernon Sydney and Jonathan Swift in the text, and Hobbes and Bolingbroke in notes, to the effect that men love power and need to be restrained, Gwyn says the continuing popularity of Lord Acton's remarks about the corrupting influence of power "would seem to show that in our own thinking about political power we are still very much in the eighteenth century." 152 Gwyn's concentration on political culture may not have been the best way to study the separation of powers. A polemical pamphlet about tyranny in France may reveal the limits of second-rate thought; it cannot constitute a rejection of the view of human nature expressed by Hobbes, with which Locke and Montesquieu were in substantial agreement. I am not certain whether Gwyn, like Vile, holds that thought is historically determined or whether he simply disagrees with these philosophers. Whatever the case, his discussion did not distinguish political philosophy from political rhetoric.

Finally, considering his judgment that the key concepts of the separation of powers were so poorly understood by the seventeenth and eighteenth century writers, I am surprised that Gwyn leaves open the possibility of contemporary constitutionalists' finding something of value in the doctrine. 153

Vile constructs an ideal type doctrine of the separation of powers which he finds combined in different forms in response to changing circumstances and needs. He emphasizes the importance of balance, and he warns us that support for social justice might eliminate diversity in structure and value. Having treated other writers' thought as controlled by social forces and changing needs, his own sober warning reverses things. We are entitled to ask him how, in line

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150 Gwyn, p.128.
151 Ibid., p. 22.
152 Ibid., p. 23, Note 1.
153 Ibid., p. 128.
with his theory of constitutionalism, he can object if Western soci-
ety has evolved to the point where all values are subordinated to
social justice. He may respond:

Human beings are much too complex to be dominated for long by
one overriding consideration; they demand a number of satisfac-
tions, usually potentially contradictory ones, if pursued to ex-
tremes.

The answer to that would be, "let us wait and see what evolves." Vile is not aware that his determinist treatment of political thought
is incompatible with his loss of faith in the forces of history.

The difference between the current understanding of the separa-
tion of powers and representative government and the original un-
derstanding is clarified in Harvey Mansfield, Jr.'s description of Jef-
ferson's political thought.

Jefferson did not favor unending reform for the purpose of keep-
ing pace with social change. His political science was in the tradi-
tion of Montesquieu. In his view, politics has a function between
the formative power of the Aristotelian regime and the reactive con-
ciliator of social forces argued by modern political sociology. Gov-
ernment derives from the people, where it is "deposited," and yet
acts on the people to keep them independent by making them
republican.

What Mansfield says of Jefferson was also true for the Federalists;
the institutional and sociological ways of understanding politics
were combined and tested against a self-evident truth. The truth
gave rise to a limited political science, since it did not say how one
should live other than in freedom: what to do with the freedom was,
to a large degree, none of the government's business. This limited
task apparently gave way to complete indifference to the direction
of society.

This examination of the. origins of the separation of powers con-
firms the suggestion that it depends on the existence of some ef-
fective counterweight to the executive ruler. The scope of executive
power cannot be articulated solely with reference to two or three
categories of political power. Corwin's distinction between the "ul-
tra-Whig" and the "quasi-monarchical" conceptions of the execu-
tive reminds us of the critical political controversy that preceded

\[159\] Vile, p. 349.

\[158\] American Political Thought, p. 35.
and gave rise to the most thorough formulations of the separation of powers. In light of the teachings of Locke and Montesquieu, and the creation of the American founders, we must conclude that Corwin's "quasi-monarchical" model of the executive is the more accurate formulation of the doctrine of the separation of powers. This is not to say that the "ultra-whig" model should be abandoned. While the executive branch is the source of energy necessary for representative government, the legislative branch is the most direct and sensitive source of consent of the governed. The argument for legislative supremacy which views the president as a mere executor of the laws, which are supreme, supplies the counterweight to the executive ruler. This argument should gain influence when executive energy is misused; it also follows Montesquieu’s counsel that citizens should show equal affection for both political branches of government. Apparently, if representative government is to be maintained, it must do more than just reflect social forces. A constitutional system of institutions checking power with power still requires citizens capable of choosing governors and judging their activities wisely.

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