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# The Mixed Constitution and the Common Law

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Accounts of England's constitutional system<sup>1</sup>, even the more systematic treatments of the middle decades of the eighteenth century, followed the common early -modern pattern in which political theory often comprised an uneven amalgam of classical maxims of government, narrow partisan polemics, antiquarian learning, historical researches and technical legal doctrine. Nonetheless, 'the constitution of England', so constructed, enjoyed an extensive influence on liberal political philosophy and western statecraft well beyond its place of origins and the particular circumstances of its first articulation. 'The eye of curiosity seems now to be universally turned' to this 'model of perfection', explained Jean Louis Delolme in the 1770s (Delolme 1834, p.1). And what was to be discovered in this model were the general principles of political freedom. 'Tis the Britannic Constitution that gives this kingdom a lustre above other nations', extolled Roger Acherley a half -century earlier, 'as it secure to Britons, their private property, freedom and liberty, by such walls of defense as are not to be found in any other part of the universe' (Acherley 1727, p.vi).

The organizing principle for much of the eighteenth -century celebration of the English constitution was the commonplace idea that structures of government could preserve political freedom only where they frustrated the abuse of political power. To the extent that the English enjoyed unique levels of political freedom, this was the result of a constitutional

order which so effectively prevented arbitrary or tyrannical acts of power. The achievement of this kind of political system, in turn, depended on the existence and the coordination of several distinct kinds of institutions and governmental procedures. Theorists of the English constitution differed over which of these institutions contributed most critically to the maintenance of political freedom, and disagreed sharply over which political forces and developments posed the most toxic threats to liberty's well-being. But there was a common supposition, challenged by only a minority of theorists, that public liberty was served by institutional complexity. Like the other large, centralized states of eighteenth-century Europe, the English political system contained a dense patchwork of new and older legal and corporate structures, whose contemporary functions often differed significantly from those the institution first performed. The first task for eighteenth-century constitutional analysis was the correct identification of the nature of this complex political order.

#### i. The Mixed Constitution

No characterization of England's constitution was more pervasive than the claim that the kingdom comprised a mixed form of government, combining elements of rule by one, rule by the few, and rule by the many. The formula recalled the traditional meaning of constitution to refer to the basic composition or ordering of both political and natural bodies; and, no less conventionally, it centered the state's identity on the organization of its sovereign legislature. The 'British constitution', William Blackstone explained in his renowned *Commentaries on the Laws of England* (1765-9), entrusted the 'legislature of the kingdom... to three distinct powers': the king ('a single person'), the lords ('an aristocratical assembly'), and the commons ('a kind of democracy'); which by operating jointly escaped 'the inconveniences of either absolute monarchy, aristocracy, or democracy', while uniting

‘sowell and so happily’ the benefit of each pure form (Blackstone 1979, I, pp. 50-2). Most important, and the ‘true excellence’ of this constitutional form, each component part provided a potential ‘check’ to the abuse of power committed by any other component part, which in turn secured a political order best equipped to sustain public liberty:

Like three distinct powers in mechanics [king, lords and commons], jointly impel the machine of government in a direction different from what either, acting by themselves, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community. (Blackstone 1979, I, p. 151)

The theory of England’s mixed government, centered on the tripartite legislature of King-in-Parliament, first attained prominence in the form of the 1642 statement published by Charles I as *His Majesties Answer to the Nineteen Propositions* (see Weston 1965, and Weston and Greenberg 1981). Eighteenth-century commentators continued to invoke this source, particularly in their efforts to clarify the ‘limited or regulated’ character of monarchy in this constitutional system (Mackworth 1701, pp. 2, 9). And, as in the case of the *Answer to the Nineteen Propositions*, their favored presentation clearly echoed classical and renaissance motifs concerning the superiority and durability of the ‘mixed’ political form. But in one crucial respect, they distinguished their accounts from earlier formulations. Formerly the appeal to England’s mixed government competed with other, more absolutist accounts of English kingship, now it enjoyed constitutional orthodoxy. ‘The constitution of England had been seen in two very different lights for almost a century before the revolution,’ Bolingbroke observed in 1733; but now ‘our constitution is no longer a mystery.’ ‘It is by this mixture of monarchical, aristocratical and democratical power, blended together in one

system,' he explained, 'that our free constitution of government hath been preserved.'

(Bolingbroke 1844, II, pp. 80, 119).

The Glorious Revolution of 1688 was routinely credited, as by Bolingbroke, with this definitive clarification and vindication of the political order. To invoke 1688 and the mixed constitution was thus to make plain the very different character of kingship in Britain from the absolutist governments which oppressed the continental monarchies and, in earlier eras, threatened England's liberties. One measure of the security furnished by the Glorious Revolution was the near complacency of mid-eighteenth-century commentators displayed in treating once fiercely-contested issues concerning the nature and authority of England's monarch and parliament (see Pocock 1987, and Weston 1991). Hume in the *History of England* acknowledged that it 'was once disputed... with great acrimony' whether the House of Commons formed a constituent part of the original Parliament, but that the question 'by general consent' had been settled against the claims of the Commons (Hume 1983, I, p. 467). Blackstone in the *Commentaries* noted the same controversy 'among our learned antiquarians,' but dismissed its relevance to current political arrangements (Blackstone 1979, I, p. 145). Soon after, he assured that 'whatever doubts might be formerly raised by weak and scrupulous minds' concerning 'the existence' of an 'original contract' between subjects and sovereign, such qualms 'must now entirely cease; especially with regard to every prince who has reigned since 1688' (I, p. 226).

Such appeals to the consensus and stability which followed in the wake of the Glorious Revolution were, of course, a matter of tendentious exaggeration. Indeed, the most robust claims for constitutional certainty appeared in precisely those settings - such as Bolingbroke's writing - where the legacy of 1688 underwent partisan dispute. The major enactments of the Revolution era - the 1689 Bill of Rights and Act of Toleration; the 1694

Triennial Act; the 1701 Act of Settlement - were all documents of political compromise and even purposeful ambiguity, which readily allowed for rival understandings of their constitutional meaning, novelty or conservatism. As a recent generation of historians has shown, whatever the successes of the Revolution settlement and the Hanoverian succession, this political achievement did not lead to the silencing or eradication of the antagonistic doctrines of non-resistance and hereditary kingship, Jacobite loyalty, royal supremacy or High Anglican ecclesiology (see Kenyon 1977, Gunn 1983, pp. 120-93, and Clark 1985).

Where, however, the legacy of 1688 seemed most emphatic was in its repudiation of the pretensions of Stuart absolutism, and the supporting doctrines of non-resistance and divine right kingship. 'The principal duty of the king,' Blackstone explained, 'is to govern his people according to law' (Blackstone 1979, I, p. 226). Accordingly, the Revolution parliament had moved to regulate and restrain by statute just those practices of royal prerogative (such as the 'suspending' and 'dispensing' power) through which James II violated 'the laws and liberties' of the kingdom, threatened 'the protestant religion', and undermined the constitutional order by governing 'without consent of parliament' (see Williams 1970, pp. 26-7, and Blackstone 1979, IV, 433-4). Whereas James II had sworn a coronation oath to keep 'the ancient customs of the realm', William and Mary swore more precisely to govern 'according to the statutes in parliament agreed on, and the laws and customs of the same' (Williams 1970, p. 37). The 'continual struggle' of the first four Stuart reigns between 'the crown and the people' and between 'privilege and prerogative,' Hume explained in the final chapter of his *History* had been settled 'in favour of liberty.' 'The powers of the royal prerogative were more narrowly circumscribed and more exactly defined,' and the 'great precedent of deposing one king and establishing a new family... put the nature of the English constitution beyond all controversy' (Hume 1983, VI, pp. 530-1).

## ii. Parliamentary Sovereignty

If the theory of the mixed constitution thus clarified the limited nature of monarchic power in England, it proved less decisive in settling the extent of parliament's own institutional capacity. Eighteenth-century statements of parliamentary authority often retained the traditional formulation of parliament's powers in terms of its historical responsibilities as legislature; High Court (*Magna Curia*); and place of counsel (*Commune Concilium Regni*) (Atkyns 1734, pp. 69–70). But in the routinization of parliamentary government in the decades following the Glorious Revolution, parliament's specific legislative function, including its annual enactments governing taxation and finance, came to dwarf its other roles (see Thomas 1971, pp. 45–88, and Langford 1991, pp. 139–206). And by this time it had become common place to analyze parliamentary power more abstractly in terms of a general theory of sovereignty (see Dickinson 1977, pp. 121–42, and Lieberman 1989, pp. 31–40, 49–55).

Blackstone, whose treatment in the *Commentaries* supplied the battle-ground for several important subsequent discussions, approached the topic through a brief summary of the nature of civil society and political obligation, drawn from the standard materials of natural jurisprudence. Political authority was created through a voluntary transfer of natural right; the aims of such political association were better to secure individual liberty and the collective good; and to achieve such purposes, every political society required 'a supreme, irresistible, absolute, uncontrolled authority in which... the rights of sovereignty reside' (Blackstone 1979, I, p. 49). The distinguishing mark of 'sovereign power' was 'the making of laws' (I, p. 49), which power, in Britain, was exercised by the King-in-Parliament:

It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. (I, p. 156)

This, moreover, was not a claim of pure conceptual abstraction. Parliament had confirmed its sovereign power by regulating 'the succession to the throne' ('as was done in the reign of Henry VII and William III'); by altering 'the established religion of the land' ('as was done... in the reigns of Henry VIII and his three children'); and by changing 'even the constitution of the kingdom and of parliaments themselves' ('as was done by the act of union and these several statutes for triennial and septennial elections'). 'Some have not scrupled to call its power... the omnipotence of parliament,' Blackstone reported (though he himself found the 'figure rather too bold') (I, p. 156).

As the critic of this type of formulation argued at length, such legislative 'omnipotence' seemed to threaten the very fabric of liberty the English constitution was celebrated to protect. The kingdom had simply defeated royal tyranny by enshrining parliamentary absolutism (see Gunn 1983, pp. 7-42, and Hamburger 1994). In its most extreme articulations - as in the case mounted by Paine in the *Rights of Man* - the criticism led to the dramatic conclusion that England, in fact, had no constitution: 'merely a form of government without a constitution' (Paine 1974, p. 331). A parliamentary supremacy which included the authority to revise the constitution itself entailed a reversal of a true system of constitutional government in which the constitution controlled the government, and the community itself controlled the constitution (pp. 278-80).<sup>2</sup>



Paine's, no doubt, was a self-conscious iconoclastic assault of English political orthodoxies. But he navigated a much-traversed eighteenth-century issue, which recalled and rehearsed the themes of earlier disputes concerning the nature and limits of political obligation. Notwithstanding the *Commentaries*'s imposing itemization of past parliamentary enactments that altered the basic structures of church and state, there were many who felt that the bald claim of parliament's 'uncontrollable' authority seriously distorted the nature of legislative power. One important line of speculation, dominated by jurists and university moralists, sought a more careful and discriminating treatment of the nature of sovereignty than that afforded by the Blackstonean language of 'absolute despotic power'. There was the need to distinguish 'sovereign power' and 'supreme power', and to differentiate the domestic and external (or international) faces of sovereignty (Rutherford 1822, pp. 282-5). Likewise was the injunction 'always carefully' to 'distinguish *juridical* from *moral* power' in the understanding of parliament's 'supreme jurisdiction' (Chambers 1986, I, p. 140). And again was the insistence that the frequently '*indefinite*' extent of sovereign authority in many states should not be confused, as by Blackstone, with the idea that sovereignty was therefore '*infinite*' (Bentham 1977, p. 484; and see Sedgwick 1800, p. 126).

In addition to the attempted clarification of the concept of sovereignty was a corresponding effort better to elucidate the term 'constitution'. Blackstone, as was conventional, identified the constitution with the organization of the legislature. As William Paley later put it, 'A government receives its denomination from the form of the legislature; which form is likewise what we commonly mean by the *constitution* of a country.' (Paley 1838, II I, p. 253). And on this understanding, the constitution existed so long as the tripartite structure of king-in-parliaments survived as sovereign; and any enactment issued by this legislative sovereign enjoyed legal validity (Blackstone 1979, pp. 51-2). But while the

legislature furnished the core element of the English constitution, few commentators - Blackstone included - treated this structural form as exhausting the kingdom's system of constitutional norms and practices. In this manner, Bolingbroke maintained that 'by constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs... that compose the general system according to which the community hath agreed to be governed' (Bolingbroke 1844, II, p. 88). On the basis of this more dense definition of the constitution, it was easy to identify a situation in which parliament's legislative product violated constitutional principles (Bolingbroke 1844, II, pp. 150-1; and see Burns 1962). And Paley more cautiously and hesitantly conceded that although a parliamentary enactment 'in the strict and proper acceptance of the term' could not be 'unconstitutional', 'in a lower sense it may, viz. when it militates with the spirit, contradicts the analogy, or defeats the provision of other laws, made to regulate the form of government' (Paley 1838, III, p. 261).

Most weighty and controversial, however, was the characterization of the constitutional resources available for dealing with an abuse or violation of the constitutional order. Blackstone, in setting out the case for parliament's 'sovereign and uncontrollable authority', acknowledged the arguments of 'Mr. Locke and other theoretical writers' that 'there remains still inherent in the people as supreme power to remove or alter the legislative' when it violated 'the trust reposed in them' (Blackstone 1979, I, p. 157). And later, in treating the likely response of the community to severe 'unconstitutional oppressions', he noted that 'whenever necessity and the safety of the whole shall require it', future generations would mobilize 'those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish' (I, p. 238). But, throughout the *Commentaries*, Blackstone endeavored to blunt any radical implications of his

own appeal to natural rights and natural equality (see Lieberman 1989, pp. 52–5). In the hypothetical case of morally illegitimate political resistance, he insisted that this must involve an extra-legal exercise of individual moral capacity ‘necessarily... out of the reach of any *stated rule or express legal provision*’:

No human laws will... suppose a case, which at once must destroy all law...

nor will they make provision for so desperate an event, as must render all

legal provisions ineffectual. So long therefore as the English constitution

lasts... the power of parliament is absolute and without control. (I, pp. 156–

7).

It was this Blackstonean insistence that the constitution did and could not specify in law the rights of popular sovereignty upon which it ultimately was based which more radical theorists of political liberty challenged most vehemently. ‘Judge Blackstone’, James Burgh charged in his *Political Disquisitions*, ‘seem to forget that the safety of the people *limits* all free governments.’ ‘The truth is,’ he had ‘placed the sovereignty wrong, viz. in the government; whereas it should have been in the people...’ (Burgh 1774–5, I, p. 226 and III, p. 278). The following year, Richard Price, in his savowedly Lockean defense of civil liberty, dismissed as ‘absurd’ the doctrine ‘which some have taught’ concerning ‘the omnipotence of parliaments’. All government was ‘in the very nature of it, a trust’; and legislators exercised a ‘subordinate and limited’ authority according to the specific fiduciary powers of the community had delegated to them. ‘If they contradict this trust, they betray their constituents and dissolve themselves’ (Price 1991, p. 28; and see also Wilson 1967, II, p. 723, and Sheridan 1779).

### iii. The Balanced Constitution

The classification of English government as a mixed constitution and the debate over parliamentary sovereignty tended to focus on somewhat narrow, though fundamental, questions concerning the structure and extent of public power. Analysis of the English constitution rarely confined itself to these questions alone, and a more expansive treatment of constitutional arrangements proved especially critical to the theory of English liberty. Such explorations ranged widely and often repetitively over a varied stock of preoccupations, but two broad themes enjoyed particular prominence and influence. One of these concerned the relationship between English law and English liberty (considered below in section v); the other scrutinized the conduct and coordination of the principal institutions of governance (to which I now turn in this and in the following section).

The theory of mixed constitution itself supplied the framework for evaluating the conduct of government. The legislature not only mixed elements of each of the three simple forms of government, these elements combined in such a manner 'that all the parts form a mutual check upon each other' so as to frustrate the abuse of power. This, in turn, meant that the mixture demanded a sufficient 'equilibrium of power between one branch of the legislature and the rest' in order to sustain this checking process (Blackstone 1979, I, pp. 150, 51). English liberty, in the more familiar contemporary formulation, depended upon 'the *balance* of the constitution'.

Once the necessity of constitutional balance was affirmed (and the idea already figured in the account of England's mixed government set out in the *Answer to the Nineteen Propositions*), it became possible to consider the particular powers and political functions of each branch of the legislature in terms of this requirement. William Mackworth, in a 1701 tract justifying the House of Commons' campaign to impeach several royal ministers over

alleged illegalities in their conduct in foreign affairs, furnished a particularly lucid version of this kind of constitutional analysis. <sup>3</sup> 'The Great Rule' of English government, here reported to the House of Lords, was 'to Preserve the Just Balance of the Constitution' (Mackworth 1701, 'To the Lords'). And the practice of ministerial impeachment supplied an exemplary instance of the manner in which the constitution fulfilled this maxim. The strength of the king was promoted by the crown's legal immunity, but his ministers and servants were held legally accountable in their public functions through the mechanism of parliamentary impeachment. The crown could not shield any favorite from impeachment, as the decision to prosecute fell entirely under the powers of the Commons. The actual trial and conviction of those accused, however, was the exclusive judicial right of the Lords, which again could not be obstructed by either crown or commons. Thus, the constitution equipped each part of the legislature with 'particular Powers' that served to 'assist each against the Encroachments of the other' and to prevent 'any one' part from defeating 'the Right or Power that is Lodged in any other' (Mackworth 1701, pp. 2, 4, and see pp. 5-7, 18-21). The correct understanding of the practice was supplied by this general logic of distributed functions and cumulative balance; and the same logic disclosed the vital mechanism through which the 'absolute, Supreme Power' of the legislature came in its internal operation to be checked and regulated (Mackworth 1701, p. 3).

The form of analysis adopted by Mackworth became a staple of eighteenth-century political debate and speculation. The particular privileges of each legislative branch—the crown's powers of appointment; the House of Commons' control of fiscal legislation; the judicial authority of the Lords—were routinely assessed and defended in terms of how such authority equipped that institution with sufficient power to resist encroachments from the other branches. Similarly, projects of reform and parliamentary machinations would

predictably be defended and denounced in terms of their likely impact on constitutional balance. Nonetheless, throughout the century up until the era of wars against revolutionary France, one formidable issue dominated the debate over the health of the mixed and balanced constitution: the relationship between the executive power of the crown and the independence of parliament, especially the House of Commons.

'Executive power', according to the conventional juridical categories, denoted to the task of *enforcing* (as opposed to *creating*) the laws (Blackstone 1979, I, p. 142; and see Rutherford 1822, pp. 283-5). In more common usage, the 'executive' referred to the potent list of 'discretionary powers... vested in the monarch', as Burke described it, 'for the execution of the laws, or for the nomination to magistracy and office, or for conducting the affairs of peace and war, or for ordering the revenue' (Burke 1884, I, pp. 469-70). Among the more delicate of the kingdom's constitutional arrangements was the placement of legislative power jointly in the hands of 'kings, lords and commons', and the granting of executive power to 'the king alone' (Blackstone 1979, I, p. 143).

The expansive eighteenth-century discussion of the relationship between executive and legislative authority engaged directly the major changes in government that emerged in the decades following the Glorious Revolution. These included, first, the dramatic expansion of the size, costs and revenues of statecraft: the large military establishments supporting a bellicose foreign policy; the new apparatus of public finance and national debt; the reliance on custom and excise; and the drove of crown appointees required to staff these structures. Second was the system of parliamentary management utilized to secure the annual legislative renewal of this statecraft: the techniques of ministerial direction of the crown's interests in parliament; and the extensive utilization of government offices, patronage and electoral influence to garner support in the House of Commons.

Students of eighteenth-century political thought are now well familiar with these developments, and the terms in which they were evaluated, defended and especially condemned.<sup>4</sup> The case against received classic exposition in the journalist denunciations of Walpole's administration in the 1720s and 1730s through such widely disseminated vehicles as Trenchard and Gordon's *Cato's Letters* and Bolingbroke's *Craftsman*. Bolingbroke, as we have seen, fully embraced the standard formulation of England's 'mixed constitution'; and further celebrated this constitution as the 'tree' which produced 'that delicious and wholesome fruit' of 'liberty' (Bolingbroke 1844, II, p. 112). Within this mixture, the 'essentials of British liberty' were sustained through 'parliamentary freedom'; and throughout English history, attacks on liberty invariably took the form of campaign to subvert parliament (II, pp. 96-7). What, in turn, ultimately sustained this vital parliamentary freedom was the mechanism of parliamentary elections which enabled the community to ensure 'the integrity of their trustees' in the Commons. 'As a bad king must stand in awe of an honest parliament, a corrupt house of commons must stand in awe of an honest people' (II, p. 118).

In past ages, parliamentary freedom was challenged by royal prerogative; currently, it was undermined by the more subtle, but no less malignant, forces of executive corruption. The unprecedented size of the civil and military establishments, along with the inflated revenues of the crown (which, no less menacingly, existed in virtue of equally unprecedented levels of public debt), supplied government with a vast network of patronage through which to transform, through 'place' and 'office', the trustees of English liberty into the pawns of executive power. At the same time, the deployment of electoral patronage and the statutory extension of the parliamentary term to seven years disabled the mechanisms of electoral accountability. Superficially, the outward form of a constitution of king, lords and commons

was maintained. In practice what prevailed was an anti-constitutional regime of government 'by corruption' that placed parliament under the 'absolute influence of a king or his minister' (II, p. 93).

The understanding of the constitution offered by Bolingbroke and like-minded opponents of the Hanoverian regime thus placed the fate of English liberty squarely upon the virtue of the community (its capacity to hold parliament to its trust) and the independence of parliament (its capacity to combat the ever-present tendency of political power towards corruption, abuse and aggrandizement). As such, the account - standardly adorned with the appropriate classical maxims and examples from Roman history - constituted a distinctly 'republican' and 'commonwealth' reading of the British constitution; or, in the more common contemporary usage, it furnished a 'country' critique of Hanoverian 'court' politics (see Pocock 1975, pp. 467-90). The positive 'commonwealth' or 'country' strategy for restoring constitutional balance followed directly from its diagnosis of the current threats to British liberty. The fiscal resources and scale of government were to be reduced through the elimination of public debt. The manipulation of parliamentary deliberations by the executive was to be destroyed by barring those with government offices ('placemen') or contracts from the House of Commons. And the independence of Parliament was to be restored through a strengthening of the electoral process: 'freedom of elections' (the elimination of electoral patronage and expenditures in the borough constituencies) and 'frequent elections' (the repeal of the Septennial Act). With the adoption of these measures, the constitution would be restored, and the community rescued from the party divisions and ministerial rivalries that had infested politics since the Glorious Revolution.

The response of the 'court Whigs' to this indictment of British political practice was joined immediately by ministerial apologists and journalists in the 1720s and 1730s (see



Pocock 1975, pp. 446–61; Browning 1982; Burt 1992). But what was to prove the most elegant and suggestive of the responses to the ‘republican’ interpretation of the constitution did not appear until 1741–2, when David Hume presented the first of these several editions of his ‘Essays, Moral and Political’ published in his lifetime.<sup>5</sup> In these essays, as in the later *History of England*, Hume tentatively adopted ‘the temper... of a philosopher’, who properly recognized the ‘infinitely complicated’ texture of ‘all political questions’, and taught ‘a lesson of moderation’ to replace the ‘violent animosities’ of the ‘party...-zealots’ (Hume 1994, pp. 216, 12–3). He concurred in the commonplace judgment that England’s mixed system of government produced unequalled levels of public liberty. ‘The whole history of mankind,’ he reported, offered no comparable instance of a community governed ‘in a manner so free, so rational and so suitable to the dignity of human nature’ (Hume 1994, p. 217). But in reaching this conclusion, Hume distanced himself from many contemporary commentators by emphasizing the historical novelty, institutional fragility and considerable political risks of this distinctive form.

In his response to the ‘country’ attack on Walpolean corruption, Hume maintained that what had there been treated as pathological features of post-Revolution politics instead needed to be acknowledged as the inevitable, though potentially dangerous, features of England’s complex institutional structures. The political order secured through the Glorious Revolution and Protestant succession had ended the destructive constitutional conflicts of the Stuart era. And these developments like wise had served to blur and attenuate the kingdom’s earlier political divisions between Whig and Tory parties. But it was wrong to expect that this clarification of the constitution simply eliminated political division and partisanship. The constitution’s ‘extremely delicate’ combination of ‘republican and monarchical parts’ meant that ‘different opinions must arise’ over its proper balance, ‘even among persons of

the best understanding'. On any particular issue 'some will incline to trust larger powers to the crown', while others would fear the 'approaches of tyranny and despotic power'; and hence, party divisions had to allow as 'the genuine offspring of the British government' (pp.40-1,44-55). Moreover, since 'the power of the crown' was 'always lodged in a single person, either king or minister', the extent of this power would inevitably vary according to the ambition and capacity of the individual exercising it. And accordingly, the constitutional structures could never 'assign to the crown such a determined degree of power, as will, in every hand' serve the purposes of constitutional balance (p.27; and see pp.203-5).

If, for Hume, political division and constitutional ambiguity formed an 'unavoidable disadvantage' of England's system of 'limited monarchy' (p.27), the mechanisms of constitutional balance themselves required similar re-examination and elucidation. Contrary to the conventional wisdom concerning the balance among king, lords and commons, Hume maintained that the constitution in fact 'allotted... to the house of commons' a 'share of power... so great that it absolutely commands all the other parts of the government' (p.25). Neither the monarch's legislative veto, nor the privileges of the lords, was sufficient to counter the strength of the commons. The costs of modern statecraft, coupled with the house of commons settled control over the 'right of granting money', gave the body more than enough capacity to overwhelm the constitutional order (pp.25-6).<sup>6</sup>

What, in fact, prevented this destruction of the mixed constitution were precisely those frequently condemned patronage resources of the crown which created a block of support in the house of commons sufficient to maintain the crown's authority (p.26). In this manner, Hume concluded, executive influence was revealed as the true savior of the constitutional order:

Wemay...givetothisinfluencewhatnameweplease;wemaycallitbythe invidiousappellationsof *corruption*and *dependence*;butsomedegreeand somekindofitareins eparablefromtheverynatureoftheconstitution,and necessarytothepreservationofourmixedgovernment.(Hume1994,p.26)

Inthedecadeswhichfollowed,constitutionalargumentandprogramsofreform routinelyadheredtothescriptsetoutinthese polemicsoftheearly -Hanoverianperiod. Apologistsforthepoliticalorderemphasizedthemannerinwhich‘executiveinfluence’had simplyreplaced‘prerogative’asthemainsourceofroyalpowerintheschemeof constitutionalbalance(seeBlackstone19 79,I,pp.322 -5).Buteventhemostcomplacent observersrecognizedthatthescaleofBritishgovernmentanditsmilitaryestablishmentgave theexecutive,inBlackstone’sphrase,‘aninfluencemostamazinglyextensive’(p.324). Accordingly,theconduct ofexecutivegovernmentanditsimpactonparliamentary independencenecessarilyremainedaleadingpreoccupation(seeHume1994,pp.26 -7;and BurkeI,pp.444 -50).Thiswasanimperativethatframedbothmoderateandradicalprojects ofconstitutionalpur ification(seeCannon1972,pp.47 -97,andLangford1989,pp.710 -9).

The radical schemes of constitutional reform, developed in the context of the Wilkite protests of the 1760s and the American resistance of the following decade, offered increasingly democratic versions of the ‘country’ program to block executive corruption by strengthening the mechanism of parliamentary election. The ‘subversion of the constitution’ at the hands of ‘parliamentary corruption’ received something like its encyclopedic denunciation through the vehicle of Burgh’s three -volume *Political Disquisitions* . The ‘British government’, here reported, had long ceased functioning as a mixed constitution, and now was ‘really a junctocracy... or government by a minister and his crew’ (Burgh 177 4-5, I, pp.49-50, and see III, p.267). The recovery of parliamentary independence required, as John

Cartwright expressed the radical prescription, 'making our parliament *annual* and our representation *equal*' (Cartwright 1776, p. 15).<sup>7</sup>

Conservative critics of this approach to parliamentary reform, such as Josiah Tucker and Edmund Burke, returned to analysis furnished by Hume, arguing that such schemes actually threatened to unbalance the constitution by over-strengthening its republican features, and thereby exposed the kingdom with all the vices and instabilities correctly associated with pure democracy (see Hume 1994, pp. 31-2; Tucker 1781, pp. 257-74; and Burke 1884, VII, pp. 71-87). But even the alternative, self-consciously moderated schemes of political reform adhered to much the same logic of constitutional balance. When in 1780 Burke presented to the House of Commons the whig version of the popularly-agitated plan for 'economical reform', he duly stressed that 'economy' itself merely constituted a 'secondary' goal of this plan for administrative retrenchment. Its primary purpose was to reduce 'the direct and visible influence' of the executive, and to extinguish 'secret corruption almost to the possibility of its existence' (Burke 1884, VII, p. 356).<sup>8</sup>

The debates over corruption, influence and constitutional balance formed the common coin of political argument in eighteenth-century Britain, and frequently involved little better than repetitive and even formulaic rehearsals of stock themes. Yet, this material came to attain an intellectual impact far more substantial than the oftentimes narrowly-partisan contexts of its rehearsal. In focusing so much attention on the relationship between executive power (on the one hand) and integrity of the house of commons (on the other), the debate tended to shift attention away from the conventional image of the mixed constitution and its combination of monarchic, aristocratic and democratic elements.<sup>9</sup> And this, as was perceived with special force by the author of the period's single most famous treatment of the English constitution, made possible an alternative explication of the nature of England's

complex political structures. Not the least of Montesquieu's remarkable achievements in this account was to convince a large, cosmopolitan audience that the design of England's government, so described, revealed the foundational principles for the general theory of constitutional freedom.

#### iv. The Separation of Powers

Montesquieu's renowned chapter 'On the Constitution of England' formed the center-piece of the first of two books (Books 11 and 12) of *L'Esprit des lois* devoted to 'the law that forms political liberty'. The first of these considered liberty 'in its relation with the constitution'; a form of liberty, Montesquieu began by arguing, that was commonly misidentified with democratic self-government. Instead, political liberty was uniquely a property of those 'moderate governments' which made possible such a stable structure of law that their subjects were enabled 'to do everything the laws permit'. Such liberty could survive only under a government where 'power is not abused'; and the key mechanism for preventing the abuse of power, Montesquieu famously claimed, was a political form in which 'power' checked 'power by the arrangement of things' (Montesquieu 1989, pp. 154-6).

Having thus clarified in the abstract the nature of constitutional freedom, the French jurist invoked England as the sole 'nation of the world' whose constitution had 'political liberty for its direct purpose'. 'We are going to examine the principles on which this nation found political liberty,' he explained. 'If these principles are good, liberty will appear there as in a mirror' (pp. 156).<sup>10</sup>

The detailed analysis of England's constitution (Book 11, chapter 6) centered on an account of how the 'three sorts of powers' exercised in every state - legislative power; executive power; and 'the power of judging' - were, in England, distributed into separate

institutional hands. It was in terms of its complex distribution and coordination of these three powers that Montesquieu identified those features of England's political system designed to frustrate the principal forms of political and legal tyranny.<sup>11</sup> In the case of the 'power of judging', this separation meant that those responsible for creating law and for mobilizing the resources of the state lacked the power of punishing particular 'crimes' or 'legal disputes between individuals'. English justice—in an oblique reference to common law jurisdictions and the system of semi-annual judicial assize circuits—placed the 'power of judging' in the hands of temporary tribunals 'drawn from the body of the people' (pp. 157–9).

The 'power of judging' was acknowledged to be weakest of the three elements of state power (p. 160), which meant that the distribution and operation of legislative and executive powers required the most attention. Here Montesquieu's discussion reworked and revised topics already established in native debates over the balance of the constitution.<sup>12</sup> The division of parliament into two houses served the interests of political stability by giving those 'distinguished by birth, wealth, or honors' their own assembly serving their 'separate views and interests'. But the same bicameral structure also created an internal restraint on legislative power by requiring the agreement of two separate bodies in the making of law (pp. 160, 164). The monopolization of executive authority by an hereditary monarch rendered explicit the institutional division between legislative and executive powers. The monarch's 'faculty of vetoing' proposed legislation meant that 'the executive power' could 'check the enterprises of the legislative body' when these tended to the aggrandizement of power (p. 162). The 'legislative power', in turn, could prevent executive abuse through its control over 'the raising of public funds' and through its power to accuse and impeach those officials who violated the law 'in matters of public business' (pp. 163, 164). The overall arrangement of 'these three powers', Montesquieu observed, 'forced' them 'to move in concert'; so that

whenever public power was deployed, these institutional checks against the abuse of power were mobilized (p. 164).

The reception of Montesquieu's analysis in Anglophone political thought proved rapid and, most often, enthusiastic. 'The celebrated Montesquieu', James Madison reported, was the 'oracle' who 'enlightened patrons of liberty' invariably 'consulted and cited' in support of 'the political maxim' that 'the legislative, executive, and judicial departments ought to be separate and distinct' (*Federalist Papers* 1981, pp. 138-9). There, of course, was much in Montesquieu's assessment to flatter his English readers (and it is striking how much less attention was directed to other sections of *The Spirit of the Laws* which supplied far more critical and pessimistic assessments of England's political system (see Book 19, chapter 27, and Book 20, chapter 7, and Baker 1990, pp. 173-85). But the chief importance of the discussion owed less to its praise for England than to its presentation of England's constitution as a basic institutional model which provided the correct framework and standard for understanding the logic of constitutional liberty more generally. In contrast with native discussions, Montesquieu's treatment of English structures and practices proceeded at a highly abstract level (even such basic nomenclature as 'House of Lords' and 'House of Commons' was absent), replete with comparisons to political arrangements in the states of the ancient and modern world.<sup>13</sup> This comparative dimension was thereafter greatly extended through the remainder of Book 11, which continued with three chapters on constitutional liberty in the case of modern monarchy (chapters 7-9) and nine chapters on ancient governments (chapters 10-19). Ironically, Montesquieu's overall account of political liberty in Book 11 devoted more space to the case of ancient Rome (chapters 12-19) than it did to contemporary England (chapter 6).

Montesquieu's more general and comparative concerns help explain what proved a particularly influential feature of his analysis: the prominence and importance ascribed to 'the power of judging'. The institutional power and political impacts of courts and legal practices had long been recognized in the political theory of the European kingdoms. But the formal analysis of political power, particularly by jurists, tended to remain framed by the distinction between legislative and executive power. Montesquieu's departure from this convention received prompt notice. <sup>14</sup>Thomas Rutherforth, in his mid-eighteenth-century Cambridge University lectures on Grotius, thus lamented the growing fashion to distinguish civil power into 'three several parts, legislative, judicial and executive'. 'Judicial power,' he countered, was 'plainly... nothing else but a branch of the executive power' (Rutherforth 1982, p. 275; and see Paine 1974, p. 388).

Nonetheless, this separating and elevating of 'the power of judging' was absolutely critical to Montesquieu's comparative purposes. In the case of the modern (continental) monarchy, such as France, the fact that the king left 'the power of judging' to 'his subjects' created a level of constitutional freedom in these states unknown in despotic governments, where 'the three powers' were 'united in the person' of a single prince. Furthermore, the common failure in republican states to achieve a stable institutional separation of 'the power of judging' helped clarify Montesquieu's initial claim in Book 11 that constitutional liberty could not be equated with self-government (pp. 157-8). On the basis of this insight, Montesquieu explained the precariousness of political liberty in ancient Rome (pp. 179-84), and drew the striking, albeit reassuring, conclusion that 'the Italian republics' enjoyed 'less liberty than in our monarchies' (p. 157).

Most British commentators eagerly embraced Montesquieu's emphasis on 'the power of judging', though in a manner which often enlarged and significantly altered the



teaching. Montesquieu had focused his attention on the English jury and circuit assizes, and had consistently utilized the phrase ‘*la puissance de juger*’ (and not ‘*le pouvoir judiciaire*’) to refer to this third element of state power. His eighteenth-century English translator, Thomas Nugent, rendered the phrase as ‘judicial power’ and ‘judiciary power’, thus making easier the eventual mutation of Montesquieu’s separated ‘*la puissance de juger*’ into an independent judicial department or branch of government. Blackstone, whose analysis followed Montesquieu closely, thus spoke more broadly of the ‘distinct and separate existence of the judicial power’ being ‘one main preservative of the public liberty’ (Blackstone 1979, I, p. 259). And in explaining this vital and now extended constitutional feature, he emphasized recent legislative changes Montesquieu omitted. Formerly English judges held office ‘at the pleasure of the crown’ (*durante beneplacito*); now they served ‘during their good behaviour’ with ‘their full salaries are absolutely secured to them during the continuance of their commissions’ (I, p. 258).<sup>15</sup>

English authors, such as Blackstone, found in Montesquieu’s treatment of judging a convenient formula for accommodating the already well-rehearsed precepts concerning the importance of independent courts and impartial judicial decision-making to English liberty. The condemnation of the English crown’s earlier reliance on prerogative courts (Star Chamber, High Commission), along with the denunciation of the royal manipulation of the common law bench, formed a staple and central theme of the eighteenth-century indictment of Stuart absolutism.<sup>16</sup> Likewise, legislative enactments designed to strengthen the integrity of common law process—such as the 1679 Habeas Corpus Act, 1696 Trial of Treasons Act, the 1701 Act of Settlement—figured no less prominently in post-Revolution accounts of the basic structures preserving public freedom (see Blackstone 1979, IV, pp. 431–3; Delolme 1834, pp. 46–8, 165–70).

Still, Montesquieu's more abstract thesis concerning the separation of three powers stimulated an important shift in the English discussion of these familiar themes. In earlier discussions, concern for the impartial administration of justice focused on the threats posed by royal power and prerogative. Often the favored case for establishing the independence of the judiciary from royal interference was to emphasize the courts' proper dependence on Parliamentary authority. 'The Judges', Roger Acherley urged, 'ought to give judgment in all cases before them without being obliged to resort to the intended king for advice, instructions or directions.' Instead, they should be 'accountable in Parliament' (Acherley 1727, p. 86; and see Atkyns 1734, pp. 96-7). Once Montesquieu's separation-of-powers thesis gained currency, it became common to celebrate a far more generalized version of judicial independence and institutional autonomy. Blackstone stressed the need for the separation of 'judicial power' from the 'legislative' no less than from 'the executive power' (Blackstone 1799, I, p. 259). Paley reported 'the first maxim of a free state' that 'the legislative and judicial characters be kept separate,' thereby dropping the earlier preoccupation with interference from the crown (Paley III, p. 281). And Burke expansively extolled independent judges 'wholly unconnected with the political world' (Burke 1884, II, p. 351).<sup>17</sup>

The appropriation and adjustment of Montesquieu's 'power of judging' for domestic purposes was paralleled in the more general reception of his interpretation of the English constitution. His authority was standardly paraded to confirm whiggish pieties over the exceptionalism of English liberty; and his formulation of separated 'power' checking 'power' was mobilized in partisan disputes over constitutional balance (see Fletcher 1939 and Vile 1998, pp. 111-21). In his own discussion, Montesquieu did not classify England's constitution as a mixture of monarchy, aristocracy and democracy; in Book 11, he reserved this formula for the government of ancient Rome (Montesquieu 1989, p. 170).<sup>18</sup> English

commentators, in contrast, frequently layered Montesquieu's separation of powers thesis on top of the older theory of England's mixed constitution (see Blackstone 1779, I, pp. 50-2, 149-51; Adams 1998, pp. 58-61; Paley 1838, pp. 265, 269-71, 281-2). The combination implied two overlapping networks of institutional arrangements, both of which functioned to frustrate the abuse of political power. Analytically, however, each thesis was quite distinct: mixed government explaining the internal composition (and resulting restraints in the operation) of sovereign legislative power; the separation of powers treating the institutional distribution of three kinds of state power, of which legislative power was but one. The blending of the two theses followed readily, given their shared concern with the manner in which complex structures and balances helped produce political liberty. Nonetheless, it was possible to use the materials assembled in *The Spirit of the Laws* to propose a more substantial and ambitious recasting of established constitutional pieties. Such a task was undertaken by another influential continental author, Jean Louis Delolme, whose 1771 *Constitution de l'Angleterre*, earned later praise as 'the best defence of the political balance of three powers that ever was written' (Adams 1797, I, p. 70).

Even more than Montesquieu, Delolme presented a detailed comparative canvass in order to confirm the commonplace judgment that England enjoyed unrivalled levels of political freedom. Of special concern to him was the effort to vindicate the English system of government from the strictures of those modern enthusiasts of 'the governments of ancient times' (in particular the judgment of his fellow Genevan, Rousseau), who 'cried up the governments of Sparta and Rome as the only fit ones for us to imitate' (Delolme 1834, p. 209). Thus, although Delolme pursued at length the fundamental ways in which the English monarchy and nobility differed from their continental counterparts (see pp. 33-40,

323,335 -8), he explored most pointedly the contrast between England's unique regime of modern liberty and the republican states of antiquity.

In the course of this ambitious book -length survey, reference to England as a mixed government of monarchic, aristocratic and democratic parts appeared almost as an afterthought (p.431). Instead, Delolme emphatically anchored his constitutional analysis on 'the particular nature and functions' distributed to the 'constituent parts of the government', which gave English government 'so different an appearance from that of other free states' (p.171). The 'first peculiarity of the English government' was the crown's exclusive monopoly of 'executive power' (pp.171,335). Another 'capital principle' was identified in the provision 'that the legislative power belong to parliament alone' (p.49). And finally was the 'singular situation of the English judges' relative to the 'constituent powers of the state' (p.326); which served to frustrate the abuse of both legislative and executive power (pp.141 - 2), as well as to promote that 'strict and universal impartiality' of justice which formed yet another 'essential difference... between the English government and those of other countries' (p.392). Whereas previous commentators anxiously noted the delicacy and fragility of England's constitutional balance, Delolme instead emphasized the political system's 'resources', 'equilibrium' and overall strength (p.171). It was precisely this 'solidity' and 'peculiar stability of the governing authority' which enabled the 'several essential branches of English liberty to take place' (p.371).

Delolme's more detailed treatment explained the manner in which the constitution's distinctive distribution of government functions secured English liberty from the dangers and vices that typically afflicted free governments. The political capacity of the crown rested on its exclusive command of executive power, but this was effectively restrained by the House of Commons' control of supply. Such royal authority, denied 'the power of imposing taxes',

was 'like a vast body which cannot fit itself accomplish its motions' (p.66). Conversely, the fact that executive authority was separated, and even more 'exclusively vested' in one institution, made for an extremely potent form of executive authority. The strength of English kingship, in this respect, contributed critically to 'the remarkable liberty enjoyed by the English nation' (p.335). Historically, this 'indivisible and inalienable' executive power served to unify the commons and lords in common cause against the abuse of royal prerogative; currently, it proved easier to monitor and restrain than a more diffuse executive (pp.16-7,187-9,244-8). More importantly, since executive power was wielded only by an hereditary monarch, even the most powerful and ambitious of private subjects was discouraged from attempting that kind of direct seizure of state power that afflicted the ancient republics. Instead, each English subject - knowing he must remain a subject - acquired a strong interest 'really to love, defend and promote those laws which secure liberty to the subject' (pp.185n, and see pp.183-8,335).

In treating legislative power, De Lolme similarly emphasized the efficacy of unique structural arrangements. The organization of parliament into Lords and Commons - largely shorn of its conventional association with 'aristocracy' and 'democracy', and the social divisions to which these were related - served its primary constitutional function by introducing an internal restraint on the operation of legislative power. So effective was each house in blocking the aggrandizement of power by the other, De Lolme maintained, that the crown rarely needed to deploy its veto power to protect the executive from legislative encroachments (pp.190-1,349-50).

Of equally profound consequence was the unique arrangements governing the organization and functions of the House of Commons. The people, acting through their representatives in the Commons, enjoyed a robust power of 'the *initiative* in legislation', that

contrasted favorably to the less potent veto power allotted to the plebeian institutions of antiquity (p. 201, and see pp. 223–8). This power, however, was restricted by being exercised ‘only through’ the community’s ‘representatives’ (p. 232). These representatives – moderate in number, placed on an easily monitored political stage, and generally selected ‘from those citizens who are most favoured by fortune’ – were equipped with both the experience and incentives for resisting the ambitions and intrigues of the powerful. Hence, the absence in England of that kind of lethal political volatility and demagogic manipulation of the popular will which routinely destroyed liberty in the ancient world (pp. 220–3). England’s ‘representative constitution,’ Delolme triumphantly concluded, had thus achieved a structural ‘remedy’ to the perversions of republican government that had eluded previous ‘popular constitution(s)’ (p. 233).

In elucidating the history and operation of England’s constitution, Delolme traversed well-rehearsed matters of political structures, government functions, and the themes of balances and checks. Nonetheless, his study is indicative of how, by the mid-1770s, significantly divergent accounts had developed concerning the manner in which this government system produced its celebrated benefit: political liberty. The spectrum of interpretation can be indicated through a brief comparison of the sharply contrasting positions adopted in Delolme’s stententious rendering of England’s separation of powers and in Richard Price’s no less substantial recasting of England’s mixed constitution in his 1776 *Observations on the Nature of Civil Liberty*.

Ultimately what divided the two theorists was a basic conflict over the nature of liberty, which by this time boasted a rich and distinguished pedigree.<sup>19</sup> Price, who defined liberty in general with ‘the idea of self-government or self-direction’, identified civil freedom as the capacity of the members of a given community to govern and make laws for

themselves (Price 1991, pp. 22, 23–4). De Lolme (reacting hereto the doctrines of Rousseau) directly repudiated this approach. ‘To concur by one’s suffrage in enacting laws’ was to enjoy ‘a share’ of ‘power’; ‘to live in a state where the laws are equal... and sure to be executed’ was ‘to be free’ (De Lolme 1834, p. 212; and see Paley 1838, pp. 250–2).

Of greater concern for our discussion here, however, is the particular account each figure offered for the constitutional basis of England’s freedom. Price, associating civil freedom with popular self-government, naturally turned to the elected body of legislative representatives as an appropriate vehicle of self-government in the circumstances of a large and populous state; such an assembly fulfilled the requirements of a political liberty to the extent that it ‘fairly and adequately represented’ the community it served (Price 1991, pp. 24–5). Accordingly, England’s claim to enjoying a ‘free government’ depended entirely on the representativeness and accountability of the House of Commons. When fashioning ‘the most perfect constitution of government’, Price acknowledged, excellent reasons might exist to introduce ‘useful checks in the legislature’ by adding a ‘supreme executive magistrate’ and an ‘hereditary council’ to the ‘body of representatives’ (and thus create a mixed form of government). Still, these institutional additions were, strictly speaking, irrelevant to the issue of liberty (pp. 26–7, and see p. 43; and see Adams 1979, pp. 87–9).

For De Lolme, as we have seen, English freedom was not chiefly a function of political power’s dependence on the community, much less the result of the people immediately directing the government themselves. Rather, the liberty England enjoyed was principally a product of separations and balances operating within the institutions of political power themselves. And although De Lolme recognized the ‘right of election’ as a basic ‘remedy’ against the abuse of parliamentary power (De Lolme 1834, p. 249), his detailed treatment of the distinctive merits of England’s ‘representative’ (as opposed to ‘popular’)

constitution, celebrated the House of Commons as much for its capacity to restrain a  
 sto  
 facilitate the popular will. It was entirely in keeping with this conception of the function of  
 representatives that Delolme went on to identify the 'democratical' features of English  
 government with 'the trial by jury' and 'the liberty of the press' ; instruments which  
 respectively placed 'judicial power' and 'censorial power' directly 'in the people'. <sup>20</sup>These  
 institutions, whose efficacy Delolme emphasized, rendered England 'a more democratical  
 state than any other' (p. 381 n, and see pp. 250 -69.). But , the compliment additionally served  
 neatly (if silently) to efface the democratic credentials of the House of Commons, and  
 thereby destroy one of the major elements in the conventional depiction of England's mixed  
 government.

#### v. Common Law

The account of England's constitutional system (considered thus far) offered diverse  
 explanations for the manner in which political structures frustrated the abuse of power; how  
 England came emphatically to be blessed (in the frequently -invoked Aristotelian formula )  
 with a 'government of laws, not of men'. In principle, these treatments need not have  
 attended, in any particular detail, to the content of the specific law which governed the  
 relations among individual subjects. Eighteenth -century jurists deployed several analytical  
 categories to distinguish the issue of political or civil liberty (depending chiefly on the form  
 of the state) from the issue of personal liberty or personal security (depending chiefly on the  
 private rights secured by the body of domestic law) (see Miller 1994, pp. 130 -6).  
 Furthermore, 'the law' which governed Britain actually comprised several distinct systems of  
 rules and legal process: Scots law and English law forming one obvious division; but even  
 within England, Roman law and canon law being utilized in specific jurisdictions, such as



the ecclesiastical courts, the military courts and the courts of admiralty (see Blackstone 1979, I, pp. 79-84).

In fact, however, constitutional analysis attended at length to England's system of customary or common law. Just as most commentators found it scarcely possible to discuss English politics without reference to the mixed and balanced constitution, so they found it scarcely less difficult to consider the constitution without reference to the common law. 'The constitution', John Cartwright insisted, 'is a frame of government to be evaluated with, erected upon, and regulated by, the spirit of the common law of England' (Cartwright 1776, p. 10).

The political importance ascribed to the common law followed several lines of argument, much of it replete with the same language of exceptionalism and triumphalism directed at the constitution itself. In the grand narrative of England's political development, the common law featured as parliament's key ally in the struggles for English liberty (see Weston 1991 and Forbes 1975, pp. 233-60). Royal absolutism and unchecked prerogative threatened the courts of common law no less than the mixed constitution; both had survived through an extended process of mutual support. 'Parliaments and the Kingdom', Matthew Hale explained, had shown 'great Regard' for the common law and 'great Care... to preserve and maintain it' (Hale 1971, pp. 35-6). One momentous product of this historical process was the imposing series of declarations of basic 'rights and liberties' issued by parliament at moments of political peril. Blackstone equipped the *Commentaries* with a particularly fulsome and uncritical catalogue of these enactments: beginning with the measures forced upon an unwilling King John: the *carta de foresta* and *magna carta* (the latter, 'for the most part declaratory' of the more ancient common law); next, the confirming legislation of Edward I and his successors (*magna carta* having been renewed thirty-two times, according to the calculations of Sir Edward Coke); then, 'after a long interval', the

great monuments of the Stuart era – the 1628 Petition of Right, the 1679 Habeas Corpus Act (‘a second *magna carta*’), the Bill of Rights of the Glorious Revolution; and finally, the 1701 Act of Settlement, ‘for better securing our religion, laws, and liberties... according to the ancient doctrine of the common law’ (Blackstone, I, pp. 123–4 and IV, pp. 416–7, 431–4).<sup>21</sup>

The historical symbiosis between the common law and the mixed constitution followed readily since the two institutions shared the same goal of civil liberty. And the limitation of public power in England needed to be elucidated in terms of both structures. Just as the king could not alter the law except through the mechanism of parliamentary legislation, so he could not accuse a subject or punish him without mobilizing the institutions of the common law. Thus, when Blackstone confidently boasted that ‘the idea and practice of this political liberty flourish in their highest vigour in these kingdoms where it falls little short of perfection’, he immediately referenced ‘the legislature, and of course the laws of England.’ ‘And this spirit of liberty is so deeply implanted in our constitution’, he maintained, ‘that as slave or negro, the moment the lands in England, falls under the protection of our laws and... becomes *eo instanti* a freeman’ (I, pp. 122–3).<sup>22</sup>

For common law jurists, English law’s unrivalled devotion to personal liberty received its fullest manifestation in its protection of the rights of private property.<sup>23</sup> Property rights, particularly ‘the law of real property’, commanded special attention in light of its being ‘the most important, the most extensive, and... the most difficult’ part of English law (Sullivan 1772, p. 18). For the theory of the constitution, however, of greatest concern were those features of common law that most directly implicated issues of state power. Montesquieu, in treating the ‘the power of judging’, referred to trial by jury and the legal protections against arbitrary imprisonment (Montesquieu 1989, pp. 158–9). De Lolme predictably expanded this line of analysis through some lengthy reflection on England’s

practices of impartial and equal justice, and on the 'extreme mildness' of its criminal law (Delolme 1834, p. 329).

Criminal justice, Delolme revealingly reported at the outset of three chapters devoted to the topic, was strictly not 'part of the powers which are properly constitutional'; yet an area of law that so concerned 'the security of individuals' and 'the power of the state' was necessarily included (pp. 135-6).<sup>24</sup> In addition to the basic separation of judicial power (pp. 141-2, 146-7), England's legal order provided a full panoply of provisions further to ensure the liberty of the subject: public trials; protection against false imprisonment and false accusation; the elimination of judicial torture; written indictments and public trials; and a diligent strictness over procedural requirements in the interest of the accused (pp. 104, 147-53, 165-70). 'All branches of government are influenced', he enthused, 'from the spirit both of justice and mildness' which orientated 'the laws for the security of the subject' as well as 'the manner in which they are executed' (p. 298).<sup>25</sup>

The heralded institutional centerpiece of the common law checks against the abuse of power was, of course, trial by jury - 'that part of their liberty', Delolme reported, 'to which the people of England are most thoroughly and universally wedded' (p. 164). What Matthew Hale extolled as 'the best Trial in the World' figured prominently and unsurprisingly in the eighteenth-century catalogue of the antiquity and exceptionality of England's liberties (Hale 1971, p. 160). Blackstone's *Commentaries* (notwithstanding an initial reassurance 'not (to) mispend the reader's time in fruitless encomiums') supplied no less than three extended panegyrics detailing 'the glory of English law' and 'this *palladium* of liberties' (see Blackstone 1979, III, pp. 349-51, 379-81, and IV, pp. 277-8, 342-4). In these treatments, moreover, the common law jury was oft given an explicit and broad political purpose, which overshadowed its more specific function as one of several modes of trial in English

law. Delolme, as we have seen, classified juries as part of the 'democratic' component of English government. Blackstone reported that juries not only restrained the 'prerogatives of the crown' in criminal cases (IV, p. 343); by placing 'in the hands of the people' an appropriate 'share' in 'the administration of public justice', they equally served against 'the encroachments of the more powerful and wealthy citizens' (III, pp. 380-1). John Adams proposed that the English constitution could be thought to embody two distinct schemes of mixed government: a mixed legislature of king, lords and commons; and a mixed executive of king, judges and juries. On this basis, 'two branches of popular power' were revealed - 'voting for members of the house of commons' and 'trials by juries' - which together help sustain 'the balance and mixture of the government' (Adams 1998, pp. 58-60; and see Adams 1979, pp. 88-92).

As Adams's testimony indicates, this specifically political treatment of the common law jury was by no means unique to establishment apologists, such as Blackstone and Delolme. Indeed, through the course of the century, it was the radical critic of Hanoverian government who often pressed this characterization most zealously. Wilkes and his propagandists in the 1760s celebrated the jury as a representative body against which to measure the failings of a now-corrupted assembly of parliamentary representatives (see Brewer 1980, pp. 153-7). And in a series of notorious prosecutions for seditious libel then and in following decades, political dissidents found ample confirmation of the continuing efficacy of juries in the battle to preserve English liberties. Following the lapse of the Licensing Act in 1695, the common law bench revised and adapted the law of seditious libel so that it became a leading (if often counter-productive) instrument for silencing public attacks on the government. The frustration of these efforts largely depended on the repeated recalcitrance of jurors to accept the specific and limited legal task assigned them in such

cases by government prosecutors and common law judges.<sup>26</sup> Such episodes, and their contemporary celebration, both confirmed and helped sustain the powerful 'constitutionist idiom' which remained so central to British radicalism through to the nineteenth century (see Epstein 1994, pp. 3-5, 29-69). As in past eras, the battle against tyranny came armed with the appropriate common law weapons.

The common law's well-considered role in the restraining of public power did not, however, exhaust its contribution to the theory of England's constitutional freedom. Of no less importance was the fund of conceptual resources the law provided for defining the myriad relationships of authority and subordination that comprised the social order of the community. The same government structures, routinely described in the explicitly political terms of the theory of the mixed constitution or the theory of the separation of powers, were no less appropriately or commonly understood in the settled juridical categories of private right and legal title.

Burke made full use of this point in the ornate celebration of the English political experience which he pitted against the follies and wickedness of the French revolutionaries. Invoking the testimony of Coke and 'and the great men who follow him to Blackstone', he emphasized how 'our lawyers' had taught the nation not only to regard its 'most sacred rights and franchises as an inheritance'; in so doing, they additionally had made it possible for 'all of the people' to conceive government power and their own rights under a unifying logic of prescriptive title. 'By a constitutional policy', Burke shrewdly and reassuringly observed, 'we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives' (Burke 1969, pp. 117-20; and see Pocock 1960).

While Burke's *Reflections on the Revolution in France* supplied what for later generations became the best-known statement of this common law orientation, for his contemporary audience it is most complete rehearsal had appeared twenty-five years earlier in the first volume of the *Commentaries on the Laws of England*. Blackstone's celebrated volume furnished its readers with a uniquely detailed, elegant, and subsequently influential apology for Britain's constitutional order. But this learning did not come assembled in a discrete section on the 'constitution' or even on 'constitutional law.' Instead, the book, devoted to 'the Rights of Persons', began with a chapter-length survey of 'the three great and primary rights' of English subjects: 'personal security, personal liberty, and private property'. The chapter concluded with an overview of the principal 'barriers' established 'to protect and maintain' the three rights, which Blackstone characterized as a scheme of 'auxiliary subordinated rights of the subject' (Blackstone 1979, I, p. 136). These 'auxiliary' rights comprised the right of self-defence; the right to petition the king or parliament; the right to apply 'to the courts of justice for redress of injuries'; the 'limitation of the king's prerogative'; and 'the constitution, powers and privileges of parliament' (I, pp. 136-9). Blackstone's chapter on parliament and the king then followed; this material presenting 'the rights and duties of persons' who exercised 'supreme' magistracy. The *Commentaries* then treated, in turn, the 'rights of persons' exercising 'subordinate' magistracy (sheriffs, constables, etc.); the rights associated with particular social ranks and stations (clergy, nobility, military, etc.); the rights 'in private or economical relations' (master-servant, husband-wife, etc.); and the rights of 'artificial persons' (corporations).

This ordering of materials presented the central institutions of government as but one particular cluster of 'rights of persons'; rights which functioned to secure the 'auxiliary subordinated rights' of the subject, and that existed within a hierarchical system of personal

rights which gradually reached down to the legal relations of the domestic household. The approach, which later English jurists found confused (see Dicey 1939, p. 7), served to erode the kind of organizing boundary between state and society that featured in later treatments of constitutional law. And it properly reflected the manner in which the eighteenth-century state continued to be conceptualized and debated both in terms of the categories of customary law and in terms of the divisions of political science. Indeed, the two overlapping registers appeared in description of each of the main components of England's constitutional system.

Thus, the monarchy, from the perspective of constitutional analysis, appeared in its executive capacity and in its power of legislative veto. But the crown was equally conceived as a form of 'estate', an analogy that greatly complicated and potentially constrained efforts to alter the royal succession (see Nenner 1977, pp. 145-54, 178-90, and Clark 1985, pp. 121-41). Parliament's constitutional function, as we have seen, centered on its control of supply and its legislative supremacy. But when contests arose over Parliamentary 'privilege', its traditional status as a 'high court', whose power and jurisdiction were settled by 'custom and usage' (or *lex parliamenti*), regained its prominence (Blackstone 1979, I, p. 158; and see Thomson 1938, pp. 329-33, and Williams 1970, pp. 221-49). Again, the parliamentary franchise figured critically in the political assessment of the independence of the House of Commons and its credentials as a representative assembly. But the franchise was no less recognized to be a form of property for those who exercised it; and in disputed elections it was the issue of an elector's good title to this property that often proved paramount. 27

The categories of the common law thus furnished a distinctive framework for the elucidation and evaluation of constitutional structures; a framework, moreover, which at the same time effectively deprived the constitution of its convenient, if misleadingly limited,

identification with the 'the form of the legislature' (see Paley 1838, III, p. 253). The gain in conceptual enrichment and juridical accuracy, in this sense, came at the cost of definitional clarity and precision. 'Some have said that the whole body of the laws' make the constitution; 'others that King, Lords and Commons make the constitution', reported John Adams from Boston in 1766. But even though neither definition seemed quite 'satisfactory', 'Yet I cannot say that I am at any loss about any man's meaning when he speaks of the British constitution, or of the essentials and fundamental of it' (Adams 1998, p. 57).



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<sup>1</sup>The 1707 Act of Union, which created the single political entity of Great Britain from the previously separate kingdoms of England and Scotland, also created some cumbersome terminology for describing what previously existed as the 'English constitution'. After 1707, many of the most important institutional components of the constitutional structure (House of Commons, House of Lords, the Crown) were now British and not English. The law and the church, however, remained separately English and Scottish. Contemporary usage varied among 'English constitution', 'British constitution' and 'Britannic constitution'. In this discussion, I have not sought to unify these several usages. For surveys of eighteenth-century constitutional developments, see Carter 1969 and Langford 1991, pp. 677-725; more detailed treatments are provided by Thomson 1938 and Williams 1970.

<sup>2</sup>Paine, joined Blackstone, in viewing the 1716 Septennial Act, which extended the maximum duration of the then and future parliaments to seven years, as the definitive modern example of the parliament's ability to alter the constitution (Paine 1974, p. 280). The controversial statute was standardly given this constitutional significance by both the defenders and critics of the Hanoverian political order.

<sup>3</sup>The details of the episode, and the controversy over impeachments it raised, are set out by Thomson 1938, pp. 22-6.

<sup>4</sup>Pocock 1975, Part 3, remains the most ambitious and influential elucidation of eighteenth-century British political argument in terms of these developments. The relevant and major changes in statecraft received classic interpretation in Dickson 1967 and

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Plumb 1967, and more recent revision in Brewer 1989, O'Gorman 1989, and Langford 1991.

<sup>5</sup>Hume's general project in political theory extended well beyond these essays to include his moral philosophy and his philosophical history. The discussion here is confined narrowly to Hume's treatment of the British constitution and its political impacts. An appropriately broader treatment of Hume's political philosophy is provided in Forbes 1975, Miller 1981, and Haakonssen 1993.

<sup>6</sup>For Hume, the power of the House of Commons was but the political face of the societal transformations of the late 17th-century Tudor and Stuart eras, which he identified with commerce and manufactures. These changes had undermined the power of the peerage and the feudal order. See Hume 1994, pp. 111-2, and Hume 1983, II, pp. 522-5, for summary versions of this important sociological thesis.

<sup>7</sup>Burgh also supported the call for an extraparliamentary 'Grand National Association' to lead the mobilization for constitutional reform and restoration; see Burgh 1774-5, III, pp. 428-35. This reform movement is detailed in Christie 1962 and Black 1963.

<sup>8</sup>On 'economic reform' and its connection with parliamentary reform more generally, see Christie 1956, Cannon 1972, pp. 75-84, and Harling 1996.

<sup>9</sup>One by-product of this emphasis (ironic, in light of the actual political power of the peerage) was the marginalization of house of lords in constitutional discussions. Paley, for example, found it necessary to explain the 'littlenotice (that) has been taken of the House of Lords' in his own survey (Paley 1838, III, p. 272).

<sup>10</sup>The place of Montesquieu's discussion of England in his more general political theory is valuably explored in Richter 1977, pp. 84-97, Mason 1990, and Baker 1990, pp. 173-

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85. Montesquieu's chapter also examined in two substantial histories of the theory of the separation of powers; see Gwyn 1965 and Vile 1998.

<sup>11</sup> Montesquieu's discussion in chapter 6, as he emphasized in a concluding comment, concerned the *design* of England's constitution and not the question of whether in practice this design was realized; see Montesquieu 1989, p. 166.

<sup>12</sup> Montesquieu's debt to the partisan polemics of early 18th-century Hanoverian Britain are set out in an important article by Shackleton 1949.

<sup>13</sup> Some useful comparative perspective is supplied by William Hay's brief tract on government of 1728. Hay there identified six principal 'powers' found in every government, and then treated the institutional distribution of these powers according to whether they exercised to be continual or merely occasional; see Hay 1728, pp. 31-60.

<sup>14</sup> The ambiguities of Montesquieu's own text reflect some of the difficulties attending this revision. At the outset of chapter 6, he distinguished 'legislative power' from two different forms of 'executive power' ('executive power over things depending on the right of nations, and executive power over things depending on civil right'), before settling on the (now) more familiar classification of powers among legislative, executive, and 'judging' functions (Montesquieu 1989, pp. 156-7). Montesquieu's initial formulation recalls the language employed by Locke to distinguish legislative from two kinds of (analytically differentiated) executive power: executive power and federative power; see Locke 1964, pp. 382-4.

<sup>15</sup> The change, introduced after the Glorious Revolution, was made statutory in the 1701 Act of Settlement (see Williams 1970, p. 59). Reference to this legislation became routine

in discussions of the security and independence enjoyed by English judges.

Blackstone also cited a statute of 1760 (1 George III c.23) which extended the judges' tenure in office following the death of the monarch.

<sup>16</sup> These seventeenth-century background and famous political conflicts between crown and common law are examined in Nenner 1977, Sommerville 1986, and Weston 1991.

<sup>17</sup> These fulsome versions of judicial independence strained against much of the settled routines of political patronage and recruitment attending judicial appointments and promotions; see Lemmings 1991.

<sup>18</sup> Montesquieu in chapter 6 identified all the structural features relevant to England's 'mixed government', though he avoided the label. Here he regarded England as a largely anomalous political form, which explains some of his reticence in applying conventional political categories to its constitution. In Book 5, chapter 19, England is described as 'a nation where the republic hides under the form of monarchy' (Montesquieu 1989, p. 70).

<sup>19</sup> The longer intellectual history is valuably considered in Pocock 1985, pp. 37-50, and Skinner 1998.

<sup>20</sup> Delolme was unusual in placing the press and public opinion under a distinct political function, 'censorial power', and in treating this power on par with the other leading powers of government (Delolme 1834, pp. 48, 250-61). Other commentators likewise observed the contributions of the press and public discussion to the distinctiveness of British political culture, but tended not to accommodate these points within their specific account of the constitution (see Montesquieu 1989, pp. 325-7, and Paley 1838, III, p. 259). For the important contemporary debate over press freedom and

public opinion, see the valuable discussions in Gunn 1983, pp. 88-94, 260-315, and Hellmuth 1990; the larger historiography is surveyed in Harris 1996.

<sup>21</sup>Blackstone's catalogued and disregarded the more critical historical scholarship on the origins of the common law as well as on the antiquity of the mixed constitution (see Weston 1991 and Forbes 1975, pp. 233-307). For examples of more restrained contemporary treatments, see Barrington 1769, p. 3, Hume 1983, I, pp. 442-6, and Delolme 1834, pp. 20-3. Blackstone's legal history is examined in Willman 1983 and Cairns 1985.

<sup>22</sup>Blackstone's generous formulation (later invoked by British abolitionists) exaggerated the common law's more limited and circumspect treatment of African slaves in England, and in later editions he revised the wording. Blackstone's position and the general scholarship on chattel slavery in eighteenth-century law is explored in Oldham 1992, II, pp. 1221-44.

<sup>23</sup>Among his accomplishments in the *Commentaries* was Blackstone's success in presenting England's notoriously labyrinthine and abstruse rules of property law and common law procedure as 'the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen' (Blackstone 1979, III, pp. 422-3; and see Lieberman 1989, pp. 39-48).

<sup>24</sup>Montesquieu's own consideration of these matters had been placed in a separate book 'on the laws that form political liberty in relation to the citizen' (Book 12), which followed the immediately prior book on 'political liberty in its relation with the constitution'.

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<sup>25</sup>Delolme's case for the mildness of criminal justice ignored the developed debate over the increased severity of penal sanctions which resulted from recent parliamentary legislation; see Beattie 1986, pp. 520–618, and Lieberman, 1989, pp. 199–215.

<sup>26</sup>In these cases, juries were asked to determine whether in fact an accused printer or author had produced the publication, while the judges determined whether in law the publication was or was not seditious libel. This distribution of responsibility between bench and jury was modified in Fox's Libel Act of 1792. The legal and political dimensions of these seditious libel prosecutions are valuably treated in Hamburger 1985, Green 1985, pp. 318–55, and Oldham 1992, II, pp. 775–808.

<sup>27</sup>The understanding of the franchise as property appeared routinely in election disputes (as it did in debates over borough disenfranchisement). The issue was aired with particular thoroughness in the context of the Oxfordshire election of 1754, which raised the question of whether voters who held copyhold tenures were legally entitled to the franchise on the basis of these tenancies (see Robson 1949, pp. 141–8).

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