

Look at how and to
what extent thinking



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Look at how and to what extent thinking on the concept of the separation of powers influenced the development of laws and government in France and the United States

Introduction In the 18th century, European, science, communication, philosophy and politics went through a reorientation that birthed the Enlightenment period. Diverse ideas were synthesized into a worldview assented by the West. The convergence of these ideas questioned the then existent traditional authorities. There was the belief that rational and radical changes, could improve humanity.

The culmination of the Enlightenment period was the French Revolution which later triggered the American Revolution. In fact, in this era, natural rights and the ideals of equality were held in high regard. For this reason, both countries wanted liberation from absolute monarchs, tyrannical rules, their associated aristocrats and elites. America was founded on the revolution and the great awakening and it is upon these historical events that America's future was founded. For the case of France however, liberalisation ended with the revolution and it is only recently that liberal democracy seems to be paving its way back to Europe. Thinkers, played an important role and that is still reflected into today's society. However, this essay will concentrate on one in particular: Baron de Montesquieu.

It will examine how and to what extent the Montesquieu's concept of separation of powers influenced the legal systems of both France and US and how they differ in terms of application. Montesquieu Ideology To explain Montesquieu's political theory, it has be put into context. In pre-revolutionary France, the sovereignties were divided among the Church, Nobility and the Third Estate. A stagnant society where, the prospect of social progress was

not to be mentioned for individuals, on the basis of a superstitious status quo. Montesquieu challenged it, by creating the “ separation of powers”. In the Spirit of Laws, he in fact envisioned a system formed by three arms of government (legislative, executive, and judicial) where none had more power than the other. Montesquieu’s basis for his doctrine, was that man inherently and naturally oppresses others. Therefore, having one man legislating, implementing and adjudicating laws, is a recipe for despotism.

He believed that the trias politica, was the best way to protect individual liberties and avoid the infringement of citizens’ natural rights. The Impact of Montesquieu IdeologyHe has shaped the socio-political landscape of contemporary society. The separation of powers in France, in fact was a culmination of the Montesquieu ideology. As a matter of fact, in the Article of the French Declaration of the Rights of Man, it is stated that “ Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.” This document, is the preamble of the Constitution of the French Fifth Republic and it is deemed to be constitutional.

In the same way, he greatly impacted the US constitution as far as the structure of government is concerned. Additionally, Montesquieu is credited for forming the system of checks and balances as a result, to avoid any excess of power from any arm of the government. Montesquieu’s impact on the post-revolutionary France and USA can be viewed from the way he conceptualized freedom. Montesquieu vouched for a representative government that was directly responsible to its people through election. According to him, this was the way through which liberty could be assured;

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since the rulers were allowed to be so by the ruled. Today, in both states there are democracies where society is led by elected representatives through which, their voice is heard. Montesquieu conceived a government that would give its citizens equal rights and protect them at the same time.

While the subject of equality is still debatable; since though equality among men was at the basis of American Constitution; slavery in the US was abolished in 1865, and the 14th amendment was interpreted differently until Brown. French women were given the rights to vote, in the October 1944. Quite a late period for this basic rights to be fully applied. The first steps towards a fairer society can be spotted in Montesquieu's ideology. This essay will also concentrate on the role of judges in both systems; since they are emblematic of the difficulties present in applying the concept, in different ways.

United StatesThe US Supreme Court can set veto to the executive branches and can declare laws unconstitutional, in order to keep powers in check. However, it does that on the basis of shaky grounds. In fact the Supreme court judges decisions' are product of their interpretation; which may be subjective. Additionally, to make an amendment in the American Constitution there are only two ways as Art. V states: the amendment to be passed by two-thirds majorities in both houses of Congress and the ratification by three-quarters of the states. This first method of amendment is the only one used to date, and in all but the case of XXVII Amendment, state ratification took place in legislatures rather than state conventions. The second method, the Constitution might be amended by a Convention called for this purpose by two-thirds of the state legislatures, if the

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Convention's proposed amendments are later ratified by three-fourths of the state legislatures (or conventions in three-fourths of the states). Since the amendments can be blocked by a minority of only thirteen states, who withhold their votes, amendments are very difficult to obtain.

Hence why the interpretation of the Supreme Court is important. However, change can come about as a result of decisions by the Supreme Court. By chance, on July 1st 1982 the Supreme Court gave judgment in *Mississippi University for Women v Hogan*. This case illustrated that a large measure of sex-equality had anyway been achieved by re-interpreting the XIV Amendment. Mister Hogan applied for admission to the appellants' Nursing school. An example would be the interpretation of the IX Amendment, that constricted the whole American population to the process of racial segregation. It is for this reason that an interracial couple got arrested in Virginia for being married by infringing the Racial Integrity Act 1924. Or, why a black little girl was denied access to a nearer school because of her skin colour. US judges, are appointed in conjunction with the political idea of the President.

Whereas, Neil Gorsuch, judge of the Supreme Court appointed by Trump; emphasised he has complete autonomy due to the duration of his office. Additionally, the system would not allow the President to appoint a judge not fit for purpose. Since his appointment would have been approved from the Senate before, taking place. For instance, the Senate rejected the nominee of judge John Parker in 1930; the vote was 41-39, with 16 abstentions. The opposition alleged that Parker was anti-Unions and anti-Blacks.

Parker later on gained a liberal reputation. He strongly supported the New Deal and racial desegregation. France, an example of checks and balances is to claim, that decisions on personal rights are suitable for judicial resolution, through the Conseil Constitutionnel. Whereas, the distribution of other goods and benefits may be regarded as a matter for administrative decision (Conseil D'Etat). This particular distinction is captured by Art. 66 of the Constitution of the Fifth French Republic: “ the judicial authority, guardian of the liberty of the individual, ensures respect for this principle in conditions determined by the law”.

Although the French law is extensively detailed until the point of expunging the judge's power to make law; with the intent of making the application of laws mechanic; the Constitution, retroactively lives through the Conseil Constitutionnel judgements, since they are final. Judges have one month to consider and pass a law, which may not be enough to assess its practicality, so assessed instead by the executive branch, in the spirit of separation. This looks like the summary justice with which Justice of Virginia Charles Lynch earned his reputation, and under which a law is put into effect, in the immediate wake of being passed. In order to preserve the principle of checks and balances, the whole legal and governmental French system has to incur into forms of bureaucracies which are speeded up. This result in a less efficient application of the law. Theorists are divided into two schools. According to the first, the meaning of a constitutional text is contained in itself.

The court has to pursue the meaning given to the law by its author.

Discussions are made to seek the author's intent, and/or grammatically

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examine the text. The second school, the text is a set of words. So interpreting, for the judge means choosing a meaning of a text and assigning it, endowing it with a normative content.

Here interpretation is an act of will by which the judge determines the meaning of a law. Moreover, there is perplexity on how the balance of powers is maintained without overlapping each other, similarly to the US. Comparison between the Supreme Court and the Conseil Constitutionnel
The judicial system of the United States of America is based on common law. This is as opposed to France, where civil law is upheld. Mirroring this to the doctrine of separation of powers, it has failed in the United States as far as the basis of judicial decisions is concerned. The law should be a representation of the will of the people as opposed to the philosophy of judges. While civil law (Conseil Constitutionnel) can guarantee that this condition is met, common law (Supreme Court) cannot. The underlying fact is that under civil law, codified statutes reign supreme.

Judges are not bound by legal precedents and therefore, there is less range of interpretation. This allows for the will of the people to be articulated better as opposed to over-reliance on legal precedents in the US. At least in theory. Judicial decision making in the Conseil Constitutionnel therefore does allow much interpretation. Paradoxically, a system such as this in which judges are given more room for interpretation also should curtail their powers. However, the Conseil Constitutionnel judgements' are final therefore the Constitution although being very detailed; it paradoxically lives through the philosophy of the different French judges. This is contradictory to the

principle of separation of powers itself, because it gives the Conseil Constitutionnel more power than it should have.

It creates new laws from the interpretations of the Constitution. The Supreme Court instead, takes on administrative as well as criminal matters, which are reserved respectively to the Conseil d' Etat and the Court du Cassation and it has made a statement throughout the years on how the various interpretation of the Articles of the American Constitution, have had repercussions to the US. Taking into consideration, the case of Marbury where the 14th amendment was interpreted to cover the personal right for every woman to have an abortion, which was not mentioned in the Constitution. The Supreme Court Judge Breyer, voted in favour of it basing himself on another amendment: the 9th; which gives room for changes in the interpretation of the Constitution.

The concept of freedom can be seen blurry. In fact, as opposed to the idea of freedom, where the rulers are allowed to be so by the ruled through election; in both systems the judges are not directly elected by the people. As mentioned before US the 9 members of the Supreme Court are in fact firstly nominated by the President, then the nomination has to be ratified by the Senate. While the 9 members of the Conseil Constitutionnel in France are respectively elected by the President of the Republic, the National Assembly and the Senate. Furthermore, in the US, the opinion of one judge can actually change the Constitution, considering the fact that, if there is a disparity between opposite factions, the future of the States falls into the hands of the only judge who has not taken position yet.

In France it can change how the Constitution is applied. Shouldn't it be the case that these important figures are actually elected directly by the population? Conclusion Perhaps it is the time for democracies to rethink the concept of separation of powers, considering its failure in terms of application. Adopting a system of partial separation of powers contrary to the pure separation of powers could be a solution. Obtaining an autonomous legislature, executive and judiciary can still be achieved.

This is through having an axis within the structure of government that controls the independence of the three arms. This is indeed essential in order to create a cohesive political system that will address the frictions of the powers of the three arms.