

The Tripartite American Judiciary:
The Influence of Rome's Mixed Constitution Upon the Founding Fathers

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Honors Thesis - Political Science and Classical Civilizations

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March 19, 2018

Introduction

The Founding Fathers of the United States of America crafted the Constitution in a way that accounted for the experience, philosophy, and examples of those from Rome and from England. These men sought an innovation in their project that would enable them to create a government that survived longer than all nations of the past while still guaranteeing man's inalienable rights to all citizens. Through an analysis of Polybius' and Cicero's theory on the Roman Republic's mixed constitution, as well as a deeper look into the Roman and English legal systems, the Framers realized that the solution for a lasting state lay in a mixed government with checks and balances between three separate but equal branches: legislative, executive, and judicial. Since the judiciary had never been established as an independent branch before, the Founders were on their own for creating a system that would fit within the framework of existing governments while still ensuring justice for the people. The result of this thought project was a judicial branch composed of three parts, serving to embody the mixed constitution that both Polybius and Cicero praised. The Constitution would act as a monarch, the judges as an aristocracy, and the trial by jury as a democracy. With each part balancing out the other within the larger framework of the United States' branches, the freedom of every citizen in America has been protected since the origins of the Constitution and will continue to be guarded as long as the three parts remain in harmony.

This paper will guide the reader through an exploration of the Founders' implementation of Roman political theory as espoused by Polybius and Cicero. I will begin by showing the influence that the Roman Republic had upon the Founders, beginning with their education and advancing through the Constitutional debates. After establishing that the Founders were

motivated by the classics, more specifically Rome, in the development of the Constitution, I will delve deeper into an analysis of both Polybius and Cicero's thoughts on the Roman mixed constitution and in what ways it parallels the American Constitution. I will introduce why the judiciary gained a place as the third branch in the United States government, given that it did not play this role in either the Roman or the English example. After showing why the Founders saw the need to have this new third branch, I will explain how these men took the ideas of Polybius and Cicero regarding an equal distribution of monarchy, aristocracy, and democracy into account when creating the judicial branch as a separate but equally independent power. It will become evident that the judiciary follows the class-based theory of Polybius and Cicero, but as reinterpreted and applied through an institutional perspective. Instead of each aspect being motivated by economical or hereditary standards, as in both Rome and England, the three American separations in the judiciary - the Constitution, judges, and democracy - were based upon form and function. I will conclude by revealing how this mixed constitution schema amongst this new branch ensures that American citizens are guaranteed their inalienable rights to life, liberty, and property.

Classical Education

Among scholars studying the American colonial, revolutionary and founding generations, it remains uncontested that those who gained an education, either in grammar school or in college, were exposed to the study of Rome and Greece. Beginning at a young age, colonial boys studied Latin, mainly focusing on vocabulary, parsing, and grammar. As they advanced in their education, students were exposed to the traditional Roman authors, including Cicero, Virgil,

Livy, and Sallust. In the later years of grammar school, students were also taught Greek, mainly to allow them to read the New Testament. In the mid-eighteenth century, regional areas did not vary much in their curriculum due to college admittance requirements. Young men had to be able to read, write, and translate Latin and Greek before obtaining acceptance to any of the universities in the colonies. When John Jay was applying to King's College, the entrance requirements were to give a "rational account of the Greek and Latin grammars, read three orations of Cicero and three books of Virgil's *Aeneid*, and translate the first ten chapters of John into Latin."¹

Once these men reached the collegiate level, their Latin and Greek language instruction did not stop, but rather was used to advance an elite adept in moral and political lessons. Caroline Winterer states that professors taught the classical languages for more than just the words and syntax but to create a more classically aware generation with "an understanding of antiquity sufficient to taking up the duties of gentlemen, statesmen, and ministers as adults." Throughout their education, students would have been tested on their ability to glean messages of morality, virtue, and patriotism from the authors they were exposed to. John Adams impressed upon his son, John Quincy Adams, that the classics were vital to his development. He told John Quincy: "In company with Sallust, Cicero, Tactius, and Livy, you will learn Wisdom and Virtue. You will see them represented with all the Charms which Language and Imagination can exhibit, and Vice and Folly painted in all their Deformity and Horror. You will ever remember that all the End of study is to make you a good man and useful Citizen." By the time these men entered college, their education began focusing on practical applications of the values they learned in

¹ Reinhold, 26-28; Ziobro, 16-19; Winterer, 12; quoted Richard, 19, who cites "Laws and Orders of King's College, 1775," Vol. I, p.117.

their grammar school classroom. The Founding Fathers were not only exposed to the classical world, but they were actively involved in pulling models and anti-models from antiquity for classroom assignments and discussions.²

Through their classical education, these men gained an awareness of republican theory, a wariness towards tyranny, and an encouragement to civic virtue. As Patrick Henry of the Revolutionary generation coined it, the classics gave these men a “lamp of experience” to shine in their daily lives and in their political endeavors. John Witherspoon, president of the College of New Jersey (now Princeton), emphasized that the classics were designed “to fit young men for serving their country in public station.” A majority of the Framers were college educated individuals, with thirty-one of the fifty-two at the Constitutional Convention of 1787 holding a college degree. Meyer Reinhold argues that the fascination with antiquity in America “reached its acme in such political and intellectual giants as Thomas Jefferson and John Adams, and in the debates attending the promulgation and ratification of the Constitution.” It is undeniable that these men who helped with the political developments of the United States’ Constitution were well-versed in classical authors and influenced by the classical civilizations of Rome and Greece.³

² Quoted Winterer, 30; quoted Richard, 37, who cites Butterfield, *Adams Family Correspondence*, John Adams to John Quincy Adams, May 18, 1781, Vol. 4, p. 117; Ziobro, 24-25.

³ Quoted Patrick Henry, “Give Me Liberty or Give Me Death;” quoted Richard, 20, who cites Hofstadter and Smith, *American Higher Education*, “John Witherspoon’s Account of the College of New Jersey, 1772,” p. 141; quoted Reinhold, 24; Winterer, 16-19.

Roman Influence on the Constitutional Debates

The influence of the Founding Fathers' classical education makes itself apparent when they invoke specific examples from Rome to support their arguments during the Federal Convention and surrounding debates. John Adams, Alexander Hamilton, James Wilson, and other Founders point back to Rome as a guideline and parallel system to the government they were designing. Reinhold emphasizes that the "appeal of the Roman republic to Americans lay in its pluralistic culture, its perdurability, flexibility in policy, balanced constitution, agricultural economy, religious toleration, the vaunted purity of its great men, and its Roman virtues (especially patriotism, self-sacrifice, and frugality)." These men tirelessly searched their memories and classical authors for precedents to advance their political ideals in the creation of a republic that would not fall prey to the same vices that Rome did. The Framers also used the Roman governments, both Republican and Imperial, as an anti-model for certain articles of the Constitution, such as the size of assemblies and the power of the executive. Although some of the men during this period were critical of the Framers' reliance on ancient governments as models, Adams made the valuable defense, upheld by most people during this time, that "there is one eternal, unchangeable truth - that all men are the same everywhere, and that therefore antiquity is relevant to modern problems."⁴

For the Founding Fathers, Rome was the only ancient government that truly resembled the type of government they were seeking to create: a republic. As Adams made clear, "there is no good government but what is republican." Although some of the governments of Greece could be considered republics, the Framers used the Greek city-states rarely, such as to defend

⁴ Quoted Reinhold, 97-98; quoted Reinhold, 107.

components of federalism and the value of a written constitution. Rome was the prime example of a republic that was successful throughout its rule. Those who valued the example of Rome actively sought demonstrations of Roman successes and failures by referencing the virtues and vices manifested in this ancient people. Joseph Warren, in his 1772 speech honoring the Boston Massacre, expressed a common sentiment amongst his generation regarding Rome's love for liberty, saying that "it was this noble attachment to a free constitution which raised ancient Rome from the smallest beginnings to the bright summit of happiness and glory to which she arrived; and it was the loss of this which plunged her from that summit into the black gulfs of infamy and slavery."⁵

During the constitutional debates, the Founders were seeking to use the Roman model as a means to avoid the tyranny that fell upon this Republic, turning it into an Empire. As Carl Richard makes the point, "the founders believed that the purpose of history was the prevention of tyranny." To most of this generation, the main cause for tyranny was a loss of virtue within the citizenry due to luxury and corruption. Among the Founders, James Wilson articulates this idea best when he stated that:

in the giddy hour of her prosperity, she spurned from her obscure instruments by which it was procured; and, in their place, substituted luxury and dissipation. The consequence was such as might have been expected. She preserved, for a time, a gay and flourishing appearance; but the internal health and soundness of her constitution were gone. At last, she fell a victim to the poisonous drougths which were administered by her perfidious favorites. The fate of Rome, both in her risen and in her falling state, will be the fate of every other nations that shall follow both parts of her example.

Wilson espouses the idea that when riches and decadence rule a country's people, although success may seem to be widespread, this luxury is truly harmful to the virtue of the citizens and

⁵ Quoted Adams, *The Revolutionary Writings of John Adams*, 288; quoted Richard, 78, who cites Cary, *Joseph Warren*, p. 108.

the welfare of the state. A nation can only exist in this condition for a short period of time before collapsing. For Founders such as Wilson, it is clear that the maintenance of virtue within the citizenry is essential for the longevity of a nation.⁶

For the Framers, there were two schools of thought about how to prevent America's republic from experiencing a decline in the virtuous attributes of its citizen public. One idea was that Americans, due to their ancestry and religious belief, had evolved, as a people, in moral character since the period of Roman opulence. It was often stated that since the men of the United States knew God and walked with Him, they would not need protection in their government to prevent the decline of their republic in the way that the Romans would have. Hence, as long as religiosity and morality were instilled in the youth and maintained throughout adulthood, America would thrive as a nation. John Taylor, one of the Founders, expressed his belief that relying upon a mixed constitution, as was done by ancient governments, was unnecessary. In America, he argued, "human character has undergone a moral change" that allowed it to avoid the traps of antiquity. Although this was a commonly argued sentiment, the most influential constitutional writers felt differently.⁷

The other school believed that virtue is an issue not only for man but also for government. These men thought virtue was not inherently protected but must be safeguarded through a constitution that instilled a republican form of government with mixed components. These Framers believed that institutional separation enforced by checks would ensure that

⁶ Quoted Richard, 85; quoted Richard, 74, who cites McCloskey, *Works of James Wilson*, Oration Delivered on the Fourth of July, 1788, p. 277.

⁷ Quoted Reinhold, 107, who cites Baritz, *An Inquiry into the Principles and Policy of the Government of the United States*.

ambition was softened, luxury was harmless, and failure was avoidable. John Adams, as well as his contemporaries who wrote the *Federalist Papers*, argued that the loss of virtuous character must be secured through constitutional remedies. In his *Defense of the Constitutions of Government of the United States*, John Adams makes his belief clear:

experience has ever shown, that education, as well as religion, aristocracy, as well as democracy and monarchy, are, singly, totally inadequate to the business of restraining the passions of men, of preserving a steady government, and protecting the lives, liberties, and properties of the people. Nothing has ever effected it but three different orders of men, bound by their interests to watch over each other, and stand the guardians of the laws. Religion, superstition, oaths, education, laws, all give way before passions, interest, and power, which can be resisted only by passions, interest, and power.

These Framers argued that it would not be republican virtue that saved the United States from decline but rather a security of virtue through the institutional make-up of the government. The secret weapons for these Founding Fathers consisted of a mixed constitution and representation within the government. The mixed constitution, as highlighted by Polybius and Cicero, manifested itself as an organization of the three orders of society into a clear separation of powers between three branches of government with each possessing checks, thereby ensuring that no power overstepped its limits. To further ensure stability, representation was instilled to check the democratic element within the republic in order to ensure that there was a filter through which all opinions must pass.⁸

⁸ Quoted Adams, "Defense of the Constitutions of Government of the United States;" Strauman, 20; Storing, *What the Anti-Federalists Were For*, 1-6. For more on the representation issue, refer to James Madison Federalist no. 63.

The Classical Theory of the Mixed Constitution

The Founding Fathers who advocated for a mixed constitution relied most heavily on Polybius and Cicero to support their arguments in principle, if not in practice. The Framers knew that a mixed constitution according to classical theory consisted of a blend of different forms of rule - monarchy, aristocracy, and democracy. The Founders decided to use the ideas of Polybius and Cicero when forming their new government, but without using the exact formula as seen in the Roman model. John Adams, before launching into his defense of the United States Constitution, points out that “whether the essays [ancient philosophers] have left us were copied from history, or wrought out of their own conjectures and reasonings, they are very much to our purpose, to show the utility and necessity of different orders of men, and of an equilibrium of powers and privileges. They demonstrated the corruptibility of every species of simple government, by which I mean a power without a check, whether in one, a few, or many.” The failure of the Roman Republic led the Founding Fathers to be wary in following Polybius and Cicero’s ideas exactly, yet they also saw their genius concerning the mixed constitution in Rome.⁹

Polybius believed the Roman Republic to be the best example of a mixed constitution that balanced the power between the three pure forms of government. He argued that the success of Rome should be attributed to the fact that since its origins, the different orders had worked to balance each other until the system reached perfection during the Hannibalic War. The Roman model was not composed of the three branches Americans are accustomed with, but rather was a mixture of legislative, executive, and judicial functions across three institutions: the consuls,

⁹ Quoted Adams, “Defense of the Constitutions of Government of the United States.”

Senate, and the people - proxies for monarchy, aristocracy, and democracy. Polybius describes in detail the checks and balances of the Roman Constitution. The consuls were reliant upon the Senate for military campaign approval, provisions during war, and triumphs for outstanding service. The people also held a check over the consul, for upon his exiting of office at the end of his annual term, the consul had to produce an audit to recount his actions. As for the Senate, this institution was mainly checked by the people who had to validate all senatorial decrees regarding political investigations and criminal punishments, most importantly the death penalty. The people also held a veto power over all senatorial legislation through their representative, the tribune. Lastly, the people were balanced out by the Senate's control over all property contracts and the consul's executive authority over the military, both elements of society that almost every Roman male interacted with at some point in his lifetime. Overall, each of these institutions Polybius discusses held important checks over the other that allowed the monarchical, aristocratic, and democratic elements to balance out within the Roman Republic, keeping even native Romans from being able to identify which part of their system played the dominant role.¹⁰

Polybius' theoretical argument had an immense impact on the Framers, for he took the Greek idea of class mixtures and projected it upon an institutional arrangement. By means of each institution checking the other and balancing its power within the republic, Polybius highlighted that the survival of the Roman Republic was more institutionally based rather than the result of virtue. In theory, Polybius' argument made practical sense, but the Framers knew the danger in following the Roman model because of its failure in the century after Polybius wrote. The Founding Fathers recognized that the mixture between the orders of men was not enough to

¹⁰ Polybius, Book 6.11-18.

ensure the maintenance of a nation. As David Hume, an important philosopher to the Framers, stated, “if one order of men, by pursuing its own interest, can usurp upon every other order, it will certainly do so and render itself as far as possible, absolute and uncontrollable.” The Founders sought to ensure that rule by the one, the few, and the many was spread evenly across the three distinct branches of the United States government rather than haphazardly throughout the system.¹¹

The Founding Fathers also relied upon Cicero’s articulation of the theory of mixed government. Although the Founders accredited much of the ideas of mixed government to Polybius, Cicero did play a role. Cicero was not necessarily opposed to any of the individual forms of government, but he did see mixed government as the best. He argued “a just and wise king, or a select group of leading citizens, or the populace itself (though that is the least desirable type) can still, it seems, ensure a reasonably stable government, provided no forms of wickedness or greed find their way into it.” However, Cicero explains that most governments end up failing at maintaining virtue and fall into a ‘depraved version of itself.’ He refers to this as a cycle of constitutions, building off Polybius’ analysis of the cyclic theory of all governments, hinting that only the most intelligent of men can foresee the onset of the cycle and stop its effects. The Founding generation saw themselves as intelligent men believing that they could create a system of government which like Rome, as believed by Polybius and Cicero, would retard or entirely stop the cyclical theory. This belief led them to search tirelessly for the causes of failure in ancient governments, especially that of Rome. Cicero constantly urges that the best form of government is a “carefully proportioned mixture” of monarchy, aristocracy, and

¹¹ Pauley, 51; Hume, “Of the Independence of Parliament.”

democracy. For him, however, the Roman constitution clearly favored the aristocracy but still granted the common people liberty through participation, which was an idea that the Founding Fathers chose to espouse. Furthermore, in his *Laws*, Cicero states that he wishes to give “the people only that amount of freedom which will allow a thriving aristocracy to use its authority.” Ultimately, however, he explained that the advantage of a mixed constitution was its equity between the three competing political elements.¹²

There is clear overlap between Polybius’, Cicero’s, and the Founders’ conception of separation of powers, yet the distinct American branches of legislative, executive, and judicial form was an entirely different arrangement than what the ancient philosophers had in mind. In Rome, the legislative authority was split between the Senate, assemblies, and some of the magistrates. The executive functions were held only by the magistrates; however, the power was not instilled in a unified head. Judicial functions were dispersed most widely across magistrates, such as the praetor¹³, and in the assemblies. On the contrary, the American government ensures that the legislative, executive, and judicial powers are separated cleanly into three independent branches. During the Federal Convention, James Madison was the Framers who saw the greatest need not only for separate branches, but also for branches with independent powers. He stated, “If it be essential to the preservation of liberty that the Legislative, Executive, & Judiciary power be separate, it is essential to a maintenance of the separation, that they should be independent of each other.” He explains that if one branch had more power than any other, it would use that power to usurp the others to create a complete tyranny within the state through its designated

¹² Quoted Cicero, *The Republic*, 1.42-45. Lintott, 221; quoted Cicero, *The Laws*, 3.38.

¹³ Praetors were second to the consul in Rome and were typically seen as the chief administrator in the Roman legal system.

powers. For Madison, the only way to stop this corruption within a republican system was through a system of checks and balances that would ensure that no institution overstepped its authority. John Jay emphasized this view of the Founders in his article, "A Citizen of New York," saying that in the past, "governments vested solely in one man, or one body of men, had degenerated into tyrannies, [therefore the Framers] judged it most prudent that the three great branches of power should be committed to different hands, and therefore that the executive should be separated from the legislative, and the judicial from both."¹⁴

Beyond just separating the powers into three branches, the Founding Fathers also knew their government must not be based on class, in a Roman sense, but rather on class in their newly envisioned sense. The Founding Fathers witnessed the corruption prevalent when a society is based off of birth, nobility, and wealth; for they watched the destruction of Roman society throughout their childhood in the books they translated each day and they personally fought a war for the freedom from English monarchical and aristocratic oppression. The Founders wanted to avoid the constant struggle between the masses and the aristocracy that was a prevalent theme in much of Roman literature and throughout the British empire. These men instead saw a remedy in basing their new American society off of a measure that was attainable. Although many see the Framers as elitist, they were not discriminatory based on wealth as the Romans were, but on a different measure that was not predetermined by birth - merit. These men saw this as an attribute that surpassed the measure of wealth because in theory, any man, no matter their social ranking at birth, could work themselves up through the education system. The Founders wanted to rely upon the wisdom and virtue of men in their government, not on wealth and nobility. Therefore,

¹⁴ Quoted Farrand, who cites Madison in "The Records of the Federal Convention of 1787;" quoted Jay, 143.

when looking at Polybius' theory, it must be viewed through this new lens where the one refers to a man who is smart enough to obtain prestige through merit and wealth through success; the few would be those men who were educated and wise, while the people would be those men who were uneducated yet virtuous. Furthermore, as Cassius put it, in his reply to Richard Henry Lee, the government would be composed with men "of unsullied reputations; - of men, in whose bosoms the sacred principle of patriotism has, always, glowed in its utmost purity; - of men, who in every possible situation of affairs, have, invariably, discovered an incorruptible attachment to their country." The idea that family line and wealth would predetermine whether one would be in the monarchy, aristocracy, or democracy was not a model that the Founders sought to follow, but instead they envisioned this new class stratification based on wisdom and patriotism. This idea must be remembered when looking at both Polybius' and Cicero's theories of mixed constitution for the Framers' perspective was different than those immediately displayed by these classical philosophers.¹⁵

The Founders ended up creating a system where forms of monarchy, aristocracy, and democracy were spread evenly across the three branches, based on function, with each having checks on the other. The American legislative branch consists of the House of Representatives and the Senate, both charged with the mission of creating legislation for the nation. This branch's powers resemble those of the Senate and the people in the Roman Republic. The legislature's checks include the House's control of the budget, the Senate's approval of all appointments made by the executive, the ratification of all treaties, and Congress' ability to pass amendments that override judicial precedent. The only checks that seem to have survived since the Roman

¹⁵ Madison, "Federalist, no. 39;" quoted Storing, *What the Anti-Federalists Were For*, 51.

Republic was the idea that the legislature should control the provisions granted to the magistrate and that treaties must be ratified. In the Roman Republic, though, this last check resided in the people's hands rather than in the Senate's. The executive branch in the United States is composed of the president, his cabinet, and the administration that executes the laws passed by the legislature. The president may check the legislature by vetoing their bills and the judicial by appointing the judges. The checks afforded to the American executive do not seem to resemble those of the Roman Republic at all, even though much of the functions are similar to those of the consuls and other magistrates. Lastly, the judicial branch is tasked with ensuring that justice is maintained and the constitution is upheld. Their check is to determine whether the laws created, signed, and passed by the legislature and executive align with the principles of the United States Constitution. It is evident that although the Founders valued Polybius' and Cicero's theoretical arguments, they did not desire to create a republic modeled upon the Romans. So, why did the Founders decide to create the three branches as they did?

The Origins of the Judiciary as a Branch

The American Founding Fathers took the ideas of Polybius and Cicero into account when creating their new government, but the Framers also had to work from and within the confines of the developed British government that most of the colonists were familiar with. In England, there were two branches of government: the legislative and the executive. The legislature, also known as the House of Parliament, was made up of two houses - the House of Commons and the House of Lords - with both exercising the power to make law during the Revolutionary period. The executive, consisting of the monarch and his council, enforced and sometimes made law.

Although England did have an extensive judicial system in the eighteenth century, the judiciary played no balancing role in the government. Both the Parliament and the King had their own courts to solve disputes between citizens in an attempt to raise money for their own legislative initiatives. The English courts had no separation from the two main branches of government in a modern American sense, even though many saw the judges themselves as independent. Many of the Founders believed that this lack of judicial independence was a plague to personal liberty, leading many of them to want to ensure the new government had protections to ensure that justice was being distributed evenly across the United States.

The idea of an entity ensuring that the actions and legislation of the government align with the values of the nation was certainly an under-developed notion in England and in antiquity, yet the origins of this idea began with Cicero. This classical philosopher can shed much light on the reason why the United States' Founders might have seen the need for a judiciary. In his *Laws*, Cicero explains "the origin of justice must be derived from law. For law is a force of nature, the intelligence and reason of a wise man, and the criterion of justice and injustice." Cicero augmented the Founders' view of the judicial necessity to interpret law with his idea of natural law. In his philosophical works, Cicero discusses how natural law supersedes man's written law; for "one must understand that this and other orders and prohibitions issued by communities have the power of encouraging people to right actions and deterring them from wrongdoing. That power is not only older than the existence of communities and states; it is coeval with that god who watches over and rules heaven and earth." Cicero emphasizes that when written law properly follows higher-order norms, it should be able to prevent the tyranny of the people. In his *Pro Sestio*, Cicero states that the courts "embody the whole concept of law."

He further discusses his belief that the courts are the only institution which can enforce the norms of natural law. During Cicero's discussion on law, he emphasizes that when the laws are in the hands of jurors who can be easily corrupted, men's rights are in danger; however, when decisions are dependent on a higher law that cannot be changed, these rights, including the right to property and the right to a trial, will be properly protected. Both Cicero and Polybius argued that politics must not be governed by human passions and desires but that a constitutional solution was needed to ensure that reason is valued, since natural law alone will not always be enough.¹⁶

The failings of the Roman Republic led Cicero to express a concern about the violation of citizens' rights and to propose a constitutional solution to ensure that procedural safeguards were in place that followed a "normative criterion" based upon natural law. For Cicero, the courts should be what enforces the natural law that governs society at its most foundational level. It seems that Cicero accredits the fall of the Roman Republic to a state of lawlessness that disregarded natural law and was not constrained by any constitutional mechanism to enforce the needed norms. The Founders, in many ways, saw this failure also prevalent in England, for the British government was unwilling to recognize the most basic rights of the colonists. These frustrations of the Framers are clearly displayed in the Declaration of Independence. Between Cicero's philosophical thought and the Framers' personal experience, it seems that the constitutional solution to the potential oppression of personal liberty must be secured through a

¹⁶ Quoted Cicero, *The Laws*, 1.19 & 2.9-10; quoted Strauman, 165 who cites Cicero, *Pro Sestio*, 92.

court that understands natural law and has the ability to interpret written law according to these higher norms.¹⁷

James Wilson was one of the main advocates of the judicial branch as a viable solution to the cyclic theory of government and for the proper functioning of government. He argued, along with others such as Oliver Ellsworth, that the executive and judicial were what carried laws into effect after the Congress made them. Madison claimed during the Federal Convention that “an effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.” Wilson also believed that the judiciary was what kept the legislature “within its prescribed bounds.” Many Founders wanted the judiciary to act as a powerful check on the extensive powers of the legislature. These men believed in the classical doctrine of natural law. Many thought that one of the greatest offenses the English crown committed against the colonists was the violation of their inalienable rights, especially their right to property, as guaranteed by this higher law. These Founders wanted to ensure that this violation would never happen in the United States and saw the solution in the judicial branch. For the Framers, if the judiciary was held responsible for ensuring that no legislation could violate the Constitution or its spirit, then Americans would be able to avoid the tyranny that overcame England and the colonies. Wilson reminds his generation that although the judicial power is often seen as an executive function, it must be recognized for its judicious nature. Wilson states that

¹⁷ Straumann, 149-160.

“judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases.”¹⁸

How The Judicial Check Manifests Itself

To determine the role of the judiciary and its check on the government, the Founding Generation sought examples to follow and avoid from both the Roman Republic and England. A component of the Roman system that the Founders sought to counter in the United States government was the idea that the people were supreme in authority. In the Roman Republic, the most entrenched norms of their nation could be diverted by a single statute enacted by the popular assemblies. In the system of government set up by Rome, there was no authority that could void entrenched legislation yet a veto was granted to the tribune to prevent the passage of legislation. To the ancient republics, legislative supremacy was the basis of their political system. Therefore, the only checks within the legal system were held by the Roman tribune, who could potentially restrain executive misdeeds through attracting the public’s attention, and by the Roman praetor, who could began legal due process against individuals. Otherwise, the Roman judicial system did not help the Founders much in the formulation of their checks and balances.¹⁹

An aspect of the American judicial system that is influenced by the Roman Republic but solidified by the English courts is the practice of judicial review. Many constitutional law scholars of the United States refer to the Roman Republic as having a ‘diffuse judicial review’ in

¹⁸ Wilson, “Speech, Pennsylvania Convention,” 247; Ellsworth, “A Landholder,” 302; quoted Farrand, who cites Madison in “The Records of the Federal Convention of 1787;” quoted Wilson, “Pennsylvania Ratifying Convention;” Reinhold, 96-97; quoted Wilson, “Lectures on Law.”

¹⁹ Lintott, 199-200. Bederman, 155.

which at “any given forum, any given audience might be called upon to decide on the constitutionality of an issue.” In Rome as well as in England, there was no written constitution, but rather a constitutional tradition based off statutes, precedent, and custom. Although the principle of *stare decisis* was not entrenched in the Roman judiciary, as it is in the common law system of England, the roots of precedent began with the Roman urban praetor’s edict, which was a statement by the magistrate of what laws would apply for his year in office. Over time, praetors would typically adopt their predecessors’ decisions regarding the law, causing this edict to become fixed, in much of the same way that British precedent did. Furthermore, as highlighted by scholar David Bederman, the Founding Generation wanted to ensure that the judiciary used canons of construction in their interpretation of the law. This idea originated from their readings of Cicero’s writings in his *de Inventione* and *Rhetorica ad Herennium*. The concept of precedent was seen as the key to the maintenance of the Constitution. As long as each judge went back to those before him and sought to follow the original source of law, the judicial system would not fail in upholding the principles of the nation.²⁰

The Founding Fathers actively sought to ensure that the Constitution would be upheld in their republic by the judicial system, for it was this written document that ensured men’s natural rights were properly protected. For these men, the Constitution enshrined the natural law that Cicero discusses in order to ensure that reason and rights would always be prioritized within their political state. The Founders’ philosophy in completing their constitutional project seems to be articulated best by Marcus in Cicero’s *Laws* when he states “all the laws must be framed to fit that kind of community. Patterns of behavior are also to be implanted and not everything is to be

²⁰ Quoted Strauman, 53-54; Lintott, 5; Bederman, 162.

laid down in writing. For all these reasons, I shall look to nature for the origins of justice. She must be our constant guide as our discussion unfolds.” For the Framers, it was crucial that they looked not only to experience but to the natural world in order to determine how to implement justice into their government system. These men knew that if they were able to articulate Cicero’s natural law as the Constitution, it would be held supreme in the organization of the United States government.²¹

James Wilson articulates that both the legislative and the judicial branch are under the authority of the Constitution and no other power. He states that “the constitution is the supreme law of the land: to that supreme law every other power must be inferior and subordinate.” To the Founders, it was crucial that the Constitution would be upheld as the law of the land, articulating in Article VI that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Constitution and all laws that agreed with its principles were to be preeminent within the United States. In many ways, it can be argued that the Constitution replaced the role of the monarch, for this document is to be superior to all subsequent law. However, the Constitution has

²¹ Cicero, *The Laws*, 1.20.

no executive authority so it must be upheld through judicial rulings, legislative compliance, and executive action.²²

Although the Constitution holds the authority of a king, it can only be placed on such a pedestal if the branches of government allow it to remain there. The Founding Fathers seem to have put all their trust in the judiciary in order to ensure that the Constitution remains at such a level of superiority. Wilson espouses that “if a law should be made inconsistent with those powers vested by this instrument [namely the Constitution] in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.” Furthermore, as the Federal Farmer warns, “it is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.” The Framers are extremely trusting of this new branch’s ability to counteract the dangerous abuses of the legislative and executive authority, putting the security of the nation into the hands of judges.²³

Alexander Hamilton was the Founder who truly defended the power granted to the judiciary in the United States Constitution. He wanted to assure the American states and public that this new branch was the least dangerous to the longevity of the United States, for it had “neither FORCE nor WILL, but merely judgement.” Hamilton explains that the judiciary is not

²² Quoted Wilson, “Lectures on Law;” quoted Tansill, “Constitution of the United States.”

²³ Quoted Wilson, “Pennsylvania Ratifying Convention;” quoted Storing, “Federal Farmer, no. 15.”

being held as a superior to the legislature, but rather that the Constitution is what is above them all. The courts are what determine the validity of Congress' actions by acting as "an intermediary body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Hamilton states that "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." Overall, the implementation of the judicial system as a check upon the legislative and executive was designed by the Founding Fathers to protect the liberties of the people and the longevity of the nation. As the Democratic Federalist pointed out, "the separation of the judicial power from the legislative and executive has been justly deemed one of the most inestimable improvements in modern polity."²⁴

The Independence of Judges as a Safeguard to Personal Liberty

To determine how to create a branch that was independent but reliant upon the Constitution, the Founders looked to Rome and England to select the attributes of these legal systems that they desired to mimic. In Rome, judicial independence did not exist. The main judicial office, the praetorship, was an executive position elected annually, and the praetor was responsible for enforcing the civil law and bringing indictments upon individuals. Many of the judges and jurists for trials were selected from the aristocratic ranks of Roman society. Many in

²⁴ Quoted Hamilton, "Publius: The Federalist 78;" quoted "A Democratic Federalist," 353.

the Founding generation, such as Noah Webster, saw this pool of judges and jurors as the main reason for the rampant corruption within the Roman Republic amidst its decline.²⁵

In England, although there was no independent branch of government devoted to the judiciary, the judges as individuals were severed from reliance upon the executive for their salaries. This allowed the judges to make decisions contrary to the kings' wishes when need be. However, the make up of the English government itself did not guarantee the British people had fair opportunities before the law since the King and Parliament set the criteria for trials held in their courts. John Adams viewed the independence of British judges as sufficient for the American model, but James Wilson called this into question. In one of his letters, Adams states:

Now, if the wisdom of the mother country has thought the independency of the judges so essential to an impartial administration of justice as to render them independent of every power on earth, - independent of the King, the Lords, the Commons, the people, nay, independent in hope and expectation of the heir-apparent, by continuing their commissions after a demise of the crown, what justice and impartiality are we, at three thousand miles distance from the fountain, to expect from such a judge of admiralty?

It is apparent that Adams praised the monarch for granting judges their independence, for this is the only guarantor of justice. Wilson, on the other hand, believed that the English government had not gone far enough in granting independence. Although English judges were no longer dependent on the king for their salaries and commissions during the eighteenth century, the British Parliament did have legislative authority over the judiciary. Wilson states that "they still hold [the judges] at the pleasure of the parliament: the judicial subsists, and may be blown to

²⁵ Lintott, 14; Pauley, 45; Bederman, 78-80; Richard, 115-116.

annihilation, by the breath of the legislative department.” He goes on to praise the fact that “in the United States, the judges stand upon the sure basis of the constitution: the judicial department is independent of the department of the legislature. No act of congress can shake their commissions or reduce their salaries.” To both these leading Founders, the means by which the British created independent judges was a model, but the extent of independence in the judicial department from the rest of government was debatable.²⁶

It remained almost uncontested among the Founders that the best way to ensure independence of the justices was to ensure that corruption or political interests did not seep in. The best way to ensure this, according to Adams and Wilson, was through life terms and stable compensation established by law. This resulted in Section 1 of Article III which states:

Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a compensation, which shall not be diminished during their Continuance in Office.

In support of this clause, Alexander Hamilton wrote that the guarantee of commission and salary provided an “excellent barrier to the encroachments and oppression of the representative body. And it is the best expedient which can be decided in any government to secure a steady, upright, and impartial administration of the laws.”²⁷

The Founders, in seeking to determine the extent of independence necessary to uphold the ideals of the Constitution, sought to create a system that was not a pure democracy, but rather instituted certain checks upon the dangerous power of popular will. For them, a seemingly

²⁶ Quoted Adams, *The Revolutionary Writings of John Adams*, 40; quoted Wilson, “Lectures on Law.”

²⁷ Quoted Tansill; quoted Bederman, 159.

inherent check on the tyranny of the people was an aristocratic²⁸ bench. Judges who were of excellent training would not let immediate passions outweigh their reliance on fundamental law. Adams desired for the judges to be “men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention.” To Wilson, “public happiness, personal liberty, and private property, depend essentially upon the able and upright determinations of independent judges.” There was no doubt amongst the Founders who advocated for an independent judiciary that independence could only be discovered by giving aristocratic men life terms with salaries established by the law.²⁹

Role of Democracy in the Judicial Branch

Although the Founders sought to ensure that court officials were composed of an meritocracy, they also knew the value in ensuring that a democratic element was entwined within the judicial branch. Democracy manifests itself in the trial by jury that the Constitution guarantees for all criminal trials and the Bill of Rights for all civil trials. Adams was one of the main proponents of guaranteeing the power of the people within the American legal system. Admiring the British system, he stated that:

two branches of popular power, voting for members of the house of commons, and trials by juries, the one in the legislative and the other in the executive part of the constitution, are as essential and fundamental to the great end of it, the preservation of the subject's

²⁸ When the Founders sought aristocrats, they were not intending the equivalent of a patrician in America, but rather a man of learning, property, and wisdom. For this generation, wealth did not imply intelligence, therefore the Framers, although most of them were wealthy, did not exclude people on basis of status but rather on basis of their intellect.

²⁹ Quoted Adams, *The Revolutionary Writings of John Adams*, 291-292; quoted Wilson, “Pennsylvania Ratifying Convention.”

liberty, to preserve the balance and mixture of the government, and to prevent its running into an oligarchy or aristocracy, as the lords and commons are to prevent its becoming an absolute monarchy... This is the constitution which has prevailed in Britain from an immense antiquity.

The Founding Fathers brought with them from the English common law a love for the trial by jury, and this was not a liberty they sought to relinquish in the new government that they were creating. Even Brutus, a strong opponent of the majority of the Constitution and of the English government, was in favor of the trial by jury, stating, "this method would preserve the good old way of administering justice, would bring justice to every man's door, and preserve the inestimable right of trial by jury. It would be following, as near as our circumstances will admit, the practice of the courts in England, which is almost the only thing I would wish to copy in their government."³⁰

In addition to the role of English common law, Rome also played a significant role for the Anti-Federalists' argument regarding the value of trial by jury in both criminal and civil cases, as well as appellate cases. In the Constitution, trial by jury is only guaranteed for criminal procedures, but through their invocation of Rome and other arguments, the Anti-Federalists ensured that the Bill of Rights would extend this guarantee of trial by jury to both criminal and civil cases. Many of these men invoked William Blackstone's statement regarding trial by jury in antiquity where he states that "because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected, that Rome, Sparta, and Carthage, at the time, when their liberties were lost, were strangers to the trial by jury." William

³⁰ Quoted Adams, *The Revolutionary Writings of John Adams*, 55; quoted Storing, "Brutus, no. 14."

Grayson furthered this claim, believing that the lack of trial by jury is what led Rome to establish the client system that allowed patricians to dominate the legal system in a manner such that plebeians could not obtain justice. He concluded that if America did not set up trials by jury in the Constitution, then they should expect to fall into the same corrupt legal system that led to Rome's demise. However, the Romans did, towards the end of the Republic, institute the *quaestiones perpetuae*, which delegated the powers of punishment to a jury made up of the Roman people, even though in practice juries were mainly aristocratic. Polybius praised the people's power over punishment in his analysis of the Roman government, which is something that the Founders most certainly picked up on.³¹

In the Constitutional debates and pamphlets published in support or against the Constitution, almost every Founder, no matter where they stood on the issue of the power of the people, wanted to ensure that the trial by jury was instituted in their new republic. Each man argued that it was this institution that stood as the last safeguard to personal liberty in the government they were creating. Joseph Story stated that:

The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner, than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy. So long,

³¹ Quoted Story; Richard, 117; Bederman, 161; Lintott, 202.

indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall.

Other Founders, including Federalists and Anti-Federalists, further the point made by Story that jury trials are the safeguard to liberty. Hamilton in Federalist no. 83 states that “the trial by jury must still be a valuable check upon corruption.” He further discusses how it will act as a “double security” and “preserve the purity of both institutions.” Wilson believes that “the oppression of government is effectually barred, by declaring that in all criminal cases, the trial by jury shall be preserved.” The Anti-Federalists felt even stronger about trial by jury than the Federalists. Luther Martin argued that “jury trials which have so long been considered the surest barrier against arbitrary power, and the palladium of liberty - with the loss of which the loss of our freedom may be dated... it is most essential for our liberty, to have it sacredly guarded and preserved, in every cases, whether civil or criminal, between government and its officers in one part, and the subject or citizen on the other.” Cincinnatus sums it up best when he states that “the trial by [jury in] our country, is in my opinion, the great bulwark of freedom, and for certain, the admiration of all foreign writers and nations.” For the Founding Fathers, it was unavoidable to institute trial by jury into the government system they were creating and to grant a portion of the judicial branch to the people.³²

Conclusion

From the onset of the Constitutional debates, the Founding Fathers valued the example of Rome in the formation of the institutions that would compose the United States’ government.

³² Quoted Story; quoted Hamilton, “Federalist no. 83;” quoted Wilson, “State House Speech;” quoted Martin; quoted “Cincinnatus, no. 2.”

Each Founder had different views on what would allow for the nation's longevity, with some believing the success resided in the moral character of the citizens while others thought it would be due to the institutional structure. Ultimately, the institutional argument won the debate, leading the great thinkers of the time to search the classics tirelessly to discover what would best enable them to survive.

Polybius and Cicero were two philosophers that the Framers decided to lean upon for their ideas. Polybius argued that Rome's government was more successful than all other governments due to its natural mixture of monarchy, aristocracy, and democracy. He attributed the separation of powers within this system as the key to its success. Cicero furthers Polybius' idea, arguing that a perfectly balanced mixture of the three forms grounded in natural law is what enabled the Roman Constitution to sustain itself over time. However, he does call into question the Republic's ability to uphold natural law, attributing the following of this higher-order norm to be the real reason for the success of any nation.

Both Polybius and Cicero gave Founders such as Madison, Hamilton, and Adams the ammunition to support their own theories regarding mixed government and its manifestation in a separation of powers. These men had no doubt that a mixed government was what they wanted to install in the United States. As Richard points out, "ironically, in their effort to emulate the systems of Sparta, Rome, and Great Britain, whose status as mixed governments was dubious at best, the founders of the United States may have created the first real mixed government in history - though mixed in a modern sense." In the government that emerged from the United States Constitution, there were three separate and distinct branches that each had checks upon one another. As the prominent Founding scholar, Herbert Storing, stated, "the different branches

in the new government were not intended to ‘balance’ one class against another, the way British branches are. The sole intention of it is to produce wise and mature deliberation.” It appears that the American Founders were able to create the first truly mixed government with powers that checked and challenged one another.³³

The three elements of their mixed government were the legislature, executive and judiciary. The legislative branch was to create laws for the people, holding both a democratic and aristocratic element in the branch. The executive branch was to administer the laws across the nation, with the president sitting as a monarch in a limited capacity. Lastly, the judicial branch was to adjudicate cases and decide on matters of justice, with the hopes that it could be not only aristocratic but also monarchical and democratic. Each of these branches held checks over one another, ensuring that no one branch would usurp the other and destroy the foundations of the nation. Although elements of this system created by the Fathers resembled those of Rome and England, the United States government did not follow directly from any other government before.

No government of the past had enabled the courts to hold as much power as the legislative and executive branches, but the Founders knew this was a necessary component to ensure freedom and check corruption. These men decided to divide the judiciary into three components just as they had done with the United States government in total. The Constitution held a powerful position, being the ultimate answer to all problems. Every branch and person was to defer to this document and the laws enshrined within it. The judges were granted independence from the legislative and executive by means of life tenure during good behavior

³³ Quoted Richard, 167; quoted Storing, *What the Anti-Federalists Were For*, xli; Richard, 123-148; Bederman, 76-84.

and established salaries by law. They intended for the judges to be picked from an elite group of men who had years of training in the law, hoping that their education and experience would ensure their upholding of the Constitution rather than bending to the will of the majority. The last element of the judiciary was left to the people in trials by jury, instituted in both criminal and civil cases. The people were to be the last protection for man's inalienable rights to life, liberty and property.

Although it is often argued that the Founding Fathers only took Polybius and Cicero's arguments on mixed constitution into account when creating the legislative and executive branch, after an analysis of each part of the judicial branch, it is apparent that the Founders sought to implement all three elements of the philosophers' mixed government - monarchy, aristocracy, and democracy - into the judiciary. The Constitution would serve as a monarch for the nation with independent elite judges serving as interpreters to the law. The people with their role in juries were the ultimate and last protectors of freedom. The Founding Fathers were enlightened by the ideas of Polybius and Cicero which enabled them to create the tripartite judicial system that still stands in America today.

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