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"The Obscurity Which Reigns": The Development of the Founders' Theory of Separation of Powers

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If we are to return to constitutional government, America's office-holders and voters need to regain a deeper knowledge of and more nuanced skill in applying separation of powers to government functions and the institutions responsible for implementing them. Learning anew how to govern ourselves constitutionally might help to address the distrust the people have in their institutions and remove distrust based on ignorance and apathy. It also would entail significant reform of our political system to make it more accountable, more limited, and more effective in following Founding principles—and make our government more trustworthy as well. As America celebrates the 250th anniversary of this greatest of experiments in self-government, we should dedicate ourselves to this noble task of reform.

America faces a crisis of confidence in its political institutions: its bureaucracy, Congress, presidency, and courts.[1] Public distrust of these institutions has reached epidemic proportions, and the reasons given have focused on particular institutions. For years, partisan and academic elements within American politics have criticized the so-called administrative state.[2] This critique especially has come from the political Right.[3] We also hear talk of "judicial supremacy" and similar terms from both the Left and the Right.[4] In addition, the academic and political spectrum bemoans an "imperial presidency" or similar terms for executive overreach.[5] Finally, Congress commonly is viewed as the weak link, pushed around and ignored by these other political forces.[6]

While each presents its own distinctive problems, a common critique fits all of them: Accusations against an administrative state, judicial supremacy, an imperial presidency, and a broken Congress all assert that our governmental institutions violate the constitutional separation of powers.

- The administrative state combines in agencies those powers that should be distributed across Congress, the presidency, and the courts;

- In like manner, judicial supremacy occurs when judges step beyond their constitutional authority and dictate matters that are supposed to be left to Congress, the White House, and the states;

- The imperial presidency involves the executive overreaching into the powers of other branches, especially those powers properly lodged in Congress;[7] and

- Congress cedes legislative power to the executive, delegates it to the bureaucracy, and permits the courts to exercise it from the bench.

Although separation of powers is regularly a part of public discussion, individual rights tend to receive more attention because they are considered more important. After all, America's Declaration of Independence said that the very purpose of creating a government is "to secure these [previously listed] rights."[8] Moreover, the relationship of rights to separation of powers gets discussed as one between ends and means. Separation of powers exists, along with federalism, to protect rights. As the means exist for the sake of the end, this relationship also relegates separation of powers to secondary status.

The substance of the theory also is contested. Some have argued that separation of powers amounts to little more than the pragmatic dividing of a unitary political power, not a theory about the nature of that power.[9] Thus, separation of powers may be important, but it is not particularly challenging on a philosophical level. The problem seems not to be that we do not understand the theory of separation of powers, but rather that we lack the desire to adhere to it in determining how America's government should function.

With respect to both importance and complexity, the Founders told a different story. They placed great emphasis on and attributed great importance to the principle of separation of powers. In *Federalist* 47*,* James Madison wrote that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether

hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[10] Madison and other Founders thought that it was not enough for all free political regimes to know about the theory of separation of powers; free societies must structure their institutions upon that theory. No list of rights or declaration of principles could replace this structural requirement without endangering liberty.

In *Federalist* 37, Madison noted the intellectual challenge presented by the theory of separation of powers:

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[11]

In other words, Founders like Madison thought we needed separation of powers to facilitate free government. At the same time, they believed that separation of powers is far from easy to understand, much less apply. In fact, the greatest students of politics could not resolve all disputes over the nature of the distinct powers. Nor, consequently, could they perfectly agree about the proper allocation of these powers within a government. The theory involved much more than simply dividing political power to stop tyranny; it assumed that political power, rather than being homogeneous, was naturally divided into unique functions and that the formation of political institutions should reflect this division.

Faced with this need and this challenge, the Founders thought deeply about separation of powers and how to apply it in structuring a free and lasting government. They committed to a form of the theory that saw political power as naturally subdivided into legislative, executive, and judicial governmental functions. They then added checks and balances to provide stability to a theory that otherwise had proved unsustainable in practice.

Antecedents: Philosophical and Historical

The American Founders did not invent separation of powers; they adopted it from philosophical writers and historical precedents that were developed from earlier political theory and practice. Ancient politics had divided political rule into categories based on who ruled: one (monarchy), a few (aristocracy), or the many (democracy). These theories and practices

also included a fourth option known broadly as the "mixed regime," wherein political power was shared by some combination of one, few, and many.

Political scientist Clifford Bates, Jr., has noted that this structure has proven attractive today across the political spectrum, albeit for distinct reasons, including its service as a precursor to the modern separation of powers.[12] But separation of powers is qualitatively different from the mixed regime. While both attempt to divide political power, they do so in distinct ways. Put simply, the "mixed regime" classifies who is in charge (one, few, many) and distributes power among them; separation of powers asks what distinct governmental functions exist and divides those functions among different institutions.[13]

We should note that the theory of separation of powers operated less as a unified model for structuring government and more as a canopy under which different visions of division existed. All agreed that political power could and should be allocated according to distinct governmental functions. However, political thinkers and regimes could differ as to how many distinct functions existed and what exactly they were. Political thinkers and actors also disagreed with regard to the most effective way to implement and sustain separation of powers. The theory, in short, elicited plenty of debate among its adherents.

For example, John Locke's *Second Treatise* exerted a tremendous influence on the American Founders. Locke argued that legitimate government was grounded in the consent of the governed and existed to secure natural rights that came from God and existed before the establishment of any society. We see these principles articulated in the writings of most of the Founders and in public documents of the time, especially the Declaration of Independence. Locke also espoused a tripartite distinction regarding political power: a legislative category that made laws, an executive power tasked with domestic enforcement of existing laws, and a federative power over foreign affairs.[14]

Americans followed Locke's thought on the origins and purposes of government closely, but not his thought on the structure of government. Instead, the Founders adhered to the vision articulated by the French thinker Charles de Secondat de Montesquieu, who published his magnum opus, *The Spirit of the Laws*, in 1748. Montesquieu's system divided political power into legislative, executive, and judicial powers. Unlike Locke's system, Montesquieu's lacked distinct federative power and distinguished the judicial power as its own entity.

By 1750, an English translation of *The Spirit of the Laws* by Thomas Nugent appeared and sold very well in England and in the colonies. It is

hard to overstate the influence the work had on the formation of our constitutional structure. Madison wrote in *Federalist* 47 that "[t]he oracle who is always consulted and cited on [separation of powers] is the celebrated Montesquieu."[15] So influential was Montesquieu that the Anti-Federalists objected to the proposed Constitution that the *Federalist Papers* defended by also citing parts of *The Spirit of the Laws*.[16]

Locke and Montesquieu were far from the only political thinkers discussing and developing a system based on some form of separation of powers. An array of men wrote works giving their own take on the nature of, need for, and requirements of separating political functions.[17] However, Locke and Montesquieu had the greatest impact on the principles that created the American Republic before, during, and after the Revolution.

Separation of powers also developed in concrete historical episodes. Americans looked to ancient and Medieval regimes such as those of Greece, Rome, and the Italian republics. However, the most influential example for the colonists came from the mother country: England. In particular, the English Civil Wars (1642–1651) and the lead-up to them provided a context for the theory's development. It did this in the confrontations between King and Parliament. Interlocutors at the time sought to distinguish those two institutions at least partly along functional lines. Some saw Parliament as the primary institution for exercising legislative power. The monarch, although a participant in legislation, primarily exercised executive authority.[18]

The temporary suspension of the monarchy from 1649–1660 after the execution of Charles I provided greater impetus for the development of a system of government other than a mixed regime. The monarchy was restored to Charles II in 1660, but separation of powers thinking remained. In the aftermath of the Glorious Revolution of 1688, the English Bill of Rights of 1689 clearly asserted Parliament's legislative power over the monarchy and even declared the latter's discretion in enforcing existing law to be strictly limited in many spheres.[19]

The system that emerged from this struggle placed all political power in two institutions: the monarch and Parliament. It saw power as essentially executive and legislative. Courts were gaining independence but were not necessarily seen as a distinct power.[20] Sir William Blackstone, the eminent and influential English jurist, provided a systematized discussion of this developed structure in his famous *Commentaries on the Laws of England*, describing England as having elements of an ancient mixed regime while also adhering to a form of separation of powers.[21]

The American colonies were not unaware of this history any more than they were unaware of these previously discussed theories. They

developed their own political systems along separation of powers lines. Notably, these developments eventually followed the route paved by Montesquieu, not Locke.

The Declaration of Independence

On July 4, 1776, the Second Continental Congress formally adopted the Declaration of Independence. Hostilities between the American colonies and England had simmered for over a decade, bursting into open violence at Lexington and Concord in Massachusetts on April 19, 1775. To assert the colonies' separation from the mother country, the Declaration laid out a theory of justice and the legitimate purposes and powers of government in addition to providing an extended critique of the conduct of King George III according to that theory and those purposes. From the first, the Declaration played a central role in the American self-understanding. In an 1825 letter to Henry Lee, Thomas Jefferson went so far as to refer to the Declaration of Independence as "an expression of the American mind."[22]

The Declaration's most famous and most theoretical portions do not discuss the structure of government; instead, they discuss the standard of justice found in the laws of nature and of nature's God. They articulate a view of human beings as created equal and endowed by their Creator with certain unalienable rights. Moreover, the Declaration says that government's purpose is to secure these rights and that a government's just powers derive from the consent of the governed. Again, we can easily see the influence of John Locke on all of these points.[23]

Yet the Declaration does have something to say about separation of powers. The place to find some hint of the theory is in the least-read portion of the document: the list of grievances lodged against the King. The complaints note a distinct "legislative" power in several places. At one point, the document speaks of "the Legislative powers" as being "incapable of Annihilation." This point is crucial to understanding the theory of separation of powers. Politicians and theorists did not believe that they invented the particular powers of legislation, execution, and adjudication. They merely recognized their existence as a natural, inherent subset of all political power.

The grievances also speak of how George III "has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers." This accusation showed the need for judges so that the laws would be applied justly and properly. Along similar lines, the Declaration accuses the King of making "judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

This had undermined the independence of one governmental power in relation to another, enabling tyranny. Finally, the Declaration castigates George III "[f]or depriving us in many cases, of the benefits of Trial by Jury." Suppressing this crucial part of the judicial power denied an essential governmental function and in doing so violated the individual rights that government existed to protect.

With regard to executive power, the Declaration castigates the King by claiming that "[h]e has abdicated Government here, by declaring us out of his Protection and waging War against us." A fundamental aspect of executive power concerned the use of force within the law to protect the rights and privileges of subjects. This claim essentially said that the King had given up on this task—a task that is fundamental to all good governments.[24]

Nevertheless, these grievances hardly add up to a full theory. While the Declaration lays out in a succinct and orderly fashion the origins and purposes of government, its discussion of government's structure left much to be put together, filled in, and figured out elsewhere. Moreover, not every influential writing of the Revolutionary period extolled separation of powers. Thomas Paine's *Common Sense* (1776), the most famous pamphlet of the period, criticized separation of powers as illogical in theory. Paine reasoned that to give distinct institutions the power to mutually check each other presupposed that each was supreme and subordinate at the same time, a concept he called "[a] mere absurdity!"[25] Moreover, Paine argued that separation of powers in practice cloaked tyranny by hiding the true source of responsibility from the people.

But the consensus was otherwise; most American Revolutionaries, including John Adams,[26] Alexander Hamilton,[27] and James Wilson[28] among many others, assumed its importance. However, we must look elsewhere for a deeper, clearer working out of the theory in an American context.

The Articles of Confederation

America's first national constitution was not the document written in 1787 and ratified in 1788; that distinction goes to the Articles of Confederation, written in 1777 and ratified in 1781.[29] The Articles lay out in detail the powers of the national government and its relationship to the states. However, a system of separated powers is strangely missing. Article II explains that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[30] In other words, all national power was lodged in one institution: Congress.

There would be no independent executive or judicial institutions. In addition, the Articles Congress, unlike our present one, was made up of one chamber, not two.

The national government would go on to develop boards that exercised executive power,[31] and under Article IX, disputes between states could initiate the temporary formation of a judicial body. However, these exercises of non-legislative powers did not occur in bodies with any real independence of the national Congress. Instead, they carried out particular powers originally lodged in and delegated to them by that body.

Precisely why the Articles omitted a system of separated powers is not entirely clear. Perhaps it could be attributed to national governance that acted less like that of a unified nation and more like that of a league of individual sovereigns. In a point much criticized by the *Federalist Papers*, the Articles gave the national government real power to act only on the states, not on individuals.[32] This reflected a general fear of nationalized power and preference for state authority.

For the executive, the boards that developed under the Congress possessed some authority to administer the laws, but the Articles did not give the national body any real power to enforce the laws it made when those laws were ignored and disobeyed.[33] When it came to the judiciary, the Articles did provide for the occasional creation of bodies to adjudicate disputes between states, but those bodies were temporary and did not act on individuals (who would be parties in the vast majority of legal matters). Moreover, the judicial power itself is a kind of enforcement of the law; the national government's lack of ability to coerce individuals or the states largely negated any useful ability to exercise the judicial function. The only power the national government truly seemed to possess (and it possessed it imperfectly) was the legislative one, thus making only a legislating Congress necessary.

The Experience of State Constitutions

In contrast to the Articles, state constitutions in the 1770s and 1780s structured their governments with a clear separation of powers along legislative, executive, and judicial lines.[34] The Massachusetts constitution of 1780, authored primarily by John Adams, was perhaps the most emphatic:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the

> judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.[35]

But the actual experience of the states proved different from the theory articulated in their constitutions. The legislative branch tended to exert predominant power and often to exercise substantial, even total control of the other two branches.[36] This dominance included taking over functions traditionally given to executive or judicial departments in addition to trying to control the actions of those bodies.

Some of this failed separation came out of the particular historical context. When the states were colonies, governance was shared largely between legislatures and governors. The legislatures were chosen by the people; the governors were royally appointed. The two battled regularly over policy and the powers that each possessed. Charles Thatch has observed that "[i]n these struggles the popular assemblies were the bulwark of popular liberties, the executive departments the instrumentalities of British control."[37] This experience established a prejudice among the colonists in favor of legislatures and against executives.

However, the new nation began to recognize in clearer fashion that the legislature's dominance was the result of more than mere circumstance. First, the republican form of government gave precedence to a plural lawmaking body because it looked more like the people than a solitary executive or robed judges did. Second, a government based on the rule of law privileged the entity that made the law. Blackstone had gone so far as to declare that "[s]overeignty and legislature are indeed convertible terms" because "legislature…is the greatest act of superiority that can be exercised by one being over another."[38] Montesquieu had noted that corruption of the legislative power meant corruption of the regime in general.[39]

Blackstone and Montesquieu made these statements on the theory that all other functions, both law enforcement and adjudication according to law, depended on a prior act of the lawmaker. This dependence also involved lesser and greater restrictions on power, as the legislative act of creation was less bounded than were the more circumscribed actions of enforcing and adjudicating.[40]

The Constitutional Convention of 1787

The Articles of Confederation was not working. Nor were the constitutions of many states working so well. The lack of separation of powers, both in theory and in practice, was one of the significant issues plaguing

government on the national and state levels. In the summer of 1787, delegates from across the young country therefore gathered in Philadelphia. The national Congress had charged the delegates specifically with "revising the Articles of Confederation, and reporting to Congress, and the several legislatures, such alterations and provisions therein as shall, when agreed to in the Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union."[41] Many state directives to delegates read in a similar fashion.[42]

But the Convention did much more than revise the Articles: It reworked them to the extent of nearly beginning anew, the presumption being that the reformed Articles would structure the national government into distinct and independent legislative, executive, and judicial branches. We see this in what came to be known as the Virginia Plan, proposed by Edmund Randolph but largely the work of James Madison, which was introduced at the outset of the Convention and served eventually as the foundation for the final product. Articles 2–6 laid out the contours of a bicameral legislative branch, Articles 7–8 outlined a national executive, and Articles 8–9 began the discussion of a distinct judiciary.

On the first day of debate surrounding the Virginia Plan, the Convention took up the questions of whether the national government would be "*supreme*" and whether it should consist of legislative, executive, and judicial branches. Madison noted that the debates on supremacy were "less...on its general merits than on the force and extent of the particular terms *national & supreme.*"[43]

The delegates also discussed the organization of each branch, addressing such questions as:

- How would the new government select a President?
- Should he serve for seven years, for four years, or for life?
- Would the makeup of the second chamber of the legislature be based on population or equality between the states?
- Should the executive and the judiciary share a revisory power over the legislative branch?

The delegates' debates on these questions and others throughout that sweltering summer demonstrated a fundamental agreement about the importance of separation of powers.[44] Their disagreements merely

pertained to the proper way to structure institutions and allocate powers in accordance with that theory.

The resulting Constitution of the United States was adopted by the Philadelphia Convention on September 17, 1787, and officially ratified by the required number of state conventions on June 21, 1788. The first three of its original seven articles organized the national government in accordance with the distinction among governmental functions.

The vesting clauses mention particular *kinds* of power rather than political power as such. Article I opens by speaking not of power in general, but of "legislative powers." Articles II and III speak of political power as by nature distinguished into "executive" and "judicial" functions. Additionally, in all of the vesting clauses, the power comes first, followed by the institution. The creation of Congress follows from the vesting of national legislative power, the making of the presidency flows from the vesting of national executive power, and the establishment of the judiciary results from the vesting of national judicial power. This ordering reinforces the pre-existing nature of all three powers. It also points to the fact that their substance dictated the structure of the national government as a whole as well as specific institutions in particular.

The *Federalist Papers*

We now turn to the *Federalist Papers,* a series of 85 essays that were published and widely disseminated in defense of the Constitution during the ratification process. They were written by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius." This collection of essays quickly became the closest thing we have to an authoritative commentary on the Constitution as originally ratified.[45] It also provided a mature articulation of the doctrine of separation of powers as it had developed from colonial times through the Revolution and up to the Convention of 1787.

Readers often focus on *Federalists* 47–51 when considering the theory of separation of powers. These five essays begin with the assumption that governmental functions would be separated along legislative, executive, and judicial lines. They then focus on the need for adjustments—checks and balances—to mitigate the difficulties experienced in the states.

In *Federalist* 9, Hamilton noted that republics in the past had tended to model failure more than success. Since then, however, "[t]he science of politics…has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients."[46] This "great improvement" included "[t]he regular

distribution of power into distinct departments" as well as further refinements of the theory's implementation such as a bicameral legislature and lifetime judicial terms.[47]

Under the separation of powers theory espoused in the *Federalist Papers*, legislative, executive, and judicial power all received their definition by virtue of their distinct relationship to the law. Each institution—Congress, the presidency, and the judiciary—then took its shape from the exercise of its vested political function.

The Legislative Power. This power's relationship to the law concerned the making of the law. In *Federalist* 33, Hamilton begins with a simple definition: "What is a LEGISLATIVE power but a power of making LAWS?"[48] But what are laws? According to *Federalist* 75, "[t]he essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."[49] As rules, laws act as more than mere advice. In regulating, they command by prescribing and proscribing action. The reference to "society" further shows how laws, as binding rules, exist to enhance the human experience of living in community.

The Constitution constructed the legislative branch with the exercise of its particular function in mind. *Federalists* 52–61 focus on the House of Representatives; essays 62–66 consider the Senate. In *Federalist* 57, Madison says that "[t]he aim of every political Constitution" should be to have rulers "who possess [the] most wisdom to discern, and the most virtue to pursue the common good of the society."[50] Good laws should reflect such characteristics: They should be filled with wisdom about the common good and come from a virtuous pursuit of that good.

These essays, among others, pinpoint a particular characteristic that is necessary for a legislative assembly to produce such laws: deliberation. By thinking and speaking together, legislators can refine ideas and the language implementing those ideas in particular bills. The authors of the *Federalist Papers* saw the Constitution as facilitating this deliberation through a variety of mechanisms.

The Framers began this effort by making the lawmaking branch plural rather than singular. In *Federalist* 38, Madison noted that "in every case...in which government has been established with deliberation and consent" as reported in ancient history, "the task of framing it has not been committed to an assembly of men; but has been performed by some individual citizen of pre-eminent wisdom and approved integrity.[51] Might not ancient Athens, for example, have been better served by "a select body of citizens, from whose common deliberations more wisdom, as well as more safety, might have been expected?"[52] Though the Framers were speaking of legislating during

a founding period, the logic supports a plural legislature in regular times as well: Any lawmaking would benefit from having more than one participant engaged in the process of composition and refinement.

The Framers then pursued quality deliberation further with the establishment of two chambers in Congress. A bicameral structure would give the legislators room to differ among themselves. In *Federalist* 62, Madison wrote that the House and Senate must be distinct not merely in existence, but also in nature. "[I]t must be politic," he declared, "to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government."[53] The reason came back to deliberation. Differences between the House and Senate would establish distinct perspectives, and this would aid each chamber in mitigating the bad tendencies of the other and thus result in wiser, more just statutes.

Madison believed the Constitution could go quite far in differentiating the House and Senate, the appropriate line being nothing less than "the genuine principles of republican government." Thus, both institutions would have to adhere to the standard put forth in *Federalist* 39: "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[54] This limit contrasted with legislative divisions in ancient mixed regimes in which power was shared by some combination of monarchy, aristocracy, and popular government.[55] Instead, the differences between the House and Senate might stretch the principles of republican government. The Senate, with its mode of selection and term lengths, would look more aristocratic than the House, but both institutions would remain republican, tracing their ultimate authority to the American people.

One distinction concerned term length. Members of the House served two-year terms, and all came up for re-election every two years. Senators served six-year terms, and one-third came up for re-election every two years. The House's two-year term would encourage members to be responsive to current popular opinion, which could result in succumbing to the people's impulsive and at times despotic passions. The Senate's longer term and staggered election cycles gave it a longer view that might mitigate the tendency of the House to reflect the passions of the moment. At the same time, the House could push back if the Senate acted too independently of the popular will.

Another distinction came in the mode of selection. Members of the House were chosen directly by the people, and Senators were chosen by state legislatures.[56] This difference also aided deliberation. The House would tend

to look to the interests of the people both as localized districts and as a national body. The Senate would take greater account of the interests of the states as distinct governments, giving them a needed say in the actions of the national government. A final, related difference pertained to number and distribution. The House began and remains a much more numerous body than the Senate. Moreover, House districts were apportioned unevenly across the states by population, while the Constitution specifies two Senators for every state. These measures also gave the House a more popular and national perspective with the Senate serving more state-centric interests.

The Executive Power. In *Federalist* 75, Hamilton defined the executive political function as "the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense."[57] In other words, the government can use coercive means both to enforce the laws and to defend against violent threats, whether internal or external.

Federalists 15 and 70 explained the need for executive power within a government. In *Federalist* 70, Hamilton wrote that "a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[58] Why? The answer goes back to one of the purposes of the legislative power. The legislative authority makes laws to accomplish certain ends, and accomplishing those ends involves the regulation of human action. But that regulation, to fulfill its goal, must generally be obeyed. Human action must be regulated.

Here a problem presents itself. In *Federalist* 15, Hamilton asked, "Why has government been instituted at all?" His answer: "Because the passions of men will not conform to the dictates of reason and justice, without constraint."[59] In other words, people will not follow the laws voluntarily all the time. In *Federalist* 51, Madison famously makes a similar point: "If men were angels, no government would be necessary." But men are not angels; society therefore needs "government to control the governed."[60] Some means must exist to force obedience, including by punishing those who refuse to comply. This means is the executive power.

Federalists 67–77 describe how the presidency as created by Article II is structured to exercise the executive power vested in it. Earlier essays define the lead legislative characteristic as deliberation; *Federalist* 70 defines the primary quality of executive power as "energy." Essays 23–36 examine what Hamilton called in *Federalist* 1 "*the necessity of a government at least equally energetic with the one proposed, to the attainment of this object*."[61] These essays argue that the national government as a whole must have the capacity to act energetically and then focus on the special role this characteristic plays in the executive branch.

Hamilton further defines energy as involving "unity," "duration," "an adequate provision for its support," and "competent powers."[62] Unity (a solitary executive at the head of the branch) would encourage "[d]ecision, activity, secrecy, and dispatch" in a President.[63] Congress should show hesitancy before passing a bill, but a President should be decisive in enforcing the resulting law. Congress should not always be active, because new laws are not always needed, but the President must always be administering existing statutes lest at any moment they be disobeyed. Congress should have discussions that are open to the public, but the President at times might need to conceal methods and objects of enforcement for better effectiveness. Finally, Congress usually should approach legislating with mild to moderate speed, but the President must act quickly to enforce the law lest violators escape and more innocent persons experience injury.

Federalists 71 and 72 look at the quality of duration. During the Constitutional Convention, Hamilton was concerned that popular governments are not good at maintaining stability or competence in administering the laws. In response, he had promoted the idea of a President elected for life as a republican alternative to the benefits of a hereditary monarch.[64] In the *Federalist*, he argues that the President's four-year term and ability to get re-elected would help to maintain stability. An executive could serve for life if the people continued to re-elect him, and continued re-election, coupled with a long-standing set of subordinate officials, could help with competence by giving the executive branch experience as well as by keeping those with ability holding the reigns of power.

Federalists 74–77 focus mostly on presidential power and how the President would best exercise his authority. The appointment power would give the President the ability to have his own people working under him with the Senate's power of advice and consent acting as a form of quality control. The pardoning power would be a way for him to mitigate problems in lawmaking that result from its generality. In addition, the treaty-negotiating power would play to the President's strength in unity, its resulting decisive action, and the occasional need for secrecy. In the realm of foreign policy, Hamilton had already argued in *Federalist* 8 that "[i]t is of the nature of war to increase the executive at the expense of the legislative authority."[65] The decisiveness, action, speed, and capacity for secrecy that characterize the executive function all enable the President to cope uniquely well with the fast pace and unpredictability that attend military conflict.

The Judicial Power. Essays 78–83 set up the exercise of the nation's judicial power. Like the legislative and executive functions, the judicial power involves a particular relationship with the law. In *Federalist* 78, the

most famous of the judicially focused essays, Hamilton states that "interpretation of the laws is the proper and peculiar province of the courts."[66] This interpretative act stems from a need the judiciary fills within a government: The legislative branch makes laws, the executive branch enforces them, and the judicial branch adjudicates disputes over them. By further comparison, the executive branch exists to deal with persons who willfully violate the law; the judiciary exists to deal with situations that arise when people disagree about what the law means or whether it applies to particular circumstances.

Hamilton argues that the characteristic accompanying judicial power is "judgment" and distinguishes this quality from the legislative power's exercise of "will" and the executive's use of "force."[67] The judiciary would not have its own force to demand obedience. Instead, it would depend on the executive to carry out judges' determinations. But the more essential difference was between "judgment" and legislative "will." "Judgment" distinguished from "will" consisted of separating the exercise of the judge's reason from his own opinions. Thereby, the judiciary would utilize reason to implement the will of another: the legislator.

Federalist 78 defended one of the more controversial points about the federal judiciary: a term of service that lasts indefinitely during "good behavior."[68] This means that judges serve essentially for life unless they resign or are impeached and removed. It argues that doing so would help the judges better exercise the judicial power. The lifetime judge could better enforce the limits imposed on the government by the Constitution. Here, Hamilton makes an argument for judicial review well before that position was made in much the same way by Chief Justice John Marshall in *Marbury v. Madison*.[69] Hamilton's argument is that judges must resolve disputes according to the standard of law, using their reason to implement the legislative intent. However, when two or more laws apply to a case and they contradict each other, only one can be followed. In such a case, the judge is obligated to decide according to the higher law of the land. If ratified, the Constitution would become the highest law, and following it would require the judge to ignore statutory law that conflicted with it.[70]

Moreover, a lifetime judge can resist the political pressures that often attend big cases. Because he would never face election, the judge would not feel the same temptation to treat popular or unpopular defendants according to public perception. This would allow the judge to apply the law fairly to all litigants, protecting "the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people."[71] It is

not that the judge disregards the people's will entirely, but rather that he holds the people to their will as expressed in and through the laws passed by their representatives. Such a will is more settled, reasonable, and thus usually closer to true justice and liberty than are the momentary passions of the populace.

Finally, a lifetime judiciary can facilitate the development of proper expertise in the law. Hamilton notes "that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government." Therefore, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[72] Being a judge requires a baseline of knowledge regarding law and precedent that takes significant ability and time for study. Without that knowledge, miscarriages of justice and bad exercises of the judicial power are likely to follow. Long-serving judges can mitigate that danger.

With this overview of the constitutional separation of powers in place, we now return to *Federalists* 47–51. *Federalist* 51 most clearly signaled a belief that the Convention had taken account of the problems experienced in the state governments. Madison notes that "it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates."[73] In other words, no inherent equality in power existed among the three governmental functions; the legislative had the intrinsic advantage. Madison reiterates this observation in *Federalist* 48: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[74] Beyond circumstantial factors of the colonial governments, the republican form and the concept of the rule of law gave the legislative branch the upper hand. These advantages had made separation of powers on paper manifest as legislative supremacy in practice.

Bicameralism and Checks and Balances. *The Federalist* argues that the Constitution puts in place two categories of adjustments in separation of powers to mitigate this problem. One concerns the internal structure of the particular branches. The Constitution would divide the exercise of legislative power between two lawmaking chambers, thereby diminishing the exercise of power by introducing greater means for disagreement within the legislative branch. Differences would erupt not just between members but between chambers so differently composed.[75]

The Constitution would lodge the executive power, however, in one person—unity serving to enhance power by facilitating the decisiveness,

activity, and speed that were needed in an executive and that helped to define "energy."[76] Moreover, the terms of judges holding judicial power would be subject only to resignation, impeachment, or death. Congress would have a hard time removing them for purely partisan reasons. In addition, judges (as well as the executive) would have the protection of not having their pay reduced by Congress. This insulated them from efforts by Congress to bring them under its control through the threat of pay reduction or elimination.

The other means was the introduction of "checks and balances." In public discussion, this is often equated with separation of powers. Separation of powers is considered a means by which governmental power is checked through the balancing of power between institutions. However, this formulation gets the relationship wrong. The Founders saw checks and balances as a means to further the separation of powers. Checks and balances included elements within the natural power of the branch such as Congress's power of the purse and the Supreme Court's power of judicial review, but the bigger innovation came in giving a bit of the power otherwise vested in one branch to another branch. For example:

- The President's power to sign or veto bills is a legislative function because it is part of the lawmaking process;

- The President's pardoning power also can be seen as something like a judicial authority because it can expunge a guilty verdict decreed by a court;

- The Senate possesses some executive power in the requirement to give its advice and consent to the appointment of officers within the executive branch who are nominated by the President;[77] and

- The House and the Senate possess the power to bring and try impeachments, which Hamilton argues was in essence a judicial power.[78]

The Federalist also saw intentions in these sharings of power other than checking and balancing. The President's participation in legislation could add another layer of deliberation to the lawmaking process.[79] Giving Congress the power of impeachment reflected the political nature of that process that made it unfit for the judiciary.[80] These mechanisms also sought to give each institution ways outside of its own natural function to limit the overreach of the other branches.

This mixing of functions might seem to violate separation of powers. Madison addressed this point especially in *Federalists* 47 and 48. He argued that the true goal was not complete, pure separation, but rather avoiding a situation in which "the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[81] He pointed out that the English constitution from which Montesquieu claimed to model his theory mixed powers between institutions with some regularity. This was true of the states as well, though Madison was quick to say that "[i]n citing these cases in which the legislative, executive, and judiciary departments, have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several state governments."[82] He recognized the problems that many of them faced and merely said that the basic concept of some mixing was permissible and even necessary.

At the same time, we should not take *Federalists* 47–48 in isolation on the subject of separation of powers. Reading them alone, one might think the Founders' principle permitted widespread diluting of the distinction between powers in particular offices. However, that is not the broader teaching of the *Federalist Papers*. In *Federalist* 66, Hamilton declared that "[t]his partial intermixture is even, in some cases, not only proper, but necessary to the mutual defence of the several members of the government, against each other."[83] In other words, giving some of one branch's power to another branch helped to preserve separation of powers by protecting that branch from being entirely taken over by competing institutions much as a vaccine, by introducing a little of a disease into the body, is meant to enable the body to ward off a full-fledged attack.

Taken together, *The Federalist Papers* argue that the Constitution creates a system that improves on both ancient and modern models. It improves on ancient systems by separating powers along legislative, executive, and judicial lines. It improves on other modern systems by introducing and refining checks and balances to keep separation in theory relatively real in practice. The developing separation of powers theory in America had come to full flower.

Conclusion

Woodrow Wilson was among the most famous Progressive critics of the principles and structures of the American Founding. Among other reasons given, he attacked the constitutional separation of powers for seeking conflict and inefficiency when instead, he thought, it should be based on cooperation and productivity.[84] The Progressives put forward an

alternative system that combined legislative, executive, and judicial functions in unelected experts distributed among agencies based on their areas of knowledge.[85] The rise of the modern administrative state owes much to this critique of the Founding structure.

Too often, our Constitution's defenders have agreed with this assessment, diverging from the Progressives only by saying that inefficiency is a good thing. It is true that the constitutional separation of powers was intended to keep government from doing certain things at all and doing others too swiftly. The authors of the *Federalist Papers* saw a proper distribution of government functions as an essential safeguard against tyranny. However, we also have seen that this theory sought to do more than limit bad government actions. It was intended to improve how government exercised its proper functions.

Through separation of powers, the Founders created specific institutions to exercise specific vested powers. This system, like the Progressive model, was built on specialization to improve quality, but unlike the Progressives' specialization, which was based on subject matter, the Founders' system specialized around the political functions to be exercised. We have noted the hoped-for effect that working within specialized institutions would have on officeholders.

- Participation in lawmaking would mold members of Congress into better legislators;

- Occupying the White House would encourage the energy needed in a President for effective administration of laws and therefore, according to *Federalist* 70, determine whether a government would be good or not; and

- Sitting on the federal bench with a guarantee of life tenure and a non-reducible salary would better enable the exercise of judgment and proper adjudication of legal disputes according to law.

Thus, the Founders might turn the claim of inefficiency back against their Progressive accusers. According to the theory of separation of powers, institutions are not fit to exercise all three political powers and suffer from incompetence when they try to do so. Structuring and focusing Congress on lawmaking, the President on enforcing the law, and the judiciary on adjudicating according to law equipped each institution to exercise political authority more effectively and beneficially than was possible under the Progressive alternative.

Bringing the discussion to the present, conservatives have rallied around the need to dismantle the administrative state because its rule by unelected bureaucrats and combination of all three political functions in one place violate both the consent of the governed and the constitutional separation of powers. Agencies have merged powers in such outlandish ways that anyone can spot them. The same could be said of overreach by the judiciary and the presidency. These cartoonish examples may lull conservatives into a false sense of ease about addressing the problem.

Here we return to where we began with James Madison in *Federalist* 37: "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive and judiciary." American political history is filled with affirmations of this point, wherein persons committed to the theory of separation of powers nonetheless divided fiercely on where properly to draw the lines in specific instances. As the *Pacificus–Helvidius* debates in the 1790s and certain battles between Andrew Jackson and Whigs like Daniel Webster in the 1830s demonstrate, differences regarding the theory played out in real political situations well before the rise of the bureaucracy.

If we are to return fully to constitutional government, America's office-holders and voters will have to regain a deeper knowledge about and more nuanced skill in applying separation of powers to government functions and the institutions charged with implementing them. We need to learn anew how to govern ourselves constitutionally. This re-education might help to address the distrust the people have in their institutions. It might make the people more knowledgeable and involved, thus removing distrust based on ignorance and apathy. It also would entail significant reform of our political system in ways that make it more accountable, more limited, more trustworthy, and—yes—even more effective in following Founding principles. As America celebrates the 250th anniversary of this greatest of experiments in self-government, we should dedicate ourselves to this noble task of reform.

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Endnotes

1. Claudia Deane, "America's Deepening Distrust of Institutions," *Trend* [Pew Charitable Trust magazine], Fall 2024, https://www.pew.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions (accessed July 29, 2025).
2. See Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).
3. See Jonathon O'Neill, "Part I, The Administrative State: An Overview," in *Conservative Thought and American Constitutionalism Since the New Deal* (Baltimore: Johns Hopkins University Press, 2022), pp. 17–74.
4. Greg Weiner, *The Political Constitution: The Case Against Judicial Supremacy* (Lawrence: University Press of Kansas, 2019); Keith Whittington, *The Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990).
5. Eric A. Posner and Adrian Vermuele, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010); Mark J. Rozell and Gleaves Whitney, eds., *Testing the Limits: George W. Bush and the Imperial Presidency* (Lanham, MD: Rowman & Littlefield, 2009); Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked & Unbalanced* (New York: W.W. Norton, 2007); Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).
6. For underlying reasons why this is true, see Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2008).
7. See the collected essays in *The Imperial Presidency and the Constitution*, ed. Gary Schmitt, Joseph M. Bessette, and Andrew E. Busch (Lanham, MD: Rowman & Littlefield, 2017).
8. This quote and all subsequent quotes from the Declaration are taken from "Declaration of Independence: A Transcription," National Archives, America's Founding Documents, https://www.archives.gov/founding-docs/declaration-transcript (accessed August 1, 2025).
9. "The Constitutional Convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers." Richard E. Neustadt, *Presidential Power: The Politics of Leadership from FDR to Carter* (New York: Macmillan, 1954), p. 26. Emphasis in original.
10. James Madison, *Federalist* No. 47, January 30, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0266 (accessed July 30, 2025). "*The Federalist* essays were all signed 'Publius,' a reference to Publius Valerius Publicola, the legendary Roman statesman and general of the sixth century B.C. who was renowned for his eloquence, generosity, and dedication to republican principles of government." Alexander Hamilton, John Jay, and James Madison, *The Federalist, The Gideon Edition*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), pp. xlv–xlvi, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/788/0084_LFeBk.pdf (accessed July 29, 2025).
11. James Madison*, Federalist* No. 37, January 11, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0227 (accessed July 30, 2025).
12. See Clifford Angell Bates, Jr., *Aristotle's "Best Regime": Kingship, Democracy, and the Rule of Law* (Baton Rouge: Louisiana State University Press, 2003).
13. For another discussion of this distinction, see Martin Diamond, "The Separation of Powers and the Mixed Regime," in *As Far as Republican Principles Will Admit: Essays by Martin Diamond*, ed. William A. Schambra (Washington: The AEI Press, 1992), pp. 58–67.
14. See John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988), §§ 123–126, 131, 143–148, https://ia601605.us.archive.org/29/items/locke-two-treatises-of-government-camb/Locke%20-%20Two_Treatises_of_Government%20%5Bcamb%5D_text.pdf (accessed July 30, 2025). Locke also had a place for "prerogative power," which comprised the exercise of authority apart from existing law, but excluded it from his discussion of the separated powers. See ibid., §§ 159–168.
15. Madison, *Federalist* No. 47.
16. See, for example, Brutus, Essay No. I, in *The Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), Vol. 2, p. 368, ¶ 2.9.11, https://dn721908.ca.archive.org/0/items/the-complete-anti-federalist-herbert-vol-2/2%20The%20Complete%20Anti-Federalist%20%28Herbert%20J.%20Storing%20ed.%2C%201981%29.pdf (accessed July 30, 2025).
17. For other important discussions of separation of powers, see Jean Louis De Lolme, *The Constitution of England; Or, An Account of the English Government*, ed. David Lieberman (Indianapolis: Liberty Fund, 2007), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2089/DeLolme1449_Bk.pdf (accessed July 30, 2025); Jean-Jacques Burlamaqui, *The Principles of Natural and Political Law*, trans. Thomas Nugent, ed. Peter Korkman (Indianapolis: Liberty Fund, 2006), pp. 393–407, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1717/1347_LFeBk.pdf (accessed July 30, 2025).
18. See Sir Roger L'Estrange, *A Plea for a Limited Monarchy, As It Was Established in This Nation, Before the Late War* (London: T. Mabb, 1660), pp. 5–8, https://ia600508.us.archive.org/16/items/bim_early-english-books-1641-1700_a-plea-for-limited-monar_lestrange-sir-roger_1660/bim_early-english-books-1641-1700_a-plea-for-limited-monar_lestrange-sir-roger_1660.pdf (accessed July 30, 2025); Isaac Pennington, Jr., *The Fundamental Right, Liberty and Safety of the People* (London: Printed for Giles Calvert, 1657), pp. 23–25, https://ia601201.us.archive.org/31/items/bim_early-english-books-1641-1700_the-fundamental-right-s_penington-isaac-jr_1657/bim_early-english-books-1641-1700_the-fundamental-right-s_penington-isaac-jr_1657.pdf (accessed July 30, 2025).

19. See also Gilbert Burnet, *An Enquiry into the Measures of Submission to the Supreme Authority* (London: 1688), https://dn790001.ca.archive.org/0/items/enquiryintomeasu00burnuoft/enquiryintomeasu00burnuoft.pdf (accessed July 30, 2025).
20. With the eventual triumph of Parliament over the monarch and then of the Commons over the Lords within Parliament, the English system essentially lost its separation between legislative and executive with Parliament together exercising the former and through the Prime Minister and his/her cabinet exercising the latter.
21. Here we see another way in which Montesquieu exerted such great influence on how the Framers understood separation of powers. On these matters, Blackstone appropriated Montesquieu's theory and the Frenchman's application of it to England. See Herbert J. Storing, "William Blackstone," in *History of Political Philosophy, Third Edition*, ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press, 1987), p. 625. See also Robert Willman, "Blackstone and the 'Theoretical Perfection' of English Law in the Reign of Charles II," *The Historical Journal*, Vol. 26, No. 1 (March 1983), pp. 44–45, https//www.cambridge.org/core/services/aop-cambridge-core/content/view/66CABB6F9967CB874BCEB8EFFDB3FA5E/S0018246X00019592a.pdf/blackstone_and_the_theoretical_perfection_of_english_law_in_the_reign_of_charles_ii.pdf (accessed July 30, 2025).
22. "From Thomas Jefferson to Henry Lee, May 8, 1825," National Archives, Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-5212 (accessed July 29, 2025).
23. Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundations of the American Political Tradition* (Notre Dame, IN: University of Notre Dame Press, 1997), pp. 5, 23–24, 29–30, 32, 35.
24. A subtext here is that the king's protection had been tied closely to the subject's allegiance with each one obligating the other. See Sir Edward Coke, "*Calvin's Case*," in *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003), Vol. 1, pp. 166–232, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/911/0462-01_LFeBk.pdf (accessed August 12, 2025. The Declaration later will say that the colonies were "Absolved from all *Allegiance* to the British Crown." Emphasis added.
25. Thomas Paine, *Common Sense, Addressed to the Inhabitants of America* (Philadelphia: W. and T. Bradford, 1776), p. 14, https://republicfortheunitedstatesofamerica.org/wp-content/uploads/2024/09/Common-Sense-Thomas-Paine-1776.pdf (accessed July 30, 2025). Emphasis in original.
26. John Adams, "III. Thoughts on Government," April 1776, National Archives, Founders Online, https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 (accessed July 30, 2025).
27. Alexander Hamilton, "*The Farmer Refuted*, &c," February 23, 1775, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-01-02-0057 (accessed July 30, 2025).
28. James Wilson, *The Works of James Wilson*, ed. James Dewitt Andrews (Chicago: Callaghan and Company, 1896), Vol. I, pp. 353–370, https://babel.hathitrust.org/cgi/pt?id=nyp.33433008827861&seq=11 (accessed August 12, 2025).
29. For a helpful general history of the Articles, see George William Van Cleve, *We Have Not a Government: The Articles of Confederation and the Road to the Constitution* (Chicago: University of Chicago Press, 2017).
30. This quote and all subsequent quotes from the Articles are taken from "Articles of Confederation (1777)," National Archives, Milestone Documents, https://www.archives.gov/milestone-documents/articles-of-confederation (accessed August 1, 2025).
31. Early on, Hamilton wished the executive agencies to be led by one man. See Ron Chernow, *Alexander Hamilton* (New York: The Penguin Press, 2004), pp. 138–139.
32. See Alexander Hamilton, *Federalist* No. 15, December 1, 1787, https://founders.archives.gov/documents/Hamilton/01-04-02-0168 (accessed July 30, 2025); Alexander Hamilton, *Federalist* No. 71, March 18, 1788, https://founders.archives.gov/documents/Hamilton/01-04-02-0222 (accessed July 30, 2025).
33. According to James Madison, "A sanction is essential to the idea of law, as coercion is to that of Government." James Madison, "Vices of the Political System of the United States, April 1787," National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0187 (accessed July 29, 2025).
34. A basic setup that continues to this day. See G. Alan Tarr, "Interpreting the Separation of Powers in State Constitutions," *New York University Annual Survey of American Law*, Vol. 59, No. 2 (2003), p. 333, https://www.law.nyu.edu/journals/annualsurveyofamericanlaw/issues/archive/vol59/issue2 (accessed July 29, 2025).
35. Constitution of Massachusetts, 1780, Art. XXX, National Humanities Institute, "Who We Are: The Story of America's Constitution," https://www.nhinet.org/ma-1780-mob.htm (accessed August 12, 2025).
36. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: W.W. Norton, 1969), pp. 152–161. For a focus on the state legislatures' dominance over state executives, see Charles C. Thatch, Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Baltimore: Johns Hopkins University Press, 1969[1923]), pp. 13–44.
37. Thatch, *The Creation of the Presidency*, p. 15.
38. William Blackstone, *Commentaries on the Laws of England*, 3rd ed. (Oxford: Clarendon Press, 1768), Bk. I, § 2, p. 46, https://ia600809.us.archive.org/0/items/commentariesonla01blac/commentariesonla01blac.pdf (accessed July 29, 2025).

39. Specifically, Montesquieu "echo[ed] the English writers who condemn[ed] corruption of legislators—the English State will perish 'when the legislative power shall be more corrupt than the executive." M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd ed. (Indianapolis: Liberty Fund, 1998), pp. 100–101, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/677/0024_Bk.pdf (accessed July 29, 2025).
40. See James Madison, *Federalist* No. 48, February 1, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0269 (accessed July 31, 2025).
41. Nathaniel Carter Towle, *A History and Analysis of the Constitution of the United States*, 3rd ed. (Boston: Little, Brown, 1873), p. 347, https://dn790007.ca.archive.org/0/items/historyanalysiso00towluoft/historyanalysiso00towluoft.pdf (accessed July 29, 2025).
42. Ibid., pp. 348–349.
43. See *Notes in Debates in the Federal Convention of 1787 Reported by James Madison*, intro. Adrienne Koch (Athens, OH: Ohio University Press, 1966), p. 34, https://archive.org/details/notesofdebatesin00unit/page/n5/mode/2up (accessed July 30, 2025). Emphasis in original.
44. Even the New Jersey Plan, while submitted as an alternative to the Virginia Plan, kept the basic legislative–executive–judicial separation.
45. Sanford Levinson, *An Argument Open to All: Reading* The Federalist *in the 21st Century* (New Haven: Yale University Press, 2015), p. 1; David F. Epstein, *The Political Theory of* The Federalist (Chicago: University of Chicago Press, 1984), p. 3.
46. Alexander Hamilton, *Federalist* No. 9, November 21, 1787, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0162 (accessed July 31, 2025).
47. Ibid.
48. Alexander Hamilton, *Federalist* No. 33, January 2, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0190 (accessed July 31, 2025). Emphasis in original.
49. Alexander Hamilton, *Federalist* No. 75, March 26, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0227 (accessed July 31, 2025).
50. James Madison, *Federalist* No. 57, February 19, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0206 (accessed July 31, 2025).
51. James Madison, *Federalist* No. 38, January 12, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0228 (accessed July 31, 2025).
52. Ibid.
53. James Madison, *Federalist* No. 62, February 27, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0212 (accessed July 31, 2025).
54. James Madison, *Federalist* No. 39, January 16, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0234 (accessed July 31, 2025).
55. See Alexander Hamilton, *Federalist* No. 34, January 5, 1788, https://founders.archives.gov/documents/Hamilton/01-04-02-0191 (accessed July 31, 2025).
56. The Senate's selection method would change to direct choice by the people with ratification of the Seventeenth Amendment in 1913.
57. Hamilton, *Federalist* No. 75.
58. Alexander Hamilton, *Federalist* No. 70, March 15, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0221 (accessed July 31, 2025).
59. Hamilton, *Federalist* No. 15.
60. James Madison, *Federalist* No. 51, February 6, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0199 (accessed July 31, 2025).
61. Alexander Hamilton, *The Federalist* No. 1, October 27, 1787, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0152 (accessed July 31, 2025). Emphasis in original.
62. Hamilton, *Federalist* No. 70.
63. Ibid.
64. See *Notes in Debates in the Federal Convention of 1787 Reported by James Madison*, pp. 129–139.
65. Alexander Hamilton, *Federalist* No. 8, November 20, 1787, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0160 (accessed July 31, 2025).
66. Alexander Hamilton, *Federalist* No. 78, May 28, 1788, National Archives, Founders Online, https:/founders.archives.gov/documents/Hamilton/01-04-02-0241/ (accessed July 31, 2025).
67. Ibid.
68. Ibid.

69. 5 U.S. (1 Cranch) 137 (1803), https://tile.loc.gov/storage-services/service/ll/usrep/usrep005/usrep005137/usrep005137.pdf (accessed August 4, 2025).
70. Hamilton, *Federalist* No. 78.
71. Ibid.
72. Ibid.
73. Madison, *Federalist* No. 51.
74. Madison, *Federalist* No. 48.
75. Madison, *Federalist* No. 51.
76. Ibid.
77. See Alexander Hamilton, *Federalist* No. 76, April 1, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0228 (accessed July 31, 2025); Alexander Hamilton, *Federalist* No. 77, April 2, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0229 (accessed July 31, 2025).
78. Alexander Hamilton, *Federalist* No. 65, March 7, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0215 (accessed July 31, 2025). We do not mention the courts' power of judicial review as it was seen to be an exercise of judicial power, not the gaining of another branch's natural function.
79. Alexander Hamilton, *Federalist* No. 73, March 21, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0224 (accessed July 31, 2025).
80. Hamilton, *Federalist* No. 65.
81. Madison, *Federalist* No. 47. Emphasis in original.
82. Ibid.
83. Alexander Hamilton, *Federalist* No. 66, March 8, 1788, National Archives, Founders Online, https://founders.archives.gov/documents/Hamilton/01-04-02-0216 (accessed July 31, 2025).
84. See Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page, 1913), pp. 44–48, https://tile.loc.gov/storage-services/public/gdcmassbookdig/newfreedomcallfo00wils/newfreedomcallfo00wils.pdf (accessed July 29, 2025).
85. See Frank J. Goodnow, *Politics and Administration: A Study in Government* (New York: Macmillan, 1900), https://dn790004.ca.archive.org/0/items/politicsadminis00good/politicsadminis00good.pdf (accessed July 29, 2025). See also Herbert Croly, *Progressive Democracy* (New York: Macmillan, 1915), https://dn790004.ca.archive.org/0/items/progressivedemoc00croluoft/progressivedemoc00croluoft.pdf (accessed July 29, 2025).