

ARTICLES

THE CLASSICAL CONSTITUTION: ROMAN REPUBLICAN ORIGINS OF THE HABEAS SUSPENSION CLAUSE

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What chiefly attracts and chiefly benefits students of history is just this—the study of causes and the consequent power of choosing what is best in each case. Now the chief cause of success or the reverse in all matters is the form of a state's constitution; for springing from this, as from a fountain-head, all designs and plans of action not only originate, but reach their consummation.

- Polybius, *The Histories*, vi.2.8-10¹

Our received wisdom is that the Framers of the United States Constitution were pragmatists, not theorists. Likewise, we have come to believe that the American Revolution and the subsequent creation of the American republic marked a definitive break from previous political models and truths, that it truly began a modern mode of government of the people, for the people, and by the people. In short, the political story of our nation's founding has been turned into the ultimate morality play.

I intend to question this construct of the Framing by suggesting a simple but subversive idea: the members of the Framing Generation were as much influenced by the political values and experiences of classical antiquity as they were by Enlightenment liberal philosophy and the exigencies of the struggle against Great Britain. I intend to show here that, even more pertinently, the Framers' use of ancient history greatly informed their decisions in drafting the Constitution of the United States, perhaps even more so than classical philosophy. My thesis is that ancient history more than merely suffused the Framing Generation's general political theories, but actually guided, in many material respects, the engineering of the most basic features of our government. I will call such organizational elements the "structural Constitution," as distinct from the provisions of

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¹ 3 POLYBIUS, *HISTORIES*, at 271 (W.R. Paton transl., 1923; Loeb Classical Lib. rep. 1975) (passage vi.2.9).

our national charter which grant rights to individuals, groups, or civil society in general.²

The crux of this Article's approach to intellectual history is to take the Framers at face value in their speeches and writings—to let them speak for themselves (sometimes at great length, given the rhetorical styles of their day) when they make use of classical idioms to explain and amplify the political considerations in drafting the Constitution. This does not mean that we are obliged to assume that the Framing Generation had a perfect understanding of ancient history. Indeed, they did not. And one of the contributions that I hope this Article makes is to assess—based on modern archaeology, philology, and historiography—the actual operation of the constitutions of ancient polities and republics and thereby better appreciate how the Framers used—and abused—the historical evidence that was then at their disposal. For some writers, the classics are merely a window into the intellect of the Framers,³ and the underlying ancient history really does not—and cannot—matter.³ I prefer to reverse the polarity of this assumption and evaluate the ancient tradition of constitution-making in its own right while considering the practical impact that tradition has had on American constitutional practice. Nowhere is this more evident than the contemporary and highly controversial debate about the extent of the President's powers to derogate detained individuals' rights to a judicial determination of the legality of their detention under the writ of habeas corpus.

This Article unfolds in a number of steps. In Part One, I make the case that the Framers were substantially influenced by ancient history and classical political theory, and I very briefly examine the education of the members of the Framing Generation—the availability of classical readings and sources to the Framers and their inculcation in classical republican values. In Part Two, I turn to Roman Republican models of American constitutionalism and consider the theory of mixed government as applied to the Roman constitution and the distribution of powers among the organizations and institutions of the Roman Republic, as well as the way that the Framers understood these classical constitutional designs.

In Part Three, I take up the central case study of this Article: the deployment of executive power in the Roman Republic and its limitation by the Roman law doctrine of *provocatio* and the plebian tribune's power of *auxilium*. Together *provocatio* and *auxilium* provided substantial protection for a Roman citizen's individual liberties and privileges under the law, and effectively prevented an executive magistrate from infringing on those rights. However, *provocatio* and *auxilium* could still be suspended

² For elaboration of this distinction between the “structural Constitution” and the “rights Constitution,” see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132, 1201 (1991); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1153–54 (1992).

³ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, at 26 (1992); Russell Kirk, *What Did Americans Inherit from the Ancients?*, in *AMERICA'S BRITISH CULTURE* 95, 96 (1985); CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY*, at 356–57 (1953); PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS* (1968).

under the Roman constitution by a decree of the Roman Senate permitting the executive magistrates (the two consuls, or a specially-appointed dictator) to take all measures necessary to safeguard the Republic.

The Framers understood Roman constitutional history well and applied its lessons in designing many features of executive authority in the United States constitution. Of relevance here, and for Part Four of this Article, is the influence of Roman practice on the development and interpretation of the Suspension Clause, the constitutional provision that provides that “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public safety may require it.”⁴ The form and structure of the Suspension Clause is similar in scope to the Roman doctrines of *provocatio* and *auxilium* and the conditions precedent for the suspension of those rights. Debates at the Philadelphia Convention, the state ratifying conventions, and the subsequent history of the drafting of the Suspension Clause in the early American republic all evinced an appreciation by the Framing Generation for Roman constitutional history and practice.

Moreover, the Roman analogues of *provocatio* and *auxilium* are relevant to three contemporary debates about the meaning and scope of the Suspension Clause. The first of these is whether the President may unilaterally suspend the privilege of habeas corpus without prior congressional authorization. The second is whether Congress’s determination of the conditions for suspension is ever subject to judicial review. The third is whether a suspension can ever be performed retroactively for those already held in detention. Roman practice bore on all three of these inquiries and was duly recognized as significant by the Framing Generation. Understanding the classical foundations of the American Constitution can thus have a significant impact on the principles and methodologies for divining original intent, as well as on our appreciation for the Constitution’s structural and rights-protecting features.

I. THE CLASSICAL EDUCATION AND INCULCATION OF THE FRAMERS

The classical training of the Framing Generation has been the subject of exceptionally capable recent scholarship.⁵ My task here is to give a more general overview of the ways and means of classical education in the American colonies and new republic during the latter half of the eighteenth century, with particular emphasis on the role of the classics in legal education and practice. In doing so, I hope to further understanding of the leading sources for the Framing Generation’s knowledge of classical history and its consequent political lessons. The purpose of the following exposition is thus not only to offer proof of the undoubted influence of

⁴ U.S. CONST., art. I, § 9, cl. 2.

⁵ The leading sources remain, RICHARD GUMMERE, *THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION* (1963); MEYER REINHOLD, *CLASSICA AMERICANA: THE GREEK AND ROMAN HERITAGE IN THE UNITED STATES* (1984); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME AND THE AMERICAN ENLIGHTENMENT* (1994).

classicism on the mindset of the Framing Generation—what Carl Richard calls the “classical conditioning of the Founders”⁶—but also to begin this process of understanding those aspects of classical antiquity that were later incorporated into the very fabric of the structural Constitution itself.

A. CLASSICISM AND THE EARLY AMERICAN EDUCATIONAL SYSTEM

Following British models, the core curriculum of colonial primary educational systems was the study of Latin and Greek language and literature, as well as classical antiquities, even to the exclusion of English language studies.⁷ Colonial American grammar schools, particularly those associated with the handful of then-existing universities, prescribed a vigorously classical education. For example, the trustees of the College of William and Mary dictated to its grammar school that, “as for the Rudiments and Grammars, the Classick Authors of each Tongue, let them teach the same Books which by Law or Custom are used in the Schools of England.”⁸ This model extended throughout the colonies, and only the poorest of areas did not maintain a grammar school.⁹ There were few exceptions to the classical curriculum, and the only apparent innovation at some institutions was the instruction in commercial subjects for boys intending to enter commerce.¹⁰ The ideal of a well-rounded education—the Greek concept of *paideia*¹¹—was notably absent in early America.

Much of the rigor of early American primary education in the classics was attributable to the entrance requirements of the American universities of the period. Of course, a relatively small percentage of grammar school boys went on to college. At the time of the Declaration of Independence, only about one in one thousand Americans had attended college, and in the years between 1745 and 1763, the total number of graduates produced was little more than three thousand.¹² One of the reasons for these minuscule numbers—aside from the expense of a college education and the opportunity costs of foregoing an early apprenticeship in a trade—was the stringent entry requirements.

Of the nine colleges established in the colonies by 1776—Harvard, William and Mary, Yale, New Jersey (Princeton), Philadelphia (University of Pennsylvania), King’s (Columbia), Rhode Island (Brown), Queen’s (Rutgers), and Dartmouth—all had strikingly similar entry requirements that were virtually unchanged since the early 1600s. All stressed a classical education. Harvard’s entry rules from 1655 demanded reading proficiency in “ordinary” Latin texts, including Cicero and Virgil, from the leading teaching volumes, and dictated that an applicant be able to “readily make and speak or write true Latin prose and . . . [have] skill in making verse,

⁶ See RICHARD, *supra* note 5, at 12.

⁷ See GUMMERE, *supra* note 5, at 58.

⁸ See 1 EDGAR W. KNIGHT, A DOCUMENTARY HISTORY OF EDUCATION IN THE SOUTH BEFORE 1860, at 511 (1949).

⁹ See RICHARD, *supra* note 5, at 13.

¹⁰ See GUMMERE, *supra* note 5, at 61.

¹¹ See WERNER W. JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE (Gilbert Highet transl., 1945).

¹² See EVARTS B. GREENE, THE REVOLUTIONARY GENERATION, 1763–1790, at 122–23 (1943); REINHOLD, CLASSICA AMERICANA, *supra* note 5, at 27, 43.

and . . . [be] competently grounded in the Greek language, so as to be able to construe and grammatically to resolve ordinary Greek.”¹³ Yale’s regulations from 1745 and Columbia’s from 1755 both required extemporaneous reading ability of selected works from Cicero, Virgil’s *Aeneid*, and the Greek Testament, as well as a working knowledge of arithmetic.¹⁴ When Thomas Jefferson was planning the curriculum of the University of Virginia in the 1820s, he “scrupulously insisted . . . that no youth . . . be admitted . . . unless he [could] . . . read with facility Virgil, Horace, Xenophon, and Homer: unless he [was] . . . able to convert a page of English at sight into Latin: unless he [could] . . . demonstrate any proposition at sight in the first six books of Euclid, and show an acquaintance with cubic and quadratic equations.”¹⁵ The Framers that attended college had certainly not been exempt from these requirements. When John Adams matriculated to Harvard in the 1750s, John Jay at King’s College in 1760, and Alexander Hamilton at King’s in 1774, they were all closely examined in their Latin and Greek.¹⁶

Despite such strict entrance requirements, there is no real doubt that most of the leaders of the Framing Generation received some form of a college education. Of the fifty-six members of the Continental Congress that debated the Declaration of Independence, twenty-seven had college backgrounds (including eight from Harvard alone). At the Philadelphia Convention, twenty-three of the thirty-nine signers had baccalaureates (nine of them from one school, the College of New Jersey).¹⁷ Representatives at these political conclaves that did not possess an American college degree might still have had attained equivalent education overseas or through home schooling and independent studies.

To the extent that the American college experience was an immersion in classicism, few seemed to complain. As Robert Middlekauff explains, “men in colonial New England rarely questioned the value of this curriculum Whether or not they knew Latin and Greek themselves, most New Englanders respected the intellectual excellence the classics upheld Even the poorest country parson could testify that a college degree raised a man’s status, and all recognized that the path to the professions lay through a liberal education.”¹⁸ Classically trained college men received societal approbation as well as access to the learned professions: medicine, ministry, and law. As Dr. Robert Saunders informed students in a commencement address at William and Mary, “[Y]ou have separated yourselves from the throng who grope in the night of ignorance,

¹³ 1 SAMUEL ELIOT MORRISON, *HARVARD COLLEGE IN THE SEVENTEENTH CENTURY*, at 81 (1936) (spelling and punctuation modernized).

¹⁴ See 1 RICHARD HOFSTADTLER & WILSON SMITH, *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 54, 117 (1962).

¹⁵ See GUMMERE, *supra* note 5, at 56–57.

¹⁶ See GILBERT CHINARD, *HONEST JOHN ADAMS*, at 11–12 (1933); C. BRADLEY THOMPSON, *JOHN ADAMS AND THE SPIRIT OF LIBERTY*, at 24–32 (1998); FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 11–12 (1979).

¹⁷ See GUMMERE, *supra* note 5, at 66; JAMES J. WALSH, *EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC* (1935).

¹⁸ Robert Middlekauff, *A Persistent Tradition: The Classical Curriculum in Eighteenth-Century New England*, 18 WM & MARY Q. (3d ser.) 65 (Jan. 1961).

scarcely conscious of the possession of intellect,” and that as graduates they were “entitled to that homage which the awakened intellect universally commands.”¹⁹

B. TECHNIQUES OF CLASSICISM BY THE FRAMING GENERATION

It is important to next consider the particular methods of classical scholarship employed in colonial America and the early republic. While Gilbert Chinard has famously observed that “most of the men who made a name for themselves during the revolutionary era were [by] no mean[s] classical scholars,”²⁰ one might legitimately wish to distinguish the exercise of reading and immersion in the classics from active scholarship and the generation of truly new ideas and insights about classical texts and subjects. The truth is that there were major impediments to the development of true classical scholarship in America. These limitations were later reflected in the lessons drawn by the Framing Generation on issues relating to the drafting and ratification of the Constitution.

One of these constraints was the inferior nature of the classical texts available in late eighteenth century America. The original versions of Latin and Greek texts were often corrupted. Errors and omissions often crept into works undetected, while the science of classical philology and the practice of applying close, technical reading to classical texts were only beginning to develop in Europe at this time. It is therefore no surprise that members of the Framing Generation relied heavily upon English translations of the classics and that despite the protestations of figures such as Thomas Jefferson, who always counseled that classical texts must be read and appreciated in their original language²¹, most followed the example of John Adams, preferring to find quality English versions of classical texts while keeping the original version handy to check disputed or doubtful passages.²² Despite the intensive and rigorous training in Latin and Greek that many Americans had received in their youth, most Americans still preferred to later read the classics in translation.²³ In this respect, however, they were little different from their British counterparts or other colonial societies.²⁴ The act of reading the classics outside of their original language drew a sort of faint praise from Samuel Miller, who, writing in 1803, called eighteenth-century America “the Age of Translations,” and commented on

¹⁹ See Edwin A. Miles, *The Young American Nation and the Classical World*, 35 J. OF THE HIST. OF IDEAS 265 & n.25 (Apr.-June 1974).

²⁰ Gilbert Chinard, *Polybius and the American Constitution*, 1 J. OF THE HIST. OF IDEAS 38 (1940), reprinted in *THE AMERICAN ENLIGHTENMENT*, at 217, 219 (Frank Shuffleton, ed., 1993).

²¹ See *Letter to Peter Carr*, Aug. 19, 1785, 8 PAPERS OF THOMAS JEFFERSON, at 407 (Julian P. Boyd, ed., 1950-present); *Letter to Thomas Mann Randolph*, Aug. 27, 1786, 10 *id.* at 305. See also Gilbert Chinard, *Thomas Jefferson as Classical Scholar*, 18 JOHNS HOPKINS ALUMNI MAGAZINE 291 (1929-30); Louis B. Wright, *Thomas Jefferson and the Classics*, 87 PROC. AM. PHIL. SOC'Y 223 (1943-44).

²² See REINHOLD, *CLASSICA AMERICANA*, *supra* note 5, at 30. John Adams would later reminisce that “[s]ome thirty years ago I took upon me the severe task of going through all [of Plato’s] works. With the help of two Latin translations, and one English and one French translation, and comparing of the most remarkable passages with the Greek, I labored through the tedious toil.” See *THE ADAMS-JEFFERSON LETTERS* (Lester J. Cappon, ed., 1959) (July 16, 1814).

²³ See GUMMERE, *supra* note 5, at 174.

²⁴ See CARY H. CONLEY, *THE FIRST ENGLISH TRANSLATORS OF THE CLASSICS* (1927).

their widespread use, “particularly within the last sixty or seventy years.”²⁵ Even so, in published discourse, many Greek and Latin texts were left untranslated, on the assumption that educated readers could either recall the school-taught classics or consult a dictionary or English translation.²⁶

The Framing Generation also used a variety of secondary sources to inform their knowledge of classical antiquity. Most prominent was Montesquieu’s *Esprit des Lois* (*The Spirit of the Laws*), which was certainly the most referenced gloss on classical history mentioned by the Framers. As James Madison noted in *Federalist* 47, “The oracle who is always consulted and cited on this subject [of ancient modes of government], is the celebrated Montesquieu.”²⁷ The availability of these secondary works should not suggest, however, that classical historiography was already advanced by the late eighteenth century, for it was not. Archaeology as a tool for understanding the past was virtually unheard of, and until Napoleon’s expedition to Egypt in the last days of the century, there had been no systematic effort made to unearth the historical past and subject it to contemporary investigation. Likewise, few attempts had been made to collect the Greek and Latin stone inscriptions exhibited in public spaces that are today a significant source of information for classicists about the dating of ancient events and the proper reading of documents. Most of the scholarship of ancient events was thus dependent on original literary sources, the canon of ancient writings that had managed to survive to modern times in a relatively uncorrupted condition.

As will be seen in the balance of this Article, it is often quite difficult to characterize the Framing Generation’s use of classical sources in particular contexts. There is no question, for example, that classical citations were often used as affectations, literary flourishes demonstrating the erudition of their user.²⁸ But as Charles Mullett has observed, the occasional appearance of “the window-dressing value of classical writers and incidents . . . [is] not to be scorned as merely ornamental.”²⁹ The Framers, without explicit reference to ancient texts, often deliberately sought to employ the substantive ideas, conceptions, and values of the Greeks and Romans, particularly those relating to the nature of man and society.

II. ROMAN REPUBLICAN MODELS FOR AMERICAN CONSTITUTIONALISM

For purposes of this Article, the focus will be on the Framing Generation’s engagement with the political tradition of the Roman Republic. While the Framers often discussed other ancient polities—including the Athenian democracy, the Spartan military republic, and the

²⁵ 2 SAMUEL MILLER, BRIEF RETROSPECT ON THE EIGHTEENTH CENTURY, at 273, 434–36 (1803).

²⁶ See M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY AND THE UNITED STATES CONSTITUTION, at 21 (1994).

²⁷ See THE FEDERALIST PAPERS at 301 (Clinton Rossiter ed., 1961). Also influential was Montesquieu’s CONSIDERATIONS IN THE CAUSES OF GREATNESS OF THE ROMANS AND THEIR DECLINE (authoritative ed. 1748) (David Lowenthal, transl., 1965).

²⁸ See SELLERS, *supra* note 26, at 21.

²⁹ Charles F. Mullett, *Classical Influences on the American Revolution*, 35 CLASSICAL J. 92, 97 (1939–40).

Carthaginian commercial commonwealth—they drew their main inspiration from the history and constitution of the Roman Republic, which existed from approximately 509 BCE to about 50 BCE (that is, until the time of the civil wars and Ceasar Augustus’s imposition of the Principate).

A complete political history of the Roman Republic is beyond the scope of this Article, but it is worth noting that the Framers were acutely self-conscious that they were establishing a new political order, and they consequently drew on classical allusions to previous foundings. George Wythe commented in one of his decisions as Chancellor of the Virginia High Court of Chancery that “[n]ational identity is a mystical union of members of successive generations,”³⁰ and, to illustrate his point, he drew attention to the founding of the Roman Republic and the continuity in identity between the citizens who expelled Tarquin, the last Latin king, in 509 BCE and those who defeated the Greek mercenary-King Perseus in Asia Minor in 168 BCE.³¹ It was notorious to the Framing Generation that, in the words of Tacitus’ opening lines in the *Annals*, Rome was once ruled by kings.³² Although “the annalists’ picture of the founding of the republic is more satisfying as a philosophical object-lesson or a piece of tragic drama than as history,”³³ it was precisely the accounts from Tacitus, Polybius, and Livy that informed the American understanding of that precedential founding.

While modern historiography has suggested that the Roman Republic emerged gradually from a series of modest institutional and legal reforms,³⁴ the Framing Generation would have believed that it came about as the result of a violent revolution against the tyranny of the last king, Tarquinius Superbus. After the Roman nobility and people further repulsed an Etruscan attempt to reinstitute the monarchy,³⁵ the Republic was on a firmer foundation. Indeed, the leading figure of the post-revolutionary period of the Roman Republic was the aristocrat Publius Valerius (“Poplicola”), a lawgiver as successful as Solon or Lycurgus, immortalized in Plutarch’s *Lives*, and the pseudonym selected by Hamilton, Madison and Jay for their *Federalist Papers*.³⁶

³⁰ Page v. Pendleton, Wythe 211, 215 (Va. Ch. 1793).

³¹ See *id.* All references to ancient dates shall be to “Before Common Era” (BCE). “Anno Domini” (AD) dates will be rendered “Common Era” (CE).

³² See TACITUS, ANNALES, at 243 (John Jackson transl., 1931: Loeb Classical Lib. rep, 1979) (passage i.1).

³³ ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC, at 27–39 (1999)[hereinafter LINTOTT, THE CONSTITUTION].

³⁴ See *id.* at 31–34. The founding of the city of Rome (*ab urbe condita*) is traditionally given as 753 BCE. Kings ruled in Rome for nearly 200 years.

³⁵ See 1 LIVY, HISTORY OF ROME 289–94, 303–07 (passages ii. 23 & 27) (B.O. Foster transl. 1929; Loeb Classical Lib. rep. 1988).

³⁶ See William A. Galston, *The Use and Abuse of Classics in American Constitutionalism*, 66 CHI.-KENT L. REV. 47, 53–54 (1990); Charles R. Kesler, *Federalist 10 and American Republicanism*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING, at 13, 19, 33 (Charles R. Kesler, ed., 1987) (discussing PLUTARCH, PUBLICOLA x.1-6); GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING, at 111–12 (1999).

A. MIXED CONSTITUTIONS AND THE ROMAN REPUBLIC

Central to understanding the Framing Generation's perception of Roman republican institutions is their reading of Polybius's and Cicero's contemporaneous accounts of the Roman Constitution and their insights on effective and enduring government. In particular, Polybius's theory of balanced government must be regarded as one of the crucial linchpins of American constitutionalism. In return, the Framers put a uniquely American gloss on Polybian political philosophy.

There is no better substitute for understanding Polybius's views on mixed government than by reading his own words:

Most of those whose object it has been to instruct us methodically concerning such matters, distinguish three kinds of constitutions, which they call kingship, aristocracy, and democracy. . . . Nor on the other hand can we admit that these are the only three varieties; for we have witnessed monarchical and tyrannical governments, which while they differ very widely from kingship, yet bear a certain resemblance to it, this being the reason why monarchs in general falsely assume and use, as far as they can, the regal title. There have also been several oligarchical constitutions which seem to bear some likeness to aristocratic ones, though the divergence is, generally, as wide as possible. The same holds good about democracies. . . . We should therefore assert that there are six kinds of governments, the three above mentioned which are in everyone's mouth and the three which are naturally allied to them, I mean monarchy, oligarchy, and mob-rule. Now the first of these to come into being is monarchy, its growth being natural and unaided; and next arises kingship derived from monarchy by the aid of art and by the correction of defects. Monarchy first changes into its vicious allied form, tyranny; and next, the abolishment of both gives birth to aristocracy. Aristocracy by its very nature degenerates into oligarchy; and when the commons inflamed by anger take vengeance on this government for its unjust rule, democracy comes into being; and in due course the licence and lawlessness of this form of government produces mob-rule to complete the series. The truth of what I have just said will be quite clear to anyone who pays due attention to such beginnings, origins, and changes as are in each case natural. For he alone who has seen how each form naturally arises and develops, will be able to see when, how, and where the growth, perfection, change, and end of each are likely to occur again.³⁷

In this dense passage, Polybius weaves a number of independent thoughts. One is a typology of government, a categorization scheme that attempts to articulate the broadest patterns of government by individuals (kingship), elites (aristocracy), and the people (democracy). Polybius acknowledges his debt to Plato,³⁸ but also states that Plato's arguments "are subtle and

³⁷ 3 POLYBIUS, *supra* note 1, at 273–77 (passage vi.3 & 4).

³⁸ See 1 PLATO, LAWS 225 (R.G. Bury transl., 1926; Loeb Classical Lib. rep. 1984) (passage 693e) (a state should balance its monarchic and democratic elements, for "a State which does not partake of these can never be rightly constituted."). See also Frank W. Walbank, in *Polybius and the Roman State*, 5 GREEK, ROMAN & BYZANTINE STUDIES 239, 247–48 (1964).

stated at great length . . . [and] beyond the reach of all but a few.”³⁹ In any event, Polybius is actually attempting a new formulation of the age-old conundrum of human government.⁴⁰

The second theme is a related idea of dynamic cyclical change and decline through political revolutions (anacyclōsis, or ἀνακύκλωσις).⁴¹ Polybius observes that constitutions, like people, pass through three phases (πολιτεία) of growth (αὐξήσις), prime (ἀκμή), and decline (φθίσις).⁴² He makes clear that the various “pure” forms of government inevitably and inexorably must degenerate into their evil twins—tyranny, oligarchy and ochlocracy (mob rule)—and then collide with the inevitable backlash of an opposing faction. Polybius later elaborates a lengthy narrative of the generational succession of various kinds of government⁴³ and concludes, “Such is the cycle of political revolution, the course appointed by nature in which constitutions change, disappear, and finally return to the point from which they started.”⁴⁴

Polybius’s last—and most influential—point was his prescriptive notion that the best government was one that mixed the various attributes of monarchical, aristocratic, and democratic modes of governance. Turning to Polybius’s lengthy narrative of the mixed Roman constitution, his commentary on the salient features of Roman political organization states:

The three kinds of government that I spoke of above all shared in the control of the Roman state. And such fairness and propriety in all respects was shown in the use of these three elements for drawing up the constitution and in its subsequent administration that it was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical. This was indeed only natural. For if one fixed one’s eyes on the power of the consuls, the constitution seemed completely monarchical and royal; if on that of the senate it seemed again to be aristocratic; and when one looked at the power of the masses, it seemed clearly to be a democracy. The parts of the state falling under the control of each element were and with a few modifications still are as follows.⁴⁵

Polybius then concentrates on the three great branches of the Roman constitution: the high magistracies (in the form of the two consuls elected

³⁹ 3 POLYBIUS, *supra* note 1, at 277 (passage vi.5.1).

⁴⁰ See KURT VON FRITZ, *THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY* 73–75 (1954; rep., 1975).

⁴¹ See G.W. TROMPF, *THE IDEA OF HISTORICAL RECURRENCE IN WESTERN THOUGHT: FROM ANTIQUITY TO THE REFORMATION*, at 4–59 (1979); Stephan Podes, *Polybius and His Theory of Anacyclōsis: Problems of Not Just Ancient Political Theory*, 12 *HIST. OF POL. THOUGHT* 577 (1991); I F.W. WALBANK, *A HISTORICAL COMMENTARY ON POLYBIUS* 637–45, 647–49 (1967) [hereinafter “WALBANK”].

⁴² 3 POLYBIUS, *supra* note 1, at 385 (passage vi.51.4).

⁴³ See *id.* at 283–89 (passage vi.7–9).

⁴⁴ *Id.* at 289 (passage vi.9.10). This same point is made by CICERO, *DE RE PUBLICA* 69 (Clinton Walker Keyes transl., 1928; Loeb Classical Lib. Rep. 1988) (passage i.28) (“For the primary forms already mentioned degenerate easily into the corresponding perverted forms, the kind being replaced by a despot, the aristocracy by an oligarchical faction, and the people by a mob and anarchy; but whereas these forms are frequently changed into new ones, this does not usually happen in the case of the mixed and evenly balanced constitution except through great faults in the governing class.”).

⁴⁵ 3 POLYBIUS, *supra* note 1, at 295–97 (passage vi.11.11–13). See also FERGUS MILLAR, *THE ROMAN REPUBLIC IN POLITICAL THOUGHT*, at 23–36 (2002) [hereinafter, “MILLAR, POLITICAL THOUGHT”].

annually); the Senate; and the people, acting either through popular assemblies or tribunes:

The consuls, previous to leading out their legions, exercise authority in Rome over all public affairs, since all the other magistrates except the tribunes [of the people] are under them and bound to obey them, and it is they who introduce embassies to the senate. Besides this it is they who consult the senate on matters of urgency, they who carry out in detail the provisions of its decrees. Again as concerns all affairs of state administered by the people it is their duty to take these under their charge, to summon assemblies, to introduce measures, and to preside over the execution of the popular decrees. . . . [A]nd they are authorized to spend any sum they decide upon from the public funds, being accompanied by a quaestor who faithfully executes their instructions. So that if one looks at this part of the administration alone, one may reasonably pronounce the constitution to be a pure monarchy or kingship. . . .

To pass to the senate. In the first place it has the control of the treasury, all revenue and expenditure being regulated by it. For with the exception of payments made to the consuls, the quaestors are not allowed to disburse for any particular object without a decree of the senate. And even the item of expenditure which is far heavier and more important than any other — the outlay every five years by the censors on public works, whether constructions or repairs — is under the control of the senate, which makes a grant to the censors for the purpose. Similarly crimes committed in Italy which require a public investigation, such as treason, conspiracy, poisoning, and assassination, are under the jurisdiction of the senate. . . . It also occupies itself with the dispatch of all embassies sent to countries outside of Italy for the purpose either of settling differences, or of offering friendly advice, or indeed of imposing demands, or of receiving submission, or of declaring war; and in like manner with respect to embassies arriving in Rome it decides what reception and what answer should be given to them. All these matters are in the hands of the senate, nor have the people anything whatever to do with them. So that again to one residing in Rome during the absence of the consuls the constitution appears to be entirely aristocratic. . . .

After this we are naturally inclined to ask what part in the constitution is left for the people, considering that the senate controls all the particular matters I mentioned, and, what is most important, manages all matters of revenue and expenditure, and considering that the consuls again have uncontrolled authority as regards armaments and operations in the field. But nevertheless there is a part and a very important part left for the people. For it is the people which alone has the right to confer honours and inflict punishment. . . . Again it is the people who bestow office on the deserving, the noblest regard of virtue in a state; the people have the power of approving or rejecting laws, and what is most important of all, they deliberate on the question of war and peace. Further in the case of alliances, terms of peace, and treaties, it is the people who ratify all these or the reverse. Thus here again one might plausibly say that the people's

share in the government is the greatest, and that the constitution is a democratic one.⁴⁶

Polybius recognized that this broad conspectus of the mixed Roman constitution was “imperfect owing to the omission of certain details,”⁴⁷ but he nonetheless vigorously defended his broad generalizations.⁴⁸ Polybius was particularly interested in the way that “political power is distributed among the different parts of the state, [and] how each of the three parts is enabled, if they wish, to counteract or co-operate with the others.”⁴⁹ What follows in Polybius’s narrative is the now famous passage on the checks and balances between Roman constitutional institutions, with the consuls, Senate, and people able to block extreme action by any of the other agencies of the state. As Polybius states, “For when one part having grown out of proportion to the others aims at supremacy and tends to become too predominant, it is evident that, as for the reasons above given none of the three is absolute, but the purpose of the one can be counterworked and thwarted by the others, none of them will excessively outgrow the others or treat them with contempt. All in fact remains *in statu quo*, on the one hand, because any aggressive impulse is sure to be checked and from the outset each estate stands in dread of being interfered with by the others. . . .”⁵⁰ Polybius concludes that “[s]uch being the power that each part has of hampering the others or co-operating with them, their union is adequate to all emergencies, so that it is impossible to find a better political system than this.”⁵¹

Despite the clarity of Polybius’s narrative and the strong correlation with his theory of mixed government and the ruinous effects of anacyclōsis, modern historiography of the Roman Republic reveals clear faults in Polybius’s discussion, and some of these cannot be forgiven (as Polybius attempts) in his quest for simplification. For example, Polybius implies that the Roman magistracy (the set of officers that included the consuls, praetors, tribunes, censors and aediles) was organized in a strict hierarchy, with the two annually elected consuls at the top. The reality (as Polybius partially admits in relation to the quaestors) was that these officers had different jurisdictions and prerogatives and did not act entirely in lock-step.⁵² To have dwelt on this point would have obviously diminished Polybius’s conclusion that the Roman Republic featured a unified executive agency with monarchical attributes. To his credit, Polybius’s account of senatorial prerogatives in the Republic was quite complete, although senatorial discretion admittedly diminished over time as legislation was adopted and followed.⁵³ Indeed, the whole tenor of Polybius’s account is of a rigid and unyielding constitutional allocation of authority between

⁴⁶ 3 POLYBIUS, *supra* note 1, at 297–303 (passages vi.12–14). See also A.H.J. GREENIDGE, ROMAN PUBLIC LIFE 245–48 (1901) (2003 rep.).

⁴⁷ 3 POLYBIUS, *supra* note 1, at 293 (passage vi.11.3).

⁴⁸ See *id.* at 293–95 (passage vi.11.4–10). See also WALBANK, *supra* note 41, at 673–75.

⁴⁹ 3 POLYBIUS, *supra* note 1, at 303 (passage vi.15.1).

⁵⁰ *Id.* at 311 (passage vi.18.7–8).

⁵¹ *Id.* at 309 (passage vi.18.1).

⁵² See LINTOTT, THE CONSTITUTION, *supra* note 33, at 18, 94–146. See also I T. COREY BRENNAN, THE PRAETORSHIP OF THE ROMAN REPUBLIC, at 3–57 (2000).

⁵³ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 18–20, 65–88.

different segments of civil society, with little flexibility.⁵⁴ He does acknowledge, however, that when the three cohorts of political power—the leaders (consuls), aristocracy (Senate), and people—cooperated with each other, the Republic was able to respond to any crisis, even Hannibal at the gates (as occurred during the Second Punic War).

In short, the idealized Roman Constitution that Polybius presents may have been quite a bit more complex and supple than that which would have been truly consistent with his vision of a mixed government with hermetically-sealed spheres of authority between different cohorts of society.⁵⁵ Indeed, this was belied by the official style of the Roman Republic, the phrase *senatus populusque Romanus* (the Senate and People of Rome), invariably rendered in the form, “SPQR.” There was no unified executive that exercised monarchical powers, save during times of true crisis and the ultimate decay of the Republic. The Senate as an aristocratic institution was not a real legislature; membership was chiefly based on family ties and only occasionally extraordinary merit. As Andrew Lintott observed, “The aristocratic element in the Roman Republic appears in the senate’s range of administrative powers in finance and foreign affairs, and its capacity to obstruct magistrates, as Polybius saw.”⁵⁶

Lastly, it has been observed that Polybius may have deliberately underplayed the role of democratic institutions in the Roman Constitution. These institutions originally evolved from the reaction of the people to the autocracy of the *decemviri* (c. 450 BCE).⁵⁷ The college of the ten tribunes of the plebs are barely mentioned and the role of the popular assemblies is minimized, so that Polybius can later make the point that the Republic was degenerating into a democracy or, more accurately, mob rule.

The reality, of course, was that the popular assemblies in which the will of the Roman people was manifested were by no means democratic institutions, and so were very different from Athenian assemblies. Roman assemblies such as the *comitia centuriata* and *comitia tributa* could only be summoned by a magistrate, who directed the proceedings by framing the agenda and the matters to be voted upon. In short, these bodies lacked any real legislative initiative.⁵⁸ By tradition and statute, the decrees of the *concilium plebis* (*plebis scita*) were binding.⁵⁹ There were also substantial limits on those who could participate in these councils, citizenship being just one of many requirements.⁶⁰ But despite these facts, the assemblies were influential, and, notwithstanding Polybius’s suggestion, the people

⁵⁴ See *id.* at 25.

⁵⁵ See also VON FRITZ, *supra* note 40, at 220–52.

⁵⁶ LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 199. See also H.H. SCULLARD, *FROM THE GRACCHI TO NERO: A HISTORY OF ROME FROM 133 BC TO A.D. 68* (1959); VON FRITZ, *supra* note 40, at 158–78 (considering Roman senatorial powers and concluding that Polybius may have deliberately understated them).

⁵⁷ See CICERO, *DE RE PUBLICA*, *supra* note 44, at 173 (passage ii.36.61); 175 (passage ii.37.63).

⁵⁸ See E. Stuart Staveley, *The Constitution of the Roman Republic 190-54*, 5 *HISTORIA* 74, 75–84 (1956); VON FRITZ, *supra* note 40, at 160. See also CICERO, *DE RE PUBLICA*, *supra* note 44, at 149–51 (passage ii.22) (for the origins of these assemblies).

⁵⁹ See H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 24–30, 86–88 (1972); WOLFGANG KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 22 (J.M. Kelly transl., 1973).

⁶⁰ See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 40–63.

were not always beholden to aristocratic interests (whether by co-optation or bribery).⁶¹ Nevertheless, there were striking fluctuations in the powers of the popular tribunes. Sometimes the tribunes exercised authority that rivaled the Senate's and the leading magistrates'; at other times, they acquiesced to aristocratic prerogatives.⁶²

Polybius's writing, for all its historiographic faults, remains the leading record of the Roman Republic's constitution. Cicero's writings are certainly incomplete on this subject and are further complicated by the absence of clear distinctions between Cicero's references to the actual operation of governmental institutions and instances in which he substitutes his preferences for an ideal constitution.⁶³ Moreover, Cicero may not have acknowledged his intellectual debt to Polybius, and his writings may be faulted for being merely derivative of the earlier Greek historians.⁶⁴ Cicero's *De re Publica* (first circulated in 52 BCE)—a text which was only fully reconstructed in the early nineteenth century and thus would have been known to the Framing Generation simply in fragments—briefly took issue with Polybius's theory of anacyclōsis, concluding that there was no single one-way dynamic of political revolutions and that oligarchy could as easily devolve into tyranny as it could devolve into mob rule.⁶⁵ In *De Legibus* (c. 52 BCE), Cicero, like Polybius, expressed wariness at the democratic elements of the Roman Constitution and sought to minimize them in his narrative by giving them a subordinate place in his idealized vision of the Republic.⁶⁶ He made an explicit attack against the office of the plebian tribunes, which he called “a mischievous thing, born in civil strife and tending to civil strife.”⁶⁷ Indeed, Cicero emphasized the monarchical aspects of the constitution, which he termed the *imperium*, and the necessity of a strong executive.⁶⁸ In short, Cicero's constitutional narrative is as blinded by his political grudges and predilections⁶⁹ as Polybius's narrative was by his theoretical adherence to the inevitability of anacyclōsis.

With this classical pedigree it should come as no surprise that the concept of mixed government was profoundly influential for the Framing Generation. The leading Polybian proponent among the American political leadership at the time was undoubtedly John Adams.⁷⁰ In his *Defence of the Constitutions of the United States*, which was avidly read by the delegates

⁶¹ See *id.* at 198–99, 204–07. See also CICERO, *DE LEGIBUS* 503–05 (Clinton Walker Keyes transl., 1928; Loeb Classical Lib. rep. 1988) (passage iii.17).

⁶² See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 207–13.

⁶³ See *id.* at 220–32. See also NEAL WOOD, *CICERO'S SOCIAL AND POLITICAL THOUGHT* 159–75 (1991).

⁶⁴ See generally VON FRITZ, *supra* note 40, at 123–54.

⁶⁵ See CICERO, *DE RE PUBLICA*, *supra* note 44, at 101–05 (passage i.44–45) (extolling monarchy over other forms of government); 177–79 (passage ii.65).

⁶⁶ See *id.* at 183 (passage ii.42) (mixed constitution is the “most splendid conceivable”).

⁶⁷ See CICERO, *DE LEGIBUS*, *supra* note 61, at 485 (passage iii.10 & 19). See also ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 57–59 (2004).

⁶⁸ See *id.* at 461–75 (passage iii.2–5).

⁶⁹ For more on Cicero's political life, see ANTHONY EVERETT, *CICERO* (2003); CHRISTIAN HABICHT, *CICERO THE POLITICIAN* (1990).

⁷⁰ See RICHARD, *supra* note 5, at 132–39.

at the Philadelphia Convention,⁷¹ Adams indicated that among the “opinions and reasonings of philosophers, politicians and historians, who have taken the most extensive views of men and societies, whose characters are deservedly revered, and whose writings were in the contemplation of those [who] framed the American constitutions[,] [i]t will not be contested that all these characters are united in Polybius. . . .”⁷² Thomas Jefferson was likewise an enthusiastic reader of Polybius and a cautious supporter of mixed government, although he criticized the Roman Republic for its “heavy-handed unfeeling aristocracy, over a people ferocious, and rendered desperate by poverty and wretchedness.”⁷³ The “testimony of Polybius” also figures prominently in both Madison’s *Federalist* 63⁷⁴ and the separation of powers discussion in *Federalist* 47. Invocations of the precept of mixed government were made at the Philadelphia Convention⁷⁵ and some of the state ratifying conventions.⁷⁶

Nonetheless, Adams felt himself at liberty to disagree with some of Polybius’s premises and conclusions.⁷⁷ For example, he appeared to take issue with Polybius’s view of the inevitability of political change. Although Adams thought that decay was likely within any polity, he also believed in the perfectability of government and that Polybius’s model of a mixed constitution could still be further refined: “The constitutions of several of the United States, it is hoped, will prove themselves improvements both upon the Roman, the Spartan, and the English commonwealths.”⁷⁸ He expressed the sincere hope that “the institutions now made in America will not wholly wear out for thousands of years.”⁷⁹ Adams was cognizant of the mortality of ancient constitutions, notwithstanding their adherence to precepts of mixed government.⁸⁰ Yet Adams later argued in his *Discourses on Davila* (published in 1790), that “a Balance, with all its difficulty, must be preserved, or liberty is lost forever. Perhaps a perfect balance, if it ever existed, has not been long maintained in its perfection; yet, such a balance

⁷¹ See THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 24 (1993); CHINARD, *supra* note 16, at 221.

⁷² THE WORKS OF JOHN ADAMS: SECOND PRESIDENT OF THE UNITED STATES VOL. 4 435 (1856).

⁷³ See 11 PAPERS OF THOMAS JEFFERSON, at 159 (letter of Feb. 16, 1787) (list of favored classical texts); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 128–29 (1787) (William Peden, ed., 1955); RICHARD, *supra* note 5, at 131.

⁷⁴ THE FEDERALIST NO. 63, *supra* note 27, at 389 (Madison).

⁷⁵ See 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299–300, 308, 424, 432 (remarks by Alexander Hamilton) (1911). For an extended and outstanding discussion of Montesquieu’s influence on Hamilton in this regard, see PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM, at 185–210 (2003).

⁷⁶ See 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 68 (Dr. Willard) (Massachusetts convention) (stating that, “republics had soon degenerated into aristocracies.”); 3 *id.* at 19 (Mr. Nicholas) (Virginia convention) (favorably noting system of balances introduced into the Roman government by the “creation of tribunes of the people.”).

⁷⁷ See CHINARD, *supra* note 16, at 221–25.

⁷⁸ *Id.*

⁷⁹ *Id.* at 298.

⁸⁰ See 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 58 (L.H. Butterfield, ed., 1961) (*citing* 2 TACITUS, ANNALES, *supra* note 32, at 57 (passage iv.33.1)). See also THOMPSON, *supra* note 16, at 123, 140–47.

as has been sufficient to liberty, has been supported in some nations for many centuries together.”⁸¹

There were members of the Framing Generation who were skeptical of the application of mixed government precepts to American constitutionalism. After all, no one was seriously suggesting a reinstatement of monarchy or the constitutional recognition of an aristocracy. James Wilson kept his doubts on these points quiet at the Philadelphia Convention, but when the proposed Constitution was later attacked at the Pennsylvania Ratifying Convention for being anti-democratic, he was compelled to agree that a mixed constitution would be an “improper government for the United States . . . because it is suited to an establishment of different orders of men.” In order to reconcile political theory with the impelling need to ratify the Constitution, Wilson observed, “What is the nature and kind of government which has been proposed for the United States by the late Convention? In principle, it is purely democratical. But the principle is applied in different forms, in order to obtain the advantages, and exclude the inconveniences, of the simple modes of government.”⁸² Wilson was well aware that the antifederalist forces would ruthlessly exploit the classical rhetoric and exemplars of mixed government as a way to portray the Constitution as a vehicle for imposing an oligarchy on the country.⁸³ Because of his scholarly use in *Defence* and *Discourses* of arguments based on mixed government principles, John Adams was continually dogged by the charge that he was a secret advocate of hereditary monarchy and a landed aristocracy.⁸⁴ It is one of the great ironies of the Framing period that those who most enthusiastically supported mixed government as a crucial theoretical insight in the drafting of the Constitution would later denounce it as fundamentally anti-democratic.

B. DISTRIBUTION OF POWERS IN THE ROMAN REPUBLIC

The enduring legacy of the ancient theory of mixed constitutions came to be manifested in the notion of separation of powers. Just as mixed government speaks to maintaining the equilibrium between divergent social cohorts, the separation of powers doctrine is concerned with the checks and balances between the actual institutions of constitutional government and the fundamental differentiation of governmental functions (legislative, executive and judicial) that is essential to promoting good government and safeguarding individual liberties. As already indicated, it was certainly possible for the Framers to pull this distinct strand of thought out of the writings of classical authors.

⁸¹ THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES VOL. 6 399 (Charles C. Little & James Brown eds., 1851) (quoted text from *Discourses on Davila: A Series of Papers on Political History*, No. 6).

⁸² 2 ELLIOT, *supra* note 76, at 434, 474, 523–4. *See also* 1 THE WORKS OF JAMES WILSON, at 303 (Robert Green McCloskey, ed., 1967) (*Of Government*).

⁸³ *See* RICHARD, *supra* note 5, at 143–46. *See also* 2 THE COMPLETE ANTI-FEDERALIST 272–73 (Herbert J. Storing, ed., 1981) (Letters from a Federal Farmer No. VII) (Jan. 3, 1788) (questioning whether the plebian tribunes really represented the peoples’ interests).

⁸⁴ *See* RICHARD, *supra* note 5, at 152–53. *See also* THOMPSON, *supra* note 16, at 216–19.

From the works of Polybius and Livy, it is possible to piece together details of the prerogatives and functions of different Roman political bodies and magistrates (the Senate, popular assemblies, consuls and other officers).⁸⁵ The Senate had a privileged place in the constitutional scheme of Roman government during the Republic because it was the only true deliberative body, delivering advice to magistrates (*consilium*) as well as formal resolutions (*senatus consulta*).⁸⁶ In contrast, the popular assemblies (the *comitia centuriata*, *comitia tributa*, and *comitia curiata*⁸⁷) were primarily convened to discuss a set agenda or to ratify or reject an already agreed-upon course of action. The Senate was also the “corporate body” that could purport to claim additional responsibilities and functions over time, but, interestingly, the power to create legislation of general application was never claimed. With certain narrow exceptions, such general legislation (in the fields of criminal law or private law) was the province of the popular assemblies, although it can be imagined that the drafting of these laws was left to smaller committees that were likely controlled by the same aristocratic factions dominating the Senate. Interestingly, however, the Senate in 98 BCE, through the *lex Caecilia Didia*, sought to exercise a veto over legislation enacted by other bodies.⁸⁸

The concept of separation of powers flows from an antecedent idea: that the councils and officers of state have clearly defined authority. In the Roman Republic, the notion of *potestas* was clearly seen as the proper limit of the jurisdiction and capacity of an official, as legitimized by law (*lex*) or custom (*consuetudo* and *mos*).⁸⁹ Combined with *potestas* was the ceremonial right of coercion (*coercitio*), which involved the display of the *fascēs* (the symbol of authority of the republic) and the use of the lictors to command obedience to the officer’s orders and decrees.⁹⁰ The highest form of *potestas* was *imperium*, which referred to the holding of a military command, but which could also confer upon the holder certain judicial authority as well.⁹¹ In truth, judicial power in the Roman Republic was split among a bewildering array of officials and exercised in a variety of jurisdictions, but generally speaking the praetors held much of the

⁸⁵ The best works on this subject remain T. ROBERT S. BROUGHTON, *THE MAGISTRATES OF THE ROMAN REPUBLIC* (1986); MICHAEL H. CRAWFORD, *THE ROMAN REPUBLIC* (1993); GREENIDGE, *supra* note 46; See JOLOWICZ & NICHOLAS, *supra* note 59; LINTOTT, *THE CONSTITUTION*, *supra* note 33; THEODOR MOMMSEN, *RÖMISCHES STAATSRICHT* (1888).

⁸⁶ See JOLOWICZ & NICHOLAS, *supra* note 59, at 33–34; LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 86–88; KUNKEL, *supra* note 59, at 20. See also TACITUS, *ANNALES*, *supra* note 32, at 57 (passage iv.32) (indicating that there was “a free scope of digression” in political discussion in the republican Senate).

⁸⁷ See GREENIDGE, *supra* note 46, at 158–61, 250–55; JOLOWICZ & NICHOLAS, *supra* note 59, at 18–24; KUNKEL, *supra* note 59, at 9–13; Staveley, *supra* note 58, at 84–90.

⁸⁸ See CICERO, *DE DOMO* (passages xli & l); CICERO, *PHILIPPICS* 153 (D.R. Shackleton Bailey transl.) (1986) (passage v.8).

⁸⁹ See *RES GESTAE DIVI AUGUSTI* (passage xxxiv.1 & 3). See also LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 3–5 (for more on the role of custom in the formation of the Roman constitution). Or, as Varro wrote in his treatise *On Customs* (as reported by Macrobius), custom is “a pattern of thought which has evolved to become a regular practice.” MACROBIUS (passage iii.8.9).

⁹⁰ See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 97–99; GREENIDGE, *supra* note 46, at 167–71, 189–90.

⁹¹ See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 96–99, 147–62; JOLOWICZ & NICHOLAS, *supra* note 59, at 46–47; KUNKEL, *supra* note 59, at 15–16; Staveley, *supra* note 58, at 107–12. See also CICERO, *DE LEGIBUS*, *supra* note 61, at 467 (passage iii.3.9).

competence over civil disputes, while they shared power with the consuls and popular bodies over the hearing of criminal charges.

For the high magistrates of the Republic, another structural limitation on power was the institutional check of collegiality (*collegio*). There were always two consuls, two censors, and, after 242 BCE, at least two or more praetors.⁹² With the exception of certain acts that required the concurrence of both sets of magistrates (such as the censors stripping an individual of his citizenship),⁹³ potestas resided in the individual officeholder. Essentially, those who shared the same potestas (such as consuls) alternated in authority, typically on an every-other-month arrangement. Depending on the situation, one magistrate could obstruct an order of his colleague by simply countermanding that order in the following month. Disputes were resolved by agreement among the consuls, the performance of auspices, or drawing lots. While the multiplicity of offices was originally intended as a pragmatic solution to finding enough leaders to make decisions, it eventually evolved into a consciously designed system of checks and balances.⁹⁴

Members of the Senate were qualified and appointed by a process (*lectio*) overseen by the censors and the number of Senate members approximated 300, at least in the later Republican period. Full membership in the Senate (*senior*) was only possible after serving in a high magistracy, reaching the age of forty-six, and receiving the censor's approbation of "those permitted to deliver their opinion in the senate."⁹⁵ Interestingly, no explicit property qualification for senators was imposed until the time of Augustus and the Principate. It was therefore possible from an early time for plebians to be selected for Senate membership.⁹⁶ The criteria for membership in the Senate during the Republic was age, specific office experience, and good moral character (as adjudged by the censors).⁹⁷ The Senate was organized into classes according to rank, which was normally based on the highest office previously held by the member. Retired consuls, for example, had precedence over ex-aediles. Speaking in the Senate was likewise governed by seniority. For much of the history of the Republic, the Senate was presided over by a member chosen from among the oldest and most respected senators (the *princeps senatus*) or by a selected chair, although technically the Senate could only be summoned and allowed to transact formal business by a sitting magistrate—usually a consul or the

⁹² See JOLOWICZ & NICHOLAS, *supra* note 59, at 48–49; Staveley, *supra* note 58, at 90–101.

⁹³ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 100. For more on the role of the censors, see BRENNAN, *supra* note 52, at 58–97; JOLOWICZ & NICHOLAS, *supra* note 59, at 51–54; GREENIDGE, *supra* note 46, at 216–33.

⁹⁴ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 104–05. See also GREENIDGE, *supra* note 46, at 191, 197–98.

⁹⁵ See *Lex latina tabulae Bantinae*, line 23, reprinted in 1 ROMAN STATUTES at 7 (M. H. Crawford, ed., 1996). See also 10 LIVY, *supra* note 35, at 163 (passage xxxvi.3.3). See also KUNKEL, *supra* note 59, at 19; GREENIDGE, *supra* note 46, at 263–67.

⁹⁶ See 1 LIVY, *supra* note 35, at 221 (passage ii.1.10-11) (suggesting that plebians sat in the senate from the beginning); JOLOWICZ & NICHOLAS, *supra* note 59, at 32–33.

⁹⁷ See 2 MOMMSEN, *supra* note 85, at 377, 421; LINTOTT, THE CONSTITUTION, *supra* note 33, at 68–72, 117–19; KUNKEL, *supra* note 59, at 18 (noting that only ex-consuls could serve as censors).

praetor urbanus.⁹⁸ Voting, although rare in the Senate (because of the search for consensus), was done by division.

The last element in the Roman conception of separation of powers involved the prerogatives of the college of the ten tribunes of the people (*tribunus plebis*). This office was the product of the Conflict of the Orders in the early Republic⁹⁹ and was a fixture of the constitution after 457 BCE. Qualified and elected from the plebian class (although patrician-born men could serve if they had been legally adopted into plebian families), the tribunes performed a variety of functions.¹⁰⁰ They chaired assemblies of the plebians, which had a limited initiative in framing popular legislation (*plebescita*), which could be given general application (in most periods of the Republic) even without ratification by the Senate. The tribunes also had prosecutorial responsibility in trials of treason (*perduellio*).¹⁰¹ Tribunes had the right to appear ex officio in the Senate and initiate matters.¹⁰²

The tribunes' most famous attribute was their power of obstruction in the Senate and popular assemblies and over the decisions of the high magistrates of the Republic. This was referred to generally as *intercessio*, but in the specific context of negating legislation or decrees, it was known, of course, as the *veto*. Polybius famously observed that “if a single one of the tribunes interpose[d], the senate [was] unable to decide finally about any matter, and . . . [could not] even meet to hold sittings.”¹⁰³ The tribunes could forestall the enactment of legislation from the popular assemblies,¹⁰⁴ although a tribune could not really block the election of a magistrate or official.¹⁰⁵

However, it is another power of the Roman Republican tribunes that is the main focus of this Article. After consulting together as a group, the tribunes could sometimes intercede on behalf of a plebian by way of an appeal or avoidance of a criminal punishment. This authority was called *auxilium* (or sometimes *provocatio*), a right exercisable within Rome (marked by the first milestone outside the city walls, the *pomerium*).¹⁰⁶ *Intercessio* in all of these forms depended on the tribune's legal and religious sacrosanctity—he, along with his junior associate, the plebian

⁹⁸ See JOLOWICZ & NICHOLAS, *supra* note 59, at 43–45; KUNKEL, *supra* note 59, at 19; GREENIDGE, *supra* note 46, at 269–72. See also 10 PLUTARCH, LIVES 112 (B. Perrin transl. 1914; Loeb Classical Lib. rep., 1968) (*Flaminius*, xviii) (censors name first member of the senate).

⁹⁹ See ANDREW BORKOWSKI & PAUL DU PLESSIS, TEXTBOOK ON ROMAN LAW 5-6 (2005); JOLOWICZ & NICHOLAS, *supra* note 59, at 54–55; VON FRITZ, *supra* note 40, at 197–204.

¹⁰⁰ See 8 PLUTARCH, *supra* note 98, at 331–33 (*Cato the Younger*, passage xl).

¹⁰¹ See 6 LIVY, *supra* note 35, at 349–51 (passage xxv.3.13); 7 *id.* at 7–13 (passage xxvi.2.7-3.12); 13 *id.* at 31 (passage xliii.8.2–3).

¹⁰² See Ernst Badian, *Tribuni Plebis and Res Publica*, in IMPERIUM SINE FINE: T. ROBERT S. BROUGHTON AND THE ROMAN REPUBLIC 187 (Jerzy Linderski, ed., 1996). See also 9 PLUTARCH, *supra* note 98, at 543–47 (*Gaius Marius*, xxix).

¹⁰³ 3 POLYBIUS, *supra* note 1, at 307 (passage vi.16.4); 8 *id.* at 281–83 (*Cato the Younger*, xx). See also WALBANK, *supra* note 41, at 691–92.

¹⁰⁴ See VON FRITZ, *supra* note 40, at 207–09; GREENIDGE, *supra* note 46, at 176–80.

¹⁰⁵ See 7 LIVY, *supra* note 35, at 223–25 (passage xxvii.6.2–11).

¹⁰⁶ See 7 PLUTARCH, *supra* note 98, at 473–77 (*Caesar*, xiv). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 98, 125–28; KUNKEL, *supra* note 59, at 16.

aedile, was quite literally immune from interference, on pain of death.¹⁰⁷ Under leaders such as the Gracchi brothers, the tribunate could exercise substantial power. Under opportunists such as Sulpicius (Marius's crony), it could even verge on the tyrannical. For much of the Republic's history, plebian tribunes could aspire to the higher offices of praetor and consul, although during the period of Sulla's reforms (81-70 BCE), the powers of the tribunate were decreased, and holders could not seek higher office.¹⁰⁸

From this description of the Roman Constitution in the middle and late Republican period (the third and second centuries BCE), it is apparent that while there may have been a classical understanding of a division of authority between various government institutions and the need for checks and balances between offices and entities (and the social cohorts they represented), there was no separation of powers in the sense that we understand it today. Legislative authority (meaning the power to initiate binding laws) was dispersed among a variety of assemblies, the Senate, and some magistracies.¹⁰⁹ Executive power was more concentrated, but there was hardly a unified executive. Judicial authority was exercised both by the magistrates (praetors) and the assemblies, with no provision for a truly distinct and independent judiciary. Powers in the idealized Roman Constitution may have been allocated to different offices and councils, but there was no separation of executive, legislative, and judicial functions and certainly no prohibition on the same magistrate or body exercising more than one of these functions.

The Framing Generation was well aware of the limitations of the classical canon in this regard. Roman institutions might have provided inspiration on the allocation of authority among government institutions as a system of checks and balances, but not as a true model of separation of powers. John Adams observed in his *Defence* that there were only three major discoveries about the "constitution of a free government" made after the time of Polybius, but that each was incredibly significant: "[r]epresentations, instead of collections, of the people; a total separation of the executive and legislative power, and of the judicial from both; and a balance in the legislature, by three independent, equal branches. . . ."¹¹⁰ Moreover, Adams wrote that the Roman Republic—or at least as related by Polybius—was flawed in precisely this respect: "The distribution of power was. . . never accurately or judiciously made in that constitution. The executive was never sufficiently separated from the legislative, nor had these powers a control upon each other defined with sufficient accuracy. The executive had not the power to interpose and decide between the people and the senate."¹¹¹

¹⁰⁷ See CICERO, DE LEGIBUS, *supra* note 61, at 469 (passage iii.3.9); 1 LIVY, *supra* note 35, at 325 (passages ii.33.1 & iii.55.6-7); 4 DIONYSIUS at 121-23 (passages vi.89.2-4). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 123-24.

¹⁰⁸ See 5 PLUTARCH, *supra* note 98, at 167 (*Pompey*, xxi).

¹⁰⁹ One important limit on the legislative power of the popular assemblies was that the senate had to give its approval, or auctoritas, for the measure to enter into force. See VON FRITZ, *supra* note 40, at 195-96.

¹¹⁰ 4 THE WORKS OF JOHN ADAMS, *supra* note 72, at 284.

¹¹¹ *Id.* at 440. One scholar disputes this. See GREENIDGE, *supra* note 46, at 179 (citing Livy).

Adams saw the defect in the Roman Constitution's assumption that a mixed government (representing different social segments) was the same thing as a constitution that imposed effective checks and balances on the abuse of power. Referring to Manlius Valerius's speech in the Senate advocating greater power to the plebians,¹¹² Adams observed:

It is surprising that Valerius should talk of an equal mixture of monarchical, aristocratical, and democratical powers, in a commonwealth where they were so unevenly mixed as they were in Rome. There can be no equal mixture without a negative in each branch of the legislature. . . . The consuls in Rome had no negative; the people had a negative, but a very unequal one, because [they did not have] the same time and opportunity for cool deliberation. The appointment of tribunes was a very inadequate remedy. What match for a Roman senate was a single magistrate seated among them? . . . It is really astonishing that such people as Greeks and Romans should have ever thought that four or five ephori [in Sparta], or a single tribune, or a college of ten tribunes [in Rome], an adequate representation of themselves. . . .¹¹³

The Framing Generation thus quickly moved from the political abstraction and irrelevancy of the idea that government institutions somehow authentically "represented" social groups (such as a senate embodying an aristocracy). To this end, they hardly needed the insights of Whig constitutionalists or Enlightenment *philosophes*.¹¹⁴ When Montesquieu observed that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can then be no liberty. . . . [and] there is no liberty, if the power of judging be not separated from the legislative and executive,"¹¹⁵ the Founders were already well aware of this lesson based on their experiences with conflicts between provincial governors, councils and assemblies.¹¹⁶ The problem for the Framers was to design a national government where functions and powers were distinct and separate, but under the revolutionary precept of popular sovereignty.¹¹⁷ In any event, the articulation of the broad principle of separation of powers had already been accomplished in the state constitutions adopted after 1776. Perhaps the most articulate expression of this was in the Bill of Rights of the 1784 New Hampshire Constitution, which is still in force to this day. The Bill states, "In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independence of each

¹¹² See DIONYSIUS OF HALICARNASSUS, *ROMAN ANTIQUITIES*, (Ernest Cary & Edward Spelman, transl., 1937; Loeb Classical Library rep. 1990) (passage ii.7.7).

¹¹³ 4 *THE WORKS OF JOHN ADAMS*, *supra* note 72, at 447–48. See also THOMPSON, *supra* note 16, at 212–22.

¹¹⁴ See generally, WILLIAM B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS; AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965).

¹¹⁵ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 182 (Thomas Nugent, transl. & J.V. Prichard rev., 1900). For more on Montesquieu's life and times, see ISAIAH BERLIN, *MONTESQUIEU* (1955); THOMAS L. PANGLE, *MONTESQUIEU'S PHILOSOPHY OF LIBERALISM: A COMMENTARY ON THE SPIRIT OF THE LAWS* 121–26 (1973); ANNE M. COHLER, *MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM* 43–47 (1988); CARRESE, *supra* note 75, at 43–47.

¹¹⁶ See Benjamin F. Wright, *The Origin of Separation of Powers in America*, 13 *ECONOMICA* 169, 171–76 (1933).

¹¹⁷ See GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 11–12 (1997).

other, as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.”¹¹⁸

As has been well noted, the final version of the constitutional text at least rhetorically adheres to this principle. Each branch of the government is the subject of its own Article in the Constitution, and each begins with a clause that allocates or “vests” the respective legislative, executive and judicial powers.¹¹⁹ Even though there is substantial interplay between the branches—especially with the appointment of personnel to staff the various branches—the functions of the branches are not often conflated. The Framing Generation clearly viewed the separation of powers principle as the practical application of mixed government. But as Gary Will has observed, this amalgamation of constitutional metaphors clearly posed uncomfortable problems for the Framers.¹²⁰ The important point is that the Framers saw that the problem required a proven solution; theory was but of limited help. In the constitutional debates of 1787 and 1788, the primary sources of evidence of balanced and stable governments were the British government of the eighteenth century, the state constitutions ordained after 1776, and the experiences of ancient republics.

III. EXECUTIVE POWER AND *AUXILIUM* IN THE ROMAN REPUBLIC

A. THE FRAMERS’ UNDERSTANDING OF ROMAN EXECUTIVE POWER

As already discussed, the constitution of the Roman republic featured strong executive institutions. One form of executive authority were the two annually-elected consuls, who were the most senior magistrates of the Roman Republic.¹²¹ The consuls possessed full executive authority, as expressed in the concept of *coercitio*, the right and duty to maintain public order.¹²² (That said, it was not the consuls or praetors who engaged in the day-to-day law enforcement within Rome’s city limits; that duty was usually delegated to minor magistrates charged with specific functions.¹²³)

¹¹⁸ N.H. CONST. OF 1784, art. XXXVII, reprinted in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2457 (Francis N. Thorpe ed., 1909).

¹¹⁹ See U.S. CONST. art. I, § 1 (stating that, “[a]ll legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives”); U.S. CONST. art. II, § 1 (stating that, “[t]he executive Power shall be vested in a President of the United States of America.”); U.S. CONST. art. III, § 1 (stating that, “[t]he judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). The literature on the original intent of the vesting clauses is vast. See, e.g., Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

¹²⁰ See GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST*, at 100 (1981).

¹²¹ See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 104–09.

¹²² See Joseph Plescia, *Judicial Accountability and Immunity in Roman Law*, 45 AM. J. LEGAL HIST. 51, 52–53 (2001).

¹²³ See *id.* at 97–98. See also 1 MOMMSEN, *supra* note 85, at 136, 141, 151; WILFRIED NIPPEL, *PUBLIC ORDER IN ANCIENT ROME* (1995).

Even so, no magistrate was at complete liberty to proceed against a citizen suspected of a crime or public sedition.¹²⁴ The practice of *provocatio* protected a Roman citizen from summary punishment or execution within the confines of the city.¹²⁵ A consul was forbidden, under the *leges Porciae*, from even flogging or imprisoning a citizen without the prior approval of a citizen assembly or a board of inquiry (*quaestio*), although certain types and amounts of fines (usually up to half the value of a citizen's property) could be unilaterally imposed by a consul or a praetor.¹²⁶ *Provocatio* was therefore a substantial limit on the executive authority exercised by the traditional magistrates of the Republic.

But another Roman Republican executive institution would have also been known to the Framers. From Livy, Cicero, and Machiavelli, the Framing Generation learned that the Roman Republic had mixed experiences with strong leaders. Machiavelli praised the Roman practice of naming dictators for up to one-year periods. "We can see," he observed, "that the dictatorship, as long as it was bestowed in accord with public laws and not by private authority, always benefitted the city, because it is the creation of magistrates and the granting of power by extraordinary means which harm republics, not those which are created by ordinary means."¹²⁷ In addition to this regularity in appointment, there were other limits placed on the dictator's powers and "he could do nothing to curtail the government, such as taking authority away from the senate or from the people, or abolishing the city's old institutions and creating new ones."¹²⁸ But Machiavelli observed that the institution of dictatorship went into decline when the consuls, rather than the senate or popular assemblies, were given the power to name the dictators, on occasion appointing themselves.¹²⁹ The *lex Gabinia* of 68 BCE, which granted Pompey the Great extraordinary powers to repel marauding pirates, was the beginning of the end of the Roman Republic.¹³⁰ Of course, the ultimate absolutism was manifested by Julius Caesar's appointment as "dictator-for-life," of which Plutarch said that "this was indeed a tyranny avowed, since his power was not only absolute, but perpetual too."¹³¹

We know from the classical sources that dictatorship—known by the formal title *magister populi* (master of the citizen army)—was originally conceived as an extraordinary military command to repel invasion, quell

¹²⁴ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 98. See also Dig. 1.2.2.16 (Pomponius).

¹²⁵ LINTOTT, THE CONSTITUTION, *supra* note 33, at 98 (citing Imp. Rom. 44–46).

¹²⁶ *Id.* at 98–99 (citing the *Leges Aterneia Tarpeia* (454 BCE), *Menenia Sestia* (452 BCE), *Julia Papiria* (430 BCE), and *Lex Silia*).

¹²⁷ NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 94 (Julia Conway Bondanella & Peter Bondanella transl., 1997).

¹²⁸ *Id.* at 95. See also HARVEY C. MANSFIELD, JR., MACHIAVELLI'S NEW MODES AND ORDERS: A STUDY OF THE DISCOURSES ON LIVY 110–26 (1979) [hereinafter MANSFIELD, MACHIAVELLI]; John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 211–13 (2004).

¹²⁹ MACHIAVELLI, *supra* note 127, at 96. For a brief intellectual history of the influence of the Roman institution of dictatorship, see HARVEY C. MANSFIELD JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 82–85 (1989) [hereinafter MANSFIELD, TAMING].

¹³⁰ See 5 PLUTARCH, *supra* note 98, at 177–79 (*Pompey*, xv). See also Robert Harris, *Pirates of the Mediterranean*, N.Y. TIMES, Sept. 30, 2006, at A23, col. 1.

¹³¹ 7 PLUTARCH, *supra* note 98, at 575 (*Caesar*, lvii).

civil unrest, or see Rome through periods of what Livy called “fearful times (*in trepidis rebus*),” when the “accustomed remedies (*consuetis remediis*)” were insufficient to respond.¹³² This military function was symbolized by the dictator’s ability to appoint a second-in-command, the *magister equitum* (master of the horse). But in addition to conducting military functions, the dictator could also discharge civic and religious duties, including both the holding of elections and the inauguration of festivals and observances (which was necessary when both consuls were away from Rome).¹³³ Despite Machiavelli’s statement, dictators were always exclusively appointed by the sitting consuls to respond to a particular crisis and serve no more than six months. There was virtually never an election of a dictator by popular assemblies.¹³⁴ As Machiavelli noted, dictators were still subject to some forms of redress for their violation of individual rights (*provocatio*), still obliged to respect the prerogatives of the plebian tribunes, and were further subject to audit and process after their term was over.¹³⁵ In the three hundred-year period from the establishment of the Roman Republic to the end of the Second Punic War, dictators were appointed on almost one hundred occasions and in nearly all of these instances the limitations on the office were faithfully observed.¹³⁶

For Machiavelli, the admirable Roman institution of energetic and temporary dictatorships stood in sharp contrast to the arrogation of all executive, legislative and judicial power under the decemvirate (the group of ten ostensible “law reformers” who were given plenary power in the fifth century BCE and quickly established an autocracy and virtual tyranny).¹³⁷ During their rule, all other magistracies were abrogated, and although the senate and popular assemblies continued, they did so with substantially reduced powers.¹³⁸ For Machiavelli, the key to understanding

¹³² 1 LIVY, *supra* note 35, at 277, 313–15 (passage ii. 18, 30); 2 *id.* at 71–73, 315, 341–43, 441 (passage iii.20.8; iv.17.8; iv.26.6; iv.56.8); 3 *id.* at 327 (passage vi.38.3); 4 *id.* 121–23 (passage viii.32.3). See also Wilfried Nippel, *Emergency Powers in the Roman Republic*, in LA THEORIE POLITICO-CONSTITUTIONNELLE DU GOUVERNEMENT D’EXCEPTION 5 (Pasquale Pasquino & Bernard Manin ed., 2000).

¹³³ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 109–10; GREENIDGE, *supra* note 46, at 191–96. See also 3 LIVY, *supra* note 35, at 453–55 (passage vii.28.7–8); 4 *id.* at 73 (passage viii.18.12–13); 4 *id.* at 273 (passage ix.28.6). See also JOLOWICZ & NICHOLAS, *supra* note 59, at 55–56; KUNKEL, *supra* note 59, at 17.

¹³⁴ See CICERO, DE LEGIBUS, *supra* note 61, at 467 (passage iii.9); 2 LIVY, *supra* note 35, at 99 (passage iii.29.7); 6 *id.* 73–77 (passage xxiii.22.2–11); 5 PLUTARCH, *supra* note 98, at 259 (*Pompey*, liv) (*Pompey* elected sole consul); 505 (*Marcellus*, xxiv) (suggesting that dictators could only be appointed by consuls or praetors); 7 *id.* at 513 (*Caesar*, xviii) (*Pompey*’s election as sole consul “a more legal sort of monarchy . . . [than] the dictatorship.”). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 110–11; 2 MOMMSEN, *supra* note 85, at 147–49, 160–61; 1 WILLIAM E. HEITLAND, THE ROMAN REPUBLIC, at § 150 (1923).

¹³⁵ See JOLOWICZ & NICHOLAS, *supra* note 59, at 36; GREENIDGE, *supra* note 46, at 193–95; LINTOTT, THE CONSTITUTION, *supra* note 33, at 111. See also CICERO, DE OFFICIIS 219–21 (Walter Miller transl., 1913; Loeb Classical Lib. rep. 1990) (passage ii.49–50); 1 LIVY, *supra* note 35, at 277 (passage ii.18.8); 1 *id.* at 315 (passage ii.30.5); 2 *id.* at 71–73 (passage iii.20.8); Justinian’s Digest 1.2.2.18 (Pomponius). But see DIONYSIUS OF HALICARNASSUS, at 211–27 (passage v. 70–74) (suggesting that consul’s or senate’s appointment of dictators was intended to infringe the power of the popular assemblies and tribunes); MANSFIELD, TAMING, *supra* note 129, at 84–85.

¹³⁶ See Nippel, *Emergency*, *supra* note 132, at 5.

¹³⁷ For an extended discussion of the decemvirs and their rise to power and fall, see MACHIAVELLI, *supra* note 127, at 107–12.

¹³⁸ See 2 LIVY, *supra* note 35, at 117–23 (passage iii.36–37) (likening decemvirs to dictators in this respect).

“the reasons that kept the dictators good and those which made the decemvirs bad” was “th[e] safeguards . . . put in place to make them unable to abuse their authority.”¹³⁹ Likening the Roman dictators to the Spartan kings, Machiavelli concluded that effective checks and balances on the exercise of executive authority were essential. Likewise, the Roman Republic’s brief flirtation (in the late fifth and early fourth centuries BCE) with replacing the two consuls with a college of five or more military tribunes endowed with consular power, was rejected as a failure.¹⁴⁰ Executive power had to be concentrated, not diluted, in order to be effective and accountable.¹⁴¹

The Framers thus had a diverse set of ancient models and theories of executive power, combined with the intelligent commentaries of later political thinkers.¹⁴² At the Philadelphia Convention these were occasionally addressed, and almost invariably the office of the President was referred to by the delegates as the “chief magistrate” or “first magistrate” in a very consciously classical mode of speaking. Indeed, this was regarded as an intentional break from British constitutionalism; the models for an energetic (but responsible and not autocratic) executive came from ancient Rome, not from contemporary Britain.

Early in the Convention, the Framers discussed the nature of an executive branch under the new form of government. James Wilson argued that “in his opinion so far from a unity of the Executive tending to progress towards a monarchy it would be the circumstance to prevent it. A plurality in the Executive of Government would probably produce a tyranny as bad as the thirty Tyrants of Athens, or as the Decemvirs of Rome.”¹⁴³ When William Paterson’s New Jersey Plan proposed a multiple-party executive branch,¹⁴⁴ Wilson savagely critiqued this element, stating that, “[i]n order to control the Legislative authority, you must divide it. In order to control the Executive you must unite it. One man will be more responsible than three. Three will contend among themselves till one becomes the master of his colleagues. In the triumvirates of Rome first Caesar, then Augustus, are witnesses of this truth. The Kings of Sparta, and the Consuls of Rome prove also the factious consequences of dividing the Executive Magistracy.”¹⁴⁵

The notion of an energetic Executive appeared to be a lightning rod for both advocacy and criticism of the Constitution. Noah Webster, writing as a “Citizen of America,” believed that the assortment of powers vested in the president by the Constitution—including serving as commander-in-chief, appointing the civil officials and commissioning the military officers of the

¹³⁹ *Id.* at 97. See also MANSFIELD, MACHIAVELLI, *supra* note 128, at 126–39.

¹⁴⁰ See Brennan, *supra* note 52, at 49–53. See also 2 PLUTARCH, *supra* note 98, at 95 (*Camillus*, i) (on the institution of military tribunes).

¹⁴¹ See MILLAR, POLITICAL THOUGHT, *supra* note 45, at 129.

¹⁴² MANSFIELD, TAMING, *supra* note 129, at 247–78.

¹⁴³ 1 FARRAND, *supra* note 75, at 74 (Pierce’s notes on June 1, 1787).

¹⁴⁴ See 1 FARRAND, *supra* note 75, at 244 (Madison’s notes on June 15, 1787) (referring to “persons” serving as Executive).

¹⁴⁵ *Id.* at 254 (June 16) (Madison’s notes). See also Galston, *supra* note 36, at 51; RICHARD, *supra* note 5, at 115.

United States, sending and receiving ambassadors, making treaties, pardoning offenders,¹⁴⁶ informing Congress on the state of the Union and recommending needed legislation and vetoing unwise statutes,¹⁴⁷ as well as “tak[ing] Care that the Laws be faithfully executed”¹⁴⁸—were more akin to those of the chief Roman magistrates rather than the English king from whom the American colonies had just rebelled. By the same token Webster noted that when the president acted with the concurrence of the Senate—as with the ratification of treaties or the confirmation of official appointments—he “has powers exceeding the Roman consuls.”¹⁴⁹ Webster conceded that the American Constitution was better conceived in this respect than its Roman counterpart because the President was elected to a longer term than the annual consuls, and by the carefully wrought electoral college mechanism, and not direct popular election. “[I]t is impossible,” Webster asserted, “that an executive officer can act with vigor and impartiality, when his office depends on the popular voice.”¹⁵⁰

In one respect, the American Constitution directly replicated that of the Roman republic. The age requirements for the presidency (35 years),¹⁵¹ alongside those of other federal legislators (senators age 30, and members of the House of Representatives age 25),¹⁵² was designed to promote a progression of office-holding, an American version of the *cursus honorum*. This was intended to promote a cadre of experienced leaders and to avoid hereditary successions to office. Those who sought the office of chief magistrate, whether the consulship in Rome or the presidency in America, were expected to have substantial experience.

The Roman Constitution also enunciated a principle that executive power needed to be term-limited. A number of Roman statutes barred consuls from holding the same office twice in a decade or serving in any magistracy without a compulsory two-year refectory period.¹⁵³ The Antifederalists made much of this. The “Federal Farmer” regretted that no limit had been placed on the number of terms a president could sit, and he commented that “[t]he Roman consuls and the Carthaginian suffetes possessed extensive powers while in office, but being annually appointed, they but seldom, if ever, abused them.”¹⁵⁴ As for the concern that term

¹⁴⁶ See Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001); Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13 (2002).

¹⁴⁷ These functions were neatly summarized in Justice Hugo Black's observation that the President's “functions in the law-making process” include “the recommending of laws he thinks wise and the vetoing of law he thinks bad.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). See also Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1 (2002).

¹⁴⁸ See U.S. CONST. art. II, §§ 2 & 3. See also Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993).

¹⁴⁹ NOAH WEBSTER, *Citizen of America*, in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, 136 (Bernard Bailyn ed., 1993).

¹⁵⁰ *Id.*

¹⁵¹ U.S. CONST. art. II, § 1, cl. 5.

¹⁵² U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

¹⁵³ See 3 LIVY, *supra* note 35, at 513 (passage vii.42.2); 4 *id.* at 405 (passage x.13.8); 9 PLUTARCH, *supra* note 98, at 493 (*Gaius Marius*, xii). See also JOLOWICZ & NICHOLAS, *supra* note 59, at 79; LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 145; GREENIDGE, *supra* note 46, at 186.

¹⁵⁴ 2 COMPLETE ANTI-FEDERALIST, *supra* note 83, at 311.

limits would deny the nation the service of a talented president, especially in times of war or national emergency, John Taylor would later write in his *Inquiry* that rotation of office actually improved performance, that, “[f]or seven centuries Rome applied the principle to her generals, and conquered; for five, she trusted to experience and was subdued.”¹⁵⁵ On the other hand, Alexander Hamilton observed in *Federalist 25* that ancient polities were obliged to occasionally choose between violating a law against executive reeligibility or face imminent defeat.¹⁵⁶ The strong classical example of one-year terms for magistrates with no chance for re-election was not adopted by the Framers, although a two-term limit was observed by every president until Franklin D. Roosevelt. An explicit limit on presidential re-election was not included in the United States’ Constitution until the ratification of the Twenty-Second Amendment in 1951.

Despite the indirect process of election, the President was seen by the Framers as the authentic voice of the people, although certainly not in the sense of a “plebiscitary presidency,” where the Chief Magistrate was conferred with some sort of inchoate mandate.¹⁵⁷ It was not only the case, of course, that the President and Vice President were the only federal officials elected by a nationwide ballot. Some of the president’s powers—especially that of prosecuting criminals and vetoing dangerous or unwise laws (subject to an override by a two-thirds vote of both the House and Senate¹⁵⁸)—were inevitably likened to those of the Spartan ephors and Roman plebian tribunes.¹⁵⁹ At the New York Ratifying Convention, Alexander Hamilton and Melancton Smith squared-off on this point, with Hamilton seeing the President as an embodiment of Spartiate and Roman institutions,¹⁶⁰ while Smith doubted their relevance to a society in which no hereditary aristocracy existed.¹⁶¹ More significantly, the veto granted to the President has only qualified power, whereas the veto power exercised by the ephors and tribunes appears to have been nearly absolute.¹⁶²

¹⁵⁵ JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 188 (1950) (1814).

¹⁵⁶ See THE FEDERALIST NO. 25, *supra* note 27, at 167 (Hamilton stated that, “[i]t was a fundamental maxim of the Lacedaemonian commonwealth, that the post of admiral should not be conferred twice on the same person. The Peloponnesian confederates, having suffered a severe defeat at sea from the Athenians, demanded Lysander, who had before served with success in that capacity, to command the combined fleets. The Lacedaemonians, to gratify their allies, and yet preserve the semblance of an adherence to their ancient institutions, had recourse to the flimsy subterfuge of investing Lysander with the real power of admiral, under the nominal title of vice-admiral.” Hamilton concluded that “nations pay little regard to rules and maxims calculated to run counter to the necessities of society.”).

¹⁵⁷ See GEORGE ANASTALPO, THE CONSTITUTION OF 1787: A COMMENTARY 106 (1989); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1985).

¹⁵⁸ See U.S. CONST. art. I, § 7.

¹⁵⁹ See 1 FARRAND, *supra* note 75, at 432 (Yates’s notes) (remarks by Hamilton, “[w]hat was the tribunitian power of Rome? It was instituted by the plebeians as a guard against the patricians. But was this a sufficient check? No - The only distinction which remained at Rome was, at last, between the rich and the poor.”).

¹⁶⁰ See New York Ratification Debates (June 21, 1788), *reprinted in* 2 DEBATES ON THE CONSTITUTION, *supra* note 76, at 768.

¹⁶¹ *Id.* at 774.

¹⁶² See CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE 11–15 (1998).

As has already been discussed, the comparison of presidential authority to tribunitial power was imperfect. The intensely populist role of the tribunes in Roman society, as reported by Polybius,¹⁶³ has no real modern counterpart, as Smith surmised. Vetoes of legislation in the Roman Senate or comitia centuriata (dominated by patrician influences) were common, as was *intercessio* and *auxilium* on behalf of wronged citizens (which might be likened to the American President's pardon power).¹⁶⁴ Less common were tribunitial obstruction of other Roman magistrates (including the consuls or praetors),¹⁶⁵ and the selective summons and prosecution of opponents of the plebian order.¹⁶⁶ The tribunes had no power to initiate legislative or executive action; they only had the power to block the imperium exercised by other officials or assemblies. In this sense, the Framers realized that the President conceived by the Constitution was an amalgam of an energetic, unitary executive and a popular representative.

All of these ideas were synthesized in Alexander Hamilton's famous discussion of executive power in *Federalist* 70. Beginning with first principles, Hamilton noted:

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.¹⁶⁷

Likewise, a multiplicity of executive offices—and, indeed, any dilution of executive power—was a recipe for disaster in Hamilton's mind. Of course, the experience of the Roman Republic was forefront in his mind, a topic he dwelled on at some length:

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

¹⁶³ See 3 POLYBIUS, *supra* note 1, at 307 (passage vi.16.5) ("the tribunes are always obliged to act as the people decree and to pay every attention to their wishes."). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 207–08.

¹⁶⁴ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 122–28.

¹⁶⁵ See *id.* at 106–07 (noting the difficulty of restraining consuls in office).

¹⁶⁶ See *id.* at 123–24. The tribune's power of coercion against citizens was based on statute. See 1 CRAWFORD, ROMAN STATUTES, *supra* note 85, at 7 (lex lat. Bant.), 13 (lex osca. Bant.); 2 *id.* 46 (Lex Silia).

¹⁶⁷ THE FEDERALIST NO. 70, *supra* note 27, at 423. See also 1 FARRAND, *supra* note 75, at 329 (where Hamilton observed before the Federal Convention that "[e]stablish a weak government and you must at times overleap the bounds. Rome was obliged to create dictators.") (June 19, 1787) (Yates's notes).

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example. . . .

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the Executive. . . . The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal, is a matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot—one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.¹⁶⁸

Unitary, energetic government—at least as envisioned by Hamilton—was thus seen as having direct, ancient analogues.

Always in the background in the Framing Generation's discussions of executive power was a collective fear, if not paranoia, of an unscrupulous leader who sought power by any means. The military dictator (using the modern sense of the word, not the Latin one) always lurked in the shadows, as did the more colloquial "Man on Horseback." The ratification debates were replete with references to the rogues gallery of Roman tyrants: the decemvirs, Marius, Cinna, Sulla, Catiline, and, of course, Julius Caesar.¹⁶⁹ More contemporary tyrants, such as Oliver Cromwell, were additionally mentioned. In a letter to James Madison, written just after the announcement of the Constitution's text, Thomas Jefferson reveals his concerns that the President's powers were too much like those of the Roman emperors.¹⁷⁰ One obvious objective was to create a presidency in which such despotic impulses could be controlled. This was achieved by

¹⁶⁸ *Id.* at 425. See also ANASTALPO, *supra* note 157, at 110, 113; HARVEY C. MANSFIELD, JR., *Republicianizing the Executive*, in Kesler, *supra* note 36, at 168.

¹⁶⁹ See 1 FARRAND, *supra* note 75, at 74 (June 1) (Pierce's notes) (Wilson's comment), 254 (June 16) (Madison's notes) (Wilson's comments). See also GUMMERE, *supra* note 5, at 185–86.

¹⁷⁰ See 12 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 351, 440–41.

the structural limits on the executive office, as well as the required concurrence of presidential action with congressional prerogatives. All of these institutions and features of executive power were derived from classical precedents.

B. PROVOCATIO, THE TRIBUNITIAL POWER OF AUXILIUM, AND THEIR SUSPENSION

The Roman practice of provocatio dates back to the founding of the Roman Republic by Valerius Pollicola (“Publius,” as he was known to the Framing Generation). It was intimated in the law of the Twelve Tables (c. 450 BCE) and finally codified in the *lex Valeria* of 300 BCE.¹⁷¹ Any Roman citizen faced with coercion by a magistrate could declare “provoco ad populum”¹⁷² or “provoco et fidem imploro,” in order to invoke regular judicial process before a popular assembly or board of inquiry. The right of provocatio was an invocation of judicial process; a citizen had no right to claim provocatio against a verdict of a popular assembly or a quaestio.¹⁷³

Once provocatio was invoked, the procedure used before a popular assembly or a *quaestio perpetua* (a permanent criminal tribunal) was prescribed by Roman statute.¹⁷⁴ On a number of occasions during Rome’s period of Italian and transmarine expansion, provocatio was invoked by large numbers of Roman citizen-soldiers accused of defection or treason, only to have the executions upheld by citizen assemblies.¹⁷⁵ The right of provocatio was accompanied by a corollary penalty: any magistrate who defied or ignored a citizen’s plea for due process could be himself be prosecuted and punished.¹⁷⁶ Under the *lex Sempronia*, passed under the tribuneship of Gaius Gracchus in response to the extrajudicial killing of his brother, penalties were prescribed for such unlawful executive conduct.¹⁷⁷ As Mommsen famously contended, provocatio was designed to be the legal antidote to the Roman magistrate’s imperium.¹⁷⁸ And as more recent historians have observed, the institution of provocatio, when combined with the tribunitial power of intercessio, and senate-ordered inquiries

¹⁷¹ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 33. See also 1 LIVY, *supra* note 35, at 93 (passage i.26.8); 4 *id.* at 389–91 (passage x.9.3–6). The *lex Valeria* provided that the execution of a Roman citizen in the face of provocatio was illegal (“improbe factum”).

¹⁷² See 1 LIVY, *supra* note 35, at 405 (passage ii.55.4–9) (narrating the story of Volero Publilius seeking relief from a tax levy).

¹⁷³ Despite Cicero’s suggestion that the Twelve Tables allowed for an invocation of provocatio against the actions of popular assemblies, see CICERO, DE RE REPUBLICA, *supra* note 44, at 165 (passage ii.54). See also 10 PLUTARCH, *supra* note 98, at 183 (*Tiberius Gracchus*, passage xvi. 1), we know this would have been inconsistent with the laws that codified provocatio. See *Lex lat. Bant.*, in 1 ROMAN STATUTES, *supra* note 95, at 7; *Lex repetundarum*, 70–72 (123 BCE) (prohibiting any delay or interference with a trial verdict by any magistrate or official, presumably including the tribunes). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 128, 154–55, 227; A.N. Sherwin-White, *The Lex Repetundarum and the Political Ideas of Gaius Gracchus*, 72 J. ROMAN STUD. 18 (1982).

¹⁷⁴ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 152–57.

¹⁷⁵ See *id.* at 126 (glossing Livy xxvi.33.10–14; xxix.21–22; xxxiv.44.6–8).

¹⁷⁶ See *id.* at 89. See also Plescia, *supra* note 122, at 56.

¹⁷⁷ See CICERO, PRO RABIRIO PERDUELLIONONIS REO 489 (H. Grose Hodge transl., 1927; Loeb Classical Lib. ed. 1979) (passage xii); 10 PLUTARCH, *supra* note 98, at 207 (*Gaius Gracchus*, passage iv. 1).

¹⁷⁸ See 1 MOMMSEN, *supra* note 85, at 136–52.

(*quaestio*), made consuls and even dictators¹⁷⁹ think twice before abusing the powers of their office.

Auxilium was the institutionalized practice of *provocatio* by the plebian tribunes, acting on behalf of a Roman citizen. A plebian tribune had the power to literally impose his body (*intercessio*) to block or thwart an act of a magistrate or assembly. Because of the sacrosanctity of the tribune's person, this power of *intercessio* could never be opposed, even by a senior magistrate. This insitutionalized practice of *provocatio* on behalf of a citizen was known as *auxilium* (literally "help").¹⁸⁰ Each of the ten plebian tribunes was expected to be available to citizens at their homes or at the Basilica Porcia (near the Forum opposite the Senate House), night and day, in order to exercise *auxilium*. For this reason, tribunes were never allowed to spend a night outside the walls of Rome, except for extraordinary occasions (such as the annual Latin festival or on special business ordered by a senior magistrate or the Senate).¹⁸¹

The power of *auxilium* could be exercised by any of the tribunes acting individually, or in extraordinary circumstances, collectively by the ten tribunes operating collegially. In 187 BCE, L. Scipio Asiaticus (brother of the famous Scipio Africanus, victor over Hannibal in the Second Punic War) sought relief from an order of imprisonment for failing to pay a tax judgment. A majority of the tribunes voted to exercise *auxilium* on behalf of Scipio in respect to his imprisonment, but not for the payment of the tax judgment itself, for which they ordered that he (or his brother) ought to offer surety. Tiberius Gracchus, who served as a tribune that year, sponsored a decree of the tribunes to that effect.¹⁸² In 138 BCE, after a controversial tax levy in Spain, the college of tribunes declined to exercise *auxilium* on behalf of C. Matineus, who was condemned to be flogged and then sold into slavery for a single sesterce to satisfy his tax obligation.¹⁸³

The collective power of the tribunes exercising *auxilium* was part of a larger power struggle between the tribunes, the senior magistrates, and the Senate. A fairly standard historical account has the beginnings of the Roman Senate's decline to the popular reforms of the Gracchi, Tiberius and Gaius Sempronius Gracchus in the second century BCE. Acting simultaneously as tribunes and land-commissioners in the years 133, 123 and 122 BCE, the Gracchi sought to advance an ambitious and popular program of agrarian reform, land redistribution, immigration restrictions, and fiscal policy changes, including the limitation of senatorial power over raising and spending funds in the provinces.¹⁸⁴ Tiberius Gracchus went so

¹⁷⁹ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 91 (discussing recent scholarly views), 111–12.

¹⁸⁰ See *id.* at 124.

¹⁸¹ See CICERO, DE LEGIBUS, *supra* note 61, at 477, 481–83 (passages iii. 7 & 9); 8 PLUTARCH, *supra* note 98, at 247 (*Cato the Younger*, passage v. 1); 10 *id.* at 219, 223 (*Gaius Gracchus*, passage x. 2 & xi. 3); 1 MOMMSEN, *supra* note 85, at 269, 278.

¹⁸² See THE ATTIC NIGHTS OF AULUS GELLIUS 77–81 (John C. Rolfe transl., 1927; Loeb Classical Lib. ed. 1982) (passage vi.19.1–7 (quoting Cornelius Nepos) & vi.19.8 (quoting Valerius Antias)); 11 LIVY, *supra* note 35, at 181–95 (passage xxxviii. 52–55).

¹⁸³ See 14 LIVY, *supra* note 35, at 57 (passage *Per.* 55).

¹⁸⁴ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 143–44; BORKOWSKI & PLESSIS, *supra* note 99, at 10. See also CICERO, DE LEGIBUS, *supra* note 61, at 499 (passage iii.34); 10 PLUTARCH, *supra* note 98, at 159–69 (*Tiberius Gracchus*, viii.10); *id.* at 207–09 (*Gaius Gracchus*, v). For the text of the

far as to depose his tribunitial colleague, Octavius, on the ground that he was not sufficiently supportive of the reforms and thus not discharging the will of the people.¹⁸⁵ Although the Gracchi were challenged by senators anxious to preserve their institutional power,¹⁸⁶ and both Gracchi brothers were ultimately assassinated in senatorial-led conspiracies, the Senate acquiesced here to limits on their fiscal authority in a way that set an adverse precedent for the future.

In short, the Gracchi led a popular movement that the conservative Polybius recognized as meaning “the senate is afraid of the masses and must pay attention to the popular will.”¹⁸⁷ Cicero was more blunt in his assessment, stating that the Gracchi’s actions “through the tribunate [led to] a complete revolution in the State,” which later contributed to the fall of the Roman Republic.¹⁸⁸ Most importantly of all, this traditional history of tribunitial power was well known to the Framing Generation. As James Madison observed in *Federalist* 63:

The Tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. The fact is the more remarkable, as unanimity was required in every act of the Tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government, which has the people on its side.¹⁸⁹

Indeed, there was much debate at the Federal Convention in Philadelphia as to whether the power of the tribunes waxed or waned, depending on the increase in their numbers and a requirement of unanimity for certain actions.¹⁹⁰

Under Roman constitutional law, the right of provocatio and the tribune’s corollary power of auxilium was subject to one significant caveat: it could be suspended in times of grave emergency for the Republic. In such circumstances, the Senate could decree in advance that the magistrates

Gracchi’s agrarian statute, see ANCIENT ROMAN STATUTES: A TRANSLATION, WITH INTRODUCTION, COMMENTARY, GLOSSARY, AND INDEX 50 (Allan Chester Johnson, Paul Robinson Coleman-Norton & Frank Card Bourne, eds., 1961).

¹⁸⁵ See 14 LIVY, *supra* note 35, at 61–63 (passage lviii); 10 PLUTARCH, *supra* note 98, at 177–79, 181–83 (*Tiberius Gracchus*, xi, xiv.5–8; xv.2–4). For a full account of Roman disputes on agrarian reform, see A.H. BERNSTEIN, *TIBERIUS GRACCHUS: TRADITION AND APOSTASY* (1978); DAVID STOCKTON, *THE GRACCHI* (1979).

¹⁸⁶ See NELSON, *supra* note 67, at 49–68.

¹⁸⁷ 3 POLYBIUS, *supra* note 1, at 307 (passage vi.16.5). For a gloss on Montesquieu’s discussion of this account, see CARRESE, *supra* note 75, at 58.

¹⁸⁸ CICERO, *DE LEGIBUS*, *supra* note 61, at 483 (passage iii.20). See also NELSON, *supra* note 67, at 57–59.

¹⁸⁹ THE FEDERALIST NO. 63, *supra* note 27, at 389 (No. 63) (James Madison).

¹⁹⁰ See 1 FARRAND, *supra* note 75, at 152 (where James Madison observed that “[t]he example of the Roman Tribunes was applicable. They lost their influence and power, in proportion as their number was augmented. The reason seemed to be obvious: They were appointed to take care of the popular interests & pretensions at Rome, because the people by reason of their numbers could not act in concert; were liable to fall into factions among themselves, and to become a prey to their aristocratic adversaries.”); *id.* at 153 (where James Dickenson countered that “[h]e did not admit that the Tribunes lost their weight in proportion as their no. was augmented and gave a historical sketch of this institution.”) (Madison’s notes) (June 7, 1787).

“were to defend the Republic and ensure that it come to no harm,”¹⁹¹ which meant the suspension of provocatio. This formulation of the Senate’s action was known to the Romans as the *senatus consultum ultimum* (literally, the Senate’s “final decree”), or more literally as the *senatus consultum de re publica defendenda*.¹⁹²

There are a number of famous, or rather infamous, examples of a final decree being used during the Roman Republic to suspend provocatio and auxilium. The first was in 121 BCE when the immensely popular plebian tribune Gaius Gracchus was assassinated by a cabal of senators opposed to his land reform efforts and other proposed constitutional amendments. Like his older brother Tiberius, Gaius Gracchus had a huge following amongst the citizenry and wielded the tribunitial power in a way that challenged the prerogatives of the Senate. One of the consuls for that year, L. Opimius, ordered the killing of Gracchus and a colleague, M. Fulvius Flaccus, along with their supporters, without due process of law.¹⁹³ The Senate voted a *senatus consultum ultimum* intending to retroactively suspend provocatio and to immunize the sitting consul from subsequent prosecution for arrogating the citizens’ due process rights and violating the sacrosanctity of the tribunes. The precedential value of this incident was hotly disputed in the following decades of the Republic, with many authorities arguing that a retroactive suspension of provocatio and auxilium was unconstitutional, especially as applied to tribunes who offered no direct violence or immediate threat to the Republic.¹⁹⁴

A second influential precedent involved the use of the final decree during the Catiline conspiracy during the consulship of Marcus Tullius Cicero in 63 BCE. Lucius Sergius Catilina was a scion of a patrician family whose political fortunes were thwarted by charges of electoral fraud by Cicero in the 63 BCE consular elections. Promoting a policy of debt relief for citizens, Catilina managed to acquire a huge following among the plebian classes and began to actively plot a forcible overthrow of the government. Cicero got wind of the conspiracy, averted an assassination attempt, and convened the Senate in order to pass a final decree allowing for the immediate apprehension of Catilina and his co-conspirators.¹⁹⁵ Julius Caesar, then a junior member of the Senate, made an impassioned plea that due process should still be accorded to the conspirators and they should not be subject to extrajudicial execution.¹⁹⁶

¹⁹¹ CICERO, PHILIPPICS, *supra* note 88, at 169 (passage v.34); *id.* at 221 (passage viii.14); 7 PLUTARCH, *supra* note 98, at 119 (*Cicero*, xv). *See also* LINTOTT, THE CONSTITUTION, *supra* note 33, at 89–93 (on these so-called “final decrees.”); GREENIDGE, *supra* note 46, at 278–81.

¹⁹² *See* JULIUS CAESAR, THE CIVIL WARS 9–13 (A.G. Peskett, transl. 1914; Loeb Classical Lib ed. 1979) (passages i.5.3 & i.7.5). *See also* LINTOTT, THE CONSTITUTION, *supra* note 33, at 89–90.

¹⁹³ *See* 14 LIVY, *supra* note 35, at 73 (passage *Per.* 61); MARCUS TULLIUS CICERO, DE ORATORE (passage ii. 106 & 132); MARCUS TULLIUS CICERO, PRO SESTIO (passage 140); MARCUS TULLIUS CICERO, PARTITIONES ORATORIAE (passage 104). *See also* ANDREW W. LINTOTT, VIOLENCE IN REPUBLICAN ROME 167–68 (1968) [hereinafter LINTOTT, VIOLENCE].

¹⁹⁴ *See* LINTOTT, THE CONSTITUTION, *supra* note 33, at 89–90.

¹⁹⁵ *See* T.N. MITCHELL, *Cicero and the Senatus Consultum Ultimum*, 20 HISTORIA 47 (1971).

¹⁹⁶ *See* CAESAR, *supra* note 192, at 13 (passage i.7.5); SALLUST, THE CONSPIRACY OF CATILINE AND THE WAR OF JUGURTHA 102 (Thomas Heywood, transl., 1967) (*Catiline*, passages li. 17–26; li. 35–36). *See also* LINTOTT, THE CONSTITUTION, *supra* note 33, at 90.

The combined precedents of the final decrees from 121 and 63 BCE were used to give the Senate and senior magistrates extensive powers in the face of real or perceived dangers to the Republic. Many writers of the period, including Sallust,¹⁹⁷ argued that such open-ended final decrees, especially in the face of inchoate threats, were an unconstitutional abrogation of the right of provocatio and the auxilium power of the tribunes. As Sallust observed, “once a consul has drawn his sword by virtue of the decree of the senate . . . who will fix a limit for him or who will control him.”¹⁹⁸

However, it is also important to realize that provocatio and auxilium were not automatically suspended with each appointment of a dictator despite the dictator’s appointment to deal with an extraordinary conflict. This may have turned on a delicate separation of powers question in the Roman Republic. Dictators were typically appointed by sitting consuls, and a dictator’s term ended with that of the magistrate who appointed him. Provocatio could only be suspended by senatorial decree. When some Roman sources indicated that there was no right of provocatio against a dictator, it was with the caveat that a dictator’s appointment was accompanied by a final decree from the senate.¹⁹⁹ Without such senate action, the right of provocatio and the tribunitial powers of auxilium still subsisted within the city limits of Rome, and were exercised against dictators.²⁰⁰ There were precedents for a dictator being prosecuted for violations of provocatio after fulfilling his duties,²⁰¹ and the *lex repetundarum* (123 BCE) specifically did not grant any immunity to dictators after they left office.²⁰²

IV. ROMAN PRACTICE AND THE HABEAS SUSPENSION CLAUSE

The Roman practice of provocatio and auxilium was well-documented by the ancient authorities, sources that were well known to the Framing generation. As discussed in the writings of Livy, Plutarch, Cicero, Caesar, and Sallust, Roman Republican executive power was checked by a number of devices, both structural and rights-based. The multiplicity of executive office (the two consuls and multiple praetors), counterpoised with the prerogatives of the Senate, popular assemblies, and tribunes, enunciated a principle of distribution of powers under the Roman Republican Constitution, although not of separation of powers as we understand that

¹⁹⁷ See SALLUST, *supra* note 196, at 167 (*Jugurtha*, passage xxxi. 7–8). See also LINTOTT, VIOLENCE, *supra* note 193, at 162–68.

¹⁹⁸ SALLUST, *supra* note 196, at 105 (*Catline*, passage li. 36).

¹⁹⁹ See 1 LIVY, *supra* note 35, at 277 (passages ii.18.8 & iii.20.8); 3 PLUTARCH, *supra* note 98, at 145 (*Fabius Maximus*, ix. 1); Dig. 1.2.2.18 (Pomponius) (“dictators were put in office from whom there was no right of appeal and to whom even the capital penalty was entrusted. It was not lawful for the magistrate to be kept in office longer than six months, since he held sovereign power.”); Zonaras (passage vii.13.13). See also Ferejohn & Pasquino, *supra* note 128, at 227.

²⁰⁰ See 3 LIVY, *supra* note 35, at 367 (passage vii.3.9) (363 BCE incident); 4 *id.* at 121–33 (passage viii. 32–33) (a dictator’s lieutenant (the *magister equitum*) sought and received auxilium from a tribune); *id.* at 263–65 (passage ix.26.7–16) (314 BCE incident in which an appeal of a dictator’s action was taken by auxilium). See also CICERO, DE OFFICIIS, *supra* note 135, at 391–93 (passage iii. 112).

²⁰¹ See LINTOTT, THE CONSTITUTION, *supra* note 33, at 111–12.

²⁰² See 2 MOMMSEN, *supra* note 85, at 159, 173–78.

concept today. *Provocatio* and *auxilium*, by way of contrast, was a unique rights-based paradigm in Roman law, an evocation of due process. But the individual right of *provocatio* and the tribunitial power of *auxilium* was also premised on important structural considerations, insofar as those rights and powers of assistance to individual citizens could be suspended under very specific circumstances (in order “to defend the Republic and ensure that it come to no harm”) and by passing a prescribed institutional check (a vote in the Senate).

A. THE FRAMERS’ APPLICATION OF ROMAN PRACTICE

A Roman citizen’s right of *provocatio*, coupled with the tribunitial power of *auxilium*, was an ancient analogue of habeas corpus. Additionally, the exigent circumstances for the suspension of habeas corpus closely mirror those for the derogation of *provocatio* and *auxilium*. As the United States Constitution provides, “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it,”²⁰³ and is, according to Justice Robert Jackson, the most notable emergency provision in the Constitution.²⁰⁴ The Framers’ understanding of the “Privilege of the Writ of Habeas Corpus” was primarily influenced by British precedents, especially as conveyed in such sources as British statutory law,²⁰⁵ decisions,²⁰⁶ and summaries by writers such as William Blackstone.²⁰⁷ It is important to realize, however, that British law was rather less helpful to the Framing Generation in explaining the specific conditions or timing for the suspension of habeas corpus.²⁰⁸ The reason for this was that suspensions by Parliament were often operative against a limited class of persons declared to be treasonous or in rebellion against the Crown and were essentially bills of attainder,²⁰⁹ a form of legislation proscribed by the United States Constitution.²¹⁰

Early American state constitutions and practice did provide some guidance for the Framers. The Massachusetts Constitution of 1780 allowed for the suspension of habeas corpus “by the legislature . . . upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve

²⁰³ U.S. CONST. art. I, § 9, cl. 2.

²⁰⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (Suspension Clause is the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis.”).

²⁰⁵ See, e.g., Habeas Corpus Act, (1679) 31 Car. 2, c. 2 (Eng.). See also Hamdi v. Rumsfeld, 542 U.S. 507, 561–62 (2004) (Scalia, J., dissenting) (collecting instances of Parliamentary suspensions); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. (forthcoming 2008) (section II.D) (discussing Parliamentary suspensions of the writ).

²⁰⁶ See, e.g., *Darnel’s Case*, (1627) 3 How. St. Tr. 1; *Chambers’s Case*, (1629) 79 Eng. Rep. 746 (K.B); *Opinion on the Writ of Habeas Corpus*, (1758) 97 Eng. Rep. 29, 31–51 (H.L.).

²⁰⁷ See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 686–93 (1890).

²⁰⁸ But see Ferejohn & Pasquino, *supra* note 128, at 214 n.15 (taking the opposite view); Halliday & White, *supra* note 205, at (forthcoming 2008) (sections IV.C & V.A & V.B.1) (taking a more nuanced view).

²⁰⁹ See Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 339–40 (1952) (discussing Parliamentary suspensions of habeas corpus in 1688, 1696, 1714, 1722, 1744, and during the American Revolution).

²¹⁰ See U.S. CONST. art. I, § 9, cl. 3.

months.”²¹¹ The New Hampshire Constitution of 1784 provides for an even shorter suspension period of three months.²¹² In response to Shay’s Rebellion in western Massachusetts (1786-87), the Massachusetts legislature suspended the writ by a statute providing that “any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires” could be “continued in imprisonment” until discharged by the Governor or the General Court of the state.²¹³ The language used by the Massachusetts legislature was resonant with the Roman Senate’s final decree to “defend the Republic and ensure that it come to no harm.”

At the Constitutional Convention in Philadelphia, relatively little attention was paid to what would later become the Suspension Clause. Charles Pinkney was the first to propose language regarding the privilege of habeas corpus, drawing from the Massachusetts Convention but leaving open for further debate the number of months the privilege could be suspended by Congress.²¹⁴ The Convention’s Committee of Detail draft contained no provision at all concerning habeas corpus.²¹⁵ On August 28, 1787, Pinkney renewed his motion, this time indicating a maximum suspension time of twelve months.²¹⁶ In the short debate that followed, Edmund Rutledge of South Carolina argued that there should be no suspension clause at all, and this view was seconded by James Wilson of Pennsylvania. A proposal by Gouverneur Morris of New Jersey that the writ could be suspended “in cases of Rebellion or Invasion, the Public Safety may require it,” without any time limitation on the suspension, was ultimately adopted at the Convention.²¹⁷ Nevertheless, the ultimate placement of the Habeas Suspension Clause within the set of provisions limiting Congress’s powers—Article I, section 9 of the text—strongly indicated to at least some of the Framers that they intended to break with the British Parliamentary practice of allowing suspension on spurious grounds and instead prescribe a rule of extreme necessity for such arrogations of the privilege of habeas corpus.²¹⁸

During the ratification debates following the Philadelphia Convention, attention was paid to the Habeas Suspension Clause. Some of this discussion focused on the broader question of whether the Constitution should grant the national government implied powers, and whether the

²¹¹ MASS. CONST. OF 1780, pt. 2, ch. 6, art. 7.

²¹² N.H. CONST., pt. 2, art. 91.

²¹³ MASS. LAWS OF 1786, c. 42. *See also Hamdi*, 542 U.S. at 562–63 (Scalia, J., dissenting).

²¹⁴ *See FARRAND*, *supra* note 75, at 341 (Aug. 20).

²¹⁵ *See id.* at 176 (Aug. 6).

²¹⁶ *See id.* at 438 (Aug. 28).

²¹⁷ *See id.* at 435 (Aug. 28) (three state delegations—North Carolina, South Carolina, and Georgia—voted against the suspension provision). *See also* ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 12–18 (2001); Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 *BUFF. L. REV.* 451, 455–57 (1996) (summarizing the debates at the Philadelphia Convention) [hereinafter *Suspension Clause*]; Francis Paschal, *The Constitution and Habeas Corpus*, 1970 *DUKE L.J.* 605, 608–17.

²¹⁸ *See* Collings, *supra* note 209, at 344–45; *Developments in the Law - Federal Habeas Corpus, The Suspension Clause*, 83 *HARV. L. REV.* 1263, 1264 (1970) [hereinafter *Developments in Law*]; Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2 of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1483–86 (2005).

grant of the writ of habeas corpus was in fact an implied power based on the negative wording and implications of the Clause's text.²¹⁹ More significant for the purpose of this Article, however, were the concerns raised over the tyrannical nature of *any* suspension of the privilege of habeas corpus. Fuel was added to the fire when one of the Philadelphia Convention delegates, Luther Martin of Maryland, disclosed in a series of speeches and pamphlets the internal deliberations of the Convention on this subject. In his March 21, 1788 Address to the Citizens of Maryland, Martin noted that “[i]t was my wish that the general government should not have the power of suspending the privilege of the writ of Habeas Corpus, as it appears to me altogether unnecessary, and that the power given to it, may and will be used as a dangerous instrument of oppression; but I could not succeed.”²²⁰ In a later speech, he elaborated that:

[I]f we gave this power to the general government, it would be an engine of oppression in its hands; since, whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an act of rebellion, and, suspending the habeas corpus act, may seize upon the person of those advocates of freedom, who have had virtue and resolution enough to excite the opposition, and may imprison them during its pleasure, in the remotest part of the Union. . . .²²¹

At the Massachusetts Ratification Convention debate of January 26, 1788, John Adams (who was not present at the Philadelphia Convention but nonetheless defended the Habeas Suspension Clause) was questioned as to why the proposed federal constitution did not contain the same time proviso as the Massachusetts Constitution, which limited any suspension of habeas corpus to twelve months. Judge Francis Dana responded that time limits were illusory and that:

[T]he safest and best restriction, therefore, arises from the nature of the cases in which Congress are authorized to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain terms, facts of public notoriety, and whenever these shall cease to exist, the suspension of the writ must necessarily cease also.²²²

At other state ratifying conventions, similar reservations were voiced.²²³ In private correspondence, Thomas Jefferson recorded his objection to the

²¹⁹ See *Suspension Clause*, *supra* note 217, at 460–63.

²²⁰ Address No. II of Luther Martin to the Citizens of Maryland (Mar. 21, 1788), in 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 452, 456 (Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., 1986).

²²¹ Luther Martin, Genuine Information VIII (Jan. 22, 1788), in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 433, 434 (Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., 1984). See also Ekeland, *supra* note 218, at 1486 & n.80.

²²² See ELLIOT, *supra* note 76, at 108–09.

²²³ See Dissent of the Minority of the Pennsylvania Convention (Dec. 12, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617, 630 (Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., 1976) (calling for a Bill of Rights securing “personal liberty by the clear and unequivocal establishment of the writ of habeas corpus.”); Letter of A Georgian to the Gazette of the State of Georgia (Nov. 15, 1787), in *id.* at 240 (suggesting that the Clause read: “[t]he privilege of the Writ of Habeas Corpus shall remain, without any exceptions whatever, inviolate forever.”).

Habeas Suspension Clause as drafted.²²⁴ And, as the acting French minister to Philadelphia reported to his superiors in Paris, “The Congress will suspend the writ of habeas corpus in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? The usurper.”²²⁵

The last pieces of evidence of the Framing Generation’s intent as to the Habeas Suspension Clause came in the first decade of the nineteenth century, during the administration of Thomas Jefferson. Firstly, there was the influential publication in 1803 of St. George Tucker’s annotation of Blackstone’s *Commentaries*.²²⁶ Speaking specifically to the power to suspend the privilege of habeas corpus, Tucker commented that:

In England the benefit of this important writ can only be suspended by authority of parliament. It has been done several times of late years, both in England and in Ireland, to the great oppression of the subject, as hath been said. In the United States, it can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion. A suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ. The legislatures of the respective states are left, I presume, to judge of the causes which may induce a suspension within any particular state. This is the case, at least, in Virginia.²²⁷

Tucker’s view, that habeas corpus could not be suspended except in “cases of actual rebellion, or invasion,” and that a “suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ,”²²⁸ stands as the strongest then-contemporary evidence of judicial review of the political branches’ decision-making for suspension of the writ. But close examination of other contemporary sources, especially in view of their reliance on Roman Republican authorities, indicates precisely the opposite result: judicial review of Congress’s suspension acts was never contemplated.

The proof of this comes in the 1807 debates in Congress over President Jefferson’s proposed suspension of the writ of habeas corpus in the

²²⁴ See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 482 (Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., 1983), (stating that, “I do not like . . . the omission of a bill of rights providing clearly and without the aid of sophisms for . . . the eternal & unremitting force of the habeas corpus laws”); Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in 8 *id.* at 354 (hoping that Constitution would be amended “by a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus.”); Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), in *id.* at 500 (discussing the same proposal).

²²⁵ Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 422, 424 (John P. Kaminski, Richard Leffler, and Gaspare J. Saladino, eds., 1981).

²²⁶ ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (Rothman Reprints 1969) (1803). For Tucker’s influence, see Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

²²⁷ 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 291–92 (Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., 1976).

²²⁸ *Id.*

aftermath of the Burr Conspiracy.²²⁹ Eric Bollman and Samuel Swartwout had been arrested in New Orleans for their participation in the Burr Conspiracy and were transported to Washington, D.C. under military custody. The Jefferson administration, fearing that the conspirators would be released on a writ of habeas corpus, convinced the Senate to sit in a closed session and pass a bill to suspend habeas corpus. This was the first attempt to invoke the Suspension Clause. The Senate adopted the bill to suspend the writ for three months, and then referred it to the House of Representatives, requesting that the House consider it in a secret session.²³⁰ The House refused, and rejected the bill in open session by a vote of 113-19.²³¹ The course of the debate in the House revealed several crucial understandings of the constitutional text, many of which were based on Roman Republican practice.

James Elliot, a representative from New Hampshire and a member of the Federalist Party, commented that:

We can suspend the writ of habeas corpus only in a case of extreme emergency; that alone is *salus populi* which will justify this *lex suprema*. And is this a crisis of such awful moment? Is it necessary, at this time, to constitute a dictatorship, to save the people from themselves, and to take care that the Republic shall receive no detriment? What is the proposition? To create a single Dictator, as in ancient Rome, in whom all power shall be vested for a time? No; to create one great Dictator, and a multitude, an army of subaltern and petty despots; to invest, not only the President of the United States, but the Governors of States and Territories, and, indeed, all persons deriving civil or military authority from the supreme Executive, with unlimited and irresponsible power over the personal liberty of your citizens. Is this one of those great crises that require a suspension, a temporary prostration of the Constitution itself? Does the stately superstructure of our Republic thus tremble to its centre, and totter towards its fall? Common sense must give a negative answer to these questions.²³²

John Wayles Eppes, Thomas Jefferson's son-in-law and a Democratic-Republican party member from Virginia, amplified Elliot's point stating that, "I consider the provision in the Constitution for suspending the habeas corpus as designed only for occasions of great national danger. Like the power of creating a Dictator in ancient Rome, it prostrates the rights of your citizens and endangers public liberty."²³³

The balance of the debate focused on the political and legal aspects of Congress's decision to suspend habeas. John Smilie, a Republican member from Pennsylvania, noted that "[t]he convention who framed th[e

²²⁹ For more on former Vice President Aaron Burr's alleged conspiracy to overthrow U.S. sovereignty in the western and southern regions of the United States, see BUCKNER F. MELTON, JR., *BURR: CONSPIRACY TO TREASON* (2002); 1 ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 247-48 (1999). See also *Hamdi*, 542 U.S. at 563 (Scalia, J., dissenting); Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 162.

²³⁰ See 16 ANNALS OF CONG. 402 (1807).

²³¹ See WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 135-37 (1980).

²³² 16 ANNALS OF CONG 406-07.

²³³ *Id.* at 411.

Constitution], believing that there might be cases when it would be necessary to vest a discretionary power in the Executive, have constituted the Legislature the judges of this necessity, and the only question now to be determined is[.] Does this necessity exist? There must either be in the country a rebellion or an invasion, before such an act can be passed.”²³⁴ Likewise, Samuel Whittlesey Dana, a Federalist from Connecticut, noted that:

As, on the one hand, I was inclined to believe that the judgment of the Senate had, on this occasion, been tinged by a strong abhorrence of rebellion; so I was willing, on the other, to take time to guard myself against an equally strong feeling of abhorrence of dictators. But, on one principle, I cannot agree to consider this bill as a proper subject of investigation, for one moment. I perceive, on further examination of the bill, that the Senate have provided for its suspension, in cases where persons have been already presented. Had it been confined to future arrests, I might have agreed to deliberate on it, but viewing it in the light of an ex post facto law, I must give it my instantaneous negative.²³⁵

The denouement of the Burr Conspiracy was the decision by the United States Supreme Court in *Ex Parte Bollman and Swartwout*,²³⁶ which arose when the conspirators, later in the custody of the D.C. Circuit Court on charges of treason, proceeded to seek a common law writ of habeas corpus in the Supreme Court, which the Court, in a decision written by Chief Justice Marshall, agreed that it had the jurisdiction to grant.²³⁷ The Court held that “[i]f at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.”²³⁸

The Court’s view that Congress’s decision to suspend habeas corpus was a political question and not otherwise subject to judicial review was supported by its contemporary commentators. William Rawle, writing in the second edition of *A View of the Constitution of the United States* (1829), observed that:

[W]e see that in this country it cannot be suspended even in cases of rebellion or invasion, unless the public safety shall require it. Of this necessity the Constitution probably intends, that the legislature of the United States shall be the judges. Charged as they are with the preservation of the United States from both those evils, and superseding the powers of the several states in the prosecution of the measures they may find it expedient to adopt, it seems not unreasonable that this control

²³⁴ *Id.* at 422–24.

²³⁵ *Id.* at 424.

²³⁶ 8 U.S. (4 Cranch) 75 (1807).

²³⁷ *See id.* at 101.

²³⁸ *Id.* *See also* Halliday & White, *supra* note 205 (section VI.C) (for a full history of the *Bollman* case); Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. (forthcoming 2008) (section II.B) (discussing the *Bollman* decision).

over the writ of habeas corpus, which ought only to be exercised on extraordinary occasions, should rest with them.²³⁹

Finally, Justice Story, in his *Commentaries on the Constitution* (1833), wrote that:

[T]he right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by congress since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.²⁴⁰

In reviewing the Framing Generation's consideration of the Habeas Suspension Clause, it is striking to note the extent to which Roman Republican practice was invoked. At the Philadelphia and state ratifying conventions, in contemporary treatises and in the congressional debate of the first proposed invocation of suspension, substantial attention was paid to the Roman Republican employment of temporary dictators. These temporary dictators handled authentic emergencies in which the life of the Republic was endangered, the terms of the Roman Senate's *consultum ultimum*, the six-month time period for suspension, and the limitations on the right of provocatio and the tribune's power of auxilium.

B. LESSONS FOR THE CURRENT DEBATES ON THE SUSPENSION CLAUSE

The original intent of the Habeas Suspension Clause is relevant to three questions as to the Clause's proper construction: (1) whether the President may unilaterally suspend the privilege of habeas corpus; (2) whether a decision by Congress to suspend habeas is subject to judicial review or is, instead, a political question; and (3) whether habeas may be retroactively suspended for those already in custody. Each of these three issues remain outstanding in contemporary constitutional discourse, despite previous United States Supreme Court decisions and a handful of suspensions of the privilege of habeas corpus during the history of the American Republic. For each of these questions, Roman Republican practice well known to the Framing Generation, may be significant for an analysis of the Suspension Clause's original intent.

1. Unilateral Suspension by the President

The early practice of our Presidents was to view congressional suspension of habeas corpus as a constitutional necessity. For example, in the 1807 debates regarding suspension during the Burr Conspiracy,

²³⁹ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 118–19 (1970) (1829).

²⁴⁰ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES Vol. III, Ch. 32, § 1336 (1833).

President Jefferson acquiesced when the House of Representatives declined to pass a suspension bill.²⁴¹ This is how matters stood until the Civil War.²⁴²

In 1861, during the opening stages of the Civil War, newly elected President Abraham Lincoln found himself in an untenable position. The South was in open rebellion, with a number of Southern states having already seceded from the United States. Even worse, the situation in Washington, D.C. and Maryland was disintegrating quickly. Southern sympathizers in Maryland sought to block recruitment of militia or army units, and riots broke out in Baltimore to block reinforcements heading south to protect the vulnerable capital. Acting in response to this increasingly dire situation, President Lincoln issued an executive order delegating to certain military officers the power to arrest civilians believed to be fomenting unrest and to hold them in military custody, and that the privilege of habeas corpus would be suspended for those individuals.²⁴³

This act of unilateral suspension was challenged just a few months later when John Merryman, a Baltimore resident, was taken into military custody. He applied for a common law writ of habeas corpus from Chief Justice Roger Taney, who was sitting as Circuit Justice.²⁴⁴ When the writ was returned unexecuted, and Merryman was not produced before Chief Justice Taney, the explanation by the military commander was that President Lincoln had authorized him to suspend the writ of habeas corpus.²⁴⁵ In his court opinion, Taney began by observing that “[t]he clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.”²⁴⁶ Taney observed that not even President Jefferson had sought to override the congressional refusal to suspend.²⁴⁷ Taney went on to elaborate on the original intent of the Suspension Clause, stating that:

The great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of

²⁴¹ See Collings, *supra* note 209, at 340.

²⁴² But see Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233 (1981) (for General Andrew Jackson’s suspension of habeas in occupied New Orleans in 1815).

²⁴³ See DANIEL FARBER, LINCOLN’S CONSTITUTION 16–17, 158–59 (2003).

²⁴⁴ See *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861). For the controversy surrounding the capacity in which Taney issued his opinion in *Merryman*, see Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temple L. Rev. (forthcoming 2007) (n.2).

²⁴⁵ See *Merryman*, 17 F. Cas. at 146.

²⁴⁶ *Id.* at 148.

²⁴⁷ See *id.*

the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.²⁴⁸

Taney then proceeded to state that neither the President nor the executive branch in general had any right to unilaterally suspend the privilege of habeas corpus.²⁴⁹ He concluded that:

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.²⁵⁰

After reviewing Blackstone's *Commentaries*, Story's *Commentaries on the Constitution*, and Chief Justice Marshall's decision in *Ex Parte Bollman*, Taney was confirmed in his opinion that the President could not constitutionally suspend habeas unilaterally.²⁵¹ Merryman was subsequently released to civilian courts, where a grand jury indicted him for conspiracy to commit treason; he was ultimately released on bail and never tried.²⁵²

President Lincoln virtually ignored Taney's ruling in *Ex Parte Merryman*,²⁵³ and other decisions seemed to uphold Lincoln's unilateral suspensions based on his commander-in-chief and militia powers.²⁵⁴ In a July 4th special message to Congress, he excoriated Taney's opinion and made his famous argument of necessity, asking whether "all the laws *but one*" should go unexecuted "and the government itself go to pieces, lest that one be violated."²⁵⁵ Attorney General Edward Bates issued an opinion the following day, upholding the President's unilateral powers of suspension.²⁵⁶

In August 1861, Congress retroactively approved Lincoln's acts, proclamations, and orders regarding the Army and Navy "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."²⁵⁷ However, this congressional act did not specifically address or support the President's suspension of habeas corpus.²⁵⁸ Nevertheless, President Lincoln continued issuing such suspension orders, gradually expanding the delegation of authority to

²⁴⁸ *Id.*

²⁴⁹ *See id.* at 148–49.

²⁵⁰ *Id.* at 149.

²⁵¹ *See id.* at 150–52.

²⁵² *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1537 (2003).

²⁵³ *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 67 (2002). *See generally* WILLIAM H. REHNQUIST, CIVIL LIBERTY AND THE CIVIL WAR (October 26, 1996). Lincoln considered having Taney arrested in connection with the Merryman matter. *See* H. HYMAN, A MORE PERFECT UNION (1973).

²⁵⁴ *See, e.g., Ex parte Field*, 9 F. Ca. 1, 8 (No. 4761) (C.C.D. Vt. 1862). *See also* Vladeck, *supra* note 244.

²⁵⁵ Abraham Lincoln, Special Session Message, July 4, 1861, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 20, 25 (James D. Richardson ed., 1900).

²⁵⁶ *See* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op Atty-Gen 74 (1861).

²⁵⁷ Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326.

²⁵⁸ *But see* FARBER, *supra* note 243, at 161–62.

military officers until it covered the entire nation, and not just active warfront or occupied areas.²⁵⁹ On March 3, 1863, Congress adopted a statute that granted Lincoln the authority to discretionarily suspend the privilege of habeas corpus, while providing for a modicum of judicial review; lists of arrestees had to be submitted to the local federal district court, and if a grand jury failed to indict, the court could order a detainee's release.²⁶⁰

Subsequent suspensions of habeas corpus occurred in 1871 in South Carolina to combat the Ku Klux Klan²⁶¹ in the occupied Philippines after the Spanish-American War,²⁶² and in Hawaii during World War II.²⁶³ However, these suspensions all occurred by virtue of delegated authority under an act of Congress, and no president since Lincoln has purported to unilaterally suspend habeas corpus. The practice of suspending habeas corpus after a grant of authority by Congress has ostensibly been recognized by the United States Supreme Court in recent decisions, although no decisions have expressly dealt with an assertion of presidential power to unilaterally suspend habeas corpus.²⁶⁴

Roman Republican practice, as understood by the Framers, supports the conclusion that only Congress has the power to suspend the privilege of habeas corpus and that the President may not (without some form of delegated power from Congress) purport to do so. President Lincoln's and Attorney General Bates's defense of their unilateral suspension arose from what the Constitution does *not* say rather than what it does say; nowhere in the text of the Constitution does it directly bar the president from suspending habeas corpus.²⁶⁵ Some scholars have suggested that the Suspension Clause's placement in Article I, which in Section 9 deals with Congress's powers and the limitations thereon, may simply have been serendipitous, and therefore should not be assumed to be a constitutional

²⁵⁹ See *id.* at 159. See also Proclamation No. 1, 13 Stat. 730 (1862).

²⁶⁰ See Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863) (repealed 1873).

²⁶¹ See Act of April 20, 1871, ch. 22, § 4, 17 Stat. 14–15; see also Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921 (1984).

²⁶² See Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692; see also *Fisher v. Baker*, 203 U.S. 174, 179–81 (1906).

²⁶³ See Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900); see also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 477 (1943).

²⁶⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 544–45 (2004) (stating that, “[i]n a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. . . . A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that ‘the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.’ Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.”) (alteration in original) (citation omitted); see also *id.* at 562 (Scalia, J., dissenting) (stating that, “[a]lthough this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I.”).

²⁶⁵ See U.S. CONST. art. II, § 2, cl. 1 (which states that, “[t]he President shall be the Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual Service of the United States. . . .”).

command against unilateral executive suspension.²⁶⁶ Additionally, if literally construed, the Suspension Clause means that no action can be taken when Congress is not in session. During the early years of the American Republic, this might have been up to six months out of the year.²⁶⁷

The Framing Generation would have taken seriously the Roman Republic's experience with the appointment of dictators to handle temporary emergencies and the Senate's role in suspending the privilege of provocatio and the tribune's power of auxilium. As already noted,²⁶⁸ a dictator was appointed by the annually-elected consuls and could only serve as long as the magistrate who appointed them. On the other hand, the passage of the *senatus consultum ultimum* (the "final decree") could only be done by the Senate. There was a clear distribution of powers in the Roman Republic: consuls (the Roman executive branch) appointed the dictator, but the suspension of provocatio and auxilium was only granted by the Senate. The two actions were not necessarily coterminous. A dictator could be appointed without the suspension of provocatio, and provocatio could be suspended without the appointment of a dictator. Nevertheless, the two actions—the recognition of a state of emergency and the suspension of individual judicial redress for a detention—were analytically separated in Roman constitutional law. Likewise, the Framers appeared to follow the same model, and to this extent were perhaps influenced more by Roman Republican precedents than British parliamentary practices.

2. Habeas Suspensions as Political Questions

As the Framers recognized, habeas corpus should not be suspended by Congress except in the most exigent of circumstances, "when in Cases of Rebellion or Invasion, the public Safety may require it."²⁶⁹ Moreover, the Suspension Clause refers only to putting into abeyance the "privilege of the writ of habeas corpus,"²⁷⁰ and not the writ itself. As the Supreme Court noted in *Ex Parte Milligan*, "The suspension of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."²⁷¹ This statement, found in dicta in *Ex Parte Milligan*, has been construed to mean that the "privilege" of habeas corpus is constrained by the further proceedings and the eventual discharge of the writ.²⁷² These can be suspended by Congress,

²⁶⁶ See FARBER, *supra* note 243, at 161–62; Ekland, *supra* note 218, at 1510–11; David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 & n.51 (2006).

²⁶⁷ See Ekland, *supra* note 218, at 1511; see also SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 75–77 (2006); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 224 (1948) (2002).

²⁶⁸ See *supra* Part III.B.

²⁶⁹ U.S. CONST. art. I, § 9, cl. 2.

²⁷⁰ *Id.*

²⁷¹ 71 U.S. (4 Wall.) 2, 130–31 (1886).

²⁷² See *Developments in the Law*, *supra* note 218, at 1265–66. But see *Ex Parte Zimmerman*, 132 F.2d 442, 445–46 (9th Cir. 1942) (rejecting Milligan's distinction). See Justice Haney's dissent for an opposing view, *id.* at 451.

but not the initial “show cause” order that issues from the court, demanding a written justification for an individual’s detention. Indeed, some have suggested that the “privilege” language of the Suspension Clause goes so far as to prohibit the targeting of specific individuals and to render unconstitutional any attempt to combine a suspension of habeas corpus with a bill of attainder.²⁷³

That still leaves the question of the extent to which Congress’s decision to suspend the privilege of the writ of habeas corpus—and the threshold determination that there is an actual “Case of Rebellion or Invasion [such that] the public Safety may require it”—can be reviewed or overturned by any court. Doctrinally, Congress’s decision to invoke the Suspension Clause would appear to be a paradigmatic political question, within the meaning of such canonical cases as *Baker v. Carr*.²⁷⁴ The decision to suspend habeas corpus appears from the text of Article I, Section 9 to be constitutionally committed to the political branches, specifically Congress.²⁷⁵ Congressional determinations under the Suspension Clause would appear to be as non-justiciable as the procedures for trying impeachments.²⁷⁶ Moreover, the language of the Suspension Clause is resonant with that of the Republican Guarantee Clause of Article IV, since both refer to the exigent circumstances of an invasion.²⁷⁷ To that end, jurisprudence has consistently held that matters arising under the Guarantee Clause are non-justiciable political questions.²⁷⁸ Nevertheless, some scholars have suggested that Congress’s decision to suspend habeas corpus is subject to judicial review,²⁷⁹ relying on isolated lower court decisions addressing the circumstances for the suspension of habeas corpus in the Territory of Hawaii during World War II.²⁸⁰

As a matter of original intent, it is highly unlikely that the Framing Generation would have perceived a judicial role in second-guessing Congress’s decision to suspend the writ. Indeed, the only contemporary evidence of judicial review for such decisions would have been St. George Tucker’s 1803 annotation of Blackstone, in which he remarked:

In the United States, it can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion. A suspension

²⁷³ See *Developments in the Law*, *supra* note 218, at 1266 n.18 (discussing views of Professor Freund in briefing in *United States v. Hayman*, 342 U.S. 205 (1952)).

²⁷⁴ 369 U.S. 186 (1962).

²⁷⁵ See *id.* at 210–11 (stating that, “[t]he nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the ‘political question’ label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”).

²⁷⁶ See *Nixon v. United States*, 506 U.S. 224 (1993).

²⁷⁷ See U.S. CONST. art. IV, § 4 (which states that, “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . . .”).

²⁷⁸ See *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

²⁷⁹ See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

²⁸⁰ See *Ex Parte Zimmerman*, 132 F.2d 442, 445 (9th Cir. 1942); *Ex Parte Duncan*, 66 F. Supp. 976 (D. Haw. 1944).

under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ.²⁸¹

Other contemporary publicists, including Justice Joseph Story, were equally adamant that suspensions of habeas corpus would not be subject to judicial review.²⁸²

The Framing Generation's appreciation of Roman Republican practice also supports the position of non-justiciability for habeas corpus suspensions. Once the Roman Senate adopted a *senatus consultum ultimum*, counseling that the Republic's magistrates "were to defend the Republic and ensure that it come to no harm,"²⁸³ no other constitutional body in the Roman Republic could challenge the suspension of *provocatio*. Not even the plebeian tribunes, who wielded the power of *auxilium*, could veto such an action by the Senate, as was demonstrated in the proscription of Gaius Gracchus and his followers in 121 BCE.²⁸⁴ Likewise, a final decree was not subject to referral to any of the Roman popular assemblies. It is true, however, that the consuls' appointment of a dictator did not necessarily contemplate the suspension of *provocatio* or the tribune's authority of *auxilium*, and there were instances in which a dictator who had been appointed in circumstances which did not implicate a final decree was held to account for his actions in affecting the life or liberties of Roman citizens.²⁸⁵ However, none of this detracted from the consistent Roman Republican precedent that when the Senate ordered a final decree, that decree was not subject to review by another constitutional body, including the praetor courts or a *quaestio perpetua* (a permanent criminal tribunal).

This understanding was reflected in the ratification debates of the United States Constitution. When the Framing Generation spoke of Roman dictators, it was with acknowledgment of the necessity of their appointment and the concomitant reduction of civil liberties, unreviewable by any other sources of constitutional power. In *Federalist 70*, Alexander Hamilton noted that:

Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.²⁸⁶

²⁸¹ 1 TUCKER, *supra* note 226, app. at 291–92.

²⁸² 3 STORY, *supra* note 240, § 1336 (stating that, "[i]t would seem, as the power is given to [C]ongress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body."): GREENIDGE, *supra* note 46, at 278–81.

²⁸³ CICERO, PHILIPPICS, *supra* note 88, at 291 (passage v.34); *id.* at 377 (passage viii.14); 7 PLUTARCH, *supra* note 98, at 119 (*Cicero*, xv). See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 89–93 (on these so-called "final decrees"); GREENIDGE, *supra* note 46, at 278–81.

²⁸⁴ See *supra* notes 193–194 and accompanying text.

²⁸⁵ See sources cited at note 200. See also LINTOTT, THE CONSTITUTION, *supra* note 33, at 112.

²⁸⁶ THE FEDERALIST NO. 51, *supra* note 27, at 423.

Likewise, at the Philadelphia Convention, Hamilton observed that “[e]stablish a weak government and you must at times overleap the bounds. Rome was obliged to create dictators.”²⁸⁷ Hamilton even went so far as to propose that Congress could appoint a dictator to handle particular emergencies.²⁸⁸

And during the 1807 debates in the House of Representatives concerning Thomas Jefferson’s proposed suspension of habeas corpus, James Elliot of New Hampshire declaimed:

We can suspend the writ of habeas corpus only in a case of extreme emergency; that alone is *salus populi* which will justify this *lex suprema*. And is this a crisis of such awful moment? Is it necessary, at this time, to constitute a dictatorship, to save the people from themselves, and to take care that the Republic shall receive no detriment? What is the proposition? To create a single Dictator, as in ancient Rome, in whom all power shall be vested for a time?²⁸⁹

The clear implication of these passages is that the drafters of the American Constitution, like the protagonists in Roman constitutionalism, understood that the power granted to Congress to suspend the writ of habeas corpus was extensive and effectively unreviewable. That is likely why the Suspension Clause was drafted with the built-in constraints of factual predicates (“Rebellion or Invasion”) for suspension, with a view to their ultimate consequence (as “the public Safety may require it”). But these elements, far from justifying judicial review (as some have speculated²⁹⁰), may actually counsel the opposite result; in the words of Chief Justice Marshall in *Ex Parte Bollman and Swartwout*, “If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide.”²⁹¹ More recently, judges have affirmed the same point in expansive terms,²⁹² but the basic proposition -- that a congressional determination to suspend habeas corpus is unreviewable -- continues to stand.

3. Retroactive Suspensions of Habeas Corpus

The most difficult question of original intent for the Suspension Clause is whether Congress has the power to *retroactively* suspend the privilege of habeas corpus for those already in custody. Indeed, there appears to have been virtually no contemporary consideration of this question at the Philadelphia Convention or state ratification debates. The only exception to be found is in the 1807 House of Representative debates about the proposed suspension of habeas corpus in light of the Burr Conspiracy. Representative Samuel Dana of Connecticut announced in the debate that:

²⁸⁷ 1 FARRAND, *supra* note 75, at 329 (1787) (Yates’s notes).

²⁸⁸ Notes of Alexander Hamilton in the Federal Convention of 1787, H.R. DOC. NO. 398, 69th Cong., 1st Sess. (1927) (June 1, 1787) (stating that, “[l]egislature may appoint a dictator when necessary.”).

²⁸⁹ 16 ANNALS OF CONG. 406–75 (1807).

²⁹⁰ See Tyler, *supra* note 279, at 365–66.

²⁹¹ 8 U.S. (4 Cranch) at 101.

²⁹² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 563–64 (Scalia, J., dissenting) (stating that, “[w]hen the writ is suspended, the Government is entirely free from judicial oversight.”).

I perceive, on further examination of the bill, that the Senate have provided for its suspension, in cases where persons have been already presented. Had it been confined to future arrests, I might have agreed to deliberate on it, but viewing it in the light of an ex post facto law, I must give it my instantaneous negative.²⁹³

In Representative Dana's view, because the suspension of habeas corpus was targeted against individuals already in custody, for whom writs had already been applied for, a retroactive suspension was unauthorized by the Constitution. Admittedly, Dana spoke in the argot of an ex post facto law, which was prohibited under the Constitution in the same section as the Suspension Clause,²⁹⁴ and not of a bill of attainder, but in substance it presented the same constitutional concern.

Despite this evidence of constitutional disapproval of retroactive suspensions, there is certainly evidence of United States constitutional activity supporting such a practice. As already discussed,²⁹⁵ during the Lincoln administration, Congress did purport to give some retroactive effect to the president's unilateral suspension orders (as effectuated through delegated authority to military officers), although it was by no means clear to what extent those suspensions were ratified, at least up until the passage of the Act of March 3, 1863. And although all subsequent suspensions have been prospective in effect,²⁹⁶ that does not conclusively rule out the possibility of renewal of the practice of retroactive approval.²⁹⁷

The position that the Framers would have taken from Roman constitutional procedure was that retroactive suspensions of *provocatio* and *auxilium* were highly disfavored. From Livy and Cicero, the Framing Generation would have recalled the analogous events of the extrajudicial killing of the plebian tribune Gaius Gracchus and his associates (including M. Fulvius Flaccus) in 121 BCE.²⁹⁸ The Roman Senate retroactively protected the consuls by passing a final decree, thereby immunizing their violations of *provocatio* under the *lex repetundarum* (passed just two years earlier in 123 BCE).²⁹⁹ For the remaining years of the Roman Republic, the events of 121 BCE were debated for their constitutional significance, especially during the Catiline Conspiracy that took place under Cicero's consulship in 63 BCE.³⁰⁰

It seems to have been this aspect of Roman constitutional practice that concerned the members of the House of Representatives during the Burr Conspiracy suspension debate. Representative Samuel Dana was most explicit in his concern for the retroactive effect of the proposed suspension of habeas. But other participants in the debate (including Representatives

²⁹³ 16 ANNALS OF CONG. 422–24 (1807).

²⁹⁴ U.S. CONST. art. I, § 9, cl. 3 (which states that, “[n]o Bill of Attainder or ex post facto law shall be passed.”).

²⁹⁵ See *supra* notes 257–260 and accompanying text.

²⁹⁶ See *supra* notes 261–63 and accompanying text.

²⁹⁷ See *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding against retroactivity of a provision related to habeas suspension).

²⁹⁸ See *supra* notes 193–194 and accompanying text.

²⁹⁹ See 2 MOMMSEN, *supra* note 85, at 159, 173–78.

³⁰⁰ See LINTOTT, *THE CONSTITUTION*, *supra* note 33, at 89–90; LINTOTT, *VIOLENCE*, *supra* note 193, at 167–68.

Elliot and Eppes) also invoked Roman Republican precedents to denounce retroactive withdrawals of protections for civil liberties.³⁰¹ The better view for United States constitutional practice, despite the ambivalent evidence of retroactive congressional approvals of presidential suspensions during the Civil War, is that Congress does not have the power under the Constitution to deny the privilege of habeas corpus to those already in detention prior to the suspension decree, or to particularly proscribe individuals (or narrow classes of persons) who are to be denied the privilege.

V. OUR CLASSICAL CONSTITUTION

A key criticism of the role of classicism in the development of the Constitution was the intellectual succor it gave to the Framers in seeing their creation as a set of structural safeguards, rather than as an affirmative set of liberties or rights vested in the people. As the Framing Generation seemed to believe, ancient polities had virtually no conception of individual rights. At its epitome, classical government existed only for the common weal. Liberal philosophy and the concept of individual rights were purely the product of the Enlightenment. But, as demonstrated here, Roman Republican practices did contain at least one commitment to an individual rights paradigm: the privilege of *provocatio* and specifically the plebian tribune's power of *auxilium*.

Even before the provisions of the Bill of Rights were deliberated in the aftermath of the state ratification debates, the main body of the Constitution contained many subtle but substantive aspects that served as structural safeguards on individual liberties. The Habeas Suspension Clause was certainly one of these provisions. And although the dichotomy between the structural constitution and rights constitution is a false one, and an anachronism that the Framers would have disavowed, it reveals a real tension between viewing the Constitution as either a classical instrument of divided and republican government, or as an Enlightenment vehicle for the vindication of individual liberties and personal freedoms. Of course, to state this tension this way may well mischaracterize the problem, for there can be no doubt that, to the extent that the Framers conceived of liberty, it was exclusively in the negative sense of individuals and social cohorts being free of government restrictions and coercions. This is certainly consistent with the lessons the Framing generation derived from classical antiquity's accounts of resistance to tyranny. In these respects, the *real* Enlightenment conception of liberty—the one the Framers understood and embraced—was actually quite consistent with the classical vision of a limited republican government.

Of course, that raises the quite uncomfortable problem of the Framers' insistence on extolling classical republican virtues. These included the discipline, austerity, rectitude and caution of citizens and leaders alike, the public's avoidance of avarice, luxury, and dissipation, and a common commitment to the public good. It is perhaps no surprise that John Adams

³⁰¹ See 16 ANNALS OF CONG. 403–15 (1807).

began his *Defence of the Constitutions of Government the United States* with a gloss on Cicero's aphorism, "*respublica est res populi*."³⁰² As James Madison pithily noted, "[n]o theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in a people, is a chimerical idea."³⁰³ The Framing Generation's rhetoric of classicism was therefore suffused with these values and aspirations,³⁰⁴ and perhaps this is what makes us uneasy today in sensing that the Framers may have actually *believed* all this. Articulated this way, classical republican virtues appear to be communitarian ideals, and may well pose a challenge to the rights-based, liberal Constitution many people embrace today. To the extent that modern American culture—with its emphasis on urban life, commercial economies, and entrepreneurial spirit—has moved away from the simple agrarian vision of classical republicanism, the Framers' ideals appear a little quaint, if not downright silly.³⁰⁵

Imposing a libertarian-communitarian construct on the classical thinking of the Framing generation may well be a pointless exercise. Classical texts and ancient history did not merely suggest that the only public virtue was subservience to a notional public good; if anything, the Framers may well have believed more than they publicly admitted that the notion of "mixed government," with different social cohorts (including the aristocracy and populace) balanced and poised for national purposes, was accurate. While Jefferson and Madison came to repudiate elitist notions such as the concept of a "natural aristocracy," at least in their later political writings, both admitted that public goods could never be equally distributed in a society that respected and valued talent. The Framers also constantly alluded to positive stories of ancient personages who sought fame and honor by affirmatively exercising effective leadership. And while unbridled ambition and demagoguery were obviously bad things, the Framers were as concerned about a government that was lethargic, unresponsive, and unable to unleash the creative energies of its citizens as they were about a regime that was despotic. The Framers' contemplation of the operations of the executive branch under the control of a single, nationally-elected and politically-independent official, as well as that person's control of the nation's foreign relations and war-making capacity, was premised on the ancient lesson of harnessing, and controlling, the aspirations of different individuals and social groups.

How much, then, of an intellectual debt does the Constitution—as distinct from the Framers—actually owe to antiquity? This Article has sought to provide one narrow case study of the classical influence upon the drafting of a particular set of provisions in the Constitution. The evidence seems clear that the Framers were mindful of Roman Republican precedents when they considered the key aspects of the habeas corpus suspension power: Should a president have the authority to unilaterally

³⁰² 4 WORKS OF JOHN ADAMS, *supra* note 72, at 295.

³⁰³ Quoted in PAUL M. SPURLIN, *MONTESQUIEU IN AMERICA, 1760-1801* 261–62 (1940).

³⁰⁴ See SELLERS, *supra* note 26, at 233–36.

³⁰⁵ See RICHARD, *supra* note 5, at 239.

declare a suspension, or must that power reside in the legislature? To what extent, if any, are the circumstances of such a suspension subject to judicial reviews? Can suspensions be made retroactive to cover particular detainees or suspects? Answers to each of these questions were provided in the classical record of Roman constitutionalism.

Without necessarily endorsing the originalism that is often expounded as a means for constitutional interpretation, one can still embrace the classical heritage of the Constitution on its own terms. The American constitutional experiment has proven itself as durable as the constitutions of Sparta, of the Roman and Punic Republics, and the Achaean and Aetolian Confederacies. While two centuries may not seem to be an extensive period of time in the annals of history, few republics have endured for so long under a single, consistent form of government. The genius of the Framing Generation in creating such a robust form of government—one that has survived sectional rivalry and civil war, vast territorial expansion and emergence into Great Power status, and amazing economic, social and cultural changes—would have been appreciated by their classical forebears. So instead of seeing the American Founding moment as exclusively the making of a new world order—a *Novus Ordo Seclorum*—it may do well to recognize its ancient precedents and classical heritage.