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From Colonial Rule to Constitutional Administration

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“**T**he American Constitution is the final and climactic expression of the ideology of the American Revolution,” Bernard Bailyn observed in his landmark study of the founding.¹ One might add that the Constitution embodies not just the Declaration of Independence’s principles but also the founding generation’s hard-earned experience—and, indeed, that the founding generation’s experience helped it better understand the Declaration’s principles.² And among those principles, refined and clarified by experience, was “the rule of law.”

At first glance, that principle seems clear. Writing in April 1776, John Adams contended that “the very definition of a Republic, is ‘an Empire of Laws, and not of men.’”³ Thomas Paine put it even more bluntly in *Common Sense*: “In America the *law* is king.”⁴ (Emphasis added.)

But surely Adams—and even Paine—knew that things were not so simple. Kings, after all, rule by law too. So, what would a republican rule of law actually entail? Paine offered an answer:

For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the Crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.⁵

That is, the people would be the sovereign, and they would rule themselves by law.

In hindsight, Paine merely foreshadowed one of the most vexing questions of the next 250 years: If the people are to rule themselves by law, then whom will they trust to apply the law to themselves and their elected representatives? Or, stated differently, how can the courts be made strong enough to protect the Constitution but not so strong that they subsume republican government altogether?

Abraham Lincoln would pose the same question 85 years later in his first inaugural address, warning after *Dred Scott v. Sandford* that

the candid citizen must confess that if the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.⁶

This dilemma challenged the founding generation from the start. It appears throughout the Declaration of Independence itself, but in ways that were much subtler than the Declaration's more famous lines.

For the most significant controversies precipitating the American Revolution, King George III's and Parliament's abuses of power were straightforward. They wielded legislation like a weapon: the Stamp Act, the Townshend Acts, the Tea Act, and eventually, in 1774, the Intolerable Acts. These acts illuminated the problem of bad laws and bad lawmakers. That problem is best solved by vesting legislative power in lawmakers who genuinely represent the people—and by calling them to account often at the ballot box.

But the Revolution involved more than just these abuses of power. Other founding-era controversies about the republican rule of law were not simply about *too much* law or too many *bad* laws but rather about the problems that arise when laws are not actually treated *as law*.

In the Declaration, the founders denounced King George's efforts to undermine the rule of law in courts and the weight of law in day-to-day

administration. These parts of the Declaration have been largely forgotten, but they deserve our renewed attention—now more than ever.

Colonial Judicial Independence

The Declaration of Independence famously denounced King George III's abuses of power. "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures," its writers complained, and he has "abdicated Government here, by declaring us out of his Protection and waging War against us . . . [and] plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people."

But these examples come late in the Declaration's indictment of King George. Before that crescendo, the Declaration's list of charges against the king begins with his attempts to prevent laws from being enacted, executed, or adjudicated in the colonies. And regarding the king's attacks on the courts, the Declaration is especially clear: "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers," the Declaration argues, and he has "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

These lines described infamous controversies that erupted in the 1760s and only grew in intensity until the Revolution. The first charge refers to a prolonged standoff in North Carolina, between the assembly and the Crown, over the substantive powers local courts should have—a stark reminder that the very powers of a court are generally defined by legislation and thus subject to politics.⁷

The second and, for our purposes, more important charge went to the basic question of judicial independence—and the king's attempts to nullify it. In England, the life tenure of judges was long established, dating back at least to a 1701 act of Parliament. But in the colonies, judicial life tenure was much less common. And the reason for this, as Bailyn recounted, was not unreasonable: In the colonies, unlike at home,

“properly trained lawyers were scarce,” and automatic life tenure “would prevent the replacement of ill-qualified judges by their betters, when they appeared.” So the “status of the judiciary in the eighteenth century was therefore left open to political maneuvering in which, more often than not, the home government managed to carry its point and to make the tenure of judges as temporary as their salaries.”⁸

But then, Bailyn wrote, “suddenly, in the early 1760’s the whole issue exploded.”⁹ The Pennsylvania legislature declared in 1759 that the colony’s judges would all have life tenure—a declaration King George II immediately nullified.

A public outcry erupted, exemplified by Joseph Galloway’s 1760 “A Letter to the People of Pennsylvania,” which argued that the indispensability of judicial life tenure “is rendered apparent by the slightest Consideration of human Frailty.”¹⁰

Galloway was no foe of the Crown—after serving in the First Continental Congress, he would later oppose the Declaration of Independence, serve under General William Howe, govern Philadelphia after its capture in 1777, and eventually flee the colonies for England. But he understood that judicial independence was indispensable to the rule of law and impossible without judicial life tenure. Truly exceptional judges might serve honestly without life tenure, but

to look for strict Impartiality and a pure Administration of Justice; to expect that Power should be confined within its legal Limits, and Right and Justice done to the Subject by Men who are dependent, is to ridicule all Laws against Bribery and Corruption, and to say that human Nature is insensible of the Love, or above the Lure of Honor, Interest, or Promotion.¹¹

The issue boiled over elsewhere too. New York had secured judicial life tenure in 1750, but King George II’s death in 1760 reopened the issue because the crowning of a new king required all crown commissions to be

reissued. And James De Lancey, the colony's acting governor, refused to recommission New York's judges with life tenure.

Amid the ensuing political uproar, the newly crowned King George III issued an order permanently forbidding commissions with any tenure but that of "the pleasure of the crown." New Jersey's governor violated the order and was promptly removed from office. North Carolina and others soon joined the fray, to varying degrees. "But everywhere," Bailyn wrote,

there was bitterness at the [king's] decree and fear of its implications, for everywhere it was known that judicial tenure "at the will of the crown" was "dangerous to the liberty and property of the subject," and that if the bench were occupied by "men who depended upon the smiles of the crown for their daily bread," the possibility of having an independent judiciary as an effective check upon executive power would be wholly lost.¹²

And soon, the fight over judicial *tenure* would be further inflamed by a fight over judicial *salaries*. In Massachusetts, colonists denounced the king's rumored plan to have judges be paid by the king himself instead of the colonies. They saw clearly the implications: Regardless of life tenure, the Crown's control of judicial salaries would risk the perception, or even the reality, of the Crown's control of judicial decisions.¹³ As the colonies intensified their opposition to the Stamp Act, the Intolerable Acts, and the king's further abuses of power, the Crown's control of judges became, itself, intolerable.

Confederation to Constitution

As with the aforementioned problems in administration, the Declaration solved one problem but spurred others. The newly independent states could finally control the structure of their judiciary. But the nascent union raised judicial questions of its own.

First, under the Articles of Confederation came the basic question of what matters would be entrusted to the proto-national judiciary. The Articles of Confederation did not establish a full national judiciary, of course. Most judicial questions would be decided in the states' own courts, and the Articles required the states to give "full faith and credit" to each other's judicial decisions, presaging the future Constitution's own requirement.¹⁴ But the proto-national government would have at least some courts of its own. First and foremost, there would be admiralty courts.¹⁵ (The Congress itself would also sit as a "court" of sorts, adjudicating disputes among the states themselves.¹⁶) And second, the eventual adoption of the Northwest Ordinance would necessitate territorial courts too.¹⁷

By creating a new judiciary, the Confederation raised a new question about the judiciary: namely, how to *appoint* judges to the courts. Given the nature of the Confederation's government, the answer was no surprise: Congress would collectively appoint the admiralty's and the Northwest Territory's judges.¹⁸ In a government with no executive and in which states acted collectively through Congress, one could scarcely imagine another means for appointments.

Yet when the Confederation began to collapse and the states' delegates began to frame a new constitution in Philadelphia, the federal government's major innovations forced harder questions about the judiciary. The Constitution not only established three separate branches of federal government but also provided that the Constitution would be "the supreme Law of the Land."¹⁹ This would require, in turn, a new federal judiciary, or at least one Supreme Court—and a more complicated conversation about how judges should be appointed.

At first, the prevailing convention in Congress was the Virginia Plan, which proposed that the national judiciary's members be appointed by the national legislature. This followed the Confederation's example, but it also reflected the basic nature of the Virginia Plan itself, that the predominant legislative branch would also appoint the executive. Committing judicial appointments to the legislature naturally followed.

But in the convention's deliberations on June 5, 1787, Pennsylvania's James Wilson called for the *executive*, not the legislature, to appoint judges and officers. According to James Madison's notes, Wilson argued that the responsibility for appointments could not be vested in such a numerous body without too great a risk of "intrigue, partiality, and concealment." He thought it better to vest the appointment power in "a single, responsible person."²⁰

South Carolina's John Rutledge disagreed. He opposed granting "so great a power to any single person. The people will think we are leaning too much towards Monarchy."²¹

Madison was characteristically wary of giving such a power to either a single person or a great multitude; he preferred a middle course, empowering the relatively small Senate to appoint judges. The delegates initially tabled the issue, but on June 13, they approved Madison's motion for Senate appointments.

Then William Paterson introduced the New Jersey Plan, with a unicameral legislature appointing the president—and the president, in turn, appointing judges. Hamilton then replied with his own plan for a constitution, under which the much stronger president would appoint judges "subject to the approbation or rejection of the Senate."²²

Neither displaced Madison's plan for the Senate to appoint judges, but an uneasy stalemate ensued until July 18, when Nathaniel Gorham proposed a compromise: The president would make appointments, subject to the Senate's "advice and consent."²³ This was the approach in Gorham's Massachusetts (with the Privy Council playing the Senate's advice-and-consent role). Gorham's proposal occasioned one more round of debate among Madison, Luther Martin, Edmund Randolph, and Roger Sherman, all of whom pressed the question of what mode of appointment would best secure judges with the right "character."²⁴

Eventually, the convention approved Gorham's proposal. The delegates had not seriously questioned the importance of judicial *independence*. That was taken for granted, and they focused instead on judicial *appointment*.

But when the Constitution went out for ratification, attention turned to the more profound question of judicial *power*.

When students today read *Federalist* 78, Hamilton's essay gives no hint of the history that preceded it. The Revolution's defense of judicial independence goes unmentioned. As for judicial appointments, Hamilton noted simply that "the mode of appointing the judges . . . is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition."²⁵ Rather, with the question of judicial *independence* settled beyond serious dispute and judicial *appointment*—the question that had stymied the convention for half the summer—reduced to a fairly marginal point of debate, the Constitution's judicial branch attracted an entirely new criticism focused on the sheer power given to the newly conceived Supreme Court.

This was the crux of the argument that "Brutus"—the pseudonym of a leading Anti-Federalist writer—made against the Constitution: that a judiciary vested with the independence of life tenure could not be entrusted with the power of judicial review. To be sure, Brutus observed, English judges had long enjoyed life tenure, "but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union." Brutus contended that English judges had never asserted "the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution."²⁶ Such authority, he argued, in the hands of independent judges, was a threat to republican government itself.

"I do not object to the judges holding their commissions during good behaviour," Brutus concluded, but the convention erred by making judges

independent, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power

under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.²⁷ (Emphasis in original.)

Brutus accepted judicial tenure, but he could not accept giving life-tenured judges a power to strike down legislation as unconstitutional.

In effect, Brutus was harking back not to the pre-1776 debates about judicial tenure and pay but to the *premise* of those debates: that the people themselves needed to control their community's rule of law. In the 1760s, the threat came from the king himself. Under the new Constitution, Brutus saw the threat to a rule of law coming from the new federal judiciary itself.

Hamilton responded by conceding neither judicial independence nor judicial power, but rather by highlighting the constitutional features that would contain this judicial power. First, Hamilton argued, the Supreme Court would be constrained by the Constitution's structure, which would empower the Court to decide questions brought to it in justiciable cases or controversies only (that is, by "the nature of its functions," which gave the Court "neither Force nor Will, but merely judgment").²⁸

Second, Hamilton asserted, the Court would indeed have the power to "pronounce legislative acts void, because [they were] contrary to the Constitution," but only because the justices would be agents of the people themselves—that is, as "an intermediate body between the people and the legislature"—should the legislature's work be called into constitutional question. Even Hamilton conceded, for the sake of argument, that if the Court betrayed the people's trust by striking down laws under a "pretense" of unconstitutionality, then it would call into doubt whether "there ought to be no judges distinct from" the legislature at all.²⁹

And third, Hamilton believed that judicial life tenure was the very thing needed to attract the right kind of republican judge—namely, those who would be wise enough in their study of the law and sound enough in their character to "unite the requisite integrity with the requisite knowledge."³⁰

“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them,” Hamilton wrote. Surely Hamilton, one of the greatest lawyers of his era, knew what this really entailed: Rules and precedents do not bind down a judge, so much as the judge himself *chooses* to be “bound down” by them.³¹

Hamilton had conceded that a judge’s work—“merely judgment,” as he downplayed it—would necessarily entail what today we’d label “judgment calls.” That is, Hamilton recognized a judge would sometimes need to decide whether a “fair construction” of a statute would allow it to avoid a constitutional problem or whether the conflict between a statute and the Constitution would be truly “irreconcilable.” And in that zone of discretion, there surely would be opportunities for judicial mischief.³²

It is worth emphasizing what Hamilton emphasized: An independent judiciary vested with such enormous power could still be safe for republican government, so long as judges were interpreting and applying “strict rules and precedents” sufficient to “define and point out their duty in every particular case that comes before them.”³³ In short, Hamilton’s case for the judiciary was really a case for clearer, enforceable *laws*.

This, then, was the culmination of our founding era’s debates about the judiciary’s role: First, before the Revolution, Americans defended judicial *independence*. Then, in the Articles of Confederation and the Constitutional Convention, Americans grappled with judicial *appointment*. And finally, in Hamilton’s decisive rebuttal to Brutus, Americans faced the difficulty of judicial *power*.

Each debate answered one problem but raised another, and each iteration of the debate delved deeper into the nature of republican constitutional government. At the bottom of it all, as Hamilton made clear, was not simply sound judges but sound *law*.

As it happens, that brings us to the Revolution’s second lesson for the rule of law, because King George III had not only attacked the courts—he also attacked the colonies’ capacity for making and enforcing good

laws. And this, too, gave rise to a founding experience that bears revisiting today.

On Monarchs and Mutability

Before it reached the king's worst abuses of power—and before its earlier, subtler, but still stirring lines about his attacks on the courts—the Declaration of Independence denounced the king's limits on law itself:

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

These charges are not about the *abuse* of government power so much as the forced *absence* of government, the vacuums of power caused by the king's willful and harmful neglect.

This part of the Declaration might be its most opaque—not just today but from the start. As Pauline Maier noted in *American Scripture: Making the Declaration of Independence*, “Most Americans, including professional historians, would be hard put to identify exactly what prompted many of the accusations Jefferson hurled against the King, which is not surprising since even some well-informed persons of the eighteenth century were perplexed.”³⁴

But, Maier further explained, “Jefferson left important clues to the meaning of his opening charges against the King in a still earlier document . . . a set of draft instructions for Virginia's delegates to the First Continental Congress that he wrote in 1774.”³⁵ And that document, *A Summary View of the Rights of British America*, describes the controversy surrounding King George III's efforts to render new laws dead letters.

As Jefferson wrote in his *Summary*, the king had abused his right to veto the colonies' laws "for the most trifling reasons, and sometimes for no conceivable reason at all, his majesty has rejected laws of the most salutary tendency," such as colonies' proposals to abolish slavery.³⁶

But, Jefferson added, the king abused his power by not just vetoing laws but leaving new laws in limbo: "His majesty permitted our laws to lie neglected in England for years, neither confirming them by his assent, nor annulling them by his negative." Worse still, Jefferson continued, the king's indefinite suspension of a law held open the possibility that the law "called into existence at some future and distant period, when time, and change of circumstances, shall have rendered them destructive to his people here."³⁷ Finally, Jefferson wrote, the king placed

governors under such restrictions that they can pass no law of any moment unless it have such suspending clause; so that, however immediate may be the call for legislative interposition, the law cannot be executed till it has twice crossed the Atlantic, by which time the evil may have spent its whole force.³⁸

Each delay tactic reflected a perversion of the very point of legislation. Legislators make laws to solve real-world problems, which, in turn, requires that the laws be promptly enforced. Delaying a law's effectiveness defeats its original purpose; abruptly resurrecting a dormant law under completely different circumstances, for different purposes, weaponizes the people's laws against the people themselves. And placing elaborate and arbitrary procedures for a law's eventual enactment and administration makes a mockery of the entire thing. Jefferson's point was a practical one. When law is so easily delayed or suspended, it ceases to be law, regardless of whether it nominally remains on the books.

Needless to say, winning independence solved the colonies' immediate problem—or, more accurately, it solved that version of the problem. With sovereignty now resting not in the king but in the states, domestic laws would not languish due to transatlantic voyages or depend on the

vicissitudes of royal government. But the newly independent states found entirely homegrown ways to degrade day-to-day governance.

The new states, in constructing their administrations, drew a stark lesson from the colonial experience. Charles C. Thach Jr. described this in *The Creation of the Presidency, 1775–1789*. In the struggles leading to 1776, “the popular assemblies were the bulwark of popular liberties, the executive departments the instrumentalities of British control. This attitude of mind could not fail profoundly to affect the original American concept of republican executive power.”³⁹

In every state but New York, the executive was completely subordinated to the legislature.⁴⁰ By and large, executives were selected by the legislatures, limited to short terms, and prohibited from reelection. And in every state but Pennsylvania, the chief executive was controlled or constrained by an executive council chosen by the legislature.⁴¹

At the national level, of course, the Articles of Confederation created no executive per se, only the weak Congress and the quasi-executive entities that the Congress eventually created to administer the national government’s limited, hamstrung powers. As Leonard D. White noted at the outset of his four-volume study of American administration, by 1789 “the government of the Confederation had steadily run down until its movements had almost ceased.”⁴²

Thach recounted the rise of congressional committees as the post-war confederation’s de facto administration. There were some non-congressional offices: Thach pointed to the “purely ministerial” offices of the treasurer and postmaster general. “But the *committee*,” Thach wrote, “was the real seed bed for administrative growth.”⁴³ (Emphasis added.)

The problems with these arrangements, and still more problems at the state and national level, soon became all too evident in the run-up to the Constitutional Convention in Philadelphia. Madison cataloged them in his 1787 memorandum “Vices of the Political System of the United States.” He began with the Articles of Confederation’s most glaring flaws, regarding federal revenues, diplomacy, and interstate squabbling, but eventually he turned to the problems of domestic governance in the states.

First among the problems in the states was the “multiplicity of laws.” But just as important, Madison emphasized, was “mutability of the laws of the States,”⁴⁴ and his description of this latter problem bears quoting at length:

This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before a knowledge of them can have reached the remoter districts within which they were to operate.⁴⁵

Madison expanded on this, after the Philadelphia Convention, in the *Federalist*. In *Federalist 37*’s introduction to the new Constitution’s structure, Madison explained, writing as “Publius,” the fundamental challenge of “combining the requisite stability and energy in government with the inviolable attention due to liberty, and to the republican form.”⁴⁶ Specifically, he explained that “stability in government . . . is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.”⁴⁷ And the enemy of stability, he added, is mutability:

An irregular and mutable legislation is not more an evil in itself, than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government will never be satisfied, till some remedy be applied to the vicissitudes and uncertainties, which characterize the state administrations.⁴⁸

Mutable laws, Madison knew, are repugnant to republican people.

Later, in *Federalist 62*’s defense of the Senate, he put the point bluntly: “Every new election in the states, is found to change one half of the

representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures.” And “to trace the mischievous effects of a mutable government would fill a volume.”⁴⁹

A nation of ever-changing laws, Madison wrote, would forfeit its esteem on the world stage. But the effects at home would be “still more calamitous”:

It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promul[gat]ed, or undergo such incessant changes that no man who knows what the law is to day can guess what it will be to morrow.⁵⁰

A regime of such mutable, ever-changing laws would *demoralize* its people, in both senses of the word. First, it would exhaust us. And second, by leaving us without the security of legal clarity, it would leave us all to protect our interests by our own means—perhaps, eventually, by any means necessary.

Furthermore, such a government of mutable laws would benefit “the moneyed few” over all others, by presenting “a new harvest to those who watch the change, and can trace its consequences.” It would benefit “the *few*, not . . . the *many*.”⁵¹ (Emphasis in original.)

And, Madison concluded, such a regime of mutable law would destroy Americans’ very faith in government itself. “No government any more than an individual will long be respected, without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability,” he wrote in *Federalist* 62, with clear echoes of his more famous argument for legal stability, *Federalist* 49.⁵²

But the problem of mutable government is not limited to the legislative branch. Indeed, Publius’s fullest account of the problem of mutability comes later, in his account of the administration. In *Federalist* 70, Publius

(here, Hamilton) made the definitive argument for executive power in republican government, famous for its recognition that “energy in the executive is a leading character in the definition of good government.” Less famous, among even those who readily quote that line, is the essay’s further point that this energy is not good for its own sake but for the sake of particular functions of republican government, especially “the steady administration of the laws.”⁵³ As Harvey C. Mansfield observed in *Taming the Prince*, “energy is not something good in itself,” but “in the American Constitution energy leads to virtue.”⁵⁴

This is the point of Publius’s full argument, in the less famous essays before and after *Federalist* 70, on the central importance of “steady administration” in republican government.⁵⁵ Hamilton saw the importance of what was at stake. Too much upheaval from one presidency to the next would produce “a disgraceful and ruinous mutability in the administration of the government,” he wrote in *Federalist* 72.⁵⁶ Where Madison saw that the public would lose faith in its government should there be too much change in the Constitution or in the written laws, Hamilton brought readers to an even more pointed conclusion: Even if the Constitution and written laws remain unchanged, the public would lose faith in their government if these laws were *administered* unsteadily.

This was, of course, the point of the Declaration’s indictments against King George. And it is the point of Hamilton’s unflinching statement, in *Federalist* 68 and 76, that “the true test of a good government is its aptitude and tendency to produce a good administration.”⁵⁷

The Constitution, as Publius saw it, would produce good administration by constructing the presidency—a unitary office, independent from Congress, with a four-year term long enough to empower presidents to administer government with at least temporary insulation from the popular pressures of Congress and the public. And the possibility of reelection would allow a president to be more ambitious in the legislation they would bring to Congress and more experienced in administering both old and new laws.

Even the president's power to veto legislation, Publius argued in *Federalist* 73, was good for the sake of steady administration. Congress, left to its own devices, would make too many bad laws and thus have to repeal and replace them. The president's veto would prevent many bad laws from being made and thus would preserve stability in the laws more generally.

A decade earlier, the Declaration had indicted the king for abdicating his responsibilities, an abdication that ultimately destroyed the people's allegiance to him. Now the Constitution would connect the president's powers to the president's virtues, for the sake of the public's allegiance.

The founding generation knew bad government all too well. The colonies endured too many bad laws, but they also often endured the lack of good laws, which their own assemblies had tried to enact but which the king too easily muted through outright vetoes or passive-aggressive suspensions and delays. His prevention of good laws, no less than his imposition of bad ones, was the antithesis of good, steady administration.

Liquidated and Ascertained

I began this chapter with the founders' sense of the importance of judicial independence and the rule of law before turning to their sense of the underlying challenge of law itself: how law is made and then administered, even before the law's constitutionality might be tested in court. But the relationship among legislation, administration, and adjudication is more than merely chronological. Each step shapes the next, for better or worse. And that relationship, crucial to the colonial experience and what followed, went to the very heart of Publius's argument for constitutional government—namely, the argument of *Federalist* 37.

That essay's importance is easily overlooked today, even to those who read the Federalist Papers from cover to cover. But it was obvious when the Federalist Papers were initially published in two volumes: The first 36 essays (the first volume) documented the need for a new government,

and the rest (the second volume) defended the Constitution that had been drafted. That defense began with *Federalist 37*.

As noted above, in *Federalist 37*, Madison described the delicate balance of “stability and energy in government.”⁵⁸ But he also grappled with the problem that Hamilton alluded to in *Federalist 78*: the need for republican legislatures to write rules sufficiently clear for judges to be “bound down.”

As Madison made clear, this is a challenge inherent in any system of written laws: “All new laws”—not just some, but *all* of them—“though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal.”⁵⁹

The causes for this obscurity and equivocation, Madison explained, are inherent in legislation, and triply so. Legislation uses imprecise words to capture our imperfect perception of impalpable principles. Because all laws will have some vagueness, republican government needs a way to clarify and settle a law’s ambiguities. Madison gave his own answer, in *Federalist 37*, at the end of a sentence I just quoted but cut short: “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, *until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.*”⁶⁰ (Emphasis added.)

It is a quick and subtle point, one easily glossed over, but on even just a further moment’s reflection, its implications grow clear. For Madison, the way to settle constitutional questions is not the fast-track litigation of our own era but something slower and more deliberate. And when Madison’s account of constitutional legislation is married to Hamilton’s account of constitutional administration and adjudication—which, of course, is the entire point of the *Federalist Papers*—then we see how each part of government plays a distinct role in constitutional self-government.

It begins with legislation, first at the level of writing a constitution and then at the level of writing laws under that constitution. As Madison suggested in *Federalist 37*, the constitutional ideal is for a law to be “penned

with the greatest technical skill, and passed on the fullest and most mature deliberation.”⁶¹ And just as Madison counseled in *Federalist* 49 for restraint in the making and unmaking of constitutions, he counseled in *Federalist* 62 for at least proportionate restraint in the making and unmaking of legislation, as I quoted earlier, lest they “undergo such incessant changes that no man who knows what the law is to day can guess what it will be to morrow.”⁶²

But laws will, of course, be made and unmade, and imperfectly so, and at that point we turn to the question of administration. As Hamilton explained in the aforementioned essays on the executive, the constitutional ideal is not just energetic administration per se but energetic administration that steadily and successfully executes the laws.

As it happens, administration can be more energetic and steadier if the legislature has already done its job: Writing clearer laws with less room for discretionary judgment leaves less opportunity or need for the executive to deliberate on how to craft its own discretionary judgments in the first place. With less need to make those judgments—what today we would call administrative “policymaking”—the executive can focus more on administration’s practical questions. That is, it can focus less on determining ends and more on choosing the means that best achieve Congress’s ends.

And, finally, the better a government’s legislation and administration prove to be, the more focused and constrained the judiciary itself will be. When a legislature writes clearer laws, judges need to answer fewer open-ended questions about what Congress actually meant or whether those intentions exceed the Constitution’s limits—and, for that matter, whether the executive branch is faithfully and fairly administering those laws. And when the executive branch administers laws more steadily across multiple presidencies, judges will not need to review the executive branch’s latest innovations as often.

The True Test

To describe republican self-government in those terms is to highlight the difference between the founders' ideal and today's reality. The most significant legislation governing us today was written too often in intentionally open-ended terms, not constraining the executive's ambitions so much as *inviting* them. Administration, in turn, is largely a product of enormous flip-flops from one administration to the next, each new presidency erasing its predecessor's work and creating it all anew, only to be erased and replaced in turn. And the judiciary, faced with constant administrative change under infinitely malleable legislation, is seen as single-handedly responsible for resolving every major policy issue of the day.

Taken together, our malleable legislation and bipolar administration embodies Hamilton's nightmare, in *Federalist* 72, of "a disgraceful and ruinous mutability in the administration of the government."⁶³ Instead of each part of government successively contributing to greater clarity and stability, we get the very opposite. Instead of clearer legislation for the sake of steadier administration and simpler adjudication, we get ambiguous legislation, bipolar administration, and explosive adjudication.

That last part, adjudication, is exacerbated by the bad legislation and bad administration of our era. Yet the adjudication itself—especially in the Supreme Court—draws at least as much criticism as the underlying legislation and administration.

And in a way, today's debates concerning the Supreme Court bring us full circle: These debates often focus on the institution's independence, the first thing the founders needed to defend against King George. In the media, the academy, and the government's political branches, justices face new calls to end judicial life tenure, the very threat our founders denounced in the strongest possible terms.⁶⁴ We might chuckle at our constitutional amnesia if the stakes were not so great.

So far, in this new era of attacks on the Court, we have managed to avoid the disaster of ending judicial life tenure, largely without reference to the Declaration of Independence. But our nation's 250th anniversary is

a welcome moment to return to that part of America's founding principles and founding experience.

By tracing the founders' debates over judicial independence and the rule of law, from the colonies to the Constitution, we see the rule of law is safe for democracy—and, in fact, indispensable for it—when we constrain judicial discretion, as much as reasonably possible, by good, clear laws. And by tracing the founders' debates over administration, from the colonies to the Constitution, we see that good, clear laws are the product of not just good legislatures but the kind of administration that allows good laws to be clarified and refined over time, with the benefit of experience gained from the steady, careful experience of those very same laws.

Outright abuses of legislative power are easily spotted, in the founders' day and in ours. Harder, but no less crucial, is the task of ascertaining good administration and good adjudication. That, too, is a timeless challenge for our country. One might even call it the "true test" of our own times.

Notes

1. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press of Harvard University Press, 2017), 321. Martin Diamond agreed: "It is to the Constitution that we must ultimately turn as the completion of the American Revolution." See Martin Diamond, "The Revolution of Sober Expectations," in *America's Continuing Revolution: An Act of Conservation* (AEI Press, 1975), 32.

2. Here, too, Diamond puts it best: "With the Constitution the Americans completed the half-revolution begun in 1776 and became the first modern people fully to confront the issue of democracy," he wrote in 1975. "But, again, the American Revolution precisely in its revolutionary thrust was simultaneously distinctively sober. . . . The sobriety lies in the Founding Fathers' coolheaded and cautious acceptance of democracy." From revolution to constitution, the question of American government "gradually became a debate over how to create a decent democratic regime." See Diamond, "The Revolution of Sober Expectations," 38–39.

3. John Adams, "Thoughts on Government," April 1776, Founders Online, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>. Adams is quoting James Harrington's 1656 *Commonwealth of Oceana*.

4. Thomas Paine, *Common Sense* (Philadelphia, 1776), <https://oll.libertyfund.org/pages/1776-paine-common-sense-pamphlet>.

5. Paine, *Common Sense*.

6. Abraham Lincoln, “First Inaugural Address,” speech, Washington, DC, March 4, 1861, <https://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm>.

7. Maier describes this “extended controversy in North Carolina” in great detail. King George III refused to assent to a North Carolina law that would have empowered judges to liquidate nonresidents’ property for defaulting on their debts, a power that “the Crown considered contrary to the substance and spirit of English law.” The assembly refused to enact the judicial legislation without such a power, and the ensuing standoff caused the courts to eventually close. See Pauline Maier, *American Scripture: Making the Declaration of Independence* (Vintage, 1997), 110.

8. Bailyn, *The Ideological Origins of the American Revolution*, 105.

9. Bailyn, *The Ideological Origins of the American Revolution*, 105.

10. See Galloway, “A Letter to the People of Pennsylvania (Philadelphia, 1760),” in *Exploring the Bounds of Liberty: Political Writings of Colonial British America from the Glorious Revolution to the American Revolution*, ed. Jack P. Greene and Craig B. Yirush (Liberty Fund, 2018), 3:1662.

11. Galloway, “A Letter to the People of Pennsylvania (Philadelphia, 1760),” 3:1663–64.

12. Bailyn, *The Ideological Origins of the American Revolution*, 106–7.

13. Bailyn, *The Ideological Origins of the American Revolution*, 107–8.

14. Articles of Confederation of 1781, art. IV.

15. Articles of Confederation of 1781, art. IX.

16. Articles of Confederation of 1781, art. IX.

17. Northwest Ordinance of 1787, § 4. The Northwest Ordinance also contained a fascinating provision, empowering the territory’s three-judge court as a legislature: “The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time.” Northwest Ordinance of 1787, § 5.

18. Articles of Confederation of 1781, art. IX; and Northwest Ordinance of 1787, § 4.

19. US Const. art. VI, cl. 2.

20. James Madison, “James Madison’s Notes of the Constitutional Convention,” *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 1. (Yale University Press, 1911).

21. Madison, “James Madison’s Notes of the Constitutional Convention.”

22. Alexander Hamilton, “Constitutional Convention. Plan of Government,” Founders Online, June 18, 1787, <https://founders.archives.gov/documents/Hamilton/01-04-02-0099>.

23. US Const. art. II, § 2, cl. 2.

24. For a much more detailed account of this part of the convention’s deliberations, see Adam J. White, “Toward the Framers’ Understanding of ‘Advice and Consent’: A

Historical and Textual Inquiry,” *Harvard Journal of Law & Public Policy* 29, no. 1 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=813464.

25. *Federalist*, no. 78 (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-04-02-0241>.

26. Brutus, “XV,” in Herbert J. Storing, ed., *The Complete Anti-Federalist* (University of Chicago Press, 1981), 2:438.

27. Brutus, “XV,” 2:186–89.

28. *Federalist*, no. 78 (Hamilton).

29. *Federalist*, no. 78 (Hamilton).

30. *Federalist*, no. 78 (Hamilton).

31. *Federalist*, no. 78 (Hamilton).

32. *Federalist*, no. 78 (Hamilton).

33. *Federalist*, no. 78 (Hamilton).

34. Maier, *American Scripture*, 106.

35. Maier, *American Scripture*, 112.

36. Thomas Jefferson, *A Summary View of the Rights of British America* (July 30, 1774), quoted in Maier, *American Scripture*, 113.

37. Jefferson, *A Summary View of the Rights of British America*, quoted in Maier, *American Scripture*, 113.

38. Jefferson, *A Summary View of the Rights of British America*, quoted in Maier, *American Scripture*, 113.

39. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Liberty Fund, 2007), 15.

40. Thach, *The Creation of the Presidency*, 15–16.

41. Thach, *The Creation of the Presidency*, 16.

42. Leonard D. White, *The Federalists: A Study in Administrative History* (Macmillan, 1948), 1.

43. Thach, *The Creation of the Presidency*, 48.

44. James Madison, “Vices of the Political System of the United States,” Founders Online, April 1787, <https://founders.archives.gov/documents/Madison/01-09-02-0187>.

45. Madison, “Vices of the Political System of the United States.”

46. *Federalist*, no. 37 (James Madison), <https://founders.archives.gov/documents/Madison/01-10-02-0227>.

47. *Federalist*, no. 37 (Madison).

48. *Federalist*, no. 37 (Madison).

49. *Federalist*, no. 62 (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-04-02-0212>.

50. *Federalist*, no. 62 (Hamilton).

51. *Federalist*, no. 62 (Hamilton).

52. *Federalist*, no. 62 (Hamilton).

53. *Federalist*, no. 70 (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-04-02-0221>.

54. Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Free Press, 1989), 267.

55. *Federalist*, no. 70 (Hamilton).

56. *Federalist*, no. 72 (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-04-02-0223>.

57. *Federalist*, no. 68 (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-04-02-0218>.

58. *Federalist*, no. 37 (Madison).

59. *Federalist*, no. 37 (Madison).

60. *Federalist*, no. 37 (Madison).

61. *Federalist*, no. 37 (Madison).

62. *Federalist*, no. 62 (Madison).

63. *Federalist*, no. 72 (Hamilton).

64. For an example of summarizing arguments for court-packing and other changes to the federal judiciary, see Michelle Adams et al., *Presidential Commission on the Supreme Court of the United States: Final Report: December 2021*, American Presidency Project, December 8, 2021, <https://www.presidency.ucsb.edu/documents/final-report-the-presidential-commission-the-supreme-court-the-united-states>.