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Our Mixed Regime: “An Institution That Blends Stability with Liberty”

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Abstract

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By Elias Neibart

How can we characterize American government? Do Americans live in a republic, a democracy, or something entirely different? The following will engage with the relevant historical, political, and philosophical record to answer this question. To address this question, scholars have traditionally consulted both modern philosophy—particularly the writings of Charles de Montesquieu—and the writings of the individuals who crafted and codified the United States Constitution. After doing so, such scholars have concluded that the United States is simply a *republic*. The following, however, will argue that such a characterization is incomplete and, in some ways, inaccurate. In order to properly and fully understand American government, we must look not only towards modern philosophy and the historical incidents leading up to the Constitution’s ratification; instead, we must also engage with the ancient doctrine of the mixed regime—promulgated by thinkers like Aristotle and Polybius. Such a scholarly endeavor is necessary because the following will demonstrate that those who drafted and ratified the Constitution were motivated by two primary goals: (1) guaranteeing individual liberty and (2) promoting state longevity and security. The prior of these goals was of particular interest to modern philosophers and the latter was addressed and central to the doctrines of ancient thinkers. This paper will demonstrate that a holistic approach to defining American government requires engaging with and consulting both philosophical schools of thought. And, ultimately, the following will show that American government can be defined and characterized as a *mixed regime*, for it mixes both modern and ancient political and philosophical doctrines, and, in doing so, accomplishes two distinct yet wholly important state objectives.

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Chapter 1: Introduction

As the Constitutional Convention of 1787 came to a close, the convention's delegates had just accomplished something remarkable. After months of vociferous debate, delegates had finally agreed on a new governing document for the nascent American nation—the United States Constitution (“the Constitution”). This document was rather straightforward—it set forth the size, scope, and powers of the newly formed government. But, with that said, what type of government did the Framers believe they were making? Of course, it was easy to identify the key components and characteristics of the new system—a bicameral legislature, a unitary executive, and various federal courts—but (1) how were the American people supposed to define their new government, and, (2) in our current age, is defining this system even a worthwhile political and scholarly task?

Benjamin Franklin perhaps was the first delegate to address the former question. Supposedly, as Franklin exited the Convention, a “passerby” asked Franklin what type of government the delegates had created. In response, Franklin responded that the delegates had created a “*republic*, if you can keep it” (Franklin as quoted in White 2020; emphasis added). We might understand the American system of government then as simply a *republic*, but there exists a problem with Franklin's answer to this passerby: governments that were considered republican had existed in America *before* the formation of the Constitution, and the government created by the Constitution differed considerably from those governmental systems. Labeling the government created by the delegates in 1787 as a republic does not, then, allow us to understand exactly what the delegates constructed

The aim of this paper, therefore, will be to offer a complete definition of the type of government outlined in the Constitution. In other words, what did Franklin mean when he referred to the new, American regime as a “republic”? How did this formulation differ from previous attempts at creating republican governments? And, is using the term “republican” politically, historically, and philosophically accurate? Accomplishing this task and answering these questions will require careful consideration of the relevant historical, political, and philosophical record.

For instance, with respect to the historical record, consideration must be given to the sociopolitical realities that led up to the Constitutional Convention. I will focus on the social, political, cultural, and economic problems that festered during the Confederation Period—the period in American history spanning from the ratification of the Articles of Confederation (“the Articles”)—America’s first national governing document—to the ratification of the Constitution. A deeper understanding of these problems will provide meaningful insight into what motivated the delegates to make changes to the existing federal structure. Analyzing the Confederation Period and that period’s prevailing conflicts to better ascertain the delegates’ eventual choices has been utilized by other scholars in the field, and I will draw heavily upon their work (Klarman 2017 and Van Cleve 2016).

My *political* inquiry will primarily consist of comparatively analyzing the relevant governing documents that existed during the Confederation Period—the Articles *and* the state constitutions of the original thirteen states—in relation to the Constitution. Analyzing the Articles *and* the state constitutions in relation to the United States Constitution is a method that differs from previous inquiries, for other scholarship merely analyzed the Articles in relation to the federal Constitution (Smith 1997). The following will demonstrate that delegates were not only concerned with making changes to the existing federal structure; they were equally interested in creating a strong, central government that would address some of the structural and political problems that persisted in the state governments, as well.

This paper's philosophical inquiry is, perhaps, its most important aspect, particularly because it will draw connections between this paper's historical and political inquiries. Consideration will be given to the philosophical ideas and doctrines that influenced the Framers of the Constitution ("the Framers")—the group of men responsible for debating, drafting, and, later, publicly defending the Constitution. This paper's philosophical approach, in many ways, will serve to fill in the gap between the problems observed by the Framers during the Confederation Period and the ratification of the Constitution. In other words, the Framers witnessed a particular set of events and circumstances during the Confederation Period, and, after witnessing such events, they banded together and worked to ratify the Constitution, thereby replacing the existing system of government. Yet, before they drafted the Constitution, they consulted various philosophical and political texts, to better understand how to respond to the social and political challenges facing the nation in the late 1700s. It has traditionally been argued that the philosophical doctrines consulted by the Framers can be traced exclusively back to Enlightenment philosophers, particularly Charles de Montesquieu (Branson 1979 and McDowell and O'Neill 2007). And, consequently, scholars have understood many political decisions made by the Framers as inspired or informed by modern, Enlightenment thinkers and schools of thought. This paper, however, will challenge that paradigm. Ultimately, the following will demonstrate that a complete understanding of what influenced the Framers and, therefore, a complete understanding of what influenced the ratification of the Constitution requires a careful consideration of both modern *and* ancient philosophical and political doctrines. In particular, I will pay close attention to philosophical doctrines that relate closely to state building and constitution making: the separation of powers doctrine—popularized and propagated during the modern, Enlightenment era—and the mixed regime doctrine—first introduced in ancient times

and later mediated and, in some cases, obfuscated by more modern thinkers. Both these doctrines offer unique perspectives and suggestions for constitution makers and state-builders, as they were formulated to address different problems associated with nascent governments. And, the following will show that the Framers considered both these perspectives and heeded the advice of both schools of thought when constructing the Constitution.

The aim of the historical, political, and philosophical analyses delineated above will be to provide a clear definition of the American system of government outlined in the Constitution. Franklin's quip to a passerby that the Framers created a "republic" will be shown to be not only incomplete but also misleading. The Framers created something far more intricate, complex, and nuanced; they created something that, to this day, stands as the oldest and longest-lasting representative government to have ever existed. Their remarkable creation deserves considerable attention, and the following will attempt to provide that.

In Chapter 2, I will outline both the political and social landscape during the Confederation Period. I will first discuss the Articles and the state constitutions of the time and their more salient components. Then, I will tease out the problems that festered during the Confederation Period, including but not limited to issues regarding debt-relief and the post-war economic recession.

In Chapter 3, I will shift focus to discuss the philosophical texts that influenced the Framers. Consideration will be given to the actual ideas contained within these texts, but also the extent to which the Framers read, discussed, and were intellectually impacted by these doctrines. In particular, after explicating both the ancient doctrine of the mixed regime and the more modern doctrine of separation of powers, I will compare and contrast both the components and objectives of these two doctrines. Ultimately, I will demonstrate that the ancient mixed regime

doctrine—promulgated by thinkers like Aristotle and Polybius—is primarily concerned with promoting state *stability and longevity* and the more, modern separation of powers doctrine (and with it the conception of governmental checks and balances)—promulgated primarily by Charles de Montesquieu—is more concerned with *preventing tyranny and promoting individual liberty*.

In Chapter 4, I will demonstrate how the United States Constitution is a document inspired by both of the aforementioned philosophical schools of thought. This chapter will cross-reference the text of the Constitution, the text of the *Federalist Papers*, and the writings of certain Framers with the philosophies outlined in Chapter 3. Drawing upon specific portions of these texts, this chapter will show how American government, as it was constructed in 1787, was inspired by modern and ancient state-building doctrines. Consequently, in this chapter, we will be able to provide a more precise definition for American government: our form of government is a *mixed regime*.

Yet, in Chapter 4, we will need to discern our American mixed regime with the ancient mixed regime. The latter is *mixed* because it mixes a political community's social classes, such that it provides a voice and governmental say to all classes in a particular political community; the prior is *mixed* because it combines the ancient mixed regime doctrine—concerned with social mixing—and the modern mixed regime doctrine—concerned with governmental mixing, separating, and the balancing of state powers. In other words, the American mixed regime will be shown to be a combination of (1) the ancient mixed regime doctrine and (2) the modern mixed regime doctrine.

In Chapter 5, this paper's conclusion, I will reiterate this paper's main findings and, more importantly, address the significance and scholarly importance of defining American government. At this point, I will discuss how this paper's intellectual endeavor will enhance our

nation's political discourse, as it will provide meaningful insight into the original intentions of the Framers. A clearer picture of what the Framers envisioned, will inform current conversations regarding where, in fact, power in American government resides—in the hands of the common people, the wealthy elites, the ruling-class, or a combination of these groups.

Chapter 2: The Historical Context

To properly understand precisely what motivated the Framers when crafting the Constitution, we must first appreciate both (1) the structural deficiencies of the Articles and certain original state constitutions and (2) the more salient social, political, and economic problems that festered during the Confederation Period.

The Articles of Confederation

Adopted by the Continental Congress in 1777 and ratified by all thirteen states in 1781, the Articles allowed each state in the union to “retain its Sovereignty, freedom and independence, and every power, Jurisdiction and right, which [was]...not expressly delegated to the United States in Congress assembled” (Articles of Confederation, Art. II). As we can see, this particular portion of the Articles granted the individual states a great deal of autonomy over how they conducted themselves politically and legislatively, but the Articles also delineated the specific powers of the newly formed federal government. First, with respect to voting on legislation, each state had a singular vote, and legislation required nine out of the thirteen states to vote affirmatively—an effective supermajority (Articles of Confederation, Art. X). Congress, under the Articles, was delegated a plethora of powers, including but not limited to the ability to declare war, to borrow money and “emit bills of credit,” and to hear appeals regarding land disputes between the states (Smith 1997, 278). With that being said, the central government created by the Articles “lacked an executive, administrative apparatus, and a judiciary” (Mittal and Weingast 2013, 290). Notably, the Articles also did not permit Congress to levy taxes or “the power to regulate interstate and foreign commerce”; instead, under the Articles, the onus was on the states themselves to “obtain funds to support the general government” (Mittal and Weingast 2013, 286-287). The federal system did not possess its own apparatus to collect taxes or compel

the payment of taxes by state governments, and this particular feature of the Articles prevented the nascent federal government from meaningfully tackling the “morass of debt left by the Revolutionary War,” as states were either “unwilling or unable to pay their share” to the federal government (Van Cleve 2017, 4 and 52). With respect to judicial powers, “the Articles of Confederation had barely provided for one tribunal (to hear appeals of maritime captures), and, otherwise, Congress was completely dependent on state courts to adjudicate matters potentially involving the interests of the entire nation” (Bederamn 2008, 156).

With that being said, the apparent impotence of the federal government under the Articles was, in fact, by design. The drafters of the Articles never considered that they were creating a formal Constitution—that is a document that delineated a central government that stood in relation to the state governments at the time. Instead, the Articles were viewed as a loose “compact” or “treaty” among the individual, sovereign states (Madison as quoted in *Federalist* No. 43 as cited in Smith 1997, 268). Therefore, given that the Articles set forth a rather weak central government, the state governments were left with addressing the plethora of issues that arose after the Revolutionary War (“the war”). Next, I will address the more salient social, political, and economic problems of the period, and then discuss how the state governments were ill-equipped to meaningfully address them.

Post-Revolutionary War Problems

After the conclusion of the war, the “most momentous problem facing American leaders and citizens was a giant overhang of debt” (Van Cleve 2016, 48). During the conflict, the Confederation financed the war largely on “credit,” relying on the printing of paper money and European loans from their international allies. This debt problem affected the lives of countless citizens, across socioeconomic backgrounds.

For instance, the widespread printing of money—while exports simultaneously dried up—led to massive inflation. In particular, hyperinflation deleteriously impacted the merchant class, as they were required to accept paper money at its face value, despite “what it was actually worth on the market in specie” (ibid, 23). This proved to be disastrous, as the currency was “trading at just five percent of its face value” (Klarman 2017, 21).

The country’s veterans were also negatively affected by the Confederation’s poor spending habits. Soldiers were rarely, if at all, compensated during the war. And, the unsatisfactory treatment they received during the conflict, led many soldiers to become “discontented” and disillusioned with how the federal and state governments comported themselves after the war, for they were never properly compensated for their service even after the war’s completion (Van Cleve 2016, 50).

Along with the merchants and veterans, American farmers were generally disgruntled after the war. During the conflict, the army relied on farmers for food supplies, like flour and beef, and, in return, farmers were promised repayments and issued “state debt certificates,” which were later shown to be frequently worth “only a small fraction of their face value” (Van Cleve 2016, 24).

Seeing that many different groups of citizens were impacted by the country’s postwar debt, American leaders did, in fact, decide to address the country’s financial situation, but their efforts seemed to only highlight the systemic deficiencies in the country’s governmental structure and foment discontent among the citizenry. American leaders first sought to address the nation’s debt problem by using the existing *requisition system* outlined in the Articles—that is the system by which the Confederation relied on receiving funds from the individual states to finance their collective, federal debt. The states, however, were given a great deal of latitude in

determining how they raised the funds that would later be sent to the Confederation. Despite the panoply of options available to states to raise money, many were either “unwilling or unable to pay their share of requisitions” (Van Cleve 2016, 52). The political and social reasons for why states could not pay their share will be addressed later on in this paper, yet, it should be noted, that the states who did, in fact, make good faith efforts to pay their share to the Confederation only succeeded in perturbing their citizenries.

A Case Study: Massachusetts’ Debt Problem and Shay’s Rebellion

One of the more well-known examples of a disgruntled citizenry taking action against their government is Shay’s Rebellion, and a discussion of the rebellion sheds lights on the push-back states received when trying to address their own *and* the Confederation’s debt problems.

Around 1786, the state of Massachusetts began to impose several taxes on its residents to pay off their requisition requirements to the Confederation and their own “domestic debt” (Van Cleve 2016, 219). Indebted farmers in the western part of the state—whose poor economic situation was only exacerbated by the current recession, depressed exports, and low demand for agricultural products—took issue with increased taxes and petitioned the government for both debt relief and more paper money. Many farmers found themselves entangled in legal proceedings, brought against them by private creditors and state treasury officials, and such proceedings were “extremely costly” for debtors for a variety of reasons. Of course, an unfavorable judgment could result in “foreclosures on their homes” or the repossession of their land, but the fees and attorney costs associated with legal action were often punitive and only served to intensify the farmers’ grievances with their state government (Cain and Dougherty 1999 and Van Cleve 2016).

In response to, what they believed to be, excessive taxation and unfair judicial processes, many farmers petitioned their state government with a list of legislative demands and relief measures. Quite generally, farmers called for the reduction of taxes, the abolition of certain civil courts, and the shifting of debt obligations from “manufactures” and farmers to those involved with “commerce” (Smith 1948, 85). Yet, despite these demands, the state legislature did not implement relief legislation—taxes were not lowered, more paper money was not printed, and the courts continued to operate. In fact, the legislature imposed even *more* taxes to finance the state’s debt and to pay off the state’s requisitions to the Confederation (Van Cleve 2016, 221).

Eventually, groups of indebted farmers began formally organizing to block court proceedings until their demands were met. These demonstrations were peaceful, yet they were incredibly disruptive and halted the administration of justice within the state. And, in response to these protests, the legislature convened in a special session, granting *some* relief to the farmers but stopping short of large-scale debt relief and paper money printing. But, many—including the “farmers, mechanics, and laborers” that made up the small, armed insurgency group led by Daniel Shay—were not pleased with the government’s failure to meaningfully address relief measures (Smith 1948, 87). Shay’s forces continued to block court proceedings and fearing an impending clash with state or federal troops, Shay’s forces began marching towards a Confederation arsenal in Springfield Massachusetts. Congress had long been “warned of [Shay’s] rebellious activity” and the looming threats to the arsenal, however, they were unsuccessful in raising the necessary funds from the states—through the requisition system—to “suppress the rebellion” (Cain and Dougherty 1999, 234). So, in the end, Massachusetts and New York state militias and privately funded soldiers suppressed the rebel group after they attempted to seize weaponry from the arsenal. The skirmish resulted in minimal loss of life and the uprising

was easily quashed, yet Shay's rebellion highlighted a variety of problems that animated both American political and social life. Of course, the rebellion was emblematic of the frustrations indebted citizens felt towards their government, yet it also revealed structural and organizational deficiencies in both the state governments and the federal government. More broadly, however, the rebellion acted as a microcosm for the larger structural and societal problems the plagued the nascent nation—how was “republican” government supposed to operate and how were government and society supposed to deal with class conflict?

At the heart of Shay's rebellion and other economic relief measures and demonstrations forwarded by indebted workers, was an apparent class conflict between the laboring and farming classes (“working-class”) and the merchant class. Many working-class individuals had served their country during the war and had incurred debt to support their families and properties while in combat. In many cases, the former soldiers were owed back pay by the state for their service, but the state was unable to raise enough funds to compensate them (Smith 1948, 88-89). So, in essence members of the working-class were simultaneously being sued by private creditors for debt they had incurred while serving, while also being compelled by the state to pay taxes on their land and income, having not been duly compensated for their prior governmental service. This interpretation of events is, perhaps, the most charitable way to view the working-class' dilemma, but, Van Cleve does note that the many *non*-working-class citizens sympathized with the plight of the working-class, even if they did not necessarily agree with their protest tactics (Van Cleve 2016, 219-226).

With that said, the working-class generally viewed the government's taxation efforts as the “*many* being taxed to support the *few*,” and they viewed the court system—the primary avenue for the wealthy to collect the money they were owed—as catering to the “commercial

and professional elite” (Pressman 1986, 90; emphasis added). The populist outrage felt by the working-class first manifested itself in peaceful protests meant to obstruct court proceedings, and, at first, these demonstrations were viewed as very much in-line with the spirit of the American revolution. Yet, as protestors began to threaten violence to achieve their desired outcomes, certain citizens—particularly ruling-class and merchant-class elites—began to take issue with both the goals and tactics employed by protestors. In essence, Shay and his ilk were “attempting to re-secure the liberties they believed that had fought for and won: representational taxing, property rights, and individual independence,” but the “merchant power[s]” and “government leaders” viewed their aims as self-interested and radical; to them, the “Shaysites” wanted redistribution of wealth and “social reorganization” that was “alien” to the Founders’ private property focused vision for our nation (Pressman 1986, 90). Threatening violence to achieve what the elites considered to be goals that were at odds with the philosophical soul of the nation was considered a “wholly illegitimate form of political action”; it was a “repudiation of republican government, not its fulfillment” (Van Cleve 2016, 224). Broadly, intellectual elites, like Samuel Adams, viewed this form of political action as a direct threat to the “bedrock [republican] principle that political decisions should be made exclusively by officials elected under a popularly established constitution” (ibid).

We can see then that many economic and political elites rejected the aims and tactics of the *many*, as they believed such tactics were anathema to America’s philosophical roots. However, with that said, we should also note that the very structure of the state governments themselves did not comport with the republican ideal propagated by many of those who were involved—intellectually and politically—with the country’s independence from Britain. Shay’s rebellion, the “sporadic violence against courts and governments” within other states, and the

“populist relief legislation” enacted by many states in the Union demonstrated to America’s political leaders that the current *structure* of American government—at both the state and federal level— (1) made the country unable to address domestic threats and uprisings and (2) made state governments too susceptible to “popular political influence” (Van Cleve 2016, 235 and Klarman 2017, 8). Both of these deficiencies portended a downfall into “anarchy and confusion,” as they threatened the viability of republican government (Klarman 2017, 89). Below, I will tease out exactly why the structure of the state governments, in particular, were alien to the broader republican vision of the Founders and Framers.

What Was Wrong with the State Governments and Their Constitutions?

As noted above, the Articles of Confederation did not create a strong, central government. As such, each individual state possessed a great deal of autonomy over their own governance, but, given certain features of the Articles, like the requisition system, state governments and the policies they implemented has a direct effect on the nation, as a whole. For instance, if we are again to consider Shay’s Rebellion, certain state’s failure to pay their share of requisitions inhibited the federal government from forming and mobilizing a standing army to protect the Confederation’s arsenal. In other words, the individual debt collection policies of the states, could have disastrous effects for the Confederation, as a whole. With that said, however, many—including George Washington, Alexander Hamilton, and James Madison—viewed that healthy states—that is that states that were both stable and durable—would, in turn, lead to a healthy union (Van Cleve 2016, 32). With a weak central government—outlined in the Articles—these political leaders believed that strife, instability, and—in extreme cases—state governmental collapse could result in “civil war” and could open the door for a foreign power to take control of the continent (ibid). Therefore, for the sake of the Confederation, it was imperative that the state governments be structured in a way that would (1) make them able to

meet their financial commitments to the Confederation and (2) ensure their continued existence. Yet, a survey of these state governments suggests that their constitutions were not equipped to achieve these aims, imperiling the overall health of the nation.

After the Revolutionary War, the original thirteen states drafted and ratified their own constitutions. Broadly, these documents contained a plethora of “democratic features” like “annual elections, reduced property qualifications for voting and officeholding, secret ballots, open legislative sessions, and weak executives” (Klarman 2017, 89-90). Most of these constitutions reflected a “common theme of placing primary faith in the people to control the excesses of government” (Manning 2011, 1998). Many of these constitutions were also popularly adopted—that is the masses within the states played an integral role in both the drafting and ratification processes (Van Cleve 2016, 224). Popular input during the ratification processes tended to result in the newly formed governments having “increased legislative powers” and a “weak governor who usually lacked both veto and appointment powers” (ibid). For instance, Pennsylvania’s 1776 constitution allowed almost universal suffrage and established a unicameral legislature, with *supreme authority* over lawmaking (ibid, 28). After forcing creditors to accept paper money as legal tender, Rhode Island’s legislature successfully threatened the state’s court judges with impeachment if they attempted to strike down certain, particularly draconian debt-relief legislation (Klarman 2017, 97). In Maryland, the governor was appointed by the legislature for a one-year term (Friedman 1988, 37). Delaware’s state constitution did not permit the state’s “president”—who was appointed by the legislature—to veto any legislation (Delaware Const.). Similar to Pennsylvania, the state of Georgia had a unicameral legislative body and an executive with *no* veto power (Georgia Const.). As noted above, even in Massachusetts—a state whose original constitution was thought to be “conservative” and geared towards protecting and

advancing the interests of property-holders—the state legislature acquiesced to many of the debt-relief measures advanced by the sympathizers of Shay’s Rebellion (Van Cleve 2016, 28-29). A more systematic analysis of the state constitutions can be found in this paper’s Appendix.

In sum, these democratic features increased the likelihood that state legislatures succumbed to popular economic and debt-relief demands—often to the chagrin of their elite and wealthy constituents. In these state governments, the majority made the laws, and as such, the legislation passed often did not reflect “the public good or general interest the whole society”; rather, legislation reflected the interests of “the dominant faction” of the day—whether that be creditors or debtors (Hobson et al. 1979, 222). The state governments comporting themselves in this particular manner highlighted two existing tensions in American political and social life. First, it demonstrated the political and legal tension between the (1) “natural right” of private property and (2) the economic well-being and welfare of the working-class (Klarman 2017, 103). Second, it demonstrated the undeniable chasm between the (1) wealthy, property-owning elite and (2) the (often) indebted working and agricultural class.

In essence, these two tensions demonstrate the glaring political *and* social problems that imperiled the health and stability of the state governments and, in turn, the Union, as a whole. First, there existed the political flaws within the state governments. Given that states had both weak executives and judiciaries, legislators—elected by the people—possessed and wielded nearly supreme power over political affairs. And, consequently, when popular pressure became too strong, many legislatures implemented legislation that “lacked a sense of the public good,” meaning that they promoted either the will of the current majority or, in some cases, the selfish interests of lawmakers (Hobson et al. 1979, 224). So, politically, the Confederation’s health was threatened by the very structure of the state governments, particularly their constitutionally enshrined susceptibility to popular demands. And, given that the Articles awarded the states a

great deal of autonomy over their legislative and political affairs, the federal government did not possess any meaningful power, nor did they have the legal standing to abate the majoritarianism within the states.

While the governmental structure of the states and the federal government surely threatened the health of the nascent Confederation, the problems within the country were not only political—they were also social. The economic issues that plagued the Confederation after the Revolutionary War pitted the rich against the poor and the elite against the commoners. In essence, given the existing structure of state governments, competing social classes warred over control of the government to impose their will on the other, opposing social class. This meant that in practice, the working-class, being the larger of the social classes, was often able to use the government to impose their will on the minority—a practice that James Madison called “a disease most incident to republican government” (Madison as cited in Hobson et al. 1979, 223). In this way, the government was only equipped to please one segment of the population; the existing structure did not give a voice to the minority, meaning their grievances, while considered, were never meaningfully addressed. Thus, the governments, in their current forms, only exacerbated social unrest and division, and, consequently, the “nation faced the horror of faction and civil war” (Henry Knox to George Washington as cited in Klarman 2017, 118). If left unchecked, the “trend toward democracy” and its accompanying social unrest, would irrevocably damage the Union. Thus, “men of reflection and principle”—mainly the elite—understood that changes needed to be made at the federal level to ensure the stability of the country (Klarman 2017, 118). The current system—outlined under the Articles of Confederation—did not provide the federal apparatus with enough power to meet its demands and it allowed social unrest to

fester within the states, sometimes leading to violent and deadly uprisings. In short, a solution was needed; the Constitution of the United States' ratification was imminent.

Chapter 3: Our Mixed Regime

Before discussing the Constitution's ratification, this chapter will first seek to ascertain the philosophical texts and ideas that influenced the Framers of the Constitution. While it is widely believed that Enlightenment philosophers—primarily Charles de Montesquieu— influenced the American founding and, later, the formation of the Constitution, the following will demonstrate that certain Framers were actually more influenced by ancient writers. In particular, much scholarly evidence exists proving that the Framers read and considered Aristotle's *Politics* and Polybius' *Histories*.

In the end, appreciating the extent to which the Framers were influenced by ancient thinkers, elucidates what type of government they hoped to create—a mixed regime. And, this regime was not only concerned with protecting the liberty and freedom of the people—a goal many Enlightenment thinkers held to be paramount; instead, such an analysis, will illustrate that the Framers were also concerned with creating a *stable* and *durable* regime—a goal only achievable if they were to heed the advice and ideas of Aristotle and Polybius and properly balance social and societal interests.

Charles de Montesquieu: The Oracle

There is one man who the Framers considered “the *oracle* who is always consulted and cited” on problems relating to constitutional structure, and he is Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (“Montesquieu”) (*Federalist* No. 47; emphasis added). A French jurist and philosopher, Montesquieu's seminal work, *The Spirit of Laws*, was widely discussed, cited, and referenced during the American founding and Constitutional Convention—in fact, it was viewed as “political gospel” (Carpenter 1928, 37).

In the *Spirit of Laws*, Montesquieu was broadly interested in constructing a type of government that would provide its citizens with the greatest possible *political liberty*—which he believed “consists of being able to act according to the behest of the law,” that is “to be able to do what is legal and not to be compelled to do what is illegal” (Levin 1936, 125). Government, as Montesquieu noted, usually consists of three sorts of power: the legislative, the executive, and the judiciary (Montesquieu, *The Spirit of Laws*, 11.6). Yet, he notes that men—when they possess power—tend to abuse it and try to carry their “authority as far as it will go” (ibid, 11.4). Therefore, it is necessary that these three branches of government should check one another—that is “power should be a check to power” (ibid). If power was shared or united between the three branches of government, there would, in essence, “be no liberty” (ibid, 11.6). If, for instance, the judiciary were joined with the legislative branch, each citizen’s “life and liberty would be exposed to arbitrary control,” and if jurists were also executors of the law, judges “may behave with violence and oppression” (ibid). If one body or man were to “exercise these three powers,” there would be an “end to everything” (ibid).

Montesquieu did not only stress the importance of governmental checks, he also outlined certain constitutional mechanisms that would ensure the three branches of government could most effectively balance and check one another. For instance, the executive should possess the power “to restrain the encroachments of the legislative body” and “reject” certain resolution, for if the executive did not hold this power, the “legislative body would become despotic” (ibid). The executive should also have the sole power to direct and mobilize the nations’ army, yet only after the army has been established by the legislative body. On the other hand, the legislative body must be responsible for raising “public money,” and if the executive were to interfere in this process, “liberty would be at an end” (ibid). Judicial power should not be given to the

legislative or the executive branch; judges should be chosen from the “body of the people” and make their rulings “with a form and manner prescribed by law” (ibid). If judicial power was mixed or if judges did not rule in accordance with law, “every private citizen may be ruined by [the judiciary’s] particular decisions” (ibid).

This brief explication of Montesquieu’s *The Spirit of Laws* and his doctrine of checks and balances demonstrates two important concepts relevant to this paper. First, we will clearly see, in this paper’s next chapter, that many of the structural decisions made by the Framers comported with Montesquieu’s views on how government should be structured. In particular, Chapter 4 of this paper will note that the Framers provided the President with the veto power, the legislature—the House in particular—was given complete jurisdiction over spending and taxation, and the judicial branch was constructed in a manner that would insulate it from the other branches. Second, we can also observe that Montesquieu’s political project was chiefly concerned with creating institutional checks and balances between the three branches of government *in order to* preserve the liberty of the individual, for not only did he value the normative importance of the personal liberty, he also believed that when the people lose their liberty, states perish (ibid). In this way, Montesquieu’s writings and teachings were a part of the “new science of politics”—a philosophical and political pursuit aimed at creating a government that was directed towards protecting “the private pursuit of happiness” and “individual liberty” (Diamond 1978, 37-38). And, Montesquieu’s separation of powers doctrine “aims chiefly” at securing the “liberty of each” citizen in a political community (ibid, 40).

While we have already recognized (yet not yet addressed) that the Framers implemented many of the checks and balances set forth by Montesquieu, we must also note their ideological and philosophical agreement with Montesquieu’s ultimate goal of protecting personal liberty.

Madison believed that maintaining the “necessary partition of power among” the several branches of government was “essential to the preservation of liberty” (*Federalist* No. 51). For Madison, justice was “the [ultimate] end of government...and civil society,” and it should be pursued until it was obtained “or until liberty be lost in the pursuit” (ibid). Liberty was deemed to be essential to “political life,” and well-constructed government was essential to security of this liberty (*Federalist* No. 10 and *Federalist* No. 1). The Framers, in the *Federalist Papers*, told their “countrymen” that ratifying the Constitution would be the “safest course” for their “liberty,” “dignity,” and “happiness” (*Federalist* No. 1). Thus, we can see that the both the Framers and Montesquieu agreed that liberty was not only an important element of public life, but it was also only able to flourish when government was constructed in a particular way that guaranteed checks and balances between the three branches. And, while this paper will not discuss the events and circumstances that influenced Montesquieu’s writings, the events that led the Framers to implement Montesquieu’s suggestions have already been well-established in this paper’s second chapter. To put it succinctly, however, government, during the Confederation Period, was unable to “protect the personal liberty and property of” each subject, and changes at the federal level were necessary to “provide adequate security to life, liberty, and property” (Klarman 207, 118 and 123).

At this point, it is clear that Montesquieu profoundly influenced the formation of the Constitution and, consequently, the Framers’ conception of republicanism. *Revised republicanism*, (to be discussed in Chapter 4) was, at least partially, aimed at protecting and securing individual liberty, and doing so required separating power between the three branches of government and creating a system that allowed for these branches to balance and check one another. Yet, while we would not be able to understand the Framers’ political project without

appreciating the separation of powers doctrine and Montesquieu's contribution, this doctrine cannot explain their entire intellectual, philosophical, and political agenda.

To achieve a holistic understanding of the of the Constitution and the government the Framers were concocting, we must also look towards the more ancient doctrine of the **mixed regime**. In fact, Montesquieu himself was not only propagator of his separation of powers doctrine, he was also a philosophic mediator of the mixed regime doctrine, such that some believe that he was tinkering with, expanding upon, and, in some ways, updating a political doctrine that predated his time (Resnick 1989, 100). Montesquieu did, in fact, engage with ancients, and he could have been merely modernizing the ancient record.

Yet, with that being said, after further examination, Montesquieu's doctrine and the ancient doctrine of the mixed regime are "as unlike and unrelated as any two political arrangements can be...especially if you consider the *ends* of each" (Diamond 1978, 40; emphasis added). And, the Framers were acutely aware of both the (1) differences between these doctrines and (2) the deficiencies of only relying on Montesquieu's doctrine. The Framers looked towards the ancient mixed regime doctrine because, unlike Montesquieu's emphasis on liberty, the ancient doctrine stressed the importance of stability and longevity—only achieved if the government could carefully "mix" the interests of the various social classes.

The Mixed Regime: Aristotle and Polybius

Before discussing the extent to which the Framers were influenced by this ancient doctrine and before analyzing how we can see that influence take form in the Constitution, we must first understand the mixed regime's components, its nuances, and, lastly, its philosophical and political dissimilarly to the separation of powers doctrine. To accomplish this feat, we will first begin with Aristotle's *Politics*.

In Book 4 of his *Politics*, Aristotle seeks to understand what the “best regime” is and “what quality it should have to be” (Aristotle, *Politics*, 97). Accomplishing this goal required that one have a view towards “determining both how [the best regime] might arise initially and in what manner [such a regime] might be preserved for the *longest time* once in existence (ibid; emphasis added). From the outset, Aristotle also wishes to study the best regime possible and most attainable for all, noting that the best regime, in theory, might not be the best regime, in practice (ibis, 98). Aristotle begins his study into the best regime by noting the number and types of regimes in existence and the “ways they are combined” with one another.

For Aristotle, there are three “correct” regimes— “kingship, aristocracy, polity”—and three deviations from these “correct” regimes—“tyranny is the deviation from kingship, oligarchy from aristocracy, and democracy from polity” (ibid, 99). Before discussing why Aristotle believes tyranny, oligarchy, and democracy to be deviations from the their three, corresponding “correct” regimes, we should note how Aristotle characterizes types of government.

For Aristotle, whoever has “authority” in the city is the governing body and the governing body is, in turn, the regime. For example, when a single person has authority and governs, the regime is a kingship. When the few people who are most virtuous rule, the regime is an aristocracy. And, when the majority of free people rule, the regime is a polity. With that said, a regime is “correct” when the ruling class looks toward the “common advantage...according to what is unqualifiedly just, while those which look only to the advantage of the ruler are errant...[or] deviant” (ibid, 73). Additionally, I will note that oligarchies do not put the most virtuous, but rather the wealthiest, in charge, and in democracies, the most numerous—not the best—rule the regime. Understanding the nuances of these deviations is not entirely necessary

for the purposes of this paper, but it is important to note that terminology that Aristotle uses when referring to the various regimes he observes across ancient societies.

Aristotle recognizes that the “reason there a number of regimes is that there are a number of parts in a city” (ibid, 100). Of course, rather generally, there are always (1) the well-off in a city, (2) a large collection of poor people, and (3) others who are “middling” or neither destitute nor affluent (ibid). Yet, within each class, there are even more groups and types of people. In the middling and lower class, there are farmers, workers, and merchants. The rich can even be differentiated by the extent of their property owned. “In addition to the differences based on wealth,” Aristotle also notes that we can distinguish people in the city by both their families and virtue (ibid). What is clear, then, is that in each city, there exists countless groups of people with varying social interests, and, often, different parts of the city—particularly the rich and poor—are “seen as opposed to one another” (ibid, 105). And, therefore, there are necessarily “as many regimes as there are” types of people and groups of people in each political community (ibid, 101).

Certain regimes type, however, come with particularly odious political consequences. In democratic regimes, where the many are not meaningfully restrained by the law, the many rule “all together” (ibid). And, as a unified governing body, they become like a “master,” and this regime type quickly becomes tyrannical. With respect to oligarchy, when the few are not constrained by law or custom, the regime simply becomes a “rule of the powerful” over the rest of the political community. Yet, even after mentioning how these two deviant forms of government can be harmful to the health and success of the city, Aristotle notes that mixing these two regime types—democracy and oligarchy—results in a non-deviant and “correct” regime

type—*polity*. Here, is the first time that Aristotle highlights the importance of regime mixing, and, thus, it requires our further attention (ibid, 110).

Aristotle generally believes that there are three competing forces that “dispute over equal treatment in the regime”—wealth, freedom, and virtue. With respect to wealth, a polity succeeds in mixing socioeconomic classes—that is the well-off and the poor. And, when mixing democracy and oligarchy to create a polity, certain “defining principles” must also be followed. Generally, the chief defining principle of a “good mixture” is that “it should be possible [for the polity] to be spoken of as either a democracy or an oligarchy” (ibid, 112). One particular way in which regime types can be mixed is by using two different methods for selecting political officers. For instance, the Spartan regime seems democratic because the people elect the ruler and the board of overseers, yet by merely having elections for these positions, and not choosing officers by lot—which is characteristic of pure democratic regimes—the Spartan regime is also oligarchic, for in oligarchies, elections—or picking representatives to rule—is commonplace. Additionally, the Spartan regime featured a rudimentary judiciary that ruled over cases of exile and death; in these cases, the people’s judgement was not considered.

Aristotle’s discussion of Sparta and polity, however, is by no means an outright endorsement of polity nor should it be taken as a designation of polity as the best regime or even the best regime possible. His reference to polity is important because it demonstrates that mixing two deviant regime types can result in a single, correct regime. Aristotle begins his explanation of the *best regime*, however, by first referencing a point made in his *Ethics*—that virtue is the “mean” and the best life of life is “the middling sort of life” (ibid, 114) Rather than addressing the merits of Aristotle’s claim or the philosophical reasoning he provides in his *Ethics*, for the purposes of this paper, we will stipulate that Aristotle’s claim about the middling sort of life is

true, and, just as he does, apply that reasoning and principle to the organization and structure of the regime.

First, the city wishes “to be made up of equal and similar persons to the [greatest] extent possible,” and this is generally the case among the middling class of city—they are neither poor nor rich. This middling class neither desires the possession of others—like the poor—nor do they feel the constant pressure of being plotted against or envied—like the very wealthy. Aristotle concludes then that the best “political communities” depend on the middling class, and the cities that are capable of being well governed are cities where the middling class is numerous, so they can prevent the other social classes from tipping the scales of power in their favor (ibid, 115-116).

Tyranny, therefore, is least likely to arise in a middling sort of regime. In this regime, factional conflicts are minimal. But, in regimes where the middling class is few, conflicts are commonplace, as either the poor or the rich take control, and govern in a manner that merely benefits their own interest, not what is “common or equal” (ibid, 115). Mixing power results in a longer “lasting” regime, as all sides take part and participate in the running of and governing of the regime (ibid, 118-119). This regime will not last for “two or three days” like other states and constitutions; instead, because of its mixed nature, it will be governed for “the longest time” possible, as this regime establishes “the safety of the state, carefully avoiding the things that cause [state] destruction” (ibid, 6.28). Aristotle quite clearly outlines the advantages of the mixed regime and its desired outcome, but, now, we must shift our focus to explaining to how state-builders (or constitution-makers) can successfully create a mixed regime.

Aristotle notes that the functions of government are manifested in (1) a deliberative body that discusses “common matters”, (2) a part that determines how officers should be elected and

in what manner, and (3) an “adjudicative part” (ibid, 120). Again, he introduces the concept of mixing when discussing these parts of government. For instance, he asserts that the masses “should have authority over the highest offices by electing and auditing these officeholders, but he also limits their participation to the collective activities of serving in the [common] assembly and on juries” (Cherry 2009, 1407). Additionally, in a mixed regime, some legislative offices and judicial offices will be filled by lot and others will be filled by election (Aristotle, *Politics*, 126-128).

To briefly contrast Aristotle’s mixed regime from Montesquieu’s separation of powers doctrine, we can see that “Aristotle does not consider these functions in connection with the balance of powers in the state,” like Montesquieu (Levin 1936, 127). In other words, he does not view this process of mixing and balancing as a way to halt governmental interference or overreach; instead, he views mixing as a way to keep social strife in-check, ensuring that factional conflicts do not overwhelm the political community. In this way, mixing does not ensure that government is limited; rather, it ensures government is stable and durable, unphased by competing social classes and their attempts to gain power. Thus, we see that Aristotle is more interested in the blending, balancing, and mixing of the “monarchical, the aristocratic, and democratic elements” of society—the various social classes that make up every political community (ibid, 130). And, if we look towards Polybius, we see that the Aristotle’s mixed regime doctrine was, in some ways, codified in the Roman Constitution.

A historian, not a philosopher, Polybius’ main goal, from the outset of Book VI of *The Histories*, was to provide the reader with an understanding of how the Roman Empire was able to take over the “whole world” in less than fifty-three years (Polybius, *Histories*, 6.1). To explain Rome’s rise, Polybius turns to the political institutions of Rome which were outlined in their

constitution. Polybius begins by noting the three kinds of constitutions—kingship, aristocracy, and democracy. While Polybius refers to them as *constitutions*, for the purposes of this paper, we can understand them as regime types, similar to how Aristotle identifies monarchy, aristocracy, and polity as the three “correct” regime types. In fact, for clarity’s sake, given that Aristotle considers democracy to be a deviant form of polity, when Polybius uses the word democracy, we can understand it is a polity, for Polybius believes that the deviant form of democracy is “mob rule” (ibid).

Before addressing the Roman system, Polybius praises the legislation and constitution enacted by Lycurgus, an ancient Spartan leader. Lycurgus noted, as Polybius and Aristotle both pointed out, that all of the three “correct” regime types had their accompanied deviant forms, and, if the more odious aspects or characteristics of the “correct” forms were left unchecked, they could “in course of time [turn] into the [deviant] form” (ibid, 6.10). As such, Lycurgus blended all the “good distinctive features of the best governments, so that none of the principles should grow unduly and be perverted”; rather, the “force of each [type of government would] be neutralized by that of the others” (ibid). If the three “correct” types of government were successfully blended in this manner, the regime would “remain for long thanks to the principle of reciprocity”—the kingship would be guarded from “arrogance” by the commoners, who were given “a sufficient share in government” (ibid). Additionally, the commoners would not “treat the king with contempt” because they feared the “elders,” or the group of best citizens who would always be “on the side of justice” (ibid). Here, Polybius offers a rather broad sketch of how he believes Lycurgus mixed his regime to promote stability and longevity. Next, however, he discusses the Roman constitution and the precise mechanisms that Rome instituted to mix their government.

In the Roman state, all “three kind of governments” shared control. If one were to look at the Roman consuls, one would think the government was “completely monarchical” (ibid, 6.11). If one were to look at the Roman senate, he or she would consider the state to be aristocratic, and, if one were to look at the masses, one would think that the government was a democracy (ibid). The duties and elements of these three parts of governments are as follows.

The consuls in Rome, can be understood as the executives in the state, they exercise “authority...over all public affairs,” “they consult the senate on matters of urgency,” and they “carry out” and “preside over the execution of popular decrees” (ibid, 6.12). They also possessed almost complete power over the military, including selecting the “fittest” officers and “levying” soldiers (ibid). The Roman senate had control of the “treasury, all revenue and expenditure being regulated by it” (ibid, 6.13). The senate also investigated public crimes, like “treason, conspiracy, poisoning and assassination” (ibid). This body also had complete control of interstate relations—like “settling differences, imposing demands, or declaring war” (ibid). The people, or the masses, were responsible for serving on juries, they had “exclusive control of elections,” and, perhaps most notably, they had the power to veto convene in a tribune, and “bring senatorial proceedings to a halt or prevent the senate from meeting at all” (McGing 2010, 180-182).

Polybius goes on to discuss how these three governmental powers check one another, as well. The consul’s power over the army is checked by both the people and the senate, as the consul “is not able to bring his operations to a conclusion without [the consent of the senate and people]” and the senate’s continued financial backing of military operations (Polybius, *Histories*, 6.15). The senate, as mentioned above, was, in many ways, “afraid of the masses” because of the people’s power to halt their proceedings. Yet, the people also found it necessary and advantageous to respect the senate, as the senate had complete power over “public property,”

meaning that they could greatly “benefit or injure” the masses who had pecuniary interest in both public property and contracts (ibid, 6.17).

Much like how Aristotle believed that the mixed regime ensured that the political community did not fall prey to the outsized influence of one particular interest group, Polybius asserts that the mixed, Roman constitution ensured that “one part [of the political community]” would not grow “out of proportion to the others” and “become too predominant” (ibid, 6.18). Any “aggressive impulses” by one of the three “estates,” “stands in dread of being interfered with” by another estate (ibid). For Polybius, we must note that these three branches of government were, in essence, political extensions of the three classes of Roman citizens—the monarchical consuls, the aristocratic senate, and the democratic people—and, therefore, implementing constitutional checks and balances for the Roman political system, in turn, ensured that social life in Rome could also remain in equilibrium. Thus, mixing for Polybius, creates social and political stability—no one group can “outgrow the others” and “treat them with contempt,” which would, in practice, result in discontent and, possible, revolution, severely imperiling the health of the state.

I should also note that Polybius believes that constitutional mixing not only has a negative effect—that is it makes sure social conflict *does not* happen—it also has a positive effect. Polybius remarks that when all three parts of government—and thus all three social classes—work together, the political community “possesses an irresistible power of attaining every object upon which it is resolved”; in other words, when they work together, the state is stronger, more secure, and more prosperous (ibid).

What is clear then, from both Aristotle’s *Politics* and Polybius’ *Histories*, is that there is a rich philosophical and historical record of the mixed regime doctrine. This doctrine deals with institutions, practices, and theories that mirror those mentioned and discussed in Montesquieu’s

Spirit of Laws. However, the mixed regime doctrine and the separation of powers doctrine differ markedly in their *goals*. Montesquieu believed that checks and balances and separation of powers would create a system of government that protected the liberty of the individual against state overreach. Aristotle and Polybius believed that mixing the social classes within government and creating a system that stopped any one class of people from exerting an outsized influence on a different class of people. In doing so, the mixed regime would allow for more a stable, durable, and healthy political community.

Did the Framers Read These Writings?

Before discussing how Aristotle's and Polybius' conception of the mixed regime impacted the American founding, we must first assess to what extent the Framers read, considered, and discussed these philosophical works and others associated with them.

David Bederman notes that the "Framing generation particularly prized the works" of Aristotle and Polybius (Bederman 2008, 15). With respect to Aristotle, his "tripartite division of constitutional government between monarchical, aristocratic and democratic forms" was obviously influential" to the Framers when they were crafting the Declaration of Independence and the Constitution (ibid). Yet, while Aristotle was clearly considered, Polybius was, perhaps, the "most referenced in the Framing generation" for both his political philosophy and his historical account of the Roman constitution (ibid). Polybius' discussion of the mixed constitution "was positively crucial to the Framers' sense of checks and balances or separation of powers," and, later, Bederman notes that the Framers' read Montesquieu, who in many ways was "mediating" Polybius' political theory (ibid).

Similarly, Bernard Bailyn in his seminal work, *The Ideological Origins of the American Revolution*, notes that it was "common knowledge" in English society and, later, Revolutionary

American society too, that society “consisted of three social orders, or estates, each with its own rights and privileges, and each embodying...a certain form of government: royalty, whose natural form of government was monarchy; the nobility, whose natural form was aristocracy; and the commons, whose form was democracy” (Bailyn 1992, 70). This conception of government and the division of social classes had been “known” and discussed “since Aristotle,” and the English accepted Aristotle’s belief that if one class was left “unchecked,” it would be at ‘the expense of the others’” and, in turn, not generate liberty nor happiness, but rather “misery for most” (ibid). Thus, the “theoretical explanation” of the “famous mixed constitution”—which was discussed in ancient tradition—was universally accepted in eighteenth century (ibid). And, American colonist “unanimously agreed” that whatever system they created had to mirror the Aristotelian conception (Bailyn 1992, 71).

If we are to look towards primary sources, we see that in John Adams’ *A Defence of the Constitutions of Governments of the United States of America* (“*Defence*”), the Framers frequently credits Polybius for his intellectual and political development, and for informing his thought on how the best form of government should be constructed. Adam writes:

“I wish to assemble together 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. It will not be contested that all these characters are united in Polybius, who, in a fragment of his sixth book translated by Edward Spelman, at the end of his translation of the *Roman Antiquities of Dionysius Halicarnassensis*, says – ‘It is customary with those who professedly treat this subject, to establish three sorts of government – kingly government, aristocracy and democracy. . .’ It is manifest that the best form of government is that which is compounded of all three. This is founded not only in reason, but in experience “(*Defence*, 136-137).

Additionally, even in *Federalist 63*, when discussing the United States Senate and its benefits, Polybius is referenced, and he is believed to have informed “[James] Madison’s

insistence on the need for a senate” in order to stymie popular “fluctuations” (McGing 2010, 217). Adams’ and Madison’s “advocacy of mixed government” and admiration of Polybius and his writings has also been noted in the writings of Hamilton, James Wilson, and “many others involved in the process of founding the new nation” (ibid, 218).

What can clearly be seen, then, is that the Framers were both read and were deeply informed by Polybius’ and Aristotle’s writings and philosophical doctrines. Largely, the Framers, when discussing Aristotle and Polybius and how these writings informed them, were, in essence, laying the groundwork for an American “mixed government, tempered by the modern developments of representative politics and [Montesquieu’s] doctrine of separation of powers” (ibid). But, why, precisely, did the Framers turn to these more ancient texts rather than simply relying on and following the more modern, Enlightenment doctrine of separation of powers and governmental checks and balances? The following will address that question, and I will ultimately argue that both ancient and modern understandings of mixed government were considered by the Framers, as they were attempting to create the most stable regime that simultaneously protected individual freedom.

Blending Stability and Liberty: Separation of Powers is Not Enough

To best understand why the Framers were drawn to the ancient doctrine of the mixed regime and then to later ascertain the precise form of government created by the Framers, we need to appreciate the Framers’ concern for governmental stability and longevity. And, in *Federalist 62*, when discussing the need for the United States Senate in *Federalist 62*, Hamilton addresses this widely held concern amongst the Framers.

He begins by talking about the internal problems associated with unstable or, as he called it, “mutable government.” When government is mutable, changing, and too dynamic, the policy

that government creates can be “calamitous”; “[such government] poisons the blessing of liberty.” If the laws, undergo such “incessant changes that no man” can reasonably understand, know, and, therefore, follow the law, then law itself and governmental policy lose both their significance and power.

Instability, however, also can benefit the “few over the industrious and uniformed mass of the people.” The wealthy few who are able to “watch the change” of laws and policies that affect currency or property can “trace its consequences” and benefit instantly. Additionally, merchants, farmers, and laborers would have no reason or incentive to “go forward” with any “great improvement or laudable enterprise” which requires “the auspices of a steady system of...policy.” Above all else, however, the “most deplorable effect” of unstable government is the “diminution of attachment and reverence” of the people towards a political system that is ever-changing, weak, and disappointing to many of their “flattering hopes.” To Hamilton and the Framers, “no government would be respected...without possessing a certain portion of order and stability” (*Federalist* No. 62).

The preceding discussion of *Federalist 62* is important for the following reasons. First, Hamilton’s reference to the conflict between the *few* and the *many* should not be overlooked. This particular *Federalist Papers* suggests that Framers recognized that American government, as it stood before the ratification of the Constitution was unstable and too mutable, and, consequently, such a political landscape created tension between the well-connected and wealthy few and the less-connected and middle-class many. For instance, as noted in *Federalist 62*, the wealthy few have a proclivity for profiting off rapid changes in governmental policy, and, on the other hand, middle-class workers, like farmers and manufacturers, cannot reasonably invest their money and time in pursuits that might be later affected by an unsteady government and its laws.

While these specific problems may not have been directly discussed as the more salient issues occurring during the Confederation Period (see Chapter 2 of this paper), the problems discussed in *Federalist 62*, at the very least, mirror the political and social climate of the Confederation Period.

In some ways, however, the conflict between social groups during that period cannot merely be characterized as the *few* benefitting and the *many* being plainly disadvantaged; the social strife was far more nuanced. In some cases, the less-fortunate many were clearly disappointed and disenchanted with both the structure of government, its policies, and its goals. For example, American farmers and laborers—many of whom had assisted the country during the war effort—were now being taxed by their state governments at an increased rate, and found themselves in state courts, as private creditors demanded that they repay their debts. And, these state courts were often viewed as disproportionately ruling in favor of private creditors. On the other hand, as we have seen, some state governments were more structured in a way that made them more susceptible and responsive to popular demands—some states had weak executives, others had unicameral legislatures, and many states did not possess a meaningful court system meant to check executive or legislative overreach. And, in these states, when middle and lower class citizens banded together and “raged for paper money,” wished to “abolish debts,” and called for the “equal division of property,” wealthy citizens were often disproportionately impacted by debt-relief legislation, species manipulation, and other popular-economic reforms (*Federalist* No. 10). Not only did the wealthy believe that their private property and liberty were threatened by the overzealous actions of popular government, they, much like Hamilton notes in *Federalist 62*, did not believe that government was “truly respectable” nor sustainable if changes were not immediately made to its current form.

In that same respect, events like Shay's Rebellion, highlight the fact that in some states, like Massachusetts, less-well-to-do citizens did not find their own government "truly respectable." In other words, they did not find the government to be representative of their interests, nor did they believe the actions and policies implemented by government had equal effects on *all* citizens. Thus, we cannot merely understand the economic and social issues that festered during the Confederation resulted as issues that were only felt by the *many*, as *Federalist* 62 might suggest. The economic recession that followed the Revolutionary War, the ratification of popularly focused governing documents, and, in severe cases, violent uprisings, also deeply affected the *few*.

Of course, however, the proceeding analysis begs the following question: rich, middle-class, and poor Americans were, in different ways, disgruntled with government during the Confederation Period and adversely affected by both federal policy and their respective state government's policies, but, how does their dissatisfaction with government relate to the stability, durability, and longevity of the American federal system and the state governments of the time?

In this respect, we should understand how exactly the structure and form of government during the Confederation Period could lead to instability. *It is not the case* that the structure of government itself is inherently unstable or "mutable"; instead, the mechanism by which the government created instability is as follows and neatly mirrors what Aristotle laid out in his *Politics*.

If government is constructed in a way that does not provide representation for all social classes or an avenue for each class to formally and meaningfully voice their frustrations and concerns, then the particular social class that feels disenfranchised will not respect the decisions made by government as they are deemed to be either invalid or illegitimate. When this occurs,

whichever social groups believes that they are in the governing minority revolts against the government—such that they no longer respect its authority—or they physically revolt—by, for instance, interfering with the everyday functions of government or mounting armed resistances. Whether government is attacked intellectually or physically, the stability of the regime is then called in to question. And, if the regime and its laws are challenged as unstable or too-often changing, political communities risk “dissolution” and “impending ruin” (Madison to George Washington as cited in Klarman 2017, 136).

During the Confederation Period, some political leaders even believed that “civil war with all its terrible consequences” was likely to result if no changes were made to the Articles or the more problematic state government constitutions (Tobias Lear as cited in *ibid*, 158). The fact that certain leaders feared civil war is emblematic of the class conflicts and tensions that were palpable in Confederation Period America: in political communities, certain social classes felt so disenfranchised and powerless that political leaders feared armed conflict not only between the people and the government but also between one social class and their other, opposing social class.

With all that being said, we should now shift focus and look at the actual decisions made by the Framers when they were constructing the Constitution. Chapter 4, therefore, will seek to answer the following questions: (1) given their fears about the future of American government, what precise changes did the Framers make to American government? And, (2) did these changes comport with mixed regime doctrine, the more modern separation of powers doctrine, a combination of the two, or neither?

Chapter 4: Forming the Constitution and Preserving Republicanism

In 1787, delegates from all thirteen states traveled to Philadelphia to take part in the Constitutional Convention—a gathering aimed towards addressing, amending, and replacing the Articles of Confederation. I have previously identified the salient political and social issues that the delegates wished to address (Chapter 2) and their fears about the dissolution of the Union (Chapter 3). I have noted that, in some political communities, the rich were perceived to have disproportionate power of the poor, and in other communities, the more-numerous lower class was perceived to have an outsized influence on government, much to the chagrin of the less-numerous elite class. Yet, we must understand that delegates at the Constitutional Convention were primarily a part of the latter social class—that is they were wealthy and rather well-connected—and, thus, they wished to “rein the ‘excess of democracy’ in the thirteen state governments,” a problem made possible and exacerbated by the weak central government outlined by the Article and the democratically minded constitutions in the states (Holton 2005, 339). The elite men who attended the Convention also “criticized the [the many] for their fickleness [and] their tendency to vibrate from one extreme to another” (George Clinton as cited in Morris 1956, 155). Thus, the actual individuals who were present at the Convention clearly considered that the social group responsible for the more salient issues in the Confederation Period was the *many*. And, consequently, they wanted to rein and stymie that particular social class’ influence because they believed doing so would ameliorate the prevailing social conflict and strife that characterized that period in American history.

More precisely, however, as noted in Chapter 3 of this paper, by combatting social division and strife, the Framers believed they were addressing their overarching objective: rescuing the Union from the instability they witnessed and the impending dissolution they

portended. In particular, by rescuing the Union from, the Framers were preserving, protecting, and, ultimately, revising *republicanism*—their preferred system of government which they believed to be at risk given the sociopolitical realities of the Confederation Period.

With that said, a clearer definition of *republicanism*—that is a clearer definition of what the Framers hoped to save and preserve—must be discussed and delineated. Later, the following will address how the Constitution differed from the Articles of Confederation and the state constitutions and, after doing so, precisely why the Framers made those decisions will be considered. To achieve the latter, much consideration will be given to the *Federalist Papers*—the set of writings already alluded to throughout this paper and produced by Alexander Hamilton, John Jay, and James Madison during the Confederation Period. These writings were meant to persuade the states to ratify the Constitution after it was drafted at the Constitutional Convention. In the end, our discussion of (1) how the Constitution differed from previous governing documents and (2) republicanism, will help us address the questions posed at the end of Chapter 3. Specifically, the following discussion will, in the end, demonstrate that the republican regime ultimately constructed by the Framers was a *mixed* regime—incorporating the ancient mixed regime doctrine and the more modern separation of powers doctrine.

Understanding Republicanism

Keeping in mind the Framers' displeasure with certain state governmental systems and processes, the Constitution explicitly guaranteed to “every State in this Union a *Republican* Form of Government” and provided that the federal government would protect each state from “Invasion” and “domestic Violence” (U.S. Const. Art. IV sec. 4; emphasis added). While James Madison—one of the authors the *Federalist Papers*—believed that the states, at that time, were generally “republican in nature,” this provision of the Constitution solidified that the states were

now *required* to be republican and supplied the federal government with a legal means to intervene if states ever sought to “exchange republican for anti-republican” forms of government (Smith 1997, 296; *Federalist* No. 43). Thus, when ratifying the Constitution, the Framers believed they were (1) creating a republican federal system of government and (2) ensuring republican governments would survive in the individual states. Yet, this decision by the Framers begs the following questions: what did they mean when they used the term *republican* and did the government they actually create comport with their own definition (Barnett 2016 and Berman 2017).

Addressing the prior question is perhaps more straightforward—Madison defined republican government as “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior” (*Federalist* No. 39). Yet, such a definition although, perhaps, accurate is incomplete—the Framers detested the republican government in the states that comported with the above Madisonian definition; state governments, before the ratification of the Constitution, certainly derived power from the people. In fact, Madison actually took issue with the extent to which the people influenced the “persons holding office” in the state legislatures. This all suggests, then, that the definition of republican government—offered by Madison in the 39th *Federalist Paper*—does not adequately encapsulate the precise form of government outlined in the Constitution and supported by the Framers.

Madison’s inclusion of an imprecise and, perhaps, disingenuous definition of republicanism could be attributed to political realities of the time period. The *Federalist Papers* were, at their core, a form of political propaganda, intended to persuade American citizens—from all social classes—to ratify the Constitution after its drafting. Perhaps, then, Madison used

that definition of republicanism to appeal to the general public. So, in the *Federalist Papers*, Madison was being earnest about his respect for and admiration of republican government, yet he did understand that republicanism, in its current form, could not persist. The delegates at the Constitutional Convention needed to begin “rendering the republican form competent to its purposes” (Madison as cited in Klarman 2017, 125). In this sense the Framers were “revising” republicanism and improving the “defective systems under which the [American people now lived] (Barnett 2016, 54 and Klarman 2017, 125). Therefore, republicanism—for the Framers—was not only a form of government where power was derived from the people; revisions and elements needed to be made to create a “*properly designed*” republican government (Klarman 2017, 125; emphasis added). And, the particular revisions made shed light on the Framers’ conception of how *real* republican government should operate.

The New Federal Structure

With respect to the size and structure of the newly formed federal government, the Constitution outlined a far more intricate and powerful form of government than both the Articles and the state constitutions set forth. The following will then focus on a few of the more salient ways in which the Constitution differed structurally from the governing documents that preceded it. In particular, I will note the formation of the (1) bicameral legislature, (2) the President, and (3) the federal court system.

The Legislature

The establishment of a bicameral legislature and with it the United States Senate is widely considered to be one of the largest revisions the Framers made to the federal structure (Barnett 2016, 58-61; Manning 2011, 1983). Article I, Section I of the Constitution established the House of Representatives and the United States Senate. The former’s members would be

chosen every “second year” by the “People of the several states,” and the number of legislators each state received would be based on their population. Furthermore, legislators needed to be only twenty-five years old to be elected. The latter would be “composed of two Senators from each state chosen by the [state] Legislature,” and each Senator would serve for six years in office. Senators also had to reach the age of thirty to be elected into office. In order for any piece of legislation to become law, both houses of Congress had to pass it, yet each chamber possessed their own unique duties, as well. For instance, all “bills for raising revenue” were required to originate in the House. On the other hand, the Senate was responsible for trying the impeachment trials of federal officials and for voting on treaties and executive appointments (U.S. Const. Articles I, Sect. I-VII, Article 2, Section II).

The Constitution also granted Congress “greater enumerated powers” than it had under the Articles. Most notably, Congress was granted the power to levy taxes and regulate interstate commerce, both of which were powers that Alexander Hamilton believed to be an “indispensable ingredient in every constitution” (Smith 1997, 285-286; *Federalist* No. 40). The power to levy taxes can be contrasted with the Article’s requisition system. The Constitution now gave Congress the power to compel entities or persons to pay taxes to the federal government; Congress no longer relied on the state governments for funding their limited yet important programs and departments. Notably, under the Constitution, Congress would now also be able to properly fund and organize a national military apparatus.

Quite clearly, this newly formed Congress, under the Constitution, differed from the Congress outlined by the Articles. While certainly Congress was granted increased powers and responsibilities, the structure of the Congress itself was also vastly different, and such a structure was a line with the chief *political* goals of Madison and the other delegates at the Convention:

(1) they wished to “maintain the necessary partition of power among the several [governmental] departments” in order to preserve liberty and (2) they sought to guard society from the potential “injustices” carried out by other citizens who—when united in a common interest—could trample the rights of the minority (*Federalist* No. 51).

Yet, changing the structure of Congress was not only pursued to accomplish the *political* goals of the Framers—chiefly protecting individual rights and preventing unabated majorities from forming—it was also meant to address the *social* strife that animated the Confederation Period. In essence, Madison solution’s to class conflict was to “institutionalize social classes into the two houses of the legislature” (Wood 2006, 188). These political and social goals were central to the changes in the United States Congress, and these changes provide a little more insight into the Framers’ conception of republicanism—at this point, we can see that some sort of separation within the legislature was necessary for republican government to be properly designed. A closer look at these changes, however, provides greater insight into the goals of the Framers and their preferred form of republican government.

The House—given that the citizens within the states would choose their own officials—was clearly designed to have a “common interest” and an “intimate sympathy” with the people (*Federalist* No. 52). This part of the federal government was also open to men of “every description,” no matter their age, social status, or profession. The House, then, would provide the masses and the general public an outlet to voice their frustrations and opinions. Thus, at the first glance, the establishment of the House neatly aligns with the definition of republicanism Madison offered in *Federalist* 10; it appears that the establishment of the House reflected the Framers’ belief that the “the fabric of American Empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from

that pure original fountain of all legitimate authority” (*Federalist* No. 22). The House, therefore, was meant to “encompass the “reception of all the different classes of citizens in order to combine their interests and feelings of every part of the community, and to produce a true sympathy between the representative body and its constituents” (Bederman 2008, 72).

Yet, it should be noted that even when forming the House and discussing its powers and duties, delegates “sought ways to neutralize populist influences upon [the] national representatives” (Klarman 2017, 208). This has led some to argue that the more popular-minded rhetoric employed by the authors of the *Federalist Papers* was, in essence, pure lip service to the masses (Miller 1988). In other words, by including the “doctrine of popular sovereignty” within the *Federalist Papers*, Hamilton, Madison, and Jay made the governmental structure outlined in the Constitution more rhetorically palatable to the average American citizen (Miller 1988, 114). I find such a view compelling but ultimately too reductive. While surely the Framers wanted the general public to support the nation’s new government, their establishment of the House and their desire for popular input *cannot merely* be viewed as a persuasive or rhetorical tactic. Establishing the House of Representatives most likely made the Constitution more palatable, but it also “mitigated...the social antagonisms of American politics,” particularly the antagonisms between rich and less-well-to-do Americans (Wood 1998, 562). With all that being said, Klarman is right when he asserts that the Framers still attempted to limit the influence the people had over Congress.

We can see such efforts first in the structure of the House itself. The House would contain a small number of legislators who would represent “vast constituencies,” this intentional design ensured that there would be a loose connection between representatives and their constituents. Additionally, to further insulate representatives from popular opinion, elections

would take place every two years—not annually—and there was no mandatory rotation in office—two policies that differed markedly from how the state assemblies conducted themselves during that period (Klarman 2017, 288-289).

Yet, if we are to best understand how the Framers sought to check the power and influence of the masses, we have to look no further than the establishment of the United States Senate. Quite generally, the United States Senate was meant to “balance and check” the House of Representatives; it would insulate Congress from the will of the less-well-to-do and protect the interests of the wealthy (Chinard 1940, 51). I will note that that model of an “upper” and “lower” house actually mirrored the English system which had a House of Commons and a House of Lords; this system had similar aims to the American system, but Madison was revising the English system for an American context. Unlike the House, however, in this legislative chamber, Senators would have to be at least thirty years old to hold office, and the Framers hoped that, in the Senate, “fewer,” “wiser,” and “older” men would govern (Ely 1999). Senators were to be chosen by the legislatures in the states, they would serve six-year terms, and each state would have an equal number—two. The United States Senate would, therefore, ensure that “no law or resolution can now be passed without the concurrence a majority of the States.” Additionally, the Senate would serve to check the “sudden and violent passions” of the House; it would be a “permanent body to correct the prejudices, check the intemperate passionate, and regulate the fluctuations, of a popular assembly” (*Federalist* No. 62 and Elliot 1863, 301). The establishment of the Senate then suggests that its purpose was twofold—providing the states a voice in national politics and tempering the more populist measures pursued by the House.

As Klarman notes, the Senate was quite clearly, in part, a “substantive choice made in the Constitution” that demonstrate Framers’ “deep distrust of the people” (Klarman 2017, 700). Given that the Framers believed that if “social pluralism” were “unchecked by a constitutional superstructure” the Constitution would “fail to control the violence of faction,” the Framers were comfortable crafting a system and an institution, like the Senate, that would “be...less beholden

to citizens than the state assembly-men whom debtors and taxpayers had denounced” during the Confederation Period (Holton 2005, 382 and Morgan 1974, 867).

The Framers’ fear of the “violence of faction” must also not be overlooked. One impetus behind the Constitutional Convention was the fact that the Framers wished to protect minority rights—particularly the rights of the wealthy elites—from majoritarian factions—who, in the Confederation Period, tended to be collections of working-class citizens. Given the lack of social mixing within governmental institutions during the Confederation Period, conflicts were, as we have noted, commonplace, as either the poor or the rich took control, and governed in a manner that merely benefited their own interest, not in a manner that what “common or equal” (Aristotle, *Politics*, 115).

Thus, James Madison, in *Federalist* No. 10, emphasized the need to control the effects of factions—which he deemed to be the “disease most incident to republican government” (*Federalist* No. 10). Even today, modern scholars have noted the danger of factionalism and the threat factions pose to democratic and republican forms of government. Successfully combating factionalism, in turn, actually enhances regime stability and durability (Schmitter and Karl 1991). Thus, we can understand the creation of the bicameral legislature as a way to combat the formation and prevalence of factions—providing both social groups with an avenue to advocate for and vocalize their concerns, and in effect, this aspect of the Constitution decreased the likelihood that either social class retaliated against or took advantage their opposing social class.

In turn, the fact that social groups possessed a formal means to voice their preferred political and social stances created and enhanced regime stability. Given the existence and power of the House, the “Senate [would] never be able to transform itself into an independent and aristocratic body.” Therefore, the Senate—and the House—could not simply pursue their own

represented class' interests unchecked; both chambers—given that they would be checked by the other—would have to show some “attachment to the public good,” not just the good of the *few* or the *many* (*Federalist* No. 63). In other words, “a single assembly could not strike a balance between aristocratic elitism and populist faction,” “the only remedy is to throw the rich and the proud into one group, in a separate assembly, and there tie their hands” (Bederman 2008, 136). Bicameralism, therefore, “is a necessary component of mixed government”—it prevented factions in government from infringing on another group’s liberty and it also resulted in a far more stable and durable regime (ibid, 144).

The President

All executive powers are vested in the President of the United States. These powers include, making federal appointments, commanding the federal armed forces, issuing pardons, and vetoing federal legislation (U.S. Const. Article II, Sect. I-II). Of course, such a figure did not appear in the Articles of Confederation, and the state governments, during the Confederation Period, tended to have weak executives, who were often hamstrung by more powerful legislative assemblies and generally had constitutional limits on their executive power (Klarman 2017, 256). Crafting a meaningful federal executive branch, therefore, especially considering that the government under the Articles lacked one, required that “the Framing generation... articulate a credible theory of energetic, but responsible, executive authority” (Bederman 2008, 146).

Before discussing the role of the President, itself, we should first consider how the Constitution outlined the precise way the President would get elected—through the Electoral College. In essence, the people themselves would not directly choose the President, states would choose electors to form “an intermediate body” who would then convene to elect the President. The number of electors each state had would be equal to their number of federal representatives

in Congress, both in the House and the Senate. Members of the Electoral College would be selected by their “fellow-citizens from the general mass,” and they would be more “capable of analyzing the qualities” of executive candidates. Hamilton believed that the Electoral College would be much “less apt to convulse the community with any extraordinary or violent movements.” The President, therefore, would be much less susceptible to the “heats and ferments” of the people.” The Electoral College would also ensure that the President be “endowed the with requisite qualifications” to rule (*Federalist* No. 68).

Both the nature and selection of the federal executive, outlined in the Constitution, was meant to create a position that could restrain “the instability and encroachments” of the legislature (Gouverneur Morris as cited in Klarman 2017, 256). While some feared that a unitary executive would too much resemble monarchy, it was ultimately decided that the United States President would be the “best safeguard against tyranny” (James Wilson as cited in *ibid* 2017, 256). In essence, the federal executive would ensure the “balance of powers and interests,” and as such, when needed, he would have the power to stop legislation—through a veto—that he deemed a threat to the *liberty* of the people (Madison as cited in *ibid* 2017, 258).

While the President certainly was meant to play a crucial role in preventing tyranny and hindering the encroachments of an overzealous legislature, we should also note the President’s important *social* role, as well. When discussing the Constitution’s new Congressional structure, I noted that Madison’s solution to rampant class conflict “was to institutionalize social classes into the two houses of the legislature”—the House and the Senate—but, the creation of a relatively strong federal executive—the President—was also meant to ameliorate social conflict. Madison believed that the President would assist in keeping “social forces in equilibrium” (Wood 2006, 188). In fact, John Adams viewed that the executive would act as a “balancer” of sorts; he would

be an “independent social entity”, standing between and mediating the aristocratic interests of the wealthy and the democratic interest of the masses (Wood 2006, 69-72). During the Confederation Period most states were “flawed because [they] lacked a strong executive that could mediate between the popular assemblies and the senate”—that is they lacked a mediator between the *few* and the *many* (Bederman 2008, 75). Therefore, the creation of the presidency was, in part, aimed at preventing one social class from infringing on the rights or privileges of another; in essence, the presidency increased regime stability.

The Courts

Article III of the Constitution vested the “judicial power of the United States” in one “supreme court”; Congress was also granted the power to establish inferior courts from time to time, if they deemed it necessary. These courts’ powers extend to all cases arising under the Constitution and the laws of the United States. Federal judges would receive lifetime appointments, as long as they held office during “good behavior” (U.S. Const. Article III). If we are to simply read the text of the Constitution, we might not get a clear picture of the precise powers of the federal courts and the role they played within in tripartite federal government. Looking towards the Federalist Papers, however, elucidates Article III and the Framers’ intent.

When established the judiciary was considered to be “beyond comparison the weakest of the three departments of government,” for it did not possess the power of the purse—like Congress—and it did not have the power of the sword—like the executive.” The judiciary, lacking an enforcement mechanism, would then rely on the “executive to enforce their rulings.” Yet, for the Framers, the judiciary’s relative weakness did not mean that they viewed this branch of government as unimportant; in fact, the “courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the

limits assigned to their authority.” Given that “no legislative act...contrary to the Constitution, can be valid,” the court’s role was to stand as a safeguard against legislative overreach. The judiciary, however, could prove to be the most dangerous branch of government, if its powers were ever merged with the other two branches of the federal government. The Framers believed that there would be “no liberty, if the power of judging be not separated from the legislative and executive powers” (Montesquieu as cited in *Federalist* No. 78). Of course, then, we see that judiciary played a vital role in ensuring that the liberty of the people would not be infringed by “legislative encroachments” or an overly active executive.

One particular way in which the Framers guaranteed that judges would check the “immediate mischiefs” of the legislature was by ensuring that judges would be independent “against the effects of occasional ill humors in the society.” To accomplish this, judges were appointed by the President and confirmed by the United States Senate for lifetime appointments. It was, therefore, the duty of the President and Senate to find men that possess “sufficient skill in the laws” and have the “requisite integrity with the requisite knowledge” (*Federalist* No. 78 and Page and Winters 2009). This interplay between the executive, legislative, and judicial branch requires more attention.

The Framers believed that the Constitution was the “intention of the people,” and consequently, when disputers aroused, federal judges would be, in essence, protectors of the people’s intention and will (*Federalist* No. 78). Yet, the people would never have a direct say in the appointment or confirmation processes of these judges. Senators—appointed by state legislatures—and the President—ostensibly chosen by the Electoral College—would decide who would serve in the judiciary. And, on top of that, as the 78th *Federalist Paper* points out, the

court was meant to check policies implemented by the legislature—an institution that was, in part, meant to represent the people’s will—that were deemed to be contrary to the Constitution.

What we are left with then is a judiciary that is, at its core, meant to protect a document that is considered to be the people’s intention and is explicitly required to nullify legislative encroachments on the people’s liberty, yet the individuals who actually make up the judiciary are intentionally insulated from popular pressure and influence. In other words, the Court is “the people’s institutionalized means of self-control”—it is an “inherently oligarchic” institution whose main goal is to ensure that the people do not implement laws that contravene their own fundamental values, principles, and rights (Bickel 1962, 18-30 and Black 1960, 106-107).

The federal court system, therefore, further demonstrates the mixing involved with creating the Constitution. Judges would protect the people’s will (the Constitution), but, in practice, the people who have little to no say in appointing these judges. And, in crafting the system in this manner, the Court further protected the nation from political and social conflict, thereby enhancing regime stability.

Understanding Republicanism and The Nation’s New Government

The foregoing analysis was meant to illustrate the substantive choices the Framers made when crafting the Constitution. Broadly, they wished to revise and preserve republican government by saving republican government from succumbing to its more odious tendencies—particularly the salient social issues that animated the Confederation Period and the tendency for government to be too active in the lives of its citizens, thereby imperiling the body-politic’s individual liberty and freedom.

By looking at the Framers’ final product—that is the Constitution—we are then able to determine what the Framers believed to be *real* republicanism—that is a refined version of what

existed during the Confederation Period. Quite generally, this form of republicanism, first, involved separating governmental authority among three branches and implementing checks on potential state overreach. However, it is also clear that when crafting this type of republicanism, the Framers kept social concerns in mind, as well. They provided every social class with a means to interject their own interests into government, while simultaneously ensuring that not one class or type of person held too much influence on the government. These deliberate choices by the Framers clearly differentiated their republicanism from the republicanism they witnessed in the original thirteen states and the Confederation. So, although we may now be able to distinguish these versions of republicanism, the following question now arises: *is there a more precise term that can be used to describe what the Framers created?*

Here, I argue that we can understand the type of government or *regime* created by the Framers as a *mixed regime*. However, my use of the term *mixed* must be qualified. The regime established by the Constitution should not be considered mixed because it comports to the Aristotle's and Polybius' doctrine of the mixed regime—although, as we have seen, in some ways, it quite clearly does—instead we should consider the American regime mixed because it mixes that ancient mixed regime doctrine with the modern separation of powers and checks and balances doctrine.

The Framers entered the Constitutional Convention with two objectives: (1) creating a regime that prevented the emergence of tyranny and secured the liberty of all citizens and (2) creating a stable system of government that balanced competing social interests. While these goals were not contradictory, they were different in substance, and, therefore, they required two distinct approaches. The ancient doctrine of the mixed regime was surely considered and discussed by the Framers, and we can see that the structural components of the ancient mixed

regime—outlined by Aristotle and by Polybius—made their way into the final version of the Constitution. In particular, we can see elements of this doctrine in the establishment of a bicameral legislature aimed at representing opposing social interests, the creation of the President to mediate class conflict, and the establishment of a court system aimed at insulating social minorities from the overreach of a social majorities. We should note, however, that while the Framers were interested in balancing social interests in line with Aristotle’s and Polybius’ doctrines, the new, American nation did not have *truly* distinct social classes, like the ancient civilizations observed by Aristotle and Polybius. In those ancient cultures, there were rigid and formal differences between *the one, the few, and the many*, but, in America, social mobility was, in fact, possible, and elevated social status could be gained or lost during one’s life. Yet, with that said, the Confederation Period highlighted that the schism between the rich and poor threatened the stability of the American regime, and hence, they still found the ancient doctrine applicable, persuasive, and important for their political project. And, because this regime contained some aristocratic elements, this regime could not merely be considered a “liberal government in the sense used [by] Enlightenment [philosophers]” (Bederamn 2008, 72).

With that said, the regime did, of course, contain some liberal elements. Montesquieu’s influence on the Constitution and the American founding is palpable. The colonists’ desire for liberty surely inspired their original revolution from Great Britain, and, when crafting the nation’s second founding document, the delegates at the Constitutional Convention wanted to ensure that each citizen—no matter their social standing—was able to pursue their happiness, cultivate their property, and enjoy their liberty. To accomplish this, the Framers heeded Montesquieu’s advice—they separated power among three branches and allowed for each branch to check and balance the powers of the others. As we can see, then, the Framers *mixed* ancient and modern doctrines, and their final product was their revised version of republicanism—a republicanism that differed from previous iterations because it was constructed after consulting two separate theories about state building.

In *Federalist* 63, Hamilton remarked that the United States Senate would be an “institution that [would] blend stability with liberty” (*Federalist* No. 63). While such a characterization surely applies to the Senate, I believe it also applies to the newly constructed federal government, as a whole. The new federal system was a regime that blended stability with liberty and guaranteed the existence of similar regimes in the thirteen states, as well.

Chapter 5: Conclusion

Gordon Wood, one of the nation's foremost scholars on the Confederation Period and the Constitution, has called the United States Constitution an "intrinsically . . . aristocratic document, designed to check the democratic tendencies of the [Confederation] [P]eriod" (Wood 1969, 558-563). What I hope the foregoing analysis has illustrated is that Wood's view of the what actually occurred in 1787 is, at the very least, incomplete, and, perhaps, is even misleading.

While the men who gathered to formulate the Constitution were surely motivated by their shared antipathy of mob-rule and popularly focused legislative efforts, the document they created was not *only* intended to combat democratic tendencies. They sought to foster social equilibrium—between the rich and the poor, the connected and the disenfranchised, and the elite and the common, while also maintaining and "safeguarding individual liberties" (Bederman 2008, 76-77). Mixed government, therefore, achieved the former, while separation of powers "with the checks and balances between the actual institutions of constitutional government and the fundamental differentiation of governmental functions" achieved the latter (*ibid*). With that being said, Wood's recognition that the Constitution *appeared* aristocratic, was a concern identified by the Framers—specifically James Madison—and, in the years that followed the ratification of the Constitution, Madison and other delegates repudiated or distanced themselves from the ancient mixed regime doctrine, and its aura of aristocracy (Bederman 2008, 76).

This decision, however, appeared to be a convenient political strategy, rather than an honest, intellectual change-of-heart. In other words, the Framers did not disavow the importance of the ancient mixed regime doctrine; instead, in their public lives, they minimized the aristocratically minded aspects of the Constitution. However, now, as onlookers of what transpired in 1787, we must understand the intellectual tradition that undergirds the Constitution

in its entirety—that requires recognizing its aristocratic elements, but it also necessitates that we appreciate its components that provide the people—or the *many*—a significant and meaningful voice in government.

Given that they were successful in mixing social concerns and governmental power, the Framers created a “federal Constitution [that] avoided the key failings of the earlier state constitutions [and the Articles of Confederation]” (Bederman 2008, 84). At the heart of their success, was a “recognition that political power was an unstable and dangerous force that had to be carefully balanced not only among government institutions but also among all sectors of...*society*” (ibid, 51; emphasis added). Having witnessed the turbulence that characterized the Confederation Period, the Framers quickly acted, after thoughtfully considering ancient and modern philosophy. While American government was previously unstable—both politically and socially—the new, mixed American regime guaranteed political stability, ensuring that the problems that animated American public life after the Revolutionary War would not lead the nascent country to ruin.

Why is this important?

On the very first page of this paper, I asked whether meticulously defining the system of government created by the Framers was even a worthwhile political and scholarly endeavor. I hope the foregoing analysis and this paper’s ultimate conclusion have shown that addressing *what* exactly American government is, can help us better talk about the purpose of our founding document and the government it created.

Currently, we can see ongoing political debates—both domestically and internationally—about the emergence of populism as a political ideology. Yet, this phenomenon should not be viewed as something novel or unique. In fact, as Chapter 2 of this paper has demonstrated,

populism—that is the political idea that the concerns of ordinary people should be valued and considered more so than the concerns of other social groups—has existed, in America, since our nation’s inception. After our country became independent from Great Britain, the *many* felt as though government was not adequately representing or defending their interests, and this shared sentiment resulted in the rise of populism in certain states. Understandably, elites felt threatened by this growing political and social movement, and, in response, they took steps to combat what they believed was a political force that was anathema to our country’s core principles. The solution to growing populism was, of course, the ratification of the Constitution. The nation’s new founding document delicately balanced the social interests of both the *few* and the *many*, and, in doing so, the Framers were able to diffuse popular uprisings, thereby providing a formal means for all social classes to voice their political frustrations and, thereby, enhancing the country’s stability.

Thus, while the rise of populism might be alarming to some, informed political onlookers should recognize that its antidote is already in place: the Constitution—particularly its first three articles—guarantees socially balanced government. Our solution to populism then is simple: a bipartisan recommitment to our Constitution’s structure and principles. Too often, our founding document is decried by the left-leaning citizens and politicians as too atavistic; they challenge our system of government as not responsive enough to popular demands. Yet, in this political moment, given the rise of populism and some of its odious supporters, reasonably minded people, from both the political left and right, should collectively reaffirm that the Constitution’s structure is important and intentional. The Constitution and, thus, *the mixed regime* it sets forth, protects us and our liberties from *both* overzealous populists and aristocrats. Rather than departing from our founding document and its core principles when times are good, as America’s

social climate proves to be more contentious, we should defend what the Framers created in 1787—we must defend our institution that blends stability with liberty, for our lives and our government are more secure because of it.

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Appendix

Table 1: A Systematic Analysis of the State Constitutions

State (in alphabetical order)	Bicameral Legislature (Yes or No)	Strength of Legislature (Low, Medium, High)	Strength of Executive (Low, Medium, High)
Connecticut*	N/A	N/A	N/A
Delaware	Yes	Medium	Medium
Georgia	No	High	Medium
Maryland	Yes	Medium	Medium
Massachusetts	Yes	Medium	High
New Hampshire	Yes	High	Low (N/A)
New Jersey	Yes	Medium	Medium
New York	Yes	Medium	Medium
North Carolina	Yes	Medium	Medium
Pennsylvania	No	High	Low
Rhode Island**	N/A	N/A	N/A
South Carolina	Yes	Medium	Medium
Virginia	Yes	Medium	Medium

*Connecticut did not ratify a formal constitution until 1818.

**Rhode Island did not ratify a formal constitution until 1842.

Out of the thirteen states, two did not have formal constitutions until the 1800s: Connecticut and Rhode Island.

Seven other states—Delaware, Maryland, New Jersey, New York, North Carolina, South Carolina, and Virginia—all were coded similarly for the following reasons: (1) these eight states all had bicameral legislatures, (2) each legislature’s strength was designated as “medium,” for while they did possess all lawmaking power, the state’s executive possessed other important, governmental powers, like the execution of law, pardoning criminals, and organizing the state militia, and (3) each state’s executive’s strength was designated as “medium” because while they were neither popularly election nor did they possess any veto power, they could organize and mobilize the state’s armed forces and grant and issue pardons.

In Georgia, the legislature was unicameral, meaning that legislation only required the approval of a single legislative body, and the state’s executive, did not have veto power nor was he popularly elected. However, the executive had power over the state’s militia and the execution of its laws.

In Pennsylvania, the state constitution created a unicameral legislature that had supreme authority over lawmaking. The state executive’s role was limited to picking officers for other state and county-level positions.

In New Hampshire, the state constitution created a bicameral legislature and did *not* create a formal executive office, as such the legislature had almost complete authority over both the formation and execution of law.

In Massachusetts, the legislature was bicameral, and it possessed similar powers to other state legislatures. However, in this state, the executive had the power to veto legislation—along with possessing powers that mirrored other state executives. And, as such, the Massachusetts executive was the country’s strongest.