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"Parchment Barriers" versus Separation of Functions: Self-Restraint, Popular Virtue, and the Separation of Powers in the First Pennsylvania and Virginia Constitutions

Kevin Akalski
Baylor University[*]

The burgeoning literature, led by such scholars as Benjamin Kleinerman, David Siemers, and Jeffrey Tulis, arguing that the Constitution's separation of powers is a separation of functions opens new vistas for the interpretation of the first state constitutions. To be sure, the literature on the separation of powers in the first state constitutions squares well with James Madison's observation that the legislative branches created by these constitutions were much more powerful than the executive and judicial branches: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex" (*Federalist* No. 48). Gordon Wood, for instance, argues, "When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation."[1] Donald Lutz

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speaks of the Americans' "strong inclination to legislative supremacy,"[2] and Lee Ward traces the weakness of state governors to the historical experience of mistrust toward the British Crown and the tradition of Whig political thought.[3] These observations lead Ward to conclude that "there was no coherent philosophical or political consensus in America in 1776 supporting the idea of vigorous and independent executive power."[4] Similarly, Robert Steinfeld writes, "The framers of the first state constitutions established a system in which the representatives of the people, embodied in their legislatures, were to be supreme within governments."[5] And while Mark Kruman notes that the Americans did not feel any special "fidelity" toward their representatives, he admits that "most citizens accepted the legislature's virtual omnipotence."[6]

But this scholarship has not merely articulated Americans' more favorable view of legislative over executive and judicial power. It has also demonstrated how this preference was translated into the first state constitutions and thereby threatened the very separation of powers system that the constitution makers so desired to institute. Among the many problems with the separation of powers in these constitutions that scholars have noticed are the tendency for the absence of an executive veto, short terms of office and rotation requirements, the dependence of most state governors on the legislatures for their election, and the lack of ability for some governors to have any say in appointments.[7]

While the scholarship has doubtless performed us a service in describing the problems with the separation of powers in the first state constitutions, it does not go far enough in understanding the theoretical basis behind Madison's critique of them. I suggest that engagement with the literature that views the Constitution's separation of powers as a separation of functions can remedy this deficiency by directing our attention to how the structure of each branch empowers it to perform the functions for which it is suited. Contrasting the first state constitutions with the Constitution in the light of the separation of functions literature holds out the promise to help us understand the innovative nature of the document that Madison and Hamilton spiritedly defended. The first Pennsylvania

and Virginia constitutions, as illustrated in this article, differ from the Constitution insofar as the former rely on "parchment barriers," or ineffective prohibitions that aim to restrain the branches from encroachments on each other's authority, that require both legislators to exercise a virtuous self-restraint and the people to watch their legislators with suspicion, whereas the latter requires the people to defer to the political process until they can judge the effects of interbranch conflict. The theoretical reason for this difference between the first Pennsylvania and Virginia constitutions and the Constitution is that whereas these state constitutions were designed primarily to prevent governmental tyranny by creating a powerful legislature and a weak executive and judiciary, the Constitution is designed to prevent governmental tyranny at the same time as it empowers each branch to perform the function for which it is structurally suited.

The literature on the separation of functions distinguishes itself from two understandings of the Constitution popular among scholars of American government. On one hand, this literature disagrees with the view, characteristic of scholars like Edward Corwin, Richard Neustadt, and William Howell, that the Constitution's separation of powers is primarily a system of checks and balances aimed to thwart effective government. For Neustadt, we should understand the separation of powers as a system of "separate institutions sharing powers."[8] Once the Constitution's separation of powers is conceived in this way, however, little is left to American politics except the grasping after power, especially the power to strike bargains.[9] In the words of Corwin, politics becomes an "invitation to struggle" among the branches.[10] Against this vision of the separation of powers, separation of functions scholars like Jordan Cash illustrate that central to the president's power is the authority granted to him by the Constitution. On the basis of this premise, Cash is able to show how the "isolated presidents"—John Tyler, Andrew Johnson, and Gerald Ford—were able to achieve significant goals using merely their constitutional authority.[11] Hence, separation of functions scholars would reply to Neustadt's understanding of the separation of powers as a division of institutions with the same powers as Siemers does—namely, by saying that "we

have 'separated institutions sharing in governing, through the exercise of their distinctive powers.'"[12]

On the other hand, the separation of functions literature rejects the view that the Constitution is, at its most fundamental level, a legal document whose true meaning the judiciary explicates to the legislative and executive branches. Corwin expresses this understanding of the Constitution when he writes, "The judicial version of the Constitution is the Constitution."[13] Instead, separation of functions scholars hold that the crux of the Constitution is the politics that it creates, and this politics enables each branch to lay claims to authority in the name of its own structural suitability for a given task.[14] On the separation of functions model, we can see that the Constitution sets up a system where a politics of inter-branch conflict determines which branch has authority in a given situation.[15]

Divided into three main parts, this article makes the case that the first Pennsylvania and Virginia constitutions and the Constitution differ in that the former sought to prevent tyranny through the creation of a powerful legislature whereas the latter aims to prevent tyranny at the same time as it empowers each branch to perform its own distinctive function. The first part of the article provides a brief summary of how the Constitution achieves its separation of powers through a separation of the functions of government. Making use of both *The Federalist* and the growing literature on the Constitution's separation of functions among scholars of American constitutionalism, this section aims to provide the preliminary work necessary to gain a fruitful vantage point from which to understand the profoundly different manner in which the framers of the first Virginia and Pennsylvania constitutions hoped to achieve the separation of powers. The second part of the article delineates how in the first Pennsylvania and Virginia constitutions the aforementioned need for self-restraint in their representatives can be derived from the normative language with which they separated powers. Shown in the third part is that the Pennsylvania and Virginia constitutions did not lack a means to remedy legislative encroachments were the needed legislative self-restraint to fail. These constitutions, I suggest, ultimately depended on the existence

of a suspicious spirit among the people to remedy any legislative encroachments that might occur.

The Constitution's Separation of Functions

For Madison, the reason for the state legislatures' encroachment on the other branches is clear: The state constitutions trusted in so-called parchment barriers to preserve the separation of powers (*Federalist* No. 48).[16] This faith in parchment barriers, however, arose naturally from a misreading of Montesquieu, and Madison is forced to combat this reading given its incompatibility with the Constitution's blending of powers (*Federalist* No. 48).

The critics of the Constitution's blending of powers proceed from the notion that "the legislative, executive, and judiciary departments, ought to be separate and distinct" (*Federalist* No. 47). Conceiving this teaching of Montesquieu's to imply that "these departments ought to have no *partial agency* in, or no *control* over the acts of each other" means that a constitution maker's logical next step is to give each department only the powers that belong to its essence (*Federalist* No. 47). For example, the legislative department must be given only those powers that are proper to lawmaking, and it must not be given any powers proper to execution or to judgment. A president with a veto power over legislation becomes out of the question on this understanding of the separation of powers.

Madison points out, however, that a rigorous adherence to this view of the separation of powers is impractical. In fact, none of the first state constitutions was able to give each department only those powers that corresponded with its nature. As Madison writes, "If we look into the constitutions of the several States, we find that, notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct" (*Federalist* No. 47).

For Madison, a more accurate reading of Montesquieu highlights that partial agency, or some degree of blending between departments, is both permitted and necessary: "[Montesquieu's] meaning . . . can amount to no more than this, that where the *whole*

power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted" (*Federalist* No. 47). Given this view, while the separation of powers would be violated if an executive had the entire lawmaking power, it is not violated when the executive makes use of a veto power to halt legislation from an otherwise powerful legislature.[17]

Madison goes on to reveal the method for creating a constitution that recognizes the necessity for some blending among the departments. A constitution maker must first distinguish "in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others" (*Federalist* No. 48). The strategy devised by the founders is to grant "those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others" (*Federalist* No. 51). This bleak image of power that Madison paints in *Federalist* Nos. 47–51 should cause us to raise a more general question, however. Given "the encroaching spirit of power" (*Federalist* No. 48), why should human beings submit to government in the first place? Why ought we to blend the powers of government to create checks against tyranny when we could avoid the trouble entirely by living in a state of nature?

Hamilton reveals the key to his and Madison's project in *The Federalist*, and thereby the key to their view of the necessity for a government of separated powers, in the very first paper: "[T]he vigour of government is essential to the security of liberty" (*Federalist* No. 1). *The Federalist* seeks to demonstrate that energetic government, far from being in tension with liberty, is a necessary condition for the enjoyment of rights. Liberty must be produced by government. Furthermore, the Constitution's Preamble reminds us of other substantive ends that government is designed to achieve—namely, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the Common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." We establish

government, then, so that we can empower it for the sake of ends that we desire.[18] In the words of *Federalist* No. 51, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." We first make government to produce lawfully ordered liberty among the people, but we need the separation of powers to prevent government from becoming tyrannical.

What if, however, any attempt to control the government conflicts with its ability to control the people, and any attempt by the government to control the people makes it more in danger of becoming tyrannical? If this alternative accurately describes the human situation, all attempts at designing a government would be tragic. Every move toward limiting the government would bring us a step closer to anarchy, while every attempt to empower the government would make it more like a tyranny.

The achievement of separation of functions scholars, however, is to show us that to understand government in this way is misleading. Drawing especially on *Federalist* Nos. 52–85, separation of functions scholars show us that the separation of powers is meant to be the means by which the government is "enable[d] . . . to control the governed" just as much as it is meant to be the means by which it "control[s] itself."[19] According to Tulis, "The term 'separation of powers' has perhaps obstructed understanding of the extent to which different structures were designed to give each branch the special quality needed to secure its governmental objectives."[20] As Tulis goes on to explain, Congress is structured in such a way that "while the founders were not so naive as to expect that Congress would be simply 'deliberative,' they hoped that its plural membership and bicameral structure would provide necessary, if not sufficient, conditions for deliberation to emerge."[21] Furthermore, the unity, ability for discretion, and eligibility for reelection characteristic of the presidency make it particularly apt for energetic administration, and that Supreme Court justices serve during good behavior makes them suited to decide cases impartially for the purpose of the protection of rights.[22]

Study of *The Federalist* Nos. 52–85 bears out this theory of the separation of powers. In *Federalist* No. 55, Madison shows his concern for a limit on the number of representatives in the House "to secure the benefits of free consultation and discussion," for "[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." *Federalist* No. 70 illustrates that the presidency's energy will help to defend "the community against foreign attacks" and assist in "the steady administration of the laws," "the protection of property," and "the security of liberty."[23] Finally, an independent judiciary, Hamilton posits in *Federalist* No. 78, will give truth to the maxim that "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments," along with enabling it "to guard the constitution and the rights of individuals."[24] Any blending of the departments, then, is justified on the grounds that it secures a more fundamental energy to help government achieve the goals it is designed to achieve. For example, the president's veto power may thwart Congress from performing its own properly legislative functions, but the president has this power so that Congress will be unable to usurp his properly executive functions. The president can veto congressional legislation because this empowers him to continue to execute the laws with energy without having to worry that this executive function will be taken away from him by a Congress that is not structured to execute the laws.

Understanding the Constitution's separation of powers as empowering each branch to perform the function for which it is structurally suited for the sake of effective government comes with an additional implication—namely, that when the Constitution is ambiguous about which branch has authority in a given situation, conflict among the branches can lead to a good outcome.[25] The "different capacities" of each branch, Mariah Zeisberg helpfully writes, "condition the perspectives of each branch, and these perspectives may in turn lead the branches to different evaluations of constitutional meaning in service of distinctive political goals."[26] And Zeisberg elucidates how the differing "capacities" of each branch lead to differing "perspectives": "[T]he actual exercise of their powers brings the branches into relationship

with one another, a relationship that may activate the conflictual possibilities inherent in their independent sources of authority . . . and distinctive perspectives on public matters."[27] Thus, for example, since the Constitution leaves considerable ambiguity about whether Congress or the president has the authority to take the United States to war, John F. Kennedy could justifiably keep the information he received about the buildup of Soviet missiles in Cuba secret from Congress—which Article I, section 8 vests with the power to declare war—thereby for a time enabling him to develop his own plan of action.[28] In fact, if we ask a given branch to limit itself, or to be self-restrained, so that it does not become tyrannical, we would be asking it not to bring its distinctive institutional capacities to bear in a way that could serve the public good.

Although the Constitution might be ambiguous about the authority of the branches in certain situations and the interests of each branch might be different and lead to conflict, Siemers makes clear that constitutional conflict should be in the service of each branch faithfully carrying out its responsibilities. In fact, Siemers shows us that contrary to Corwin's "invitation to struggle,"[29] that the departments share power with each other means "the American founders designed a *necessity to cooperate* into the Constitution."[30]

Overall, then, a separation of functions model makes the following claims about the Constitution: (1) the purpose of the separation of powers is to prevent governmental tyranny at the same time as it promotes effective government, (2) the Constitution has structurally designed each branch in such a way that it is effective at a certain function, (3) the Constitution's ambiguity about which branch has authority in certain situations leads to constitutional conflict among the branches that can serve the public good, and (4) at the bottom of this conflict is a concern that each branch perform its constitutional responsibilities faithfully. In a word, then, the founders conceived of the Constitution's separation of powers politically. To see the confusions that can arise when a constitution's separation of powers is not designed to encourage conflict that can serve the public good, we now turn to an analysis of the first Pennsylvania and Virginia constitutions.

The Separation of Powers in the Virginia and Pennsylvania First State Constitutions

Many of the first state constitutions began with declarations of rights, and these declarations are not limited simply to listing the rights of the people.[31] Indeed, some of the declarations include normative statements about the need to preserve the separation of powers. The Bill of Rights in the Constitution of Massachusetts (1780), for instance, mandates, "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws, and not of men" (Art. XXX).

Despite this language, I do not claim that all the first state constitutions depended only on parchment barriers. Such a view would be contrary to Madison's observation in *Federalist* No. 47 that in the state constitutions "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." Crucial to recognize, however, is Madison's qualification of this observation, for he writes that the state constitutions propounded the necessity for absolutely separate and distinct powers in "unqualified terms." If we take Madison's cue, the problem with the first state constitutions seems to be that they suffered from a lack of clarity concerning how to square the need for a separation of powers with the need to blend the departments to avoid encroachments by one branch over the others. As such, rather than making a causal claim that all the first state constitutions were bound to lose the separation of powers, the need for which they so strongly declared, structural analysis of the Pennsylvania and Virginia constitutions from a separation of functions point of view evinces their confusion about how the separation of powers is just as much about effective government as it is about protection against government.[32] The focus here is on the first Pennsylvania and Virginia constitutions because in *Federalist* No. 48 Madison singles out these constitutions for their inability to preserve the separation of powers.[33]

Like most of the other first state constitutions, the Pennsylvania and Virginia constitutions both feature declarations of rights. Among the listed rights in both constitutions are the rights to life, liberty, property, and the pursuit of happiness and safety, the freedom of worship, and the accountability of public officials to the sovereign people (Constitution of Pennsylvania, I, II, IV; Constitution of Virginia, sec. 1, 2). For our purposes, however, it is most interesting to note that a part of the separation of powers is included among the rights in the Virginia constitution—namely, "[t]hat the legislative and executive powers of the State should be separate and distinct from the judiciary" (sec. 5). And while the first Pennsylvania constitution's statement concerning the need for the separation of powers to be preserved does not come in its declaration of rights, it is placed in the section delineating its Council of Censors, tasked with inquiring into whether the separation of powers has been preserved, but lacking the tangible power to restore the separation.[34] As the constitution says, the Council of Censors' "duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution" (sec. 47).[35]

Overall, scholars disagree over the significance of the normative language evident in the Pennsylvania, Virginia, and other first state constitutions. On one hand, Donald Lutz argues that these constitutions' frequent use of the word *ought*, indicating a wish, instead of *shall*, an imperative, indicates that the declarations of rights were symbolic and not to be understood as a part of the constitutions.[36] On the other hand, Lee Ward, noticing that the declarations made provisions for their amendment, or even their immunity from such amendment, writes, "It is perhaps best to understand the declarations as being meant to illuminate the natural rights principles at the core of the early American idea of limited government."[37] Like Ward, Mark Kruman thinks that "by incorporating the declarations into the constitutions, framers infused their plans of government with the idea of limitation."[38]

Despite this disagreement among scholars, the fact that *ought* and *shall* are both words that signify an obligation implies that the first state constitutions relied on their elected officials' self-restraint to preserve the separation of powers. Indeed, the first Pennsylvania constitution mentions that the representatives in the state's unicameral legislature "shall consist of persons most noted for wisdom and virtue" (sec. 7). This constitution then requires each representative to take an oath declaring that he "will in all things conduct [himself] as a faithful honest representative and guardian of the people, according to the best of only judgment and abilities" (sec. 10). The need for a virtuous self-restraint suggested in these sections of the Pennsylvania constitution differs, of course, from the thinking behind the Constitution, which, as we have seen, encourages each branch to make claims to authority jealously in cases where it is unclear which branch in fact has authority.

But to determine the nature of the required governmental self-restraint to which the Pennsylvania and Virginia first state constitutions point, we must look to the particular manner in which they separated powers. In the Pennsylvanian case, "[t]he supreme legislative power" was vested in a unicameral legislature, where representatives served one-year terms and could serve for no "more than four years in seven" (sec. 2, 8). And section 9 of the constitution lists the powers of the legislature:

> [The legislators] shall have power to choose their speaker, the treasurer of the state, and their other officers; sit on their own adjournments; prepare bills and enact them into laws; judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause; they may administer oaths or affirmations on examination of witnesses; redress grievances; impeach state criminals; grant charters of incorporation; constitute towns, boroughs, cities, and counties; and shall have all other powers necessary for the legislature of a free state or commonwealth: But they shall have no power to add to, alter, abolish, or infringe any part of this constitution.

Of special note among the legislature's powers is its complete control over the lawmaking process.

By contrast, although the Pennsylvania constitution grants a lengthy list of powers to the executive branch (sec. 20), notably absent from this list is a veto power that would provide the necessary blending, to which Madison points in *Federalist* No. 48, between the legislature and the executive to enable the latter to resist encroachments by the former.[39] Also absent is the energy that would be obtained with a unitary executive, for the executive in the first Pennsylvania constitution consisted of a president and a council, and a long duration in office, since presidents served terms lasting only one year and "[a]ny person having served as a counsellor for three successive years, shall be incapable of holding that office for four years afterwards" (sec. 3, 19).[40]

The judicial branch similarly lacked independence in the Pennsylvania constitution. Indeed, the members of the state's "supreme court," while given fixed salaries, lacked the independence they would have been given by holding their positions with life tenure. Although Hamilton would observe about a decade later that "[t]he standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government" (*Federalist* No. 78), the Pennsylvania constitution gave its supreme court justices seven-year terms with the eligibility for reelection (sec. 23). We can see, then, that from the beginning the legislature threatened to undermine the separation of powers in the first Pennsylvania constitution, for due provision was not made for an energetic executive and an independent, stable judiciary.

To be sure, Virginia's first constitution did not empower the legislature at the expense of the executive and the judiciary to the degree that Pennsylvania's did. But this observation should not obscure the fact that Virginia's constitution, too, laid the groundwork for the legislature's eventual encroachments on the other branches, which Madison sees in *Federalist* No. 48. Although it established a bicameral legislature and a unitary executive, the Virginia constitution, like the Pennsylvania constitution, did not

give the executive, called a "governor," a veto power and limited him to one-year terms, stipulating that he could "not continue in that office longer than three years successively, nor be eligible, until the expiration of four years after he shall have been out of that office" (p. 3816). Moreover, the Virginia constitution's provision for a "Privy Council, or Council of State" that would "assist in the administration of government," typically an executive duty, gave the governor no say in its members' appointments (p. 3817). Nonetheless, the Virginia constitution allowed a greater degree of judicial independence than did the Pennsylvania constitution, for although appointed by the legislature, the "Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General" were commissioned by the governor and served in office during good behavior (p. 3817). Overall, however, the legislature was much more powerful than the executive in the first Virginia constitution owing to the governor's lack of a veto power, short length of office, and lack of appointment power over members of the Privy Council.[41]

We are now in a position to make sense of the normative statements that the Pennsylvania and Virginia first state constitutions made about the separation of powers and the need for legislators' self-restraint. Rather than try to blend the powers of government so as to give each department, in the words of Madison in *Federalist* No. 51, "the necessary constitutional means" to preserve its independence, the Pennsylvania and Virginia first constitutions suffered from deficiencies that made their executive and judicial branches especially vulnerable to legislative encroachment. Whereas the Constitution provides for the "inconveniency" that "[i]n republican government, the legislative authority necessarily predominates" by making Congress bicameral and giving the president a veto power (*Federalist* No. 51), the Pennsylvania and Virginia constitution makers had to rely on representatives to exercise a virtuous self-restraint to preserve the separation of powers.[42] Energetic claims to authority put forth by each branch make less sense, and could be disconcerting, within the context of a strong legislature needing to restrain itself and a weak yet feared executive and judiciary.

Alternatively, understanding the separation of powers as a separation of functions, implicit in the Constitution, would help us see that governments must, first and foremost, be effective, although they must also have internal checks to ensure that they do not become tyrannical.[43] Nonetheless, the dependence of the first state constitutions on parchment barriers did not mean that the constitution makers did not conceive of any checks that would prevent their legislatures from tyrannically assuming all the powers of government, as shown in the next section.

Popular Virtue in the Pennsylvania and Virginia First State Constitutions

The failsafe on which the Pennsylvania and Virginia constitution makers relied in the event that legislative self-restraint failed was the people.[44] Indeed, Willi Paul Adams suggests that the first state constitutions were grounded in a "whiggish" spirit of popular suspicion against representatives subject to corruption.[45] This spirit of suspicion, however, is important for more than comprehending the philosophical thought behind the first state constitutions. It is also important if we wish to understand the people's role as the sole check on legislative tyranny.[46]

That the framers of the first state constitutions envisioned popular checks on governmental tyranny can be gathered from the Pennsylvania and Virginia constitutions. After both constitutions declare that all authority derives from the people (Pennsylvania, sec. 2; Virginia, sec. 4), they also constitutionalize a right to revolution using almost exactly the same phrasing. Section 5 of the Pennsylvania first state constitution's declaration of rights, for instance, states:

> [t]hat government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to

> reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.[47]

Clearly, then, the makers of the first state constitutions believed that resistance to government would sometimes be both necessary and desirable. By contrast, the Constitution has no similar statement on the need for the people to ensure that the government remains free.

Even more enlightening is that the Pennsylvania and Virginia constitutions appeal to the need for a virtuous people if they wish to preserve their free government. Section 14 of the first Pennsylvania constitution's declaration of rights states:

> That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.[48]

Invoking the principle that Niccolò Machiavelli advocates in his *Discourses on Livy* that republics periodically need to return to their beginnings, the constitutions nonetheless have a radically different view of this return than the Florentine does. Whereas Machiavelli held that an outstanding individual is needed to bring an increasingly corrupted people back to their ancient virtue,[49] the Pennsylvania and Virginia constitutions reverse this relationship. These constitutions imply that virtue is needed so that the people will be able to preserve their liberty amidst their representatives' inclination to corruption. The people must watch their representatives and, if they find that these representatives have been

corrupted, have the virtue to bring the government back to the institutional structure designed by the constitutions' framers.[50]

Such a view of the goodness of the people and the corruptibility of their representatives is in contrast to the vision of human nature put forward in *The Federalist*. According to Madison, the people may, for example, be "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men," causing them to "call for measures which they themselves will afterwards be the most ready to lament and condemn" (*Federalist* No. 63). Overall, Madison recognizes that neither the people nor their representatives can be trusted to be wholly good, a view that he poetically advances in the most famous paper in *The Federalist* that takes the separation of powers as its immediate subject:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary… A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (*Federalist* No. 51)

While the latter part of this quotation doubtless tells us that we should have a separation of powers in case the people have no opportunity to act as a failsafe against a powerful tyrannical government, it may also be read as suggesting caution about reliance on the people. Perhaps we should be aware that the people may become politically apathetic or, more crucially, that the people will become as corrupt as their representatives.[51]

The Constitution, then, avoids this reliance on the people by restraining them just as much as it prevents governmental tyranny. As John Agresto argues, "Constitutionalism is, in brief, a method by which the democracy purposefully guides its activity in the light of certain expressed principles, and restricts its own actions now and in the future. Constitutionalism was surely meant as a limitation on the unbridled exercise of legislative power. And by that very fact it

was also a conscious limitation on the ordinary power of the popular will itself."[52] In fact, understanding the separation of powers as a separation of functions suggests that once the people choose their representatives, they should defer to the political process itself, letting each branch advocate its own interpretation of the Constitution as a whole according to its ability to perform the functions for which it was designed.

To be sure, the people are not wholly passive under the Constitution, for they have the ability to express their approval or disapproval on constitutional questions at the polls every few years.[53] Having "[t]he interest of the man . . . connected with the constitutional rights of the place" depends on ensuring that it is one's electorate, and not the politicians occupying the other branches,[54] that rewards or punishes a politician for his actions. The people are fit to judge the effects of constitutional disputes. Yet, for the people to get involved in constitutional questions on more occasions, such as in "*occasional* appeals" (*Federalist* No. 50) for a constitutional convention, Madison's disapproval could not be clearer:

> It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character, and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions*, therefore, not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controled [*sic*] and regulated by the government.[55] (*Federalist* No. 49)

Thus whereas the first Pennsylvania and Virginia state constitutions require representatives to restrain themselves to preserve the separation of powers and then require the people to restrain their representatives, the Constitution asks the people to restrain themselves from interfering in inter-branch conflict. The people should

let each branch of government claim authority energetically in the name of its own institutional strengths, waiting to reward and to punish politicians for such claims at the polls.

Conclusion

This article has illustrated, through an analysis of the Pennsylvania and Virginia first state constitutions, that the first state constitutions had a tendency to separate powers with the goal of preventing tyrannical government instead of ensuring effective government. As shown, we can derive this understanding of the Pennsylvania and Virginia first state constitutions from the normative manner in which they separated the powers of government and from the limited provisions the documents made for avoiding legislative tyranny. If we turn to the Constitution, however, recent separation of functions scholarship highlights that the framers baked into the Constitution the branches' need to make active claims to authority to enable the government to produce lawfully ordered liberty, for the founders created each branch in such a way that each has its own distinctive institutional strengths.

This difference in understanding the separation of powers has profound implications for the nature of constitutionalism. Whereas the first Pennsylvania and Virginia constitutions rely on a virtuous people to preserve the separation of powers, the Constitution does not assume that either the people or their representatives will be motivated to live their political lives in the light of constitutional principles. As such, where the Pennsylvania and Virginia constitutions ask the people to restrain their representatives, the Constitution asks that the people, being content to judge the effects of inter-branch conflict when it comes time to vote, restrain themselves in deference to the political process.

Notes

1. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 2011), 157.
2. Donald S. Lutz, *The Origins of American Constitutionalism* (Louisiana State University Press, 1988), 105.

3. Lee Ward, *The Politics of Liberty in England and Revolutionary America* (Cambridge University Press, 2004), 400: "The revolution era state constitutions were in effect laboratories of radical Whig philosophy in which American Whigs set to the task of constitution making with divergent, overlapping, and often even conflicting philosophical commitments regarding sovereignty, rights, and the principle of representation."
4. Ward, *Politics of Liberty*, 412.
5. Robert J. Steinfeld, *"To Save the People from Themselves": The Emergence of American Judicial Review and the Transformation of Constitutions* (Cambridge University Press, 2021), 72.
6. Marc W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America* (University of North Carolina Press, 1997), 110–11.
7. Kruman, *Between Authority & Liberty*, 123–26; Lutz, *Origins of American Constitutionalism*, 103–6; Ward, *Politics of Liberty*, 411; Wood, *Creation of the American Republic*, 148: "The constitution-makers in North Carolina and New Jersey decided to eliminate conclusively the springs of modern executive power by wresting every bit of control over appointments away from the governors. Other Americans were not willing to go quite so far, yet in no state did the chief magistrate alone name men to the judicial and executive offices of the government."
8. Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Reagan to Roosevelt* (Free Press, 1990), 29.
9. Neustadt, *Presidential Power*, 32. See also William G. Howell, *Thinking About the Presidency: The Primacy of Power* (Princeton University Press, 2015).
10. Edward S. Corwin, *The President: Office and Powers, 1787–1957*, 4th rev. ed. (New York University Press, 1984), 171.
11. Jordan T. Cash, *The Isolated Presidency* (Oxford University Press, 2023), 6.
12. David J. Siemers, *The Myth of Coequal Branches: Restoring the Constitution's Separation of Functions* (University of Missouri Press, 2018), 183: "Political scientists should be aware that *separated institutions sharing powers* is a term that the founding generation would not recognize as an accurate description of American constitutionalism. The president and the judiciary now shape policies, but they do so in distinctive ways, and the branches do their main work sequentially and separately, something not well captured by Richard Neustadt's pithy phrase."
13. Edward S. Corwin, "Judicial Review in Action." *University of Pennsylvania Law Review and American Law Register* 74, no. 7 (1926): 652.

14. Thomas Bell, *The Constitution of Conflict: How the Supreme Court Undermines the Separation of Powers* (University Press of Kansas, 2025); Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013), 233. For Zeisberg, a political understanding of the Constitution "is not an antilegal method so much as one that transcends and embraces the 'legal,'" for "the translation of substantive terms like 'free press' into a set of constitutional policy commitments by the judiciary is not the sine qua non of constitutional enforcement. For the judiciary to develop fair and impartial interpretations of the meaning of the 'free press' is really just one more episode of an empowered institution constructing policy enactments of constitutional significance by applying its distinctive governing strengths to the task at hand."
15. Zeisberg, *War Powers*, 229.
16. References to *The Federalist* are in Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. George W. Carey and James McClellan, 2nd ed. (Liberty Fund, 2001).
17. See Madison's examples in *Federalist* No. 47 about how the British constitution does not violate the separation of powers: "The magistrate, in whom the whole executive power resides, cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature, can perform no judiciary act; though by the joint act of two of its branches, the judges may be removed from their offices; and though one of its branches is possessed of the judicial power in the last resort. The entire legislature again can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy; and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department."
18. See Sotirios A. Barber, *Constitutional Failure* (University Press of Kansas, 2014), 26–27. See also Sotirios A. Barber, "Originalism, Moral Objectivity, and the Lost Constitutionalism," in *Beyond Checks and Balances: The Political Purpose of the Separation of Powers*, ed. Connor Ewing, Benjamin Kleinerman, and Charles Zug (University of Pennsylvania Press, forthcoming), 83.
19. See Charles U. Zug, "Introduction: The Purposes of Constitutional Conflict," in *Beyond Checks and Balances: The Political Purpose of the*

Separation of Powers, ed. Connor Ewing, Benjamin Kleinerman, and Charles Zug (University of Pennsylvania Press, forthcoming), 7.

20. Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton University Press, 2017), 42; see also Siemers, *Myth of Coequal Branches*, 6–7; Zeisberg, *War Powers*, 26.
21. Tulis, *Rhetorical Presidency*, 42; see also Siemers, *Myth of Coequal Branches*, 6–7; Zeisberg, *War Powers*, 26.
22. Tulis, *Rhetorical Presidency*, 42–43: "Similarly, the president's energy, it was hoped, would be enhanced by unity, the prospect of reelection, and substantial discretion. As we all know, the Court does not simply 'judge' dispassionately; it also makes policies and exercises will. But the founders believed that it made no sense to have a Supreme Court if it were intended to be just like a Congress. The judiciary was structured to make the dispassionate protection of rights more likely, if by no means certain"; Benjamin Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (University Press of Kansas, 2009), 13: "Because of each branch's objective, it is structured so as to achieve the virtue most conducive to achieving this function. The legislature requires deliberation. The executive requires energy. And the judiciary requires judgment."
23. For a discussion of the theoretical foundations of the presidency from the perspective of a separation of functions understanding of the Constitution, see Cash, *The Isolated Presidency*, 12–45.
24. For a discussion of the founders' understanding of the separation of functions, see Siemers, *Myth of Coequal Branches*, 35–58.
25. Such ambiguities are not rare. See Zeisberg, *War Powers*, 222: "The Constitution does not draw clear boundaries between legislative and executive powers in a variety of policy areas. Many of the Constitution's substantive terms are also underdeterminate; and it protects rights whose provisions, in some circumstances, conflict with one another (for example, the right to a fair trial can conflict with guaranteeing a free press). From impeachment, to the debt crisis, to appointments, to governance overseas, a vast universe of constitutional problems is handled not through judicial supervision or adherence to determinate text but rather as a result of legislative—executive interactions in ordinary politics."
26. Zeisberg, *War Powers*, 27.
27. Zeisberg, *War Powers*, 30.
28. Zeisberg, *War Powers*, 179–80.
29. Corwin, *The President: Office and Powers*, 171.

30. Siemers, *Myth of Coequal Branches*, 7–8. See also Zeisberg, *War Powers*, 29.
31. For examinations of the broader trends characterizing the first state constitutions, see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the First State Constitutions in the Revolutionary Era*, trans. Rita Kimbler and Robert Kimbler (Rowman & Littlefield, 1980); Kruman, *Between Authority & Liberty*; Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the First State Constitutions* (Louisiana State University Press, 1980); Lutz, *Origins of American Constitutionalism*, 96–110; Ward, *Politics of Liberty*, 396–425; Wood, *Creation of the American Republic*, 197–255.
32. Perhaps the confusions behind the separation of powers in the first state constitutions derive also from Whig political thought, popular among the constitution makers, which distrusted the separation of powers in favor of legislative supremacy. See Ward, *Politics of Liberty*, 400: "The Whig republican concern to ensure popular control of government and the deep distrust of the idea of the separation of powers did not typically evince the same degree of concern for the concentration of power. Whig republican philosophy stressed the dangers of tyranny from the executive and oligarchy from an upper chamber of the legislature, but maintained that a single representative assembly regulated by populist procedural controls such as annual elections, broad franchise, and regular rotation of delegates could responsibly and accountably express what Sidney identified as the primal constitutional truth: 'The Legislative Power is always Arbitrary.'"
33. I also direct my attention only to the Pennsylvania and Virginia first state constitutions to avoid redundancy. As Forrest McDonald shows, many of the first state constitutions shared the same problems arising from their makers' belief in the need for legislative supremacy and a weak executive and judiciary. Forrest McDonald, *The American Presidency: An Intellectual History* (University Press of Kansas, 1994), 130–35. To be sure, however, some of the first state constitutions, in particular that of New York, were less hostile to a strong executive. Hamilton acknowledges the strength of New York's executive in *Federalist* No. 69.
34. Steinfeld, *Emergence of American Judicial Review*, 94–95. Some scholars compare the Council of Censors with a judiciary with the power of judicial review, although they are careful to note the differences between them. See Adams, *The First American Constitutions*, 270; Angus Harwood Brown, "The Pennsylvania Council of Censors and the Debate on the Guardian of the Constitution in the Early United States," *American Journal of Legal History* 64, no. 1 (2024): 4.

35. For Madison's critique of the meetings of the Council of Censors in 1783 and 1784, see *Federalist* No. 50.
36. Lutz, *Popular Consent*, 61–70.
37. Ward, *Politics of Liberty*, 404–5.
38. Kruman, *Between Liberty & Authority*, 38.
39. For Hamilton's argument that an executive needs a veto power to resist encroachments by the legislature, see *Federalist* No. 73. Interestingly, however, among the first state constitution makers, giving the governor a veto power was thought to violate the separation of powers. See Steinfeld, *Emergence of American Judicial Review*, 76.
40. For Hamilton's argument that executive energy can be fostered by unity and a long duration in office, see *Federalist* Nos. 70–72.
41. Ward helpfully traces the first state constitution makers' hostility to executive power to their colonial experience: "In the turbulent opening year of the war, many constitutional framers in the states felt a palpable, almost reflective, hostility to executive power given the colonial experience of mistrust and accusation toward crown officials in the years of the imperial crisis." Ward, *Politics of Liberty*, 412. For an examination of privy councils in the first state constitution-making period, see Kruman, *Between Liberty & Authority*, 126–30.
42. Kruman, *Between Liberty & Authority*, 36–37: "In developing theories of rights and governmental restraint, the authors of the first state constitutions retained the traditional belief that declarations of rights protected the people from their rulers, but they perceived danger in different parts of government. Whereas English constitutionalists located the threat of tyranny in the monarch, revolutionary constitution makers identified legislators and executives as potential oppressors. They did not embrace James Madison's modern theory of rights, which posited that the greatest threat to liberty came from unchecked popular majorities expressing their will through legislators. In 1776, constitutional framers believed that government, not the people, posed the greatest threat to freedom."
43. Accordingly, I agree with the sentiment behind Lutz's comment that "the idea of checks and balances was present institutionally in the early state constitutions, but it was up to the Federalists to articulate the theoretical underpinnings." Lutz, *Origins of American Constitutionalism*, 100.
44. John Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (University Press of Kansas, 2021), 5: "To the extent . . . that there was any expectation that particular individuals or institutions would be responsible for remedying violations of these principles [embedded in the state bills of rights], this role was entrusted primarily to the people and to their representatives."

45. Adams, *The First American Constitutions*, 142–43: "The people had to insist on a permanent role and be ready to intervene in the political process before it came to a violent halt. This could be achieved by frequent elections and timely reforms of the constitutional system."
46. Ward helpfully shows that legislative supremacy resulted from Whiggish populism itself: "In the first-wave constitutions, the republican desire to maintain popular control over government trumped the liberal aspiration to preserve the integrity of the written constitution vis-à-vis the legislature. This was the constitutional price many American Whigs were prepared to pay for populist goods." Ward, *Politics of Liberty*, 421. See also Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (Princeton University Press, 2019), 25–29; Lutz, *Popular Consent*, 105; Wood, *Creation of the American Republic*, 156–57.
47. The corresponding passage in the Virginia constitution, found in section 3, reads, "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."
48. In section 15 of the Virginia constitution, the text says that "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."
49. Niccolò Machiavelli, *Discourses on Livy*, trans. Harvey Mansfield and Nathan Tarcov (University of Chicago Press, 1996), 209–12.
50. The effects of this reliance on legislative self-restraint and popular virtue were dismal. See Flaherty, *Restoring the Global Judiciary*, 29–30: "Of the many evils that had arisen [after the passing of the first state constitutions], perhaps the most dismaying was the behavior of the legislatures. In state after state, self-interested and rapacious factions, it seemed, had managed to seize the assemblies and enact ill-advised laws that confiscated property, transferred wealth through schemes of calculated inflation, eliminated existing contractual obligations, and even limited the sacred right of trial by jury. Most observers agreed that these and other ills arose because the American people were not so virtuous after all." See also Ward, *Politics of Liberty*, 403–4.

51. For an article illustrating the awareness of the founders of classical liberalism concerning the possibility of popular apathy toward politics, see Benjamin Kleinerman, "Can the Prince Really Be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke's Second Treatise," *American Political Science Review* 101, no. 2 (2007): 209–22.
52. John Agresto, *The Supreme Court and Constitutional Democracy* (Cornell University Press, 1984), 53.
53. For the importance of the passage of time to Madisonian republicanism, see Greg Weiner, *Madison's Metronome: The Constitution, Majority Rule, and the Tempo of American Politics* (University Press of Kansas, 2012).
54. See *Federalist* No. 51: "[T]he members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal."
55. See also *Federalist* No. 37: "The genius of republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those intrusted [*sic*] with it should be kept in dependence on the people, by a short duration of their appointments; and that, even during this short period, the trust should be placed not in a few, but in a number of hands. Stability, on the contrary, requires, that the hands, in which power is lodged, should continue for a length of time the same. A frequent change of men will result from a frequent return of electors; and a frequent change of measures, from a frequent change of men: whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand."