THE CICERONIAN ORIGINS OF AMERICAN LAW AND CONSTITUTIONALISM

JACK FERGUSON*

"As all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight."
—John Adams[1]

"Cicero [was] as great a master in the art of government as in eloquence and philosophy."
—Emer de Vattel[2]

INTRODUCTION

In the summer of 1792, Secretary of State Thomas Jefferson sought to turn President George Washington against Treasury Secretary Alexander Hamilton. After months of newspaper attacks on the administration (orchestrated by Jefferson), Jefferson wrote Washington a letter with various charges against Hamilton.[3] The letter criticized Hamilton's system of public credit and insinuated that he was conspiring to change "the present republican form of government

* Law Clerk, U.S. Court of Appeals for the Sixth Circuit; J.D., Notre Dame Law School. I thank Joel Alicea, A.J. Bellia, Caitlin Ferguson, Rick Garnett, Matthew Mehan, Walter Nicgorski, Jeff Pojanowski, Nathaniel Schetter, and Candace Terman for helpful comments and conversations.

1. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA xxii (John Stockdale, Picadilly 1794) (1787–1788).

2. EMER DE VATTEL, THE LAW OF NATIONS 19 (Béla Kapossy & Richard Whatmore eds., 2008) (1758).

3. *See* FORREST MCDONALD, ALEXANDER HAMILTON 250–51 (1979).

to that of a monarchy."[4] The President forwarded the message to Hamilton to request his response.

In a lengthy reply, Hamilton refuted the accusations point by point. To answer the charge of subverting the government, he turned it back on his rival. Comparing Jeffersonian populism to the revolutionary populism of ancient Rome, Hamilton wrote:

> *Cato* was the Tory—*Caesar* the whig of his day. The former frequently resisted—the latter always flattered the follies of the people. Yet the former perished with the Republic[;] the latter destroyed it.
>
> No popular government was ever without its Catalines & its Caesars. These are its true enemies.[5]

By invoking Catiline—the leader of a failed coup against the Roman Republic whose name became synonymous with insurrection—and Julius Caesar, Hamilton drew a parallel between himself and the Roman statesman-philosopher Cicero. As the foremost political leader of his day, Cicero had defeated Catiline's conspiracy and fought Caesar's rise to power. If no republic lacked its Catilines and Caesars, Hamilton seemed to suggest, then no republic was without need for a Cicero.

This Article considers the Founding generation's intellectual debt to Cicero. Philosopher, statesman, lawyer, and rhetorician, Cicero was a frequently invoked classical authority in the Anglo-American legal tradition.

Part I situates the reception of Cicero in Enlightenment thought. The eighteenth-century world held him in great esteem for his writings and his political accomplishments. In one sense, there were two Ciceros. Cicero the politician held Rome's highest office, navigated the republic through civil crisis, and defended its constitution

---

4. Thomas Jefferson to George Washington (May 23, 1792), *in* 23 THE PAPERS OF THOMAS JEFFERSON 535, 537 (Charles T. Cullen ed. 1990) [JEFFERSON PAPERS].

5. Alexander Hamilton to George Washington—Enclosure: Objections and Answers Respecting the Administration of the Government (Aug. 18, 1792), *in* 12 THE PAPERS OF ALEXANDER HAMILTON 228, 252 (Harold C. Syrett ed., 1962) [HAMILTON PAPERS]. Hamilton spelled the name "Cataline" in contrast to the traditional "Catiline."

against Catiline, Julius Caesar, and Mark Antony. Cicero the philosopher, meanwhile, wrote some of the most enduring works of ancient thought, including *De Officiis* ("On Duties"), *De Legibus* ("On the Laws"), and *De Re Publica* ("On the Republic").

But in another sense, there was really only one Cicero. His ideas and his actions informed each other in a lifelong feedback loop. As John Dickinson put it in his *Letters from a Farmer in Pennsylvania*, "this great and excellent man['s] vast abilities, and the calamities of his country . . . enabled him, by mournful experience, to form a just judgment on the conduct of the friends and enemies of liberty."[6] It was this legacy that the likes of John Adams, Alexander Hamilton, James Wilson, Joseph Story, and others found so attractive, and they accorded Cicero special authority to comment on law and government.

This Article then considers three aspects of early American law and constitutionalism. Part II studies Cicero's principles of natural law and how they defined natural law theory into the seventeenth and eighteenth centuries. These principles also laid the groundwork for the law of nations, or general law, in early modern legal systems. General law crossed the Atlantic with the common law and served as a backdrop to the adoption of the U.S. Constitution. As a case study, Part II looks at Hamilton's argument for judicial review in *Federalist No. 78* and how he derived it from Cicero and the law of nations.

Part III examines Cicero's republicanism, which shaped American republicanism in three areas—popular sovereignty, institutional structure, and the rule of law. His writings provided source material for early American conceptions of consent-based government, separated or divided power, checks and balances, and constitutionalism. Those who framed the U.S. Constitution and its chief model, the Massachusetts Constitution, had frequent recourse to classical constitutional theory and incorporated Ciceronian principles in their work.

---

6. *See* Letter XI, Letters from a Farmer in Pennsylvania, *in* EMPIRE AND NATION 68, 71 (Forrest McDonald ed., 2d ed. 1999).

Part IV zeroes in on one branch of divided power—executive power. Cicero's political thought and his historical example leading Rome through crisis influenced how some members of the Founding generation conceived of presidential authority. At the level of theory, Cicero provided arguments for the virtues of an energetic executive and the structural advantages of unitary administration. And at the level of practice, his political example was invoked by Hamilton in his response to the Whiskey Rebellion of 1794, a response that set the first post-ratification precedent on the domestic use of military force.

An impressive body of scholarship has already studied the influence that the classical world had on the American Founding.[7] These scholarly accounts tend to survey many classical figures and focus on philosophy or politics. But most accounts give only a passing nod to Cicero and his distinctly legal thought.[8] This Article gives Cicero full-length treatment and considers his unique contributions to American law and constitutionalism, reconstructing his thought as the Founders understood it.

Recovering the Founders' reception of Cicero would enrich the ongoing recovery of an older way of thinking about our law, alternatively called the "general law" approach or the "classical legal tradition." This approach has experienced a remarkable renaissance in recent years.[9] But to fully grasp eighteenth-century general

---

7. This scholarship mostly comes from the disciplines of history, philosophy, and political theory. *See, e.g.*, RICHARD M. GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION (1963); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22–28 (1967); Walter Nicgorski, *The Non-Lockean Heritage of the Declaration of Independence*, 21 AM. J. JURIS. 156 (1976); CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS (1994); DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION (2008); THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA (Peter S. Onuf & Nichole P. Cole eds., 2013); KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS (2023).

8. For two recent exceptions, see J. Joel Alicea, *Constitutional Theory and the Problems of Disagreement*, 173 U. PA. L. REV. 321 (2025); MICHAEL C. HAWLEY, NATURAL LAW REPUBLICANISM (2021).

9. *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024)); William Baude & Robert Leider,

law, we should appreciate the sources from which it arose. As Jud Campbell has written, "accurately understanding the content of law at some point in the past requires appreciating [its] imbedded assumptions" and "then considering whether those assumptions were themselves part of the law."[10] Cicero's work was a common resource for lawyers in the general law tradition, from Grotius and Vattel to Wilson and Story. By reading what they read, we can better understand their sometimes-foreign modes of thinking and lawyering.[11]

Reexamination of Cicero also reveals many conceptual continuities between classical and Anglo-American legal thought. When Founding-era lawyers spoke about things like natural law, general principles of law, "right reason," and natural justice,[12] they were speaking in a Ciceronian dialect. The same goes for their debates over republicanism and forms of government. Tracing the jurisprudential and political commitments that American lawyers shared with Cicero lets us push back against those who cast the early constitutional project as more of a break from the past.[13] As constitutional scholarship experiences what Joel Alicea calls a "natural law

---

The General Law Right to Bear Arms, 99 NOTRE DAME L. REV. 1465 (2024); Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023); William Baude, *Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331 (2023); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519 (2022); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 247 (2017); ANTHONY J. BELLIA, JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017).

10. Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31 (2020); *see also* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 809–10 (2019) ("Tracing a chain of title or a chain of legal authority . . . into the past is normal lawyers' work.").

11. *See* Campbell, *supra* note 9, at 251–53 (discussing the challenges posed by understanding Founding-era constitutional discourse); Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 115 (2019) ("By our lights, [the Founding] is a foreign world.").

12. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 339–46 (2021).

13. *Contra, e.g.*, PATRICK J. DENEEN, WHY LIBERALISM FAILED 22–24 (2018) (concluding that the English Enlightenment was a "wholesale rejection of its precedents," including classical thought, and "redefin[ed] shared words and concepts").

moment," it is worth revisiting old "insights and arguments that have lain dormant for . . . many years."[14]

At the same time, it's worth recognizing the limits of what Cicero's thought could offer the Founders. Things like natural law and principles of reason were particular tools used by lawyers in a particular manner. They had limits. They worked in tandem with sources of law like the common law and written law. First principles were important, but not everything, and we should care about the parochial ways in which the Founders adapted them to our legal order.[15]

A note on methodology. Attributing "influence" to this or that writer has its dangers. As one historian puts it, "[w]hen interpreting the elusive processes of intellect and will, [we] rarely have enough evidence to move convincingly from *post hoc* to *propter hoc*."[16] And when dealing with ancient sources, language barriers pose another pitfall. Nonspecialists can easily mishandle Latin and Greek works in translation.[17] This Article treads carefully around such traps.

---

14. *See* J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL'Y 307, 327 (2025).

15. As Judge Neomi Rao writes, while "the terrain of our law includes the foundational political theory animating the Constitution, not to mention roots resting in the common law and natural law," our law has incorporated these sources in unique ways and "reference to [them] must be bounded by our constitutional system of government." Neomi Rao, *The Province of the Law*, 46 HARV. J.L. & PUB. POL'Y 87, 88, 98 (2023). The natural law itself requires respect for the fixed determinations made by constitution-makers, determinations which can include limits on the power of a legislator or judge. *Id.* at 98.

16. Stephen Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical "Influence"*, 73 CLASSICAL J. 313, 313 (1978).

17. As an example, consider the recent body of scholarship on "fiduciary constitutionalism" claiming that the Constitution imposes fiduciary duties on federal officials, including the President. This scholarship purports to locate the origins of fiduciary constitutionalism in Plato, Aristotle, and Cicero. *See, e.g.*, Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1099–1101 (2004); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 & n.2 (2015); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019). But as Samuel Bray and Paul Miller have demonstrated, this work misreads the classical sources, deriving legal meaning from

First, this Article uses English translations for the convenience of the reader but includes Cicero's Latin where he employed crucial or contested terms.[18] Where available, it notes eighteenth-century writers' own translations of Cicero. When writers or cases quote him in Latin, this Article gives both the original Latin and English translation.

Second, this Article's discussion of Cicero's thought (mostly) centers around works and passages that were extant in the 1700s. This is largely relevant for *De Re Publica*. We have much of the dialogue today after an archival discovery in 1819, but the Founding generation had only fragments. This Article traces which fragments early Americans had, noting how they were preserved by writers from late antiquity through the Renaissance.

Third, direct citation is stronger than inference. This Article grounds its claims about "influence" in precise passages or lines of Cicero's cited in eighteenth-century writings. Taking the "Founders' bookshelf" approach,[19] it asks how the likes of Adams, Hamilton, Wilson, Story, and others would have read and understood Cicero as a legal authority, constitutional theorist, and historical figure.

Of course, in many instances where English or American lawyers cited Cicero, they probably would have made the same claim even without Cicero. Blackstone, for example, cited Cicero in arguing against ex post facto laws.[20] Blackstone and Cicero were, in turn,

---

English translations where the original Latin or Greek language bore no such meaning. *See* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1484–91 (2020).

18. This Article uses the Loeb Classical Library editions of Cicero, which are valuable for their side-by-side facing Latin and English translation.

19. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1188 (2019); *see also* David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 AM. Q. 262 (1976) (cataloguing the contents of Founding-era libraries).

20. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 & n.e (1753).

invoked on this point during ratification of the U.S. Constitution.[21] In all likelihood, the Founding generation would have disliked ex post facto laws even without Blackstone, and Blackstone would have disliked ex post facto laws even without Cicero.

But *A* still may have "influenced" *B* even if *A*'s belief were not the but-for cause of *B*'s belief. Sources were more than window dressing. The Founders' legal and political culture was one in which writers relied on authorities to situate claims within existing traditions and to maximize rhetorical effect. And on a deeper level—if we think about the young Adams or the young Story in school—their views on law and government came from *somewhere*. Cicero's work, like that of Blackstone or Aristotle, would have been among their first encounters with the most basic and enduring questions of law, government, and human nature.

Scholars have not always taken the rosiest view of Cicero. One states that his "writings may be faulted for only being derivative of the earlier Greek historians," and that his "constitutional narrative is . . . blinded by his political grudges and predilections."[22] Another contends that "Cicero's thought does not have any coherent philosophical system."[23] Yet another writes that *De Re Publica* was "unphilosophical" and "only rhetoric."[24]

Others have doubted that Cicero had any serious influence on American law and constitutionalism. One writes that "Enlightenment readers took inspiration from Cicero, but they did not as a rule think of him as the inaugurator of a theoretical vision that

---

21. *See An Impartial Citizen VI*, PETERSBURG VIRGINIA GAZETTE (Mar. 13, 1788), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492, 493 (John P. Kaminski et al. eds.) [DOCUMENTARY HISTORY] ("*Ex post facto* laws are universally allowed to be the most dangerous ingredients of any government. . . . The learned Judge Blackstone . . . quotes Cicero, the most learned, and perhaps the wisest of the ancient Romans, who expresses his detestation of such laws in the most nervous and energetic language.").

22. BEDERMAN, *supra* note 7, at 70.

23. Matthew Fox, *Cicero During the Enlightenment*, *in* THE CAMBRIDGE COMPANION TO CICERO 318, 319 (Catherine Steel ed., 2013).

24. MOSES FINLEY, POLITICS IN THE ANCIENT WORLD 128 (1983).

could be taken as more than a vague foundation for their own endeavors. . . . [I]t is a fallacy to imagine that Cicero played a particularly prominent role in the founding values of the American constitution."[25] Another scholar agrees that Cicero "had little to contribute" by 1787.[26]

The Founding generation would not have shared any of those assessments. Adams, Hamilton, Wilson, Story, and others made Cicero an express intellectual anchor of their work. So did their European predecessors, from Grotius and Vattel to Coke, Locke, Mansfield, and Blackstone. Cicero had much to teach them. To the extent their law and constitutionalism is ours today, his relevance endures.

I. CICERO: PHILOSOPHER AND STATESMAN

Because Cicero took part in public life, he stands apart from those like Plato or Aristotle whose biography had little connection to their philosophy. Some historical background will help set the stage for how the Founding generation understood him.

A. Cicero's Life and Times

Born in 106 B.C., Marcus Tullius Cicero came from provincial origins.[27] His upper middle class family lived some 70 miles south of Rome and was "undistinguished and unknown to the Roman people."[28] The Roman historian Plutarch tells us that the Cicero family name was thought to come from *cicer*, Latin for "chickpea" or "legume."[29] When the young Marcus first entered politics, Plutarch wrote, his friends urged him to change his name and find something more respectable. He refused and replied that he would make

25. Fox, *supra* note 23, at 319–20.

26. David S. Weisen, *Cicero's Image in America and the Discovery of* De Republica, 2 HIST. CLASSICAL SCHOL. 159, 164 (Stanley M. Burstein ed. 2020).

27. The biographical and historical material in Part I.A is drawn from ANTHONY EVERITT, CICERO (2003) and ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC (1999). Direct quotations have individual footnotes in this subsection.

28. Catherine Tracy, *Cicero's* Constantia *in Theory and Practice*, *in* CICERO'S PRACTICAL PHILOSOPHY 79, 107 (Walter Nicgorski ed., 2012).

29. 2 PLUTARCH, LIVES 408–09 (Arthur Hugh Clough ed., 2001) (second century A.D.).

his name "more glorious than that of the Scauri or Catuli," two prominent political families.[30]

Cicero went to Rome for his studies. He learned rhetoric, law, and philosophy with leading scholars of the day and spent time in military service. Then, as a young professional, he began practicing law and attracted notice for his rhetorical abilities.

He entered Roman society in a period of political turbulence. Animosity between the two classes, the patricians and plebeians, threatened the stability of the Roman state, as did years of civil war. Two generals, Marius and Sulla, spent several years (during Cicero's twenties) chasing each other around the Italian peninsula and terrorizing the public. Sulla was notorious for his proscriptions, which condemned many of Marius's supporters (and indiscriminate others) to death and confiscated their property. Cicero gained in his early years an appreciation for political stability, the rule of law, and limits on governmental power.

Rome had an unwritten constitution. In the Roman Republic, the city's aristocrats held great sway over government, but the people had a voice as well. Elections took place in various assemblies, or *comitia*, as did votes on proposed legislation, declarations of war, and other matters. Administrative authority, or *potestas*, resided in a number of elected magistracies. These magistracies were sequentially ordered in the *cursus honorum*; one had to hold lower office before ascending to higher office.

The highest office was the consulship. Rome elected two consuls annually; they wielded *imperium*, or supreme power, the highest form of *potestas*. They commanded the Roman army in battle, convened popular assemblies to propose and pass legislation, and acted as chairs of the Senate. The Roman Senate was a standing deliberative body composed of hundreds of patricians and ex-magistrates. The Senate exercised an advisory power called *auctoritas*, and the Senate's approval was expected before policy could go into effect. The Senate and the consuls could appoint a dictator out of

30. *Id.* at 409.

necessity in military emergencies. Dictators exercised broad power but only for short terms.

With the end of the civil war, Cicero's legal career took off. He gained renown for his trial skills and won an acquittal as defense counsel in a high-profile capital case. In 76 B.C., he ran for the position of Quaestor (treasury official, first on the *cursus honorum*) and won. He served in a Sicilian province, where Plutarch reported that after the people "had experience of his care, justice, and clemency, they honored him more than ever they did any of their governors before."[31]

Cicero successfully scaled the *cursus honorum*, serving as Aedile (public works administrator) in 69 B.C. and Praetor (judicial official) in 66 B.C. At age 42, he was elected consul. For a *novus homo*, or "new man" lacking patrician heritage, this was a remarkable feat. As one biographer puts it, "[i]n less than twenty years, Cicero had risen from being a little-known lawyer from the provinces to being joint head of state of the greatest empire in the known world."[32] His fellow consul, Gaius Antonius Hybrida, was unimpressive and content to let Cicero govern unilaterally during the year 63 B.C.

Cicero's signature accomplishment as consul was suppressing an insurrection led by Lucius Sergius Catiline. Catiline had run for consul against Cicero, and when he lost he began to flirt with alternative methods of gaining power. Catiline came from an aristocratic family but caucused with the *populares*, or populist faction. He opposed the status quo more from a desire for personal gain, however, than from sympathy for the people. The Roman historian Sallust wrote that Catiline "had been assailed by the greatest passion for seizing control of the government, and he did not consider it at all important by what means he achieved his objective."[33]

After his consular ambitions stalled, Catiline had allies gather an army north of Rome. He and a ring of conspirators then planned to

31. PLUTARCH, *supra* note 29, at 412.

32. EVERITT, *supra* note 27, at 94.

33. SALLUST, BELLUM CATILINAE 27 (J.C. Rolfe trans., Loeb Classical Library 2013) (c. 40 B.C.).

assassinate Cicero and many leading Senators. With the government decapitated, he could then march his army into the city and seize power.

Cicero had long been wary of Catiline's revolutionary tendencies and kept watch on him through informers. He soon learned of the planned coup and let the Senate know. This was as direct a threat the republic had faced since the civil war of Marius and Sulla decades before. The Senate sent troops out to confront Catiline's army.

Trying to save face, Catiline remained in the city rather than flee to his men. In the next session of the Senate, with Catiline present, Cicero delivered the first of a series of orations, *In Catalinam* ("Against Catiline"), denouncing the revolutionary and his conspirators. Unmasked, Catiline left Rome to join his forces. Cicero had the other conspirators arrested and summarily executed. The legality of this measure was uncertain, since Roman law ordinarily prohibited the execution of citizens without trial. But Cicero justified it under the emergency powers the Senate had granted him to combat the insurrection. Catiline later died in battle against the Roman army.

If Cicero was famous before his election as consul, he was now the greatest Roman of his day. His decisive action had put down a serious threat to the state, even if he later presented it as a closer call than it might have been. The Catilinarian affair cemented his legacy as an effective statesman, unmatched rhetorician, and defender of the constitutional order.

Cicero's post-consulship career proved more of a mixed bag. As a former magistrate, he sat in the Senate and attempted a reconciliation between the patricians and plebeians. He himself was neither. As a *novus homo*, he had never been truly accepted by the senatorial class, but he disliked radical plebeian reformers who, in his view, sought more change than the republic could accommodate. His pride alienated some who might otherwise have been his allies. According to Plutarch, Cicero "offended very many, not by any evil action, but because he was always lauding and magnifying him-

self . . . neither Senate nor assembly of the people, nor court of judicature could meet, in which he was not heard to talk of Catiline."[34] Humility was never his strong suit.

Subsequent years saw the rise and fall of the First Triumvirate and the assassination of Julius Caesar. After Caesar's death, Cicero experienced a brief and intense revival in popularity for his opposition to Mark Antony. Now an elder statesman, Cicero delivered a series of orations, the *Philippics*, against Antony for which he received great acclaim.

Cicero tried to recruit the young Gaius Octavian, Caesar's adopted son, to the republican side. But Octavian and Antony made common cause, and with Marcus Lepidus formed the Second Triumvirate in 43 B.C. Proscriptions followed. Antony added Cicero's name to the list of the condemned over Octavian's objections.[35] A centurion and his men found Cicero as he was departing the country and executed him.

Rome ceased to be a republic. Octavian, restyled as Caesar Augustus, became emperor. Plutarch reported that later in life, Augustus once found his grandson reading one of Cicero's works. The boy tried to hide it out of fear, but the emperor told him: "My child, this was a learned man, and a lover of his country."[36]

Cicero's political career would have been legacy enough. But he was a prolific writer as well, leaving behind works on philosophy, ethics, politics, law, and rhetoric. Many of his speeches and letters also remain with us.

Three of his works rank among the most influential of classical thought. First, his *De Re Publica* ("On the Republic").[37] Composed in the early 50s B.C., *De Re Publica* set out Cicero's reflections on Roman constitutionalism and good government. For the Latin

34. PLUTARCH, *supra* note 29, at 424.

35. *Id.* at 439 ("Caesar, it is said, contended earnestly for Cicero the first two days; but on the third day he yielded and gave him up.").

36. *Id.* at 441.

37. CICERO, De Re Publica, *in* DE RE PUBLICA, DE LEGIBUS (Clinton W. Keyes trans., Loeb Classical Library 1928) (c. 54–51 B.C.) [hereinafter DE RE PUBLICA].

West, Cicero laid the foundation of the idea of republicanism. Cicero combined historical analysis of the Roman constitution with an argument for its structure—a mixed constitution—as the best practically available form for a state. The work also considered natural law's role in grounding government. It concluded with the *Somnium Scipionis* ("Scipio's Dream"), a mystical vision of the cosmos recounted by the dialogue's protagonist, Scipio.

Although the dialogue's complete text was lost, many passages survived through quotation and commentary in the works of Latin writers like Lactantius, Augustine, Macrobius, and Nonius.[38] Through these surviving pieces, the dialogue's general arguments were well known even though the precise text was not always available. In 1819, Cardinal Angelo Mai discovered much of the lost text on a palimpsest in the Vatican libraries and had it published a few years later.[39]

Second, Cicero's *De Legibus* ("On the Laws") investigated the nature and origins of law.[40] He wrote it as a sequel to *De Re Publica*, but never finished it. *De Legibus* probed the relationships between law and religion, law and reason, and natural law and civil law. He outlined a legal code for his ideal constitutional republic and proposed a system of administrators.

De Re Publica and *De Legibus* are dialogues, and dialogues always pose a hermeneutical problem. The arguments of one speaker cannot be automatically attributed to Cicero himself. Cicero's classical skepticism led him to test opposing views by subjecting them to Socratic debate (and as a lawyer, he was keenly aware of the truth-finding capacity of the adversarial process). As Martha Nussbaum suggests, classical dialogues are an invitation to philosophize—a stimulant as much as a lecture—and should be read "not as a tradi-

38. *See* PAUL MACKENDRICK, THE PHILOSOPHICAL BOOKS OF CICERO 258–60 (1989).

39. *See* Weisen, *supra* note 26, at 167–68.

40. CICERO, De Legibus, *in* DE RE PUBLICA, DE LEGIBUS, *supra* note 37 (unfinished, but written 50s and 40s B.C.) [hereinafter DE LEGIBUS].

tion of positions, but as a tradition of argument and counter-argument."[41] This Article considers an argument to be Cicero's only when, as Jed Atkins writes, "the dialogue as a whole endorses [it]."[42]

Third, Cicero's *De Officiis* ("On Duties") dealt with ethics.[43] Writing in the Stoic tradition, he argued that the moral or just course of action is also always the most useful or practical one. He rejected any divergence between morality and utility. The work drew on the full range of Cicero's professional experience and touched on oratory, statesmanship, public administration, the law of war, piracy, economics, trade, public credit, property law, and poetry. Written in Cicero's final years as the republic collapsed, *De Officiis* survived as a classical guidebook on the virtuous human life. It was one of the first books printed on Gutenberg's press, a testament to its enduring salience.[44]

B. The Reception of Cicero

Cicero was immediately a popular subject for commentators and historians. Sallust began writing his history of the Catilinarian conspiracy before Cicero had died. A century later, Plutarch wrote a colorful biography of Cicero comparing him to the Greek orator Demosthenes. In the fifth century, the Roman writer Macrobius wrote a monograph on Scipio's Dream from *De Re Publica*.[45] Thanks to Macrobius, Scipio's Dream was the longest extant part of the text until 1819.

Christian authors embraced Cicero. Lactantius, an early Christian writer and advisor to the emperor Constantine, deemed Cicero "at

41. Martha C. Nussbaum, Comment, *Symposium on Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 213, 213 (1990).

42. JED ATKINS, CICERO ON POLITICS AND THE LIMITS OF REASON 44 (2013).

43. CICERO, DE OFFICIIS (Walter Miller trans., Loeb Classical Library 1913) (44 B.C.).

44. HAWLEY, *supra* note 8, at 90.

45. MACROBIUS, COMMENTARY ON THE DREAM OF SCIPIO (William Harris Stahl trans., Columbia University Press 1990) (c. 430).

once perfect orator and supreme philosopher."[46] Lactantius preserved key parts of *De Re Publica* in his treatise *Divine Institutes* by block-quoting and commenting on them.[47] In his *Confessions*, Augustine credited Cicero's work with orienting him toward the study of philosophy and initiating his conversion to Christianity.[48] Augustine's *City of God* engaged extensively with Cicero's thought and cited him over one hundred times.[49] Jerome, the translator of the Vulgate, wrote that he read so much Cicero that he was accused by God in a dream of being a Ciceronian rather than a Christian.[50]

Medieval scholastics, concerned as they were with the baptism of classical philosophers, believed that Cicero's works contained universal truths accessible by reason.[51] Macrobius's commentary on Scipio's Dream became a key source for the scholastic Neoplatonist revival.[52] Thomas Aquinas's *Summa Theologica* cited Cicero over one hundred times on natural law, virtue, and other subjects. Cicero featured heavily across disciplines, in the work of academics like John of Salisbury and political writers like Marsilius of Padua.[53] Medieval European law was also indebted to Cicero. Jurists like Huguccio of Pisa drew on Cicero in well-circulated legal commentaries,[54] and Dante's writings on legal interpretation cited Cicero.[55]

Cicero's popularity reached new heights in the fourteenth century, largely thanks to the archival discovery of many of his letters

---

46. LACTANTIUS, DIVINE INSTITUTES 191 (Anthony Bowen & Peter Garnsey trans., Liverpool University Press 2004) (c. 300).

47. *See id.* at 346 (quoting Cicero's formulation of natural law).

48. AUGUSTINE, CONFESSIONS 38–39 (F.J. Sheed trans., Hackett Publishing Co. 1993) (c. 400).

49. *See* MACKENDRICK, *supra* note 38, at 259.

50. *See* Jerome, Letter 22 (To Eustochium), *in* SELECT LETTERS OF ST. JEROME 53, 125–27 (F.A. Wright trans., Loeb Classical Library 1954) (fifth century).

51. BART WAUTERS & MARCO DE BENITO, THE HISTORY OF LAW IN EUROPE 49 (2017).

52. *See* Caroline Bishop, *Roman Plato or Roman Demosthenes? The Bifurcation of Cicero in Ancient Scholarship*, *in* BRILL'S COMPANION TO THE RECEPTION OF CICERO 283, 302–304 (William H.F. Altman ed., 2015).

53. *See generally* CARY J. NEDERMAN, THE BONDS OF HUMANITY: CICERO'S LEGACIES IN EUROPEAN SOCIAL AND POLITICAL THOUGHT CA. 1100–CA. 1550 (2020).

54. *See* WAUTERS & DE BENITO, *supra* note 51, at 61–62.

55. *See* DANTE ALIGHIERI, DE MONARCHIA 89 (Aurelia Henry trans., Houghton Mifflin & Co. 1904) (1313).

by Petrarch.[56] In the sixteenth century, humanist scholar Carlo Sigonio compiled Cicero's fragmentary writings in a single volume.[57] His compilation confirms that certain parts of *De Re Publica* were still around, despite the loss of the whole.

Early modern thought continued to hold Cicero in high esteem. On the continent, international law jurists like Hugo Grotius, Samuel von Pufendorf, and Emer de Vattel considered Cicero a foundational writer on the law of nature and the law of nations.[58] Grotius, Pufendorf, and Vattel drew on Cicero and the classical concept of *foedera* ("treaties") in work which influenced the American Founders' ideas of federalism.[59] Montesquieu wrote a short essay, *Discourse on Cicero*, where he wrote that it was Cicero "who of all the ancients had the most personal merit, and whom I would prefer to resemble."[60] He praised Cicero as "the liberator of his fatherland and the defender of liberty" who deserved "the title of philosopher no less than Roman orator."[61]

Across the channel, John Locke grounded his moral and political philosophy in Cicero's thought, and his library held more works by Cicero than nearly any other author.[62] Conyers Middleton's *Life of Cicero*, published in 1741, was one of the most popular books of its day.[63] This biography, like Plutarch's, was as a key conduit for re-

56. Martin McLaughlin, *Petrarch and Cicero: Adulation and Critical Distance*, *in* BRILL'S COMPANION, *supra* note 52, at 19, 21.

57. CARLO SIGONIO, FRAGMENTA CICERONIS PASSIM DISPERSA (1560)

58. *See infra* Part II.B.1; *see also generally* BENJAMIN STRAUMANN, ROMAN LAW IN THE STATE OF NATURE (2015); HAWLEY, *supra* note 8, at 94–116.

59. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 18–19 (2010).

60. Montesquieu, *Discourse on Cicero* (1717), *in* MONTESQUIEU: DISCOURSES, DISSERTATIONS, AND DIALOGUES 72, 72 (David W. Carrithers & Philip Stewart eds. 2020).

61. *Id.* at 73.

62. *See generally* TIM STUART-BUTTLE, FROM MORAL THEOLOGY TO MORAL PHILOSOPHY: CICERO AND VISIONS OF HUMANITY FROM LOCKE TO HUME (2019); *see id.* at 19; HAWLEY, *supra* note 8, at 137–85.

63. *See* Robert G. Ingram, *Conyers Middleton's* Cicero, *in* BRILL'S COMPANION, *supra* note 52, at 96, 112–13.

telling Cicero's life and times. John Adams "warmly recommend[ed]" Middleton to friends.[64] Scottish philosophers like David Hume and Adam Smith were heavily influenced by Cicero,[65] as were English jurists like Lord Mansfield who urged young lawyers to read *De Officiis* as an introduction to "general ethics."[66]

Cicero was also a key figure in the English republican tradition. Radical Whigs and Commonwealthmen like Henry Neville, Algernon Sidney, Thomas Gordon, John Trenchard, and Middleton praised Cicero's thought and example, holding him up as a guardian of popular liberty against arbitrary rule.[67] Their work circulated widely in the American colonies and helped fuel resistance to British rule. In certain enclaves, Cicero became a beacon for the Revolution. For example, one Boston clergyman who spoke out against the Stamp Act declared that Cicero "fell as one of the most glorious advocates of liberty that the world ever saw."[68]

Education in eighteenth-century America was education in the classics.[69] Students were steeped in ancient literature and learned to read and write Greek and Latin from an early age. The basics of formal schooling typically consisted of Homer, Aristotle, Cicero, Virgil, and the Greek New Testament. Students learned rhetoric from Cicero's speeches and modeled their prose after his. Translating these speeches was a standard entrance requirement for the

64. John Adams to William Tudor (Aug. 4, 1774), *in* 2 THE PAPERS OF JOHN ADAMS 125, 127 (Robert J. Taylor ed., 1979) [ADAMS PAPERS].

65. *See* Daniel J. Kapust, *Cicero and Eighteenth-Century Political Thought*, *in* THE CAMBRIDGE COMPANION TO CICERO'S PHILOSOPHY 268, 273–77 (Jed W. Atkins & Thomas Bénatouil eds., 2021); FONNA FORMAN-BARZILAI, ADAM SMITH AND THE CIRCLES OF SYMPATHY 6–8, 106–31 (2010).

66. LORD MANSFIELD, A TREATISE ON THE STUDY OF LAW WITH DIRECTIONS TO STUDENTS 49 (1797). Locke did the same, recommending *De Officiis* for the study of "the Principles and Precepts of Vertue, and the Conduct of [] Life." JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 185 (1693).

67. *See* Weisen, *supra* note 26, at 161–63.

68. CHARLES W. AKERS, CALLED UNTO LIBERTY: A LIFE OF JONATHAN MAYHEW 133 (1964).

69. The material in these two paragraphs on Founding-era education comes from RICHARD, *supra* note 7, at 12–38.

likes of Princeton (then the College of New Jersey), Columbia (then King's College), Harvard, Brown, and William and Mary.

University students studied all manner of ancient works, including Xenophon, Plato, Polybius, Plutarch, Tacitus, Horace, Ovid, Sallust, and Livy. Academic dissertations applied Cicero's political writings to contemporary debates over resistance and revolution. Familiarity with the liberal arts represented to European powers that the American colonials were more than provincial frontiersmen; they could earn what Alison LaCroix describes as "membership in the broader Atlantic world of letters."[70] Early American society was deeply classically literate.

Several editions of Cicero's works circulated in this period and would have sat on the Founders' bookshelves. They included *M. Tulii Ciceronis Opera Omnia* ("The Complete Works of Marcus Tullius Cicero") by the Dutch philologist Cornelis Schrevel and *M. Tullii Ciceronis Opera* ("The Works of Marcus Tullius Cicero") by Thomas Hearne.[71] These tomes would have been an invaluable resource. John Adams owned Schrevel's Cicero; Alexander Hamilton had Hearne's.[72]

Adams wrote that "as all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight."[73] During the American Revolution, he declared that his "revolution-principles" were "the principles of Aristotle and Plato, of Livy and Cicero, of Sydney, Harrington, and Lock[e]."[74] When he and young John Quincy were delayed returning from a diplomatic mission to France, they passed the time by

---

70. Alison L. LaCroix, *The Lawyer's Library in the Early American Republic*, *in* SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL 250, 253 (Martha C. Nussbaum & Alison L. LaCroix eds. 2013).

71. *See* CORNELIS SHREVEL, M. TULII CICERONIS OPERA OMNIA (1661); THOMAS HEARNE, M. TULLII CICERONIS OPERA (1783).

72. The "Libraries of Early America" database has catalogued many Founding-era personal libraries. For Adams's library, see https://www.librarything.com/catalog/JohnAdams [https://perma.cc/7D4C-ERS3], and for Hamilton's, see https://www.librarything.com/catalog/AlexanderHamiltonI [https://perma.cc/6HRF-U2YW].

73. 1 DEFENCE, *supra* note 1, at xxii.

74. John Adams, Novanglus No. 1, *in* 2 ADAMS PAPERS, *supra* note 64, at 226, 230.

translating Cicero in their hotel.[75] Adams bemoaned the loss of the text of *De Re Publica*,[76] but liberally quoted the passages and fragments that remained. He also had a hand in picking the nation's motto, *e pluribus unum*, and may have clipped it from *De Officiis*.[77]

Hamilton wrote essays under the pseudonym "Tully," the affectionate diminutive of Cicero's family name "Tullius."[78] Ever the student of classical history, Hamilton viewed statesmanship and American politics through a Ciceronian lens. He argued that "the Catalines and Caesars of [a] community" described "men to be found in every republic," self-serving politicians "who [lead] the dance to the tune of liberty without law."[79] He wrote that "[e]very republic at all times has its Catalines and its Caesars . . . . arbitrary, persecuting, intolerant, and despotic."[80] Hamilton described Aaron Burr as "the Cataline of America" and "as true a Cataline as ever met in midnight conclave."[81] He also called Burr an "embryo-Caesar in the United States."[82] Hamilton cited Cicero favorably in his legal practice, at the Constitutional Convention, and in newspaper

---

75. DAVID MCCULLOUGH, JOHN ADAMS 213 (2001).

76. 1 DEFENCE, *supra* note 1, at xxi ("The loss of his book upon republics is much to be regretted").

77. Adams sat on the committee of the Continental Congress that developed the first seal and motto for the United States. *See* Monroe E. Deutsch, *E Pluribus Unum*, 18 CLASSICAL J. 387, 387–89 (1923). The committee lifted the motto from some classical antecedent, unknown to us but for which Cicero was a possibility, along with Virgil and Horace. *Id.* In *De Officiis*, Cicero wrote of friendship: "When two people have the same ideals and the same tastes, it is a natural consequence that each loves the other as himself; and the result is, as Pythagoras requires of ideal friendship, that several are united in one [*unus fiat ex pluribus*]." DE OFFICIIS, *supra* note 43, at 59 (1.56).

78. *See infra* Part IV.B.2.

79. Catullus No. III (Sept. 29, 1792), *in* 12 HAMILTON PAPERS, *supra* note 5, at 498, 500–01.

80. The Vindication No. 1 (May–August 1792), *in* 11 HAMILTON PAPERS, *supra* note 5, at 461, 463.

81. Alexander Hamilton to Oliver Wolcott, Jr. (Dec. 16, 1800), *in* 25 HAMILTON PAPERS, *supra* note 5, at 257, 257; Alexander Hamilton to James A. Bayard (Aug. 6, 1800), *in* 25 HAMILTON PAPERS, *supra* note 5, at 56, 58.

82. Alexander Hamilton to unknown (Sept. 26, 1792), in 12 HAMILTON PAPERS, *supra* note 5, at 480, 480.

essays. He found things to criticize in Cicero's writings,[83] but on the whole he considered Cicero an indispensable thinker.

So did many others. Thomas Jefferson, when asked about the putative Lockean inspiration for the Declaration of Independence, responded that the Declaration's principles rested on the authority of Cicero and Aristotle as well as Locke.[84] Jefferson's theory of intellectual property may have been adopted from *De Officiis*.[85] John Marshall's biography of George Washington modelled the president's life on Cicero's.[86] Charles Carroll, the wealthy Marylander and only Catholic signatory of the Declaration, declared: "after the Bible . . . give me, sir, the philosophic works of Cicero."[87]

As Cicero was the classical lawyer's lawyer, aspiring practitioners would read his work to hone their rhetorical and legal skills.[88] Universities had general offerings on law, such as James Wilson's *Lectures on Law* given in 1790 at the University of Pennsylvania (then the College of Philadelphia). Wilson's *Lectures* cited Cicero extensively on natural law, republicanism, and other subjects, and he declared that "the jurisprudence of Rome was adorned and enriched by the exquisite genius of Cicero, which, like the touch of Midas, converts every object to gold."[89] He called *De Officiis* "a

---

83. Alexander Hamilton, To Defence No. XX (Oct. 23–24, 1795), *in* 19 HAMILTON PAPERS, *supra* note 5, at 329, 332–33 (critiquing Cicero on a point of just war theory); *see also* Alexander Hamilton, Remarks on an Act Acknowledging the Independence of Vermont (March 28, 1787), *in* 4 HAMILTON PAPERS, *supra* note 5, at 126, 140 ("Neither the manners nor the genius of Rome are suited to the republic or age we live in. All her habits and maxims were military, her government was constituted for war.").

84. Thomas Jefferson to Henry Lee (May 8, 1825), FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/98-01-02-5212 [https://perma.cc/MQX3-XWQV]. Walter Nicgorski suggests that "Lockean generalities dominate in the Declaration primarily because they suggested themselves as the most useful elements in a political consensus, most useful for the purposes at hand," and that they were "but the tip of the iceberg." Nicgorski, *supra* note 7, at 163–64.

85. *See* Jeremey N. Sheff, *Jefferson's Taper*, 73 SMU L. REV. 229 (2020).

86. RICHARD, *supra* note 7, at 36.

87. *See* Oration in Honour of the Late Charles Carroll of Carrollton Delivered Before the Philodemic Society of Georgetown College 21 (Joshua N. Rind ed., 1832).

88. R.H. HELMHOLZ, NATURAL LAW IN COURT 130 (2015)

89. James Wilson, Of the Common Law, *in* 2 COLLECTED WORKS OF JAMES WILSON 749, 760 (Kermit L. Hall & David Hall eds., 2007) [WILSON].

work which does honor to the human understanding and the human heart."[90]

In the generations following the Founding, Cicero became the refuge for those who saw Jacksonian populism as a Caesarian force engulfing the republic. John Quincy Adams, upon losing the 1828 presidential election to Andrew Jackson, reread the *Philippics* in retirement and wrote that they "exhibit the expiring agonies of Roman liberty."[91] Joseph Story, who considered *De Re Publica* the "the most mature" of all Cicero's "splendid labors,"[92] compared Jackson's America to Ceasar's Rome, where "liberty itself expired with the dark and prophetic words of Cicero."[93]

Story repeatedly used Cicero as an authority in his legal treatises on equity, the conflict of laws, and the Constitution.[94] His son William later wrote that his father's "favorites were Aristotle and Cicero."[95] The young Charles Sumner, who studied under Story, grew up reading Cicero and arrived at Harvard Law School as a distinguished Latinist.[96] Sumner worked for the Harvard law library that Story curated, and one can easily imagine the future abolitionist Senator discussing Cicero's natural law late at night with his learned mentor.

---

90. James Wilson, Of the Natural Right of Individuals, *in* 2 WILSON, *supra* note 89, at 1053, 1068.

91. John Quincy Adams, Diary Entry (Apr. 10, 1829) *in* VIII MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 135 (Charles Francis Adams ed., 1876).

92. Joseph Story, The Science of Government as Branch of Popular Education, *in* 2 THE LIFE AND LETTERS OF JOSEPH STORY 183, 188 (William W. Story ed., 1851) [STORY LETTERS].

93. Joseph Story to the Hon. Judge Fay (Feb. 18, 1834), *in* 2 STORY LETTERS, *supra* note 92, at 154, 154.

94. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (title page), § 325 (1833); 2 *id.* § 525; 3 *id.* § 1782; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 898–99 (Lawbook Exchange 2d ed., 2001) (1834); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1 n.2; § 2; § 3 n.1; § 5 n.2; § 7 n.2; § 18 (Little, Brown & Co., 7th ed. 1857) (1836).

95. William W. Story, Conclusion, *in* 2 STORY LETTERS, *supra* note 92, at 564.

96. ELIAS NASON, THE LIFE AND TIMES OF CHARLES SUMNER 22–26, 39 (1874).

Even as the prominence of the classics waned in the late nineteenth and twentieth centuries, Cicero continued to enjoy great purchase among public intellectuals. Writers as varied as W.E.B. DuBois, Hannah Arendt, and Friedrich Hayek took inspiration from his work.[97]

So did modern American presidents. In 1984, after his famous debate stage quip about Walter Mondale's "youth and inexperience," President Reagan jokingly added: "It was Seneca or it was Cicero, I don't know which, that said 'if it was not for the elders correcting the mistakes of the young, there would be no state.'"[98] President Obama's rhetorical style has been compared to Cicero's, and pundits have suggested that he (or his speechwriters) drew directly from Cicero.[99]

II. THE LAW OF NATURE AND THE LAW OF NATIONS

Cicero wrote extensively on the law of nature and the law of nations. He returned again and again to the relationships between natural law and positive law, international law and local law, and law and human reason. He was not the first to write on these topics. As in many areas, he took Plato and the Stoics as his starting point. The Stoic tradition had long propounded the notion of universal natural laws discoverable by reason.[100] But Cicero's extended treatment of the subject made him the most prominent expositor of the natural law tradition. His work greatly influenced European legal commentators and English and American lawyers and jurists.

---

97. *See* David Withun, *American Archias: Cicero and* The Souls of Black Folk, 13 CLASSICAL REC. J. 384 (2021); Dean Hammer, *Hannah Arendt and Roman Political Thought: The Practice of Theory*, 30 POL. THEORY 124 (2002); F.A. Hayek, *Freedom, Reason, and Tradition*, 68 ETHICS 229, 231 (1958).

98. *See* Transcript, Debate Between the President and Former Vice President Walter Mondale (Oct. 21, 1984), RONALD REAGAN PRESIDENTIAL FOUND., https://www.reaganfoundation.org/media/128828/debate.pdf.

99. *See* Michael J. Cedrone, *Cicero and Barack Obama: How to Unite the Republic Without Losing Your Head*, 20 NEV. L.J. 1177 (2020); Charlotte Higgins, *The New Cicero*, THE GUARDIAN (Nov. 25, 2008).

100. *See* Carli N. Conklin, *The Origins of the Pursuit of Happiness*, WASH. U. JURIS. REV. 195, 235–36 (2015).

A. Cicero's Legal Thought

In *De Legibus*, the characters of Cicero and Atticus debated the nature and origins of law. Atticus asked: "[Do you] not think that the science of law is to be derived from the praetor's edict, as the majority do now, or from the Twelve Tables, as people used to think, but from the deepest mysteries of philosophy?" "Quite right," Cicero answered.[101] "[O]ut of all the material of the philosophers' discussion," he continued, "surely there comes nothing more valuable than the full realization that we are born for Justice."[102] To find out what justice is, Cicero proposed starting "with that supreme Law (*summa lex*) which had its origin ages before any written law (*scripta lex*) existed or any State had been established."[103] The source of this supreme law, he asserted, was "based, not upon men's opinions, but upon Nature."[104]

Cicero then defined law. He stated that "those creatures who have received the gift of reason from Nature have also received right reason (*recta ratio*), and therefore they have also received the gift of Law, which is right reason applied to command and prohibition."[105] Because humans were endowed by nature with the gift of reason, they were expected to live according to that reason. Jed Atkins reminds us that for the ancients, reason was not merely a formal ability to deduct and infer. The ancients "held that reason is substantive and prescriptive. . . . [I]t prescribes what is good, how we should live, and how we should treat one another as social animals."[106]

The same notion of natural law appeared in *De Re Publica* during a debate on justice and injustice between the characters Laelius and

---

101. DE LEGIBUS, *supra* note 40, at 315 (1.17).

102. *Id.* at 329 (1.28).

103. *Id.* at 319 (1.20).

104. *Id.* at 329 (1.28).

105. *Id*. at 333 (1.33). The notion of "right reason" predated Cicero in the work of the Stoic Cleanthes, but the Founders typically considered Cicero the spokesman for Stoicism. RICHARD, *supra* note 7, at 170, 175.

106. Atkins, *supra* note 42, at 5; *see also* MALCOLM SCHOFIELD, CICERO: POLITICAL PHILOSOPHY 114 (2020) (similar).

Philus. Philus defended the argument of the philosopher Carneades that humans should seek whatever is most advantageous to themselves. Though parts of the back-and-forth remain lost (even after the 1819 discoveries), much of it was preserved in the work of the writer Lactantius, including the key passage where Laelius responded to Philus, a particularly elegant description of natural law. Laelius stated:

> True law (*vera lex*) is right reason (*recta ratio*) in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions on good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it altogether. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one ruler and master, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[107]

The law of nature was universal, eternal, unchanging, and inscribed on our very being. "Even if there was no written law against rape at Rome," Cicero offered as an example, "we cannot say on that account that [King] Sextus Tarquinius did not break that eternal Law (*lex sempiterna*) by violating Lucretia."[108]

Besides supplying governing norms in the absence of human law, the law of nature also supplied a standard of measurement for human law. "What of the many deadly, the many pestilential statutes

---

107. DE RE PUBLICA, *supra* note 37, at 211 (1.33); *see also* SIGONIO, *supra* note 57, at 7 (preserving this fragment); 3 HEARNE, *supra* note 71, at 380 (same).

108. DE LEGIBUS, *supra* note 40, at 383 (2.10).

which nations put in force? They no more deserve to be called laws than the rules a band of robbers might pass in their assembly," Cicero wrote in *De Legibus*.[109] "The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations (*leges populorum*). Would that be true, even if these laws had been enacted by tyrants?"[110] Law's ends were "the safety of citizens, the preservation of states, and the tranquility and happiness of human life," he argued, so those that achieved the opposite were "anything but 'laws.'"[111]

The proper role of human law was to apply right reason to facts about human nature. Human law did not have to share all the features of natural law (immutability, universality, and the like). Cicero recognized that humans are imperfect, and that our affairs are contingent and must adapt to changing circumstances. As Jed Atkins summarizes Cicero's view, "[s]o long as law is directed toward justice while it regulates the health of citizens, the security of states, and the happiness of human life, it is to be recognized as genuine law and to possess the authority of such."[112]

Tradition and practice were also sources of authority for Cicero. "[T]he established customs and conventions (*mores institutaque*) of a community . . . are in themselves rules," he stated, "and no one ought to make the mistake supposing that, because Socrates or Aristippus did or said something contrary to the manners and established customs (*consuetudines*) of their city, he has a right to do the same."[113] Cicero believed that customary law had presumptive

109. *Id.* at 385 (2.13).

110. *Id.* at 343–45 (1.42).

111. *Id.* at 383 (2.11).

112. ATKINS, *supra* note 42, at 207.

113. DE OFFICIIS, *supra* note 43, at 151; *see also* CICERO, De Inventione, *in* DE INVENTIONE, DE OPTIMO GENERE ORATORUM, TOPICA 231 (2.67) (H.M. Hubbell trans., Loeb Classical Library 1949) (c. 87 B.C.) [hereinafter DE INVENTIONE] ("Customary law is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute. In it there are certain principles of law which through lapse of time have become absolutely fixed.").

moral authority as a matter of natural law. "[I]t is in a manner prescribed by natural principle (*ius naturale*) that we shall preserve our own customs and laws (*mores legesque*)," he wrote.[114]

Cicero was practical in working out the worldly ramifications of his ideas. Throughout his writings, he restated, expounded, or developed legal principles that applied the law of nature to individuals and states. Self-preservation was the starting point.[115] The human person had a natural right to preserve his or her own life. This right, in turn, meant two things.

First, the human person had a natural right to self-defense. As Cicero put in his speech *Pro Milone*, there "is a law which is a law not of the statute-book, but of nature . . . that if our life should have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable."[116]

Second, Cicero defended the right to property, to acquire those things that are useful for preserving human life. "Without any conflict with Nature's laws," he stated, "it is granted that everybody may prefer to secure for himself . . . what is essential for the conduct of life."[117] He also acknowledged the role that positive law played in governing property rights. He saw the need for limits on prop-

---

114. CICERO, De Partitione Oratoria, *in* DE ORATORE BOOK III, DE FATO, PARADOXA STOICORUM, DE PARTITIONE ORATORIA 411 (§§ 130–31) (H. Rackham trans., Loeb Classical Library 1942); *see also* DE INVENTIONE, *supra* note 113, at 329 (2.160) (The "first principles [of justice] proceed from nature, then certain rules of conduct become customary by reason of their advantage; later still both the principles that proceeded from nature and those that had been approved by custom received the [sanction] of the law.").

115. DE OFFICIIS, *supra* note 43, at 13 (1.4).

116. CICERO, Pro Milone, *in* PRO MILONE, IN PISONEM, PRO SCAURO, PRO FONTEIO, PRO POSTUMO, PRO MARCELLO, PRO LIGARIO, PRO REGE DEIOTARIO 17 (§ 10) (Loeb Classical Library, N.H. Watts trans., 1953) (52 B.C.) [hereinafter PRO MILONE].

117. DE OFFICIIS, *supra* note 43, at 289–91 (3.22).

erty "established not by Nature's laws alone . . . but also by the statutes (*leges*) of particular communities, in accordance with which in individual states the public interests are maintained."[118]

As negative corollaries of these two rights, individuals were forbidden from harming or stealing from others. Cicero thus made "the inviolability of the person and property" the cornerstone of his natural law thought.[119]

Natural law could also impose duties on states. The law of war featured prominently in *De Officiis* and *De Re Publica*, with Cicero often drawing on the Roman fetial law. "In the case of a state in its external relations," he wrote, "the law of war (*iura belli*) must be strictly observed."[120] Tracking the right to self-defense for individuals, states had a right to go to war in self-defense. But because of the heavy toll war took on human life, "war is never undertaken by the ideal state, except in defense of its honor or its safety"[121] so that the state "may live in peace unharmed,"[122] Cicero argued. Going to war "without provocation" was unjust, and states had to "proclaim and declare" war and first demand reparation.[123] States had a duty to use diplomacy to avoid war, since diplomacy rested on reason, the defining human characteristic, while war rested on force.[124] When wars concluded, Cicero stressed, states "should spare those who have not been bloodthirsty and barbarous in their warfare," and "ensure protection for those who lay down their arms and throw themselves upon the mercy of [the victor]."[125]

---

118. *Id.* On the extent to which Cicero did or did not consider property rights a matter of natural law, see J. Jackson Barlow, *Cicero on Property in the State*, *in* CICERO'S PRACTICAL PHILOSOPHY, *supra* note 28, at 212.

119. STRAUMANN, *supra* note 58, at 123.

120. DE OFFICIIS, *supra* note 43, at 37 (1.34).

121. DE RE PUBLICA, *supra* note 37, at 211 (1.34).

122. DE OFFICIIS, *supra* note 43, at 37 (1.35).

123. DE RE PUBLICA, *supra* note 37, at 213 (1.35); *see also* DE OFFICIIS, *supra* note 43, at 39 (1.36) ("[N]o war is just, unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made.").

124. DE OFFICIIS, *supra* note 43, at 37 (1.34).

125. *Id.* at 37 (1.35).

Cicero discussed principles of interpretation for treaties and truces. Because "[f]idelity to an oath must often be observed in dealings with an enemy,"[126] treaties and truces were to be respected and read according to their natural, reasonable meaning. "Injustice often arises . . . through chicanery, that is, through an over-subtle and even fraudulent construction of the law," he contended. "This it is that gave rise to the now familiar saying, 'More law, less justice.'"[127] Cicero argued that by twisting the meaning of agreements, "a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general [Cleomenes of Sparta] went to ravaging their fields by night, because, he said, the truce stipulated 'days,' not nights."[128]

The law of war applied only to legitimate and declared enemies, however. Pirates, for example, were "not included in the number of lawful enemies, but [were] the common foe of all the world, and with [them] there ought not to be any pledged word nor any oath mutually binding."[129] For this reason, failing to deliver a promised ransom to a pirate would not be considered deception.

In other examples too numerous to count, Cicero wrote on subjects like commercial law, real estate law, rhetoric and trial advocacy, and evidence, bringing the natural law to bear on each subject. Cicero's legal thought and the principles he developed became some of the most influential treatment of law in the Western tradition.

B. The Reception of Cicero's Legal Thought

In the seventeenth and eighteenth centuries, Cicero's writings on the law of nature and the law of nations were discussed across continental Europe and England by commentators, lawyers, and courts. Through these conduits, Cicero's legal thought reached

126. *Id.* at 385 (3.107); *accord id.* at 387 (3.108) ("[There is] no right to confound by perjury the terms and covenants of war made with an enemy.").

127. *Id.* at 35 (1.33).

128. *Id.*

129. *Id.* at 385–87 (3.107).

North American shores and shaped American ideas of natural law, general law, and constitutionalism.

1. International Law and Early American Law

With the publication of Hugo Grotius's landmark treatise *De Jure Belli ac Pacis* ("The Law of War and Peace") in 1625, Cicero's legal thought took on a new stature in the European world and formed the "backbone of [a] new natural law tradition."[130]

De Jure Belli examined the law of international relations and its basis in the law of nature. Its impact was such that Grotius came to be seen as "the defining initiator of modern natural law."[131] Grotius drew heavily on Cicero and made his work the foundation of the treatise—including by drawing the title of the treatise from a line in Cicero's speech *Pro Balbo*.[132] Grotius cited Cicero nearly three hundred times in *De Jure Belli*.[133] In the opening pages, he established the importance of studying international law by referencing Cicero, and he set up Carneades, whose views Laelius had argued against in *De Re Publica*, as a spokesman for the anti-natural law viewpoint.[134] Grotius then took Cicero's definition of war as the starting point for his own discussion.[135]

Even in places where he did not directly quote Cicero, his language is clearly Ciceronian. For instance, he defined a commonwealth as a "complete association of free men, joined together for

130. HAWLEY, *supra* note 8, at 96. Cicero's writings were also the basis for the work of legal commentators that Grotius drew on, like Francisco Suárez. *See, e.g.*, FRANCISCO SUÁREZ, DE LEGIBUS AC DEO LEGISLATORE 40–41, 60, 173, 185, 220 *in* SELECTIONS FROM THREE WORKS (Gwladys L. Williams, Ammi Brown & John Waldron trans., Oxford Clarendon Press 1944) (1612) (citing Cicero's theory of natural law).

131. Knud Haakonssen, *Early Modern Natural Law Theories*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, at 76, 80 (George Duke & Robert P. George eds., 2017).

132. *See* STRAUMANN, *supra* note 58, at 38.

133. *Id.* at 76 & n.118.

134. HUGO GROTIUS, DE JURE BELLI AC PACIS 9–11 (Francis W. Kelsey trans., Oxford Clarendon Press 1925) (1625).

135. *Id.* at 33.

the enjoyment of rights and for their common interest," a restatement of Cicero's definition.[136] One reviewer of the treatise noted that the "whole glory of the Latin philosophers is represented in Cicero, whose two works [*De Legibus* and *De Officiis*] can speak volumes. . . . Grotius is indebted at many points to these books, even when he does not show it."[137]

For Grotius, the law of nature was something external to and above human law. Citing *De Re Publica*, Grotius defined the law of nature as "a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality or moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[138] Human law, on the other hand, was conventional and could take multiple forms. Grotius divided human law into municipal law ("that which emanates from the civil power") and the law of nations (that "which is broader in scope than the municipal law" and "which has received its obligatory force from the will of all nations, or of many nations").[139]

Grotius believed that the law of nations was not part of the natural law because *summa lex* on Cicero's account was universal, while positive international law was not. "[I]n one part of the world there [may be] a law of nations which is not such elsewhere," he wrote.[140] Thus, while the law of nations "permits many things which are forbidden by the law of nature, so [the law of nations] forbids certain things which are permissible by the law of nature."[141]

Grotius cited Cicero's treatment of just war theory[142] and argued that war "should be publicly declared, and in fact proclaimed so publicly that the notification of this declaration be made by one of

136. *Id.* at 44; *see infra* note 256 (Cicero's definition).

137. JOHANN HEINRICH BÖCLER, IN HUGONIS GROTII JUS BELLI ET PACIS LIBRUM PRIMUM COMMENTATIO 13 (Geissen 1687).

138. GROTIUS, *supra* note 134, at 38–39, 38 n.4.

139. *Id.* at 44.

140. *Id.*

141. *Id.* at 651–52; *see also id.* at 295 (describing the "volitional law of nations" as "distinct from the law of nature").

142. *Id.* at 54–56.

the parties to the other."[143] He quoted or drew on Cicero in discussing contracts, oaths, and good faith in dealings between states, as well as proportionality in killing, punishment, and pillaging during war, among many other subjects.[144] Grotius adopted Cicero's notion of the right to self-defense and the right to property, and grounded his theory of the state of nature in *Pro Milone*.[145] And he used Cicero to support his discussion of legal interpretation, tracing several general interpretive rules back to Cicero's work.[146]

Grotius's work exerted great influence on American legal thought. Benjamin Straumann writes that "[j]udging by the libraries of pre-Revolutionary Virginia, Grotius was the second-most prominent political and jurisprudential author after Lord Coke, far more prominent than even John Locke," and notes that the Supreme Court has cited Grotius nearly eighty times.[147]

In 1672, Samuel von Pufendorf published *De Jure Naturae et Gentium* ("On the Law of Nature and Nations"). In this extended treatment of Grotius's work, Pufendorf put Grotius in dialogue with seventeenth-century philosophers such as Thomas Hobbes and Richard Cumberland. Like Grotius, Pufendorf took Cicero's philosophy (with nearly two hundred citations) as the foundation on which to advance a natural law framework for the modern European world. He provided the usual references to Cicero—on the law of nature, Carneades and justice, legal interpretation, and more.[148]

Pufendorf dealt with the law of nations differently from Grotius. As he saw it, the natural law was divided into a natural law of individuals and a natural law of states, "commonly called the law of

143. *Id*. at 633.

144. *See, e.g.*, *id.* at 328–33, 348–51, 362–68, 494, 658, 725–31, 860.

145. STRAUMANN, *supra* note 58, at 121–23, 140, 152.

146. *See, e.g.*, GROTIUS, *supra* note 134, at 410 (technical terms are understood according to technical use), 426 (promises do not bind when overriding obligations subsequently arise), 427 (interpreting conflicting rules according to various conventions).

147. STRAUMANN, *supra* note 58, at 233.

148. *See, e.g.*, SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 193, 220, 710 (C.H. Oldfather & W.A. Oldfather trans., Oxford Clarendon Press 1934) (1672).

nations," though he noted that "on this point scholars are not entirely agreed."[149] He thus considered some aspects of the law of nations as part of the natural law.

Pufendorf and Grotius also took different approaches to Cicero's treatment of piracy. Grotius did not accept Cicero's claim that pirates stood outside the human community.[150] But Pufendorf found Cicero's analysis compelling. "[S]omething can be said for Cicero's position," he reasoned, "since a pirate is the common enemy of all, that is, a man who without having been injured robs and murders any person . . . [and] disturbs and destroys that social relationship between men which has been instituted by God; he has, in consequence, no right to avail himself of that bond."[151]

In the eighteenth century, Emer de Vattel adopted many of Cicero's ideas in his treatise *The Law of Nations*. Published in 1758, *The Law of Nations* "was the most influential treatment of the law of nations in England and America," and was often cited by American courts in the eighteenth century.[152]

Like his predecessors, Vattel considered himself indebted to Cicero. He began his treatise with an epigraph from Scipio's Dream in *De Re Publica*: "For to the Supreme God who governs the whole universe nothing is more pleasing than assemblies and gatherings of people associated in justice, which are called states."[153] He believed Cicero to be "as great a master in the art of government as in eloquence and philosophy."[154] And in other writings, Vattel endorsed Cicero's definition of natural law as right reason in agreement in nature and Cicero's admonition that recourse to philosophy must be had to discern the true nature of law.[155]

---

149. *Id.* at 226.

150. GROTIUS, *supra* note 134, at 793.

151. PUFENDORF, *supra* note 148, at 505.

152. Bellia, Jr. & Clark, *supra* note 9, at 526 & n.12.

153. VATTEL, *supra* note 2, at 1 (translation); *see infra* note 368.

154. VATTEL, *supra* note 2, at 19; *see also id.* at 161 (same).

155. *See* Emer de Vattel, Dissertation on This Question: "Can Natural Law Bring Society to Perfect Without the Assistance of Political Laws?", *in* VATTEL, *supra* note 2, at 773, 802, 808 (T.J. Hochstrasser trans.). This principle of Cicero's was also approvingly

His thematic concern was the same as Cicero's—to understand the relationship between natural law and human law. He agreed with Pufendorf that there could be a natural law of nations, but departed from Pufendorf's belief that it would work the same way as the natural law of individuals. Vattel sought to expound the natural law of nations as a distinct science.[156]

Vattel's treatment of the law of war rested on Cicero numerous times. *The Law of Nations* argued that states should show restraint in punishing conquered foes, since Rome's needless destruction of Corinth "was reprobated by Cicero and other great men."[157] Vattel also approved of *De Officiis*'s claim that states should resort to war only after diplomacy fails because the defining human characteristic is rationality of thought and speech.[158] Similarly, Vattel argued with citation to Cicero that during war nations must keep diplomatic channels open and respect the inviolability of ambassadors.[159]

Vattel's discussion of legal interpretation also drew on Cicero. Vattel described rules of interpretation as "rules founded on right reason . . . approved and prescribed by the law of nature,"[160] and referred to Cicero many times. He cited Cicero for the principle that words should be given their natural and plain meaning, and he used Cicero's example that a truce for a certain number of "days" would cover the nights as well.[161] When interpreting treaties, Vattel wrote, one must discern the "reason of the law" and the intent of the treaty-makers. According to Cicero, he wrote, "the language, invented to explain the will, must not hinder its effect."[162]

---

invoked by Christian Wolff, the writer who inspired Vattel. *See* CHRISTIAN WOLFF, 2 JUS GENTIUM SCIENTIFICA PERTRACTATUM 428 (Joseph H. Drake trans., Oxford Clarendon Press 1934) (1749).

156. VATTEL, *supra* note 2, at 5, 70.

157. *Id.* at 544.

158. *Id.* at 651–52.

159. *Id.* at 701.

160. *Id.* at 410.

161. *Id.* at 413–14, 417.

162. *Id.* at 425. Vattel heavily qualified this interpretive principle, stressing that words generally were sufficient to convey intention and that speculation as to the reason of the law could not overcome clear text. *Id.* at 408–26.

The closest thing the United States had to a Grotius or Vattel was James Wilson. Wilson's *Lectures on Law* grounded American jurisprudence in this classical tradition. For Wilson, as for others, that meant looking to Cicero. Wilson was trained in Roman law and classical philosophy, and he deployed this knowledge throughout his career to inform his work as a constitutional drafter, Supreme Court Justice, and law professor. His inaugural address of the *Lectures on Law*, which invoked Cicero, was attended by Washington, Adams, Hamilton, and Jefferson.[163]

The *Lectures* cited Cicero repeatedly on many subjects and called him an "exquisite judge of human nature and of law"[164] who "knew so well how to illustrate law by philosophy."[165] Following Cicero, Wilson repeatedly identified reason as the defining quality of human nature and of law: "'There are two kinds of disputation,' says Cicero, 'one, by argument and reason; the other, by violence and force. To determine controversies by the former belongs to man; by the latter, to the brutes.'"[166] He also used "right reason" to describe the contours of natural law.

> This law, or right reason as Cicero calls it, is thus beautifully described by that eloquent philosopher. "It is indeed," says he, "a true law, conformable to nature, diffused among all men, unchangeable, eternal. . . . It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations."[167]

Following Vattel, Wilson divided the universal law of nations from the voluntary law of nations. Universal law, or "law which is

---

163. *See* Paul A. Rahe, *Cicero and the Classical Republican Legacy in America*, *in* THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA, *supra* note 7, at 248, 249.

164. James Wilson, Of Steps for Apprehending Offenders, *in* 2 WILSON, *supra* note 89, at 1189.

165. James Wilson, Of Man, as a Member of Society, *in* 1 WILSON, *supra* note 89, at 632.

166. James Wilson, Of Man, as a Member of the Great Commonwealth of Nations, *in* 1 WILSON, *supra* note 89, at 676.

167. James Wilson, Of the Law of Nature, *in* 1 WILSON, *supra* note 89, at 523.

communicated to us by reason and conscience," was binding on individuals and states alike.[168] "As addressed to men, it has been denominated the law of nature; as addressed to societies, it has been denominated the law of nations," he wrote.[169] "The law of nations, properly so called," he continued, "is the law of states and sovereigns, obligatory on them in the same manner, and for the same reasons, the law of nature is obligatory on individuals. Universal, indispensable, and unchangeable is the obligation of both."[170] Positive international law, that "which two or more political societies make for themselves," Wilson considered "the voluntary law of nations."[171]

Here Wilson departed from Grotius and Pufendorf, whom he saw as running "into contrary extremes."[172] Grotius had separated natural law and the law of nations entirely, while Pufendorf claimed the two were identical. The "former was of the opinion, that the whole law of nations took its origin and authority from consent," Wilson wrote, while "the latter was of the opinion, that every part of the law of nations was the same with the law of nature."[173] For Wilson, both universal duties and the duties of positive international law were species of the law of nations.

The natural law of nations also helped give the voluntary law of nations moral force. For example, natural law required that vows be kept, so nations that entered agreements with each other were bound to abide by them. Violating a treaty, Wilson argued, "violates not only the voluntary but also the natural and necessary law of nations; for as we have seen that, by the law of nature, the fulfilment of promises is a duty as much incumbent upon states as upon

---

168. James Wilson, Of the General Principles of Law and Obligation, *in* 1 WILSON, *supra* note 89, at 498.

169. *Id.*

170. James Wilson, Of the Law of Nations, *in* 1 WILSON, *supra* note 89, at 529. Like Vattel, Wilson qualified this proposition by adding that "important difference between the objects [nations and individuals] will occasion a proportioned difference in the application of the law." *Id.* at 531.

171. Wilson, Of the General Principles of Law and Obligation, *supra* note 168, at 498.

172. James Wilson, Of the Law of Nations, *supra* note 170, at 530.

173. *Id.*

men."[174] Wilson thus derived the presumptive moral authority of positive law from natural law.

Sitting as a judge, Wilson looked to Cicero and the law of nations as an interpretive guide. Riding circuit in 1791, Justice Wilson instructed a grand jury on the meaning of a federal piracy statute. The statute criminalized forms of piracy committed by "any person," not just by citizens.[175] As Wilson saw it, this raised two problems. First, a question of statutory interpretation. In other provisions, the statute applied only to "citizens"—was the use of the broader term "person" intentional or accidental? Second, a question of statutory validity. If Congress did intend to punish noncitizen conduct on the high seas, was this a legitimate exercise of congressional power under the law of nations?

Like Cicero and other jurists, Wilson regarded piracy as "a crime against the universal law of society [and a] declar[ation of] war against the whole human race."[176] Still, he expressed doubts about this particular statute's long arm. As Wilson saw it, the statute modified the common definition of piracy and countries could traditionally only modify the law of nations as applied to their own people. As he put it in his charge to the grand jury, using *De Re Publica*'s canonical formulation:

> The maritime law is not the law of any particular country: it is the general law of nations. "*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit*." [There will not be different laws at Rome and at Athens, or different laws now and in the future, but one law for all peoples and all times.]
>
> The law of nations has its foundations in the principles of natural law, applied to states; and in voluntary institutions, arising from custom or convention. This law is universal in its authority over the civilized part of the world; and is supported by the

174. *Id.* at 547.

175. *See* Act of April 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

176. James Wilson, A Charge Delivered to the Grand Jury in the Circuit Court of the United States for the District of Virginia, in May, 1791, *in* 1 WILSON, *supra* note 89, at 333.

> consideration of its general utility; as well as that of its obligatory force. . . .
>
> True it is, that, so far as the law of nations are *voluntary* or *positive*, it may be altered by the municipal legislature of any state, in cases affecting *only* its own citizens. True it is also, that, by a treaty, the voluntary or positive law of nations may be altered so far as the alteration shall affect *only* the contracting parties. But equally true it is, that no state or states can, by treaties or municipal law, alter or abrogate the law of nations any farther. This they can no more do, than a citizen can, by his single determination, or two citizens can, by a private contract between them, alter or abrogate the laws of the community, in which they reside.[177]

Addressing a grand jury rather than adjudicating a case, Wilson did not have occasion to conclusively address the statute's lawfulness. He remained content to "suggest [his] doubts concerning it."[178] But recourse to natural law and the law of nations to resolve statutory ambiguity and validity was a tool in his legal toolkit.

One scholar has described Wilson as "bolder in asserting [natural law's] existence than in establishing its contents."[179] Wilson probably deserves more credit than that. With self-preservation as the starting point, the *Lectures* derived from natural law many duties and rights states had with respect to matters like national defense, land acquisition, immigration, education, and treaty negotiation.[180]

Wilson also got into specifics bringing natural law to bear on individual rights, which the *Lectures* covered with reference to Cicero. Bearing arms, for example, was an obvious means of making effective the natural right of self-preservation. Wilson explained how

177. *Id.* at 333 (translation added).

178. *Id.* at 334.

179. RICHARD, *supra* note 7, at 177.

180. See Derek A. Webb, *The Great Synthesizer: Natural Rights, the Law of Nations, and the Moral Sense in the Philosophical and Constitutional Thought of James Wilson*, 12 BRIT. J. AM. LEGAL STUD. 79, 98–100 (2023) (cataloguing the duties Wilson described).

"the defence of one's self" was "justly called the primary law of nature" by Cicero's *Pro Milone*.[181] *Pro Milone*, discussed above, was the classical exposition of self-defense and endorsed the carrying of weapons for that purpose.[182] Echoing Cicero, Wilson stated that homicide was lawful when "necessary for the defence of one's person" under "the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution."[183] The right was "expressly recognized" in his home state of Pennsylvania, he noted, where the constitution declared that the "right of the citizens to bear arms in the defence of themselves shall not be questioned."[184]

Wilson also argued for a natural right of expatriation. At English common law, the doctrine of perpetual allegiance held that one could not renounce citizenship without the consent of the sovereign. But the doctrine was a poor fit in United States, Wilson insisted, because in consent-based government one had a natural right or "general liberty" "to leave the state."[185] After Locke and "right reason," his authority was Cicero: "'O glorious regulations,' says Cicero, 'originally established for us by our ancestors . . . that no one contrary to his inclination, should be deprived of his right of citizenship; and that no one, contrary to his inclinations, should be obliged to continue in that relation."[186] Wilson agreed with Cicero that "the power of retaining and of renouncing our rights of citizenship, is the most stable foundation of our liberties."[187]

Wilson's familiarity with the classics made an impression on his son, Bird Wilson. When the younger Wilson published his father's

---

181. Wilson, Of the Natural Rights of Individuals, *in* 2 WILSON, *supra* note 89, at 1053, 1082 & n.z. Wilson cited the "celebrated trial of Milo" multiple times in the *Lectures*. *See* Wilson, Of Steps for Apprehending Offenders, *supra* note 164, at 1196; *see also* James Wilson, Of Juries, *in* 2 WILSON, *supra* note 89, at 954, 964–65.

182. PRO MILONE, *supra* note 116, at 13 (§ 7), 17 (§§ 9–11).

183. James Wilson, Of Crimes Against the Right of Individuals to Personal Safety, *in* 2 WILSON, *supra* note 89, at 1137, 1142.

184. *Id.*

185. Wilson, Of Man, as a Member of Society, *supra* note 165, at 642.

186. *Id.*

187. *Id.*

law lectures in 1804, he included as an epigraph a line from Cicero's *Pro Cluentio*: "*Lex fundamentum est libertatis, qua fruimur. Legum omnes servi sumus, ut liberi esse possimus* [Law is the foundation of the freedom we enjoy. We are all slaves to law, so that we may be free]."[188]

2. English Law and Early American Law

English law's cognizance of the law of nature and the law of nations is well documented. Edward Coke's *Institutes*, which began with an epigraph from Cicero's *Pro Caecina*,[189] listed "Lex naturae, the law of Nature" as part of the "divers laws within the Realm of England," along with the common law, statute law, "customs reasonable," the law of war, canon law, and more.[190] Coke's writings cited Cicero more than almost any other classical authority.[191] In 1608, his landmark decision in *Calvin's Case* found that persons born in Scotland were subjects of the King and could enjoy the rights of English citizenship. Coke looked to *De Officiis*'s treatment of natural law to help determine Calvin's legal status.[192] *Calvin's Case* was cited frequently by American colonists[193] and became a key precedent on birthright citizenship for the U.S. Supreme Court.[194]

Cicero was a favorite authority for English republicans. *Cato's Letters*, written by John Trenchard and Thomas Gordon, began by quoting *De Legibus*'s proposition that law is a distinction between

188. 1 WILSON, *supra* note 89, at 415 (translation added).

189. 1 EDWARD COKE, INSTITUTES (title page) (1628–1644) ("*Major hereditas venit unicuique nostrum a Jure & Legibus, quam a Parentibus*." [A greater inheritance comes to each of us from the laws than from our parents.]); *see also* 2 *id.* at 56 (same).

190. 1 *id.* at 11 (1628–1644). HELMHOLZ, *supra* note 88, is the magisterial treatment of this subject.

191. *See* John Marshall Gest, *The Writings of Sir Edward Coke*, 18 YALE L.J. 504, 516–17 (1909).

192. Calvin's Case, 77 Eng. Rep. 377, 391–92 (K.B. 1608).

193. 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION 53 (7th ed. 1991).

194. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

just and unjust things modeled on nature.[195] Trenchard and Gordon also used Cicero's description of law as "right Reason, commanding things that are good and forbidding things that are bad."[196] They took a principle from *De Legibus*'s legal code, *salus populi suprema lex est*, to describe the goal of human law. The *salus populi* principle (their translation: "the Benefit and Safety of the people constitutes the supreme law") was, they wrote, "the most universal and everlasting maxim in government."[197] Government action contrary to this supreme law was not lawful, but "usurpation."[198]

In the 1750s, Thomas Rutherforth published the *Institutes of Natural Law*, a commentary on Grotius that was widely read and cited in the early American legal system. Rutherforth cited Cicero on some of the same points as Grotius did, but in other places he appropriated Cicero's arguments and maxims with no acknowledgment.[199] For example, Rutherforth adopted without citation *De Officiis*'s example of ordinary-meaning interpretation that a truce for thirty "days" would cover full 24-hour periods and would not permit attacks at night.[200] The provenance of the example was probably obvious to the reader. For a classically literate eighteenth-century audience, attribution was not always necessary.

A decade later, Blackstone's *Commentaries* defined natural law and human law in familiar Ciceronian terms. Blackstone wrote that

---

195. 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS (title page) (1723–1724).

196. 2 *id.* at 253–54.

197. 1 *id.* at 67. They considered *salus populi* a matter of natural law: "No Customs can change, no positive Institutions can abrogate, and no Time can efface this primary Law of Nature and Nations." *Id.*

198. *Id.*

199. *Compare* THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 427 (Baltimore, William & Joseph Neal 2d Am. ed. 1832) (1754–1756) (citing Cicero on equitable interpretation), *with id.* at 423 (citing *Rhetorica ad Herennium* on the letter and spirit of the law, without attribution). *See* CICERO, RHETORICA AD HERENNIUM 35–37 (1.19) (Harry Caplan trans., Loeb Classical Library 1954) (c. 80s B.C.). Cicero was long thought to be the author of the *Herennium*, but its authorship has been disputed. *See* Introduction, *in id*. Eighteenth-century writers, aware of the dispute, still gave Cicero credit for it. *See, e.g.*, 1 BLACKSTONE, *supra* note 20, at 61.

200. RUTHERFORTH, *supra* note 199, at 412.

the law of nature was "superior in obligation to any other" and "binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this," language he copied from Cicero.[201] He also began his discussion of English local law as follows: "[A]s municipal law is a rule of civil conduct, commanding what it right and prohibiting what is wrong; or as Cicero, and after him our Bracton, have expressed it, *sanctio justa, jubens honesta et prohibens contraria* [a just ordinance, commanding what is right and prohibiting what is not], it follows, that the primary and principal objects of the law are rights and wrongs."[202]

Blackstone's rules of interpretation referenced Cicero. When text is unclear, Blackstone wrote, "the most universal and effectual way of discovering the true meaning . . . is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."[203] When "this reason ceases, the law itself ought likewise to cease with it," he concluded, citing Cicero.[204]

In a world where Parliament was sovereign, natural law was not generally used by judges to void statutory law. But at a minimum it could supply a sort of gap-filling or default law. In 1772, Lord Mansfield ruled in *Somerset's Case* that James Somerset, an enslaved man, could not be lawfully detained. Since only positive law, not natural law, could authorize slavery, Somerset could not be held in England where no law authorized it. Decrying slavery as "odious"

---

201. 1 BLACKSTONE, *supra* note 20, at 41; *see also* GUMMERE, *supra* note 7, at 16. Of course, Blackstone also wrote that if "the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." Whether or how he reconciled these two statements is a contested matter. *See* J.M. Finnis, *Blackstone's Theoretical Intentions*, 12 AM. J. JURIS. 163 (1967).

202. 1 BLACKSTONE, *supra* note 20, at 118 (translation added).

203. *Id.* at 61.

204. *Id.*; *see also* ROGER NORTH, A DISCOURSE OF THE POOR 19 (1753) ("Tully, in his book *De Legibus* . . . concludes, that Reason is so essential to a Law, that it cannot subsist without it: And that a Law against Reason is void."). Like Vattel, Blackstone greatly qualified this interpretive rule. *Id.* at 59–60, 62. So did American courts. *See, e.g.*, Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 202 (1819) (Marshall, C.J.) ("[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.").

and against the natural order, Lord Mansfield granted habeas relief.[205] Somerset went free. *Somerset's Case* and its use of natural law became a key precedent in American conflict-of-laws debates and the American antislavery tradition.[206]

Appeals to natural law played a central role in American revolutionary rhetoric, which "commingled claims of unconstitutionality and natural injustice."[207] In the celebrated *Writs of Assistance* case, James Otis argued that acts of Parliament "against natural Equity [were] void."[208] In 1764 pamphlet, he similarly maintained that acts of Parliament contrary to "natural laws, which are immutably true," were "void."[209] Quoting Cicero and *Cato's Letters*, Otis declared that "*salus populi suprema lex esto*" [the good of the people shall be the highest law], and reasoned that government had no authority to act against that law.[210]

Hamilton's *The Farmer Refuted* likewise declared acts of Parliament against natural law void. Borrowing from Blackstone (who borrowed from Cicero on this point), Hamilton appealed to that "eternal and immutable law, which is, indispensably obligatory upon all mankind," and recommended that Loyalists familiarize themselves with Grotius, Pufendorf, and Locke.[211] In so doing, Hamilton was recommending that they familiarize themselves with

205. Somerset v. Stewart, 98 Eng. Rep. 499, 510 (1772).

206. *See* Commonwealth v. Aves, 35 Mass. 193, 211–12 (Ma. 1836); STORY, CONFLICT OF LAWS, *supra* note 94, at 144–45 & 145 nn. 3–4; *see also* Scott v. Sandford, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J., dissenting) ("Slavery, being contrary to natural right, is created only by municipal law.").

207. *See* COOPER & DYER, *supra* note 7, at 34.

208. John Adams's Notes on the First Argument of the Case (February 1761), *in* THE COLLECTED POLITICAL WRITINGS OF JAMES OTIS 5, 6 (Richard Samuelson ed., 2015) [hereinafter OTIS WRITINGS].

209. James Otis, The Rights of the British Colonies Asserted and Proved (1764), *in* OTIS WRITINGS, *supra* note 208, at 119, 155.

210. *Id.* at 125.

211. Alexander Hamilton, The Farmer Refuted, &c. (Feb. 23, 1775), *in* 1 HAMILTON PAPERS, *supra* note 5, at 81, 87; *see also* GUMMERE, *supra* note 7, at 16.

Ciceronian natural law. What one commentator remarked of Grotius was also true of Hamilton—he was indebted to Cicero even when he did not show it.[212]

Related to this use of natural law was the concept of fundamental law. Like natural law, fundamental law was theoretically superior to ordinary law; it fused principles of right reason with custom and written law to arrive at some supposedly inviolable higher order of things. Eighteenth-century lawyers on both sides of the Atlantic thought and spoke of constitutions as fundamental law. They reasoned about fundamental law with reference to "natural law," "right reason," "natural justice," and "general principles of reason and law."[213] Their vocabulary bears the clear imprint of Cicero, with no clearer example than his trademark term "right reason." They also described his *salus populi* maxim as a fundamental law undergirding all nations, unalterable by ordinary lawmaking.

This is not to say that lawyers learned about natural law or right reason from no other writer—quite the opposite. Grotius, Coke, Vattel, Blackstone, and others had much to contribute. But the core of what they taught here can be traced back to Cicero, something they themselves recognized by routinely quoting him. If the terms "nature" and "reason" seem unremarkable in the context of fundamental law because of their ubiquity, that means Cicero has been a victim of his own success. To borrow from Stephen Sachs, minimizing Cicero's influence here would be "like accusing Shakespeare of being full of *clichés*, now that our language is defined by his turns of phrase."[214]

---

212. *See* BÖCLER, *supra* note 137, at 13.

213. *See* Gienapp, *supra* note 12, at 339–46. None of this is to say that lawyers and judges appealed primarily or only directly to natural law for principles of reason. The common law, for example, reflected the "artificial reason" of centuries of practice. *See* Micah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 289–90 (2022). Nor is it to say that natural law required courts to enforce it in freewheeling fashion. The role of a judge and the precise limits of judicial authority in any jurisdiction are matters underdetermined by natural law, matters which can be authoritatively prescribed by constitution-makers or legislatures. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

214. Stephen E. Sachs, *Good and Evil in the American Founding*, 48 HARV. J.L. & PUB. POL'Y (forthcoming 2025).

Anglo-American law also looked to the law of nations, which combined elements of natural law with custom and convention. Justice Story explained that

> the law of nations may be deduced first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or lastly, from the conventional or positive law, that regulates the intercourse between states.[215]

The law of nations mainly consisted of the law merchant, the law maritime, and the law of state-state relations (such as the law of war).[216] The law of nations was alternatively known as general law.[217] It was distinct from local or municipal law, the law of one jurisdiction or sovereign.

As writers like Vattel, Wilson, and Story discussed, the general law encompassed principles of universal applicability and positive law rules arising from custom or choice. Positive law rules were necessary to order human life in matters where the natural law was indifferent.[218] Complex contract cases or disputes over admiralty jurisdiction were not determined by first principles. So long as the lawmaking or lawfinding process was an exercise of right reason, reasoned decisionmaking, it fit with and was sanctioned by natural law.

Like natural law, general law was thought of as universal law shared by all nations.[219] In the 1759 English case of *Luke v. Lyde*, for example, Lord Mansfield quoted Cicero to describe the breadth of the maritime branch of the general law. Maritime law was "not the

---

215. United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (No. 15,551) (C.C.D. Ma. 1822) (Story, J.).

216. BELLIA, JR. & CLARK, *supra* note 9, at 1–9.

217. Bellia, Jr. & Clark, *supra* note 9, at 660.

218. See Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 427–28 (2022).

219. This sentiment was more "aspirational" than literally true. Baude, Sachs & Campbell, *supra* note 9, at 1249.

law of a particular country," he wrote, "but the general law of nations. . . '*non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit*' [there will not be different laws at Rome and at Athens, or different laws now and in the future, but one law for all peoples and all times]."[220]

General law crossed the Atlantic with the common law. American state governments adopted the English common law by statute, thereby incorporating principles of general law that the common law carried with it.[221] General law could apply both substantively and as an interpretive backdrop.[222] It could apply in state court and, after ratification of the Constitution, in federal court.

General law was not federal law. It was not "the supreme law of the land," did not have preemptive effect, and did not give rise to federal question jurisdiction. General law was also not common law, in the sense of local or municipal law. Early federal courts rejected the idea of a comprehensive federal common law,[223] yet routinely applied general law in diversity cases to private commercial or maritime disputes.[224]

The Supreme Court's decision in *Swift v. Tyson*, considered the high-water mark of general law in federal court, reaffirmed the status of general law. *Swift* posed the granular question of whether the exchange of a negotiable instrument for the release of preexisting debt constituted valuable consideration.[225] If it did, then the plaintiff, Swift, was a bona fide holder of a bill of exchange he received from two land speculators, who in turn had fraudulently obtained it from the defendant, Tyson. If he was a bona fide holder, Swift

220. Luke v. Lyde, 97 Eng. Rep. 614, 617 (1759) (translation added).

221. *See* BELLIA & CLARK, *supra* note 9, at 10–11.

222. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1830–32 (2012).

223. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

224. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1538–54 (1984) (discussing the "[f]ifty-three diversity cases involving marine insurance law [that] were decided by the United States Supreme Court between 1803 and 1840," and noting how in most cases, "the Court simply considered the question at large . . . follow[ing] its own judgment on what the general law was or should be.").

225. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 15 (1842).

could demand payment on the bill despite the fraud. To answer this question, the Court had to determine the relevant source of law.

Tyson argued that under "the law of New York, as thus expounded by its Courts, a pre-existing debt does not constitute . . . a valuable consideration."[226] But even if that's what the New York courts thought,, Justice Story's opinion found, the Supreme Court did not have to follow the New York courts' view because the question was one of general law, not New York common law. The New York courts themselves considered it a question of general law. "It is observable," Justice Story wrote, "that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law."[227] Since the general law was not the law of any one sovereign, the decisions of the New York courts could furnish "only evidence of what the laws are; and are not of themselves laws."[228] General commercial law could govern cases in New York, but it was not New York law. Justice Story wrote:

> The law respecting negotiable instruments may truly be declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde . . . to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit*.[229]

(Justice Story was fond of Cicero's formulation and quoted it in his conflict-of-laws treatise as well.[230])

The Court exercised its independent judgment about the content of the general law (just as all courts were free to do). Justice Story

---

226. *Id.* at 16.

227. *Id.* at 18.

228. *Id.*

229. *Id.* at 19. Lord Mansfield was a prominent authority for American courts. *See, e.g.*, Taylor v. Lowell, 3 Mass. 331, 343 (Ma. 1807) ("The general rules of law applicable to this question [of marine insurance], are expressed by Lord Mansfield."); *see also supra* notes 205–06.

230. STORY, CONFLICT OF LAWS, *supra* note 94, at 898–99.

looked to federal precedent, state precedent, English precedent, and treatises, and found a consensus that the release of debt did constitute consideration under the law merchant.[231] That made Swift a bona fide holder of the note. Tyson had to make good on it.

Swift did not hold that a federal court could overrule a state court on a question of state common law. *Swift* applied general commercial law, something federal and state courts did routinely. The case is remarkable today for being somewhat *un*remarkable then.

When the Court decided *Erie Railroad Co. v. Tompkins* a century later, it overruled "the doctrine of *Swift*," so understood by that time.[232] But the "*doctrine* of *Swift*" in the early twentieth century differed from what *Swift* originally contemplated. As A.J. Bellia and Bradford Clark write, "[o]nly later . . . would courts (mis)cite *Swift* for the broader proposition that federal courts could exercise independent judgment over other kinds of unwritten law, regardless of whether states considered them to be general law or local law."[233] The fact that Justice Story cited Lord Mansfield and Cicero confirms that *Swift* was a decision about general law, not federal or state common law.

Judicial decisions cited Cicero repeatedly throughout the nation's first century, both before and after *Swift*. At the Supreme Court[234] and the federal circuit level,[235] he was a standard legal authority

231. *Swift*, 41 U.S. (16 Pet.) at 19–22.

232. 304 U.S. 64, 69 (1938).

233. BELLIA & CLARK, *supra* note 9, at 33.

234. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 455 (1793); United States v. Smith, 18 U.S. (5 Wheat.) 153, 163 n.h (1820); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 298 (1853); Watson v. Tarpley, 59 U.S. (18 How.) 517, 520 (1855); Keith v. Clark, 97 U.S. (7 Otto) 454, 460 (1878); Wilson v. McNamee, 102 U.S. (12 Otto) 572, 574 (1880); *see also* Glass v. The Sloop, Betsey, 3 U.S. (3 Dall.) 6, 14 (1794) (counsel citing *Pro Milone*); Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 446 (1805) (counsel citing *De Re Publica*).

235. *See, e.g.*, Wilson, *supra* note 176 (C.C.D. Va. 1791); Flagg v. Mann, 9 F. Cas. 202, 215 (No. 4847) (C.C.D. Ma. 1837); Jewett v. Hone, 13 F. Cas. 609, 611 (No. 7311) (C.C.S.D. Ga. 1873).

(though no authority was without its critics[236]). State courts were no different.[237]

3. Case Study: Judicial Review

Cicero's writings on law directly contributed to the formation of American judicial review. One of his interpretive principles was that higher law displaces ordinary law when the two conflict. Grotius, Pufendorf, Vattel, and others cited Cicero for this rule in their commentaries, and Hamilton cited Cicero for it in his law practice. Hamilton's celebrated *Federalist No. 78*, arguing for the displacement of statutory law by constitutional law, borrowed from his law practice and from the law of nations. So when *Marbury v. Madison* embraced Hamilton's position, it was constitutionalizing a Ciceronian legal principle.[238]

Cicero discussed rules of interpretation in several works, including *De Inventione*. In one well-known passage from *De Inventione*, he wrote this:

> A controversy arises from a conflict of laws when two or more laws seem to disagree. . . . In the first place, then, one should compare the laws by considering which one deals with the most important matters, that is, the most expedient, honorable, or necessary. The conclusion from this is that if two laws (or whatever number there may be if more than two) cannot be kept because they are at variance, the one is thought to have the

236. Veazie v. Williams, 28 F. Cas. 1124, 1132 (No. 16,907) (C.C.D. Me. 1845) ("I do not rely on the opinion of Cicero as applicable to this subject . . . because [*De Officiis*] was intended as a manual of pure and high moral duties, and not as a treatise on jurisprudence.").

237. *See, e.g.*, Rutgers v. Waddington (NY 1794), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 392, 393 n.*, 402 (Julius Goebel Jr. ed., 1964) (quoting DE OFFICIIS, *supra* note 43, at 36–37 (1.34) without attribution).

238. The literature on American judicial review is voluminous; scholars have located its origins in the English legal notion of judicial duty, the Privy Council's review of colonial statutes, and early American state court practice. *See, e.g.*, William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); Justin W. Aimonetti, Note, *Colonial Virginia: The Intellectual Incubator of Judicial Review*, 106 VA. L. REV. 765 (2020). Cicero and the law of nations provide yet another source for the theoretical underpinnings of judicial review.

> greatest claim to be upheld which has reference to the greatest matters.[239]

In other words, the more important or foundational law would control in a conflict of two laws.

The law of nations writers adopted this rule in their legal commentaries. Vattel, for example, articulated ten principles for "the collision or opposition of laws."[240] One principle held that "when two duties stand in competition, that one which is the more considerable, the more praiseworthy . . . is entitled to the preference."[241] Vattel wrote that this was "placed by Cicero at the head of all the rules he lays down on the subject."[242] Grotius cited Cicero for the same rule.[243]

Hamilton, well versed in the writings of Cicero, Grotius, and Vattel, invoked the rule while practicing law. In 1784, he litigated the case of *Rutgers v. Waddington* in New York state court. *Rutgers*, a landmark case in the development of American judicial review, considered whether a New York statute violated of the Treaty of Paris which the Confederation Congress had just ratified.[244] Hamilton argued that the statute violated the Treaty, and that the New York judges were bound to prefer the Treaty to the statute. The question was an open one; there was not yet a Constitution declaring federal law the "supreme law of the land."

To the question "how are the judges to decide" as to the controlling law, Hamilton argued that "they must take notice of the law of Congress as a part of the law of the land."[245] Then, citing "the golden rule of the Roman Orator," Hamilton quoted from Cicero:

---

239. DE INVENTIONE, *supra* note 113, at 313 (2.144–45).

240. VATTEL, *supra* note 2, at 443.

241. *Id.* at 446.

242. *Id.* at 446–47.

243. GROTIUS, *supra* note 134, at 427–28 ("[T]hat provision should prevail which has either the more honourable or the more expedient reasons.") (citing Cicero); *see also* PUFENDORF, *supra* note 148, at 822 (similar); RUTHERFORTH, *supra* note 199, at 432 (similar).

244. Treanor, *supra* note 238, at 480–81, 487.

245. Brief No. 6, Rutgers v. Waddington (1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 237, at 362, 380.

"When two or more laws clash, that which relates to the most important concerns ought to prevail."[246]

In the *Federalist*, Hamilton copied his argument from *Rutgers*. Everyone accepted that federal courts would hear cases and adjudicate parties' rights. So courts would have to discern the proper rule of decision when two laws conflicted. When the Constitution set out one rule and a statute set out another, the Constitution, as fundamental law, would have to prevail. Hamilton wrote: "If there should happen to be an irreconcilable variance between the two, that which has superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute."[247] Years later, *Marbury v. Madison* agreed in nearly identical language.[248]

Hamilton seems to have lifted this principle straight from Cicero. The essay does not expressly cite any authority, but it is clear from Hamilton's *Rutgers* brief that he was copying from *De Inventione*: "*si leges duae . . . conservari non possint, quia discrepent inter se, sed ea maxime conservanda putetur, quae ad maximas res*" [Loeb translation: "if two laws . . . cannot be kept because they are at variance, the one is thought to have the greatest claim to be upheld which has reference to the greatest matters"].[249]

We know that Hamilton kept his language skills sharp. His briefs in the *Rutgers* case cited legal authorities in Latin,[250] and friends observed him consulting Grotius in Latin into his forties.[251] With a

---

246. *Id.* at 381.

247. THE FEDERALIST NO. 78, at 466 (Hamilton) (Clinton Rossiter ed., 1961).

248. 5 U.S. (1 Cranch) 137, 177–80 (1803) ("If two laws conflict with each other, the Courts must decide on the operation of each. . . . If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.").

249. DE INVENTIONE, *supra* note 113, at 312–13 (2.145).

250. *See, e.g.*, Brief No. 6, *supra* note 245, at 370–71 (citing Grotius on a contested point, observing that "[i]n the Latin original the difficulty is solved," and sifting through competing translations of Latin terms).

251. *See* James Kent to Elizabeth Hamilton (Dec. 10, 1832), *in* MEMOIRS AND LETTERS OF JAMES KENT 281, 317 (William Kent ed., 1898) (observing that Hamilton "was not

copy of Cicero on his desk, Hamilton may have translated from *De Inventione* on the fly while writing *Federalist No. 78*. Or equally likely, he borrowed from Vattel's or Grotius's quotation of Cicero. Or Hamilton just wrote from memory, having internalized Cicero's rule as a general principle of law and reason. The *Federalist* is yet another example of how eighteenth-century lawyers, immersed in the classics, could use Cicero's language without acknowledgment or second thought.

Whatever the case, this principle's descent from Cicero to the law of nations to Hamilton and *Marbury* is plain. The consensus of Cicero, Grotius, Vattel, and others corroborates *Marbury*'s statement that this method of choosing between conflicting laws rested on principles "long and well established."[252] And it suggests that Hamilton's approach, or something like it, was considered part of the general law. If Chief Justice Marshall was the father of judicial review, Cicero was its ancient ancestor.

III. STRUCTURING GOVERNMENT

The 1770s and 1780s launched a new era of constitution-making. After the break from England, Americans turned to a new form of government—the republic. Most states immediately wrote new republican constitutions, and the federal Constitution followed some years later. This republican renaissance, like the Founders' natural law theory, had origins in the classics. For an eighteenth-century world turning to republican principles, the ancients played "a critical role in keeping alive the memory of self-government through a long epoch in which despotism was the norm."[253]

Republicanism was a slippery concept. In *Federalist No. 39*, Madison asked "what, then, are the distinctive characters of the republican form?" History provided no clear answers: "Were an answer to

---

content . . . with examining Grotius, and taking him as an authority, in any other than the original Latin language"). This is all the more impressive because, as one historian notes, "most educated Americans in the eighteenth century preferred to read English versions of the classics." Botein, *supra* note 16, at 315.

252. 5 U.S. (1 Cranch) at 176.

253. Rahe, *supra* note 163, at 256.

this question to be sought," Madison continued, "in the application of the term by political writers to the constitutions of different states, no satisfactory one would ever be found."[254] Building new republics required recourse to first principles. For many, Cicero—the primary expositor of the ancient republican tradition—provided those principles.

A. Cicero's Republicanism

Cicero helped coin the distinctly Roman idea of *res publica* and made it central to his constitutional project. Translated literally as "public thing" or "public affairs," the term also signified "state" or "commonwealth." In large part thanks to Cicero, *res publica* or "republic" became a foundational concept in Western political thought and the republican tradition emerged as an alternative to arbitrary power.[255]

Three main principles animated Cicero's republicanism. First, a republic belonged to the people and was oriented toward their welfare. Second, the best institutional design to achieve that end was mixed government, where power was separated, checked, and balanced. And third, government had to be bound by the rule of law. The rule of law could refer to higher law that ordered and constrained government—the idea of constitutionalism. But the rule of law could also entail ordinary law. Government had to administer public affairs according to law, not arbitrary will.

The first principle dealt with the people's relationship to the state. In *De Re Publica*, Scipio defined a republic as follows: "A commonwealth (*res publica*) is a property of the people (*res populi*). But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice (*iuris consensu*) and a partnership for the common good (*utilitatis communione*)."[256]

---

254. THE FEDERALIST NO. 39, at 236 (Madison) (Clinton Rossiter ed., 1961).

255. HAWLEY, *supra* note 8, at 17.

256. *Id.* at 65 (1.39); *see also* SIGONIO, *supra* note 57, at 9 (preserving this fragment); 3 HEARNE, *supra* note 71, at 382 (same).

Scipio's definition is laden with assumptions that Walter Nicgorski has unpacked at length. Nicgorski notes that *populus*, or "people," "is left undifferentiated," implying a measure of equality in the people.[257] He also points out the significance of the property metaphor—a republic, as a *res* or possession of the people, can be disposed of as its owner sees fit.[258] Scipio was making an argument for popular sovereignty.

Scipio's republic belonged to the people. The people therefore had a right to participation in government and to be free from arbitrary authority. "[S]urely nothing can be sweeter than liberty," Scipio suggested, and "liberty has no dwelling place in any State except that in which the people's power is greatest."[259] Cicero emphasized his love for liberty elsewhere, too, as in the *Philippics*, where he declared that "the birthright of the Roman people is freedom."[260]

But Scipio's definition did not leave the people entirely to their own devices. Popular assent was a necessary but not sufficient condition for legitimate government. A true republic would be one marked by its disposition toward justice (*ius*) and the common welfare, Scipio insisted. Nicgorski explains that Cicero viewed majorities without such a disposition as mobs who could not "legitimately claim to exercise sovereignty."[261]

The second principle of Cicero's republicanism was the mixed constitution—the form of government that combined the rule of one, the few, and the many to achieve stability. The mixed constitution was a cornerstone of classical constitutional theory.

---

257. Walter Nicgorski, *Cicero's Republicanism*, *in* CAMBRIDGE COMPANION, *supra* note 65, at 215, 223.

258. *Id.*; *see also* BENJAMIN STRAUMANN, CRISIS AND CONSTITUTIONALISM 171–73 (2016).

259. DE RE PUBLICA, *supra* note 37, at 71–73 (1.47).

260. CICERO, Philippic 6, *in* PHILIPPICS 1–6, at 321 (§ 19) (D.R. Shackleton Bailey trans., Loeb Classical Library 2009) (43 B.C.).

261. Nicgorski, *supra* note 257, at 223; *see also* STRAUMANN, *supra* note 258, at 173 ("The idea that the state comes into being by way of contract for the mutual benefit of society is therefore there in Cicero but it is constrained by an ideal of justice which gives some additional normative content and shape to the norms political society is governed by.").

The mixed constitution tradition did not begin with Cicero. Several generations earlier, the Greek historian Polybius had analyzed the Roman Republic in terms of mixed government. Like Plato and Aristotle before him, Polybius laid out three basic forms of government: rule by one (monarchy), by the few (aristocracy), and by the people (democracy). Each had an ideal form and a corresponding corrupt or perverted form. Monarchy could slide into tyranny, for example, while democracy could degenerate into mob rule. The different forms were thought to evolve (and devolve) into each other in a cyclical way. Polybius attributed Rome's greatness to its mixed constitution; it had held off the instability of cyclical regime change by blending and mixing the simple forms of government into a hybrid one.[262]

Polybius developed proto-notions of checks and balances and the separation of powers. He claimed to locate distinct powers vested in the consuls, the Senate, and the people, and lauded the ability of each class to restrain the others.[263] Such arrangements, he believed, prevented any one part of government from obtaining too much power and dominating the others. "Each of the three components of the Roman constitution can harm or help the other two," he argued, making it "the best conceivable system of government."[264] For if "one of the estates . . . pushes itself forward and tries to gain the upper hand over the others . . . the designs of each of them can be effectively counteracted and hampered by the others."[265]

Cicero lauded Polybius as "one of the very best authorities"[266] and built on his foundation. In *De Re Publica*, Scipio spent much of the dialogue defending and fleshing out the mixed regime as the

---

262. Scholars have critiqued Polybius's account as overly simplified or forced, see JED ATKINS, ROMAN POLITICAL THOUGHT 18–24 (2018), but it became a highly influential account regardless.

263. POLYBIUS, HISTORIES 380–81 (Robin Waterfield trans., 2010) (second century B.C.) (describing the distinct powers wielded by the consuls, the Senate, and the people); 381–85 (describing the checking function that divided power served, making each part of government dependent on the other parts and watching over the other parts).

264. *Id.* at 384.

265. *Id.* at 385.

266. DE OFFICIIS, *supra* note 43, at 395.

best form of government. After describing the three simple forms, he declared that he considered "a fourth form of government the most commendable—that form which is a well-regulated mixture of the three."[267] "[T]he absolute rule of one man will easily and quickly degenerate into a tyranny," Scipio argued.[268]

Scipio explained that the ideal constitution would allocate powers over different matters to different institutions. He argued that "there should be a supreme and royal element in the State, some power ought also to be granted to the leading citizens, and certain matters should be left to the judgment and desires of the masses."[269] When such a government obtained, no one group would be able subvert the whole design on its own—"there underlies [this government] no perverted form into which it can plunge and sink,"[270] he concluded.

Limited, balanced, and carefully delineated governmental authority was crucial for Cicero. To avoid the chaos of regime change and preserve liberty, he argued, the different elements of government needed to watch and check the others. "[U]nless there is in the State an even balance of rights, duties, and functions, so that the magistrates have enough power, the counsels of the eminent citizens enough influence, and the people enough liberty, this kind of government cannot be safe from revolution," Scipio argued.[271] Elsewhere in *De Re Publica* and *De Legibus*, Cicero described the tribunes as counterbalancing the consuls, spoke of a carefully calibrated "distribution of powers," and praised "evenly balanced constitution[s]."[272]

---

267. DE RE PUBLICA, *supra* note 37, at 71 (1.45); *see also id.* at 105 (1.69) (same); *id*. at 177–79 (2.65) (same).

268. *Id.* at 69 (1.44).

269. *Id.* at 105 (1.69).

270. *Id.*

271. *Id.* at 169 (2.57).

272. DE LEGIBUS, *supra* note 40, at 477 (3.16); DE RE PUBLICA, *supra* note 37, at 105 (1.69), 107 (1.70), 169 (2.58). The Founding generation, unfortunately, did not have all the material from *De Re Publica*.

The study of classical republicanism often focuses on civic virtue and personal character over political institutions. Some scholars believe that the ancients dismissed institutional design altogether.[273] But Cicero thought that institutional design mattered, and the Founding generation knew it. "The whole character of a republic is determined by its arrangements in regard to magistrates," he wrote.[274] Cicero's republicanism embraced the idea that constitutional structure could provide stability, preserve liberty, and create the conditions for human flourishing.

In the end, the mixed constitution was supposed to bring about social harmony. In a famous simile, Scipio proposed that the political order should look like musical notes brought together to form a beautiful symphony:

> For just as in the music of harps and flutes or in the voices of singers a certain harmony (*concentus*) of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony (*concentus*) is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony (*harmonia*) in song is concord in a State, the strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice.[275]

---

273. *See, e.g.*, William A. Galston, *The Use and Abuse of Classics in American Constitutionalism*, 66 CHI.-KENT L. REV. 47, 49 (1990) ("For Madison . . . institutional design trumps personal character. . . . [A]s Gordon Wood argued [] decades ago, the Federalist persuasion contained 'an amazing display of confidence in constitutionalism, in the efficacy of institutional devices for solving social and political problems.' In this respect, as others, the gap between Federalist and classical political thought was wide indeed.").

274. DE LEGIBUS, *supra* note 40, at 461 (3.5). Story's *Commentaries on the Constitution* used this line as an epigraph.

275. DE RE PUBLICA, *supra* note 37, at 181–83 (2.42); *see also* SIGONIO, *supra* note 57, at 5 (preserving this fragment); 3 HEARNE, *supra* note 71, at 377 (same).

The theme of harmony appeared again in Scipio's Dream at the end of *De Re Publica*, where the dialogue took a turn for the cosmological. Scipio recounted a recent dream he had in which his grandfather, the Roman hero Scipio Africanus the Elder, appeared and revealed to him a vision of the universe. The younger Scipio saw stars and planets moving about the heavens with a divine force guiding their orbit.[276]

Scipio asked his grandfather about the beautiful sounds emanating from the planets. Echoing the earlier image of musical harmony, the Elder replied: "That [sound] is produced . . . by the onward rush and motion of the spheres themselves; the intervals between them, though unequal, being exactly arranged in a fixed proportion, by an agreeable blending of high and low tones various harmonies (*concentus*) are produced."[277] Rational principles ordered the natural world, and it was the stateman's job to order human communities according to those principles.

The third tenet of Cicero's republicanism was the rule of law. With roots in Aristotle's philosophy,[278] the concept of the "sovereignty of law over the ruler" was one of the "greatest contribution[s] of ancient thought."[279] The rule of law was essential to a republic, Cicero argued. Wherever a tyrant ruled arbitrarily and not according to the law of the land, "we ought not to say that we have a bad form of commonwealth . . . but that we really have no commonwealth at all."[280]

For Cicero, some sort of fundamental law ought to govern ordinary law. Cicero identified the law of nature as one external constraint on government. But he also believed in constitutionalism, having a higher-order human law comprised of written or custom-

276. DE RE PUBLICA, *supra* note 37, at 269–71 (6.16–17).

277. *Id.* at 271 (6.17).

278. *See* ARISTOTLE, POLITICS 93 (§ 1287a) (Carnes Lord trans., Univ. of Chi. Press 2013) ("[T]o have law rule is to be chosen in preference to having one of the citizens do so.").

279. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 25 (1998).

280. DE RE PUBLICA, *supra* note 37, at 219 (3.43).

ary law. The legal code proposed in *De Legibus*, Benjamin Straumann explains, was "intended by Cicero to be hierarchically superior to mere legislation: what Cicero is thus engaged in . . . is the drafting of a set of constitutional norms" which would "be more firmly entrenched than mere normal legislation and superior in case of conflict."[281] Ordinary legislation or edicts could be judged unconstitutional and unlawful as well as unjust.

Cicero's legal code seemed to recognize a fundamental law that would govern the consuls. The "safety of the people (*salus populi*) shall be their highest law (*suprema lex*)" he wrote.[282] This principle, which he elsewhere indicated was a matter of natural law,[283] aligned with his vision that republican government be oriented above all toward the popular welfare.

The rule of law meant that government was bound by ordinary law, too. Legislators, judges, and administrators had to conduct business according to known rules and procedures, not will or caprice. "The function of a magistrate is to govern, and to give commands which are just and beneficial and *in conformity with law*," Cicero argued in *De Legibus*.[284] "For as laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law (*lex loquens*), and the law is a silent magistrate."[285]

Cicero gave his most eloquent articulation of the rule of law in *Pro Cluentio*, a speech given as defense counsel in a criminal trial. Calling it a "great[] shame" for "a state which rests upon law to depart from law," he declared:

> [L]aw is the bond which secures these our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice. Within the law are reposed the mind and heart, the

281. STRAUMANN, *supra* note 258, at 46. As discussed above, *supra* Part II.B.3, *De Inventione* also contemplated the idea that a higher law could displace lower law in case of conflict.

282. DE LEGIBUS, *supra* note 40, at 467 (3.8).

283. *See* CICERO, Philippic 11, *in* PHILIPPICS 7–14, at 167–69 (§ 28) (D.R. Shackleton Bailey trans., Loeb Classical Library 2009) (43 B.C.).

284. DE LEGIBUS, *supra* note 40, at 459 (3.2) (emphasis added).

285. *Id.* at 461 (3.2).

> judgment and the conviction of the state. The state without law would be like the human body without mind—unable to employ the parts which are to it as sinews, blood, and limbs.
>
> The magistrates who administer the law, the judges who interpret it—all of us in short—are slaves to law so that we may be free.[286]

In sum, Cicero's republican constitutionalism rested on popular sovereignty, incorporated divided power and checks and balances, and made law rule the rulers. Cicero's thought became central to the classical republican tradition along with that of Aristotle, Polybius, and others, and it contributed greatly to Anglo-American constitutional theory.

B. The Reception of Cicero's Republicanism

English and American lawyers took up these ideas with great enthusiasm. The Stuart dynasty oversaw a period of great religious and political upheaval in the English government, from the English Civil War to the Glorious Revolution, and as the seventeenth century gave way to the eighteenth, notions of sovereignty and constitutionalism were subject to constant debate and revision. Early Americans took up this debate, and each of Cicero's principles became principles of American law and government.

First, popular sovereignty. American government post-1776 was based on the idea that civil authority originated in the people. But Americans' conversion to popular sovereignty during and after the Revolution was so quick and complete that it is now "difficult to grasp the radicalism of the undertaking as it appeared to contemporaries."[287] The philosophical sources of popular sovereignty are too numerous to count, but Cicero was one of them. Jefferson and Adams counted Cicero as an inspiration for the revolution and the Declaration. Decades later, reflecting on the formation of the Constitution, Justice Story wrote in his *Commentaries* that the idea of "civil society ha[ving] its foundation in a voluntary consent . . .

---

286. CICERO, Pro Cluentio, *in* PRO LEGE MANILIA, PRO CAECINA, PRO CLUENTIO, PRO RABIRIO PERDUELLIONIS 378 (§ 146) (H. Grose Hodge trans., Loeb Classical Library 1927) (66 B.C.) (author translation, second paragraph).

287. KELLY, HARBISON & BELZ, *supra* note 193, at 66.

does not, in substance, differ from the definition of Cicero, *Multitudo, juris consensu et utilitatis communione sociata*; that is . . . a multitude of people united together by a common interest, and by common laws, to which they submit with one accord."[288]

Second, institutional structure. The English constitutional order resembled the classical mixed constitution. England had a monarch, an aristocratic House of Lords, and a democratic House of Commons, each with its own powers and duties. But when the legitimacy of monarchy and nobility came into question, lawyers and political theorists had some rethinking to do.

Enlightenment thinkers developed the theory of the separation of powers. This theory identified basic governmental functions—legislative power, executive power, and (later on) judicial power. Good government would separate the exercises of these powers to prevent concentration. As Locke wrote in his *Second Treatise of Government*, the legislative power had to be separated from the executive power "because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the power of making Laws, to have also in their hands the power to execute them."[289] Montesquieu made the same point in *The Spirit of the Laws* and extended it to judicial power.[290]

The separation of powers was analytically distinct from the mixed constitution. The latter combined social classes, giving a say to the different estates. The former distinguished powers based on their nature or function (legislative, executive, and judicial) and was agnostic as to the holder of the power. One concerns *who*; the other *what*.

---

288. 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 94, at § 325.

289. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 364, § 143 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689). Locke focused on the legislative and executive powers and did not identify a separate judicial power. His third power was a "federative," or international relations, power.

290. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (§ 11.6) (Thomas Nugent trans., 1914) (1748).

At the same time, they were closely linked. M.J.C. Vile writes that the separation of powers emerged as "an alternative, but closely related, formulation of the proper articulation of the parts of government."[291] The basic insight of the mixed constitution, as propounded by Cicero and Polybius, also animated separationism—divided government limited the ability of any one person or faction to take all power. As Cynthia Farina puts it, "[l]ike separation of powers, the theory of mixed government attempts, through structural devices, to render government power safe."[292] The mixed constitution may not have used *the* separation of powers, but it was *a* separation of power. Many English republicans credited Cicero with showing how the Roman constitution had separated power to safeguard liberty.[293]

Government based on the separation of powers could still resemble a mixed constitution. Parliament was bicameral, with houses for Commons and Lords (the many and the few), and the Crown was a branch of one. After the break from England, state constitutions retained the bicameral model by creating lower and upper legislative houses while excising hereditary membership. "The radical accomplishment of American political theorists in the decade following independence," writes Farina, "was to cut loose the idea of shared, counterbalancing power from the class-based moorings of mixed government, so that it could become the positive mechanism of restraint."[294]

Like mixed government, government based on the separation of powers could also incorporate checks and balances. Checks and

---

291. VILE, *supra* note 279, at 3; *see also* Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. L. REV. 527, 529–36 (2012).

292. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 491 (1989); *see also* HAWLEY, *supra* note 8, at 180 (noting that mixed government and the separation of powers serve "similar function[s]: to protect by institutions the constraints on government that already exist by the law of nature"); SCHOFIELD, *supra* note 106, at 77 (similar).

293. HAWLEY, *supra* note 8, at 129–30.

294. Farina, *supra* note 292, at 492.

balances in the American tradition thus reflected another continuity with the English constitution.[295] Legislative, executive, and judicial branches might work well as a baseline, but each needed a method of checking the others to fend off encroachment. The executive might have a veto to check the legislature, for example, or the executive might need the consent of the legislature to appoint officials.

Eighteenth-century writers often employed Cicero as their classical authority on mixed government, even though Plato, Aristotle, and Polybius had also written on the subject. Blackstone, Wilson, and Adams praised the English constitution as an exemplar of Cicero's model, not Aristotle's or Polybius's.[296]

Third, the rule of law. English lawyers sounded this theme for hundreds of years as relations between Parliament and the Crown evolved. During the seventeenth and eighteenth centuries, many English republicans and Whigs invoked Cicero in the name of subjecting government to law.[297] So did lawyers in Europe and the United States. Cicero's metaphor of magistrates and judges as "speaking laws" was referenced by Coke, Montesquieu, and Wilson, and it appeared in English and American court decisions.[298] Cicero's admonition that those who obey law are truly free had a similar reception.[299]

---

295. *See* Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 247–48, 265–66 (2024); Calabresi, Berghausen & Albertson, *supra* note 291, at 529–36.

296. *See* 1 BLACKSTONE, *supra* note 20, at 50; James Wilson, Of Government, *in* 1 WILSON, *supra* note 89, at 689, 711; *infra* Part III.B.1 (Adams).

297. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 371–72 (1975); HAWLEY, *supra* note 8, at 129.

298. EDWARD COKE, SEVENTH PART OF THE REPORTS 4 ("*Judex est lex loquens*" ("The judge is a speaking law")); Calvin's Case, 77 Eng. Rep. at 381 (same); 1 MONTESQUIEU, *supra* note 290, at § 11.6 (Judges "are no more than the mouth that pronounces the words of the law."); Wilson, Of the Common Law, *in* 2 WILSON, *supra* note 89, at 749, 754; Ross v. Pleasants (Va. High Court of Chancery, 1788).

299. 1 WILSON, *supra* note 188; Francis W. Gilmer to Thomas Jefferson (July 10, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 205, 206 (James P. McClure & J. Jefferson Looney eds., 2013).

English and American writers also used Cicero to think about fundamental law and constitutionalism. Cicero's *salus populi* principle, that the welfare of the people should constitute the highest law of a state, was invoked by the likes of Locke, Trenchard, Gordon, and Otis. Locke called it a "just and fundamental" rule,[300] while Trenchard and Gordon called it a "a universal and everlasting maxim in government" that "can never be altered by municipal statutes."[301] Trenchard and Gordon added that "[n]o Customs can change, no positive Institutions can abrogate, and no Time can efface this primary Law of Nature."[302] Otis used *salus populi* the same way in *The Rights of the British Colonies Asserted and Proved*, as did countless other American lawyers, writers, and politicians from the Revolution to the Washington administration.[303]

Eventually, Americans came around to the idea of putting fundamental law into writing. They saw the shortcomings of the unwritten English constitution, a combination of statute, custom, and institutional arrangements that Parliament could alter by ordinary lawmaking. As historians have described, early Americans "argued that a constitution, in order to accomplish the purpose of controlling the government, must be fixed [as well as] separate from and antecedent to government so as to be unalterable by the legislature."[304]

---

300. LOCKE, *supra* note 289, at 373.

301. 1 CATO'S LETTERS, *supra* note 195, at 67.

302. *Id.*

303. *See, e.g.*, *supra* note 210; John Adams, Diary Entry (Jan. 18, 1766), *in* 1 ADAMS PAPERS, *supra* note 64, at 296 ("The public Good, the salus Populi, is the professed End of all Government."); Benjamin Franklin, Marginalia in a Pamphlet by Matthew Wheelock (c. 1770), *in* 17 THE PAPERS OF BENJAMIN FRANKLIN 390 (William B. Willcox ed., 1973); Edmund Jenings to John Adams (Nov. 20, 1780), *in* 10 ADAMS PAPERS, *supra* note 64, at 361; Elbridge Gerry to John Adams (Nov. 23, 1783), *in* 15 ADAMS PAPERS, *supra* note 64, at 369; 1 ANNALS OF CONG. 470 (1789) (statement of Rep. Boudinot, calling it "the first object of republican government"); *id.* at 579 (statement of Rep. Vining); "A Citizen of Virginia" to George Washington (Oct. 28, 1793), *in* 14 THE PAPERS OF GEORGE WASHINGTON 294 (David R. Hoth ed., 2008).

304. KELLY, HARBISON & BELZ, *supra* note 193, at 62; *see* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 307–08 (1795) ("In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is

After the break from England, Americans concluded that principles of right reason and natural justice had to "be given positive, written, documentary expression as a fixed standard . . . against which to hold government accountable."[305] This led to written constitutions at the state and national level. Intriguingly, the oft-cited *salus populi* maxim came from Cicero's *written* constitution in *De Legibus*. We shouldn't make too much of it, but that fact was probably not lost on Americans who invoked it.

1. Adams, the *Defence*, and the Federal Convention

For a case study in how Cicero's republicanism shaped American republicanism, consider John Adams and the Massachusetts Constitution. The Massachusetts Constitution was considered the crown jewel of the early state constitutions.[306] Adams, its principal author, brought the full scope of his classical learning to bear on the document. And his later treatise on American constitutionalism, the *Defence of the Constitutions of Government of the United States of America*, successfully made the case to the federal Convention for a constitution modeled on Massachusetts's.

After independence, most states wrote new constitutions. But although these constitutions were based on the separation of powers, they did not use the balanced tripartite structure we associate with

---

transcendant and has no bounds. . . . [I]n England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different.").

305. KELLY, HARBISON & BELZ, *supra* note 193, at 62. STUART BANNER, THE DECLINE OF NATURAL LAW (2021), JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018), and JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM (2024) have explored fixity and written constitutionalism in more detail, though this Article takes no position on their conclusions.

306. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 434 (1969) (observing it "came to stand for the reconsidered ideal of a 'perfect constitution'"); John Phillip Reid, *In the Taught Tradition: The Meaning of Law in Massachusetts Bay Two Hundred Years Ago*, 14 SUFFOLK U. L. REV. 931, 931 (1980) ("[T]he Massachusetts constitution of 1780 should be ranked along the side of the Declaration of Independence, the Constitution of the United States, the Bill of Rights, and the *Federalist* papers, as one of the five most important documents of the revolutionary era.").

the federal Constitution. They largely made legislatures the dominant branch, with weak executives and judiciaries that lacked independence.[307] Governors were often chosen by the legislature and limited by councils. They had short terms and lacked a veto power. The radically democratic Pennsylvania had a plural executive body to water down executive influence.

The powerful state legislatures soon became deeply unpopular. They confiscated property, suspended the means of debt recovery, experimented with paper money schemes, and set aside judicial decisions.[308] The "generally acknowledged failure" of these early constitutions, one scholar states, "led influential political thinkers to reassess what the old theory of mixed government could offer the country."[309]

Massachusetts passed a new constitution in 1780 after the initial wave of state constitution-making. A convention was called and the delegates gave John Adams the task of drafting the document. The convention refined his draft, but on the whole it reflected his authorship.[310] Adams created a bicameral legislature, a popularly elected governor with a veto, and an independent judiciary with life-tenured members.[311] His constitution balanced and divided power among branches more than the other states had done while still making government responsive to the people. The Massachusetts Constitution then became the leading state model at the federal Convention.

Massachusetts was also the first state to submit its constitution to the people for ratification.[312] Earlier state constitutions had been passed by legislatures as statutes, closer to the English model. With its citizens ratifying the constitution outside the ordinary lawmaking process, Massachusetts gave a boost to the emerging idea that

---

307. KELLY, HARBISON & BELZ, *supra* note 193, at 68–74.

308. WOOD, *supra* note 306, at 404–12.

309. Farina, *supra* note 292, at 491.

310. *See* LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 11 (2011); Edward F. Hennessy, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U. L. REV. 873, 880 (1980).

311. MASS. CONST. of 1780, Part II, ch. 1, § 1, art. I; *id.* ch. 2, § 1; *id.* ch. 3, § 1.

312. KELLY, HARBISON & BELZ, *supra* note 193, at 69–70.

a written fundamental law could be antecedent and superior to ordinary government. In this respect, as with institutional design, Massachusetts provided the federal Convention with an attractive precedent.

In the late 1780s, while serving as ambassador to England, Adams wrote *A Defence of the Constitutions of Government of the United States of America*. The *Defence* studied governments across history, distilling the essence of republicanism to show how it had been captured in American government (with no clearer example than Adams's Massachusetts Constitution). Adams composed the work in epistolary form as a series of letters critiquing Turgot, a prominent French minister who thought little of English mixed government and argued that republics should have a single legislative body and no real executive. The *Defence*, which Gordon Wood calls "the finest fruit of the American Enlightenment,"[313] ranked among the most influential works of American political thought for years to come.

Adams sought to isolate the structure of mixed government from the social orders of nobility and royalty. He believed that a constitution could combine and adapt the rule of one, few, and many without hereditary offices and titles. His insistence on the vocabulary of classical mixed constitutionalism led him to sometimes retain the terms "monarchy" and "aristocracy," which caused consternation among his opponents. But Adams used the terms more in the typological sense of "one" and "few." He would not have imported royalism across the Atlantic. Still, his less-than-tactical preference for the old vocabulary invited skepticism in some quarters.

The *Defence* made a simple claim—a republic should be based on popular sovereignty and divide power between a bicameral legislature, executive, and judiciary, each checking and balancing the others.[314] Adams wanted to refine English constitutionalism, not

313. WOOD, *supra* note 306, at 568.

314. *See* 1 DEFENCE, *supra* note 1, at iii ("Representations, instead of collections, of the people—a total separation of the legislative from the executive power, and of the judicial from both—and a balance in the legislature by three equal independent branches

replicate it. Many of his contemporaries, Michael Hawley writes, took the *Defence* "to be the best expression of the philosophical underpinnings of both the Revolution and the Constitution."[315]

Adams began the *Defence* with a preface explaining his goals and setting out the basic argument. "Without three orders," he wrote, "and an effectual balance between them, in every American constitution, it must be destined to frequent, unavoidable revolutions."[316] He then turned to Cicero. Adams quoted *De Re Publica* at length (in Latin, replaced here with the translation) to set the stage:

> Cicero asserts, "I consider the best constitution for a republic to be that which is a balanced combination of the three forms, kingship, aristocracy, and democracy" in such peremptory terms the superiority of such a government to all other forms, that the loss of his book upon republics is much to be regretted. . . . As the treble, the tenor, and the bass exist in nature, they will be heard in concert: if they are arranged by Handel, in a skillful composition, they produce rapture the most exquisite that harmony can excite. . . .
>
> "For just as in the music of harps and flutes or in the voices of singers a certain harmony of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony in song is concord in a State. The strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice." As all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight. His

---

[referring to the lower house, senate, and executive veto as a legislative act]—are perhaps the three only discoveries in the constitution of a free government since the institution of Lycurgus.").

315. HAWLEY, *supra* note 8, at 190.

316. 1 DEFENCE, *supra* note 1, at ix.

> decided opinion in favor of the three branches is founded on a reason that is unchangeable; the laws, which are the only possible rule, measure, and security of justice, can be sure of protection, for any course of time, in no other form of government; and the very name of a republic implies, that the property of the people should be represented in the legislature, and decide the rule of justice. "A commonwealth is a property of the people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good."
>
> "A republic, or commonwealth, exists when there is good and lawful government whether in the hands of a monarch, or of a few nobles or of the whole people. When, however, the monarch is unlawful, which I call 'tyrant,' or the nobles are unlawful, which I call 'faction,' or the people are unlawful, for which I also find no term other than 'tyrant,' then the state is no longer merely defective, but, as a chain of reasoning from the foregoing definitions has made plain, does not exist at all. For there is no republic when a tyrant or a faction captures the state, nor are the people any longer a people, if they are unjust, since in that case they were not a throng united in fellowship by a common sense of justice and a community of interest."[317]

In just a few paragraphs, Adams imported wholesale Cicero's republican themes—popular sovereignty, mixed government, social harmony, and the rule of law. He believed that the English constitution, properly understood, had brought Cicero's vision to life. And he believed that American constitutionalism could perfect it.

The *Defence* has had a polarizing history. Adams's contemporaries disputed its success within months of its publication. Thomas Jefferson complimented Adams on the book and suggested that it would "do a great deal of good," but James Madison thought that

317. *Id.* at xx–xxiii.

"Men of learning will find nothing new in it, Men of taste many things to criticize."[318]

Modern scholars have long debated the work's relevance to the federal Convention, which Adams missed while serving in London. Some argue that the Convention delegates looked to Adams's work for inspiration,[319] but others disagree, minimizing Adams as a quixotic thinker. After praising Adams's brilliance, Gordon Wood's classic *The Creation of the American Republic* nonetheless concludes, in a chapter titled "The Relevance and Irrelevance of John Adams," that Adams misunderstood the significance of the Convention and remained stuck in outdated mixed constitutionalist modes of thought.[320] Similarly, the editors of the *Documentary History of the Ratification* find the *Defence*'s influence "difficult to determine," stating that there "is not a single recorded reference to Adams or his work in the debates."[321]

Recent work by Mary Sarah Bilder, however, has shed new light on the influence the *Defence* may have had on the Convention. She traces how the *Pennsylvania Mercury* newspaper serialized the *Defence* in Philadelphia as the Convention took place, reproducing Adams's case for a house (many), senate (few), and strong executive (one) with checks and balances for months. Serialization "drummed in Adams's argument over and over again."[322] In May 1787, as the Convention began its work, the *Mercury* excerpted portions of the *Defence*'s crucial preface. It ran the body of the treatise weekly throughout the summer and fall and finished around the time the Convention did.

---

318. Thomas Jefferson to John Adams (Sept. 28, 1787), *in* 12 JEFFERSON PAPERS, *supra* note 4, at 189, 189; James Madison to Thomas Jefferson (June 6, 1787), *in* 10 THE PAPERS OF JAMES MADISON 28, 29 (J.C.A. Stagg ed., 2010).

319. *See* GILBERT CHINARD, HONEST JOHN ADAMS 212 (1964); ZOLTÁN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 31 (1952).

320. WOOD, *supra* note 306, at 567–87.

321. Editor's Note on John Adams, A Defence of the Constitutions, *in* 13 DOCUMENTARY HISTORY, *supra* note 21, at 81, 83–84.

322. Mary Sarah Bilder, *The Soul of a Free Government: The Influence of John Adams's A Defence on the Constitutional Convention*, 1 J. AM. CONST. HIST. 1, 15–20 (2023).

Bilder demonstrates that several of the delegates, including George Washington, Benjamin Franklin, William Samuel Johnson, and George Mason obtained early copies of the *Defence* as the Convention began.[323] Other delegates, including James Madison, Alexander Hamilton, Rufus King, and Gouverneur Morris read it and discussed it over the course of the summer.[324] And while Madison found the *Defence*'s ideas unoriginal, he nonetheless admitted that "the book also ha[d] merit" and that it "excited a good deal of attention."[325] He predicted that it would "be read, and praised, and become a powerful engine in forming the public opinion," owing to "the name and character of the Author."[326]

Adams was among the most prominent American intellectuals and had just written a massive treatise on American republicanism; it would have been remarkable if the delegates had *not* discussed his work. The delegates were highly intellectual politicians and lawyers who liked to keep up with the literature. Indeed, contra the claim of the *Documentary History* editors, Bilder finds that the delegates did invoke Adams.[327] Luther Martin, for one, referenced "the celebrated Mr. Adams, who talks so much of checks and balances" in the debates of June 27.[328]

Bilder identifies three main ways the *Defence* made a mark on the Convention.[329] First, it bolstered the credibility of the strong national government proposed by the Virginia Plan.[330] A stronger national government was no foregone conclusion. The Confederation

323. *Id.* at 20; *see also* Weisen, *supra* note 26, at 165 (noting that the *Defence* "was much circulated at the Constitutional Convention").

324. Bilder, *supra* note 322, at 20.

325. Madison, *supra* note 318.

326. *Id.*

327. Bilder, *supra* note 322, at 5 & n.3 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Yates's Notes, speech of Luther Martin)).

328. *Id.* at 5.

329. *Id.* at 20–21.

330. *Id.* at 21–27

Congress was unicameral and had no independent executive, similar to the New Jersey Plan, the Virginia Plan's rival.[331] Second, Adams's treatment of a bicameral legislature, familiar from mixed constitution theory, was picked up by Madison in the Convention debates.[332] And third, the Committee of Style's revision of the Convention's draft matched Adams's proposed structure.[333] The Committee edited twenty-three clunky articles down into seven, with three articles for the three branches of government, the cleaner "parallel vesting formulas reinforc[ing] parallel separation."[334]

To the extent the *Defence* made its way into the Convention, so did Ciceronian republicanism. Adams would have found curious Madison's critique that the book was unoriginal; as a repackaging and rearticulation of Cicero's key ideas, it was unoriginal by design.

But Cicero was also invoked in the Convention apart from Adams's transmission. Wilson and Dickinson appeared to cite Scipio's Dream in the debates on the Senate while Hamilton cited Cicero in his speech introducing his plan of government.

2. Wilson, Dickinson, and the Federal Convention

The theme of harmony as the goal of constitution making appeared in the debates over the selection of senators. The delegates were familiar with Scipio's Dream and its picture of the planets moving about the cosmos in harmony. They may have used the Dream to set the terms of debate on the Senate. It is difficult to know for certain from the limited reports available from the debates, but what we do have coincides heavily with the language of the Dream.

On June 7, the Convention considered whether senators would be chosen by state legislatures or popular election. In so doing, the delegates aimed to pick a structure that would bring about "due

331. *See id.* at 26–27.
332. *See id.* at 27–35.
333. *See id.* at 36.
334. *Id.*

harmony" between the state governments and the new federal one.[335]

John Dickinson argued for state legislative selection.[336] Dickinson, who knew his Cicero,[337] defended his proposal with a metaphor reminiscent of Scipio's Dream. Madison's notes tell us that Dickinson "compared the National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits."[338] Popular election, he argued, would "extinguish these planets" by excluding the state governments "from all agency in the national one."[339] State selection, by contrast, would generate a "collision between the different authorities which should be wished for in order to check each other."[340] Dickinson maintained that "government thus established would harmonize the whole, and like the planetary system, the national council like the sun, would illuminate the whole—the planets revolving round it in perfect order."[341]

James Wilson, who favored popular election, met Dickinson on the same terms. He turned the planetary metaphor back on his colleague. Wilson feared not that the federal government would subsume the states, but that the states would "devour[] the national Govt."[342] As Madison's notes record, Wilson "was not . . . for extinguishing these planets[, the states,] as was supposed by Mr. D.—neither did [Wilson,] on the other hand, believe that they would

335. 1 FARRAND'S RECORDS, *supra* note 327, at 150 (Madison's notes, motion of Roger Sherman).

336. *See id.* at 152–53 (Madison's notes, speech of John Dickinson).

337. *See supra* note 6. In his Revolution-era *Letters from a Farmer in Pennsylvania*, Dickinson quoted Cicero's *Pro Sestio* and warned his fellow colonists against following the example of one of Cicero's populist opponents. *See* John Dickinson, Letter III, Letters from a Farmer in Pennsylvania, *reprinted in* EMPIRE AND NATION, *supra* note 6, at 15, 19; *id.* at 71 (Letter XI).

338. 1 FARRAND'S RECORDS, *supra* note 327, at 153 (Madison's notes, speech of John Dickinson).

339. *Id.*

340. *Id.*

341. *Id.* at 157 (Yates's notes, speech of John Dickinson).

342. *Id.* at 153 (Madison's notes, speech of James Wilson).

warm or enlighten the sun."[343] Ever the nationalist, Wilson believed that the state governments would unduly hamper federal objectives if given a say in the Senate's composition.[344] "Within their proper orbits [the states] must still be suffered to act for subordinate purposes (for which their existence is made essential by the great extent of our Country[,])"[345] he argued, but they could "only answer local purposes."[346] A national government independent of the state governments would prove more "vigorous."[347]

Dickinson's state selection, of course, prevailed in the end.[348] But the outcome is not the point so much as the process. Both sides were comfortable trading on Ciceronian terms and thought doing so would appeal to other delegates.

3. Hamilton and the Federal Convention

Cicero made another appearance at the Convention, in Alexander Hamilton's famous speech of June 18. With the Convention delegates at an impasse over the Virginia Plan and the New Jersey Plan, Hamilton offered his own.[349] His speech introducing his proposed government lasted several hours and gave his critics ample material with which to tar him as an elitist.[350] His plan provided for a bicameral legislature and an elected executive known as a governor.[351] The governor and the members of the senate would serve during "good behavior," or for life unless impeached.[352]

---

343. *Id.*

344. *See id.* at 153–54

345. *Id.*

346. *Id.* at 157 (Yates's notes, speech of James Wilson).

347. *See id.*

348. *But see* U.S. CONST. amend. XVII. Wilson won the long game.

349. *See* ALEXANDER HAMILTON, Plan of Government (June 18, 1787), *in* 4 HAMILTON PAPERS, *supra* note 5, at 207–09.

350. *See* PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 112 (1968).

351. *See* Plan of Government (June 18, 1787), *supra* note 349, at 207–08.

352. *Id.* at 208–09.

Hamilton began his speech with a genealogy of ancient and modern governments.[353] Paul Eidelberg writes that as Hamilton rose to speak, "he deemed it necessary to have recourse to fundamental principles, that is, to political philosophy."[354] The speech covered ground from Greece and Rome to Charlemagne's France, Germanic states, Swiss cantons, the Venetian republic, Poland, and England, all by way of background.[355] At the linchpin of his speech, Hamilton arrived at British mixed constitutionalism.[356] In his notes, Hamilton wrote to himself at this point to give his sentiments "of the best form of government . . . as a model which we ought to approach as near as possible." [357]

He then scribbled: "British constitution best form. Aristotle—Cicero—Montesquieu—Neckar."[358] The subsequent pages of his notes lay out the traditional arguments for mixed constitutionalism, concluding with a recapitulation of the strengths of the English government and why the Convention would do well to imitate it.[359] One wonders whether Hamilton had Adams's recently serialized *Defence* and its Ciceronian preface in mind.

Hamilton's plan of government earned him a reputation as a monarchist. Perhaps it was well deserved, perhaps not. Scholars generally agree that the plan, which went nowhere, had the effect

353. *See* ALEXANDER HAMILTON, Notes for Speech on a Plan of Government, *in* 4 HAMILTON PAPERS, *supra* note 5, at 181–84.

354. *See* EIDELBERG, *supra* note 350, at 112.

355. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 181–84.

356. *See id.* at 184.

357. *Id.*

358. *Id.* at 184–85. Madison's notes on Hamilton's speech confirm that Hamilton actually delivered this point from his notes. *See* James Madison, Notes, *in* 4 HAMILTON PAPERS, *supra* note 5, at 192.

359. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184–92.

of casting Madison's Virginia Plan in a much more favorable, centrist light.[360] Hamilton probably had this in mind all along—"a strategic ploy" as much "designed to draw fire as to be adopted."[361] Now a mean between two extremes, the Virginia Plan jumped out ahead as the leading candidate.[362] Instead of a difficult binary choice, the delegates could assure themselves that they had picked a middle road. That Hamilton never formally introduced any document with his plan,[363] avoiding making a record of it, adds support for this view.

Still, Hamilton's choice of authority is telling. If he could plausibly present Cicero as a chief authority on "the best form of government" that the Convention "ought to approach as near as possible,"[364] he was likely not alone. Adams, in absentia, certainly agreed, as did Wilson and others of the Federalist persuasion.

IV. EXECUTIVE AUTHORITY

In structuring the new Congress, the delegates had plenty of models in their state assemblies and the Confederation Congress. But with the new national executive, the delegates were more in the wild.[365]

They did not write on a completely blank slate. They were familiar with King George III and his council government, and most states had governors. But the state constitutions provided more an-

360. *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1653 (2012); HARVEY FLAUMENHAFT, THE EFFECTIVE REPUBLIC: ADMINISTRATION AND CONSTITUTION IN THE THOUGHT OF ALEXANDER HAMILTON 295 (1992) ("The immediate effect of the speech was to make the Virginia plan seem immensely more choiceworthy than the New Jersey plan, by which it had just been challenged.").

361. Bilder, *supra* note 360, at 1653

362. *See* EIDELBERG, *supra* note 350, at 109.

363. Bilder, *supra* note 360, at 1653.

364. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184.

365. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 20 (2020) ("[N]o one in attendance at the Philadelphia Convention—indeed no one anywhere—had experience with a strong republican executive for a nation the size of the United States.").

timodels than models, since legislatures often dominated governors. And no one thought monarchy an appropriate institution for a republican nation. The federal executive was to be neither governor nor king.

Several debates framed the creation of the American presidency. Would the executive be plural or single? Would the executive be weak or strong? How would the executive interact with the other branches? To chart a path through these unknowns, the figures most closely associated with the creation and implementation of Article II drew on Cicero's theory and practice.

As far as theory goes, Cicero put forth early versions of the argument for energy and unity in administration. The "rule by one" element of the mixed constitution became the archetype for the single executive. Hamilton, Wilson, and others adopted this position as it had been filtered down through the ages. And as for practice, Cicero's accomplishments as consul left a historical example that inspired Hamilton in handling questions of military force during the Washington administration. Hamilton responded to the Whiskey Rebellion of 1794 using Cicero's name as a pseudonym and imitating his efforts, quashing an insurrection to preserve the rule of law.

By precept and example, Cicero bequeathed to the Founding generation the earliest germ of the Hamiltonian "energetic executive."

A. Cicero's Theory and Example of Executive Authority

Cicero praised statesmanship as the highest human duty across his writings. He stressed in *De Officiis* that "we are not born for ourselves alone, but our country claims a share of our being,"[366] and again in *De Re Publica* that "our country has not given us birth and education without expecting to receive some sustenance, as it were, from us in return."[367] Statesmanship—encompassing things like military leadership and public administration—was the occupation

366. DE OFFICIIS, *supra* note 43, at 23 (1.22). James Wilson cited this passage in his *Lectures*. *See* Wilson, Of Man, as a Member of Society, *supra* note 165, at 631.

367. DE RE PUBLICA, *supra* note 37, at 23 (1.4). Justice Story cited this passage in a speech to the American Institute of Instruction. *See* 2 STORY LETTERS, *supra* note 92, at 188–89.

in which humans could most approach the divine. In Scipio's Dream, Scipio Africanus revealed to his grandson that the afterlife would be especially sweet for those who served well in public office:

> Be assured of this, so that you may be even more eager to defend the commonwealth: all those who have preserved, aided, or enlarged their fatherland have a special place prepared for them in the heavens, where they may enjoy an eternal life of happiness. For nothing of all that is done on earth is more pleasing to that supreme God who rules the whole universe than the assemblies of men associated in justice, which are called States. Their rulers and preservers come from that place, and to that place they return.[368]

Cicero echoed this idea in his speech *Pro Sestio*, where he declared that he "reckon[ed] among the company and number of the Immortal Gods" those "who firmly established this State."[369]

Cicero knew that public administration was an intensely practical task: "If anyone is entering public life," *De Officiis* cautioned, "let him beware of thinking only of the honor that it brings; but let him be sure also that he has the ability to succeed."[370] But should one have the requisite abilities, one "should put aside all hesitation" and "take a hand in directing the government; for in no other way can a government be administered or greatness of spirit made manifest."[371] Cicero differed here from Plato, who preferred that wise citizens "not . . . assume civic duties except under compulsion."[372] As a general matter, public administration on Cicero's view was not to be a reluctant enterprise, but an enthusiastic and vigorous one.

Cicero recognized the need for a deliberative part and an active part of government. The mixed constitution, with its power divided

---

368. DE RE PUBLICA, *supra* note 37, at 267 (6.13). James Wilson cited this passage in his *Lectures*, *see* Wilson, Of Man, as a Member of Society, *supra* note 165, at 635, and *Chisholm v. Georgia*. *See* 2 U.S. (2 Dall.) at 455 (opinion of Wilson, J.).

369. CICERO, *Pro Sestio*, *in* PRO SESTIO, IN VATINIUM 233 (§ 68) (R. Gardner trans., Loeb Classical Library 1958) (56 B.C.).

370. DE OFFICIIS, *supra* note 43, at 75 (1.21).

371. *Id.* at 73–75 (1.21).

372. *Id.* at 29 (1.28).

between different bodies, had room for both. Cicero saw the monarchical element of government as the branch best-suited for energetic leadership—not because he favored royalism, but because he appreciated the structural advantages of unitary governance. The consuls and dictator "represented the monarchical element in the constitution," Michael Hawley writes, "allowing for decisive response to crisis."[373] Scipio admitted in *De Re Publica* that he considered monarchy the best unmixed form of government, as the form most conducive to activity and efficiency.[374] Decisions requiring deliberation and assent from multiple parties or coalitions would naturally require more time: "[I]f the management of a State is committed to more than one," Scipio explained, "you can see that there will be no authority at all to take command, for unless such authority is a unit, it can amount to nothing."[375]

As examples, Scipio pointed to a ship in a storm or a case of terrible sickness.[376] Sailors look to the expert direction of the captain, he observed, while the sick look to a doctor.[377] In an emergency, neither sailor nor sick person would seek to debate the best course of action or ask for a vote. Cicero thus established a goal (energetic, active government) and suggested a possible means or institutional design (unitary decision making) to achieve that goal.

We should not overread Cicero here. First, Scipio's example of the captain and doctor was not part of the extant text in the eighteenth century. Second, Cicero was no monarchist. While he found desirable qualities in unilateral government, he incorporated it as just one part of the larger mixed government framework. Next, his proposed constitution in *De Legibus*, mirroring Rome's, divided the *imperium*, or supreme power, between two consuls.[378] The consulship had developed as a domestication of the old kingship, and Rome

373. HAWLEY, *supra* note 8, at 46–47.

374. DE RE PUBLICA, *supra* note 37, at 83 (1.35), 103–05 (1.45).

375. *Id.* at 91 (1.38). SCHOFIELD, *supra* note 106, at 72, points out that this passage draws upon the Platonic understanding of the mind and its struggle for mastery over the appetites and passions.

376. DE RE PUBLICA, *supra* note 37, at 93–95 (1.39).

377. *Id.*

378. DE LEGIBUS, *supra* note 40, at 465–67 (3.2).

had what we would understand as a plural executive. And last, Cicero lived and wrote well before the idea of distinct powers, including executive power, emerged. Speaking of "Cicero's theory of executive power" might be somewhat anachronistic. He spoke in broader terms of administration or statesmanship.

We can nonetheless find—and more to the point, eighteenth-century readers did find—an association in Cicero's thought between unity, energy, decisiveness, and administration. First, despite the partial loss of *De Re Publica*, the Founding generation was quite familiar with the rest of Cicero's work and his mixed constitution theory.

Second, Rome conspicuously delegated the *imperium* to a sole ruler in times of crisis. Cicero endorsed this practice in his proposed constitution.[379] He included provision for a dictator when the state's welfare required decisive action: "[W]hen a serious war or civil dissensions arise, one man shall hold, for not longer than six months, the power which ordinarily belongs to the consuls, if the Senate shall so decree."[380] As a matter of natural law, states had to have a means of self-preservation, something that required unilateral action from time to time.

And third, while the concept of executive power had yet to be consciously theorized, its referent—military force or the carrying out of laws—did exist. The Romans administered public affairs through various magistrates we would classify as executive officials.[381] So when Cicero made claims about public administration or consular duties, the eighteenth-century reader would have mentally translated them into claims about executive power.[382]

---

379. *Id.* at 467 (3.3).

380. *Id.*

381. *See* BEDERMAN, *supra* note 7, at 79 ("The Roman consuls clearly exercised a bundle of authority that approximated executive power.").

382. *See, e.g.*, Alexander White, *To the Citizens of Virginia*, WINCHESTER VA. GAZETTE (Feb. 22, 1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 21, at 406 ("Where the executive power [of Rome] was vested and how distributed, I will give you in language better than mine. 'While the consuls resided at Rome, they had the administration of all public affairs. All other magistrates, except the tribunes of the people, were subject to them, and obliged to obey them[.]'") (citing Polybius).

So much for theory. Turning to practice, the historical Cicero lived out his ideal of decisive governance. Unlike other classical philosophers, he was a statesman first. He got his hands dirty in the messiness of public life, serving as a prosecutor and public administrator, managing funds, directing troops, conducting festivals, and giving speeches.[383]

In his time as consul, his defeat of the Catilinarian conspiracy exemplified the qualities of energetic and decisive statesmanship. Though Cicero nominally shared power, his co-consul Gaius Antonius Hybrida was a nonfactor.[384] Plutarch described Hybrida as "a man fit to lead neither in a good cause nor in a bad one," and "a valuable accession to another's power."[385] With Hybrida on the sideline, Cicero was effectively the sole consul. Rome had a plural executive on paper, but later generations would have understood Cicero as acting with the dispatch and strength of a unitary executive.

B. The Reception of Cicero's Theory and Example of Executive Authority

The modern notion of executive power emerged in the thought of Machiavelli, Hobbes, and Locke, among others—a centuries-long process of "taming the prince."[386] The recognition of the executive function of government played a central role in the development of the separation of powers.

Cicero's role in shaping early understandings of the American executive has gone entirely unnoticed. Forrest McDonald writes that "the ancient philosophers were not relevant" to the political theory of the presidency, and that "[c]onstitution-makers could . . . look no further back than 1513, when Machiavelli wrote *The Prince*."[387] That might be largely true, but Cicero was the exception.

---

383. *See* PLUTARCH, *supra* note 29, at 412–15.
384. *Id.* at 415.
385. *Id.*
386. *See generally* HARVEY C. MANSFIELD, JR., TAMING THE PRINCE (1989).
387. FORREST MCDONALD, THE AMERICAN PRESIDENCY 39 (1994).

1. Theory: Treatises, the Federal Convention, and Ratification

One of the earliest writers to touch on executive power, Marsilius of Padua, held up Cicero the consul as a sort of proto-executive in his 1324 treatise *Defender of the Peace*.[388] Marsilius, whose work later influenced Machiavelli, cited Cicero's handling of the Catilinarian conspiracy as an example of skillful executive action.[389] Marsilius praised Cicero for acting swiftly and putting Catiline's coconspirators to death rather than prolonging civil unrest.[390] Machiavelli famously argued in a similar vein that executives must have the attributes of suddenness, secrecy, and unity.[391]

Political theorists argued for energy and unity in the executive into the eighteenth century, often with reference to mixed constitution theory. In *The Spirit of the Laws*, Montesquieu invoked Cicero in extolling the virtues of monarchy and argued that "the executive power is . . . enabled to act with greater expedition" in monarchies than in other states.[392] Montesquieu wrote that the "executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many."[393]

William Paley, a prominent English philosopher, made the same claim in his work *The Principles of Moral and Political Philosophy*.[394] Paley, described by Gordon Wood as a "summarizer of common

388. *See* MARSILIUS OF PADUA, DEFENDER OF THE PEACE 56–57 (Alan Gerwith trans., 1956) (1324); *see also* NEDERMAN, *supra* note 53, at 108 (noting that Cicero "looms large" in Marsilius's thought).

389. MARSILIUS, *supra* note 388, at 56–57.

390. *Id.*

391. *See* MANSFIELD, *supra* note 386, at 142–49; HAWLEY, *supra* note 8, at 67. Many, of course, took issue with much of Machiavelli's thought. *See* MCDONALD, *supra* note 387, at 39–43.

392. 1 MONTESQUIEU, *supra* note 290, at 59–61.

393. *Id.* at 168.

394. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 450 (J. Davis, 2d ed. 1786).

eighteenth-century English thought,"[395] wrote as follows: "The separate advantages of MONARCHY, are unity of council, activity, decision, secrecy, dispatch; [and] the military strength and energy which result from these qualities of government."[396]

Writing at the same time as Paley, John Adams admitted in the *Defence* that he entertained doubts about a single executive and wondered instead whether the executive power should be vested in a council or plural body.[397] But the virtues of a single chief administrator proved irresistible. "I had almost ventured to propose [an] assembly for the executive power," he wrote, "but the unity, the secrecy, the dispatch, of one man, has no equal."[398] As Cicero had argued millennia before and as Montesquieu, Paley, and Adams now believed, the ideal manner of administration (energy) could be achieved through a particular institutional design (unity).

This position carried the day at the Constitutional Convention. Oversimplifying things mightily, the delegates designed the presidency in part as a response to the lack of an energetic, single, or independent national executive under the Articles of Confederation.[399] The shortcomings of the weak state executives bolstered the case for a stronger national executive.[400]

James Wilson, in first introducing the proposal for a single executive, argued that unity would give the "most energy dispatch and

395. WOOD, *supra* note 306, at 261.

396. PALEY, *supra* note 394, at 450. Earlier English writers like Bacon and Locke had argued the same. *See* Jeremy D. Bailey & Haimo Li, *"Decision, Activity, Secrecy, and Dispatch": The Intellectual Origins of Hamilton's Rhetoric in Federalist No. 70*, 42 HIST. POL. THOUGHT 318, 329–35 (2021).

397. *See* 1 DEFENCE, *supra* note 1, at 379.

398. *Id.*

399. *See* MCCONNELL, *supra* note 365, at 19–23.

400. The constitutions of the states (most adopted during a war against a king) generally had powerful legislatures and established weak executives-in-council. But by 1787, the pendulum had swung the other way, as legislatures became increasingly aggressive and unpopular. *See* WOOD, *supra* note 306, at 404–12. "The experience under post-independence state constitutions . . . convinced many Philadelphia Convention delegates and other nationalists that a strong executive was important to political stability." Kent, Leib & Shugerman, *supra* note 17, at 2121.

responsibility to the office."[401] (In response, Edmund Randolph decried "unity in the Executive magistracy" as "the foetus of monarchy."[402]) Hamilton named Cicero as an authority supporting the English constitution, which Hamilton believed would allow for the "vigorous execution of the laws" and a "[b]etter chance for a good administration."[403] Wilson, Hamilton, and their nationally minded allies defeated motions to create an executive council as a limit on presidential power.[404] The Article II that emerged from the Convention made the President single rather than plural and independent of Congress. The Convention's plan gave the President a capacity for "energy" not yet familiar to state republican governments.

As the states began the ratification process, Charles Carroll cited Cicero in support of the proposed executive. Writing for the Maryland ratifying convention, Carroll argued that "the energy of monarchy" was an element of an ideal constitution.[405] "Cicero," he wrote, was "[o]f this sentiment," and was one "of the best judges of Antiquity."[406] The proposed Constitution properly incorporated "the vigor & dispatch of monarchy," Carroll concluded, as the "energy" of the proposed government would "give it respectability abroad, & stability at home."[407] He concluded that the Philadelphia delegates "determined wisely in giving the executive to a single person."[408]

---

401. 1 FARRAND'S RECORDS, *supra* note 327, at 65.

402. *Id.* at 66.

403. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184–86.

404. *See* MCCONNELL, *supra* note 365, at 33–35.

405. Charles Carroll of Carrollton, Draft Speech for Maryland Convention (January–March 1788), *in* 12 DOCUMENTARY HISTORY, *supra* note 21, at 832, 833. Carroll prepared this speech in anticipation of serving at the Maryland ratifying convention. He never had the chance to deliver it, as his county elected Antifederalist delegates instead. *Id.* at 832. But regardless of whether he actually gave his speech, it still reflected Federalist sentiments on the Constitution that others would have shared. Carroll, a self-professed Ciceronian, *see* Oration, *supra* note 87, cited Cicero multiple times in his draft speech. *See* Carroll, *supra*, at 848.

406. Carroll, *supra* note 405, at 833

407. *Id.* at 834.

408. *Id.* at 841.

And all of this came before Hamilton wrote *Federalist No. 70*.[409] Montesquieu, Paley, Adams, Wilson, Carroll, and others had promoted executive energy and unity—some citing Cicero—in the years leading up to Hamilton's famous essay. They had done so in France, England, and America.

The *Federalist No. 70* recapitulated their points: "Energy in the executive is a leading character in the definition of good government," Hamilton wrote.[410] "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[411] The elements of "energy" were unity, duration in office, salary protection, and "competent powers."[412] Elaborating on unity, Hamilton stated that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[413]

And we know Hamilton had the Roman example in mind: "Every man the last conversant in Roman history," he declared, "knows how often that republic was obliged to take refuge in the absolute power of a single man."[414] A unitary executive defended Rome against external threats, but Hamilton also suggested that a unitary executive worked just as well internally against "the intrigues of ambitious individuals who aspired to the tyranny," a possible allusion to Cicero's defeat of Catiline.[415]

Though the*Federalist* has proved the most enduring historical text defending energy in the executive, Hamilton was largely recycling

---

409. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

410. *Id.* at 423.

411. *Id.*

412. *Id.* at 424.

413. *Id.*

414. *Id.* at 423.

415. *Id.* Coincidentally, but tellingly, Hamilton's performance at the New York ratifying convention led New York newspapers to deem him "the American Cicero" for his rhetorical success in winning over co-delegates to the Federalist cause. *See Extract of a Letter from a Gentleman in Poughkeepsie, to His Friend in This City*, N.Y. PACKET (June 24, 1788), *in* 22 DOCUMENTARY HISTORY, *supra* note 21, at 1741–42.

the older sources. He even recycled from himself. Almost a decade earlier, he had written a memorandum discussing administrative organizational principles.[416] For government agencies overseeing commerce, Hamilton admitted that a board would do, "but for most other things single men" were preferred.[417] For war, foreign affairs, and finance, a single minister was superior, he maintained, because "[t]here is always more decision, more dispatch, more secrecy, more responsibility where single men [rather than] bodies are concerned," thus blending "the advantages of Monarchy and of a republic."[418] And just months before he wrote *Federalist No. 70*, Hamilton was arguing on the Convention floor for a unitary executive and a "vigorous execution of the laws" with reference to Cicero.

In a modest way, the design of Article II reflected Cicero's thought. The office of President of the United States was proposed, defended, and critiqued in terms of energy and unity. Adams used these concepts in the *Defence*, Wilson used them at the federal Convention, and Hamilton used them during ratification. And Hamilton and Carroll used them on Cicero's authority.

None of this was foreordained. Convention delegates and state ratifiers fought hard for the unity and strength of the presidency we know today. Had votes swung the other way on this or that motion in the Convention, Article II might have vested the executive power in a President and privy council or in the legislature. Taking a cue from classical constitutional theory, the delegates and ratifiers chose the Hamiltonian path instead.

---

416. *See* Letter from Alexander Hamilton to unknown (1779), *in* 2 HAMILTON PAPERS, *supra* note 5, at 234.

417. *Id.* at 246 n.H.

418. *Id.*; *see also* Letter of Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 HAMILTON PAPERS, *supra* note 5, 404–05 ("A single man, in each department of administration, would be greatly preferable . . . . [W]e shall blend the advantages of a monarchy and republic in our constitution.").

2. Practice: Hamilton and the Whiskey Rebellion

In the summer of 1794, militias in western Pennsylvania rose up in arms against the federal government.[419] Hamilton led the Washington administration's response, mobilizing a military expedition and running a public relations campaign to win popular support.[420] He used classical Ciceronian imagery and language to do so, taking Cicero's name as a pseudonym to invoke the suppression of the Catilinarian insurrection. Hamilton's actions matched his model's. The Whiskey Rebels were put down. As much as anyone, Hamilton embodied the Ciceronian ideals of energetic statesmanship in service of the rule of law.[421]

Cicero and Hamilton shared several biographical experiences that may have positioned them to approach law and politics with a similar eye. Each was born outside the ruling class, yet worked his way into the upper echelons of power. Cicero was the rare *novus homo* to scale the *cursus honorum*, while Hamilton was the "new man" of the Founding generation, born and raised in Caribbean obscurity.[422] Through talent and sheer will, each overcame humble origins to become peers of those born into wealth, status, and power.

Both valued social order, constitutional stability, and the rule of law. They feared anarchy as much as tyranny. The civil war of Marius and Sulla plagued the Rome of Cicero's early years, while Hamilton's tiny home island of St. Croix was in constant fear of armed slave uprisings.[423] As a student at King's College, Hamilton also

---

419. *See* MCDONALD, *supra* note 3, at 299.

420. *See id.* at 300–01.

421. This section focuses on Hamilton, but he wasn't the only one to see himself as a modern Cicero. *See, e.g.*, THOMAS E. RICKS, FIRST PRINCIPLES: WHAT AMERICA'S FOUNDERS LEARNED FROM THE GREEKS AND ROMANS AND HOW THAT SHAPED OUR COUNTRY xx (2020) (discussing how John Adams liked to "cast himself as a modern Cicero" and drew inspiration from "Cicero's triumph over the Catilinarian conspiracy").

422. *See* MCDONALD, *supra* note 3, at 6–7.

423. Ron Chernow traces Hamilton's later abolitionist efforts to the cruelty against enslaved people he witnessed on St. Croix, cruelty practiced so as to deter revolt. *See* RON CHERNOW, ALEXANDER HAMILTON 33 (2004). Hamilton detested the treatment of enslaved people as much as feared the consequences of uprisings: "The twin specters of despotism and anarchy were to haunt him for the rest of his life." *Id.*

had run ins with the Sons of Liberty.[424] Ideologically sympathetic to their cause, he nonetheless disliked their lawless methods and helped rescue Miles Cooper, the Tory president of King's College, from one of their mobs.[425]

Cicero and Hamilton both took education seriously but halted their studies for military service. As a teenager in 90 B.C., Cicero joined the staff of the Roman commander Gnaeus Pompeius Strabo for a military campaign.[426] Hamilton dropped out of King's College to join the Revolution as George Washington's aide-de-camp.[427]

Hamilton lacked the formal secondary schooling his wealthier peers had, but he taught himself about government, economics, trade, public finance, and military science. His intense personal studies also incorporated classical history and philosophy, which he had begun studying in his youth on St. Croix.[428] Plutarch's *Lives*, which included a biography of Cicero, was his boyhood favorite.[429] During lulls in Revolution campaigns, Hamilton retreated to his books, rereading Cicero and Plutarch alongside modern works on politics and commerce.[430] Hamilton deployed this wide-ranging learning in the crucial years of the drafting and ratification of the Constitution and became the figure most closely associated with the new executive branch.

The Whiskey Rebellion put the republic's authority to the test. After years of rabblerousing over a federal tax on whiskey, Pennsylvania frontiersmen erupted in revolt against the enforcement of the tax.[431] In the summer of 1794, local militias exchanged lethal fire with federal excise officers, tarred and feathered them, robbed the mail, and shut down the federal courthouse.[432] Thousands of rebels

---

424. *See* MCDONALD, *supra* note 3, at 13–14.

425. *Id.*

426. EVERITT, *supra* note 27, at 36–37.

427. *See* MCDONALD, *supra* note 3, at 13.

428. *See id.* at 7.

429. *Id.*

430. *See* JOHN C. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 46 (1964); FLAUMENHAFT, *supra* note 360, at 265.

431. MCDONALD, *supra* note 3, at 297–99.

432. *Id.* at 298–99.

gathered to march on Pittsburgh.[433] State and local authorities did little to stop them.[434] Western Pennsylvania descended into lawlessness.

Hamilton saw the Whiskey Rebellion as a trial of ordered liberty, the supremacy of federal law, and the executive's ability to govern.[435] As acting Secretary of War, he planned to project a show of military strength to render the actual use of force unnecessary.[436] At his urging, President Washington invoked the Militia Act of 1792,[437] which permitted the federal government to call forth the militias of the states whenever "combinations too powerful to be suppressed" obstructed the execution of the law.[438] Washington assembled militia forces from Virginia, Maryland, New Jersey, and Pennsylvania to put down the insurrectionists.[439]

Catiline's insurrection in Cicero's Rome naturally sprang to Hamilton's mind. Under the pseudonym "Tully" (short for Cicero's family name "Tullius"), Hamilton wrote a series of letters in the *American Daily Advertiser* to rally the public to the administration's cause and explain the legality of its actions.

In *Tully No. I*, he reminded the public that resistance to federal law enforcement was resistance to congressional legislation, and resistance to congressional legislation was resistance to the principle of popular sovereignty.[440] Though they might not admit it, what the rebels intimated was that "forcible resistance by a sixtieth part of the community" was permissible against "the representative will of the whole, and the constitutional laws expressed by that will."[441]

---

433. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878 35 (1988).

434. MCDONALD, *supra* note 3, at 299.

435. *See id.* at 300.

436. *See id.* Secretary of War Henry Knox was unavailable in Maine at this time. *Id.* at 300–01. Washington designated Hamilton acting secretary. *Id.* at 301.

437. *See id.* at 299–300.

438. Act of May 2, 1792, Ch. 28, § 2, 1 Stat. 264, 264.

439. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160–61 (2004).

440. *See* Alexander Hamilton, Tully No. I (Aug. 23, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 132–35

441. *Id.* at 133.

Congressional will required enforcement to have any effect.[442] Hamilton asked the people for their support of the President's expedition, urging them to reject the rebel efforts "to leave the government of the Union in the prostrate condition of seeing the laws trampled under foot by an unprincipled combination of a small portion of the community, habitually disobedient to laws."[443]

Three days later, Hamilton published *Tully No. II*.[444] "[S]hall the majority govern or be governed?" he asked.[445] "[S]hall the nation rule, or be ruled? shall the general will prevail, or the will of a faction? shall there be government, or no government?"[446] Pointing out that the Constitution expressly authorized the setting of excises, he addressed the people directly:

> [T]he four western counties of Pennsylvania, undertake to rejudge and reverse your decrees; you have said, "The Congress *shall have power* to lay *Excises*." They say, "The Congress *shall not have* this power." . . . Your Representatives have said, and four times repeated it, "an excise on distilled spirits *shall* be collected." They say it *shall not* be collected. We [the rebels] will punish, expel, and banish the officers who shall attempt the collection. We will do the same by every other person who shall dare to comply with your decree expressed in the Constitutional character; and with that of your Representative expressed in the Laws. The sovereignty shall not reside with you, but with us. If you presume to dispute the point by force—we are ready to measure swords with you.[447]

Were anyone to argue that the President lacked justification to use military force, Hamilton scoffed that he would be a "pretended republican," "however he may prate and babble republicanism."[448]

---

442. *Id.*

443. *Id.* at 135.

444. Alexander Hamilton, Tully No. II (Aug. 26, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 148–50.

445. *Id.* at 148.

446. *Id.*

447. *Id.* at 149.

448. *Id.*

In *Tully No. III*, Hamilton warned of the dangers of anarchy.[449] "An inviolable respect for the Constitution and Laws" constituted "the most sacred duty and the greatest source of security in a Republic[.]"[450] As a result, "a large and well organized Republic can scarcely lose its liberty from any other cause than that of anarchy, to which a contempt of the laws is the high road."[451] Hamilton classified governments into those ruled by laws and those ruled by arbitrary force.[452] If the laws were "disrespected and disobeyed,"[453] he contended, a government of laws would cease to exist:

> Government supposes controul. It is the POWER by which individuals in society are kept from doing injury to each other and are bro't to co-operate to a common end. The instruments by which it must act are either the AUTHORITY of the Laws or FORCE. If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government there is an end to liberty.
>
> Those, therefore, who preach doctrines, or set examples, which undermine or subvert the authority of the laws, lead us from freedom to slavery; they incapacitate us for a GOVERNMENT OF LAWS, and consequently prepare the way for one of FORCE, for mankind MUST HAVE GOVERNMENT OF ONE SORT OR ANOTHER.[454]

As a final charge, Hamilton quoted one of the most recognizable lines of all of Cicero's speeches—the opening of the Catilinarian orations: "To the plausible but hollow harangues of such conspirators," Hamilton told the public, "ye cannot fail to reply, How long, ye Catilines, will you abuse our patience."[455]

---

449. Alexander Hamilton, Tully No. III (Aug. 28, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 159–61.

450. *Id.* at 159.

451. *Id.* at 160.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 161. The line comes from CICERO, IN CATILINAM 32 (C. MacDonald trans., Loeb Classical Library 1977) (63 B.C.) ("Quo usque tandem abutere, Catilina, patientia

Tully No. IV, the final letter, repeated many of the same points and defended the application of armed force to domestic uprisings.[456] "Fellow Citizens," Hamilton wrote, "You are told, that it will be intemperate to urge the execution of the laws which are resisted—what? will it be indeed intemperate in your Chief Magistrate, sworn to maintain the Constitution, charged faithfully to execute the Laws, and authorized to employ for that purpose force when the ordinary means fail—will it be intemperate in him to exert that force, when the constitution and the laws are opposed by force?"[457] To ask such a question was to answer it. Failing to put down the rebellion would "give a CARTE BLANCHE to ambition—to licentiousness; to foreign intrigue. . . . The Hydra Anarchy would rear its head in every quarter."[458]

In the end, the expedition succeeded easily.[459] Thousands of the Whiskey Rebels dispersed without firing any shots.[460] Some were arrested, tried, and convicted, but Washington pardoned them.[461] This show of force and exercise of clemency resulted in a wave of relief and support for the administration throughout the nation.[462]

The Whiskey Rebellion established the first historical precedent on the use of executive force to quell a domestic insurrection. The actions of Hamilton and Washington eased the fears of many in Congress that the presidency could not be trusted with military power.[463] Their response also reasserted the supremacy of federal

---

nostra? Quam diu etiam furor iste tuus nos eludet?") ("How long, O Catiline, will you abuse our patience? How long will this fury of yours elude us?" (author translation)).

456. Alexander Hamilton, Tully No. IV (Sept. 2, 1794) *in* 17 HAMILTON PAPERS, *supra* note 5, at 175–80.

457. *See id.* at 178.

458. *Id.* at 179.

459. MCDONALD, *supra* note 3, at 302.

460. *Id.*

461. *Id.*

462. *Id.* at 301–02.

463. *See* COAKLEY, *supra* note 433, at 67–68. Akhil Amar has described how the "settlements and understandings reached during the Washington Administration" have gained a "special authority" in the liquidation of constitutional government. AKHIL REED AMAR, AMERICA'S CONSTITUTION 197 (2005).

law. The Whiskey Rebels believed that the will of the people, expressed by violent force, might constitute a sort of "plebeian constitutionalism" that could override federal law.[464] In this, they were very much in continuity with Revolution-era notions of mob activity as a natural and healthy channel for expressing popular sentiment. But under the Constitution, the people had to express their will through their representatives in the regular lawmaking process. Hamilton's military efforts and the Tully letters put plebeian constitutionalism to rest, at least for a while.

Some scholars have seen the Pennsylvania militias' actions more as a riot or protest than insurrection.[465] For whatever Hamilton's experience of the affair is worth, he understood the Pennsylvania militias to be in a state of insurrection. Writing under Ciceronian auspices and calling the militia members "Catilines,"[466] he cast the saga in classically insurrectionist terms. He referred in each of the four letters to the militias' "insurrection," called them "insurgents," and accused them of "treason."[467]

This was more than self-serving propaganda. While it was true that the Pennsylvania militias never seriously threatened to overthrow the government, they had successfully suspended the enforcement of federal law.[468] They had also threatened to secede.[469] They were also rumored to be in contact with England and had kickstarted another revolt down in western Maryland.[470] In the age of horse and carriage, keeping wide swaths of rural land under federal control was no joke and the threat of secession was not an empty one. Had the administration failed to respond with strength,

---

464. Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 896–97 (2006).

465. *See* COAKLEY, *supra* note 433, at 67; Vladeck, *supra* note 439, at 161, n.46.

466. *See* Tully No. III, *supra* note 449, at 161.

467. *See* Tully No. I, *supra* note 440, at 133 ("insurrection"), 134 ("insurgents"); Tully No. II, *supra* note 444, at 148 ("insurrection"), 149 ("insurgents"); Tully No. III, *supra* note 449, at 160 ("treason"); Tully No. IV, *supra* note 456, at 176 ("Insurgents").

468. MCDONALD, *supra* note 3, at 301.

469. *Id.*

470. *See id.*

it would have rendered federal collection officials—and the idea of the federal Constitution as supreme law—impotent.

CONCLUSION

In an 1837 speech, Ralph Waldo Emerson worried that "[m]eek young men grow up in libraries, believing it is their duty to accept the views, which Cicero, which Locke, which Bacon, have given, forgetful that Cicero, Locke, and Bacon, were only young men in their libraries when they wrote these books."[471] The Founding generation had no need for that warning. Many were on the younger side, and they took Cicero to heart by infusing his thought into their own work. They wore multiple hats—legal practitioners as well as legal scholars, constitutional architects as well as constitutional theorists. This combination of abilities made them, in many ways, heirs to Cicero's legacy.

Cicero, of course, had his own intellectual debts. He adapted and took inspiration from the work of Polybius, Panaetius, Chrysippus, Cleanthes, and Plato. He is no exception to Alfred North Whitehead's famous remark that the history of Western thought is a "a series of footnotes to Plato."[472]

But the Founders viewed Cicero as indispensable for a lawyer's work. In one way or another, directly or indirectly, they took from him the conceptual framework or substantive dictates of natural law, "right reason," the law of nations, rules of interpretation, judicial review, fundamental law, self-defense, popular sovereignty, republican government, divided power, checks and balances, the rule of law, and the energetic unitary executive. Fully appreciating the Founding period requires appreciating the Ciceronian origins of American law and constitutionalism.

---

471. RALPH WALDO EMERSON, THE AMERICAN SCHOLAR 26–27 (Orren Henry Smith ed., 1911) (1837).

472. A.N. WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY 39 (Free Press 1978) (1929).