

GOVERNEUR MORRIS AND JAMES WILSON AT THE CONSTITUTIONAL CONVENTION

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INTRODUCTION

John Adams worried that the true story of the American Revolution would be lost on later generations. In a letter to his dear friend, Dr. Benjamin Rush, he lamented, “The History of our Revolution will be one continued Lye from one End to the other.”¹ “The Essence of the whole,” Adams wrote, “will be that *Dr Franklins* [sic] *electrical Rod, Smote the Earth and out Spring General Washington. That Franklin electrified him with his Rod—and thence forward these two conducted all the Policy Negotiations Legislation and War.*”² Clearly, Adams would have not have been confused for an optimist.³ Fortunately for the prospects of future generations, however, his worst fears have not been realized—no school has been reported to teach children this mythical version of the Founding. Nevertheless, there is some truth in what Adams wrote to Dr. Rush: the legends of our nation’s founding are often better known than the history.⁴

Take, for example, the Constitutional Convention. In its most simple

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¹ Letter from John Adams to Benjamin Rush (Apr. 4, 1790), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-0903>.

² *Id.*

³ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 571 (1998) (“Within a few years after Independence, however, whatever optimism Adams had had for the refinement of the American character was gone.”).

⁴ See, e.g., David McCullough, *Knowing History and Knowing Who We Are*, 34 *IMPRIMIS* 4, at 3 (Apr. 2005), <https://imprimis.hillsdale.edu/knowing-history-and-knowing-who-we-are/> (“In the rotunda of the Capitol in Washington hangs John Trumbull’s great painting, ‘The Declaration of Independence, Fourth of July, 1776.’ It’s been seen by more people than any other American painting. It’s our best known scene from our past. And almost nothing about it is accurate.”).

form, the story is distilled down to the genius of the “Father of the Constitution”—James Madison.⁵ Alternatively, it is framed as a clash between two groups: one, the Federalists, favoring a strong central government and the other, the Anti-federalists, believing that such an outcome would betray the democratic principles on which American independence was achieved.⁶ There is some truth to this narrative. To be sure, Madison was one of the most important figures in shaping the Constitution and, broadly speaking, the delegates to the Convention and those who engaged in the debate over ratification organized into the two aforementioned factions.⁷ Lost in this classical telling, however, is a recognition of the influential role played by many of the lesser-known delegates and of the divisions within those factions in which they organized.⁸

The purpose of this Comment, then, is twofold: first, to highlight the contributions of two unsung delegates to the Constitutional Convention, James Wilson and Gouverneur Morris; and second, in the process of pursuing the first goal, to examine some of the internal divisions within the Federalist party and highlight, in some small way, the complexities of the politics of the Convention.

Although both men shared the honor of serving in the Pennsylvania delegation to the Constitutional Convention, Wilson and Morris came from different backgrounds and evolved into politicians of very different styles. Wilson, the son of a lower-middle class farmer, immigrated from Scotland in 1765

⁵ EEOC v. Wyoming, 460 U.S. 226, 270 (1983) (Powell, J., dissenting) (“As James Madison, ‘the Father of the Constitution,’ explained . . .”).

⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 549 (1997) (O’Connor, J., dissenting) (discussing the disagreements between the two groups over individual liberties); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting) (discussing disagreements between the two groups over principles of federalism); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting) (discussing disagreements between the two groups over the inclusion of a bill of rights).

⁷ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 322 (1992) (“On one side, Madison, Wilson, Ellsworth, Hamilton, Jay, Iredell, the Morrises, Sherman; on the other, the junta of immensely articulate Pennsylvania antifederalists and their counterparts north and south—Melancton Smith, Luther Martin, James Winthrop, George Mason, Patrick Henry, Elbridge Gerry—the list of truly interesting actors in this drama seems endless.”); see also Richard A. Epstein, *The Federalist Papers: From Practical Politics to High Principle*, 16 HARV. J. L. & PUB. POL’Y 13 (1993) (discussing Federalist thought as articulated in the *Federalist Papers*); Paul Finkelman, *Turning Losers into Winners: What Can We Learn, if Anything, from the Antifederalists?*, 79 TEX. L. REV. 849, 856–70 (2001) (reviewing SAUL CORNELL, *THE OTHER FOUNDERS* (1999)) (providing an overview of Anti-federalist thought).

⁸ See BAILYN, *supra* note 7, at 327 (“And the mass of federalist writings reveals the great range and variety of thinking on that side of the struggle, by no means all represented in the *Federalist* papers.”); John P. Kaminski, *Antifederalism and the Perils of Homogenized History: A Review Essay*, 42 R.I. HIST. 30, 31 (1983) (reviewing THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981)) (“Storing tends to simplify and homogenize what is really a mosaic of Antifederalist positions varying throughout the country.”).

while in his early twenties;⁹ he diligently studied law and philosophy and became one of the most sophisticated legal theorists of the founding generation, later serving as an Associate Justice on the first Supreme Court and writing a series of detailed lectures on law.¹⁰ Morris, born into a wealthy New York family, displayed a natural brilliance and enrolled in King's College at the age of twelve; a lawyer by trade, he moved to Philadelphia to pursue what he saw as the more exciting world of politics and business. His many suitors—he was a bachelor until fifty-seven—and his wooden left leg—from a carriage accident when he was twenty-eight—gave him a mercurial quality that contrasted with the calculating, often rigid, Wilson.¹¹ Fellow delegate William Pierce, in his character sketches of all the delegates to the Convention, described Wilson as “no great Orator,” but one whose arguments were “clear, copious, and comprehensive.”¹² He would win over his opponents “not by the charm of his eloquence, but by the force of his reasoning.”¹³ Morris, on the other hand, was “one of those Genius's in whom every species of talents combine to render him conspicuous and flourishing in public debate.”¹⁴ “No Man has more wit,” Pierce wrote, “But with all these powers he is fickle and inconstant,—never pursuing one train of thinking,—nor ever regular.”¹⁵

More consequential than their differing personalities, however, were their differing constitutional theories. These differences, however, are not readily apparent from how they cast their votes. Both Wilson and Morris were avowed Federalists who argued forcefully for a strengthened central government.¹⁶ Although their votes were aligned on many of the key issues at the Convention, a comparison of their rationale for these votes reveals a fundamental disagreement on the nature of republican government. Wilson believed that republican government could only endure if the people were represented in all aspects of government; this philosophy took seriously the revolutionary concept of popular sovereignty: the theory that ultimate political authority resided in the people and could be delegated to the government only on a limited basis. Morris, however, engaged in what was described by John Adams as the “analysis of antiquity”¹⁷: the belief that society's inherent

⁹ William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 902–03 (2008) (“James Wilson was born in 1742 . . . His ship landed in New York in the fall of 1765.”).

¹⁰ *Id.* at 913.

¹¹ See generally RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 44–52 (2009) (detailing the backgrounds of other Convention co-conspirators).

¹² 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 92 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) [hereinafter CONVENTION RECORDS].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See BAILY, *supra* note 7.

¹⁷ WOOD, *supra* note 3, at 592.

distinctions between the few and the many must be balanced in a mixed constitution. In Morris's view, republican government depended not on the involvement of the people in every aspect of government, but on the proper balancing of the people and the aristocracy in separate spheres of government.

Despite the prominent role they played at the Convention, both men are woefully understudied. "The neglect of Wilson, the unsung of the unsung heroes," writes historian William Lee Miller, is so often "deplored in the retellings of the events of the American beginnings . . . that in the select world of books his unsungness is sung."¹⁸ Similarly, Morris, despite speaking more than any other delegate at the Convention, has yet to be the subject of a scholarly article that focuses exclusively on his contributions there.¹⁹

For this Comment, I examine Wilson's and Morris's speeches at the Constitutional Convention. While both men served on influential committees during the Convention,²⁰ I focus solely on their contributions during

¹⁸ WILLIAM LEE MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* 62 (1992). For an overview of the scholarship on James Wilson, see Ewald, *supra* note 9, at 923–24, n.54.

¹⁹ There are several biographies that have been written on Morris, but his treatment in academic journals is sparse. The best recent treatment of Morris's life is RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS—THE RAKE WHO WROTE THE CONSTITUTION* (2003). Other major biographies include WILLIAM HOWARD ADAMS, *GOUVERNEUR MORRIS: AN INDEPENDENT LIFE* (2003); JAMES J. KIRSCHKE, *GOUVERNEUR MORRIS: AUTHOR, STATESMAN, AND MAN OF THE WORLD* (2005); MARY-JO KLINE, *GOUVERNEUR MORRIS AND THE NEW NATION: 1775–1788* (1978); MELANIE RANDOLPH MILLER, *AN INCAUTIOUS MAN: THE LIFE OF GOUVERNEUR MORRIS* (2008); MELANIE RANDOLPH MILLER, *ENVOY TO THE TERROR: GOUVERNEUR MORRIS AND THE FRENCH REVOLUTION* (2005); MAX M. MINTZ, *GOUVERNEUR MORRIS AND THE AMERICAN REVOLUTION* (1970); THEODORE ROOSEVELT, *GOUVERNEUR MORRIS* (1888); JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS*, 3 vols. (1832); HOWARD SWIGGETT, *THE EXTRAORDINARY MR. MORRIS* (1952). There is no scholarly article that focuses exclusively on Morris's contributions to the Constitutional Convention. His treatment in academic journals, however, includes Paul Finkelman, *The Pennsylvania Delegation and the Peculiar Institution: The Two Faces of the Keystone State*, 112 *PA. MAG. HIST. AND BIOGRAPHY* 49 (1988); Catharine Keppeler Meredith, *Sketch of the Life of Gouverneur Morris*, 2 *PA. MAG. HIST. AND BIOGRAPHY* 185 (1878); Donald L. Robinson, *Gouverneur Morris and the Design of the American Presidency*, 17 *PRESIDENTIAL STUD. Q.* 319 (1987); Philip Wild, *Gouverneur Morris, Conservative*, 5 *PA. HIST. J. MID-ATLANTIC STUD.* 141, at 204–06 (1938); Philipp Ziesche, *Exporting American Revolutions: Gouverneur Morris, Thomas Jefferson, and the National Struggle for Universal Rights in Revolutionary France*, 26 *J. EARLY REPUBLIC* 419 (2006).

²⁰ For a discussion of Wilson's contributions during the Committee of Detail, see William Ewald, *The Committee of Detail*, 28 *CONST. COMMENT.* 197, 282 (2012) ("Wilson was deeply involved in the drafting process, and the Committee report undoubtedly bears many traces of his influence. It is incorrect, however, to exaggerate this point and to characterize the Committee as 'a committee of Wilson and four others.'"). For a discussion of Morris's contributions to the Committee of Style and Arrangement, see Letter from James Madison to Jared Sparks (Apr. 8, 1831), in 3 *THE RECORDS OF THE FEDERAL CONVENTION* 499 (Max Farrand ed., 1911) ("The *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having, probably, been handed over to him by the Chairman of the Committee, himself a highly respectable member, with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved."). For an overview of all of the committees convened at the

proceedings of the “Committee of the Whole House.”²¹ Through these speeches, both men articulated, in a more comprehensive manner than most delegates, their theory of republican government. Furthermore, a comparison of these theories highlights the revolutionary shift in political thought that occurred during the American Revolution.²²

For such a momentous event in the history of the United States and the history of the world,²³ there is very little primary source material on the actual proceedings of the Philadelphia Convention.²⁴ To allow delegates to speak freely and without fear of political consequences, the Convention was conducted entirely in secret.²⁵ An official journal was kept, but in somewhat careless fashion and with few details other than vote tallies and the text of proposed motions.²⁶ Therefore, the balance of what we know about what was actually said at the Convention comes from the various unofficial notes taken by the delegates.²⁷ Of the eight delegates that took notes outside of the

Convention, see John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 171–74 (2006) (describing the committees’ roles).

²¹ When a body is said to operate in a “Committee of the Whole House,” this means that all representatives of that body are included in the proceedings. See, e.g., *McCConnell v. FEC*, 251 F. Supp. 2d 176, 202 n.19 (D.D.C. 2003) (describing how the U.S. House of Representatives has certain procedures allowing it to operate as a Committee of the Whole House).

²² See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1991) (“[The American Revolution] was one of the greatest revolutions the world has known, a momentous upheaval that not only fundamentally altered the character of American society but decisively affected the course of subsequent history.”).

²³ See *id.*

²⁴ See BEEMAN, *supra* note 11, at 445 (“Much of what we know about the deliberations inside the Assembly Room of the Pennsylvania State House during the summer of 1787 comes from just one source—James Madison’s notes on the debates of the Convention.”); Ewald, *supra* note 9, at 931 (“[T]he documentary record is far from ideal: the Madison Notes are the best evidence we have, but it should be borne in mind that they can represent only a brief summary of what he in fact said.”).

²⁵ See *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (“The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the Convention. Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.” (citations omitted)).

²⁶ See Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1723–24 (2012) (“The Convention appointed Major William Jackson to serve as the secretary. In this capacity, he kept an official Journal of the proceedings. The Journal includes minutes of the full Convention and the proceedings as a Committee of the Whole. The minutes record the text of most of the resolutions before the Convention and the votes taken on them. Unfortunately, William Jackson made some mistakes in his record keeping. In addition, Jackson also omitted various important details, such as the dates of certain votes. Jackson also intentionally destroyed some of the records, either because he did not think them worth saving or because he was seeking to preserve secrecy.”). But see Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1682 (2012) (“So, how bad were the original records? Not perfect, but not so bad after all.”).

²⁷ See Maggs, *supra* note 26, at 1724–25 (explaining that Madison’s notes are the most comprehensive,

context of their own speeches, James Madison's are far and away the most comprehensive and detailed.²⁸ Madison's notes contain the imperfections one would expect given the enormous task of recording several months of dense speeches on constitutional theory while simultaneously planning his own remarks and strategy.²⁹ Furthermore, Madison revised his notes late in his life, mostly to align details such as vote tallies with the official journal.³⁰ Despite these drawbacks, Madison's notes are the most important source for studying the Convention.³¹ I rely heavily on them for this Comment, but I have tried to buttress my claims with the notes of other delegates, or point out where the delegates' notes are in disagreement, when necessary.

Historians have offered a number of frameworks through which to view the Convention of 1787.³² In broad strokes, the Convention lasted from May 25 to September 17, 1787, with the major issues, such as representation of the states in the national legislature, being settled in the first half of the summer, before July 26, and many of the less contentious provisions being discussed in August and September. For the purposes of this Comment, with its narrow focus on James Wilson and Gouverneur Morris, I have chosen to organize the events in a manner that is tailored to their contributions to the Convention and thus focuses heavily on the proceedings prior to July 26. In Part I, I discuss Morris's first speeches in the brief period between May 25 and 30. In Part II, I discuss the period between May 31 and July 1, during which time Wilson articulated much of his constitutional theory while Morris took leave from the Convention for personal business. Morris's return on July 2 marks the beginning of Part III, which lasts until July 26. During this time, Morris spoke on nearly every issue considered by the Convention and, in the process, articulated much of his constitutional theory. In this Part, with both Wilson

but listing others that took notes).

²⁸ *See id.*

²⁹ *See* Ewald, *supra* note 9, at 929–32 (discussing Madison's note taking process and how Madison did not document informal conversations or proceedings that may have impacted the Constitutional Convention). In addition, Madison's notes are vulnerable to a couple major, but unavoidable, limitations. First, the notes cover only the Committee of the Whole House, and it is important to recognize that his notes from these proceedings are not word-for-word transcripts, but rather his best attempt to paraphrase a given speech. Second, much of the Convention's business was conducted in smaller committees, during private dinners, or in the annexes of the Convention hall during breaks. There is scant evidence from the committees, and even less regarding the many informal gatherings of delegates.

³⁰ *See generally* MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015) (arguing that Madison revised his notes to a greater extent than is commonly recognized).

³¹ *See id.* at 1 (“James Madison's record of the Constitutional Convention in Philadelphia in the summer of 1787 is the single most important source for the Convention.”).

³² *Compare* Ewald, *supra* note 9, at 938 (partitioning discussion of the Convention into three “Acts”), with CLINTON ROSSITER, *1787: THE GRAND CONVENTION* (1966) (partitioning discussion of the Convention into three phases which encompass different dates than Ewald's three “Acts”).

and Morris having contributed substantially to the Convention, I compare and contrast their theories of governance. For the purposes of this Comment, my analysis concludes when the Convention adjourned for ten days on July 26. By this point, the Convention had addressed most of the major constitutional issues and would spend much of August and September sorting out the Constitution's finer points.³³ I discuss this period only briefly in Part IV. While Wilson and Morris continued to be intimately involved with the proceedings during this time, for this Comment I am concerned with their broader theories of government that were articulated earlier in the summer.

I. OPENING ARGUMENTS: MAY 25–30

Gouverneur Morris's first stint at the Convention was short-lived but consequential; he was present when the Convention achieved a quorum on May 25 but left only six days later to tend to personal matters.³⁴ This absence would keep him from the Convention until July 2, but those first six days provided enough time for him to make his mark.³⁵ Following Edmund Randolph's introduction of the Virginia Plan on May 29, it became clear that many of the delegates did not see themselves limited by the Convention's call to recommend alterations to the Articles of Confederation. Morris agreed that an entirely new form of government was required and moved on May 30 for the Convention to pass a three-part resolution:

1. *Resolved*, That a union of the states, merely federal, will not accomplish the objects proposed by the articles of the confederation, namely, common defence, security of liberty, and general welfare.
2. *Resolved*, That no treaty or treaties among any of the states as sovereign, will accomplish or secure their common defence, liberty or welfare.
3. *Resolved*, That a national government ought to be established, consisting of a supreme judicial, legislative and executive.³⁶

³³ See Ewald, *supra* note 9, at 937 (“The final phase (‘Details, Details, Details’) extends from August 6–September 11, when the Convention debated the fine print of the Committee draft; there was a final coda (September 12–17, ‘Last Rites and Retrospect’) during which the text was polished and signed.”) (citing ROSSITER, *supra* note 25, at 247–48).

³⁴ BROOKHISER, *supra* note 19, at 81 (2003).

³⁵ *Id.*

³⁶ 1 CONVENTION RECORDS, *supra* note 12, at 39. It is useful to briefly note the distinction between a *federal* government and a *national* government, as it was understood at the Convention. This is particularly important because that understanding is in stark contrast to our current understanding of the terms. Gouverneur Morris explained the distinction between *federal* and *national* this way: “the former being a mere compact resting on the good faith of the parties; the latter having a complete [sic] and *compulsive* operation.” *Id.* at 34. Thus, a “federal” plan would more closely resemble the Articles of Confederation, whereas a “national” plan would feature a strong central government. See *generally id.* at 33–35 (discussing certain limitations of the Articles of Confederation and the extent the new government should address these limitations). Richard Beeman also provides a useful summation of the first two of these three propositions:

“The meaning of that language, though convoluted, was nevertheless clear to all of the

This resolution made explicit what was implicit in Randolph's proposed Virginia Plan: the work of the Convention would not be limited to revising the Articles, but rather would extend to the drafting of an entirely new system of government. The proposal was agreed to with only Connecticut voting against, thus setting the stage for the drafting of a new constitution over the coming months.³⁷

In those six days, Morris also injected himself into the debate over the issue of representation in the national legislature, seconding James Madison's motion calling for proportional representation of the states.³⁸ This resolution at first seemed to place the specter of dissolution over the Convention. George Reed of Delaware was the first to speak after Morris seconded Madison's resolution, reminding the Convention that the Delaware delegation was prohibited by their commission to agreeing to any change on the issue of representation in the legislature.³⁹ Furthermore, Reed warned the Convention that if such a change were to be made "it might become their duty to retire from the Convention."⁴⁰ Madison noted, however, that Reed's warning lacked force; several delegates rose to express their skepticism that the *Act of Delaware* could "require or justify a secession of her deputies."⁴¹ In what would become a trend over the course of the summer, Morris was less than diplomatic in his response, drawing his own line in the sand.⁴² Despite the "valuable assistance" provided by the Delaware delegation, he argued that the issue of proportional representation was "so fundamental an article in a national Govt. that it could not be dispensed with."⁴³ On May 30, the Convention voted to save this contentious measure for a later date, and two days later Morris retired, returning to his seat a month later on July 2.⁴⁴

Thus, Morris needed only six days at the Convention to stake out his position on two major issues: First, he established his support for a strong, national government by proposing his resolution to discard the Articles and draft a new form of government altogether; and second, he advocated for proportional representation of the states in the national legislature, even if it meant losing the participation of smaller states in the new government. Mor-

delegates: The Articles of Confederation amounted to nothing more than a treaty among individual, sovereign states, and any such treaty, so long as the states retained their sovereignty, could never be the basis for a proper and durable union."

BEEMAN, *supra* note 11, at 100.

³⁷ *Id.* at 35.

³⁸ *Id.* at 36. Madison's motion did not specify whether a state's representation would be proportioned by population or by some other means, such as wealth. *Id.* at 35-37.

³⁹ *Id.* at 37.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ BROOKHISER, *supra* note 19, at 81.

ris's position on the latter issue would evolve over the course of the Convention, but his commitment to a strong national government never wavered. Wilson would agree with Morris on both scores, and he would address both of these issues and more during Morris's month-long absence.

II. JAMES WILSON AND THE VIRGINIA PLAN: MAY 31–JULY 1

During Morris's absence, the Convention began to address the Virginia Plan. In brief, the plan provided for a bicameral legislature with representation in both chambers being proportional either to the state's population or to the sum of the state's contribution to the national treasury. The members of the lower house would be elected by popular vote, and the members of the upper house by the members of the lower house (picking from nominees chosen by the state legislatures). The legislature would have broad authority to legislate in "all cases to which the separate States are incompetent," and would also have the ability to veto any law passed by a state legislature.⁴⁵ The plan specified little about the executive other than its existence,⁴⁶ and the major provision regarding the judiciary was that its members would be chosen by the legislature, not the executive.⁴⁷

The Convention continued where Morris left off: the structure, powers, and mode of appointment of the lower house.⁴⁸ On Thursday, May 31—the day Morris left the Convention—James Wilson rose to speak for the first time.⁴⁹ In that first speech, Wilson did more than just opine on the issue at hand; he also began articulating his broader views on the purpose of republican government. No government, but especially no republican government, he argued, could last without the confidence of the people; and there was no better way to engender the confidence of the people than by "drawing the most numerous branch of the Legislature immediately from the people."⁵⁰ Wilson likened the federal government to a "pyramid," with the lower house of Congress representing the foundation.⁵¹ Given that he was for "raising the federal pyramid to a considerable altitude," it must rest upon "as broad a basis as possible," meaning that participation in elections should be extended to as

⁴⁵ 1 CONVENTION RECORDS, *supra* note 12, at 21.

⁴⁶ See Ewald, *supra* note 9, at 946 ("Indeed, Articles 7 and 8 of the Virginia Plan said little more than that an Executive should exist, and that it should have the power of a veto. Unspecified were: the term of office; the manner of election; who should make the election; whether and on what grounds the Executive could be removed from office, and, if so, by whom; whether the Executive should be eligible for re-election; and even whether there should be one Executive or many.").

⁴⁷ 1 CONVENTION RECORDS, *supra* note 12, at 21.

⁴⁸ BEEMAN, *supra* note 11, at 105.

⁴⁹ 1 CONVENTION RECORDS, *supra* note 12, at 49.

⁵⁰ *Id.*

⁵¹ *Id.*

many as possible.⁵² Wilson concluded his first speech by laying the groundwork for the debate over the Senate, arguing that *all* legislators—implicitly including those in the upper house—should be elected by the people and that it would be wrong to “increase the weight of the State Legislatures by making them the electors of the national Legislature.”⁵³ In just his first speech, Wilson began to articulate his theory of popular sovereignty.⁵⁴

With the support of James Madison, and overcoming opposition from a coalition led by Elbridge Gerry and Roger Sherman,⁵⁵ the Convention voted 6-2-2 in favor of “election of the first branch of the national Legislature, by the people.”⁵⁶ The Convention immediately moved to Article 5 of the Virginia Plan, which provided for election of the second branch of the Legislature by the first branch selecting from candidates nominated by the state legislatures. Wilson rose from his chair on that same day to argue against Randolph’s plan for the Senate. He expressed his support for proportional representation—even in the Senate—arguing that equal senatorial districts could be created that cut across state lines,⁵⁷ thus keeping his views on the Senate in accordance with his theory of one-person-one-vote. Although the Convention rejected the Virginia Plan’s proposal for the Senate, it also declined to adopt Wilson’s. The Convention then turned to the issue of legislative power, where Wilson remained silent as the delegates debated and adopted a general principle of enumerated powers for the Legislature.⁵⁸

A. *The Executive*

From June 1 through June 4, the Convention turned to the Executive, for which the Virginia Plan provided very little to frame the debate.⁵⁹ One of the most important issues to be decided regarding the Executive was the number of magistrates it would contain: one or many. The colonists’ experience with King George III led several states to experiment with executive councils in lieu of a single governor,⁶⁰ and similar schemes were proposed for the national

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ewald, *supra* note 9, at 942 (highlighting James Wilson’s first substantive statement during the Constitutional Convention and detailing Wilson’s theory of a “pyramid of government” resting on “the broad basis of popular sovereignty.”).

⁵⁵ BEEMAN, *supra* note 11, at 111, 114.

⁵⁶ 1 CONVENTION RECORDS, *supra* note 12, at 50.

⁵⁷ *Id.* at 51–52.

⁵⁸ Ewald, *supra* note 9, at 945.

⁵⁹ *See id.* at 946 (“Unspecified were: the term of office; the manner of election; who should make the election; whether and on what grounds the Executive could be removed from office, and, if so, by whom; whether the Executive should be eligible for re-election; and even whether there should be one Executive or many.”).

⁶⁰ WOOD, *supra* note 3, at 137 (“In Pennsylvania, where radical Whig thought found its fullest expression, the governor was actually totally eliminated, and replaced by an Executive Council of twelve,

government at the Convention. James Wilson, despite the revolutionary fear harbored by many delegates of a monarchical executive, was a forceful advocate for a single magistrate.⁶¹ Wilson argued that “[u]nity in the Executive instead of being the fetus of Monarchy would be the best safeguard against tyranny.”⁶² Nevertheless, his motion for a single executive was postponed.⁶³ Regarding the mode of appointing the Executive, Wilson trod carefully. First, he expressed his hesitation even to offer his views, worrying that “it might appear chimerical.”⁶⁴ He then proceeded to declare his support, “at least . . . in theory,” for popular election of the Executive, citing the experiences of New York and Massachusetts as evidence of this method’s “convenien[ce] and success[.]”⁶⁵ As with both branches of the Legislature, he believed the Executive should be chosen in a manner that is consistent with the principle of popular sovereignty. If the people truly hold the ultimate political authority, then they should be entrusted with appointing the Executive.⁶⁶

The idea of the national Legislature electing the Executive had gained considerable support, but Wilson believed that such a measure would place too much power in the Legislature.⁶⁷ Sensing that his proposal for popular election of the Executive was dead in the water, he pivoted to a compromise position, proposing a method strikingly similar to the Electoral College. Under Wilson’s plan, the people would directly elect special electors who would then convene to choose the Executive.⁶⁸ This proposal, Wilson believed, maintained the involvement of the people, albeit indirectly, while mollifying elements of the Convention who harbored fears about the direct involvement of the people in choosing the Executive. The measure was voted down, but would be returned to later.⁶⁹

Wilson continued to address issues regarding the Executive over the proceeding days, arguing forcefully against John Dickinson’s proposal that the Executive be removable on the request of a majority of the state legislatures. Once again, Wilson invoked the principle of one-person-one-vote; Dickin-

who were elected directly by the people . . .”).

61 See generally BAILYN, *supra* note 7, at 55–93 (discussing pre-Revolutionary conceptions of power and American colonists’ understanding of the threat that power in the hands of a corrupt despot posed to liberty).

62 1 CONVENTION RECORDS, *supra* note 12, at 66.

63 *Id.*

64 *Id.* at 68.

65 *Id.*

66 *Id.* at 69. At this time, Wilson also argued for a short term of office—three years—and no term limits. The Convention initially agreed to a seven-year term for the executive but would return to the issue at a later date. *Id.* at 68–69.

67 *Id.* at 80.

68 *Id.*

69 *Id.* at 80–81; Ewald, *supra* note 9, at 949.

son's proposal would give outsized influence to small states, allowing a minority of the people to either prevent the removal of a criminal or allow for the removal of the Executive for partisan reasons.⁷⁰ He also argued once again—this time winning the support of the Convention—for a measure providing for a single executive.⁷¹ Finally, Wilson argued for investing the Executive, ideally independently but perhaps jointly with the Judiciary, with an absolute veto over legislation.⁷² This measure was postponed, and the Convention provisionally agreed to vest the Executive with a veto that could be overridden by a two-thirds vote in each branch of the Legislature.⁷³

Over these four days Wilson, more than any other delegate, sketched a vision of the presidency that closely resembles the one we have today: a single Executive whose authority was derived from the people, thus imbuing the office with a national character that would allow its occupant to transcend the sectional quarrels of the Legislature and govern for *all* of the people. Rather than representing a threat to the people, James Wilson's executive would be the guarantor of their rights.

B. *The Judiciary*

On Tuesday, June 5 the Convention turned to Clause 9 of the Virginia Plan, which provided for a national judiciary appointed by the Legislature.⁷⁴ Wilson opposed the measure and was the first to speak when it was brought up for debate. "Intrigue, partiality, and concealment," he argued, "were the necessary consequences" of such appointments by a numerous body.⁷⁵ This engendered a response from John Rutledge that vesting the Executive with such power would inch it too close to monarchy—a sentiment that was no doubt shared by those other delegates who favored a *federal* plan.⁷⁶ Nevertheless, Madison moved, and the Convention passed, a resolution striking out "appointment by the Legislature" from the Virginia Plan to be left blank and filled at a later date.⁷⁷ On the last measure of the day, the Convention vested the Legislature with the power to establish lower national courts, thus declining to provide for their creation in the Constitution.⁷⁸ The Convention then adjourned and prepared to return to the battle over the Legislature the next morning.⁷⁹

⁷⁰ 1 CONVENTION RECORDS, *supra* note 12, at 86.

⁷¹ *Id.* at 96–97.

⁷² *Id.* at 98.

⁷³ *Id.* at 103–04.

⁷⁴ *Id.* at 119.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 120.

⁷⁸ *Id.* at 125.

⁷⁹ *Id.* at 132.

C. *The House*

The issue of electing the lower branch of the Legislature was back on the agenda on June 6.⁸⁰ Wilson rose to defend the popular election of the lower house, which was under attack by the South Carolina delegation's proposal to have that house elected by the state legislatures.⁸¹ Once again, it is clear that Wilson's views were not formulated in isolation to other issues, but rather they represented a piece of a remarkably well-thought-out and thorough view of government:

He wished for vigor in the Govt. but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Govt. ought to possess not only 1st. the *force* but 2ndly. the *mind* or *sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.⁸²

In this speech, he continued to advocate for a form of government grounded in the principle of popular sovereignty. If ultimate political authority does reside in the people, it follows, then, that the people should have responsibility for choosing their agents in government. In the same speech, Wilson also made an argument that James Madison would later make in *Federalist No. 10*⁸³: "There is no danger of improper elections if made by *large* districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office."⁸⁴ Many of Wilson's contemporaries subscribed to the conventional wisdom that republican government could only thrive in small territories. Wilson, however, turned this perceived liability—America's extensive territory—into a virtue.

Wilson also answered the charge that the national government might engulf the state governments. He perceived "no incompatibility [sic] between the national & State Govts. provided the latter were restrained to certain local purposes; nor any probability of their being devoured by the former."⁸⁵ To Wilson's mind, the reverse was more likely: "In all confederated systems antient [sic] & modern the reverse had happened; the Generality being destroyed gradually by the usurpations of the parts composing it."⁸⁶ Wilson's

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 132–33.

⁸³ THE FEDERALIST NO. 10, at 125 (James Madison) (Lawrence Goldman ed., Oxford Univ. Press 2008) ("[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.").

⁸⁴ 1 CONVENTION RECORDS, *supra* note 12, at 133 (emphasis in original).

⁸⁵ *Id.* at 137.

⁸⁶ *Id.*

arguments, along with those of Madison, Mason, Dickinson and Pierce, carried the day and the measure providing for electing of the first branch of the Legislature by the state legislatures was voted down.⁸⁷

D. *The Senate*

On June 7, the Convention turned once again to the second branch of the Legislature, opening debate on John Dickinson's measure to allow the state legislatures to elect the Senate.⁸⁸ James Wilson continued to argue in favor of the theory of proportional representation over the preceding days. Once again, he stressed the importance of popular sovereignty:

If we are to establish a national Government, that Government ought to flow from the people at large. If one branch of it should be chosen by the Legislatures, and the other by the people, the two branches will rest on different foundations, and dissensions will naturally arise between them.⁸⁹

For Wilson, popular sovereignty was not just rhetoric; rather, this principle carried real, legal significance. Adhering to this principle—maintaining the participation of the people in government—would provide a stable foundation on which a republican government could be built. This marked a sharp departure from the classical political theorists, such as Gouverneur Morris, who believed that this separation of interests would provide for balance rather than instability.

In response to his argument for proportional representation, Wilson was accused of trying to abolish the states.⁹⁰ “The British Governm[ent],” he replied, “cannot be our model.”⁹¹ This was evident because of the stark difference in character and laws of the British and American people. The only danger Wilson saw was that of the states “devouring the national Gov[ernment].”⁹² Both governments were compatible with each other, as both operated in separate “orbits.”⁹³ Despite this lengthy argument, Wilson's plan for popular election of the Senate was soundly rejected.⁹⁴

During the subsequent debate over Madison's proposal to vest the Senate with an absolute veto over state laws, Wilson elaborated on his fear of “the whole,” or “the general interest,” being consumed by the interests of “each

⁸⁷ *Id.* at 137–38.

⁸⁸ *Id.* at 148.

⁸⁹ *Id.* at 151.

⁹⁰ *Id.* at 153. Fellow Pennsylvania delegate John Dickenson likened the proposed system of government to “the Solar System, in which the states were the planets.” *Id.* “The Gentleman from Pa. (Mr. Wilson),” he argued, “wished . . . to extinguish these planets.” *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 155.

part,” or the “local interests.”⁹⁵ The Articles failed, he argued, because the “jealousy & ambition” of the states predominated over the national interest.⁹⁶ Regarding the states, “[e]ach endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands.”⁹⁷ This proposal, however, is somewhat puzzling in the context of Wilson’s broader theory of government, and there is reason to believe that his support for it was based more on tactics than principle.⁹⁸ It was voted down with only three large states—Pennsylvania, Virginia, and Massachusetts—voting in favor.⁹⁹

The Convention then turned back to the question of proportional representation in the Senate—a debate that would hold the attention of the delegates for much of the next five weeks. At this time, the coalition of small states began to present a strong front in favor of the one-state-one-vote theory in the Senate. Wilson’s support of one-person-one-vote, however, remained unshaken. Noting that Pennsylvania had more than double the population of New Jersey, Wilson asked, “Shall New-Jersey have the same right or influence in the councils of the nation with Pennsylvania?”¹⁰⁰ He quickly answered his own question:

I say no. It is unjust – I never will confederate on this plan . . . I say again I never will confederate on his principles. If no state will part with any of its sovereignty, it is in vain to talk of a national government. The state who has five times the number of inhabitants ought, nay must have the same proportion of weight in the representation. If there was a probability of equalizing the states, he would be for it. But we have no such power. If however, we depart from the principle of representation in proportion to the numbers, we will lose the object of our meeting.¹⁰¹

No other delegate argued as consistently and thoroughly for the principle of one-person-one-vote as did Wilson. In doing so, he revealed a deep understanding of the principles on which American democracy is based as well as a prescient view of where it would go over the next two hundred years.

By this point in the Convention, James Wilson had sketched out his general theory of government—a theory that was remarkably thorough and consistent. Wilson was firmly in the nationalist camp, but he can be distinguished from other nationalists by his views on popular sovereignty and his consistent

⁹⁵ *Id.* at 167.

⁹⁶ *Id.* at 166.

⁹⁷ *Id.*

⁹⁸ See Ewald, *supra* note 9, at 957 (“This is one of the places where one most suspects an explicit alliance between Wilson and Madison. The idea of a ‘national negative’ was one that Madison cherished, but that otherwise had little support in the Convention; and there is no particular reason to think that Wilson would have come up with it on his own, or that he would have supported it had he not been working so closely with Madison.”).

⁹⁹ 1 CONVENTION RECORDS, *supra* note 12, at 168.

¹⁰⁰ *Id.* at 183.

¹⁰¹ *Id.*

adherence to the principle of one-person-one-vote; he believed that if this republic, founded on the authority of the people, was to prosper then the people must be truly represented, and represented equally, in all branches. When Gouverneur Morris returned in July, the nationalists would gain another advocate. But as we will see, Morris's ideology was often at odds with Wilson's, even when they were in agreement on a particular measure.

E. June 11–July 2

In the weeks leading up to Morris's return on July 2, the delegates climbed deeper into the contentious debate of proportional representation in the Senate. On June 15, William Patterson introduced the "New Jersey Plan" or the "Small-state Plan" which featured a unicameral legislature that would be proportioned according to the one-state-one-vote principle.¹⁰² The plan was not taken seriously in its entirety, and the Convention remained committed to a bicameral legislature, but its introduction pushed the issue of proportional representation in the Senate to the top of the agenda.¹⁰³

III. GOUVERNEUR MORRIS RETURNS: JULY 2–JULY 26

Gouverneur Morris returned on Monday, July 2, one day before the Convention adjourned to observe the eleventh anniversary of America's independence from Great Britain. On his return, the delegates were, as Roger Sherman explained, "at a full stop."¹⁰⁴ The issue of proportional representation had consumed the Convention for weeks and tensions were at an all-time high.¹⁰⁵ Gouverneur Morris wasted no time rising to speak in what started out as an expression of support for the formation of a "compromise committee" but quickly transitioned into a lengthy discussion of his views on government.¹⁰⁶ Silenced for over a month, Morris was ready to make up for lost time.

Like James Wilson, Morris advocated for a strong national government, but he did so based on principles directly at odds with Wilson's theory of popular sovereignty. Only the first branch of the Legislature, he argued, originated from the people, while the second branch must be composed of "men of great and established property—an aristocracy. Men, who from pride will support

¹⁰² BEEMAN, *supra* note 11, at 163.

¹⁰³ *Id.* at 163–71 (detailing the contentious debate regarding representation in the national legislature after the introduction of the New Jersey Plan).

¹⁰⁴ 1 CONVENTION RECORDS, *supra* note 12, at 511.

¹⁰⁵ See Ewald, *supra* note 9, at 961 ("Benjamin Franklin delivered a speech remarking that, until this subject of proportional representation had arisen, '[o]ur debates were carried on with great coolness & temper. If any thing of a contrary kind, has on this occasion appeared.'").

¹⁰⁶ See 1 CONVENTION RECORDS, *supra* note 12, at 511–14 (recording Gouverneur Morris's support for a committee and his comments on the nature of government).

consistency and permanency.”¹⁰⁷ This second branch must provide a check on the excesses of the first. Morris continued, “The first branch, originating from the people, will ever be subject to *precipitancy*, *changeability*, and *excess*. . . . This can only be checked by *ability* and *virtue* in the second branch.”¹⁰⁸ Furthermore, to “make them completely independent,” the members of the second branch “must be chosen *for life*, or they will be a useless body.”¹⁰⁹ Shorter terms for the second branch, he argued, would defeat its purpose.¹¹⁰

Acknowledging that aristocratic bodies have their own excesses, he then explained the benefits of confining them in their own branch of government. “It is good policy,” he argued, “that men of property be collected in one body, to give them common influence in your government.”¹¹¹ By giving the aristocracy its own branch of government, “you secure their weight for the *public good*.”¹¹² He continued:

The Rich will strive to establish their dominion & enslave the rest. They always did. They always will. The proper security ag[ainst] them is to form them into a separate interest. The two forces will then controul each other. Let the rich mix with the poor and in a Commercial Country, they will establish an Oligarchy. Take away commerce, and the democracy will triumph. Thus it has been all the world over. So it will be among us. . . . By thus combining & setting apart, the aristocratic interest, the popular interest will be combined ag[ainst] it. There will be a mutual check and mutual security.¹¹³

Without their own body, he argued, the aristocracy would still influence events, but they would do so in “some left-handed way.”¹¹⁴ Providing for an aristocratic body, therefore, arose out of his fear of the aristocracy’s malevolent influence and his hope that confining their interests within a single branch of government would check their abuses.¹¹⁵

Regarding their mode of appointment, Morris was firmly against democratic elections, suggesting instead that it be left to the Executive to make appointments and fill vacancies. Allowing democratic concerns to permeate the Senate would defeat its purpose:

¹⁰⁷ *Id.* at 517.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 518.

¹¹² *Id.* at 517.

¹¹³ *Id.* at 512.

¹¹⁴ *Id.* at 518 (“The wealthy will ever exist; and you never can be safe unless you gratify them as a body, in the pursuit of honor and profit. Prevent them by positive institutions, and they will proceed in some left-handed way.”).

¹¹⁵ *Id.* at 514 (“He fears the influence of the rich. They will have the same effect here as elsewhere if we do not by such a Govt. keep them within their proper sphere. We should remember that the people never act from reason alone. The rich will take advantage of their passions and make these the instruments for oppressing them. The Result of the Contest will be a violent aristocracy, or a more violent despotism.”).

The aristocratic body, should be as independent & as firm as the democratic. If the members of it are to revert to a dependence on the democratic choice. The democratic scale will preponderate. All the guards contrived by America have not restrained the Senatorial branches of the Legislatures from a servile complaisance to the democratic. If the 2d. branch is to be dependent we are better without it.¹¹⁶

Thus, in his first speech back at the Convention, Morris firmly established himself as a proponent of a strong national government—“A firm Governmt. alone can protect our liberties,” he argued¹¹⁷—but one founded on very different principles than those articulated by James Wilson. Morris saw class distinctions as inherent in society. He argued that while the people and the aristocracy each offer something unique to society, both also have their vices; to provide a proper check on these vices, these two classes must have their own power centers in government so that they may be “turned agst. each other” for their mutual benefit;¹¹⁸ if such a balance is to function properly, the aristocratic body must be composed of men of property and virtue, appointed for life and independent from the democratic branch.¹¹⁹ Finally, despite the arguments he made in his first six days at the Convention, he now argued that a body so composed rendered moot the question of proportional representation; however the Senate is apportioned, its members will generally have the same interests. “You may begin with any ratio you please,” he argued, “it will come to the same thing.”¹²⁰

A. *A Representative of America*

When the Convention returned following the Independence Day holiday, the compromise committee presented its proposal: the lower house of the Legislature would be represented proportional to a state’s population, while in the upper house the states would be represented equally.¹²¹ Wilson objected, arguing that the issue of the first branch had been settled and that the committee had exceeded their authority in re-addressing it.¹²² Morris objected too, but at greater length. In his address he emphasized the national character of the government and the dangers of allowing sectional interests to predominate:

¹¹⁶ *Id.* at 512.

¹¹⁷ *Id.* at 514.

¹¹⁸ *Id.* at 512.

¹¹⁹ *See id.* (outlining Morris’s views on how the Second branch should be established). Morris also argued that members of the Senate must serve without pay: “They will pay themselves if they can. If they can not they will be rich and can do without it. [O]f such the 2d. branch ought to consist; and none but such can compose it if they are not to be paid.” *Id.* at 513.

¹²⁰ *Id.* at 513.

¹²¹ *Id.* at 526.

¹²² *Id.* at 527.

He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he had heard, he should suppose that we were assembled to truck and bargain for our particular States.¹²³

Morris saw two major threats if politics were to devolve into sectional disputes, rather than a joint pursuit of national interests. First, he foresaw sectional interests leading to armed conflict between the states: “This Country must be united. If persuasion does not unite it, the sword will.”¹²⁴ Second, he believed that foreign powers would use the confusion created by such sectional crises as an opportunity to pursue their interests on the continent. Morris’s plan for the Senate, he believed, would obviate this tendency to pursue sectional interests, while the plan developed in the committee would lead to “constant disputes & appeals to the States which will undermine the Gen[eral] Government”¹²⁵

Morris believed that a wholly national government provided the best chance at creating an enduring republic. Although he did not call for the abolition of state and local governments, like Wilson, he frequently expressed the danger they present to a well-functioning general government. He cited the experience of Germany, which at the time was not unified and would not be for another eighty-four years, as a cautionary tale to the delegates:

We must have an efficient Govt. and if there be an efficiency in the local Govts. the former is impossible. Germany alone proves it. Notwithstanding their common diet, notwithstanding the great prerogatives of the Emperor as head of the Empire, and his vast resources as sovereign of his particular dominions, no union is maintained: foreign influence disturbs every internal operation, & there is no energy whatever in the general Governmt. Whence does this proceed? From the energy of the local authorities; from its being considered more consequence to support the Prince of Hesse, than the Happiness of the people of Germany. Do gentlemen wish this to be ye case here.¹²⁶

The similarities between America and Germany, he argued, are striking: both peoples were bound by a common language and culture as well as a common interest in unification; but in Germany, sectional interests had taken precedence over national concerns, thus preventing unification. Morris then asked rhetorically: “What if all the Charters & Constitutions of the States

¹²³ *Id.* at 529.

¹²⁴ *Id.* at 530.

¹²⁵ *Id.*

¹²⁶ *Id.* at 552.

were thrown into the fire, and all their demagogues into the ocean[?] What would it be to the happiness of America[?]"¹²⁷

The solution, Morris reiterated, was his plan for a Senate that could be counted on to consider the interests of the *nation*. A Senate whose members were drawn from the people and served short terms would function similarly to the lower house, being prone to devolve into sectional disputes. Morris argued forcefully for his plan, stating that other plans claimed to protect the rights of *individuals* or *states*, but only his "support[ed] the dignity and splendor of the American Empire."¹²⁸ In the end, Morris reluctantly came to support proportional representation in the Senate; he did so, however, only because his plan for the Senate lacked support, not because his thoughts on government had in any way changed. He still contended that the apportionment of the second branch was irrelevant under his plan, but sensing that his plan lacked the necessary support he argued that "[a]s [the Senate] is now constituted he must be agst. its being drawn from the States in equal portions."¹²⁹

B. All Other Persons

Before a solution regarding apportionment of the Legislature could be reached, the Convention would first confront the issue of slavery. While some delegates—Morris included—spoke out against the institution, they never constituted a large enough coalition to threaten putting an end to the practice. To the extent slavery was discussed at the Convention it was mostly in the context of how slaves factored into a state's representation in the Legislature. James Wilson was one of the original cosponsors of the three-fifths ratio but by July 11 he was having second thoughts. Madison wrote in his notes:

Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? [T]hen why is not other property admitted into the computation?¹³⁰

This speech highlights the tensions between Wilson the tactician, who had seen the three-fifths measure as a means of keeping the southern states at the Convention, and Wilson the political theorist, who could not square his own proposal with his ideology. There was also support among several of the delegates for apportioning the Legislature on the basis of property, or some combination of population and property, which naturally led to some very contradictory arguments regarding how slaves should be factored. Initially, Wilson argued for the three-fifths ratio because it was agreed that slaves were

¹²⁷ *Id.* at 553.

¹²⁸ *Id.* at 552.

¹²⁹ *Id.* at 553.

¹³⁰ *Id.* at 587.

to be classified as “persons.”¹³¹ At the time of this speech, however, there was a dispute over whether they would be considered persons or property and Wilson could no longer justify such a clause. It is clear from Wilson’s arguments, however, that he knew the issue to be so contentious that it could threaten a break-up of the Convention. Despite the questions raised in the aforementioned paragraph, he stated: “These were difficulties however which . . . must be overruled by the necessity of compromise.”¹³²

Gouverneur Morris, on the other hand, did not mince words regarding his position. Morris found himself “reduced to the dilemma of doing injustice to the Southern States or to human nature, and he must therefore do it to the former.”¹³³ Agreeing to the three-fifths ratio, he believed, would effectively lend his encouragement to the slave trade. Morris knew that the southern states would never agree to a Constitution that ended the slave trade, but at that time he was still unwilling to compromise.

The next day, July 12, Morris moved that the formula for apportioning representation in the Legislature should be the same as for apportioning taxation.¹³⁴ He contended that if southern states counted slaves towards their representation, they must also count towards their taxes owed to the national government. A number of delegates, including James Wilson, and Charles Cotesworth Pinckney and Pierce Butler of South Carolina, spoke in favor of the measure.¹³⁵ The tenor of the debate took a sharp turn, however, when William Davie of North Carolina took to the floor, declaring, “[I]t was high time now to speak out.”¹³⁶ “It was meant by some gentlemen,” he argued, “to deprive the Southern States of any share of Representation for their blacks.”¹³⁷ If those gentlemen were to be successful, he promised that “the business [of the Convention] was at an end.”¹³⁸ Morris had poked the southern delegates in the eye and they had responded in kind.

In response, Morris once again eschewed the language of compromise. “It has been said that it is high time to speak out,” he stated, and “as one member, he would candidly do so.”¹³⁹ He then proceeded to make a variation on the argument he had been making for the past two weeks: that he endeavored to form a government for the *national* good, and that *sectional* issues such as these will only tear apart the nation. He continued:

He came here to form a compact for the good of America. He was ready to

¹³¹ BEEMAN, *supra* note 11, at 209.

¹³² 1 CONVENTION RECORDS, *supra* note 12, at 587.

¹³³ *Id.* at 588.

¹³⁴ *Id.* at 591–92.

¹³⁵ *Id.* at 592.

¹³⁶ *Id.* at 593.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

do so with all the States: He hoped & believed that all would enter into such a Compact. If they would not he was ready to join with any States that would. But as the Compact was to be voluntary, it is in vain for the Eastern States to insist on what the Southern States will never agree to.¹⁴⁰

By threatening to confederate without the southern states, Morris had drawn a red line that most other northern delegates were not prepared to draw, and thus would be impossible to enforce. Instead of spurring the southern delegates to compromise, Morris's speech produced a renewed push for a full accounting of slaves in a state's representation.¹⁴¹ Wilson, blessed with greater abilities as a tactician, sought to control the blaze by including slaves in a state's representation indirectly: slaves would factor into taxation, and representation would be based off of taxation.¹⁴² In the end, the Convention returned to the same three-fifths ratio that had been established when the debate started. Morris would return to the issue on August 8 to deliver a lengthy address about the "nefarious institution" of domestic slavery, but at that late stage there was little appetite among the delegates for such a contentious fight.¹⁴³ Morris's speeches—rousing as they were—did not affect the final outcome and had threatened a break-up of the Convention in the process.

C. *The Interior Country*

The debate over representation also encompassed the issue of representation for new states that would inevitably be admitted as the nation expanded westward. While Morris "looked forward to that range of New States which w[ould] soon be formed in the west," he believed that those new states should never out-represent the Atlantic states in the Legislature.¹⁴⁴ This is a curious position to take, especially for someone who frequently warned the Convention against sectionalism and who urged his fellow delegates to act in the best interests of the nation *as a whole*. He framed his position, however, as being for the good of the country: "The new States will know less of the public interest than [the Atlantic states], will have an interest in many respects different, in particular will be little scrupulous of involving the Community in wars the burdens & operations of which would fall chiefly on the maritime States."¹⁴⁵ This would not be unjust, he argued, because the new states would be fully informed of the conditions on which they would enter the union.¹⁴⁶

¹⁴⁰ *Id.*

¹⁴¹ BEEMAN, *supra* note 11, at 211.

¹⁴² 1 CONVENTION RECORDS, *supra* note 12, at 595.

¹⁴³ 2 CONVENTION RECORDS, *supra* note 12, at 221–23. Wilson tactfully killed debate on the issue by arguing that a debate over the institution of slavery was premature.

¹⁴⁴ 1 CONVENTION RECORDS, *supra* note 12, at 533.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 534.

At first glance, this issue appears to be Morris's most glaring contradiction at the Convention. Throughout the summer he had stressed the importance of a national government that could withstand sectional bickering. One might be hard pressed to describe this plan any other way than as a means of promoting the sectional interests of the Atlantic states. Morris did not conceive of his argument in this way, however. As a classical political theorist, one who believed that republican governments were dependent upon men of virtue rising to positions of leadership, he worried that it would be to the detriment of the nation *as a whole* if "uncultivated" men from the western territories were given too much political power. This is why his arguments often took on a high-minded tone, such as when he questioned whether the western states could "furnish men equally enlightened, to share in the administration of our common interests."¹⁴⁷ He also argued that the western citizens' lack of interest in commerce and separation from any war that might occur in the Atlantic states would cause their interests to run contrary to those of the national interest.¹⁴⁸ In this way, then, his position is actually quite consistent with his overall political philosophy; he believed that virtuous men were required to advance the national interest, and he was not confident in the ability for such virtue to be fostered on the frontier.

Madison and Wilson quickly trained their fire on Morris's plan. In a lengthy address on July 11, Madison was "clear & firm in opinion that no unfavorable distinctions were admissible either in point of justice or policy."¹⁴⁹ Wilson then addressed the Convention on July 13, in a speech that put the issue to rest for the remainder of the Convention. He compared Morris's plan to the British treatment of the colonies before the Revolution:

The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves of it whether we will or no. This jealousy misled the policy of G. Britain with regard to America. The fatal maxims espoused by her were that the Colonies were growing too fast, and that their growth must be stinted in time. What were the consequences? [F]irst[,] enmity on our part, then actual separation. Like consequences will result on the part of the interior settlements, if like jealousy & policy be pursued on ours.¹⁵⁰

Nonetheless, Morris's arguments were not entirely unpersuasive. The next day four state delegations voted to include a measure that would limit the number of representatives from all future western states to the number of

¹⁴⁷ *Id.* at 583.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 584.

¹⁵⁰ *Id.* at 605.

representatives in the original Atlantic states.¹⁵¹ The measure was voted down, however, with five states voting against and one state divided.¹⁵²

On July 16, the Convention ended the debate over representation by narrowly adopting the infamous “Connecticut Compromise.”¹⁵³ This name is somewhat misleading, as proportional representation of the lower house had already been agreed to and was not seriously in jeopardy. Therefore, the agreement was much less of a compromise as it was a win for the small states and a loss for those, like Wilson and, reluctantly, Morris, who advocated for proportional representation. Whatever the name, this agreement provided for apportionment of the Senate on the principle of equal representation among the states. For the next ten days until the Convention adjourned on July 26 to allow the Committee of Detail to prepare a working document, the delegates debated more detailed matters, including those related to the Executive and the Judiciary. Gouverneur Morris used the discussion of these matters as an invitation to address a wide range of issues regarding the purpose and function of the Executive—thoughts that, he might have believed, his fellow delegates had been unjustly deprived of during his absence from the Convention.

D. Morris’s Executive

On July 19, Luther Martin of Maryland moved that the President should not be eligible for a second term. Gouverneur Morris immediately rose to respond. Over the course of his lengthy address, he would eventually discuss the question of re-eligibility, but “it is necessary,” he told the Convention, to first “take into one view all that relates to the establishment of the Executive.”¹⁵⁴ He would get to Mr. Martin’s motion, but only after he shared everything that was on his mind regarding the Executive.

He began with the proposition, one that was considered conventional wisdom at the time, that republican governments could not endure in extensive territories. Governments in which “the people” play an important role could prosper in small territories such as the ancient Greek city-states, but they would face serious problems in a country as extensive as America. This problem presented the delegates with two options, Morris argued: “We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it.”¹⁵⁵ Given those options, Morris argued forcefully for a strong Executive.

Like Wilson, Morris conceived of the Executive as being the “guardian

¹⁵¹ 2 CONVENTION RECORDS, *supra* note 12, at 2–3.

¹⁵² *Id.* at 3.

¹⁵³ *Id.* at 13–15.

¹⁵⁴ *Id.* at 52.

¹⁵⁵ *Id.*

of the people, even of the lower classes.”¹⁵⁶ The threat of legislative tyranny was not obviated by the creation of a Senate; its role was to provide a check on hastily drafted or ill-advised legislation passed by the lower house. It therefore fell to the Executive to be the “great protector of the Mass of the people.”¹⁵⁷ To effectively carry out this role, the Executive must be vested with the power to appoint officers and judges, to command the military, and to veto ill-advised legislation.¹⁵⁸

Furthermore, the Executive must be re-eligible. Morris’s theory of re-eligibility is grounded in his views on human nature. Man possesses an inherent desire to seek glory, he argued. Seeing as human nature cannot be changed, it is the job of constitution-makers to devise a system that enlists man’s vices, such as the lust for recognition, on the side of the public good. Re-eligibility creates, in his words, a “[c]ivil road to Glory.”¹⁵⁹ Without it, the consequences are clear: “[I]t will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with a reappointment. It may give a dangerous turn to one of the strongest passions in the human breast.”¹⁶⁰ Without the “civil road,” men would be left to seek glory “by the sword.”¹⁶¹

Morris argued against allowing for the impeachment of the Executive, but he would change his position the very next day.¹⁶² This change would arise, however, without a change in the principle on which his opinion is based. In his July 19 speech, he argued against impeachment because he was also arguing for short, two-year terms. Under such an arrangement, any executive who acted with impropriety would surely have their reappointment withheld by the people. Allowing for impeachment by the Legislature in this circumstance would only open the Executive to being controlled by “demagogue[s] in the Legislature.”¹⁶³ In his speech on July 20, however, it became clear that such short terms lacked support among the delegates; therefore, he stated that “[h]e was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office.”¹⁶⁴ Impeachments should result only in the Executive’s punishment as an officer, not as a man; this

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 52–53. Morris initially argued for the Executive to be vested with an absolute veto of legislative measures. *Id.* at 200. Sensing that support for an absolute veto was weak, he pushed for a high bar for legislative override of a veto: a three-fourths vote in both Houses. *Id.* at 585. The Convention eventually settled on a two-thirds vote in both Houses to override an Executive veto, which Morris believed to be “not sufficient to answer the purpose.” *Id.* at 585.

¹⁵⁹ *Id.* at 53.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 68.

¹⁶³ *Id.* at 53.

¹⁶⁴ *Id.* at 68.

meant that a president could lose his position but not be open to criminal sanctions from the Legislature.¹⁶⁵

To effectively serve as the “guardian of the people,” Morris argued that the Executive must be independent from the Legislature. Furthermore, he saw only two measures that could provide such independence: appointment for life or appointment by popular election. Morris did not consider lifetime appointments for the Executive to be a realistic idea, and thus he argued forcefully for popular elections. Morris had discussed his thoughts on this matter in a speech on July 17:

He will be the mere creature of the Legis[ature]: if appointed & impeachable by that body . . . If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation. If the Legislature elect, it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment.¹⁶⁶

Echoing Wilson’s argument from earlier in the summer, he also contended that the vastness of the electorate for the Executive would work in its favor. “The extent of the Country,” he argued, “would secure his re-election ag[ainst] the factions & discontents of particular States.”¹⁶⁷ The national electorate would be too large for the sort of intrigue that plagued the legislatures to affect the outcome. An added bonus of this plan was that it would be “extremely palatable to the people.”¹⁶⁸ Morris no doubt understood that whatever plan of government emerged from the Convention would require the support of the people to be enacted and to endure over the coming years.

In the debates over the Executive, Morris and Wilson’s preferences were almost always aligned: both argued for a single magistrate, elected by the people and independent from the other branches of government; there was much more daylight, however, between their rationale for these preferences. Morris harbored serious concerns about the potential for legislative tyranny and he believed that this configuration of the Executive would provide the best check on those tendencies.¹⁶⁹ Wilson’s rationale had less to do with balancing of power and more to do with political philosophy; most of his ideas regarding the Executive can be explained by his views on popular sovereignty. If that principle were to mean anything, he argued, then the appointment of the Executive must be made by the people via a popular election.

¹⁶⁵ *Id.* at 69.

¹⁶⁶ *Id.* at 29.

¹⁶⁷ *Id.* at 54.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 105. Morris, even more so than Wilson, harbored serious worries about the legislature controlling the executive. “Of all possible modes of appointment that by the Legislature is the worst. If the Legislature is to appoint, and to impeach or to influence the impeachment, the Executive will be the mere creature of it. . . . The Legislature is worthy of unbounded confidence in some respects, and liable to equal distrust in others.” *Id.* at 103–04.

To Wilson's mind, a popular election was the most just means of appointing an executive. Morris, arguing for the same method of appointment, did so because he believed it would produce the best individual who could then provide the best check on the Legislature.

E. The Judiciary

The debate over the Judiciary lacked the contentious issues that animated the debates over the Legislature and had accordingly taken a back seat throughout the Convention. On June 4, the delegates agreed that a national judiciary would exist and would "consist of one supreme tribunal and one or more inferior tribunals."¹⁷⁰ The delegates did not discuss much else besides this general proposition, however; still unanswered was the manner in which the members of the Judiciary would be appointed. The Convention turned to this issue on July 18; once again, Wilson and Morris's interests were aligned.

Nathaniel Gorham opened the debate by arguing for appointment by the Executive with the advice and consent of the Senate: the position to which the Convention would ultimately agree.¹⁷¹ Wilson was the first to respond to Gorham, stating that while his colleague's proposal was perhaps the second best option, he thought it was "his duty" to propose the best: "[T]hat the Judges be appointed by the Executive [alone]."¹⁷² Morris seconded the motion, opening up debate.¹⁷³ The Convention would oscillate on this issue several times, first agreeing to vest the appointment of judges in the Senate before eventually ending up with Mr. Gorham's proposal. Before the issue was resolved, Morris conveyed his thoughts to the Convention on July 21. The Senate, he argued, would be ill-fitted to judge the character of judges as they would inevitably rely too heavily upon the "flattering pictures drawn from their friends."¹⁷⁴ The Executive, however, has the proper distance from the States and is well positioned to have the necessary information to make these appointments. "If the Executive can be safely trusted with the command of the army," he argued, "there can not surely be any reasonable ground of Jealousy in the present case."¹⁷⁵ Here, Morris's reasoning mirrors Wilson's concerns, expressed earlier in the Convention, that the appointment of judges was a task ill-suited to a body as numerous as the Senate.

¹⁷⁰ 1 CONVENTION RECORDS, *supra* note 12, at 104–05.

¹⁷¹ 2 CONVENTION RECORDS, *supra* note 12, at 41.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 82.

¹⁷⁵ *Id.* at 82.

IV. THE FINAL STRETCH: AUGUST AND SEPTEMBER

On July 23, Elbridge Gerry proposed that the Convention appoint a Committee of Detail to incorporate the many measures that had been agreed to in a single document. This committee was arguably the most influential of any convened over the course of the summer.¹⁷⁶ Its five members, one of whom being James Wilson, often exceeded their jurisdiction and inserted provisions into their report that had not been voted on by the full Convention.¹⁷⁷ For the purposes of this paper, however, the Committee of Detail effectively represents an end point. The committee's report framed the debate for the rest of the summer, and thus the majority of speeches took on a different character from what had been seen up to that point. The delegates had elucidated their philosophic views on the nature and purpose of republican government in June and July, but for the remaining month and a half they would be occupied by a more detailed, clause-by-clause analysis of the committee's report.

During this time, Gouverneur Morris continued to opine on a large number of issues: he argued for a fourteen-year citizenship requirement for senators, which Wilson opposed;¹⁷⁸ he argued against the inclusion of an age requirement for Congressmen;¹⁷⁹ he argued that a provision allowing for the president to communicate with state governors was "unnecessary and implying that he could not correspond with others";¹⁸⁰ he argued against the pardon for treason;¹⁸¹ and he argued against restrictions that would give the lower house the exclusive right to originate money bills.¹⁸² Despite their continued engagement in the debate, neither Morris nor Wilson substantially added to or altered their theory of government in this period.¹⁸³

CONCLUSION

If one were to listen to Gouverneur Morris and James Wilson opine on the nature of government independent from any specific questions about structure, one could reasonably assume that they were bitter enemies in the debates at the Constitutional Convention. Over the course of the summer, Morris articulated a more comprehensive and consistent theory of governance than he

¹⁷⁶ See generally William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012).

¹⁷⁷ See generally *id.*

¹⁷⁸ 2 CONVENTION RECORDS *supra* note 12, at 235–37.

¹⁷⁹ *Id.* at 271.

¹⁸⁰ *Id.* at 419.

¹⁸¹ *Id.* at 626.

¹⁸² *Id.* at 224, 276, 297.

¹⁸³ Morris, like Wilson, served on committees, the most influential being the Committee of Style. Through his work on this committee, Morris is credited with drafting the preamble to the Constitution. See generally BROOKHISER, *supra* note 19.

is given credit for.¹⁸⁴ His ideology fit squarely into the classical mold of political science; society, he argued, was inherently divided between the few and the many, and he believed the fruits of enlightenment thinking to be the creation of a mixed constitution: a form of government that could properly divide and balance these different interests. Like Wilson, he advocated for a government of a strong, national character, but their views differed in key respects. James Wilson also wanted balance, but a balance of the functions of government rather than the orders of society. To his mind, republican government could only endure if the people shared in all aspects of government; if the branches of the Legislature were drawn from different sources, class warfare and instability—not balance and order—would result. Morris’s desire to balance orders of society and Wilson’s desire to balance functions of government, mixed with their shared pursuit of a national government, led them to advocate for essentially the same form of government at the Philadelphia Convention. Their agreements at the Convention, however, were founded on diametrically opposed principles. As a result, despite both being on the “winning” side of the constitutional debate, their legacies are as divergent as their ideologies: Morris’s classical political thought could not find its place in the democratic process that sprung from the Constitution, and by the close of the founding generation it had all but disappeared from American politics; Wilson’s theory of popular sovereignty, however, quickly gathered support among Americans of all political persuasions, forming a consensus that has endured to this day.¹⁸⁵ While Morris’s theories represent where American political thought had originated, Wilson’s represent where it would lead.

¹⁸⁴ See EWALD, *supra* note 9, at 917 (“As for the other delegates, figures such as . . . Gouverneur Morris . . . each made important contributions, and each helped to shape the final document in a significant way. But their contributions were primarily tactical, contributions of detail, and none of these delegates can be credited with a comprehensive and carefully worked-out *theory* of constitutional governance of the sort possessed by Madison and Wilson.” (emphasis in original)).

¹⁸⁵ See WOOD, *supra* note 3, at 606–15; see also MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEFS* 4 (1957) (“When the Jacksonian movement formed in the late 1820’s America was far out upon a democratic course For most of the country the Federalist conservatism of Hamilton or John Adams was stone dead Government by the people was largely a matter of consensus and of wont.”).

