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### James Wilson as the Architect of the American Presidency

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# James Wilson as the Architect of the American Presidency

Christopher S. Yoo\*

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## INTRODUCTION

For decades, James Wilson has been something of a “forgotten founder.”<sup>1</sup> The reasons for this are puzzling. Commentators as distinguished as Max Farrand and Clinton Rossiter have recognized his influence at the Constitutional Convention.<sup>2</sup> Indeed, recent historical scholarship based recently discovered documentary evidence suggests that Wilson may have played a more significant role in the initial draft of the Constitution than widely believed.<sup>3</sup>

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<sup>1</sup> Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 189 (2014); accord Nicholas Pederson, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257 (2010) (tracing Wilson’s initial obscurity, increasing interest, and present neglect since 1988).

<sup>2</sup> See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913) (describing Wilson as “[s]econd to Madison and almost on a par with him” and even “[i]n some respects . . . Madison’s intellectual superior”); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 247–48 (1966) (calling Wilson “[s]econd only to Madison—and an honorable second”); accord MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* 21 (1997) (noting that James Bryce, Randolph G. Adams, and Robert McCloskey cited Wilson as no lower the second in influence at the Convention).

<sup>3</sup> Pederson, *supra* note 1, at 269 (citing Lorianne Updike Toler, *Missing Documents and Constitutional Treasures: (Re)Discoveries in Volume 2 of James Wilson’s Papers at the Pennsylvania Historical Society* 5 (2010) (unpublished manuscript)).

The area where commentators generally recognize Wilson’s influence at the Convention is with respect to Article II, which establishes the executive and defines its powers.<sup>4</sup> Most scholars characterize him as a resolute advocate of an independent, energetic, and unitary presidency,<sup>5</sup> and a particularly successful one at that.<sup>6</sup> In this regard, some scholars have generally characterized Wilson’s thinking as overly rigid,<sup>7</sup> perhaps abetted by a personality that William Ewald has aptly characterized as “cerebral, bookish, and aloof.”<sup>8</sup>

Yet a close examination of the Convention reveals Wilson to be more flexible than sometimes characterized. With respect to many aspects of the presidency, including the appointment power, the use of an advisory council, the veto power, and presidential selection, he adopted a more pragmatic approach than generally recognized. The most dramatic example of this is an event that is almost entirely overlooked in the historical record: Wilson’s break late in the Convention from his consistent support for a unitary executive by proposing an advisory council to advise the president on appointments.<sup>9</sup>

While initially seeming like something of a puzzle, the reasons for Wilson’s change of heart become clearer when debates over presidential power are placed in the context of the larger controversies that dominated the Convention, such as the Great Compromise and presidential re-

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<sup>4</sup> See, e.g., William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 950–51 (2008) (noting that “it is clear that over the course of the Convention [Madison] was following Wilson on . . . matters [of executive power] rather than the other way around”).

<sup>5</sup> See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Law*, 104 YALE L.J. 541, 608 (1994) (calling Wilson “the intellectual father of Article II’s vigorous, independent Executive”); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 742–52 (calling Wilson a “well-known champion of an energetic executive”).

<sup>6</sup> Prakash, *supra* note 5, at 777 (observing that “advocates of a strong executive nearly ran the table” at the Convention).

<sup>7</sup> FARRAND, *supra* note 2, at 196, 198 (calling Wilson less “adaptable” and “practical” than Madison); Robert Green McCloskey, *Introduction*, 1 THE WORKS OF JAMES WILSON 9 (Robert Green McCloskey ed., 1967) (describing Wilson as having “a confidence in ideas and an impulse to push them to the limits of their implications without great regard for practicalities”).

<sup>8</sup> Ewald, *supra* note 4, at 925.

<sup>9</sup> The only acknowledgement of Wilson’s change of position of which I am aware is a passing mention in Robert E. DiClerico, *James Wilson’s Presidency*, 17 PRESIDENTIAL STUD. Q. 301, 313 (1987).

eligibility and selection. This broader frame suggests that Wilson held a more pragmatic, less doctrinaire vision of executive power than is commonly recognized.

## I. THE PRESIDENCY AT THE CONSTITUTIONAL CONVENTION

The basic timeline of the Convention is well known. Although the Convention convened on May 14, 1787, it did not achieve a quorum until May 25 and did not begin its work in earnest until May 29, when Edmund Randolph submitted the fifteen resolutions laying out the Virginia Plan. The Convention debated and amended the Virginia Plan as a committee of the whole for two weeks until June 15, when William Paterson introduced an alternate set of resolutions that constituted the New Jersey Plan. After five more days of debate, the committee of the whole rejected the New Jersey Plan in favor of the modified Virginia plan, which prompted two small state delegations to walk out. The disagreement between the large states and the small states continued to fester until Connecticut proposed the Great Compromise on June 29, which the Convention approved on July 16.

After ten days of further debate, the Convention appointed a Committee of Detail on July 26 to distill the various resolutions into a single document. The Committee of Detail issued its report on August 4, and the Convention reconvened on August 6. On August 31, the Convention appointed a Committee of Eleven (consisting of one representative from each state) to resolve the remaining issues. On September 8, the Convention turned the document over to a Committee of Style, which reported its work on September 12. After some further minor amendments, all but three of the delegates signed the Constitution on September 17 (specifically Elbridge Gerry, George Mason, and Edmund Randolph). It is noteworthy that Wilson was one of the five

members of the Committee of Detail, possibly serving as the sole author of the initial draft<sup>10</sup> and generally recognized as the primary author of the final draft.<sup>11</sup> Wilson also played an important supporting role in the Committee of Style.<sup>12</sup>

From the standpoint of the presidency, four important debates occurred at the Convention. Section A reviews the relatively uncontroversial dispute over whether the executive power should be vested in a single person or either a triumvirate. Section B analyzes the somewhat more protracted discussion of whether the single executive should be supplemented by an advisory council modeled on the British Privy Council, which became intertwined with the debate over the appointment power, including Wilson's surprising deviation from his opposition to such an institution late in the Convention. Sections C and D describe Wilson's pragmatism during debates over the veto and the method for presidential selection.

#### **A. Single Executive vs. Triumvirate**

As prior scholars have noted, the Framers clearly rejected proposals to establish an executive triumvirate and instead embraced vesting the executive power in a single individual. Specifically, the Convention approved the idea of a unitary executive on June 4 (prior to the Great Compromise) by a vote of 7 to 3<sup>13</sup> and reaffirmed that decision by affirmation on July 17 (after the Great Compromise) and on August 24 (after the Committee on Detail).<sup>14</sup>

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<sup>10</sup> See *supra* note 3 and accompanying text.

<sup>11</sup> DiClerico, *supra* note 9, at 310.

<sup>12</sup> *Id.* at 302.

<sup>13</sup> 1 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 113 (Max Farrand ed., 1911) [hereinafter FARRAND].

<sup>14</sup> 2 *id.* at 29.

The Virginia Plan, which was submitted on May 29 and devised principally by Madison,<sup>15</sup> said relatively little about the executive.<sup>16</sup> The seventh resolution simply stated that “[a] National Executive be instituted” and would be “chosen by the National Legislature.”<sup>17</sup> The executive’s salary could not be reduced, and the executive would be “ineligible a second time.”<sup>18</sup> It would enjoy “a general authority to execute the National laws” as well as “the Executive rights vested in Congress by the Confederation.”<sup>19</sup>

As soon as the Convention began its consideration of the seventh resolution on June 1, Wilson moved to fill the void in the Virginia Plan by proposing an amendment specifying that the executive would “consist of a single person.”<sup>20</sup> Madison’s notes report that this proposal was followed by a “[a] considerable pause,” after which Benjamin Franklin noted that the issue was of great importance and implored the delegates to state their views.<sup>21</sup> Edmund Rutledge similarly chided the delegates for their reticence and offered his support for Wilson’s proposal on the ground that a single executive would feel the most accountable and would lead to better administration, although he would withhold from the executive the power of war and peace.<sup>22</sup>

Roger Sherman disagreed, arguing that the composition of the executive should be left to the legislature.<sup>23</sup> Randolph offered an even stronger critique, condemning unity in the executive “as the foetus of monarchy.”<sup>24</sup> He instead suggested that the executive power be placed in three

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<sup>15</sup> Ewald, *supra* note 4, at 934.

<sup>16</sup> Indeed, Madison, who was the architect of the Virginia Plan, confessed that he had given little thought to how the executive should be constituted and what powers it should wield. *Id.* at 946 (quoting Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, 9 APRIL 1786–24 MAY 1787, at 370 (Robert A. Rutland et al. eds., 1975)).

<sup>17</sup> 1 FARRAND, *supra* note 13, at 21.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 63. Charles Pinckney seconded the motion. *Id.*

<sup>21</sup> *Id.* at 65.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 65.

<sup>24</sup> *Id.* at 66.

people, arguing that a triumvirate could also exercise vigor, dispatch, and responsibility and would make the executive more independent.”<sup>25</sup>

It was during these initial debates that Wilson laid the conceptual foundation for a unitary executive. In his initial statement, Wilson emphasized that placing the executive power in a single person would give it the most energy and accountability.<sup>26</sup> Giving the power of appointment to a single person would make clear who was responsible for choosing a particular official, while a plural executive would allow officials to evade responsibility.<sup>27</sup> In his second statement, he argued that far from being the embryo of monarchy, a single executive represented the best protection against tyranny in that a complex executive may be more prone to turn into a despotism than a single one and, as reported colorfully in Pierce’s notes, “as bad as the thirty Tyrants of Athens, or as the Decemvirs of Rome.”<sup>28</sup> If a plural executive conducts its affairs poorly, “on whom shall we fix the blame? Whom shall we select as the object of punishment?”<sup>29</sup> Unlike legislatures, which are subject primarily to the internal constraints inherent in their divisions, “the restraints on the executive power are external,” that is by the voting public.<sup>30</sup> Wilson continued, “These restraints are applied with greatest certainty, and with greatest efficacy, when the object of restraint is clearly ascertained. This is best done, when one object only, distinguished and responsible, is conspicuously held up to the view and examination of the public.”<sup>31</sup>

That Wilson would emerge as the unitary executive’s strongest proponent should come as no surprise. He had advanced similar ideas in his lectures on law three years earlier, which

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<sup>25</sup> *Id.* at 65, 71.

<sup>26</sup> *Id.* at 65, 70.

<sup>27</sup> *Id.* at 70.

<sup>28</sup> *Id.* at 66, 71, 74.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 293, 294.

<sup>31</sup> *Id.*

offered two justifications for unity. The first was the need for democratic accountability. In contrast to the legislature, in which restraint is accomplished by dividing power, “The executive power, in order to be restrained, should be *one*.”<sup>32</sup> While Congress relies primarily on internal restraints, “the restraints are on the executive power are external.”<sup>33</sup> Such external constraints “are applied with greatest certainty, and with the greatest efficacy, when the object of restraint is clearly ascertained” and “when one object only, distinguished and responsible, is conspicuously held up to the view and examination of the publick.”<sup>34</sup>

The second was the need for vigor and dispatch, particularly in the case of emergencies, which would be dissipated if “to every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views, of discordant tempers, and of discordant interests, are indispensably necessary.”<sup>35</sup> Placing the executive power “in the hands of one person, who is to direct all the subordinate officers of that department” would lead to “promptitude, activity, firmness, consistency, and energy.”<sup>36</sup>

The notes of the Convention are somewhat contradictory with respect to Madison’s position. Madison’s own notes indicate that he sought to remain noncommittal by postponing the decision between executive unity and plurality until the powers wielded by the executive had been defined.<sup>37</sup> King’s notes, in contrast, indicate that Madison stated that a single executive

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<sup>32</sup> James Wilson, *Lectures on Law: X – Of Government*, in 1 THE WORKS OF JAMES WILSON 383, 400 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 403–04.

<sup>37</sup> 1 FARRAND, *supra* note 13, at 66 (“before a choice shd. be made between a unity and a plurality in the Executive”); *id.* at 67 (“whether administered by one or more persons”). Pierce reports that Dickinson concurred. *Id.* at 74.

was probably the best plan.<sup>38</sup> Pierce's notes record that Madison favored placing the executive power in a single person aided by an advisory council.<sup>39</sup>

In any event, it appears that Wilson himself seconded Madison's motion to postpone consideration of Wilson's proposal, and the Convention approved the motion by unanimous consent.<sup>40</sup> The Convention returned to the issue the next day late on June 2 and discussed it further on June 4. Wilson responded directly to Randolph's claims that a single executive would be tantamount to monarchy and unacceptable to the people by pointing out that all thirteen states placed the executive authority in a single individual.<sup>41</sup> A single executive would also lead to greater tranquility. If all three members of a plural executive wielded equal power, they would be in constant disagreement; whereas if their power was asymmetric, the benefits of tripartite balance would be lost.<sup>42</sup> Moreover, should an issue have more than two sides, the executive could well deadlock, with each of the executives espousing a different position.<sup>43</sup>

A number of delegates supported Wilson. Butler argued that unity was critical in military matters and responded to Randolph's criticism that a unitary executive would ignore the remote parts of the country by arguing that a unitary executive would be more likely to represent all parts of the country impartially.<sup>44</sup> Sherman offered his support for a unitary executive (although, as discussed in the next section, he favored annexing a council to the single magistrate).<sup>45</sup> Elbridge Gerry concurred, arguing that a plural executive would be extremely inconvenient, particularly in military matters, which would be tantamount to a general with three heads.<sup>46</sup>

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<sup>38</sup> *Id.* at 70.

<sup>39</sup> *Id.* at 74.

<sup>40</sup> *Id.* at 66–67.

<sup>41</sup> *Id.* at 96, 105, 109.

<sup>42</sup> *Id.* at 96

<sup>43</sup> *Id.* at 96, 105, 109.

<sup>44</sup> *Id.* at 88–89.

<sup>45</sup> *Id.* at 97, 105.

<sup>46</sup> *Id.* at 97, 105.

A handful of voices spoke in disagreement. A document found in George Mason's papers that Farrand believes is a speech given on June 4<sup>47</sup> arguing in favor of a three-person executive,<sup>48</sup> although Mason was not present for the vote.<sup>49</sup> Mason warned that single executives tend to degenerate into a monarchy, whereas a plural executive could represent different parts of the country.<sup>50</sup> The Convention nonetheless approved Wilson's motion by a vote of 7 states to 3.<sup>51</sup>

Aside from the inclusion of a plural executive in the New Jersey Plan<sup>52</sup> and side comments made during debates on the veto and the appointment powers,<sup>53</sup> the Convention did not return its focus to the topic until July 17, immediately after the Great Compromise and prior to the appointment of the Committee of Detail, when it reaffirmed its embrace of a single executive by affirmation.<sup>54</sup> Aside from a comment on July 24 by Hugh Williamson offered during the debate over whether the President should be appointed by Congress,<sup>55</sup> the issue did not arise again until August 2, when it was once again reaffirmed by unanimous consent.<sup>56</sup>

The choice of a single executive over a plural one thus ultimately proved relatively uncontroversial. As Madison noted in a letter to Thomas Jefferson following the Convention, the plural executive "had finally but few advocates" aside from Randolph.<sup>57</sup> A tally of those who spoke and voted in favor of the proposition confirms Madison's observation, revealing that only

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<sup>47</sup> *Id.* at 110 n.26.

<sup>48</sup> *Id.* at 114.

<sup>49</sup> *Id.* at 97, 101.

<sup>50</sup> *Id.* at 113.

<sup>51</sup> *Id.* at 93.

<sup>52</sup> *Id.* at 244.

<sup>53</sup> *Id.* at 100, 101–02, 103, 107, 139.

<sup>54</sup> 2 *id.* at 29.

<sup>55</sup> *Id.* at 100.

<sup>56</sup> *Id.* at 401.

<sup>57</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 3 FARRAND, *supra* note 13, at 131, 132.

twelve of the forty-five delegates currently in attendance supported a plural executive.<sup>58</sup>

Moreover, it is telling that the two most vocal proponents of the plural executive (Randolph and Mason) found the final document so repugnant that they refused to sign it.

Wilson would reiterate his support for the unitary executive in his remarks before the Pennsylvania Ratifying Convention, where he noted that plural bodies “cannot plan well, act decisively, or keep the common good in view.”<sup>59</sup> Wilson argued that government is most effective when “the *executive authority is one* . . . . The executive power is better to be trusted when it has no *screen*. . . . We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility in them.” Indeed, having a “single magistrate” promotes “strength, vigor, energy, and responsibility in the executive department.”<sup>60</sup>

The Constitutional Convention thus yielded an unusually clear decision on whether the executive should be headed by a single person or a plural institution. Concluding that the executive power should reside in a single individual left unanswered many key questions about what powers that person would wield.

## **B. Proposals for an Executive Council, the Appointment Power, and Wilson’s Big Switch**

The Convention similarly rejected the idea of supplementing the president with an executive council similar to the British Privy Council, although this idea received occasional support during the course of the Convention and ultimately became intertwined with the debate

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<sup>58</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 240 & n.48 (1985).

<sup>59</sup> 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA* 450, 451, 475 (Merrill Jensen ed., 1976).

<sup>60</sup> 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 495, 579 (Jonathan Elliot ed., 1836) [hereinafter *ELLIOT*].

over the appointment power. It was initially debated and arguably implicitly rejected during consideration of Wilson's amendment endorsing a unitary executive during the opening days of the Convention. It would be subsequently be re-proposed following the Great Compromise, endorsed by the Committee of Detail, rejected by the Committee of Eleven, and then debated and rejected again in the closing days of the Convention. Perhaps most surprisingly and most importantly for purposes of this Article, Wilson consistently opposed the idea of an executive council until the final debate, when, in an important event the significance of which has not yet been noted in the literature, he surprisingly switched sides.

The idea of an executive council was first advanced by Gerry on June 1, who, despite supporting a single executive,<sup>61</sup> averred that such a council would add gravitas to and inspire greater public confidence in the executive.<sup>62</sup> King's and Pierce's notes report that Madison endorsed the idea of a council as well, albeit one that operated in a purely advisory capacity.<sup>63</sup> Williamson also favored the idea, arguing that there was no difference between a single executive supplemented by a Council and an executive triumvirate.<sup>64</sup>

The Convention again debated the idea of an executive council when it returned to Wilson's proposal on June 4. Sherman argued in favor of such a council, pointing out that all of the states possessed such an institution and that even the British King was subject to the advice of the Privy Council.<sup>65</sup> Wilson, however, came out firmly against the idea because such a council would tend to obscure responsibility for any malpractices that may occur.<sup>66</sup> This exchange provides some support for the inference that the Convention's subsequent approval of

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<sup>61</sup> 1 FARRAND, *supra* note 13, at 97.

<sup>62</sup> *Id.* at 66, 70–71.

<sup>63</sup> *Id.* at 70, 74.

<sup>64</sup> *Id.* at 71.

<sup>65</sup> *Id.* at 97, 105.

<sup>66</sup> *Id.* at 97.

Wilson’s proposal on June 4 represented an implicit rejection the idea of an executive council as well.

At the same time the Convention weighed the merits of an advisory council, it also engaged in a parallel debate over the appointment power. The original Virginia Plan proposed on May 29 provided that judges be appointed by the national legislature.<sup>67</sup> On June 1, Madison successfully moved that the power to appoint all other officers rest with the executive.<sup>68</sup> Wilson offered his support, arguing as noted earlier that appointment, along with the power to execute the law, represented the only quintessentially executive powers.<sup>69</sup> Allowing a plurality of individuals to wield the appointment power instead of a single executive would destroy all responsibility.<sup>70</sup>

On June 5, the Convention addressed the nomination of lower court judges. During this debate, Wilson again complained that placing the appointment power in a plural body invariably devolved into intrigue, partiality, and concealment.<sup>71</sup> According to Madison’s notes, Wilson further contended, “A principal reason for unity in the Executive was that officers might be appointed by a single person.”<sup>72</sup> Rutledge and Franklin opposed Wilson out of concern that presidential appointment would give the executive too much power.<sup>73</sup>

Madison characteristically equivocated. On the one hand, he questioned allowing legislatures to appoint judges because of their tendency towards partiality and their lack of the background to assess potential judges’ qualifications.<sup>74</sup> On the other hand, he disliked giving so

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<sup>67</sup> 1 FARRAND, *supra* note 13, at 21, 28.

<sup>68</sup> *Id.* at 63, 67, 70.

<sup>69</sup> *Id.* at 66.

<sup>70</sup> *Id.* at 70.

<sup>71</sup> *Id.* at 119, 126, 127.

<sup>72</sup> *Id.* at 119.

<sup>73</sup> *Id.* at 119–20.

<sup>74</sup> *Id.* at 120.

much power to the executive, suggesting perhaps that the power be given to the Senate alone.<sup>75</sup> Rather than resolve this conundrum, Madison attempted to buy time by proposing that the clause determining who should appoint lower-court judges be struck out and left blank, a proposal that was approved by a vote of 9 to 2.<sup>76</sup> Wilson immediately offered a statement that he would oppose any future attempt to give legislatures the power to appoint judges, which was met by an equally determined statement by Pinckney in favor of legislative appointment of judges.<sup>77</sup>

This attempt to postpone addressing this issue was quickly derailed by Rutledge. In an attempt to protect the prerogatives of state courts, Rutledge successfully pushed through an amendment deleting the clause affirmatively creating inferior federal courts.<sup>78</sup> In a sharp reversal of position, this prompted Wilson and Madison to push through compromise language that, instead of creating inferior federal courts by virtue of the Constitution itself, gave Congress the power to create such courts if it so wished. Although Butler complained about the fineness of the distinction, the Convention approved the amendment by a vote of 8 to 2, with 1 state divided.<sup>79</sup> As later summaries revealed, this was taken to give the legislature the power to appoint lower court judges.<sup>80</sup>

On June 13, Pinckney prevailed pushed through an amendment favoring senatorial appointment of the Supreme Court,<sup>81</sup> but only after proposing and withdrawing an amendment to involve both houses of Congress.<sup>82</sup> According to the summaries of the then-current state of the proposals, the Convention gave the Senate the power to appoint the members of the Supreme

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<sup>75</sup>

*Id.*

<sup>76</sup> *Id.* at 116, 120, 126.

<sup>77</sup> *Id.* at 120–21.

<sup>78</sup> *Id.* at 118, 125.

<sup>79</sup> *Id.* at 118, 125, 127.

<sup>80</sup> *Id.* at 226, 231, 237.

<sup>81</sup> *Id.* at 224, 226, 230, 233, 238.

<sup>82</sup> *Id.* at 232, 238.

Court, the entire Congress the power to appoint lower court judges, and the executive the power to appoint all other offices.<sup>83</sup>

The Convention returned to the issue on July 18 following the Great Compromise and before the document had been referred to the Committee of Detail. Wilson's proposal to vest the sole power to appoint judges in the executive failed by a vote of 2 to 6.<sup>84</sup> A compromise proposal supported by Wilson that would have adopted the solution that would ultimately prevail, giving the executive the power to nominate with the advice and consent of the Senate, failed by an equally divided vote of 4 to 4.<sup>85</sup> The Convention postponed consideration on a third proposal submitted by Madison, which would have given the executive the power to nominate the members of the Supreme Court and gave the Senate the power to overturn a nomination based on a two-thirds vote.<sup>86</sup> A final proposal that gave the legislature the power to appoint lower court judges passed unanimously by a vote 9 to 0.<sup>87</sup>

The Convention returned to Madison's compromise proposal on July 21, when it was defeated by a vote of 3 to 6.<sup>88</sup> The Convention then approved the provision giving the Senate the power to appoint the members of the Supreme Court by a vote of 6 to 3.<sup>89</sup>

The issue now passed to the Committee of Detail, which despite the fact that Wilson bore the laboring oar in drafting the report, expanded the legislature's role in appointments. Specifically, in addition giving the Senate the sole power to appoint the members of the Supreme Court; its report of August 6 also gave them the authority to appoint ambassadors (as well as

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<sup>83</sup> *Id.* at 230–31, 236–37. A similar document providing that the entire Congress had the power to appoint the members of the Supreme Court is recognized as being current as of the beginning of the day on June 12. *Id.* at 225 n.4, 226.

<sup>84</sup> 2 *id.* at 37, 41, 44.

<sup>85</sup> *Id.* at 38, 41, 44.

<sup>86</sup> *Id.* at 38, 44.

<sup>87</sup> *Id.* at 38–39, 46.

<sup>88</sup> *Id.* at 71–72, 83.

<sup>89</sup> *Id.* at 72, 83

make treaties).<sup>90</sup> The authority to “constitute tribunals inferior to the Supreme Court” rested with the entire legislature.<sup>91</sup> The power to appoint all other officers rested with the president.<sup>92</sup>

The recommendations of the Committee of Detail provided an occasion to revisit the idea of an executive council. On August 18, Oliver Ellsworth again proposed that the president be advised by a council consisting of the President of the Senate, the Chief Justice, and the heads of the departments of foreign affairs, domestic affairs, war, finance, and marine.<sup>93</sup> Charles Pinckney noted that Gouverneur Morris was planning to submit a similar proposal and suggested that the matter be postponed until the Convention could consider both proposals.<sup>94</sup> Pinckney preferred allowing chief executives to seek advice as they thought best, warning that a strong council would tend to thwart the executive and that a weak one would only provide a pretext for the chief executive to disavow responsibility.<sup>95</sup>

Morris submitted his proposal two days later on August 20, seconded by Pinckney. It advocated establishing a Council of State comprised of the same officials suggested by Ellsworth minus the President of the Senate.<sup>96</sup> The proposal made clear that the purpose of this council was to assist the president and not to serve as an independent repository of executive power. The president could “submit any matter to the discussion of the Council of State, and . . . may require the written opinions of any one or more of the members.”<sup>97</sup> But the president “shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper.”<sup>98</sup>

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<sup>90</sup> *Id.* at 183.

<sup>91</sup> *Id.* at 182.

<sup>92</sup> *Id.* at 185.

<sup>93</sup> 2 *id.* at 328–29.

<sup>94</sup> *Id.* at 329

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 342–43.

<sup>97</sup> *Id.* at 343.

<sup>98</sup> 2 *id.* at 343–44.

These proposals were referred back to the Committee of Detail,<sup>99</sup> which issued a supplemental report on August 22 endorsing what it called a “Privy-Council” consisting of the members suggested by Morris as well as the President of the Senate and the Speaker of the House.<sup>100</sup> Again the language made clear that the Council was subordinate to the president and was not an independent repository of executive power. Instead, the Privy Council was simply charged with advising the president “respect the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.”<sup>101</sup>

The Convention returned to the question of the appointment power on August 23, when Wilson supported Gouverneur Morris’s complaint that bodies like the Senate were too numerous, subject to cabal, and devoid of responsibility to wield the appointment power.<sup>102</sup> Rather than follow this suggestion, the Convention expanded the Senate’s authority by expanding its appointment power to include “other public ministers” as well as ambassadors and judges.<sup>103</sup> Some inconsequential jousting over minor changes to the president’s residual appointment power ensued on August 24.<sup>104</sup>

Questions about an advisory council and the appointment power were included in the matters that had been postponed or on which no action had been taken committed to the Committee of Eleven on August 31.<sup>105</sup> When the Committee of Eleven issued its report on September 4, all mention of a Privy Council had disappeared in favor of the familiar language specifying that the president “may require the opinion in writing of the principal officer in each

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<sup>99</sup> *Id.* at 334, 341 n.4, 342.

<sup>100</sup> *Id.* at 367

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 389.

<sup>103</sup> *Id.* at 383, 394.

<sup>104</sup> *Id.* at 398–99, 405–06, 407.

<sup>105</sup> *Id.* at 473.

of the executive departments, upon any subject relating to the duties of their respective offices.”<sup>106</sup> Morris later explained that the Committee believed that an executive council would allow the president to avoid responsibility for any actions that turned out to be mistakes.<sup>107</sup>

With respect to the appointment power, the Committee of Eleven report eliminated appointment by the Senate in favor of nomination by the president subject to the advice and consent of the Senate.<sup>108</sup> The abandonment of direct senatorial appointment came at a price, however: The advice and consent power now applied to all officers of the U.S. and was no longer limited to judges, ambassadors, and other public ministers.<sup>109</sup>

The Committee of Eleven’s September 4 report appeared to sound a death knell for the idea of an executive council. Wilson commented again about the Senate’s inability to make appointments well on September 6, when criticizing the role envisioned for the Senate in selecting the president when the Electoral College failed to yield a clear majority.<sup>110</sup> Yet during the debates on September 7, the idea of an advisory council was to receive an unlikely advocate in the person of Wilson. Wilson reiterated his belief that the proper execution of the law depends on the ability to appoint responsible officers to execute it and that appointment represented a quintessential executive power.<sup>111</sup> When faced with a proposal that would subject presidential nominations of all federal officers to confirmation by the Senate, however, Wilson believed that senatorial involvement in the appointment power would destroy executive responsibility.<sup>112</sup> Compared with this alternative, Wilson preferred an advisory executive council of the type

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<sup>106</sup> *Id.* at 495.

<sup>107</sup> *Id.* at 542.

<sup>108</sup> *Id.* at 495, 498–99.

<sup>109</sup> *Id.* at 495, 498–99, 539; *see also* DiClerico, *supra* note 9, at 313.

<sup>110</sup> 2 FARRAND, *supra* note 13, at 522–23, 530.

<sup>111</sup> *Id.* at 538–39.

<sup>112</sup> *Id.* at 539.

proposed by Mason to giving the Senate a role in the appointment power.<sup>113</sup> The Convention disagreed, unanimously affirming the Senate's role in confirming appointments and voting 9 to 2 to confirm the decision to extend it to all federal officers.<sup>114</sup>

Mason followed this exchange by making a last ditch effort to revive the idea of an executive council by proposing that it consist of two members each from the eastern, middle, and southern states, appointed either by the **Legislature** or the Senate.<sup>115</sup> Benjamin Franklin, John Dickinson, and Madison all supported the proposal.<sup>116</sup> The real shock was that Wilson spoke in favor of it as well, again as an alternative to giving the Senate a role in appointments.<sup>117</sup> The Convention rejected Mason's amendment by a vote of 3 states to 8.<sup>118</sup>

Wilson's consistent opposition to an advisory council made his support for it in conjunction with a power that he regarded as quintessentially executive quite surprising would seem to contradict the vision Wilson as a doctrinaire advocate of a strong, unitary presidency. Indeed, in his *Lectures on Law* delivered after the Constitution's ratification, James Wilson applauded the lack of the constitutional council:

In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counselors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.<sup>119</sup>

A close analysis of the reasons Wilson gave for his change of heart and a careful examination of the context surrounding this decision provide a much richer and more nuanced

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<sup>113</sup>

*Id.*

<sup>114</sup>

*Id.* at 533.

<sup>115</sup>

*Id.* at 542.

<sup>116</sup>

*Id.*

<sup>117</sup>

*Id.*

<sup>118</sup>

2 *id.* at 533, 542.

<sup>119</sup>

Wilson, *supra* note 32, at 318–19.

understanding of the executive branch. Wilson was willing to compromise unitariness if necessary to recalibrate the larger balance of power between the branches. Admittedly, this concession may have been nothing more than the product of *realpolitik*. But even that implicitly acknowledges that the content of executive power is a human construct rather than a matter of principle not subject to negotiation. Indeed, it was the more important issue of the appointment power that led Wilson to compromise.

### C. The Veto Power

The positions that Wilson took with respect to the veto further illustrate his non-doctrinaire approach to executive power. The initial proposal contained in the Virginia Plan submitted on May 29 called for the veto power to reside in a “council of revision” composed of “the Executive and a convenient number of the National Judiciary.”<sup>120</sup> This veto would be final unless passed by an unspecified supermajority of Congress.<sup>121</sup>

The Convention took up the issue on June 4. Gerry submitted a successful amendment eliminating the council of revision, thereby removing the judiciary from any role in the exercise of the qualified veto.<sup>122</sup> Wilson, seconded by Hamilton, proposed an amendment to eliminate the legislative override that the Convention rejected unanimously.<sup>123</sup> Gerry then successfully moved to set the necessary majority to override a presidential veto at two thirds.<sup>124</sup> Then, somewhat curiously, Wilson, seconded by Madison, attempted to reintroduce the courts into the process by restoring the requirement that the national executive exercise the veto power in conjunction with

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<sup>120</sup> 1 FARRAND, *supra* note 13, at 21.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 94.

<sup>123</sup> *Id.* at 94.

<sup>124</sup> *Id.*

“a convenient number of the national judiciary.”<sup>125</sup> At Hamilton’s request, debate was postponed until June 6,<sup>126</sup> at which time Wilson renewed his plea for including the judiciary in the veto power.<sup>127</sup> The Convention rejected Wilson’s proposal by a vote of 3 to 8.<sup>128</sup>

Wilson renewed this proposal on July 21 after the adoption of the Great Compromise and before the appointment of the Committee of Detail during the time the small states had walked out of the Convention.<sup>129</sup> Despite Wilson’s and Madison’s assurances that such an arrangement would not violate the separation of powers and was necessary to counterbalance the weight of the legislature,<sup>130</sup> the amendment was defeated again by the narrower vote of 3 to 4, with 2 states divided.<sup>131</sup>

Consistent with the debates of June 4 and 6 and despite the fact that Wilson was the primary drafter of the report, the Committee of Detail’s report of August 4 provided for a presidential veto that was subject to being overridden by a two-thirds vote of both houses of Congress.<sup>132</sup> The Convention debated this proposal on August 15. Madison, seconded by Wilson, proposed adding the Supreme Court to the veto process and increasing the supermajority needed for an override to three fourths should both the president and a majority of the Supreme Court object to the legislation.<sup>133</sup> This proposal failed by a vote of 3 to 8.<sup>134</sup> Williamson’s subsequent motion to increase the supermajority required to override a presidential veto to three fourths passed by a vote of 6 to 4, with 1 state divided.<sup>135</sup>

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<sup>125</sup> *Id.* at 95.

<sup>126</sup> *Id.* at 95.

<sup>127</sup> *Id.* at 138.

<sup>128</sup> *Id.* at 131, 140.

<sup>129</sup> 2 *id.* at 71, 73.

<sup>130</sup> *Id.* at 77, 78, 79

<sup>131</sup> *Id.* at 71, 80.

<sup>132</sup> *Id.* at 146, 167, 181.

<sup>133</sup> *Id.* at 294–95, 298.

<sup>134</sup> *Id.* at 295, 298

<sup>135</sup> *Id.* at 295, 301

The Committee of Style’s report of September 12 incorporated the presidential veto subject to being overridden by three fourths of both Houses of Congress.<sup>136</sup> When the Convention debated the report later that day, it immediately reversed its decision of August 15 and reduced the supermajority required for Congress to override a presidential veto back to two thirds.<sup>137</sup> This final language was integrated into the Constitution.

As might have been anticipated, Wilson initially argued that the executive should have an absolute veto (without judicial participation or being subject legislative override) on the grounds that the three branches should be kept distinct and independent as possible.<sup>138</sup> As noted earlier, this proposal failed unanimously.<sup>139</sup> What is harder to explain was his support on June 4, June 6, and August 15 for Madison’s proposal to vest the veto power jointly in the executive and the Supreme Court. It is possible that Wilson insisted on executive unity only with respect to core executive powers, but not with respect executive involvement in legislative powers such as the veto.<sup>140</sup> Whatever the explanation, it is clear that Wilson’s views on the separation of powers were far from rigid. Quite the contrary, it exhibits a willingness to reallocate powers in an attempt to strike the proper balance between the branches. In the words of one historian, “[t]he need to control the legislature was more important than the principle of a strictly unitary executive authority.”<sup>141</sup>

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<sup>136</sup> *Id.* at 593–94.

<sup>137</sup> *Id.* at 583.

<sup>138</sup> *Id.* at 98.

<sup>139</sup> *See supra* note 123 and accompanying text.

<sup>140</sup> 1 FARRAND, *supra* note 13, at 140.

<sup>141</sup> Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 *PRESIDENTIAL STUD. Q.* 689, 692 (1987).

#### D. Presidential Selection

Aside from the Great Compromise, the selection of the executive represented perhaps the most controversial issue during the Convention and the issue on which Wilson came the closest to losing.<sup>142</sup> The Virginia Plan had proposed selection of the executive by the legislature.<sup>143</sup> Wilson initially suggested direct election of the President on June 1.<sup>144</sup> When that idea received a tepid response, Wilson instead formally proposed election by an electoral college, only to see that proposal rejected by a vote of 2 to 8 and legislative selection affirmed by a vote of 8 to 2.<sup>145</sup>

The Convention debated the issue again on July 17, immediately following the Great Compromise. Despite Wilson's support, direct elections were rejected by a vote of 1 to 9, and selection by an electoral college was rejected by a vote of 2 to 8, after which the provision that the President be chosen by the legislature was unanimously reaffirmed.<sup>146</sup>

The issue would arise again two days later on July 19 when the Convention debated whether presidents would be allowed to stand for reelection. Madison pointed out that if the legislature selected the president, re-eligibility would make the Presidents dependent on the legislature.<sup>147</sup> Wilson noted the unanimous sense of the Convention that the President should not be selected by the legislature if eligible to serve a second term and observed with evident pleasure that the idea of popular election, either directly or indirectly through an electoral college, was gaining ground.<sup>148</sup> Madison noted that direct election was probably the best principle, but the differing nature of the franchise in northern and southern states led him to favor

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<sup>142</sup> ELLIOT, *supra* note 60, at 511; DiClerico, *supra* note 9, at 305.

<sup>143</sup> 1 FARRAND, *supra* note 13, at 21.

<sup>144</sup> *Id.* at 68,

<sup>145</sup> *Id.* at 77, 80–81.

<sup>146</sup> 2 *id.* at 32.

<sup>147</sup> *Id.* at 56.

<sup>148</sup> *Id.* at 56.

an electoral college.<sup>149</sup> The motion to reconsider was rejected by a vote of 3 to 7.<sup>150</sup> The Convention then approved a proposal to elect the president by an electoral college by a vote of 6 to 3 and agreed that those electors would be selected by state legislatures by a vote of 8 to 2.<sup>151</sup>

Five days later on July 24, John Houstoun's motion to reconsider presidential selection via the electoral college was rejected by the narrower vote of 4 to 7.<sup>152</sup> A series of additional proposals followed, including a somewhat bizarre suggestion from Wilson that the President be elected fifteen members of Congress chosen by lot.<sup>153</sup> Wilson stated that he had not given his proposal much thought and that he preferred direct election.<sup>154</sup> Consequently, he acceded to the decision to postpone consideration of his proposal.<sup>155</sup>

When the Convention reconvened on July 25, the delegates struggled to reconcile re-eligibility with legislative selection. Ellsworth moved for legislative selection of first-term presidents and for selection by electors appointed by state legislatures in the case of re-eligible candidates was rejected by a vote of 4 to 7.<sup>156</sup> Although Butler, Morris, and Madison spoke in favor of Wilson's proposed electoral college, the Convention failed to concur, and the entire issue was committed to the Committee of Detail.<sup>157</sup>

The Committee of Detail's report of August 6 reaffirmed the idea of legislative selection, notwithstanding the fact that Wilson was the report's principal author.<sup>158</sup> But the entire issue was reframed by the Committee of Eleven's report of August 31, which gave the Presidency

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<sup>149</sup> *Id.* at 56–57.

<sup>150</sup> *Id.* at 57.

<sup>151</sup> *Id.* at 58.

<sup>152</sup> *Id.* at 101.

<sup>153</sup> *Id.* at 103, 105.

<sup>154</sup> *Id.* at 106.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 111.

<sup>157</sup> *Id.* at 112, 113, 114, 115.

<sup>158</sup> *Id.* at 185.

most of its familiar outlines: a four-year term, eligibility for reelection, selection by an electoral college chosen by a method determined by each state legislature, with elections in which no candidate received an electoral college majority being decided by the Senate.<sup>159</sup> On September 6, the Convention substituted the House for the Senate.<sup>160</sup> After many twists, turns, and hardships, Wilson's proposal for presidential selection by electoral college finally prevailed. The core concern was that legislative selection would render any president planning to seek reelection unduly subservient to Congress.

## II. UNDERSTANDING WILSON'S VIEWS ON EXECUTIVE POWER

Although Wilson is often portrayed as an adamant supporter of presidential power, his switch with respect to an executive council and his views with respect to the veto and presidential selection reveal that his beliefs may not have been as simple as is typically believed. Indeed, when his decision is placed within the broader context of the positions he took during the Convention supporting direct democracy, favoring institutional design over class divisions, a strong argument emerges that the Constitution is better regarded as a reflection of Wilson's vision for the country, not Madison's.

### A. Wilson, the Executive Power Pragmatist

Wilson's reversal on the executive council is most easily understood as a reflection of his pragmatic conception of the executive power. As an initial matter, it is useful to differentiate between two distinct concepts that are often conflated together: the unitary executive and inherent executive power. The former addresses the institutional form that the executive branch

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<sup>159</sup> *Id.* at 497–98.

<sup>160</sup> *Id.* at 127.

should take. The latter addresses the scope of the power the executive branch should wield. Taking a strong position with respect to one does not necessarily require taking a strong position with respect to the other. More specifically, one can adopt a narrow vision on the scope of inherent executive power and yet nonetheless insist that whatever power is properly considered executive in nature (either because it is inherently executive or because the Constitution conferred that power on the president as a matter of positive law) must be wielded by a single person.

Focusing on the scope of inherent power, Wilson is far from an executive power essentialist or an executive power maximalist. While Wilson was a strong supporter of executive unitariness, he exhibited greater flexibility when discussing the scope of executive power. In this sense, Wilson shared the inherent pragmatism of the other Founders.<sup>161</sup> McLaughlin notes, “The men of the convention, and Wilson above all, were not rote-learners: they did not absorb unquestioningly the lessons of Blackstone or of Montesquieu. They were themselves original seekers after truth, making their own inductions and extracting the principles of their science from the raw materials of history.”<sup>162</sup> Indeed, Wilson did not base his arguments in favor of a unitary executive on citations to Blackstone, although he clearly could have done so.<sup>163</sup> Instead, Wilson offered his own normative defense of the institution based on energy, accountability, and democratic values.

Wilson’s non-doctrinaire approach to executive power was also apparent in his positions taken with respect to the veto and the appointment power. As noted above, although Wilson supported giving the president an absolute veto, he proposed various alternatives that would have

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<sup>161</sup> MCDONALD, *supra* note 58, at 235; Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 POL. SCI. Q. 1, 14 (1897).

<sup>162</sup> McLaughlin, *supra* note 161, at 3.

<sup>163</sup> WILLIAM BLACKSTONE, COMMENTARIES \*242–43.

included the judiciary in the veto process. Similarly, although Wilson regarded appointment as one of two quintessentially executive powers (with the other being the power to execute the law)<sup>164</sup> and initially opposed given the legislature any role, he compromised in response to efforts to give Congress the power to appoint Supreme Court justices and lower court judges and a later proposal to give the Senate the power to appoint ministers and ambassadors as well, making the surprising proposal to augment the presidency with an council to advise it regarding appointments.

## **B. Wilson, the Democrat**

Even more fundamental to Wilson's position on the proper scope of executive power was his belief in democracy. Ultimately his willingness to compromise on structural matters was counterbalanced by the Convention's willingness to embrace democratic principles.<sup>165</sup>

### **1. Madison's Distrust of Democracy and Embrace of Mixed Government**

Many in the Convention harbored a healthy distrust of what they called the "extravagances of the populace."<sup>166</sup> The principal embodiment of this perspective was Madison. According to his notes from the Convention, Madison began from the premise that "[i]n all civilized Countries the people fall into different classes havg. a real or supposed different interests," "particularly the distinction of rich & poor."<sup>167</sup> As population increased, "the equal laws of suffrage" will cause power to "slide into the hands" of the agrarian poor would exhibit a "leveling spirit" that sought to impose a forcible redistribution of the nation's wealth.<sup>168</sup>

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<sup>164</sup> See *supra* notes 69, 111 and accompanying text.

<sup>165</sup> McCarthy, *supra* note 141, at 692.

<sup>166</sup> McLaughlin, *supra* note 161, at 15; DiClerico, *supra* note 9, at 309.

<sup>167</sup> 1 FARRAND, *supra* note 13, at 422.

<sup>168</sup> *Id.* at 422–23.

Madison’s solution was to conduct elections through a series of “successive filtrations” designed to insulate the government from the democratic will.<sup>169</sup> As an initial step, Madison would limit the franchise to those owning real property, warning that unlanded citizens “will become the tools of opulence & ambition.”<sup>170</sup> Although voters would elect the House of Representatives, Madison proposed that the Senate be elected by the House of Representatives instead of through direct elections.<sup>171</sup>

The Senate was the key institution to Madison’s vision for the federal government. A Senate constituted through indirect elections would be composed of a small number of “enlightened citizens.”<sup>172</sup> The Senate, moreover, was supposed to represent the wealth of the nation<sup>173</sup> and have as “one of its primary objects the guardianship of property.”<sup>174</sup> As such, the Senate was designed to serve as a “check on democracy.”<sup>175</sup> As Madison would later state in his letter to Jefferson describing what had transpired at the Convention, the Senate would serve as the “great anchor of the Government.”<sup>176</sup>

To achieve this, Madison envisioned a Senate comprised of a relatively small number of members serving relatively long terms and invested with vast power,<sup>177</sup> including the authority to negotiate treaties,<sup>178</sup> appoint judges,<sup>179</sup> and even invalidate state legislation.<sup>180</sup> Madison argued

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<sup>169</sup> *Id.* at 50.

<sup>170</sup> 2 *id.* at 203–04.

<sup>171</sup> *Id.* at 20.

<sup>172</sup> *Id.* at 432, 433.

<sup>173</sup> *Id.* at 158.

<sup>174</sup> 1 *id.* at 562; *accord* FARRAND Supp. 119 (stating that the Senate is supposed to protect the private property held by the “opulent minority”).

<sup>175</sup> *Id.* at 222.

<sup>176</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND, *supra* note 13, at 131, 133.

<sup>177</sup> Ewald, *supra* note 4, at 969, 985.

<sup>178</sup> *Id.* at 1000.

<sup>179</sup> 1 FARRAND, *supra* note 13, at 120.

<sup>180</sup> 1 *id.* at 21. Madison regarded as power as the lynchpin of the entire system. *Id.* at 164; McDONALD, *supra* note 58, at 165; Ewald, *supra* note 4, at 968.

that representation in the Senate would be proportional to population not out of some commitment to equality, but rather to ensure that Virginia would be well represented in what would be the most powerful institution in the federal government.<sup>181</sup> The proposed primacy of the Senate helps explain why Madison gave so little thought to the design of the executive, because in his vision of a government dominated by the Senate, the president was simply an auxiliary player.<sup>182</sup>

In this sense, Madison's conception is less like the American conception of the separation of powers and more like the traditional British tradition of mixed government. Mixed government bears some superficial similarity to the U.S. vision of separated powers leavened by a system of checks and balances, but in its essence is based on fundamentally different principles. As M.J.C. Vile noted in his landmark book, however, mixed government relies on supposed differences among different social classes of people in ways that are generally considered antithetical to the America's traditional hostility towards aristocracy.<sup>183</sup>

The theory of mixed government envisioned that society was constituted of three elements—monarchy, aristocracy, and democracy—and sought to blend each of these groups into every function of government.<sup>184</sup> The central concern was to use the royal and aristocratic elements to as a check on the democratic element's tendency toward "mob rule."<sup>185</sup> The idea, then, is not to divide power for its own sake or to segregate particular functions that should be kept separate for theoretical reasons. Instead, mixed government is based on maintaining a

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<sup>181</sup> Ewald, *supra* note 4, at 971.

<sup>182</sup> *Id.* at 970, 1007.

<sup>183</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 144–45, 184–86 (1967).

<sup>184</sup> *Id.* at 37.

<sup>185</sup> *Id.*

dynamic tension between the different social classes, paying particular attention to favor the upper classes.

This balance was implemented through the institutions of government, and the institutional forms were purely instrumental toward these goals. Although there was a tendency to equate the executive with the monarchy, the judiciary with the aristocracy, and the legislature with democracy, mixed government did not perceive any particular institution as having an essentialist character.<sup>186</sup> The mutability of functions is demonstrated eloquently by the British government, which blended executive, legislative, and judicial functions in the Crown, selected executive ministers from the members of Parliament, and allowed the House of Lords to evolve into a judicial body. The separation of powers, in contrast, allows the nature of particular governmental functions to determine to which branch it should be assigned. Rather than blending functions across multiple institutions, once a function has been allocated to a branch, the separation of powers attempts to ensure that no other branch can interfere with its exercise.<sup>187</sup>

Mixed government is thus based on principles that are quite different from those underlying the separation of powers and indeed conflicts with it to a considerable extent.<sup>188</sup> Both concepts share a common focus on relying on institutional internal checks within the government to guard against abuses of power, but for different reasons.<sup>189</sup> The separation of powers prevents the aggrandizement of power by dividing functions according to an abstract principle and isolating those sets of functions into separate spheres. Mixed government requires some division of functions, but is not wedded to any particular allocation of power. Instead, it relies on what

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<sup>186</sup>

*Id.*

<sup>187</sup>

*Id.*

<sup>188</sup>

*Id.* at 37, 38, 152, 153.

<sup>189</sup>

*Id.* at 38.

Vile called “the separation of agencies”<sup>190</sup> or what modern scholars might call “the separation of functions”<sup>191</sup> that simply required that powers be divided without embodying any preconceived vision of how that would be done. The checking was done not by the differences in the institutions, but rather by the differences in the nature of the people constituting those institutions.

The inapplicability of mixed government to a country where monarchy and aristocracy were considered anathema naturally led the former colonists to eschew it in favor of the separation of powers when organizing the new state governments.<sup>192</sup> Aside from the constitutions of South Carolina, New Hampshire, and New Jersey, which were all intended to be temporary, the state constitutions drafted in 1776 and early 1777 embraced the separation of powers as an organizing principle and rejected any concept of checks and balances, although the weakness of the Governors and the strength of the legislatures created by these constitutions meant that the embrace of the concept of limited import.<sup>193</sup> Still, the non-viability of mixed government as a theory left Americans with no other alternative.<sup>194</sup> But the separation of powers left many key questions unanswered, including how the executive should be selected, whether the legislature should be bicameral or unicameral, and ambiguities about where certain powers should reside.<sup>195</sup>

Equally importantly, early state legislatures began to engage in a wide range of abuses, most notably the failure to protect private property,<sup>196</sup> but also including failure to respect

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<sup>190</sup> *Id.* at 40.

<sup>191</sup> Peter L. Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

<sup>192</sup> VILE, *supra* note 183, at 138–39, 1651–62.

<sup>193</sup> *Id.* at 147–48.

<sup>194</sup> *Id.* at 155.

<sup>195</sup> *Id.* at 156–57.

<sup>196</sup> MCDONALD, *supra* note 58, at 154–57

religious freedom, the rights of criminal defendants, and freedom of the press.<sup>197</sup> The separation of powers offered no way to place limits on the legislature aside from elections.<sup>198</sup> As Vile notes, “unlike the theory of mixed government, which opposed power with power, the pure separation of powers depended upon an intellectual distinction between the functions of government for its safeguard and upon elections for its sanction.”<sup>199</sup> That explains why later state constitutions, including New York and Massachusetts, began to move away from the strict separation of powers.<sup>200</sup>

Many of the leading writers of the day continued to be influenced by the mixed government vision of the state. John Adams’s vision of the separation of powers showed such clear sympathy for monarchy and aristocracy<sup>201</sup> that Thomas Paine was provoked to complain that Adams’s “head was a full of kings, queens and knaves as a pack of cards.”<sup>202</sup>

## 2. Wilson’s Embrace of Democracy

In this debate, Wilson espoused a very different vision of government. Mixed government was inappropriate for the U.S., as it was “suited to an establishment of different orders of men.”<sup>203</sup> Instead, Wilson envisioned a government based on the sovereignty of the people.<sup>204</sup> The contrast between Madison’s and Wilson’s position was stark. As Vile has noted, the idea of delegation of power from the people “is deeply opposed to the ideas of the balanced

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<sup>197</sup> Ewald, *supra* note 4, at 967.

<sup>198</sup> VILE, *supra* note 183, at 158, 162.

<sup>199</sup> *Id.* at 161.

<sup>200</sup> *Id.* at 162–63.

<sup>201</sup> 6 THE WORKS OF JOHN ADAMS 67.

<sup>202</sup> Novanglus, or a History of the Dispute with America, *in* 4 THE WORKS OF THOMAS PAINE 62–63.

<sup>203</sup> JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 40 (McMaster & Stone).

<sup>204</sup> VILE, *supra* note 183, at 174.

constitution, in which important elements were independent of popular power, and able to check the representatives of that power.”<sup>205</sup>

Moreover, Wilson regarded men as being fundamentally equal, perhaps not in all respects, but at least with respect to creating a civil government.<sup>206</sup> He thus opposed making property ownership a prerequisite for voting and favored making the franchise as broad as possible.<sup>207</sup> Not only could the electorate be trusted; participating in elections would serve an educative function by forcing people to look beyond their limited circle and thereby heighten their awareness of the interdependence of society.<sup>208</sup>

Wilson espoused democratic positions on a wide range of other issues. He opposed an unsuccessful attempt to replace direct election of the members of the House of Representatives with selection by state legislatures<sup>209</sup> and advocated unsuccessfully for direct election of Senators.<sup>210</sup> He opposed imposing property qualifications on both the franchise<sup>211</sup> and as a precondition to serving in Congress.<sup>212</sup> He insisted that the Constitution be ratified by state conventions instead of by Congress.<sup>213</sup> And he was the only delegate to favor proportional representation as a matter of justice.<sup>214</sup> He thus opposed efforts to have each state represented equally in the Senate<sup>215</sup> as well as proposals to limit the representation of newly admitted states in the west.<sup>216</sup>

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<sup>205</sup> *Id.* at 150

<sup>206</sup> James Wilson, *Lectures on Law: VII – Of Man, as a Member of Society*, in 1 THE WORKS OF JAMES WILSON, *supra* note 32, at 306, 308; George W. Carey, *James Wilson’s Political Thought and the Constitutional Convention*, 17 POL. SCI. REVIEWER 49, 67 (1987).

<sup>207</sup> 1 FARRAND, *supra* note 13, at 375.

<sup>208</sup> McCarthy, *supra* note 141, at 694.

<sup>209</sup> 1 FARRAND, *supra* note 13, at 132–33.

<sup>210</sup> *Id.* at 151.

<sup>211</sup> *Id.* at 375.

<sup>212</sup> Ewald, *supra* note 4, at 994.

<sup>213</sup> 1 FARRAND, *supra* note 13, at 253.

<sup>214</sup> *Id.* at 179, 183.

<sup>215</sup> *Id.* at 179–80.

<sup>216</sup> *Id.* at 583, 605–06.

Perhaps Wilson's greatest labor in support of direct democracy is his advocacy in favor of the direct election of the President. As discussed above, the Convention's rejection of this proposal led him to offer the ultimately successful compromise of relying on an electoral college. And even this proposal was repeatedly rejected until the waning days of the Convention when the Framers' desire to permit George Washington to stand for reelection led them to reject congressional selection of the president.

The principle animating Wilson's positions is that direct elections from a broad franchise best reflect the power of the people, which is the source from which all sovereignty flows.<sup>217</sup> Moreover, his believe in the equality of all citizens led him to adhere to the principle of one person, one vote. His reasons for favoring direct election of the Senate were thus squarely in conflict with Madison's filtration model of the Senate.<sup>218</sup> Rather than viewing selection by different approaches to be a good thing, Wilson argued that both branches of Congress should rest on the same foundation: the power of the people at large.<sup>219</sup> His opposition to the Great Compromise was not because it undercut Madison's vision of the Senate as a repository of wisdom and stability, but rather for its abandonment of the principles of equal representation.<sup>220</sup>

In short, Wilson and Madison proceeded from fundamentally different premises. For Madison, the government was designed to represent social interests, whereas for Wilson, the government was designed to represent individuals.<sup>221</sup> The differences between Madison's and Wilson's positions also explain their disparate reactions to the Great Compromise. It effectively killed Madison's animating vision of setting up the Senate as a filter to limit democracy and as

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<sup>217</sup> *Id.* at 79.

<sup>218</sup> Ewald, *supra* note 4, at 945.

<sup>219</sup> 1 FARRAND, *supra* note 13, at 151.

<sup>220</sup> *Id.* at 179–80.

<sup>221</sup> Ewald, *supra* note 4, at 978.

the dominant governmental institution. While it also represented a setback for Wilson's vision based on popular sovereignty, it far from killed it.<sup>222</sup> In addition, he viewed the fundamental unit of politics to be the individual, not the states.<sup>223</sup>

### C. **Wilson, the Institutionalist**

But Wilson's commitment to democracy did not extend only to participation in elections. In addition, it was about promoting accountability. Accountability stems from three sources. The first is the tendency of plurality to obscure responsibility already discussed above. The second focuses on certain fundamental differences between legislatures and executives. The third turns on the relationship between the size of the electoral district and the responsiveness of elected officials to the popular will. Wilson was able to use these various insights to construct a system that depended neither on underlying social differences among classes of people nor the immutable nature of the governmental functions to define how powers would be divided. Moreover, it was able to avoid the need to hermetically seal the branches off from one another by creating a new basis for dynamic interaction based on institutional design rather than class.

Wilson did not share Madison's reflexive fear that the government would be too strong. Instead, Wilson's primary concern was that the government would be too weak.<sup>224</sup> Specifically, one of the Framers' central concerns was the danger of all power being drawn into the legislative vortex.<sup>225</sup> Wilson thus saw the need to use other institutions as counterbalances to legislative power. The problem is that the rejection of the class-based institutions associated with mixed government left Wilson searching for other bases for identifying other institutions.

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<sup>222</sup> *Id.* at 1002.

<sup>223</sup> 1 FARRAND, *supra* note 13, at 482–83; Ewald, *supra* note 4, at 978.

<sup>224</sup> McCarthy, *supra* note 141, at 691.

<sup>225</sup> 2 FARRAND, *supra* note 13, at 74; McDONALD, *supra* note 58, at 241.

Instead of class differences, Wilson relied on institutional differences between different types of actors. For example, plural institutions like legislatures do not plan well, lack secrecy and decisiveness, and often lose focus on the common good.<sup>226</sup> Moreover the nature of the checks on the two branches is different.<sup>227</sup> Wilson noted in his lectures on law, “The restraints on the legislative authority must, from its nature, be chiefly internal; that is, they must proceed from some part or division of itself. But the restraints on the executive power are external.”<sup>228</sup> And external restraints require clear lines of responsibility. Thus, as Wilson noted during the Convention, “In order to control the Legislative authority, you must divide it. In order to control the Executive you must unite it.”<sup>229</sup>

Wilson also suggested that large electoral districts are less likely to elect bad representatives than small ones, because small districts provide the greatest opportunity for bad men to intrigue their way into office.<sup>230</sup> This reaches its logical conclusion in the President, who, having been elected by different parts of the country, will consider himself charged with watching over the entire nation rather than favoring particular parts of it.<sup>231</sup> The President then “may justly be styled *the man of the people*,”<sup>232</sup> a concept often regarded as a post-revolutionary idea associated with Andrew Jackson.<sup>233</sup>

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<sup>226</sup> McCarthy, *supra* note 141, at 691. For the classic statement, see THE FEDERALIST NO. 70.

<sup>227</sup> DiClerico, *supra* note 9, at 304.

<sup>228</sup> Wilson, *Lectures on Law: X: Of Government*, *supra* note 32, at 400.

<sup>229</sup> 1 FARRAND, *supra* note 13, at 254, 343; accord Wilson, *Lectures on Law: X: Of Government*, *supra* note 32, at 400 (“The legislature, in order to be restrained, must be *divided*. The executive power, in order to be restrained, should be *one*. Unity in this department is at once a proof and an ingredient of safety and of energy in the operations of government.”).

<sup>230</sup> 1 FARRAND, *supra* note 13, at 133. Madison sounded similar sentiments. *Id.* at 136.

<sup>231</sup> ELLIOT, *supra* note 60, at 448.

<sup>232</sup> 1 FARRAND, *supra* note 13, at 133; 2 ELLIOT, *supra* note 60, at 452; McCarthy, *supra* note 141, at 693. Wilson advanced similar views during the Pennsylvania Ratifying Convention. FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 201 (1994). For a discussion of Wilson’s views and other historical antecedents, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 96–97 (2008).

<sup>233</sup> Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 78 (1994).

These differences provide some justification for dividing power that are distinct from the class-based system of mixed government. Because these categories avoid the categorical approach of the strict separation of powers, it permitted the development of checks and balances between the branches. For example, the legislature would be restrained by bicameralism and by the executive and judicial departments through the veto and judicial review.”<sup>234</sup>

At the time, Wilson was quite concerned that the current structure would turn President into a “Minion of the Senate.”<sup>235</sup> He opposed the role the Senate was initially supposed to play in resolving presidential elections that did not yield a clear electoral college majority, a role that was eventually transferred to the House of Representatives. He similarly disliked the role of the Senate in ratifying treaties, which he also proposed be shifted to the House.<sup>236</sup>

But Wilson’s biggest concern during the closing days of the Convention was the role of the Senate in appointments. Wilson regarded appointments as an executive function and argued that giving the power to the legislature would create partiality and reduce accountability.<sup>237</sup> The Committee of Detail had given the Senate the exclusive right to appoint judges and ambassadors.<sup>238</sup> The Committee of Eleven transferred the power to the President, making nominations subject to confirmation by the Senate, while simultaneously expanding it to cover all executive officials.<sup>239</sup>

Framing as Wilson as a nonessentialist who cared about accountability as a means of promoting democracy provides a possible explanation for the reason he embraced augmenting the single executive with an advisory council during the waning days of the Convention. Wilson

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<sup>234</sup> 1 FARRAND, *supra* note 13, at 52.

<sup>235</sup> 2 *id.* at 523.

<sup>236</sup> *Id.* at 129–33.

<sup>237</sup> 1 *id.* at 119; 2 *id.* at 41.

<sup>238</sup> 2 *id.* at 169, 171.

<sup>239</sup> *Id.* at 498, 499; DiClerico, *supra* note 9, at 313.

was more concerned about the lack of democratic accountability resulting from the blurring of responsibility than he was about the diminution of executive power.<sup>240</sup> In the process, he created a uniquely American vision of the separation of powers that preserved the checks and balances of mixed government without assuming any of the aristocratic baggage.<sup>241</sup>

#### **D. Wilson, the Nationalist**

Equally fundamentally, Wilson rejected the Virginia conception that civic virtue required that the country remain a small, agrarian republic. Influenced by the Scottish school of political economy led by Adam Smith, Thomas Reid, and David Hume, Wilson developed a view that interaction with a large community developed civic virtue in a different way by underscoring people's interdependence and shared human nature.<sup>242</sup> A person elected by a broad elector would not be obligated to particular economic or local interests and would instead have to appeal to a wider range of people representing a broader range of interrelated interests.<sup>243</sup> At the same time, voters' participation in a national election would develop their public spirit by making them more aware of the different ways of life reflected in the larger community in which they live.<sup>244</sup>

Wilson saw was the need to create a strong state broad enough to knit these different communities together into a nation.<sup>245</sup> This conception views the state is a potential edifier rather than a necessary evil.<sup>246</sup> The lesson of the Articles of Confederation is that a government

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<sup>240</sup> DiClerico, *supra* note 9, at 314.

<sup>241</sup> VILE, *supra* note 183, at 174–76.

<sup>242</sup> McCarthy, *supra* note 141, at 689–90.

<sup>243</sup> *Id.* at 693.

<sup>244</sup> *Id.* at 694.

<sup>245</sup> McLaughlin, *supra* note 161, at 4–5.

<sup>246</sup> McCarthy, *supra* note 141, at 690.

that is too can be as big a concern as a government that is too strong. Equally important was ensuring that the federal government was not simply the minion of the state governments.<sup>247</sup>

#### CONCLUSION

What emerges is a vision of Wilson that is more complex than the idea of a simple adherent of executive power. Instead, Wilson's positions are animated by a commitment to democracy, a keen awareness of institutional design, and a vibrant sense of how to create a national polity. That said, willingness to reallocate powers during the Framing does not necessarily authorize further reallocation post-ratification. The balance enshrined in the Constitution is intended to be enduring.

Even more importantly, a comparison of Wilson's vision for the nation with Madison's is quite revealing. Madison hoped to create a plutocracy of small landowners with a limited franchise governed largely by a Senate comprised of the landed gentry. Wilson hoped to create a large, integrated nation with a strong commitment to broad-based democracy in which the presidency was the preeminent institution. A moment's reflection reveals that Wilson's vision is the one that became a reality.

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<sup>247</sup> McLaughlin, *supra* note 161, at 6.