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# **THE EFFICIENT SECRET: HOW AMERICA NEARLY ADOPTED A PARLIAMENTARY SYSTEM, AND WHY IT SHOULD HAVE DONE SO**

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# The Efficient Secret: How America Nearly Adopted a Parliamentary System, and Why It Should Have Done So

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*Abstract.* The American presidential system, with its separation of powers, plausibly imposes enormous costs on the economy without compensating gains, as seen in the current gridlock over the debt crisis. Modern parliamentary systems of government, such as those in Britain and Canada, seem to handle such problems more efficiently. Regretfully, however, the principle of separationism has been extended in Supreme Court decisions and in the Senate filibuster, in part because of the mistaken idea that this is what the Founders intended. A close examination of the preferences of the delegates to the Philadelphia Convention of 1787 tells a very different story. Had they voted on our present regime of presidential elections, they almost certainly would have rejected it. This conclusion is buttressed by an empirical analysis of delegate voting patterns.

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# The Efficient Secret: How America Nearly Adopted a Parliamentary System, and Why It Should Have Done So

The prejudice of Englishmen, in favor of their own government ...  
arises as much or more from national pride than reason.

*Thomas Paine, Common Sense*

The delegates who met in Philadelphia in the summer of 1787 drafted Article II of the Constitution, which as amended governs modern presidential elections. What they had in mind, however, was a different form of government than our present one, a government with a weaker separation of powers between the executive and legislative branches and very different ideas about presidential elections. Getting the history right is important, for at least two reasons.

First, the sentimental appeal of separationism owes much to the simple patriotism Americans feel for the Framers of the Constitution, a patriotism shared by scholars and political leaders.<sup>1</sup> Separationism is an icon of American national identity. “The American Constitution is unlike any other,” said historian Hans Kohn. “It represents the lifeblood of the American nation, its supreme symbol and manifestation.”<sup>2</sup> Other countries had their common cultures or religions. What America had was an idea. Robert Penn Warren wrote, “To be American is not...a matter of blood; it is a matter of an idea.”<sup>3</sup> And just what was the idea? Not simply liberty or liberty under

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<sup>1</sup> See, e.g., Cong. Record, 112th Cong. S5155-56 (Sen. Reid, Aug. 1, 2011).

<sup>2</sup> Hans Kohn, *American Nationalism: An Interpretive Essay* 8 (1957).

<sup>3</sup> Robert Penn Warren, *The Legacy of the Civil War: Meditations on the Centennial* 78 (1961).

law, for those were also English ideas. The special American contribution, which defined the nation itself, is the idea of a constitutional order that prominently includes the separation of powers.

The second reason why getting the history right matters is because the Framers' intent is the touchstone of constitutional interpretation for an increasing number of Originalists. An "Original intent" Originalism of this kind must be distinguished from an "original meaning" Originalism. The former looks only to the Framers for guidance, while the latter would interpret the Constitution as the intelligent reader of 1787 would have done.<sup>4</sup> I think the former kind of Originalism more compelling.

The latter form of Originalism was an attempt to respond to criticisms made about the difficulty of identifying the intent of the Framers as a group. Such concerns, while eminently sensible when addressed to the 536 people who are called on to deliberate over say, the "John Murtha For the Children Act," are overstated when it comes to the 53 delegates who drafted the Constitution. Moreover, the best evidence of what ordinary educated Americans (or Britons) of the time would have made of the Constitution comes from what the delegates had to say about it. To make things easier still, the Founder's intent may be identified with that of the delegates, since what they drafted was a take-it-or-leave-it Constitution which the ratifying conventions of the states could only adopt or reject, without amendments.

I suggest further that, in ascertaining original intent, what matters is what the Framers thought was the function or purpose which a provision was meant to serve. Otherwise, one might argue that the meaning of a term remained the same even if the use to which it was put had changed utterly. That doesn't seem right, if a delegate presented with the current regime of presidential elections would have protested "that's not what we meant at all!"<sup>5</sup>

I shall argue, then, that today's Originalists are mistaken, that the Constitutional regime which now governs us is very different from the one which the Framers intended. We take it for granted that our system of separation of powers was devised by them, and that we should adhere to it for that reason. Yet if one closely examines what they thought, as Lincoln did in his 1860 Cooper Union speech, one quickly discovers that they were less than enamored with the modern American system of the separation of powers. We very nearly adopted a system not unlike the parliamentary regimes of Great Britain and Canada. Our presidential system was a near-run thing, decided only on day 105 of a 116 day Convention. The delegates debated the selection of the president on 21 different days and took more than 30 votes on the subject.<sup>6</sup> In 16 roll calls

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<sup>4</sup> See Randy E. Barnett, An Originalism for Nonoriginalists, 45 *Loy. L. Rev.* 611 (1999); Lawrence B. Solum, *District of Columbia v. Heller* and Originalism, 103 *Nw. U. L. Rev.* 923 (2009).

<sup>5</sup> Cf. Ronald Dworkin, Comment, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 115-27 (1997) (distinguishing between semantic- and expectations-originalism).

<sup>6</sup> The records on the deliberations were edited by Max Farrand in a four volume set originally published in 1911, and comprise the sketchy notes of the Convention's secretary as well as notes made by the delegates, principally James Madison. *The Records of the Federal Convention of 1787* (New Haven: Yale U.P., rev. ed. 1937)

they voted on how to select the president. On six of these (once unanimously), they voted for a president appointed by Congress, which would have closely resembled a parliamentary regime. Once they voted 8 to 2 for a president appointed by state legislatures, which would also have greatly weakened the separation of powers. On one thing they were wholly clear: they did not want a president elected by the people. That question was put to them four times, and lost every time.

When the delegates finally settled on the language now found in Art. II of the Constitution, few thought that they were agreeing to the present presidential regime. What they had agreed to was a compromise, and like a good compromise it was nicely balanced, with so many concessions to every side that everyone might have thought they had won the day. The nature of the compromise has been obscured by the passage of time and the development of the modern presidential system. These were changes the delegates did not anticipate, for their Constitution was not our Constitution. Their Constitution featured an electoral system in which the electors had real choices to make, where state legislatures could elect presidents, and where the choice of president would generally fall on the House of Representatives.

Our present system is one in which the president is elected by popular ballot, through an electoral system in which electors are automatons who lack a will of their own. But the delegates mistrusted democracy and that's not what they thought would happen. Instead, they believed that the electors would exercise an independent judgment. They would be better informed than the average voter and would pick whomever they thought was the best candidate.

States' rights supporters were strongly represented at the Convention, and a core of them wanted state legislatures to choose the president. On one roll call, they persuaded a majority of the states to go along with them. These delegates would then have taken heart from Art. II § 2, under which the method of choosing electors is left to state legislators. A state might permit the choice to be made by popular election, but it might also reserve the choice to the state legislature, and that's just what many states did in the Republic's early years.

Many delegates were fearful of presidential power and wanted Congress to appoint the president, that he might be better controlled. And that is what they thought would happen under Art. II § 3, which provides that the choice is taken from the electors if majority of them fail to agree on a candidate. Few delegates thought that, after George Washington, candidates with national appeal would emerge. Instead, each state would vote for a favorite son and no candidate would gain a majority of electoral votes. The electors would scatter their votes, and the House would choose from amongst the top five vote-getters, which amounted to virtually a free choice. Moreover, each state would be given one vote in the House, a further bone for the states' rights delegates.

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[hereafter cited by volume number and page]. On the accuracy of the records, see James H. Hutson, "Introduction," in IV.xv ff.

Our modern presidential system was not invented by the Framers. They had a different understanding of the separation of powers than we do, one in which more power was reposed in the legislature and less in the Executive than is the case today. Our current understanding of the division of powers owes less to the Framers, and to the homage we might as patriots or Originalists pay to them, than it does to a living constitution which is detached from their intentions.

### *Separationism's Inefficiencies*

Standard & Poor's downgraded America's public debt on August 5, 2011, and life went on. The stock market fluctuated widely, then returned to prior levels. The dollar dropped in value, until investors realized that it remained the only game in town. And yet the downgrade is an event of the first magnitude, whose effects will be felt for a long time to come.

Given America's public debt overhang, other rating agencies might join Standard & Poor's in downgrading U.S. debt. On the same day as the Standard & Poor's downgrade, Moody's Investor Services warned that the federal government needs to stabilize the debt-to-GDP ratio to 73 percent by 2015 to ensure that it keep its AAA rating.<sup>7</sup> That doesn't seem on the cards, and Standard & Poor's itself didn't see any quick fixes for America. The budget deal to which Republicans and Democrats had agreed a few days before wasn't sufficient to resolve the crisis, which would only get worse with time. The problem was the American system of separation of powers between branches of government under the Constitution, and the gridlock which results from divided government and polarized political parties.

Standard & Poor's noted that a future election might give one party the White House and both houses of Congress, ending divided government and bringing a resolution to the debt crisis. Hat tricks of this kind have happened more often than one might think, 40 percent of the time since the Second World War. Even without this, the two parties have been able to work out compromises. In the recent past, as many bills were passed in periods of divided government as when one party controlled all three branches of government.<sup>8</sup> However, politics have now become much more ideological. The smoke-filled backrooms of American politics are no more, their place taken by the energized grass-roots of democratized parties, and divided government is more likely to result in gridlock today. There will be fewer deals between the parties, and fewer solutions to long-term problems. The gridlock which the debt crisis revealed seems likely to continue as a permanent feature of American government.

The costs of the separation of powers in America, so evident today, have long been recognized by political theorists, many of whom expressed a preference for a parliamentary form of government, with its weakened separation of powers. Woodrow Wilson was there first, in a

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<sup>7</sup> Jennifer Depaul, New Debt Ratio Signals Out-of-Control Spending, Fiscal Times, August 5, 2011.

<sup>8</sup> See David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002* (2005).

little book he published in 1885 called *Congressional Government*. The fastidious Wilson wrinkled his nose at the *ton* of American politics. Congressmen read banal speeches to an empty house, with nothing like the drama, the wit, the sharp exchanges of a parliamentary debate in Westminster. We had no Gladstones and Disraelis, no Arthur Balfours or Charles Stewart Parnells. Ours was a system that protected the boring and inarticulate from exposure, and sent mediocrities to Congress.

One who today compares Question Period in the House of Commons of a parliamentary system with speeches in Congress might well agree with Wilson. And ask, so what? What matters is whether we are well-governed, not wittily governed. But Wilson did not think we were well-governed. Because power is divided, in an American-style separation of powers, the government's strength is weakened. Things happen more slowly, if at all, and when things don't happen, or happen poorly, there is no one person to hold responsible. By contrast, Walter Bagehot's *The English Constitution*, a book much admired by Wilson, described a rival system which offered promptness where speed was needed and accountability when things went wrong. This Bagehot attributed to the absence of a separation of powers in a system where the House of Commons was all powerful, which he said was the efficient secret of the English constitution.

American separationism came in for similar criticism from the progressives in the last century. These were liberals in a hurry, and what they objected to was the glacial slowness of legal change in America. In England, a major piece of legislation could be enacted simply, through an act of Parliament passed by a Labour government holding a majority of seats. The progressives saw a need for major reforms, and it gnawed at them when this was blocked by divided government. They looked back fondly to the first hundred days of the Roosevelt Administration in 1933, when the executive drafted bills which Congress rubber-stamped without debate. That was the closest that America ever came to a parliamentary system, and progressives thought that that was how government should work.<sup>9</sup>

After the budgetary impasse of July 2011, many have begun again to question the value of separationism. President Obama blamed the tortured negotiations and the risk that Congress would fail to raise the debt ceiling on the gridlock produced by the American political system. "We did not have a AAA political system to match our AAA credit rating," he said. Presumably the imbalance has now been corrected, with a downgraded fiscal system to match our second-rate political system.

It might seem pointless to enquire whether a better constitutional regime might be imagined, if we can never get there. To the extent that separationism is enshrined in the Constitution, that's not about to change. However, the separation of powers has taken on a life that transcends the detailed requirements of the Constitution. It has become a foundational norm

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<sup>9</sup> See E.E. Schattschneider, *Party Government* (New Brunswick: Transaction, 2004); James MacGregor Burns, *Deadlock of Democracy* (1963). See generally James L. Sundquist, *Constitutional Reform and Effective Government* ch. 1 (1992); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 *Wm. and Mary L. Rev.* 679 (1993).

of American constitutionalism which justifies and even requires features of American government that are not expressly mandated by the Constitution.<sup>10</sup>

Where there is some ambiguity about the power of a branch of government, the principle of separation of powers is often invoked to settle the matter. For example, in *Clinton v. City of New York* the Supreme Court ruled that presidents lacked line-item veto powers to zero out part only of a bill.<sup>11</sup> The line-item veto might have been a salutary way to address problems of overspending and corruption in Congressional earmarks, but the Supreme Court held that it violates the Constitution's Presentment Clause of Article I, section 7:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary ... shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Did this mean that the President's only option is to sign or veto a bill in its entirety? The clause was less than clear, but the ambiguity was resolved against the line item veto in order to vindicate the principle of separationism. "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."<sup>12</sup>

Similarly, the court held, on separationist grounds, that Congress lacked the power to restrict presidential authority through a legislative veto by one house of Congress. In a legislative veto, Congress makes a broad grant of authority to the Executive and subsequently clips its wings by vetoing Executive regulations to which it objects. Since it takes both branches of Congress to pass a bill, a one-branch legislative veto might be thought effective if the relevant legislation so provides. Regrettably, however, the Supreme Court has held that the one-house veto violates the structure of separation of powers in the Constitution.<sup>13</sup>

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<sup>10</sup> For a criticism on the idea that separationism should be thought a grundnorm of Constitutional interpretation, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939 (2011) (arguing that no such overarching principle can be found in the disparate provisions of the Constitution).

<sup>11</sup> 524 U.S. 417 (1998).

<sup>12</sup> *Id.* at 450 (concurring opinion of Kennedy J.).

<sup>13</sup> *I.N.S. v. Chadha*, 462 U.S. 919 (1983). While the decision sought to protect the authority of the executive branch, it plausibly has the opposite effect. A one-branch legislative veto, if effective, would encourage Congress to enact broadly-worded laws which leave smaller points to be settled at the discretion of the Executive. Since such vetoes are ineffective, Congress is more likely to micromanage the Executive through over-long legislation that specifies what is to be done in excruciating detail. See *Chadha*, 462 U.S. at 968 (White, J., dissenting).

Congress' gridlock problem is worsened by the Senate's procedural rules, particularly the filibuster, which since 1975 has permitted 41 senators to limit debate. Obviously, the filibuster is anti-democratic, since it prevents democratic majorities from enacting legislation. Nevertheless, it has been defended on the grounds that it enhances the doctrine of separation of powers at the core of the U.S. Constitution by erecting one more obstacle to majoritarian reforms. That, however, is precisely the problem.

Some might nevertheless prefer the present regime, with its gridlock, to a parliamentary system. We have been taught to think that American separationism, with all its inconveniences, is a bulwark of liberty. So James Madison said, in *Federalist* 47. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." That's not been our historical experience, however. There are a good many more presidents-for-life than prime ministers-for-life.<sup>14</sup> For example, every country from the former Soviet Union which adopted a presidential system has become an autocracy. Only the parliamentary systems remain democracies. The U.S. Constitution seemingly was not made for export. If it has not led to autocracy, was that because it was American, and not because of the separation of powers?

Gridlock might also be thought to make for better government by systematically screening and excluding bad legislation that does not survive the winnowing process of separationism. That was Hamilton's argument for the separation of powers in *Federalist* 73. "The oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest." If the government legislates less under the separation of powers, then, that is no bad thing if good laws survive and bad laws don't. The downside is the problem of reversibility: if the separation of powers makes it more difficult to pass bad laws, it also makes it harder to repeal them.

At a time of fiscal crisis, reversibility would appear to trump the benefits of pre-enactment screening in a separation of powers regime. Canada was able to put its fiscal house in order in the mid 1990s when a majority government, unhampered by the gridlock problems of the separation of powers, took decisive action to cut spending.<sup>15</sup> Reversibility would also seem systematically superior to pre-enactment screening because it is easier to identify bad laws with

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<sup>14</sup> The evidence is reviewed in Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* ch. 6 (2008). See also Adam Przeworski et al., *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* 128-36 (2000). For evidence that presidential regimes are associated with higher levels of political corruption, see Jana Kunicova and Susan Rose-Ackerman, *Electoral Rules and Constitutional Structures as Constraints on Corruption*, 35 *British J. Political Science* 573 (2005).

<sup>15</sup> F.H. Buckley, "Reversing," in F.H. Buckley, *The American Illness: Essays on the Rule of Law* (New Haven: Yale U.P., forthcoming 2012).

the benefit of hindsight. Bad laws, based on bad ideas, with what are conceded to have bad consequences, are enacted everywhere. In dictatorships, bad laws are often bad from the start. In democratic regimes, bad ideas are typically recognized only after the fact. When one Parliament reverses a prior Parliament, it does so with more information than the prior enacting parliament. It will know better what works and what doesn't. In America, by contrast, the benefit of hindsight is greatly diminished, since it is so much harder to reverse course. What separationism has given us is a one-way ratchet in which bad ideas are adopted and then turned into the laws of the Medes and the Persians.

As a matter of fact, there doesn't seem to be much more pre-enactment screening in the United States than in comparable parliamentary systems. In Congress, major amendments are quietly inserted at the last moment, escaping the scrutiny of regulators charged with overseeing the bill.<sup>16</sup> Bills are also significantly longer than their counterparts in a parliamentary system, in part as a consequence of the competition between branches of government in a separation of powers system. At the extreme, a statute might be so lengthy as to greatly reduce any possibility of meaningful pre-enactment screening. One might have expected the Chairman of the House Judiciary Committee to have had something to say about the Patient Protection and Affordable Care Act (Obamacare), whose constitutionality is now before the courts. John Conyers' difficulty was that it's a little hard to have an opinion about a bill one has not read. One can't be unsympathetic, however. "What good is reading the bill if it's a thousand pages," said Conyers, "and you don't have two days and two lawyers to find out what it means after you've read the bill?"<sup>17</sup>

### *The Convention*

The delegates who gathered in Philadelphia in the summer of 1787 were, in the popular imagination, a set of brilliant political philosophers who produced what a hundred years later Gladstone called "the most wonderful work ever struck off by the brain and purpose of man."<sup>18</sup>

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<sup>16</sup> For example, the cost which the housing crash imposed on the federal government was greatly increased by an obscure amendment inserted by Senator Dodd (D. Ct.) which made FDIC emergency financing available to insurance companies, most of whom were located in the Senator's state. Gretchen Morgenson and Joshua Rosner, *Reckless Endangerment: How Outsized Ambition, Greed, and Corruption Led to Economic Armageddon* 40-41 (2011).

<sup>17</sup> Abby Schachter, *Quick Fix for Congress: Speak English*, N.Y. Post, Dec. 15, 2010.

<sup>18</sup> William Ewart Gladstone: *Life and Public Services* 323 (Thomas W. Handford, ed.) (Chicago: Dominion, 1899). Amongst the best recent books on the Convention are Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009); Carol Berkin, *A Brilliant Solution: Inventing the American Constitution* (Boston: Mariner Books, 2003); and David O. Stewart, *The Summer of 1787: The Men who Invented the Constitution* (New York: Simon & Schuster, 2007). The best-known earlier popular accounts are Catherine Drinker Bowen, *Miracle at Philadelphia* (Boston: Little, Brown, 1966) and Clinton Rossiter, *1787: The Grand Convention*, New York: Macmillan, 1966).

For the British Prime Minister, the delegates were the supreme political theorists, who produced a compelling system of government to rival that of Westminster. While taking a rather more sober view of things, many modern accounts of the Convention emphasize the high theory of republican government.<sup>19</sup> However, the theorists amongst the delegates, people such as Madison and Alexander Hamilton, were few in number, and when the Convention was over both men left Philadelphia less than happy with the result. It was better than the alternative of the Articles of Confederation, but was nevertheless a missed opportunity.

The Constitution was more the work of lesser known men, who possessed a larger fund of practical wisdom and, compared to Madison, a much greater ability to compromise. And compromise was what was needed, for there was nothing like a consensus about the form the government would take. In particular, there was no agreement about the scope of executive power. Pennsylvania's James Wilson remarked "This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."<sup>20</sup>

The delegates sought to create something entirely new, a charter for a republican government to be formed from states loosely united under the Articles of Confederation. For models they had nothing wholly serviceable. They admired the virtues they saw in the ancient world, but saw a hodgepodge of confusing institutions when they examined the constitutions of republican Greece and Rome. They admired the constitution of Great Britain, with which they were more familiar, but they had fought a revolution to replace it and most thought it ill-suited for what they called the genius of America. They had the Articles of Confederation, which provided for what passed as a central government from 1781 to 1788, but these had proven unsatisfactory and the purpose of the Convention was to correct their defects. Finally, they had the constitutions of the states, most of which were reformed during the Revolution, but the delegates thought them flawed, and they were in any event of limited assistance in designing a constitution for a compound republic composed of all the states.

What nearly all of the delegates knew, however, was that they had come to the end of the line with the Articles of Confederation. This had created a "firm league of friendship" amongst sovereign, free and independent states, with the thinnest of central governments. Congress could not levy taxes directly on the people, nor could it compel the states to pay their share of national expenses. It could issue paper currency which rapidly proved almost worthless, giving us the expression "not worth a Continental." Europe today is more of a country than America was under the Articles.

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<sup>19</sup> In particular, as expressed by Madison. For one example of the enormous Madison-lehr literature, see Jack N. Rakove, *The Madisonian Moment*, 55 *U. Chicago L. Rev.* 473 (1988).

<sup>20</sup> II. 501. Madison recalled "tedious and reiterated discussions" about the presidency in a letter to Thomas Jefferson on Oct. 24, 1787. 10 *The Papers of James Madison* 208 (Robert A. Rutland et al., eds.) (Chicago: U. of Chicago, 1962--) [hereafter "PJM"]. The delegates met in Committee of the Whole, which freed them to return to subjects previously discussed and undo prior resolutions.

Amendments to the Articles required the unanimous consent of all states, and for ordinary decisions one needed a supermajority of nine of the thirteen states. If gridlock is good, it didn't get better than that. Important decisions were left unmade, and it was increasingly difficult to assemble a quorum in Congress. Whatever government might exist, said Hamilton, it was "dissolving or already dissolved."<sup>21</sup> At a critical point, when the delegates seemed hopelessly divided, the country's leading Deist, Benjamin Franklin, suggested that the delegates appoint a chaplain and pray for guidance.<sup>22</sup> Had the Convention adjourned at that point, the country would almost certainly have broken apart.<sup>23</sup> Its fate, recalled Gouverneur Morris, hung by a hair.<sup>24</sup>

Apart from the threat of disunion, it had become difficult to raise funds for investment projects because the states had treated creditors shabbily, and the country was in a depression. "In every point of view," wrote Madison in 1785, "the trade of this Country is in a deplorable Condition."<sup>25</sup> This the delegates attributed to the mercenary new men who now inhabited the state houses in America. A good part of the colonial elite had been exiled by the Revolution, and many of those who were left served as delegates at the Philadelphia Convention or in the Continental Congress in New York. That left what the delegates saw as a second string of ill-educated populists to serve in the state legislatures.<sup>26</sup> What would be needed, many thought, was a strong national government to correct these ills.

### ***The Virginia Plan***

The impetus for the Philadelphia Convention had come from Virginia, the largest and most populous state. Under the Articles of Confederation the national government lacked the power to regulate interstate commerce, and after the Revolution the states began to levy tariffs on each other's goods. Virginians, including George Washington, wanted to open the Potomac up to trade, but the river lay almost entirely within the borders of Maryland and navigation rights were disputed between the two states. A trade agreement made sense, and delegates from the two states met in Alexandria in March 1785 to relax trade barriers (even though the Articles of Confederation prohibited interstate treaties).

The conference was so successful that, when it ended at Mount Vernon, the Virginia delegates proposed a further conference of all thirteen states. This was held in Annapolis in September 1785. However, eight states stayed away and five states was too small a group for a national agreement. A third conference would be needed, to be held on May 14, 1787 in Philadelphia.

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<sup>21</sup> I.291.

<sup>22</sup> I.451-52.

<sup>23</sup> III.423 (Autobiography of William Few).

<sup>24</sup> III.391.

<sup>25</sup> To R.H. Lee, July 7, 1785. 8 PJM 315.

<sup>26</sup> Gordon S. Wood, *The Radicalism of the American Revolution* 250 (New York: Vintage, 1991).

The Virginians arrived in Philadelphia before any of the other out-of-state delegates. James Madison was there on May 5 and the rest of the Virginians arrived by May 17. A quorum of seven states was not in place until May 25. Had everyone arrived on time the Convention would likely have begun cautiously, but as they arrived early the Virginians used their time to steal a march on the other delegates. They met as a group for two or three hours a day to prepare a plan for a new Constitution.<sup>27</sup>

The first day of substantive business was May 29. The delegates assembled in the Assembly Room of the Pennsylvania State House (now Independence Hall), where eleven years before eight of them had signed the Declaration of Independence. At 10:00 am, the door was closed behind them by sentries who stood watch to ensure that none but the delegates could enter. Washington had been unanimously elected the president of the Convention, and he ascended the dais to open the session. Next to him James Madison took his seat to take notes of the proceedings. Stately, plump Edmund Randolph, Virginia's Governor, stood up, and Washington nodded at him to speak. What Randolph would read came to be known as the Virginia Plan. It proposed to scrap the Articles of Confederation, and the debate over it dominated the Convention for its first six weeks.

The other delegates were quite unprepared for the Virginia Plan. When Congress had joined the call for the Convention in February 1787, it proposed that the delegates meet “for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal government adequate to the exigencies of Government and the preservation of the Union.”<sup>28</sup> This was a call to tinker with the Articles, nothing more. Some delegates argued that, as it exceeded the mandate from Congress, the Virginia Plan was out of order. As the Convention continued, bitter words were exchanged. Several delegates threatened to walk out in protest, and some indeed did so.

Nevertheless the delegates continued talking. The prestige of the Virginia delegation, and the presence of Washington, made it difficult to ignore the Virginia Plan. It was also, that which had sorely been lacking, a plan, a serious attempt to amend the defects of the Articles of Confederation, prepared by the thoughtful James Madison. It was also backed by a core of nationalists from Virginia and Pennsylvania, the two largest states.

Madison had outlined his thoughts about government in an essay entitled the *Vices of the Political System of the United States*, written a month before the Convention began,<sup>29</sup> and the imprint of the essay can be seen throughout the Virginia Plan. The problem, he argued, was that government under the Articles was both too decentralized and too democratic. The ultimate

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<sup>27</sup> III.23.

<sup>28</sup> At [http://avalon.law.yale.edu/18th\\_century/const04.asp](http://avalon.law.yale.edu/18th_century/const04.asp); quoted in Winton Solberg, *The Federal Convention and the Formation of the Union of the American States* 64 (1958).

<sup>29</sup> 9 PJM 348. Madison arrived at his views on the presidency sometime between an April 8 letter he sent to Edmund Randolph and an April 16 letter he sent to George Washington. 9 PJM 368; 9 PJM 382.

authority rested with the states, and the decisions of Congress were little more than recommendations. In addition, state governments were excessively democratic and the honest delegate too often “the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence.” (That would be you, Patrick Henry.) Too often, the voice of (ahem) “individuals of extended views, and of national pride” were silenced by the demagogues.

For an answer to these ills, Madison borrowed two ideas from David Hume, whom he had studied at Princeton.<sup>30</sup> Hume had proposed, in a 1754 essay on the *Idea of a Perfect Commonwealth*, a highly artificial scheme of government that began with a division of Great Britain and Ireland into 100 counties, each with 100 parishes, and built from there with parish meetings, county-town assemblies, county magistrates and senators. It would be difficult to imagine anything more at odds with Hume’s empiricism, with his belief that political arrangements were the product of messy historical quarrels that owed more to contingent conventions and accidental arrangements than to abstract reasoning, and one is permitted to wonder whether the essay was only half-serious and meant in part as a satire on political theorizing, a possibility that surely would have escaped the humorless Madison.

And yet Hume’s essay was something more than a satire too. He believed that some constitutions were better than others,<sup>31</sup> and that speculations about the best kind of constitution were “the most worthy curiosity of any the wit of man can possibly devise.” It would be foolish to propose radical changes to existing benign constitutions, like that of Britain, he thought. But what if the opportunity to start afresh arose elsewhere, “either by a dissolution of some old government, or by the combination of men to form a new one, in some distant part of the world”? When Madison read this, he must have heard Hume speaking to him directly. The time had come to dissolve the old government, and the combination of delegates in Philadelphia now had the responsibility to devise a new one.

Hume had suggested two principles of constitutional governance in his essay, both of which Madison thought admirably suited to America. The first was a theory of refinement or *filtration* of representatives, in which higher levels of representatives would be chosen by those at lower levels, rather than elected by the people. Ordinary voters would elect local representatives, who would then elect a higher level of representatives, and so on up the ladder. Madison adopted the filtration theory wanted in his *Vices* essay, which envisaged “a process of elections” designed to ensure that the most senior places in government would be occupied by

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<sup>30</sup> David Hume, “Idea of a Perfect Commonwealth,” In Hume, *Political Essays* 221 (Cambridge: Cambridge U.P., 1994). On Hume as the source of Madison’s thoughts on government, see Douglas Adair, *That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist*, in (Trevor Colbourn, ed.), *Fame and the Founding Fathers: Essays by Douglas Adair* 132 (Indianapolis: Liberty Fund, 1998); Douglas Adair, *The Intellectual Origins of Jeffersonian Democracy: Republicanism, the Class Struggle, and the Virtuous Farmer* 130-39 (Lanham: Lexington Books); Mark G. Spencer, *Hume and Madison on Faction*, 59 *Wm. & Mary Q.* (Third Series) 869 (2002).

<sup>31</sup> David Hume, *That Politics May Be Reduced to a Science*, *Political Essays* at 4.

“the purest and noblest characters” in society. Such a system would “extract from the mass of the Society” those who “feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.” In the Convention he described this as a “policy of refining the popular appointments by successive filtrations.”<sup>32</sup>

Hume offered a second thought on the problems of democracy, and Madison seized on this as well. The public good is more likely to be promoted in large republics, said Hume, and Madison saw this as an argument to transfer power from the states to the *extended republic* of a national American state. Hume had turned on its head an argument which Montesquieu had made in *The Spirit of the Laws*. Montesquieu believed that republics should be small in size because he thought that powerful interest groups would promote their private ends in large states.<sup>33</sup> Just the opposite, said Hume. Large republics are protected from “tumult and faction,” since the very size of the country makes it harder for factions or interest groups to unite in a common plan. “The parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.”<sup>34</sup>

Madison had seen corrupt voters back in Orange County, Virginia, and experienced the “turbulence” of small state politicians in the state’s House of Delegates. He expected something better from a national American government, and eagerly adopted Hume’s defense of extended republics. With Hume, he recognized that a well-organized state would seek to prevent a majoritarian faction from oppressing a minority; and this, he thought, a large state could do more easily than a small one. In his essay he wrote that, in an extended republic,

the Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.

Madison had added a wrinkle to Hume’s theory. Hume had thought that a majoritarian faction could never assemble in a large state. Madison agreed with this, but said that it wasn’t the size of the state that prevented this. Rather, it was the multiplicity of the factions and their ability to check each other.<sup>35</sup>

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<sup>32</sup> I.50. Other delegates subscribed to the filtration theory: I.133 (Wilson); I.136 (Dickinson); I.152 (Gerry); II.54 (G. Morris). Hamilton subsequently endorsed it in the New York ratifying debates. June 21, 1788, 5 *The Papers of Alexander Hamilton* 41 (Harold C. Syrett and Jacob E. Cooke, eds.) (New York: Columbia U.P., 1962).

<sup>33</sup> *The Spirit of the Laws* VIII.16.

<sup>34</sup> *Idea of a Perfect Commonwealth*.

<sup>35</sup> Hume had argued elsewhere for the need for a constitution in which private interests check each other in his essay “Of the Independence of Parliament.”

In the Convention, Madison dropped the extended republic theory into a speech he made to answer Connecticut's Roger Sherman. As a states' rights supporter, Sherman had wanted state legislatures and not the voters to choose members of the House of Representatives, and as a nationalist Madison opposed this. In a large nation, argued Madison, representatives might safely be elected by the people. There is a danger of majoritarian oppression, but this is less likely in an extended republic.

The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1<sup>st</sup> place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2<sup>d</sup> place, that in case they sh<sup>d</sup> have such an interest, they may not be so apt to unite in the pursuit of it.<sup>36</sup>

That gives us two methods of dealing with the problems of democracy—filtration and an extended republic—and as E.E. Schattschneider noted this might seem like one method too many.<sup>37</sup> If democracy is not to be feared in an extended republic, why should presidents and senators be filtered by having them chosen by elected representatives and not by the people? That was a point which supporters of democracy would grasp in time, but Madison was yet not one of them.<sup>38</sup> Instead, he thought the two strategies would reinforce each other and that both were necessary.

The Virginia Plan incorporated Madison's filtration principle: the idea that superior men will reach the exalted seats of power in government when they are appointed from lower bodies rather than elected by the people. The Plan provided for a separation of powers, with executive, legislative and judicial branches, but democratic excesses would be minimized by interposing layers of representatives between the people and their political leaders. The "first" or lower house, today's House of Representatives, would be popularly elected, and would be "the grand depository of the democratic principle of the government," according to George Mason. "It was,

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<sup>36</sup> I.136. Martin Diamond unpersuasively argued that this speech converted the other delegates to Madison's theory of extended republics. However, the theory was not mentioned elsewhere in the Convention, and there is little evidence to support Diamond's claim. Martin Diamond, *The Founding of the Democratic Republic* 37 (Boston: Wadsworth, 1981). See Christopher Wolfe, *On Understanding the Constitutional Convention of 1787*, 39 *J. Pol.* 103 (1977); James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 *Wm. & Mary Q.* (third series) 411, 421-22 (1987).

<sup>37</sup> See E.F. Schattschneider, *Party Government* at 9.

<sup>38</sup> After responding to Sherman on June 6, Madison must have voted in favor of a Congressionally-appointed president in roll calls 45, 46 and 167, on June 11 and 12 and July 17, respectively. Madison continued to support a filtration theory of government on June 26 (the people and many representatives "were liable to err ... from fickleness and passion"). I.422. While the filtration theory had been nearly swallowed up in Federalist 10 by the manner in which the defects of democracy would be cured in an extensive republic, Madison continued to insist on the need for "auxiliary precautions" in Federalist 63, the last of the papers he authored.

so to speak, to be our House of Commons.”<sup>39</sup> The second or higher branch, our Senate, would be co-equal in power, but its members would be selected by the first branch from a list of nominees provided by the state legislatures. Together, the two branches would elect the President, called the “national executive.” This was spelled out in the Plan’s Resolution Seven:

Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of \_\_\_ years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.<sup>40</sup>

Resolution Seven would also have limited the president to a single term. That might have seemed an uncontroversial fetter on the office, since term limits were a feature of the Virginia Constitution, which Madison had drafted along with Mason and Jefferson, and governors are still term limited in Virginia. However, the restriction expressed a concern about presidential power, even beyond the filtration principle.

When compared to the Constitution which the delegates finally adopted, the Virginia Plan limited the President’s power in yet another way. The Constitution grants the president the power to veto bills for any or no reason, subject to an override by a two-thirds vote of Congress. In Resolution Eight of the Virginia Plan, however, the presidential veto power was much more restricted, and shared with a quasi-judicial Council of Revision.

Resolved, that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by \_\_\_ of the members of each branch.<sup>41</sup>

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<sup>39</sup> I.48.

<sup>40</sup> I.21.

<sup>41</sup> Id. Randolph presented the Virginia Plan on May 29. On the same day, South Carolina’s Charles Pinckney tabled his own plan of government. A record of its contents was not kept but New York’s Robert Yates reported that Pinckney stated that it was grounded on the same principles as the Virginia Plan. A draft of the plan which Pinckney subsequently provided featured a Congressionally-appointed president. See III.604-09. Pinckney is a less than reliable witness about his role in the Convention, but there is no reason to suppose that he differed from Randolph on how the president was to be chosen.

The idea of a president sharing his veto power with members of the Supreme Court will seem strange to us. It made sense to Madison, however, since he did not have a thick conception of executive power or of a separation of powers in which the president might routinely oppose the will of Congress. He did think the veto might be employed to strike down the debtor relief schemes he feared, “those unwise & unjust measures which constituted so great a portion of our calamities.”<sup>42</sup> Nevertheless, the structure of the Virginia Plan would not lead one to expect this to happen very frequently, for the reasons Madison gave in his *Vices* essay. Pro-debtor factions would be weaker in an extended republic than in state governments, and the appointed senate would wisely constrain immoderate measures from the House, as an application of Madison’s filtration theory.

If Madison wanted judges on the Council of Revision, then, it was because he saw the veto more as a judicial than a political act, to be employed when the legislature overstepped its constitutional bounds. Maryland’s Luther Martin recognized that the courts would pass on the constitutionality of legislation,<sup>43</sup> but the doctrine of judicial review lay in the future and what Madison saw in its place was the Council of Revision.

Madison’s Council of Revision was not adopted. Instead, the delegates compromised on a full veto power, which might be exercised in any case of political disagreement, but one which a super-majority in Congress could override. Nevertheless, the president’s veto power was understood in constitutional terms for much of the nineteenth century. Madison gave an example of this in his last act before leaving office, in vetoing legislation for internal improvements because it thought the federal government’s Commerce Power could not include the power to build roads and canals.<sup>44</sup> Similarly, near the end of the century, Grover Cleveland vetoed a farm relief bill for which he said he could find no warrant for it in the Constitution.<sup>45</sup>

In sum, the Virginia Plan would have created an Executive very different from the one we know today. Appointed by Congress, the president would be its creature, charged with doing its will but seemingly with little discretion about how to do so. He would have a veto over legislative acts, but this would be shared with members of the bench and for the most part limited to passing on the constitutionality of bills. The crucial power would vest in the House of Representatives, Mason’s “House of Commons” which would appoint the members of the Senate, and which with the Senate would appoint the president, who would thus be doubly insulated from the people. If anything, Madison’s president would have lacked the power of a modern prime minister in a parliamentary system, who typically dominates his party and parliament.

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<sup>42</sup> II.74.

<sup>43</sup> II.76.

<sup>44</sup> Veto Message to Congress. James Madison, Writings 718 (New York: Library of America, 1999).

<sup>45</sup> Veto Message, Feb. 16, 1887, at <http://www.presidency.ucsb.edu/ws/index.php?pid=71489#axzz1TzmvIGZj>.

The fear of executive misbehavior led some delegates to propose an extraordinary further limitation on the office: a three-man presidency. The Virginia Plan contemplated a single president, but Edmund Randolph argued that a troika could better represent what were then the three sections of the country: New England, the middle states and the south. Besides, said Randolph, a single executive is “the fœtus of monarchy.”<sup>46</sup> Madison opposed this and the Convention voted it down, but George Mason agreed with Randolph, as did another ten delegates.<sup>47</sup> At the end of the Convention, Mason and Randolph refused to sign the Constitution, in part because they feared executive power.

### ***Why Did They Want Parliamentary Government?***

Presidential government is taken for granted by Americans. Why then were the Framers so attracted to what today more closely resembles a parliamentary system? The simplest answer is that this was the system with which they were most familiar. Save for Connecticut, all of the states adopted new constitutions after the Revolution, and in nearly every case they featured a governor chosen by the legislature. The most influential state constitution, and the first one to be adopted, was that of Virginia, and this provided for a governor, or chief magistrate, to be chosen annually by joint ballot of both houses of the legislature.<sup>48</sup> Only in New York, Massachusetts and New Hampshire were governors elected directly by the people.

Many constitutions, like that of Virginia, formally provided that the legislative, executive and judicial powers were to be separate, and that legislators could not serve as governors. This, however, this was the thinnest kind of separation of powers, one that scarcely deserves its name. In every state but New York the legislature appointed an executive council which could countermand the governor’s decisions. “The Executives of the States,” noted Madison, “are in general little more than Cyphers; the legislatures omnipotent.”<sup>49</sup> For the delegates, then, parliamentary government was the default position.

The parliamentary form of government was also one with which the delegates had become familiar during the colonial period. And while they might have abhorred government *from* Westminster before the Revolution, once it was over they fell over themselves in praise of the government *of* Westminster. Conservatives such as Hamilton, Dickinson and South

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<sup>46</sup> I.66.

<sup>47</sup> Forest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 240-41 (Lawrence: Kansas, 1985).

<sup>48</sup> A procedure recommended in 1776 by John Adams, *Thoughts on Government*, *The Revolutionary Writings of John Adams* 290 (Indianapolis: Liberty Fund, 2000).

<sup>49</sup> II.35. See Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* ch. 2 (Indianapolis: Liberty Fund, 2007); Bernard Bailyn, *The Origins of American Politics* 78-79 (New York: Vintage, 1967).

Carolina's Charles Pinckney confessed their admiration of Britain's constitutional monarchy,<sup>50</sup> and even their opponents saw the virtues of the British system. "There is a natural inclination in mankind to Kingly Government," observed Franklin.<sup>51</sup> Only a republican system of government would do for the United States, said Randolph; otherwise, he said, he might well be prepared to adopt the British system in America.<sup>52</sup> North Carolina's Hugh Williamson saw an American monarchy as inevitable,<sup>53</sup> and some delegates such as Hamilton and Gouverneur Morris might have welcomed this.<sup>54</sup> Maryland's John Mercer copied out a list of 20 delegates who, he laughingly said, favored an American monarchy. Mercer was an opinionated 28 year-old who saw monarchists under his bed, but some delegates took him seriously.<sup>55</sup> As Gordon Wood notes, monarchy prevailed almost everywhere else, and "we shall never understand events of the 1790s until we take seriously, as contemporaries did, the possibility of some sort of monarchy developing in America."<sup>56</sup>

Some delegates wanted a parliamentary government for a reason that seems very dated today. If a president were popularly elected, would voters know much about a candidate from outside their state? "Of the affairs of Georgia," said Madison, "I know as little as those of Kamskatska."<sup>57</sup> That was an argument for a Congressional appointment, said Sherman, since legislators would know the presidential candidates better than the voters.<sup>58</sup> All this would soon change, and indeed was changing, with changes in transportation and communication technology.<sup>59</sup> On August 22, John Fitch made the first successful trial of a steamboat on the Delaware River, in the presence of delegates to the Convention. Nevertheless, the delegates did not foresee these changes, or the rise of national parties that would shortly address the problem of voter ignorance.

There were two additional and more important reasons why the delegates opposed a democratically elected president: first, they were fearful of democracy; and second, they were apprehensive of presidential power. Put the two together, in the form of a democratically elected president, and one had the fetus of monarchy of which Randolph had complained.

Nearly all of the delegates mistrusted democracy, and given a choice between the popular election of the president and a Congressional appointment they preferred the latter. Like

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<sup>50</sup> I: 299 (Hamilton), I.86-87 (Dickinson), I.398 (Pinckney).

<sup>51</sup> I.83.

<sup>52</sup> I. 66.

<sup>53</sup> II.101.

<sup>54</sup> See Louise Dunbar, *A Study of "Monarchical" Tendencies in the United States from 1776 to 1801* 60, 91 (Urbana: U. Illinois, 1922).

<sup>55</sup> II.191-92.

<sup>56</sup> Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* 50 (New York: Penguin, 2006).

<sup>57</sup> Letter to Thomas Jefferson, Aug. 12, 1786, 9 PJM 95.

<sup>58</sup> II.29.

<sup>59</sup> See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (2007) on how new technologies in travel and communication helped shape the movement towards popular sovereignty.

Madison, they liked the idea of a selection filtered by an intermediate level of elected officials. The defects of the Articles period could be traced, they thought, to an “excess of democracy,”<sup>60</sup> with its “turbulence and follies.”<sup>61</sup>

The delegates had decided to keep their deliberations secret, and for the most part adhered to this. This made it easier to express a contempt for democracy which at times made them seem like French aristos peering through their lorgnettes at *la canaille*. Elbridge Gerry, fresh from Shays’ Rebellion in western Massachusetts, observed that “the worst men get into the Legislature. Several members of that body have lately been convicted of infamous crimes. Men of indigence, ignorance and baseness, spare no pains, however dirty to carry their point against men who are superior to the artifices practiced.”<sup>62</sup> Roger Sherman agreed. “The people ... immediately should have as little to do as may be about the Government. They want information and are constantly liable to be misled.”<sup>63</sup> For his part, George Mason thought that “it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.”<sup>64</sup>

Madison had spent the previous winter boning up on the republics of antiquity, a study which did nothing to reassure him about democracy. He feared “the transient impressions into which [the people] might be led,” and wondered whether they might propose land reform schemes like those of the Gracchi in republican Rome.

An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.<sup>65</sup>

What were they thinking, we are tempted to ask. Without the support of the ordinary people they now denigrated, America would not have won its independence a few years before. However, the Patriot’s passionate attachment to absolute liberty during the Revolution had led to lawlessness and violence, and while this was condoned and even encouraged when directed

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<sup>60</sup> I.48 (Gerry), I.301 (Hamilton).

<sup>61</sup> I.51 (Randolph).

<sup>62</sup> I.132.

<sup>63</sup> I.48.

<sup>64</sup> II.31.

<sup>65</sup> I.422-23.

against Loyalists, it was quite another thing when the mob turned its attention to the new American governments.

Serious rioting broke out in many of the major American cities in the 1780s. The Revolution had clothed public protests with a mantle of legitimacy, and state authorities, which had relied on extralegal groups during the Revolution, were reluctant to resist the same groups when the war was over.<sup>66</sup> Knowing this, the delegates feared that what popular suffrage would produce was the Massachusetts election of May 1787, when conservative James Bowdoin had lost his bid for reelection as governor of the state because he had called up the militia to suppress Shays' rebellion. Madison told the delegates that "the insurrections in Massachusetts admonished all the States of the danger to which they were exposed."<sup>67</sup>

In the midst of their deliberations, the delegates were treated to a vivid example of mob rule when an elderly woman was stoned to death not five blocks from their meeting place. Widow Korbmacher, as she was called, had been set upon as a witch on May 5, before the delegates arrived. On July 10, the mob struck again, shouting insults, carrying her through the streets and pelting her with stones. She died of her injuries on July 18,<sup>68</sup> the day after the delegates voted 9 to 1 against the popular election of the president on roll call 165.<sup>69</sup>

Some delegates knew mob violence at first hand. In 1779, James Wilson narrowly escaped death at the hands of a mob after he defended Loyalists whose property had been seized. Wilson barricaded himself in his house, two blocks from Independence Hall, with twenty or so of his colleagues (including two delegates to the Philadelphia Convention, Robert Morris and Thomas Mifflin). The mob was in the process of aiming a cannon at the house when they were dispersed by the arrival of the cavalry led by the military commandant of Philadelphia, Benedict Arnold. The mob had been whipped up by the state's populist governor, who himself lived in a house that had been confiscated from a Loyalist. Six people died in the affair, but the rioters were afterwards pardoned. Wilson had to flee Philadelphia for a few weeks, and his house came to be called "Fort Wilson."<sup>70</sup>

The fear of democracy was especially pronounced when the subject of a popularly elected president arose. Roger Sherman argued that "an Independence of the Executive on the supreme Legislative, was ... the very essence of tyranny."<sup>71</sup> Similarly, George Mason argued

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<sup>66</sup> Gordon S. Wood, A Note on Mobs in the American Revolution, 23 *William & Mary Q.* 635 (1966); Arthur M. Schlesinger, Political Mobs and the American Revolution, 1765-76, 99 *Am. Phil. Soc.* 244 (1955).

<sup>67</sup> I.318.

<sup>68</sup> Beeman, *Plain, Honest Men* at 77, 226-27.

<sup>69</sup> II.24. The delegates agreed that votes would be taken by state, with a majority of states deciding an issue, and a majority of delegates within each state deciding how the state would vote.

<sup>70</sup> Pauline Maier, *Popular Uprisings*, 27 *Wm. & Mary Q.* (third series) 29, 33-34 (1970); John K. Alexander, *The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 *Wm. & Mary Q.* (third series) 589 (1974).

<sup>71</sup> I.68.

that “if strong and extensive powers are vested in the Executive, and that Executive consists only of one person, the government will of course degenerate (for I will call it a degeneracy) into a monarchy.”<sup>72</sup> What delegates feared was that a president elected by the people would threaten liberty more than a hereditary monarch who lacked the legitimacy conferred by a popular election. “We are not indeed constituting a British Government,” said Mason, “but a more dangerous monarchy, an elective one.”<sup>73</sup>

Sherman wanted Congress to impose severe limits on the president’s authority. The president, he said, in a nasal accent which grated on the ears of Southern delegates, should be nothing more than the legislature’s agent. His job is to execute the laws passed by the legislature without exercising much or any discretion about how this is done.<sup>74</sup> This was a theory of separation of powers, though not one now familiar to us. The legislature would make the laws but not apply them and the executive would apply them but not make them, and the separation of the two powers would preserve liberty and the rule of law.<sup>75</sup>

This was a very old-fashioned view of executive authority. A hundred years before John Locke had argued that the executive should have broader powers. Under the royal prerogative, the King had the discretion to interpret or even vary legislation when the public good so demanded, and Locke thought this a valuable right, since legislators are not “able to foresee, and provide by laws, for all that may be useful to the community.”<sup>76</sup> However, Sherman and others of the Framers hearkened back to even earlier theories of the prerogative which had their origins in the English Civil War and parliamentary jealousy of the use Charles I had made of the prerogative to dispense with parliament and rule autocratically.

Sherman’s views about the prerogative were those of a member of a “Country” party, in contradistinction to a “Court” party, with the distinction between the two parties derived from

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<sup>72</sup> I.113.

<sup>73</sup> I.101. Mason was echoing Thomas Jefferson. “An *elective despotism* was not the government we fought for.” Thomas Jefferson, Notes on the State of Virginia, Query 13, in Writings at 245. The tendency towards unchecked presidential power has also been lamented by modern scholars. See, e.g., Eric A. Posner and Adrian Vermule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford U.P., 2011); Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge: Harvard U.P., 2010).

<sup>74</sup> Sherman proposed other measures to curtail the president’s power. He would have permitted Congress to remove the president at its pleasure (I.85). He also wanted Congress to appoint a council of advice which, like the executive councils of state governments, could veto the president’s decisions (I.97). He opposed a presidential veto over the legislature (I.99), and would even have approved a multiple presidency with the number of co-presidents left blank, so that Congress might appoint additional co-presidents should it want to overrule a president to whom it objected (I.65).

<sup>75</sup> Sherman’s ideas about the prerogative seem to have been taken from Jean-Jacques Rousseau, amongst others. J.-J. Rousseau, *Social Contract* II.ii. See Roger Sherman Boardman, *Roger Sherman: Signer and Statesman* 259 (New York: Da Capo, 1971). Even John Adams, in his 1776 *Thoughts on Government*, supra note X, wanted a governor who was elected annually by the legislature and who was “stripped of most of those badges of domination called prerogatives.”

<sup>76</sup> John Locke, *Second Treatise on Government* ch. xiv § 159.

the Court and Country parties of early modern British history. During the English Civil War, the Court party favored the crown prerogative, at the expense of parliament, while the Country party sought to restrict the royal prerogative and saw Parliament as the guarantor of English liberties. The two parties also differed on the need for civic virtue in a republic. Country party members thought that republican government could not be preserved unless the citizens had a disinterested desire to promote the public good, shorn of any attachment to their private or factional interests. “Cabal,” “corruption” and “faction,” where private interest trumped the public good, were seen as mortal ills for a state.<sup>77</sup> Court party members scoffed at the idea of a special kind of republican virtue. With Hume they agreed that “all plans of government, which suppose great reformation in the manners of mankind, are plainly imaginary.”<sup>78</sup>

Apart from Sherman, Country party members likely included Elbridge Gerry of Massachusetts, John Lansing and Robert Yates of New York, Benjamin Franklin and Jared Ingersol of Pennsylvania, John Dickinson, Gunning Bedford and Richard Bassett of Delaware, Luther Martin, Daniel Jenifer and John Mercer of Maryland, Virginia’s Edmund Randolph, Hugh Williamson of North Carolina, Pierce Butler, John Rutledge and Charles Cotesworth Pinckney of South Carolina, and Abraham Martin and William Few of Georgia.<sup>79</sup> The Court party was represented by Hamilton, Gouverneur and Robert Morris and James Wilson of Pennsylvania, and John Rutledge of South Carolina.<sup>80</sup>

Madison may also be counted as a member of the Court party at the Convention. His *Vices* essay argued that self-interest would blind voters to the common good or even their long term interest. “Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure?” As an answer, Madison devised a constitutional regime whose purpose was to blunt the majoritarian excesses of an unconstrained democracy. In *Federalist* 51 Madison famously expanded on the idea that republican virtue would not suffice. Men are not republican angels, he said, but self-interested seekers of private gain, and government should channel self-

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<sup>77</sup> Luxury was also an enemy, since it made citizens focus on their self-interest and wealth, and as a member of the Country party Mason proposed that Congress be given the power to enact sumptuary laws against luxury goods. “No Government can be maintained unless the manners be made consonant to it,” he argued (II.344). Let those who seek distinction be channeled into ways more conducive to the public welfare. The motion failed (roll call 319, at II.340), but received support from Delaware, Maryland and Georgia.

<sup>78</sup> Idea of a Perfect Commonwealth.

<sup>79</sup> A list that overlaps somewhat with that of McDonald, *Novus Ordo Seclorum* at 200. Those who adhered to Country party ideals could nevertheless be hard-eyed realists when they considered the shortcomings of their fellow countrymen. Washington, than whom no one better represented republican virtue, had his nose rubbed in it when he sought to persuade his soldiers to re-enlist or requested supplies for his troops from Congress. From his experiences he concluded that “the few ... who act upon Principles of disinterestedness are, comparatively speaking, no more than a drop in the Ocean.” Washington to John Hancock, Sept. 24, 1776, in John C. Fitzpatrick (ed.), *VI Writings of Washington*, at <http://etext.virginia.edu/toc/modeng/public/WasFi06.html>.

<sup>80</sup> II.364

interest in such a way that it serves the public good.<sup>81</sup> “Ambition must be made to counteract ambition,” so that the overweening pursuit of advantage by one group is checked by other groups in the competition for power.

One would expect a Country party member to prefer a Congressionally-appointed president who was closely accountable to Congress, and a Court party member to want a powerful president who might on occasion defy Congress. Country party members would also be expected to want to limit the president to a single term of office, and Court party members to oppose term limits. However, the distinction between the two parties blurs over an influential group of delegates, such as Washington, who adhered to Country party ideas about republican virtue but who nevertheless wanted a strong national government and who, sooner or later, saw a popularly elected president as a way to strengthen the national government. And then there was Madison, a Court party nationalist whose filtration principle nevertheless led him to propose a Congressionally-appointed president. How he and the Country party nationalists were led to support the method of electing presidents in Article II of the Constitution, and what they understood this to mean, is one of the greatest and least understood dramas of the Convention.

### *The Delegates Vote*

The delegates came from very different backgrounds. Some were conservative, some not; some were rich, some not. Surprisingly, it was the conservative or wealthy delegates—Hamilton, James Wilson, Gouverneur Morris and John Dickinson—who wanted a president elected by the people, while those whom one would have expected to be most sympathetic to popular elections—Roger Sherman, George Mason and John Rutledge—sought an appointed executive. As Hamilton observed, “the members most tenacious of republicanism ... were as loud as any in declaiming against the vices of democracy.”<sup>82</sup>

James Wilson had most cause to fear the “excesses of democracy,” after the Battle of Fort Mifflin. Like Hamilton, Wilson wanted a strong central government; unlike Hamilton, however, Wilson sincerely believed in popular sovereignty, and subscribed to that most benign of legal fictions, the idea that in America sovereignty vests in the people.<sup>83</sup> Of all the delegates, he came

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<sup>81</sup> Garrett Sheldon traces Madison’s rejection of republican virtue to the Calvinist influence of James Witherspoon. Garrett Ward Sheldon, *The Political Philosophy of James Madison* (Baltimore: Johns Hopkins, 2001). See also John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: Basic, 1984).

<sup>82</sup> I,288.

<sup>83</sup> See Randolph G. Adams (ed.), *Selected Political Essays of James Wilson* 180 (New York: Knopf, 1930) (speech at the Pennsylvania Ratifying Convention, Nov. 24, 1787). Yet it was more than a legal fiction to Wilson, who employed his theory to impugn the doctrine of sovereign immunity which the state of Georgia had invoked when sued by a private citizen from another state. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The ruling in the case was subsequently reversed by the Eleventh Amendment, which removed such cases from federal courts. On the difficulties of current attempts to give life to Wilson’s theory, see Henry Paul Monaghan, *We the Peoples*, Original

closest to championing our present constitutional regime, one with a popular election of members of both houses of Congress as well as the president. He had signed the Declaration of Independence and served on the Supreme Court, but deserves to be remembered principally for his role at the Convention.<sup>84</sup>

What Wilson had recognized, before anyone else, was how a democratically elected president would strengthen the strong national government he yearned to see. An elected president would be the only member of the government chosen by all the people of the United States, and would provide the leadership to resist parochial parties from different states. That was not a politic thing to say before the defenders of states' rights at the Convention, but Wilson could be more candid at the Pennsylvania ratifying convention later that year. The president, he said, would be "THE MAN OF THE PEOPLE," and as such would "consider himself as not particularly interested for any [one part of the United States], but will watch over the whole with paternal care and affection."<sup>85</sup>

Wilson recognized that, for most delegates, a direct election of the president was a bridge too far. Nevertheless, the idea of democracy might be made more palatable if presidential electors were interposed between the president and the people, and what Wilson proposed was our present electoral college: voters would elect members of the electoral college who would then choose the president. This was a clever method of addressing the fears of democracy, since it suggested that the electors might exercise an independent judgment if the voters chose poorly. However, Wilson's motion was defeated 7 to 2 in roll call 11,<sup>86</sup> with only Pennsylvania and Maryland supporting it. The delegates then voted 8 to 2 for a president appointed by the legislature.<sup>87</sup> Wilson had failed, but over the course of the Convention he and his allies would create a coalition of nationalists who supported a strong presidency, and give rise to an opposing coalition of delegates who favored states rights and a weak presidency.<sup>88</sup>

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Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121 (1996), responding to Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

<sup>84</sup> Albeit one recognized as such only in recent years. See William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901 (2008). Like Robert Morris, Wilson speculated wildly in land development schemes and ended up in a debtor's prison. His leading role in the Convention remained hidden from view until Madison's notes were published in 1840, and by then the country had moved on.

<sup>85</sup> II *The Documentary History of the Ratifying Conventions* 452 (Merrill Jensen, John P Kaminski et al.) (Madison: Wisconsin Historical Society, 1976 ff.) [hereafter DHRC].

<sup>86</sup> I.79.

<sup>87</sup> Roll call 12, at I.79. Wilson's subsequent motion for a senate elected by the people fared even worse. Only his state supported the motion and it was voted down 10 to one. Roll call 31, at I.149.

<sup>88</sup> Thach at 67-68. It is sometimes suggested that Washington's presence at the Convention helped persuade the delegates to support a popularly elected president, since everyone expected that he would also be the first president. If it were thought that a popularly elected president might abuse his powers, he must have seemed a reassuring figure. South Carolina's Pierce Butler thought that the delegates would not have been so willing to repose their confidence in the executive "had not many of the members cast their eyes toward General Washington as President;

A second group of delegates, led by Elbridge Gerry, opposed the Virginia Plan's proposal of a Congressionally-appointed president. These were states' rights supporters who were troubled by the degree of centralization implicit in both Wilson's democratically elected president and Madison's Congressionally-appointed president, and who wanted the states to appoint the president.<sup>89</sup> A Congressional appointment, argued Gerry, would lead to "corruption."<sup>90</sup> For Country party members, this was a code word for pampered fops trading favors at the feet of a monarch, and Gerry said the Virginia Plan would result in the same kind of underhanded deals between the president and legislators. Finally, said Gerry, a state-appointed presidency would give us better presidents than those whom the people would elect, as an application of Madison's filtration principle.

On June 7 the delegates voted unanimously for a Senate appointed by state legislatures,<sup>91</sup> but two days later voted 10 to 1 against a president appointed by state governors.<sup>92</sup> They were, at this point, still wedded to a Congressionally-appointed president. On June 11 and 12 they voted to approve the Virginia Plan,<sup>93</sup> and when William Paterson presented the New Jersey Plan to the delegates on June 15 it also featured a president appointed by Congress.<sup>94</sup>

The New Jersey Plan was a bombshell. When it was tabled John Dickinson turned to Madison and said "you see the consequence of pushing things too far."<sup>95</sup> The Plan was proposed by "small state" delegates as more decentralized and less nationalistic alternative to the Virginia Plan. It modified the Articles of Confederation, but unlike the Virginia Plan did not junk them. Congress would have a taxing power, but would continue as a unicameral house, with each state given a single vote. The "large state" delegations from Virginia and Pennsylvania had caucused together. Behind the scenes, so too had the small state delegations from New Jersey, Connecticut and Delaware, along with Robert Yates and John Lansing from New York and Luther Martin from Maryland. There were now two radically different plans on the floor, and the debate between them would consume the deliberations and passions of the delegates for the next month.

To resolve the crisis, on July 2 the delegates appointed a Committee of Eleven, with one member from each state, to settle on a compromise. At Franklin's suggestion, the committee proposed the plan of representation now found in the Constitution: representation by population in the House of Representatives and equal representation for states in the Senate. Delegates from

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and shaped their Ideas of the Powers to given to a President, by their opinions of his Virtue." Letter to Weedon Butler, May 5, 1788, at III.302. And yet the delegates voted down a popularly elected president again and again.

<sup>89</sup> I.80 (Gerry). See also I.154 (Sherman).

<sup>90</sup> I.175-76. See also I.152, where Gerry argued for state-appointed senators for this reason.

<sup>91</sup> Roll call 32, at I.149.

<sup>92</sup> Roll call 36, at I.175.

<sup>93</sup> Roll call 45, at I.195; and roll call 46, at I.213-14.

<sup>94</sup> Paterson had seemingly subscribed to Madison's filtration argument, but turned it around to argue for senators filtered by state legislatures. I.251.

<sup>95</sup> I.242.

the large states objected to this but were outvoted on July 7,<sup>96</sup> and on July 16 the Convention ratified the entire Committee's proposal.<sup>97</sup> This came to be called the Connecticut Compromise, but the label is misleading, for it was less a compromise than a defeat for the large state delegates. The large state delegates met the next morning to see whether their plans for the Senate might be salvaged, but decided the game was lost.<sup>98</sup>

When they met on July 17 the small state delegates pressed their advantage again, this time to defeat another of Madison's pet ideas, a Congressional veto over state laws. On Madison's extended republic theory, the national government would be less prone to factions and interest group inefficiencies than state governments, and the Virginia Plan's Resolution Six would therefore have given Congress the power to "negative" or veto state laws which it thought contravened the Constitution. On June 8, Madison had taken this further and seconded a motion to extend the veto to every case in which Congress objected to the state law, whether or not it was thought to violate the Constitution.<sup>99</sup> The delegates had voted down the Congressional veto on June 8,<sup>100</sup> and lest any doubt remain the subject was brought to a vote again on July 17. Madison argued for the veto power, but even the Pennsylvanians threw in the towel and the motion failed 7 to 3.<sup>101</sup>

Now, however, the Pennsylvanians would counterattack over the presidency. Up to that point there had been a broad agreement that the president should be appointed by Congress. If anything, the New Jersey Plan tilted more strongly in the direction of parliamentary governance, since it reopened the question whether there should be more than one president at a time, and would have permitted Congress to remove the president at any time on the application by a majority of state governors.<sup>102</sup>

Gouverneur Morris moved that the president be elected by popular suffrage. When it came to a vote, however, only Pennsylvania supported the resolution.<sup>103</sup> Maryland's Luther Martin then proposed that the president be chosen by electors appointed by state legislatures, but the delegates were still wedded to a Congressional appointment and voted 8 to 2 against, with only

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<sup>96</sup> Roll call 120, at I.549.

<sup>97</sup> Roll call 156, at II.15. In an extraordinarily short time the delegates in Philadelphia and in Congress at New York arrived at two of the most momentous decisions in American history. Sixteen of the Philadelphia delegates had left for New York at the end of June to represent their states in Congress, which on July 13 passed the Northwest Ordinance that abolished slavery north of the Ohio River and prepared the way for the admission of six new states.

<sup>98</sup> "The time was wasted in vague conversation," wrote Madison. II.19-20.

<sup>99</sup> Roll call 34, at I.163. This was what Madison had wanted all along. Letter of George Washington, April 16, 1787, 9 PJM 382. After the Convention was over, he continued to regret the absence of a Congressional veto over state legislation. Letter to Thomas Jefferson, Oct. 24, 1787, 10 PJM 206.

<sup>100</sup> Roll call 34, at I.163.

<sup>101</sup> Roll call 163, at II.24.

<sup>102</sup> I.244 (Resolution 4).

<sup>103</sup> Roll call 165, at II.24.

Delaware and Maryland in the minority.<sup>104</sup> Finally, the delegates voted unanimously for a Congressionally-appointed president.<sup>105</sup> Even the dissenters had thrown in the towel at this point, and everyone must have thought that the issue was finally settled.

That afternoon the delegates broke early and a group of them, led by Washington, visited Gray's Ferry, where one could observe the exotic plants of Bartram's Garden, drink tea or fish in the Schuylkill.<sup>106</sup> The leafy walks may have prompted reflection about the office Washington soon would hold, for two days later, on July 19, the delegates suddenly reversed themselves. On a motion by Gouverneur Morris, they unanimously agreed to reconsider the presidency.

Morris was a representative of the rising merchant class and a member of the Court party. He was as fearful of democracy as any delegate, but now he sought to persuade Country party members to support a democratically elected president. What Morris wanted was a president who, clothed with the authority conferred by a popular election, would strengthen the national government.<sup>107</sup> That was not an argument that would appeal to Country party or states' rights delegates, however. Instead, Morris astutely argued that the lower classes needed a tribune of the people, and this could only be the president. Congress would come to represent the rich and powerful, and if it appointed the president "legislative tyranny" would ensue. What was needed, therefore, was a separation of powers between the executive and legislative branches. "If the Legislature elect," said Morris, "it will be the work of intrigue, of cabal, and of faction."<sup>108</sup>

Morris had cleverly sought to appeal to several different constituencies amongst the delegates. The "tribune of the people" would appeal to the pro-debtor crowd, who wanted a new Tribune Gracchus. Morris also sought to enlist the support of Country party members, with the buzz words of intrigue and cabal. The reference to Congressional tyranny would also appeal to states' rights supporters, notably Elbridge Gerry, who had spoken of corrupt bargains if the legislature appointed the president.<sup>109</sup> Finally, Morris sought to appeal to that man of theory, James Madison, whom Morris knew would hear echoes of Montesquieu in an argument for separation of powers.

The two men had known each other for some years. They did not overlap in the Continental Congress, but both were in Philadelphia in the early 1780s. For the first month of the Convention they saw little of each other. Though he was present at its start, Morris left after a few days and returned only on July 2, when he wasted no time in making up for his absence by

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<sup>104</sup> Roll call 166, at II.24.

<sup>105</sup> Roll call 167, at II.24.

<sup>106</sup> IV.172.

<sup>107</sup> Hamilton too was no democrat, but as a nationalist recognized that a popularly elected president would change the balance of power between the states and federal government. Before anyone else, he recognized that the day would come "when every vital interest of the state will be merged in the all-absorbing question of *who shall be the next PRESIDENT.*" Letter of Governor Lewis, at III.410.

<sup>108</sup> II.29-31.

<sup>109</sup> I.80.

launching into a patronizing speech in favor of a senate composed of American aristocrats.<sup>110</sup> In his brashness, he had failed to take the measure of the delegates, and Madison was especially annoyed. On July 11 he admonished Morris for continually insisting on the “political depravity of men, and the necessity of checking one vice and interest” against another.<sup>111</sup> It wasn’t so much what Morris had said, however, as the way he had said it. Madison didn’t think men were angels, but Morris had spoken like a brassy New Yorker and this had irritated the Virginian.

Morris was everything Madison was not. The New Yorker was tall, confident, ebullient and witty. He had lost a leg and his right arm was withered, but this scarcely slowed him down. By contrast, Madison was a hypochondriac who outlived every other member of the Convention. Madison was especially shy with women, while Morris enjoyed a remarkably successful career as a rake. While the story that he owed his peg-leg to a jump from a window to escape a jealous husband is probably apocryphal, we do know something of his many affairs, thanks to his candid diaries and letters.<sup>112</sup> With a touch of envy, a French diplomat described him as “sans moeurs, et, si l’on en croit ses ennemis, sans principes.”<sup>113</sup>

At the Convention Morris was the master of the strategic compromise, the adroit suggestion, the art of the deal. A Georgia delegate described him as:

one of those Genius’s in whom every species of talents combine to render him conspicuous and flourishing in public debate:—He winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away all the senses of all who hear him.<sup>114</sup>

As for Madison, the Georgian recalled his scholarship, industry, sweet temper and “great modesty.”<sup>115</sup>

This was a trying time for Madison. When he heard of the New Jersey Plan, he had felt “serious anxiety.”<sup>116</sup> Before the Connecticut Compromise of July 16, the delegates feared the Convention might end in failure and tempers were running high. Within a few days, however, the crisis had passed, and the two men seem to have made up their differences. Years later Madison remembered Morris not unfondly. “To the brilliancy of his genius, [Morris] added, what is too

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<sup>110</sup> I.517.

<sup>111</sup> I.584.

<sup>112</sup> The letters which Mme. de Chaumont wrote to him are too heated to be quoted, sniffed a prim Morris biographer. James J. Kirschke, *Gouverneur Morris: Author, Statesman, and Man of the World* 345 at n.47 (New York: St. Martin’s Press, 2005). More discreetly still, Morris’ granddaughter complained of the lady’s “ceaseless annoyances.” I *The Diary and Letters of Gouverneur Morris* 91 (Anne Cary Morris, ed.) (New York: Scribner’s, 1888).

<sup>113</sup> III.236.

<sup>114</sup> III.92.

<sup>115</sup> III.94-95.

<sup>116</sup> I.242.

rare, a candid surrender of his opinions, when the lights of discussion satisfied him, that they had been too hastily formed, and a readiness to aid in making the best of measures in which he had been overruled.”<sup>117</sup> Evidently Morris had confessed his error of July 2 to Madison (who also came appreciate the need to check one interest against another, in *Federalist* 10).

At the same time, Morris brought Madison around to the idea of a popularly elected president. When he arrived in Philadelphia Madison had subscribed to Hume’s theory of government, with its appointed executive, but without investing the deepest thought or feeling on the subject. A month before the Convention he confessed his uncertainties to Edmund Randolph. “A national Executive will also be necessary. I have scarcely ventured to form my own opinion yet, either of the manner in which it ought to be constituted, or of the authorities with which it ought to be clothed.”<sup>118</sup> It was now prudent to drop Hume’s theory, but Madison needed a new theory to do so, and that was what Morris handed him, by invoking the separation of powers. At some level, Madison must have recognized, with the Pennsylvanians, that the nationalist cause would be served by a powerful presidency, one who could stand up to the states as American presidents have done since then. But practical considerations were little more than an empty breeze to Madison, who yearned for the rock of a good hard theory. Happily, Madison was a supple theorist, one who could amend his theories when the need arose.<sup>119</sup>

The penny, so carefully inserted by Morris, now dropped. Madison had authored the Virginia Plan’s proposal for a Congressionally-appointed president, but after listening to Morris he did a nimble volte-face. As a nationalist, Madison was dismayed by the Connecticut Compromise and senators appointed by state legislatures, and as a nationalist he was now brought around to the idea of a popularly elected president. Like Morris, he recognized that a president so elected would strengthen the national government, and like Morris he veiled his argument in separationist rather than nationalist terms. A separation of powers between legislative, executive and judicial powers was essential to preserve liberty, and the three branches could be separate only if they were independent of each other. “A dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then

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<sup>117</sup> Letter to Jared Sparks, April 8, 1831, at III.500.

<sup>118</sup> April 8, 1787, 9 PJM 368.

<sup>119</sup> It is not easy to reconcile the Madison of 1787, with his Congressional veto of state legislation, with the Madison of 1798, with his Virginia Resolution which argued that states had the right, when confronted with “dangerous” and unconstitutional federal laws, “to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties of the states.” Years later an embarrassed Madison sought to distinguish this from Calhoun’s nullification doctrine. “Notes on Nullification,” in Marvin Meyers (ed.), *The Mind of the Founder: Sources of the Political Thought of James Madison* 417 (Waltham: Brandeis, 1973). Madisonian apologists, notably Lance Banning and Jack Rakove, have nevertheless argued for the inner truth and consistency of Madison’s beliefs. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the American Republic* (1995); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996). But for the patriotic impulse to elevate Madison as an original thinker on the level of a Montesquieu or Hume, this would not matter.

according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.”<sup>120</sup>

Morris had consolidated the nationalist faction at the Convention. Until that point the nationalists had differed amongst themselves on democratic elections and the presidency. Some had supported the Congressionally-appointed president of the Virginia Plan, others wanted a popularly elected president. Now the nationalists would present a united front in favor of a popularly elected president.

Morris and his allies moved cautiously. On July 19 Connecticut’s Oliver Ellsworth and Maryland’s Jacob Broom moved that the president be appointed by electors. This was an ambiguous motion. It might lead to a motion that the electors be elected by popular ballot, as James Wilson had proposed on June 2.<sup>121</sup> Alternatively, it might be tacked on to a motion that the electors be chosen by state legislatures, as Elbridge Gerry had suggested,<sup>122</sup> and as Maryland’s Luther Martin and Jacob Broom had proposed.<sup>123</sup> What Morris, Ellsworth and Broom sought to create was a coalition of all those opposed to a Congressional appointment, for they only had no use for electors.

The tactic succeeded. The motion passed by 6 to 3, with only the three southernmost states holding out for a Congressional appointment.<sup>124</sup> Ellsworth and Broom were states’ rights supporters, and they next moved that the electors be chosen by state legislatures. This passed 8 to 2 in roll call 183, with Madison’s Virginia in dissent and Morris’ Pennsylvania voting yes.<sup>125</sup> The Pennsylvanians had bowed to what they saw as inevitable, a states’ rights coalition that had won one trick after another that month.

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<sup>120</sup> II.34. In a note he wrote afterwards Madison said that this speech was meant to defend Dr. McClurg’s suggestion of a president appointed without a fixed term during good behavior. *Id.* In making the suggestion, McClurg had invoked the separation of powers. However, it is much more likely that, in adopting separationism, Madison was influenced by Gouverneur Morris than he was by Dr. McClurg, who had been picked from obscurity and whose talents were unsuited for political debate. It took two days for Madison to come fully around to separationism, from July 17 to July 19. See II.56.

William Riker’s reliance on McClurg’s motion as a peg from which to hang an account of strategic voting seems considerably overdrawn. Riker, *supra*. McClurg was a naïf who very likely did mean his motion seriously, adopting it from a similar suggestion Hamilton had made at I.292. Other delegates seemed to take McClurg seriously also, as four states supported his motion on roll call 169 at II.24. Madison continued to think well of McClurg’s proposal for an unlimited presidential term in an Oct. 24, 1787 letter to Thomas Jefferson. 10 PJM 208.

<sup>121</sup> Roll call 11, at I.79.

<sup>122</sup> I.80 and II.57.

<sup>123</sup> Roll call 166, at II.24.

<sup>124</sup> Roll call 182, at II.51.

<sup>125</sup> Roll call 183, at II.51.

**Table I**      *The Delegates Vote for a President Appointed by the States*

<b>Roll Call Date Page</b>	<b>Resolution (Movers)</b>	<b>Outcome</b>	<b>Aye</b>	<b>No</b>	<b>Divided</b>
36 June 9 I.175	State governors appoint (Gerry)	0-10-1 (NH absent)		MA, CT, NY, NJ, PA, MD, VA, NC, SC, GA	DE
166 July 17 II.24	State legislatures appoint (Ellsworth, Broom)	2-8 (NH, NY absent)	DE, MD	MA, CT, NJ, PA, VA, NC, SC, GA	
182 July 19 II.51	Substituting an election by electors in place of a Cong. appointment (Ellsworth)	6-3-1 (NH, NY absent)	CT, NJ, PA, DE, MD, VA	NC, SC, GA	MA
183 July 19 II.51	State legislatures appoint (Ellsworth)	8-2 (NH, NY absent)	MA, CT, NJ, PA, DE, MD, NC, GA	VA, SC	

What would a presidency have looked like, had the choice fallen to state legislatures? The states would have been stronger, of course. There would have been a much weakened separation of powers, since state legislatures would appoint both the president and the Senate. The party structure of American politics would be based at the state level, and this would likely have carried over to elections for the House of Representatives. For the most part the gridlock which characterizes the federal government today would be absent.

In short order, the delegates had voted twice against what we understand as the separation of powers, in both cases by overwhelming margins. On July 17 in roll call 167 they voted unanimously for a Congressional appointment. Two days later they voted 8 to 2 in roll call 183 for a president appointed by electors appointed by state legislatures. In both cases they rejected the popular election of the president and affirmed his dependence on the legislative branch.

That should have been an end to it. However, on July 24 a Georgia delegate argued that it would be difficult to find capable men to serve as electors in distant states and moved that the president be appointed by Congress. This passed 7 to 4 in roll call 215, with Virginia and Pennsylvania voting no.<sup>126</sup>

Roll call 215 might have seemed decisive, but the delegates remained troubled and the next day they considered a proposal to split the difference. The president would be appointed by Congress for his first term, but if he ran again would be appointed by electors appointed by the

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<sup>126</sup> II.98.

states. This failed, seven votes to four.<sup>127</sup> That left the Virginia Plan on the table. On July 26 George Mason moved that the president be appointed by Congress, and this passed 6 to 3 in roll call 225, with Washington and Madison voting no.<sup>128</sup>

At this point the delegates had voted six times for a Congressionally-appointed president. Its supporters had assembled a caucus composed of those, such as Randolph, Sherman, Mason and Charles Pinckney, who thought liberty best defended by the legislature and feared that a strict separation of powers would make a monarch of the president.<sup>129</sup> It also included those, such as Gerry, Sherman and Pinckney, who simply didn't think that the people were up to the task of electing a president.<sup>130</sup> Finally, it included the three southernmost states of North and South Carolina and Georgia, which as slave states had their own special reasons to fear a concentration of power in the national government. They were opposed by a smaller group of states, composed of Pennsylvania and (depending on who showed up that day) Maryland, Delaware and Virginia.

**Table II**                      *The Delegates Vote for a President Appointed by Congress*

<b>Roll Call Date Page</b>	<b>Resolution (Movers)</b>	<b>Outcome</b>	<b>Aye</b>	<b>No</b>	<b>Divided</b>
12 June 2 I.79	For an appointment by Congress	8-2 (NH absent)	MA, CT, NY, DE, VA, NC, SC, GA	PA, MD	
45 June 11 I.195	For the Virginia Plan (Randolph)	6-5 (NH absent)	MA, PA, VA, NC, SC, GA	CT, NY, NJ, DE, MD	
46 June 12 I.213-14	For the Virginia Plan (Randolph)	6-3-2 (NH absent)	MA, PA, VA, NC, SC, GA	CT, NY, NJ	DE, MD
167 July 17 II.24	For an appointment by Congress	10-0 (NH, NY absent)	MA, CT, NJ, PA, DE, MD, VA, NC, SC, GA		
215 July 24 II. 98	For an appointment by Congress (Houstoun, Spaight)	7-4 (NY absent)	NH, MA, NJ, DE, NC, SC, GA	CT, PA, MD, VA	

<sup>127</sup> Roll call 218, at II.109.

<sup>128</sup> Roll call 225, at II.118.

<sup>129</sup> I.66 (Randolph); I.68 (Sherman); I.113 (Mason), I.101, I.113; II.30 (Pinckney).

<sup>130</sup> I.48, I.132 (Gerry); I.154 , II.29 (Sherman), II.30 (Pinckney).

218 July 25 II.108	Cong. appoints for the first term, state legislatures appoint for subsequent terms (Ellsworth)	4-7 (NY absent)	NH, CT, PA, MD	MA, NJ, DE, VA, NC, SC, GA	
225 July 26 II. 118	Cong. Appoints, seven year term, term limits, impeachable on malpractice (Mason)	6-3-1 (MA, NY absent)	NH, CT, NJ, NC, SC, GA	PA, DE, MD	VA

The delegates now thought they were nearly done. At the end of the day they turned over the draft constitution, with its appointed president, to a Committee of Detail for fine tuning and adjourned for ten days. The Committee reported back to the Convention on August 6, with a draft constitution that departed significantly from the Virginia Plan, but which still retained a Congressionally-elected president.<sup>131</sup> That question, it was thought, had been settled.

It wasn't, though. On August 24 the delegates returned to the question. Daniel Carroll of Maryland, one of the two Catholics at the Convention and an ardent democrat, proposed that the president be elected by the people and not the legislature, but only Pennsylvania and Delaware supported the motion and it failed 9 votes to 2 in roll call 355.<sup>132</sup> The coalitions which had been assembled for roll calls 11 and 215 continued to hold, if less strongly than before. But then Gouverneur Morris spoke up to warn of legislative tyranny if the president were dependent on the support of Congress, and proposed that the president be appointed by electors themselves elected by the people. This gained three more votes, including that of Virginia, but the motion still failed, 6 to 5 in roll call 359.<sup>133</sup>

*Table III                      The Delegates Vote Against a Popularly Elected President*

<b>Roll Call Date Page</b>	<b>Resolution (Movers)</b>	<b>Outcome</b>	<b>Aye</b>	<b>No</b>	<b>Divided</b>
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<sup>131</sup> II.171, II.185.

<sup>132</sup> II.399.

<sup>133</sup> II.399.

11 June 2 I.79	Election by electors elected by the people (Wilson)	2-7-1 (NH, NJ absent)	PA, MD	MA, CT, DE, VA, NC, SC, GA	NY
165 July 17 II.24	Election by the people	1-9 (NH, NY absent)	PA	MA, CT, NJ, DE, MD, VA, NC, SC, GA	
355 Aug. 24 II.399	Election by the people (Carroll, Wilson)	2-9 (NY absent)	PA, DE	NH, MA, CT, NJ, MD, VA, NC, SC, GA	
359 Aug. 24 II.399	Election by electors to be elected by the people (G. Morris, Carroll)	5-6 (NY absent)	CT, NJ, PA, DE, VA	NH, MA, MD, NC, SC, GA	

This was the high tide of strict separationism at the Convention. Morris had won Connecticut and New Jersey over to his side, but had still not assembled a winning coalition. There were now three proposals on the table: one for a Congressional appointment, one for an appointment by the states, and a third for an election by the people. The first two proposals had secured majority support in various roll calls. Only the third, with its popularly elected president, failed to pass every time it was put to the delegates.

That still left the question up in the air. A motion to postpone the issue failed, as did a motion to refer the matter to a committee of all the states. Gouverneur Morris then proposed that the president be chosen by electors, as an abstract matter. The delegates would have understood that the electors might either be democratically chosen or appointed by the states. Had the motion passed, it would have amounted to a rejection of a Congressionally-appointed president, which was the plan then on the table. However, the delegates were split 4 to 4 and the motion was taken to have failed.<sup>134</sup>

### *An Empirical Study*

The delegates arrived at their final compromise two weeks later, on September 6, in what became Article II of the Constitution. Two narratives might be offered to explain how they

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<sup>134</sup> Roll call 361, at III.399. William Riker mischaracterized this as a vote for the popular election of the president. William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 *Am. Pol. Sc. Rev.* 1, 6 (1984).

finally settled on the manner of choosing a president. The first is that the democrats amongst them persuaded their colleagues to accept a popularly elected president by appealing to the need for popular elections and a separation of powers. This is the commonly accepted view of the Convention, but I think it mistaken. Instead, I suggest that the preferences and coalitions that had emerged over the first three months of the Convention were too strong for what would have been a radical change of heart. What the delegates agreed to on September 6 was not our modern presidential system, but a compromise in which each of the different coalitions walked away with the belief that their side had won the day.

To understand how the delegates arrived at their final compromise, I examined the coalitions that emerged over the first three months of the Convention. In an empirical study of delegate votes to this point, appended as Appendix A, I regressed how they voted on choosing a president on variables measuring their ideologies, background and state characteristics, and found that three things principally influenced the delegates: nationalism, personal wealth and a desire for constraints on presidential power.

I hypothesized that a nationalist would want a popularly elected president, as this would increase his political authority in his dealings with states. For examples of this, think of Lincoln in 1861 or Eisenhower's decision to send federal troops to enforce integration in Little Rock in 1957.

Wealthy delegates had a greater stake in the revival of the economy, as well as a greater understanding of the costs of state laws that weakened credit markets. More than most delegates, they would have wanted a strong national government to emerge from the Convention. They would then have supported the popular election of the president, as this would result in a stronger national government, one which would draw forth power from the states which were seen as the source of the country's financial problems.

If those who wanted a strong president supported a popular election, those who wanted to weaken the president's power opposed a popular election. This would include Country party delegates, who were suspicious of executive power, as well as states' rights delegates who saw a powerful president as a threat to state power.

I found that, as expected, delegates were more likely to support a popularly elected president if they were nationalists who wanted a strong central government. They were also more likely to do so if they were wealthy. On the other hand, they were less likely to do so if they wanted to weaken presidents by limiting them to a single term of office, as Country party members would seek to do.

The September 6 compromise led, in the fullness of time, to the modern system of American presidential politics, with a president elected by electors who do not exercise an independent judgment and simply vote the way the voters tell them. It would be a mistake, however, to assume that that is what the delegates intended. Many of them made it abundantly clear that they wanted anything but that, and the empirical analysis which I conducted helps to explain how the delegates understood the compromise.

## *What They Decided*

After roll call 355 on August 24, the delegates groped towards a grand compromise, with something for everyone, and the coalitions which had formed over the question of the appointment of the president began to blur. On August 31 the delegates referred the question of presidential elections to the Committee on Unfinished Parts, with one delegate for each state. Those who favored a democratically elected president were represented by Madison, Gouverneur Morris, Dickinson, Carroll, Rufus King of Massachusetts and possibly Hugh Williamson of North Carolina.<sup>135</sup> They would be opposed by New Hampshire's Nicolas Gilman, South Carolina's Pierce Butler and Georgia's Abraham Baldwin. The two remaining members of the committee, Roger Sherman and New Jersey's David Brearly, had supported a Congressional appointment, but their states had voted a few days earlier on roll call 359 for a popular election.

The committee was well aware that whatever solution it might propose should commend itself to the delegates. The Convention was now three months into its deliberations. Everyone sensed that it must come to an end shortly. Years later Madison recalled that the decision about how to choose a president, made so late in the day, "was not exempt from a degree of the hurrying influence produced by fatigue and impatience."<sup>136</sup> The delegates were out of time and voted for the plan with a minimum of discussion. It was this or nothing.<sup>137</sup>

On September 4 Gouverneur Morris spoke for the committee in explaining the changes. Many of its members, he said, had wanted a popular election of the president, but that was not what the committee had recommended. Instead, Morris said, the committee had proposed a change which would eliminate the prospect of intrigue and faction were Congress to appoint the president.<sup>138</sup> The committee's plan also made it possible to re-elect the president to a second term and eliminate term limits which would deprive the country of an experienced president.

This was an argument for a form of separation of powers, and it seems to have won over Butler.<sup>139</sup> However, it would be a stretch to claim that the other members of the committee or the Convention subscribed to it or understood it to mean our current understanding of separationism.

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<sup>135</sup> II.55-56 (King). Williamson was opposed to a president elected by the people on July 17 but also saw objections to a Congressional appointment on July 25. His state voted consistently for a Congressional appointment. He remained a strong state supporter on September 6, proposing an election by the House voting by state, if the electors failed to elect a president by majority vote. II.527.

<sup>136</sup> James Madison to George Hay, August 23, 1823, *The writings of James Madison: comprising his public papers and his private correspondence, including numerous letters and documents now for the first time printed* 147 (New York: G.P. Putnam, 1910).

<sup>137</sup> That was not quite the end of the matter. On September 5 John Rutledge moved that the committee's vote be postponed and that the delegates take up the original proposal for a president appointed by the legislature. This failed, 8 to 2 in roll call 445, and thereafter the Virginia Plan's idea of a president appointed by Congress was never again raised.

<sup>138</sup> II.500.

<sup>139</sup> II.501.

Crucially, the anti-democrats thought that the choice had been removed from the people in three ways.

First, the delegates who had been skeptical about democracy and who subscribed to Madison's filtration theory would have noted that an electoral college was interposed between the voters and the president under Art. II § 1, cl. 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...

This plausibly helped bring Madison on board, since he thought that the electors would exercise an independent judgment, arguing before the Virginia ratifying convention that a choice by electors would be "more judicious" than a vote by the people.<sup>140</sup> In *Federalist* 68, Hamilton agreed with him. Speaking of the electors, he said:

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

That wasn't the only reason for an electoral college. The three-fifths compromise had given slave states additional representation in the electoral college by counting slaves as three-fifths of a person. In addition, there was a concern that a state might inflate its votes by broadening its franchise.<sup>141</sup> However, these concerns might have been addressed without interposing a group of people between the voters and the president, nor was it necessary to defend their independent discretion, unless there was something suspect about choices made in popular elections. Similarly, the delegates would not have thought Art. II § 1, cl. 2's ban on Congressmen sitting as electors necessary unless they thought the electors would exercise an independent judgment.<sup>142</sup>

Second, the delegates who had previously supported a Congressional appointment of the president might also have thought they had won the day. If clause 2 failed to give a candidate a majority of electoral votes, clause 3 threw the election to the House (originally the Senate, in the Committee's draft).

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<sup>140</sup> X DHRC 1377; 11 PJM 154.

<sup>141</sup> II.57 (Madison).

<sup>142</sup> As Hamilton emphasized in *Federalist* 68.

The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President....

This would have happened in 2000 had the Florida votes been disallowed, and did happen in the elections of 1800 and 1824. Many delegates at the Philadelphia Convention thought it would almost always happen this way, since they did not expect that, after George Washington, national candidates with country-wide support would emerge. George Mason thought the election would be thrown to the legislature 95 percent of the time,<sup>143</sup> and many of the most prominent members of the Convention, including Madison, Wilson, Hamilton, Dickinson, Randolph, Charles Pinckney, Rutledge and seemingly Sherman, agreed that this was likely.<sup>144</sup> Almost the only delegate to disagree was Gouverneur Morris,<sup>145</sup> who more than anyone had put the winning coalition together.

In case anyone missed the point, Madison repeated it in *Federalist* 39, where he contrasted elections for members of the House with elections for senators and presidents. Members of the House would be elected “immediately” by the people, while senators and presidents would be chosen “indirectly from the choice of the people.” That, he said, was the way in which governors were appointed in state governments, that is, by the legislature.

The delegates had voted for a form of separation of powers, but just what did this mean to them? Madison’s encomium to separationism in *Federalist* 47 is often taken to refer to the modern American presidential system, but that is not what he had in mind. In the same paper, he held up the 1776 Virginia Constitution, which he had had a hand in drafting, as an example of separationism. We wouldn’t think it so today. The 1776 Constitution declared that “the legislative, executive and judiciary departments, shall be separate and distinct,” but then made

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<sup>143</sup> II.500. See also II.512. Mason raised the figure to 98 percent on June 18, 1788 in the Virginia ratifying convention.

<sup>144</sup> II.500, X DHRC 1377 (Madison); II.522 (Wilson); II.524-25, II.530 (Hamilton); II.513 (Dickinson); II.513 (Randolph); II.501 (Pinckney); II.511 (Rutledge); II.499 (Sherman). See also II.524 (Clymer); II.501 (Williamson). This was not what Madison had wanted, see II.513, but his motion to let the electors choose the president if only a third of them settled on a candidate was defeated 9 to 2 in roll call 448 at II.508. The majority of delegates wanted Congress to play a role in presidential elections. By the end of the Convention, however, Madison described Article II as providing for a president “elected by the people” II.587.

<sup>145</sup> II.512. For an example of the floor manager at work, see Morris’ anxious demand that Wilson get with the program, at II.523. Baldwin was the only other delegate who expressed the view that a majority of electors would agree on a candidate. II.501.

the governor the creature of the legislature. He was not popularly elected but instead was appointed by the legislature. Just in case he forgot who appointed him, the legislature also appointed an executive council which could veto the governor's decisions. The Constitution went on to prohibit the governor from exercising "under any presence ... any power or prerogative, by virtue of any law, statute or custom of England." That might have been too great a concentration of power in the legislative branch, thought Madison, but this nevertheless was "the sense in which [the separation of powers] has hitherto been understood in America."

A third coalition, composed of delegates from smaller states, might also have thought they had won. They had just won the Connecticut Compromise, which gave them an equal number of seats in the Senate, and they were on a roll. Letting state legislatures choose the method of selecting presidential electors under Art. II § 1, cl. 2 might thus have seemed like one more notch on their belt. Six weeks before the delegates had voted 8 to 2 in roll call 183 for electors chosen by state legislatures, and some delegates would have expected that that is just what their states would do, given the choice. That indeed is how most states selected electors in the first presidential election of 1788-89, and in 1812 half the states still chose their electors in this manner. A quarter did so in 1824 and South Carolina continued to choose electors in this way in 1860.

Small state delegates would also have noticed that each state would have as many presidential electors as the number of its senators and representatives, giving smaller states a greater clout than they would have had if the number of electors had been based on state population. Moreover, when the electors failed to give a majority of their votes to a single candidate and the choice of president fell to the House, each state, large and small, would have one vote, a measure proposed by the astute Sherman.<sup>146</sup> But for this, recalled Rufus King (a nationalist member of the Committee on Unfinished Parts), small state delegates would not have agreed to the compromise.<sup>147</sup>

Few if any delegates thought they were voting for the popular election of the president. And yet, for the minority of democrats at the Convention, this was as close as they would come. That was how Dickinson remembered things in 1802, fifteen years later. He recalled that one morning he came late to the Committee on Unfinished Parts and found the other members on their feet, about to leave. As a courtesy, they read their draft plan to him, which again featured a president appointed by the legislature. Dickinson remonstrated with the other delegates. "The Powers which we had agreed to vest in the President, were so many and so great, that I did not think, the people would be willing to deposit them with him, unless they themselves would be more immediately concerned in his Election."<sup>148</sup> The work of the entire Convention would be

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<sup>146</sup> II.527.

<sup>147</sup> III.461.

<sup>148</sup> IV.300.

lost, and the country would revert to the wholly unsuitable Articles of Confederation, with less chance of a successful revision. He then recalled what happened next.

Having thus expressed my sentiments, Gouverneur Morris immediately said—  
“Come, Gentlemen, let us sit down again, and converse further on this subject.”  
We then all sat down, and after some conference, James Maddison took a Pen and Paper, and sketched a Mode for Electing the President agreeable to the present provision. To this we assented and reported accordingly.<sup>149</sup>

Throughout their deliberations, the delegates were well aware that whatever they proposed would be for naught if it did not commend itself to the voters. George Mason observed that, “notwithstanding the oppressions & injustice experienced amongst us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted.”<sup>150</sup> However much the delegates in their secret deliberations might privately scorn the voters, they were still the 800 pound gorilla in the room.

More than anyone, Dickinson was sensitive to the need for a constitution that the people would support. “When this plan goes forth,” he told the delegates, “it will be attacked by the popular leaders. Aristocracy will be its watchword: the Shibboleth among its adversaries.”<sup>151</sup> The only safe way of conferring such powers on a single individual would be if he were a man of the people.

More than Hamilton, Dickinson was the voice of a prudent, empirical conservatism. Four years before Burke’s *Reflections on the Revolution in France*, Dickinson told the Philadelphia Convention that:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide.<sup>152</sup>

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<sup>149</sup> IV.301.

<sup>150</sup> I.101. See also I.215 (Gerry); II.201 (Ellsworth).

<sup>151</sup> II.278.

<sup>152</sup> Id. Hamilton repeated the encomium to experience as a guide in Federalist 6 (“the least fallible guide of human opinions” and 20 (“the oracle of truth”). Madison, not surprisingly, took a more nuanced view of things. If experience is “the guide that ought always to be followed whenever it can be found” (Federalist 52), reason is nonetheless a superior guide to popular passions (Federalist 10, 42, 49).

Burke's modern admirers must struggle with his contempt for what he called the swinish multitude and with his opposition to electoral reform. It would take another sixty years before British conservatives could begin to make their peace with modernity and the demands of egalitarianism. Benjamin Disraeli, in Young England novels such as *Sybil*, and in the Reform Act of 1867, recognized the irrelevancy of a conservatism that opposed democracy; but Dickinson was there first, realizing that American conservatism could not reject popular sovereignty. During the Convention, he was, as much as anyone, the great compromiser. He was the first to propose that the Senate be elected by the state legislatures and more than anyone voiced the moderate Federalist position which carried the day. And it was he, plausibly, who brokered the compromise which gave us Article II.<sup>153</sup>

There is, of course, the possibility that Dickinson's memory was faulty. Fifteen years after the fact, he recalled insisting that the president would entirely owe his election to the will of the people. There would be electors, but they would be mere ciphers. "There was no Cloud interposed between [the president] and the people."<sup>154</sup> In 1788, however, just a year after the Convention had concluded, he had argued that the electors would exercise an independent discretion, and this in the *Letters of Fabius* written to persuade voters to support the Constitution. Here the Fabian conservative underlined that, while the power of the people pervades the Constitution, the people do not elect the president.

This president is to be chosen, not by the people at large, because it may not be possible, that all the freemen of the empire should always have the necessary information, for directing their choice of such an officer....<sup>155</sup>

The electors might throw away their votes on an unworthy candidate, but they might also, "justly revering the duties of their office, dedicate their votes to the best interests of their country."<sup>156</sup>

If there was a pure democrat at the Convention, that honor belongs rather to James Wilson. Wilson was the first to propose the popular election of the president, and his persistent

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<sup>153</sup> While this is a nice story, it's not the only one which can be told. Pierce Butler, another member of the Committee on Unfinished Parts, took credit for proposing the method of presidential elections in a May 1788 letter to an English kinsman. III.302. This seems an exaggeration, however. In the same letter Butler wrote that he thought the powers of the president excessive, and in an earlier letter to the same relative, written less than a month after the Convention ended, he wrote that "a Copy of our deliberations ... is not worth the expense of postage, or I wou'd now enclose it to You." Quoted in S. Sidney Ulmer, *The Role of Pierce Butler in the Constitutional Convention*, 72 *Rev. of Politics* 361, 374 (1960). On the whole, Dickinson seems a considerably more reliable witness than the foppish Butler, who was given to boasting and whom the delegates took much less seriously than Dickinson.

<sup>154</sup> IV.301.

<sup>155</sup> John Dickinson, *The Letters of Fabius*, in 1788, on the Federal Constitution, Letter II, in Paul Leicester Ford (ed.), *Pamphlets on the Constitution of the United States, published during its Discussion by the People, 1787-1788* (Brooklyn, N.Y., 1888).

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

appeals to democratic principles and political realities must have had an influence on other delegates. He believed that the legitimacy of government derived from the mutual consent of free men, and from the theory of a sovereign people he derived the right of popular sovereignty.<sup>157</sup> Defending the Constitution before the Pennsylvania ratifying Convention, he asserted that in principle the new government was entirely democratic,<sup>158</sup> and that the choice of who the president would be “is brought as nearly home to the people as is practicable.”<sup>159</sup> If Wilson’s ideas did not succeed in 1787, they came in time to define the fundamental principles of American constitutionalism.

And then there was the wily Gouverneur Morris, who saw democracy as a threat to republican government, but who nevertheless supported a popularly elected president as a bulwark against populist and democratic state governments. Like Hamilton, he was above all concerned to promote American commerce, which he saw as a source of political stability as well as wealth. “Take away commerce, and the democracy will triumph.”<sup>160</sup> And what commerce needed was a strong national government, with an elected president at its head. He it was who cleverly turned that man of theory, James Madison, supplying him with a convenient new theory of separationism to permit him to abandon inconvenient old filtration theories, and who thus persuaded the nationalist Virginian delegates to abandon the idea of a Congressional appointment of the president. Without this, we today would have a form of parliamentary government in the United States.

That leaves Madison. Though he came to be called the “Father of the Constitution,” this was not a sobriquet earned at the Convention, where he often dug in his heels to defend losing propositions. Nor did the final document bear the imprint of his cherished ideas. He had wanted a president appointed by Congress, a Senate appointed by the House of Representatives, seats in the Senate allocated on the basis of population, a Congressional veto over all state laws and a Council of Revision composed of the executive and judicial branches to veto Congressional bills; and on every one of these was voted down. He was a member of the Committee on Unfinished Parts, but after Morris presented its plan for the election of the president Madison raised several objections which went nowhere. Madison was so frustrated at this point that he supported Mason’s call for an Executive Council, composed of members nominated by the states, to fetter

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<sup>157</sup> II DHRC 449, 497; Robert G. McCloskey, ed., *The Works of James Wilson* 77 (Cambridge: Harvard U.P., 1967). See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* ch. 4 (Chicago: U. Chicago Press, 1990).

<sup>158</sup> II DHRC 349, 363. Bernard Bailyn notes that this speech attracted far more attention from contemporaries than did the Federalist Papers. Bernard Bailyn, *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* 230 (New York, 1990).

<sup>159</sup> II DHRC 567.

<sup>160</sup> I.512.

the president's authority.<sup>161</sup> At the very end of the Convention, Madison had reverted to his earlier opposition to a strong presidential system.

With Hamilton, Madison was the principal author of the *Federalist Papers*, which glossed over the battles in the Convention and passed silently over the objections which the two of them had to the new Constitution (and with each other). Hamilton confessed his disappointment with the Constitution at the Convention, telling the delegates he planned to support it only because it was "better than nothing."<sup>162</sup> Madison too emerged from the Convention unhappy with the result. In a letter written on the same day that the delegates voted to adopt what has come down to us as Article II, Madison told Jefferson that "the plan ... will neither effectually *answer* its *national object*, nor prevent the local *mischiefs* which everywhere *excite disgust* agst. the *State Governments*."<sup>163</sup> He had lost, and he knew it.

The *Federalist Papers* themselves seem to have had little effect on the Ratification debate,<sup>164</sup> which was rather the work of the politicians in each state. Of these, Madison was a tireless worker. He had pushed for the Convention, secured Washington's presence in Philadelphia and gave the impetus to replace the Articles of Confederation with an ambitious Virginia Plan. In the Continental Congress which followed the Convention, he successfully argued that the Constitution be sent to state Conventions for ratification; and in the Virginia ratifying convention, he stood up to antifederalists such as Mason and Patrick Henry. If he was the Father of the Constitution, however, this was one of those cases, not unknown in delivery rooms, where the child bore little resemblance to the father.

## ***Conclusion***

In the end, the democrats won the day. The rickety machinery they devised for the election of presidents was a sealed car speeding through the first decades of the republic, darkened in obscurity on departure but emerging in sunlight on arrival to transform American politics. Presidential electors came to be chosen by popular vote, not by state legislatures, and the electors became the mere ciphers which Dickinson thought they were in 1802. Candidates with national appeal were elected by a majority of electors, so that elections were not kicked over to the House of Representatives.

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<sup>161</sup> II.542. A year later Madison had swung back to supporting a strong form of independence for the executive against the legislature, in his comments on Jefferson's draft for a new Virginia constitution. 11 PJM 289.

<sup>162</sup> II.524.

<sup>163</sup> III.77 (italics in original).

<sup>164</sup> The essays were seldom published outside of New York. Pauline Maier, *Ratification: The People Debate the Constitution, 1787-88* 84 (New York: Simon & Schuster, 2010). Credit for the rediscovery of Madison's *Federalist* 10 goes not to a conservative or public choice theorist, but to Charles Beard. See further Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611 (1999).

The president became the principal symbol of American democracy and equality, and the most effective counterpoise to state governments. Not only was he democratically elected, but he was the only person so elected by the entire country. In times of crisis, a Lincoln or Franklin Roosevelt might thus emerge to defend and lead a unified country. With a legitimacy derived from both the Constitution and the democratic process, the president became the spokesman for the welfare of the nation as a whole.

That is just what Wilson, Hamilton and Gouverneur Morris had wished. But what of the rest of the Framers? It is tempting to assume that the admirable people who lived in the past must have held the same values we hold dear today. If we admire the Framers, then, it follows that they were modern democrats, and several writers have argued that they must have known all along where things were headed.<sup>165</sup> However, this asks us to forget their fears of democracy, the strong support many gave to states' rights and the clever manner in which they nudged the decision back to the House of Representatives. The Framers drafted a Constitution which in time gave us democratic government, egalitarianism and the civil rights revolution, none of which they foresaw. As Gordon Wood reminds us, they were not the first of the moderns but the last of the ancients.<sup>166</sup> The irony is that, as ancients, they had wanted a parliamentary system of governance which would have served us better today.

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<sup>165</sup> Martin Diamond, Democracy and *The Federalist: A Reconsideration of the Framers' Intent*, 53 Am. Pol. Sc. Rev. 60 (1959); Clinton Rossiter, 1787 at 15; Richard B. Morris, *The American Revolution Reconsidered* 161 (New York, 1967).

<sup>166</sup> Gordon S. Wood, "Interests and Disinterestedness in the Making of the Constitution," in (Richard Beeman et al., eds.), *Beyond Confederation: Origins of the Constitution and American National Identity* 69 (Chapel Hill: NC, 1987); Gordon Wood, *The Radicalism of the American Revolution*, supra note X.

# Appendix A

## Estimated Logistic Coefficients of the Explanatory Variables on the Method of Presidential Election at the Philadelphia Convention

To test a model of delegate preferences as to a presidential system of government at the Philadelphia Convention of 1787, I here report on a regression of delegate preferences on measures of their personal ideology and background and state characteristics. This procedure empirically determines the impact of a specific variable on the probability of a delegate voting yes or no on a roll call. The model takes the form:

$$P_{ij} = f(I_{ij}, B_{ij}, S_j),$$

where  $P_{ij}$  represents the preferences of delegate  $i$  from state  $j$  on the election or appointment of the president, based on his voting patterns, political alliances and speeches at the Convention;  $I_{ij}$  is a set of variables representing the personal ideology of delegate  $i$  from state  $j$ ;  $B_{ij}$  is a set of variables representing the background of delegate  $i$  from state  $j$ ; and  $S_j$  is a variable for state factors in state  $j$ .

I employed two different kinds of estimation procedures. The first measured the intensity of delegate preferences by seeing how often they voted for a popularly elected president in roll calls 11 and 355. Here I employed an ordered logistic regression procedure,<sup>167</sup> which permitted an overall look at delegate preferences, on the assumption that they were stable over the course of the entire Convention. Delegates most strongly in favor of a popularly elected president would have voted yes in both roll calls, while those least in favor of an elected president would have voted no both times.

In addition, I wanted to see how delegate preferences evolved over the course of the Convention, and therefore looked at how the delegates voted on the selection of the president on three significant roll calls, once in each month from June to August 1787. During these votes, different coalitions of delegates assembled and split apart.

For these three votes I employed an Ordinary Least Squares regression procedure, which permits one to dispense with a marginal effects table. Because the preferences  $P_{ij}$  are limited to 0

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<sup>167</sup> The STATA command is `ologit y x1 x2 x3`.

or 1, I also employed a binary logistic regression procedure (logit) and arrived at very similar results, which I do not report.

A disadvantage of OLS, when the dependent variable is dichotomous, is that the model necessarily suffers from heteroskedasticity, and I sought to correct for this by clustering the standard errors by state.<sup>168</sup> An OLS model makes the unrealistic assumption that the model is correctly specified and that the residual of each observation is independent of the others. By clustering one can identify and adjust for relationships amongst the standard errors, eliminating within-group dependence in a cluster. Even though delegates within a state often disagreed with each other, the state level is the most intuitively likely place for there to be such dependence, since the delegates were appointed and voted by state.

### *The Dependent Variables*

The dependent variables measure the preferences and votes of the delegates on the choice of executive, and permit us to examine two different coalitions amongst the delegates: those who favored the election of the president by popular ballot and those who favored the appointment of the president by Congress. The former wanted a presidential regime, the latter a parliamentary one.

The President dependent variable, employed in the ordered logistic regression equation, measures the intensity of a delegate's preference for a popularly elected president. President takes the value 3 if the delegate voted yes on both James Wilson's June 2 motion that the president be elected by electors elected by popular ballot on roll call 11 and on Daniel Carroll's August 24 motion that the president be elected by the people in roll call 355. It takes the value 2 if the delegate voted yes only once on the two motions, and 1 if he voted no both times.

For the OLS estimations, I examine delegate preferences and votes for each of roll call 11 and 355, and also for roll call 215 on July 24 on William Houston's motion that the president be appointed by Congress. A delegate who wanted a popularly elected president would have voted yes on roll calls 11 and 355 and no on roll call 215. After roll call 355 the coalitions of delegates began to break down and 12 days later the delegates agreed to the compromise found in Art. II § 2, with a president chosen by electors selected by a method to be determined by state legislators.

### *The Explanatory Variables*

I hypothesized that nationalists at the Convention would want a popularly elected president, as this would increase his political authority in his dealings with states. As a proxy for nationalist sentiment, I looked at how delegates voted on a June 8 roll call 34 on a motion by Charles Pinckney and James Madison on whether Congress could veto any state legislation it

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<sup>168</sup> The STATA command is `regress y x1 x2 x3, cluster (state)`.

thought improper (NatVeto34).<sup>169</sup> This was an acid test of nationalist sentiment, and indeed the proposal drove states' rights supporters up a wall.

I boiled down the delegates' economic interests to a simple dichotomous distinction between rich vs. not-rich delegates, since the records as to property ownership are sketchy. At the time the country was suffering from a credit crisis caused by pro-debtor policies which states had adopted, and one would expect that wealthier delegates would be most sensible of this and to support a powerful national presidency.<sup>170</sup>

The suggestion that the delegates were motivated by economic considerations was first made by Charles A. Beard's pioneering work nearly a century ago, which Gordon Wood has called the most influential history book ever written in America.<sup>171</sup> Beard saw the Constitution as the product of a class struggle won by a rising capitalist class of bondholders who were displacing an agrarian class of indebted landowners.

Beard's maxisant view of the Framers, which reduced high theory and republican virtue to self-seeking economic motives, was popular with contemporary Progressives, who chafed at the barriers to social welfare legislation imposed by the separation of powers and sought to debunk the Framers. Since then, however, the Beard thesis has been taken to have been refuted by Robert Brown in 1956 and Forrest McDonald in 1958.<sup>172</sup> Beard had claimed that the Federalists who supported the Constitution were creditors who held public and private debt and who had a personal stake in the revival of credit,<sup>173</sup> but Brown and McDonald reported that Beard had misrepresented the property holdings and voting records of the delegates. Together, the two authors lay waste to the Beard thesis, ploughed it underground, and sowed salt in the earth.

That didn't amount to a refutation of the thesis that economic motives played a role, however. What Brown and McDonald concluded was not that the delegates were unmoved by economic interests, but only that Beard had failed to find evidence of this. The delegates did not

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<sup>169</sup> I.163. Delegate preferences on NatVeto34 are taken from McGuire at 55-56, 86, which in turn are largely derived from McDonald, *We the People* at 98-99.

<sup>170</sup> I constructed for the Rich variable from the description of the economic interests of the delegates in McDonald, *supra*.

<sup>171</sup> Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1935) [1913]. See Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* 6 (New York: Penguin, 2006).

<sup>172</sup> Robert E. Brown, *Charles Beard and the Constitution* (Princeton: Princeton U.P., 1956); Forrest McDonald's *We the People: The Economic Origins of the Constitution* (Chicago: U. of Chicago, 1958). See also Jac C. Heckelman and Keith L. Dougherty, *Personalty Interests at the Constitutional Convention: New Tests of the Beard Thesis*, 4 *Cliometrica* 207 (2010); Alan Gibson, *Understanding the Founding: The Crucial Questions* ch. 1 (Lawrence: Kansas, 2010).

<sup>173</sup> Beard at 324. Beard tried to have it both ways. While denying that he claimed that the members of the Convention were self-interested (Heaven forbid!), he went on to say that he did not want to ask "how many hundred thousand dollars accrued to them as a result of the foundation of the new government." *Id.* At 73.

appear to be influenced by their holdings of public debt, as Beard had claimed, but where he failed others might yet succeed in providing an economic interpretation of the Constitution. Moreover, as Beard had noted, the delegates to the Philadelphia Convention had expostulated frequently, passionately and at length on the sad decline of credit during the Articles period and the need to remedy this and protect creditor rights. Anyone reading the records of the deliberations would be surprised to be told that the delegates were unmoved by economic concerns, particularly when it came to slavery. When Robert McGuire brought more sophisticated empirical tools to the task, then, he was able to find that private economic interests (slaves, public and private debt, wealth in land) were correlated with votes on certain key roll calls.<sup>174</sup> McGuire did not, however, examine the roll calls on the method of selecting the president, as I do.

Any attempt to reduce the delegates' motives solely to economics is crude and mistaken. There was more going on, and most if not all delegates shared the disinterested concern for the country's welfare so transparently seen in a Washington or Mason. At the same time, a concern for America's welfare obviously included a concern for its economic well-being. Not merely could the two motives overlap but they might at times come down to the selfsame patriotic motive. Further, if wealthier delegates wanted a stronger presidency, this does not prove that they were motivated by the prospect of a personal payoff. Instead, and more plausibly, the wealthier delegates were simply those who had a better understanding of the financial crisis and a greater desire to fix it.

The delegates voted on several proposals which would have curbed the president's authority. Some delegates wanted a triumvirate instead of a single president; others wanted the president to share his veto power with judges; and still others wanted the president limited to a single term in office. I selected the last of these—a vote for term limits—as the proxy for the desire for a weak president, and rejected the first two. Several delegates who wanted a weak central government rejected a plural executive because a three-man presidency simply made little sense, and motions for a single executive passed unanimously on July 17 and August 24.<sup>175</sup> Similarly, some states' rights delegates did not think that judges were competent to share in the presidential veto power, while others did not want any kind of a presidential veto power.

That leaves term limits, as a proxy for the desire to limit presidential power. On June 2 the delegates voted 7 to 2 for term limits in roll call 15.<sup>176</sup> This was the first of five roll calls on term limits. The delegates voted 6 to 4 against term limits in roll call 168, 8 to 2 against term limits in roll call 184, 6 to 5 against term limits in roll call 220, and 7 to 3 for term limits in roll call 224.

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<sup>174</sup> Robert A. McGuire, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution* (Oxford: Oxford U.P., 2003). See also Jac C. Heckelman and Keith L. Dougherty, *Personalty Interests in the Constitutional Convention: New Tests of the Beard Thesis*, 4 *Cliometrica* 207 (2010).

<sup>175</sup> Roll call 164 at II.24 and II.401.

<sup>176</sup> I.79.

I rely primarily on delegate preferences in roll call 15, when it was thought that the president would be appointed by Congress. Subsequently, the delegates considered the possibility of an appointment by state legislatures, and indeed voted for this in roll call 183. Several states' rights supporters, notably Elbridge Gerry and the New Jersey delegates, who had previously supported term limits voted against them in roll call 184 when they thought the states would do the appointing. Because of this, the continuing support for term limits by other delegates in roll call 184 stands out in sharper relief.

The Officer variable was included because the officer corps of the Revolutionary Army was thought to be aristocratic and anti-democratic.<sup>177</sup> As such, its members might be expected to be opposed to the popular election of the president.

On several issues before the delegates there was a split between delegates from large and small states. Because of this I employ a variable measuring what the delegates saw as the population of each state in 1787, as estimated by Charles Pinckney.<sup>178</sup> This understates the actual figures, but what matters is what the delegates thought was the population of each state.

Six of the twelve states at the Convention were slave states. Of these, Delaware was seen to have relatively few slaves, but the remaining five states had a very large slave population, particularly Virginia.<sup>179</sup> One might expect delegates from slave states to want a weak national government, and a Congressionally-appointed president, lest it seek to limit or abolish slavery.

### *Delegate Preferences*

A total of 55 delegates attended the Convention, but two dropped out after a week (Virginia's George Wythe and New Jersey's William Houston), leaving a sample of 53 delegates.

For the purpose of determining the delegates' preferences as to the method of choosing a president and term limits, I relied on the speeches of the delegates and state voting records as well as the analysis of factional allegiances and personal backgrounds by McDonald and Rossiter (1966), as well as the close analysis of delegate voting patterns by Riker.<sup>180</sup> I took attendance records from Farrand and Hutson, and was assisted by Rossiter and the teachingamericanhistory.org website.

There are at least three obstacles to identifying the preferences of the delegates.

1. The delegates might have hidden their true sentiment in their votes and even in their speeches. They might have engaged in log-rolling, trading off votes on one

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<sup>177</sup> See II.114.

<sup>178</sup> III.253.

<sup>179</sup>The figures are taken from Pinckney at III.253.

<sup>180</sup> McDonald, *supra*, Riker *supra* and Rossiter, *supra*, as well as Forrest Macdonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790* (Indianapolis: Liberty Fund, 1979).

issue for votes in another. They might also have voiced their sentiments strategically, so as to frame the debate in a manner which ultimately favored them.

2. The delegates changed their minds on issues over the course of the Convention. In some cases they abandoned positions they initially favored but which they knew could never command the support of a majority of states. In other cases, they might have been persuaded by what they took to be the superior arguments of the other side.
3. Finally, attendance was not taken each day of the Convention, and we cannot always be certain who voted on a particular roll call.<sup>181</sup>

Identifying delegate preferences therefore requires a close reading of the delegate speeches and attendance data, an understanding of their background, and a careful analysis of state voting patterns.

*New Hampshire.* The state's two delegates, John Langdon and Nicolas Gilman, did not show up until July 23. Langdon spoke on occasion at the Convention, Gilman not once. On occasion they disagreed, as for example on September 12 on the override of the presidential veto. When one of them was absent the other did not vote. Langdon was a merchant who had had business dealings with Robert Morris.

On July 24 they voted in roll call 215 for a president appointed by the national legislature, and I infer that they would have opposed a president elected by the people on June 2 in roll call 11. They did, however, vote on July 25 in roll call 218 for a compromise suggested by Oliver Ellsworth, in which the national legislature would initially appoint the president but that the choice would devolve upon state legislatures if the president ran for a second term. On the following day they voted in roll call 225 for a president appointed by the national legislature. On August 24 in roll call 355 they voted against James Wilson's motion that the president be elected by the people and not by Congress and later that day in roll call 359 voted against a popularly elected president.

*Massachusetts.* Rufus King was present on May 25, the first day of the Convention, followed by Nathan Gorham and Caleb Strong on May 28 and Elbridge Gerry on May 29. From August 6-9 Gerry was in New York, and King was there from Aug. 13-16. Strong left Philadelphia on August 27.

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<sup>181</sup> See generally McGuire at 49-64 on regression analyses of voting patterns at the Convention.

King was allied with a populist party led by John Hancock, who had just defeated the more conservative James Bowdoin as Governor in an election fought over Bowdoin's suppression of the Shays' Rebellion. Gerry and Strong were supporters of the more conservative Bowdoin. Gerry was a leading voice in the Convention, but Rossiter described him as unpredictable. McDonald saw Gorham as a Hancock supporter but Rossiter thought him as a follower of Bowdoin.

The state opposed a popularly elected president in roll calls 11, 355 and 359. On roll call 215 it favored a Congressional appointment. It also favored an appointment by state legislators on roll call 215.

Gerry was firmly opposed to both an appointment by the national legislature and an election by the people. He proposed an election by electors appointed by state governors on June 9, and subsequently would have had them appointed by state legislatures. On June 24 he spoke against a Congressional appointment, and proposed in its place an appointment by state legislatures. King spoke up for the separation of powers between the executive and legislative branches on July 17 and supported a popularly elected president on July 19. By July 24, however, he had swung over to Gerry's side and seconded his colleague's motion for an executive chosen by the legislature of the states. No other state supported this and a few moments later Massachusetts joined a majority of the other states in roll call 215 in voting for a president chosen by Congress. Gerry and King were both present that day. One of them must have switched sides, and I assume it was the erratic Gerry, and that King opposed roll call 215 but was outvoted by Strong and Gorham and Gerry. Strong on July 24 appeared to favor of an appointment by Congress, and on August 7 Gorham might also be thought to have favored a Congressional appointment. I believe these preferences carried over to roll call 355.

The state voted for term limits on roll call 15 (June 2), but against them on roll call 184 (July 17 and 19). Gerry would have term limited a president appointed by Congress (July 19 and 24), but changed his mind when it seemed (as Gerry wished) that the states would appoint the president. (I'll refer to this as the Gerry switch). King and Strong opposed term limits, and I assume that one of them was absent for roll call 15. I also assume that Gorham agreed with Gerry on the desirability of term limits on June 2 but subsequently changed his mind on roll call 184, as part of the Gerry switch.

*Rhode Island.* "Rogue Island," which had passed strongly pro-debtor legislation, did not send delegates to the Philadelphia Convention.

*Connecticut.* Oliver Ellsworth arrived on May 29 and Roger Sherman the next day. William Johnson arrived on June 2. Ellsworth was likely absent on August 24. Sherman and Johnson were likely absent from July 20 to August 7.

The state voted against a popularly elected president in roll calls 11 and 355, and also against a Congressionally-appointed president in roll call 215.

Roger Sherman was the strongest advocate for a Congressionally-appointed president. He would have made the president accountable to Congress, and even proposed on June 1 that it have the right to appoint co-presidents to keep him in check. Sherman had been Ellsworth's mentor and friend, but the younger man was an independent spirit and voted against the older man 20 percent of the time. Ellsworth opposed a Congressional-appointment of the president by Congress and proposed an election by electors appointed by state legislatures on July 19. On July 25 he proposed a compromise in which Congress would appoint a president for his first term with state legislatures doing so if he ran for a second term.

I conclude that all three delegates voted against the popular election of the president on roll call 11. On roll call 215 on July 24 Sherman and Johnson were likely absent and Ellsworth voted against a Congressionally-appointed president, preferring a state-appointed president. I infer that Sherman and Johnson would have disagreed. Ellsworth was likely absent for roll call 355 on August 24, and Sherman and Johnson voted against a popularly elected president. I infer that Ellsworth would have agreed with them.

The state voted for term limits in roll call 15, but against them in roll call 184 (when Ellsworth was the only delegate present from the state). I assume that all three delegates supported term limits on roll call 15. They continued to do so on June 15, when they supported the New Jersey Plan, which featured a Congressionally-appointed president and term limits. Two days later Sherman seconded a motion for term limits. Connecticut favored states rights, and I assume that, as part of the Gerry switch, all three delegates opposed term limits on roll call 184 when it was thought that the states would appoint the president.

*New York.* Robert Yates and Alexander Hamilton arrived on May 25 and John Lansing on June 2. Lansing and Yates left the Convention on July 10, not to return, leaving the field to Hamilton, with his very different constitutional views. However, Hamilton was also absent for most of the Convention. He left on June 29, popped in on August 13, and returned again on September 6. Hamilton was a very strong nationalist, and Yates and Lansing became anti-federalists who opposed the new Constitution. Lansing expressed support for the New Jersey plan, which featured a Congressionally-appointed president and term limits.

On roll call 11 the state was divided. I assume that one of Yates or Lansing was absent and that Hamilton voted for a popularly elected president, as a means of strengthening the national government. No one was present for the state on roll calls 215 and 355, but I assume that their preferences had not changed.

*New Jersey.* David Brearly, William Churchill Houston and William Paterson arrived on May 25. Houston was absent from June 6 onward and is not included in my data set. William Livingston arrived on June 5 to take Houston's place. Jonathan Dayton arrived on June 21. Paterson was likely absent from July 27 until the last day of the Convention, September 17.

New Jersey voted against a popularly elected president in roll call 11, for a Congressionally-appointed president in roll call 215, and against a popularly elected president on roll call 355. There appeared to be close cooperation amongst delegates from the state.

The New Jersey Plan presented on June 15 featured a president appointed by Congress, but with a very weak central government. On July 19, Paterson expressed a desire for a president chosen by state-appointed electors. Dayton and Brearly expressed reservations about a Congressionally-appointed president on August 24 and preferred a state-appointed president.

As for term limits, the state was not represented for roll call 15 on June 2. However, I assume that all of the delegates supported the New Jersey Plan, which featured term limits. The state opposed term limits in roll calls 168 and 184, which is consistent with the Gerry switch.

*Pennsylvania.* Robert Morris, Gouverneur Morris, James Wilson and Thomas Fitzsimons attended on May 25, followed by Benjamin Franklin, George Clymer, Jared Ingersol and Thomas Mifflin on May 29. Robert Morris nominated his houseguest, George Washington, to serve as the Convention's president, but thereafter did not speak. Ingersoll was silent throughout the Convention. Mifflin, the picture of self-assurance in Copley's portrait in the Philadelphia Museum of Art, spoke once only, according to Madison's notes.

The state was divided into a populist Constitutionalist and a conservative and nationalist anti-Constitutionalist faction. The two Morris', Wilson and Clymer were members of the latter faction. Fitzsimons was an associate of Robert Morris and worked closely with the nationalist faction. Ingersoll was a member of the Constitutionalist faction, and Franklin and Mifflin also leaned towards it, though Mifflin occupied an equivocal position between both sides.<sup>182</sup> In his speeches, Franklin spoke on an avuncular manner and was principally concerned to ensure that the delegates would compromise their differences. If he was off-point at times, it was to deflect the delegates from sharp debates that threatened to torpedo the Convention. However, he rowed with muffled oars and often adopted an ironic tone which sailed over the heads of the delegates (and some subsequent historians).

Pennsylvania voted for a popularly elected president in roll calls 11 and 355, and against a Congressionally-appointed president in roll call 215. Wilson and Gouverneur Morris strongly supported a popularly elected president and opposed a Congressional appointment. I take Robert Morris, Clymer and Fitzsimons to have sided with them, as they were members of the same faction. Madison's notes indicate that Franklin supported a popularly elected president. The remaining two members, associated with the populist Constitutionalist faction, I take to be dissenters.

On term limits the state was divided on roll call 15 but voted against term limits on roll call 184. Wilson opposed term limits on June 1, as Gouverneur Morris did on July 19 and 25. I take Franklin to have expressed support for term limits on July 26, and assume that Ingersol and

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<sup>182</sup> See Owen Ireland, *Partisanship and the Constitution: Pennsylvania 1787*, 45 Penn. Hist. 315 (1978).

Mifflin agreed with him. To produce the split on roll call 15, I assume that Fitzsimons supported term limits, as Clymer was more closely a member of the Wilson and Gouverneur Morris faction. Wilson spoke against term limits on July 24, and I believe took his faction with him, as well as Fitzsimons in roll call 184.

*Delaware.* George Read, Richard Bassett and Jacob Broom arrived on May 25, followed by Gunning Bedford on May 28 and John Dickinson on May 29. Dickinson was ill and unable to attend the Convention on a consistent basis. He billed his state for attending only 74 of the 116 days of the Convention.<sup>183</sup>

Dickinson served as Governor of Pennsylvania as well as of Delaware and was a member of the conservative, anti-Constitutionalist faction in the former state. Read was his ally in Delaware and a strong nationalist (I.136-37), while Broom, Bassett and Bedford were independents. Broom was a moderately successful farmer. Bassett was a religious enthusiast and nationalist who had attended the Annapolis conference. Bedford was Delaware's Attorney-General. He had been Madison's classmate at Princeton, and as clever as Madison was it was Bedford who graduated at the head of the class.

Delaware opposed a popularly elected president in roll call 11 and supported a Congressionally-appointed president in roll call 215. However, in roll call 355 it supported a popularly elected president. On July 25 Dickinson stated that he had "long leaned towards" a popular election of the president. However, on June 15 he prepared a private plan of government, featuring a Congressionally-appointed president, which he did not share with the other delegates (IV.87, 90). I take the views he expressed publicly, and not his private thoughts of June 15, to reflect his deepest preferences throughout the Convention. Even then, however, Dickinson sought to effect a compromise, and on July 25 proposed that the voters of each state nominate a citizen of their state, and that the final choice be made by Congress from these nominees. As noted, he later recalled that he had proposed a plan for the popular election of the president.

Delaware voted for term limits on roll call 15 but against them on roll call 184. Two days after roll call 15, the state voted against a single executive, suggesting a strong fear of executive misbehavior. Bedford supported term limits on June 1, but only after a third three-year term. Read and Broom were presumably in favor of term limits on roll call 15 but must have changed their minds, as they supported a lifetime appointment during good behavior on June 26.

*Maryland.* James McHenry arrived on May 28 but left on June 1 and only returned on August 5. Daniel Jenifer arrived on June 2 and stayed to the end. Luther Martin arrived on June 9 and attended most of the rest of the Convention until he left on September 4. Daniel Carroll arrived on July 9. John Mercer arrived on August 6.

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<sup>183</sup> Milton E. Flower, *John Dickinson: Conservative Revolutionary 250* (Charlottesville: U. Press of Virginia, 1983).

Carroll was a nationalist and a democrat, and McHenry was allied with him. Jennifer also voted as a nationalist. Martin was a leader of an opposing states' rights faction, to which Mercer was allied. Carroll was allied with James Wilson and on August 24 proposed (seconded by Wilson) that the president be elected by the people. On July 17 Martin proposed a presidency chosen by electors appointed by state legislatures.

Jenifer cast Maryland's ballot for a popularly elected president on roll call 11. However, the state voted for a Congressionally-appointed president on roll call 215 and against a popularly elected president in roll call 355. For those two roll calls, I assume that Carroll and McHenry wanted a popular election but were outvoted by Mercer, Martin and Jenifer (who must have switched sides).

Maryland voted for term limits on roll call 15 but against them on roll call 184. Martin proposed term limits on July 19, at a time when it was thought that Congress would appoint the president.

*Virginia.* George Washington, Edmund Randolph, James Madison, John Blair, George Mason, George Wythe and James McClurg were present on May 25. McClurg felt inadequate to the task and was absent after August 5. George Wythe left on June 4 and did not return.

Washington and McClurg were close to Madison, while Blair was closer to Randolph. Washington was a strong nationalist, who had often had cause to complain of the shortcomings of Congress during the Revolution. Madison was the apparent author of the Virginia Plan, with its president appointed by Congress. I believe that all of the Virginia delegates voted against a popularly elected president in roll call 11. At the prompting of Gouverneur Morris, however, Madison began to argue for a separation of powers between the legislative and executive branches on July 17. McClurg was absent on roll call 215 but likely would have opposed a Congressional appointment, as Madison and Washington did. See note X. Mason argued against a popular election of the president on July 17 and on July 26 argued for a president appointed by Congress. Mason and Blair supported a Congressional appointment on roll call 215 and Randolph would no doubt have agreed with them. Mason, Randolph and Blair likely opposed a popularly elected president in roll call 355.

On June 4 Randolph, Mason and Blair favored a three-person executive and I infer that they also supported term limits. Mason feared presidential misbehavior and favored a broad impeachment power. On July 25 he agreed with Charles Pinckney that the president should be term limited to six years in any 12 year period.

The Virginia Plan featured term limits and the state voted for this on roll call 15. The state voted against term limits on roll call 184. Randolph supported term limits on July 19 and Mason spoke in favor of a limited form of term limits on July 25. Blair was likely absent for roll call 184, but I believe would have voted with his allies, Randolph and Mason. Madison, Washington and McClurg must have opposed term limits on roll call 184.

*North Carolina.* Alexander Martin, William Richardson Davie, Richard Dobbs Spaight and Hugh Williamson arrived on May 25. William Blount arrived on June 20 and spent July in Congress in New York. Davie and Martin left in August. As a judge, Martin had been severely beaten by members of the backcountry Regulator movement. When they served as state legislators, Blount and Davie had voted for laws to bar debt collections by British creditors. Williamson and Davie proposed a broad impeachment power on June 3, to which the states unanimously agreed.

North Carolina voted consistently for a Congressionally-appointed president and against a popularly elected one. On July 24 Spaight seconded Houstoun's motion for a president appointed by Congress. Williamson supported a president appointed by Congress on July 17 but saw objections to a Congressional appointment on July 25. He was playing above his weight at the Convention, and I infer that he did not buck his North Carolina colleagues on roll call 355. He remained a small state supporter throughout, and as such likely opposed a simple popular election.

North Carolina voted for term limits in roll calls 15 and 184. Williamson seconded the motion in roll call 184 and Davie seconded the motion on roll call 224, in both cases showing their support for term limits. There was little sign of disagreements amongst the delegates from the state.

*South Carolina.* John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney and Pierce Butler arrived on May 25 and stayed to the end. Rutledge and Butler were members of the low country planter aristocracy. So too was C.C. Pinckney, who also had ties to a rival merchants faction. Charles Pinckney was allied with a younger group of rising planters who would soon supplant the Rutledge faction.

South Carolina voted consistently for a Congressionally-appointed president and against a popularly elected one. Charles Pinckney argued for an appointment by Congress on July 17. Rutledge argued for a president appointed by the Senate on June 1 and argued again for an appointment by Congress on July 19, and repeated this on September 5. On July 25 Butler spoke in favor of an appointment by electors appointed by state legislators and spoke again on September 4 to oppose an appointment by Congress.

South Carolina voted for term limits in roll calls 15 and 184. Charles Pinckney proposed a limited form of term limits on July 25. Butler said he wanted term limits in all cases on July 25.

*Georgia.* William Few arrived on May 25, but left from July 4 till early August. William Pierce arrived on May 31 but left in June to attend Congress in New York. William Houstoun arrived on June 1 but left for New York in August and September. Abraham Baldwin arrived on June 11.

Few was a backwoods farmer and one of the poorest men at the Convention. He had been a member of the Regulators in North Carolina, and had moved to Georgia only after his brother had been hanged for his part in their protests. He and Baldwin had voted for a debtor relief law in

the state legislature, and Pierce had voted for paper money. Pierce was a friend of Hamilton, who helped Pierce smooth over a duel with one of Hamilton's clients in July 1787. Baldwin, born in Connecticut, began to caucus with that state's delegates towards the end of the Convention.

Georgia voted consistently for a Congressionally-appointed president and against a popularly elected one. On July 23-24 Houston moved that Congress appoint the president.

Georgia voted against term limits on roll calls 15 and 184. Houston moved the motion in roll call 168 to strike out term limits.

### *Summary of the Findings*

The voting patterns at the Philadelphia Convention of 1787 were significantly correlated with the personal ideologies and economic interests of the delegates. A coalition of nationalist delegates supported a popularly elected president, presumably because they believed this would strengthen the office and that a powerful president would serve as a counter-weight to the states. Wealthier delegates also favored a popularly elected president, likely for the same reason, as they more than most delegates would have recognized the need to protect credit markets against pro-debtor state laws. Delegates who supported term limits, and worried about excessive presidential power, were more likely to vote against a popularly elected president in the three roll calls.

As expected, the NatVeto34 coefficient is significant in Table 1.3's ordered logistic regression. Overall, the nationalist delegates wanted a popularly elected president. This didn't happen at once. In Table 1.4, the NatVeto34 coefficient is not significant on June 2's roll call 11, as the nationalist Virginian delegates continued to back the Congressionally-appointed president of the Virginia Plan. By July 24, however, the nationalists had gotten their act together and united to oppose a Congressionally-appointed president in roll call 215, as seen in Table 1.5. This coalition weakened but remained in place on August 24 for roll call 355, as seen in Table 1.6. The magnitudes of the coefficient are large, and a nationalist was almost 50 percent more likely to oppose a Congressionally-appointed president in roll call 215.

Wealthier delegates were significantly more likely to support a popularly elected president in the ordered logistic regression and in roll call 11, and to oppose a Congressionally-appointed president in roll call 215. On roll call 11, wealthier delegates were about 40 percent more likely to prefer a popular election of the president.

Delegates who wanted to term limit the president were more likely to want a Congressionally-appointed president, as that method of appointment would also tend to fetter his discretion.

The Officer variable had no significant explanatory power. Delegates who served as officers during the American Revolution, and who were seen as an aristocratic element in American society, appeared to split their votes on the appointment of the president. As an aristocratic class, one might have expected them to oppose a popular election. However, some of them, such as Hamilton, were nationalists who were close to the likely first president, George Washington.

There was no evidence of a small state coalition when it came to the method of choosing a president. The coalition of small state delegates, who were so powerful on the questions of the state appointment of senators and Congressional veto powers over state laws and, broke apart on the question of the appointment of the president. The coefficients were not significant and the magnitudes of the marginal effects vanishingly small.

There was no evidence of a slave state effect when it came to the method of choosing a president. Slave state delegates opposed a popularly elected president in roll call 11, but this was because the nationalist Virginia delegates were still supporting the Virginia Plan. By roll calls 215 and 355, they had switched sides and the slave state effect had disappeared.

The findings support the view that, from the beginning of the Convention until roll call 355 on August 24, the delegates were divided into two different factions. One faction, composed of the more nationalistic and wealthier delegates, preferred a strong presidential system; while a second faction, composed of less wealthy delegates who favored states' rights, preferred a parliamentary (Congress appoints the president) regime.

After roll call 355, the delegates compromised their differences to arrive at the language of Art. II § 2 of the Constitution, and in doing so the factions I have identified dissolved.

**Table 1.1 Variables**

*Dependent Variables*

President	Equals 1 if the delegate did not vote for a popularly elected president in either roll call 11 or 355, 2 if the delegate voted yes once only in roll calls 11 and 355, and 3 if the delegate voted yes in both roll calls
Pop11	Equals 1 if the delegate favored the election of the president by popular suffrage, as expressed in their speeches prior to July 19 or in roll call 11, 0 otherwise
Leg215	Equals 1 if the delegate favored the appointment of the president by the national legislature, as expressed in their speeches on or prior to July 24 or in roll call 215, 0 otherwise
Pop355	Equals 1 if the delegate favored the election of the president by popular suffrage, as expressed in their speeches on or prior to August 24 or in roll call 355, 0 otherwise

*Explanatory Variables*

Personal Ideology

NatVeto34	Equals 1 if the delegate voted to give the national legislature an absolute veto power over state legislation in roll call 163 on July 17 at II.24, 0 otherwise
Term15	Equals 1 if the delegate expressed a preference or voted to restrict the president to a single term of office on roll call 15 on June 2 at I.79, 0 otherwise
Term184	Equals 1 if the delegate expressed a preference or voted to restrict the president to a single term of office on roll call 184, 0 otherwise

Personal Background

Officer	Equals 1 if the delegate served as an officer during the American Revolution, 0 otherwise
Rich	Equals 1 if the delegate was rich, 0 otherwise

State Effects

Pop1787	Estimated population in 1787
%Slave	Estimated percent Slave population
Fixed State	Taking a separate number for each state

**Table 1.2 Data**

NAME	ST	Pop11	Leg215	Pop355	NatVeto34	Term15	Term184	Officer	Rich	Pop1787	SLAVE
Gilman	NH	0	1	0	0	1	1	1	0	102	0
Langdon	NH	0	1	0	0	1	1	1	1	102	0
Gerry	MA	0	1	0	0	1	0	0	1	360	0
Gorham	MA	0	1	0	1	1	0	0	0	360	0
King	MA	1	0	1	1	0	0	1	1	360	0
Strong	MA	0	1	0	1	0	0	0	0	360	0
Ellsworth	CT	0	0	0	1	1	0	0	0	202	0
Johnson	CT	0	1	0	0	1	0	0	0	202	0
Sherman	CT	0	1	0	0	1	0	0	0	202	0
Hamilton	NY	1	0	1	1	0	0	1	1	233	0
Lansing	NY	0	1	0	0	1	1	0	1	233	0
Yates	NY	0	1	0	0	1	1	0	0	233	0
Brearley	NJ	0	1	0	0	1	0	1	0	138	0
Dayton	NJ	0	1	0	0	1	0	1	1	138	0
Livingston	NJ	0	1	0	0	1	0	0	0	138	0
Paterson	NJ	0	1	0	0	1	0	0	0	138	0
Clymer	PA	1	0	1	1	0	0	0	1	360	0
Fitzsimmons	PA	1	0	1	1	1	0	1	1	360	0
Franklin	PA	1	0	1	1	1	1	0	0	360	0
Ingersol	PA	0	1	0	1	1	1	0	0	360	0
Mifflin	PA	0	1	0	1	1	1	1	0	360	0
G. Morris	PA	1	0	1	1	0	0	0	1	360	0
R. Morris	PA	1	0	1	1	0	0	0	1	360	0
Wilson	PA	1	0	1	1	0	0	0	1	360	0
Bassett	DE	0	1	1	0	1	0	1	0	37	0
Bedford	DE	0	1	1	0	0	0	1	0	37	0
Broom	DE	0	1	1	0	1	0	0	0	37	0
Dickinson	DE	1	0	1	1	1	0	1	1	37	0
Read	DE	0	0	1	1	1	0	0	0	37	0
Carroll	MD	1	0	1	0	1	0	0	1	218	0.47
Jenifer	MD	1	1	0	0	1	0	0	1	218	0.47
Martin	MD	0	1	0	1	1	1	1	0	218	0.47
McHenry	MD	1	0	1	0	1	0	0	1	218	0.47
Mercer	MD	0	1	0	1	1	0	1	1	218	0.47
Blair	VA	0	1	0	1	1	1	0	1	420	1.11
Madison	VA	0	0	1	1	1	0	0	0	420	1.11
Mason	VA	0	1	0	0	1	1	0	1	420	1.11

McClurg	VA	0	0	1	1	1	0	0	1	420	1.11
Randolph	VA	0	1	0	0	1	1	1	1	420	1.11
Washington	VA	0	0	1	0	1	0	1	1	420	1.11
Blount	NC	0	0	0	1	1	1	0	1	200	0.37
Davie	NC	0	1	0	0	1	1	1	0	200	0.37
Martin	NC	0	1	0	0	1	1	1	0	200	0.37
Spaight	NC	0	1	0	0	1	1	1	1	200	0.37
Williamson	NC	0	1	0	0	1	1	0	0	200	0.37
Butler	SC	0	0	0	0	1	1	1	0	150	0.78
C Pinckney	SC	0	1	0	1	1	1	1	1	150	0.78
CC Pinckney	SC	0	1	0	0	1	1	1	1	150	0.78
Rutledge	SC	0	1	0	0	1	1	0	0	150	0.78
Baldwin	GA	0	1	0	0	0	0	0	0	90	0.26
Few	GA	0	1	0	0	0	0	1	0	90	0.26
Houstoun	GA	0	1	0	0	0	0	0	0	90	0.26
Pierce	GA	0	1	0	0	0	0	1	0	90	0.26

**Table 1.3 Estimated Coefficients for President in an Ordered Logistic Regression**

Explanatory Variable	Alternative Model Specification			
NatVeto34	1.52b (.62)	1.24c (.66)		1.34c (.73)
Rich		1.70b (.67)		2.07a (.76)
Term15	-1.46b (.69)	-1.64b (.77)		-1.24d (.86)
Officer		-.42 (.66)		-.56 (.71)
Pop1787			.007b (.003)	-.0002 (.004)
%Slave			-2.26c (1.20)	-1.46 (1.59)
Fixed State	-.05 (.10)	-.05 (.11)	.15 (.15)	.07 (.18)
No. Observ.	53	53	53	53
Pseudo R <sup>2</sup>	0.13	0.20	0.06	0.22

a Statistically significant at the .01 level

b Statistically significant at the .05 level

c Statistically significant at the .10 level

d P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4)

*Note.* Standard Error in parenthesis.

**Table 1.4 OLS Estimated Coefficients for Pop11**

Explanatory Variable	Alternative Model Specification			
NatVeto34	.27d (.19)	.18 (.17)		.13 (.14)
Rich		.37b (.15)		.43b (.16)
Term15	-.30d (.19)	-.30b (.12)		-.22b (.09)
Officer		-.10 (.14)		-.08 (.14)
Pop1787			.001c (.0006)	.0002 (.0005)
%Slave			-.40c (.19)	-.35b (.15)
Constant	.34d (.21)	.25d (.16)	.042 (.11)	.22d (.13)
No. Observ.	53	53	53	53
F	2.27	13.01	0.10	13.64
R <sup>2</sup>	0.22	0.41	0.18	0.48

b Statistically significant at the .05 level

c Statistically significant at the .10 level

d P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4)

*Notes.* Standard Error in parenthesis. Clustered for state effects. To assess the extent to which multicollinearity is a problem for each independent variable, I tested for the variance inflation factor, using STATA's estat vif command, with the following results: NatVeto (1.42), Term15 (1.12), Officer (1.15), Rich (1.25), Pop1787 (1.83), %Slave (1.38), Mean VIF (1.36), which is not suggestive of a problem.

**Table 1.5 OLS Estimated Coefficients for Leg215**

Alternative Model Specification

Explanatory Variable

NatVeto34	-.49b (.17)	-.42b (.15)	-.42a (.14)		-.46b (.19)	-.45b (.17)
Rich		-.26c (.12)	-.26b (.10)		-.27d (.16)	-.23d (.14)
Term15	.10 (.15)	.10 (.09)			.12 (.10)	
Term 184			.24c (.12)			.27c (.14)
Officer		.11 (.13)	.07 (.13)		.13 (.14)	.07 (.13)
Pop1787				-.001c (.0006)	.0003 (.0007)	.0001 (.0006)
%Slave				.10 (.14)	-.07 (.09)	-.14 (.11)
Constant	.79a (.17)	.83a (.14)	.84a (.12)	.93a (.14)	.79a (.14)	.83a (.09)
No. Observ.	53	53	53	53	53	53
F	5.36	6.58	6.11	2.53	12.63	23.60
R <sup>2</sup>	0.29	0.40	0.42	0.10	0.37	0.42

a Statistically significant at the .01 level

b Statistically significant at the .05 level

c Statistically significant at the .10 level

d P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

*Notes.* Standard Error in parenthesis. Clustered for state effects.

**Table 1.6 OLS Estimated Coefficients for Pop355**

Alternative Model Specification

Explanatory Variable

NatVeto34	.31c (.15)	.26c (.14)	.27c (.14)		.29d (.17)	.28c (.14)
Rich		.21 (.15)	.19d (.12)		.25d (.14)	.19d (.12)
Term15	-.25 (.19)	-.25d (.15)			-.23d (.16)	
Term184			-.44b (.15)			.44b (.16)
Officer		-.05 (.14)	.030 (.13)		-.06 (.12)	.030 (.11)
Pop1787				.0009 (.001)	-.0003 (.001)	-.00002 (.001)
%Slave				-.20 (.20)	-.06 (.21)	.04 (.19)
Constant	.40d (.22)	.34d (.22)	.29d (.20)	.20 (.33)	.39 (.36)	.29 (.29)
No. Observ.	53	53	53	53	53	53
F	4.26	3.86	17.58	0.52	3.98	13.43
R <sup>2</sup>	0.18	0.23	0.37	0.05	0.23	0.37

b Statistically significant at the .05 level

c Statistically significant at the .10 level

d P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

Notes. Standard Error in parenthesis. Clustered for state effects.