WILSONIAN DOCTRINE & SEPARATION OF POWERS: A COMPARATIVE REFLECTION OF THE RATIFICATION DEBATE

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The separation of powers is a staple of liberty and American republicanism, and "the primary organizational principle" of the United States Constitution.[1] At the time of the ratification debate, Federalists and Antifederalists quarreled over the proper application of this framework to American society. For the Federalists, the three most significant voices were arguably two authors of *The Federalist*, James Madison and Alexander Hamilton, and James Wilson, the leader of the debate in Pennsylvania and one of the most active delegates of the Convention. While they disagreed profusely on many areas of governance, all three subscribed to a common, unifying notion: a stronger national government can be formed without threatening liberty.[2] All three thinkers also accepted the idea of the sovereignty of the people as a basis for abandoning the Articles of Confederation and forming a new government.[3] The Antifederalist side, however, thought that the Constitution was deficient in part because it failed to truly realize the concept of separate and distinct sources of authority.[4]

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1 JOHN A. ROHR, FOUNDING REPUBLICS IN FRANCE AND AMERICA: A STUDY OF CONSTITUTIONAL GOVERNANCE 189 (1995).

2 JAMES H. READ, POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON 18 (2000).

3 *Id.* (discussing how Alexander Hamilton's perceptions of popular sovereignty were similar but more attenuated than that of James Wilson). Wilson's political philosophy, to a large extent, orbited around this concept of sovereignty. While modern understanding of Hamiltonian thought suggests that the idea of sovereignty was more of a legitimizing principle than anything else, Wilson saw it as much more. *See id.* at 90 (noting while both Hamilton and Wilson were strong nationalists, Wilson was more democratic, as he deemed the people to be superior to both the state and federal government).

4 *See, e.g.*, Letter from Rev. James Madison to James Madison (Oct. 1, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 49 (Bernard Bailyn ed., 1993) [hereinafter THE

The principle of the separation of powers predates the ratification of the Constitution in American political thought. Even before the 1787 Convention, the separation of powers was crucial to the formation of state governments in Virginia, Maryland, and North Carolina.[5] Article VI of the Maryland Declaration of Rights of 1776, for example, provided "[t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."[6] The principle was also a common tool for pointing out the defects of the Articles of Confederation. In 1783, for instance, Alexander Hamilton, in drafting a resolution calling for a convention to amend the Articles of Confederation, referred to the governing document––particularly the broad authority granted to the unicameral legislature by the Articles––as "contrary to the most approved and well founded maxims of free government which require that the legislative executive and judicial authorities should be deposited in distinct and separate hands."[7]

Unlike the Virginia, Maryland, and North Carolina constitutions, the Federal Constitution of 1787 did not explicitly enshrine the separation of powers principle.[8] Rather, the legislative, executive, and judicial branches as we understand them today were separated as a functional result of the manner in which the different powers were delegated by the Framers. While the application of separation of powers is clear from the Constitution, the governing document itself does not provide clear guidance on the convention delegates' understanding of the doctrine in theory.

This Article explores the separation of powers principle as understood by different sides and players of the debate. The mainstream positions of the Federalists and Antifederalists are of course the most obvious schism in viewpoint. This Article will survey the differing treatments of the principle of separation of powers in *The Federalist* and by key opponents of the

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DEBATE ON THE CONSTITUTION] (advising that the "[l]egislative [and] executive [d]epartments should be *entirely* distinct [and] independent") (emphasis added).

5 Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 25 (1991); *see also* THE FEDERALIST NO. 47 (James Madison) (referencing the founding documents of these three states to argue that the separation of powers principle does not require the three branches to be completely separate from one another).

6 MD. CONST. of 1776, Declaration of Rights, art. VI; *see also* VA. CONST. of 1776 ("The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of [more] than one of them, at the same time . . . .").

7 Alexander Hamilton, *Continental Congress Unsubmitted Resolution Calling for a Convention to Amend the Articles of Confederation, [July 1783]*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0272.

8 *See generally* U.S. CONST. arts. I–III (explaining the functions of the legislative, executive, and judicial branches).

Constitution. The concepts of separation and checks have inherent tension with one another: while Federalists tended to err on the side of more overlapping powers in the form of checks, Antifederalists wanted a much greater degree of separation between the departments.[9] But there are notable differences in political thought between the most prominent defenders of the Constitution as well. James Wilson is one of the most overlooked Framers, yet he was one of the most impactful voices at the 1787 Convention and during the subsequent ratification debate.[10] In an attempt to rectify this disservice, this Article will also compare Wilson's philosophical justification for and application of separation of powers with that of *The Federalist* and the Antifederalist ideology. In so doing, it is apparent that his stances land at different points along the spectrum of the debate. While Wilson advocated for greater checks (and therefore less separation) between the branches in some senses, he also believed that some elements of governance were not separate enough under the 1787 Constitution. Wilson's interpretation of separation of powers exemplifies that, although fundamental in American political thought, the maxim was a point of contention both between the opposing sides of the ratification debate and within them. Elements of the principle are still contested in modern jurisprudence.[11]

The principle of separation of powers, as it is understood in American governance, was handed down by Charles-Louis de Secondat, baron de La Brède et de Montesquieu.[12] A French philosopher and political writer,

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9 *See, e.g.*, Bryan, *infra* note 58 (warning that the mixture of legislative and executive powers in a single would create political corruption).

10 *See* MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798, at 1 (1997) (introducing Wilson as "perhaps the most underrated founder").

11 *See, e.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1652 (2020) (determining that the Appointments Clause, and therefore executive authority, does not govern the appointment of members to the Financial Oversight and Management Board for Puerto Rico); Patchak v. Zinke, 138 S. Ct. 897, 911 (2018) (holding that the Gun Lake Trust Land Reaffirmation Act does not violate separation of powers); Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that sentencing guidelines are not a violation of the separation of powers principle); Miller v. French, 530 U.S. 327, 348–49 (2000) (holding that the automatic stay of the Prison Litigation Reform Act does not violate separation of powers principles); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) ("When these Article III limitations [such as separation of powers] are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.").

12 Montesquieu was not the first to articulate or endorse the separation of powers idea. Locke, for example, had also written in favor of separate executive and legislative powers. *See* Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 363 (1994) (highlighting Locke's observation that "'well-ordered common-wealths' separated legislative and

Montesquieu inspired the fundamental notions of government that gave birth to the structure of American republicanism. The idea that government should be decentralized among three sources of authority is one of the most celebrated principles today and during the time of the Founding. Advocates on both sides of the Constitution admired and cited Montesquieu regularly to support their conclusions. During the American Founding and beyond, many regarded his contribution to Enlightenment thought as the "greatest achievement of modern political philosophy."[13]

Montesquieu's *The Spirit of the Laws* introduced the idea of classifying government into distinct categories of power, namely the executive, judicial, and legislative powers. In Montesquieu's view, this separation is crucial to the preservation of liberty, which requires that "government be [structured such] that one man need not be afraid of another."[14] If the legislative and executive powers were combined under a single authority, for instance, there can be no liberty because that entity can "enact tyrannical laws, to execute them in a tyrannical manner."[15] Similarly, if the legislative and judicial powers were combined, then the people's liberty "would be exposed to arbitrary control," and if the judicial power joined with that of the executive, then a "judge might behave with violence and oppression."[16] In other words, a free society cannot exist where a "single institution could exert all [of the] power."[17] It would result in a "despotic sway" and "[t]here would be an end of everything."[18]

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executive powers to assure that those who make the laws also remain subject to them") (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 134–58 (C.B. Macpherson ed., 1980) (1690)). Montesquieu was, however, the first to emphasize the importance of an independent judiciary, which would later evolve into the spirit of Hamilton's *The Federalist No. 78* and the idea of judicial review. *See* Bergman, *supra* note 5, at 14 (noting that Montesquieu "popularized the trinity between the executive, legislative, and judicial branches of government"). Nevertheless, among the strongest voices during the ratification period, Montesquieu was the most often cited political authority on this issue. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) (highlighting Montesquieu); *see also* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 18 (2008) (referring to Montesquieu as "the most cited authority in *The Federalist*").

13 Michael P. Zuckert, *The Political Science of James Madison*, *in* HISTORY OF AMERICAN POLITICAL THOUGHT 153 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).

14 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 182 (J.V. Prichard ed., Thomas Nugent trans., 1900) (1748).

15 *Id.*

16 *Id.*

17 Edward H. Levi, *Some Aspects of the Separation of Powers*, 76 COLUM. L. REV. 371, 375 (1976).

18 1 MONTESQUIEU, *supra* note 14, at 183.

During the ratification debate, Federalists and Antifederalists alike found inspiration in Montesquieu's writings.[19] Both saw their visions of government as consistent with his principles. Because of their differing views on the meaning and proper application of republicanism, they used Montesquieu's arguments as a premise for different conclusions. Utilizing Montesquieu's republican ideology, for example, Antifederalists argued that the proposed Constitution would corrupt the "republican character."[20] Montesquieu wrote that, among other circumstances, "[t]he principle of democracy is corrupted . . . when the spirit of equality is extinct."[21] Many Antifederalists maintained that by empowering the elite few at the expense of the masses, the Constitution would corrupt republican virtue in America.[22] While the Antifederalists utilized Montesquieu's republican ideology to a greater degree than the Federalists, both sides relied on his principle of separation of powers in framing the debate. Federalists and Antifederalists alike agreed almost universally that all of the government's power ought not be concentrated in a single department or institution.[23] The Federalists contended that this virtue was necessary for an orderly republic and that the Constitution satisfied this demand.[24] But the Antifederalists maintained that the proposed government failed to put the principle into proper practice and, therefore, fostered a corrupt and dysfunctional republic that would eventually spiral into tyranny or aristocracy. Of course, this logically leads to the conclusion that the Federalists and Antifederalists harbored different notions of what effective separation of powers entailed. It is apparent from the arguments that the Antifederalists interpreted *The Spirit of the Laws* as

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19 *See* Abraham Kupersmith, *Montesquieu and the Ideological Strain in Antifederalist Thought*, *in* THE FEDERALISTS, THE ANTIFEDERALISTS, AND THE AMERICAN POLITICAL TRADITION 47 (Wilson Carey McWilliams & Michael T. Gibbons eds., 1992) (exploring the influence of Montesquieu's *The Spirit of the Laws* on Antifederalist thought). *See also* THE FEDERALIST NO. 47 (James Madison) (referring to Montesquieu as "[t]he oracle who is always consulted and cited on th[e] subject [of comingling governmental powers]").

20 *Id.* at 58; *see also* MELANCTON SMITH, THE ANTIFEDERALISTS 388 (Kenyon ed., 1985) (1788).

21 1 MONTESQUIEU, *supra* note 14, at 133.

22 *See*, *e.g.*, THE ANTIFEDERALIST NO. 47 (Centinel) (arguing that the Senate would serve as an "aristocratic junto" of which the president would be head); Brutus, *Excerpts from* Brutus No. 1, *Annotated* (Oct. 18, 1787), BILL OF RTS. INST., https://docs-of-freedom.s3.amazonaws.com/uploads/document/attachment/440/Brutus_No_1_Excerpts_Annotated_Proof_3__1_.pdf (quoting THE SPIRIT OF THE LAWS to argue that "[i]t is natural to a republic to have only a small territory, otherwise it cannot long subsist").

23 Referring to the principle of separation of powers, the first paragraph of *The Federalist No. 47* opens by stating that "[n]o political truth is certainly of greater intrinsic value." THE FEDERALIST NO. 47 (James Madison).

24 *See id.*

requiring a narrower definition of "separate" and "distinct." But *The Federalist* understood it quite differently.

I. THE FEDERALIST

The Federalist, one of the most significant writings in American political history, is one of the most relied upon texts when it comes to constitutional interpretation. The U.S. Supreme Court affords deference to the essays regularly in its opinions.[25] This explains, in part, the reverence of the separation of powers principle in relation to American system of government. When it comes to studying the separation of powers and the role it was meant to play in American governance, therefore, *The Federalist* is a wise starting point.[26]

One of the primary critiques of the proposed Constitution was that the three branches of government were not separate enough.[27] Publius, the pen name used by the authors of *The Federalist*, devoted a significant portion of the essays to rebutting this proposition. In *The Federalist*, Madison wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[28] He attributed this principle to "the celebrated Montesquieu," "[t]he oracle who is

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25 *See* Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RSCH. Q. 329, 329 ("Over the past several decades many on the Supreme Court have increasingly cited the Federalist Papers in majority, concurring and dissenting opinions.").

26 The reasoning in *The Federalist* should not necessarily be conflated with Madison and Hamilton's preferences for ideal forms of government in all cases. *See* Zuckert, *supra* note 13, at 165 (maintaining that an overemphasis on *The Federalist* has "prevented us from grasping the full scope or character of the Madisonian political science"). The final product was the result of a multitude of compromises. No delegate agreed with every aspect of the governing document when the Convention adjourned in September 1787. Madison's notes from the Federal Convention reveal stark differences between what *The Federalist* authors said behind closed doors and what they presented for the public's consideration. For example, on June 4, 1787, Hamilton endorsed empowering the President with an absolute negative on legislation. *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 51–52 (Gaillard Hunt & James Brown Scott eds., 1920). However, in *The Federalist No. 73*, he praised the virtues of a qualified negative (veto power with the possibility of override from the Legislature) while warning about the deficiencies of an absolute one. THE FEDERALIST NO. 73 (Alexander Hamilton).

27 *See* Hamilton, *supra* note 7 (arguing that the Articles of Confederation was contrary to the separation of powers principle).

28 THE FEDERALIST NO. 47 (James Madison). Madison was writing genuinely when extolling the virtues of Montesquieu's principle. On June 17, 1787, at the Convention, he also commented that the three separate and distinct departments as essential to the preservation of liberty. MADISON, *supra* note 26, at 112.

always consulted and cited on this subject."[29] However, he rejected the notion that the powers must be separate and distinct in an absolute sense in order for liberty to be properly safeguarded.[30] In citing Montesquieu, Madison referred to his discussion of the British Constitution. He contended that Montesquieu viewed the English government as "the mirror of political liberty," as he considered it to be the epitome of the separation of powers principle in operation.[31] Madison explained that the British Constitution does not treat the legislative, executive, and judicial functions as totally separate from one another.[32] Indeed, among other examples, the monarch has the power to enact legislative acts in the form of treaties with other sovereign nations, and he can both appoint and remove judges in certain circumstances.[33] On this basis, Madison concluded that the preservation of liberty, as understood by Montesquieu, did not prohibit one individual or body from exercising a part of the powers of different governmental functions, but rather prohibited one from wielding the entirety of multiple departments.[34]

The Federalist ideology contended that the separation of powers principle in its purest form is not only unnecessary as reasoned by Montesquieu, but also harmful to the overall objective of effective and safe governance.[35] Because "power is of an encroaching nature," a "mere demarcation on parchment," or constitutionally mandated limits, is not enough alone to control passions of human nature and prevent power from concentrating in a single individual or body.[36] Instead, the powers of the branches must overlap to a certain degree in order to prevent abuses of power from the different departments, particularly from the legislature.[37] Accordingly, in *Federalist*

29 THE FEDERALIST NO. 47 (James Madison).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *See* THE FEDERALIST NO. 66 (Alexander Hamilton) ("[P]artial intermixture [of the executive, legislative, and judiciary powers] is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other.").

36 THE FEDERALIST NO. 48 (James Madison).

37 In *The Federalist No. 48*, Madison explains that the legislature is the most prone to overstepping its authority under the Constitution because it is "less susceptible of precise limits" and "it can, with the greater facility, mask . . . the encroachments which it makes on the co-ordinate departments." *See also* 1 MONTESQUIEU, *supra* note 14, at 190 (arguing that the executive should be able to restrain the legislature but the legislature should not be able to stay the executive because "the execution has its natural limits" and "it is useless to confine it"); THE FEDERALIST NO. 51, at 264–265 (James Madison) (Ian Shapiro ed., 2009) (explaining that predomination of the legislative authority necessitates dividing Congress into two separate branches with differing functions and

Nos. 47 and *48*, Madison approaches the argument for quasi separate and distinct branches of government in two lights. First, he legitimizes the principle by lining it up with Montesquieu's vision of what separation of powers ought to look like.[38] And second, he defends its practicality and necessity by pointing out the dangers that manifest when the safeguards for separate powers merely consist of an express provision in the Constitution that forbids the intermixing of the three governments, as we saw with Virginia's constitution prior to ratification.[39] A middle ground between separate and distinct departments in its truest sense and the administration of multiple departments by one individual or body, therefore, was the most effective means of preserving liberty according to *The Federalist*.[40]

For Publius, overlapping powers among the different departments of government was vital for ensuring that each one is able to maintain "a will of its own," thereby preventing government tyranny.[41] The discussion in *Federalist Nos. 47* and *48* lays the groundwork for Madison's conception of checks and balances, as elaborated upon in *Federalist No. 51*. *The Federalist*'s conception of separate yet partially mixed powers carries over to other elements of the Constitution discussed in the essays. In addressing the judiciary, for instance, Hamilton emphasized the need not only for independent courts, but also for the courts to be able to void legislative acts that defy the Constitution.[42] The separation of powers principle thus played a crucial role for a number of important aspects of the Federalist pitch.

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modes of elections); THE FEDERALIST NO. 73, at 371 (Alexander Hamilton) (Ian Shapiro ed., 2009) (acknowledging "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments").

38 *See* THE FEDERALIST NO. 47 (leaning on Montesquieu's writings to support his conception separation of powers).

39 *See* THE FEDERALIST NO. 48 (arguing that the three branches must not be completely siloed).

40 Madison's interpretation of Montesquieu's separation of powers principle in *Federalist No. 48* seems to be supported by the text. In *The Spirit of the Laws* 189, Montesquieu explains that "[w]ere the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers." 1 MONTESQUIEU, *supra* note 14 at 189. This would suggest that Montesquieu intended for overlap between the departments, possibly to a greater extent than the Antifederalists would have liked. Even though *Federalist No. 48* does not directly mention Montesquieu or address his work, it is likely that Madison's apparent distrust of the legislature compared to the other branches, at least in part, was inspired by *The Spirit of the Laws*.

41 THE FEDERALIST NO. 51 (James Madison).

42 *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (describing the judiciary and judicial review in the Constitution). Although Montesquieu does not address judicial review, it can be inferred that it was inspired, at least in part, by *The Spirit of the Laws*, as it is an inevitable consequence of the separation of powers principle. Indeed, if there is no remedy for unconstitutional acts then the system of checks and balances collapses. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review).

However, not every Federalist would have liked to see it be applied in the same manner.[43]

II. THE ANTIFEDERALISTS' OPPOSITION

The structure of the United States government is designed by the infusion of two key principles: separation of powers and checks and balances.[44] In explaining how these concepts interact with one another, Edward Millican observed that these hallmarks, though fundamental, are often quite contradictory in practice.[45] While separation of powers, as understood by *The Spirit of the Laws*, the Maryland Declaration of Rights of 1776, and the Virginia Constitution of 1776 require that the three branches operate under "separate" and "distinct" spheres (strongly implying that they not "be subjected to the interference of the other branches"),[46] the theory of checks and balances mandates tension and overlapping powers in order to prevent governmental institutions from overreaching in violation of the Constitution. This overlap creates a system of government whereby "institutions that are for the most part functionally separate may be given a degree of control over the ordinary duties of the others."[47] Federalists and Antifederalists generally agreed "that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices."[48] It appears, however, the split between the Federalists and Antifederalists on the issue of separation of powers, to a large extent, is the result of disagreement on the degree of independence that could be reconciled with durable self-government.

In defending the constitutional system of checks and balances, Hamilton argued that the "partial intermixture" of the three branches is, in some cases, "necessary to the mutual defense of the several members of the government against each other."[49] The Antifederalists, however, believed that this mixture went too far. While *The Federalist* maintained that the mixture prescribed by the Constitution facilitated "control [of] the abuses of government,"[50]

43 *See* 1 WILSON, *infra* note 117, at 260 ("[T]he powers of the several parts of [the] government are not kept as distinct and independent as they ought to be.").

44 EDWARD MILLICAN, ONE UNITED PEOPLE: THE FEDERALIST PAPERS AND THE NATIONAL IDEA 148 (1990).

45 *Id.* at 149.

46 *Id.*

47 *Id.*

48 THE FEDERALIST NO. 51 (James Madison).

49 THE FEDERALIST NO. 66 (Alexander Hamilton).

50 THE FEDERALIST NO. 51 (James Madison).

Antifederalists argued that it provided certain institutions too much power among multiple disciplines.[51] In other words, they perceived certain mixture of powers, intended to check the branches, as enabling the improper accumulation of power by a single body.

Like Montesquieu, the Antifederalists were very suspicious of corruption and greed.[52] As discussed above, *Federalist No. 47* defended the allocation of constitutional powers by pointing out that Montesquieu viewed the British Constitution as the ideal form of government for the preservation of liberty. Although *The Federalist* by no means advocated for a replication of the English system, the fear of a shift towards overreaching government can be understood given the fact that the British government consisted of an aristocratic upper house and monarch that played a significant role in the legislature.[53]

The Antifederalists insisted that the proposed Constitution did not adhere strictly enough to Montesquieu's vision of separate powers.[54] Indeed, contrary to *Federalist Nos. 47* and *48*, those that opposed ratification commonly and strenuously demanded that the separation of the different departments be of a much greater degree. Less than a month after the 1787 Convention adjourned, Reverend James Madison wrote to Convention Delegate James Madison that the "[l]egislative [and] executive [d]epartments should be *entirely* distinct [and] independent," warning that proposed distribution of power would "threaten [d]estruction to [the] Liberties of America."[55] However, not every Antifederalist felt that the branches ought to be totally separated. In his sixteenth essay, Brutus, the pen name of a vocal Antifederalist, argued that separate and distinct branches in the literal sense were not feasible. He wrote that, "in some special cases," it was permissible to delegate certain executive powers to the legislature.[56] But with that said, the

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51 *See* THE ANTIFEDERALIST NO. 47 (Centinel) (criticizing the proposed Senate as overpowered).

52 *See* RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 76 (1993) (pointing out the Antifederalist concern about government officials acting without sufficient restraint).

53 Zuckert, *supra* note 13, at 155. Putting this trepidation into the context of the time is important too, as the Revolution against the abuses of the British government had been in recent memory.

54 *See* Bryan, *infra* note 58 (warning that the mixture of legislative and executive powers in a single would produce corruption).

55 Letter from Rev. James Madison to James Madison (Oct. 1, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 48, 49 (emphasis added). *See also* Letter from Joseph Spencer to James Madison, Enclosing John Leland's Objections (Feb. 28, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 44, at 267, 269 (expressing the same concern).

56 Brutus, *Brutus XVI*, *in* THE ANTI-FEDERALIST: AN ABRIDGEMENT, BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST 103, 191 (Herbert J. Storing ed., 1985).

separation of the departmental powers "should be sought as far as is practicable."[57] So while there was some disconformity within the Antifederalist movement regarding the degree of separation that was appropriate to maintain liberty, there was near universal consensus that the Federal Constitution had defied Montesquieu's maxim via over mixing of powers between branches.

Specifically, Antifederalists feared the broad powers afforded to the proposed Senate by Article I. The opponents of the new government vigorously denounced the Senate, fearing that it would serve as an "aristocratic junto" by conspiring with the President at the expense of the people's liberty and sovereignty.[58] Many Antifederalists claimed that by being afforded executive powers over treaties and judicial power to convict impeached officers, the Senate exercised all three powers of government, thereby violating the principle of separation of powers.[59] Writing under the pseudonym "A Columbian Patriot," Mercy Otis Warren expressed alarm about this mixture, particularly between the legislative and executive departments.[60] He believed that the powers delegated by the Constitution were "couched in such ambiguous terms—in such vague and ind[e]finite expression."[61] This can arguably be taken to be a critique of the Federal Constitution affording too much discretion through obscurity.

Antifederalists warned about the power of the Senate to remove the President from office, categorizing it as a judicial power. Opponents of the Constitution alleged that this authority stood in direct contrast to the ability to, as described by John Dawson, serve as "council to the President."[62] During the North Carolina Convention, for instance, Samuel Spencer warned that

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57 *Id.*

58 THE ANTIFEDERALIST NO. 47 (Centinel); ROHR, *supra* note 1, at 194; *see also* Samuel Bryan, *Reply to Wilson's Speech: "Centinel" II*, FREEMAN'S J. (Oct. 24, 1787), *reprinted* in *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 77, 86–87 (warning that providing the Senate with "a considerable share in the *executive* as well as *legislative*" would turn it into "a *permanent aristocracy*"). Bryan contended that any sort of mixture between the two departments "highly tends to corruption" and advocated for their complete separation. *Id.*

59 *See* THE ANTIFEDERALIST NO. 47 (Centinel) (referring to the Senate as an "aristocratic junto"); *see also* ROHR, *supra* note 1, at 194 (referring to the Senate as "a favorite whipping boy of the Anti-Federalists").

60 "A Columbian Patriot" [Mercy Otis Warren], Observations on the Constitution (Feb. 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 284, 290.

61 *Id.*

62 John Dawson's Fears for the Future (June 24, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 742, 746.

the Senate should not be able to both advise the President[63] and vote to convict him for impeachment because that would give them the power to remove the President for doing precisely what the Senate approved him to do.[64] The Senate, in this circumstance, would have too much control over the President, thereby allowing it to accumulate too much power at the expense of liberty. The power of trying impeachments also allegedly encouraged corruption by enabling the Senate to elect not to remove a culpable president in exchange for some sort of benefit from the executive branch.[65] If this is the case, then presidents would not be held accountable when executing "treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate."[66] Because the Constitution's delegation of powers enabled this kind of corruption, the executive and legislative branches were deemed by Antifederalists to be "dangerously connected."[67]

Antifederalists were additionally concerned that the long duration of Senate terms and small number of representatives would make it easier for legislators to conspire with one another, potentially leading to significant abuses of power.[68] Specifically, the Constitution's opponents feared that the duration of power and the means of acquiring it intensified the dangers that came with affording different governmental functions to the same department.[69] In his letter to Edmund Randolph, for example, Richard Henry Lee pointed out with alarm that merely twenty-seven individuals, the President, and all the Senators, would be carrying out all of the executive

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63 Many Antifederalists considered appointments to be a solely executive power and it was an overreach to give Congress a share of that authority. Instead, the Pennsylvania Antifederalists preferred that a small independent council outside of the legislative branch approve presidential appointments with a majority vote. *See* Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 526, 547 ("[T]he supreme executive powers ought to have been placed in the president, with a small independent council, made personally responsible for every appointment to office or other act, by having their opinions recorded; and that without the concurrence of the majority of the quorum of this council, the president should not be capable of taking any step.").

64 Samuel Spencer Objects to the Powers of the Senate and Fears It Will Control the President (July 28, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 879, 880.

65 Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 526, 547.

66 *Id.*

67 *Id.*

68 *See* "An Officer of the Late Continental Army" [William Findley?], *Reply to Wilson's Speech*, INDEP. GAZETTEER (Nov. 6, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 92, 99–100.

69 *See, e.g.*, *id.* at 100 ("Congress are to have the power of fixing the *time*, *place*, and *manner* of holding elections, so as to keep them forever subjected to their influence.").

power and two-thirds of the legislative power.[70] He concluded that "either a monarchy or aristocracy will be generated," as the Constitution was "highly and dangerously oligarchic" in form.[71] Randolph agreed. In his letter explaining his reasons for not signing the Constitution while serving as a delegate at the Convention, he wrote that tyranny is inevitable when "[t]he legislative and executive [powers] are concentrated in the same persons."[72]

Thus, while *The Spirit of the Laws* and *The Federalist* repeatedly warn about the danger of overreach by the legislature (preventing this is the primary purpose of separation of powers and checks and balances according to Publius), Antifederalists viewed the overlapping powers afforded to the Senate as engendering the exact outcome meant to be avoided.[73] The debate suggests that the Federalists and the Antifederalists harbored differing definitions of what constituted an executive and legislative power,[74] and they differed on the extent that the separation of powers principle should play a role in American governance. The Antifederalists generally wanted the principle applied in the

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70 *See* Letter from Richard Henry Lee to Governor Edmund Randolph (Dec. 6, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 465, 465–66 (describing such a combination of power as "formidable"); *see also* Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787) *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 526, 546 (arguing that vesting too much authority to so few representatives would encourage corruption by inducing foreign agents to bribe government officials, especially with regards to forming treaties with the nations that the agents represent).

71 Letter from Richard Henry Lee to Governor Edmund Randolph (Dec. 6, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 465, 465–66; *see also* "Cato" V, *Can an American Be a Tyrant? On the Great Powers of the Presidency, the Vagueness of the Constitution, and the Dangers of Congress*, N.Y.J. (Nov. 22, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 399, 402 ("[R]epresentation consists of so few; too few to resist the influence of corruption, and the temptation to treachery, against which all governments ought to take precautions . . . .").

72 *See* Governor Edmund Randolph's Reasons for Not Signing the Constitution (Dec. 27, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 595, 603 (providing Edmund Randolph's letter, dated October 10, 1787, outlining his reasons for refusing to sign the Constitution). The vice presidency, acting as a bridge between the executive and legislative branches, also produced concern among Antifederalists for the same reason. Richard Henry Lee, for instance, argued that the vice presidency undermined the separation of powers principle, explaining that if "[t]he vice president may be part of the Senate at one period, and act as the supreme executive at another," then it follows that "the president is connected with or tied to the Senate." Richard Henry Lee, *in* ESSENTIAL WORKS OF THE FOUNDING FATHERS 277 (Leonard Kriegel ed., 1964).

73 *See* THE ANTIFEDERALIST NO. 47 (arguing that the President would be a "mere pageant" and referring to the Senate as an "aristocratic junto").

74 *See e.g.*, THE FEDERALIST NO. 75 (explaining that the power of entering into treaties does not fall explicitly under the executive or legislative function, as it pertains to contracts with foreign sovereigns rather than passing or executing laws intended to regulate the citizenry); *see also* James Wilson's Summation and Final Rebuttal at the Pennsylvania Convention (Dec. 11, 1787), 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 832, 844 (making the same point regarding treaties made in *Federalist No. 75*).

purest and most absolute form that they deemed practical, but the Federalists had a broader view of practicality.

III. JAMES WILSON

A signer of both the Declaration of Independence and a sitting justice on the first Supreme Court of the United States, James Wilson was one of the leading voices at the Federal Convention and the lead framer of the 1790 Pennsylvania Constitution.[75] He was well-versed in Montesquieu's writings and was a long-time defender of the separation of powers principle. As far back as 1774, Wilson strenuously contended that when a single authority is vested with all governing power, "liberty, like a structure of ice, would instantly dissolve before the fire of oppression and despotick sway."[76] In Wilson's view, even in democratically elected governments, humans "may err" and "may deviate from their duty," making it necessary to counteract that with separate institutions of power.[77] He attributed the abuse of the American colonies in part to the over-expansive concentration of power in the British Parliament.[78]

In examining Wilson's philosophy, it is easy to view his political thought as something of an enigma. Although his philosophical framework revolved around his vision of popular sovereignty and he was widely regarded as one of the most democratic prominent thinkers of his age, Wilson is said to have supported outwardly counter-majoritarian ideas in framing the Constitution, particularly those pertaining to separation of powers.[79] Madison's notes of the Convention reveal, for instance, that Wilson was eager to place extensive checks on the popularly elected House of Representatives, even more so than the Constitution prescribed, as shown by his proposal for an absolute executive veto on legislation.[80]

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75 *See generally*, MADISON, *supra* note 26 (highlighting Wilson's contributions at the Constitutional Convention); 1 JAMES WILSON, *James Wilson's State House Yard Speech October 6, 1787*, *in* COLLECTED WORKS OF JAMES WILSON 171, 171–76 (Kermit L. Hall & Mark David Hall eds., 2007) (highlighting Wilson's contributions at the Pennsylvania Ratifying Convention).

76 1 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 3, 5. Mark Hall notes that, in 1776, Wilson was a stern critic of Pennsylvania's new constitution, in large part, because of its "abolition of separated powers" the document afforded most of the power to a unicameral legislature. HALL, *supra* note 10, at 15.

77 1 WILSON, *supra* note 76.

78 *See id.* (questioning the "supreme, irresistible, uncontrolled authority" that Great Britain possessed).

79 *See* HALL, *supra* note 76, at 146 (noting that Wilson viewed judicial review as "temporary injunctions" rather than as a serious avenue to "thwart the majority").

80 *See* MADISON, *supra* note 26, at 61. Wilson thought that "[t]he Executive ought to have an absolute negative. Without such a self-defense the Legislature can at any moment sink it into non-existence."

From the independence debate to the ratification debate, many of Wilson's contemporaries attacked him on the public stage as an aristocrat. In 1776, for example, he was ousted from office after opposing the Pennsylvania Constitution.[81] Although it was intended to be very democratic in form, Wilson objected to the Pennsylvania Constitution, in large part, because power had been too concentrated in a single body, affording almost all of the power to a unicameral legislature.[82] The governing document, in essence, failed to conform with the separation of powers principle. Despite the attacks from his political adversaries, Wilson's democratic principles were fundamental to his political thought. At the Convention, for instance, he had advocated for the direct election of the executive and both houses of Congress to the great disapproval of most of the delegates.[83] Overall, Wilson placed great faith and confidence in the will of the majority, more so than arguably any of his Federalist allies.

For Wilson, the proper objective of government is "to secure and to enlarge the exercise of the natural rights of its members."[84] One that fails to designate this effort as its number one priority "is not a government of the legitimate kind."[85] Natural rights form the fundamental basis of Wilson's political thought.[86] According to Wilson, natural rights derive from natural law, which is prescribed by "our Creator."[87] The "will of God" is thus the origin of moral obligation and the "only . . . source of superiority and obligation."[88] As subordinates to God, "we are under the most perfect obligation to obey that law."[89] It follows that the natural law is "universal" and "immutable."[90] Wilson describes these "eternal" truths, passed down by God, as "our constitution," being supreme to all other sources of law.[91] Therefore, human law, including the United States Constitution, must yield to the natural law when they conflict according to Wilson. In other words, if a

81 HALL, *supra* note 76, at 131.

82 *Id.* at 130.

83 *See* MADISON, *supra* note 26, at 41 (reasoning that this would help ensure that the branches would remain "independent as possible of each other").

84 2 JAMES WILSON, *Of Crimes Against the Rights of Individuals Acquired Under Civil Government*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 1060, 1061.

85 *Id.*

86 *See* 1 JAMES WILSON, *Of the Law of Nature*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 500 (discussing Wilson's observations on the natural law).

87 *Id.* at 501.

88 *Id.* at 501, 508.

89 *Id.* at 500.

90 *Id.* at 523 (explaining that natural law, although immutable, may progress as the morals develop over time).

91 *See id.* (arguing that the natural law is universal and cannot be diminished, altered, or abolished).

law violates a guarantee of natural law, then it is not valid. Wilson believed that the code of law passed down by mankind served as a means of conforming to the law passed down by Providence.

In light of this, Wilson's democratic principles were not the end themselves. Rather, it was the means for preserving supreme natural rights and realizing the virtue that it prescribes.[92] Or, as Wilson put it, the objective is a simple command: "Let man pursue his own perfection and happiness."[93] Naturally, democracy is the best fit for this end. A restrained government will, of course, better enable individuals to seek these successfully and without interference. Wilson's historical and comparative analysis of governments throughout the world demonstrate that other forms of government are more prone to descending into tyranny to the detriment of God's will.[94]

In his *Lectures*, Wilson explained that our moral perception is the guide for discerning and implementing the natural law.[95] He placed a significant degree of trust in this faculty, referring to our notion of right and wrong as "intuitively discerned."[96] The exercise of morality necessary for satisfying God's will does not require a formal education and most moral truths do not require reasoning, as they are self-evident.[97] Wilson recognized that individuals' moral sense is "diffused through every part of life" and begins to unfold "in the first stages of life."[98] His faith in the people's conscience accounts for his constant adherence to the notion of popular sovereignty.

When majority rule prevails, natural law will not be contradicted because the moral sense of the majority will be on the side of liberty.[99] Therefore, the more representative the government is of the majority of the population, the more legitimate it will be.[100] But Wilson acknowledged that this is not always

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92 *See* HALL, *supra* note 76, at 146 ("Wilson advocated democratic institutions because he thought they were most likely to legislate in accordance with natural law.").

93 1 JAMES WILSON, *Of the Law of Nature*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 503.

94 1 JAMES WILSON, *Of Government*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 689, 690.

95 *See* 1 JAMES WILSON, *Of the Law of Nature*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 500, 509 ("We have the same reason to rely on the dictates of [moral perception], as upon the determinations of our senses, or of our other natural powers.").

96 *Id.* at 512.

97 *See id.* at 513 (noting that the "cases that require reasoning are few").

98 *Id.* at 510–11.

99 *See* Ralph Rossum, *James Wilson and the "Pyramid of Government:" The Federal Republic*, 6 POL. SCI. REVIEWER 113, 135 (1976) (emphasizing the importance of consent for Wilson's political philosophy).

100 *See id.* ("[Wilson] did not fear political power as long as it was in the hands of men to whom the people had given their consent.").

the case and "there may be mistakes," resulting in human laws that conflict with natural law.[101] Indeed, "[a]n indigested and inaccurate code of laws is one of the most dangerous things that can be introduced into any government."[102] This exception to Wilson's primary thought arguably accounts for instances of his seemingly counter-majoritarian proposals. Sometimes, though rarely, majority rule does not comport with natural law, the ultimate end of government.

While some of Wilson's proposals regarding the separation of powers are seemingly contrary to his principle of popular sovereignty and are arguably inconsistent in that regard, the premise of Wilson's interpretation of Montesquieu's notion is that it furthers the natural law, thereby maintaining consistency with the Constitution's forefront objective. At the Constitutional Convention, Wilson remarked that "[t]he separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects."[103] In the *Lectures*, he suggests that independence means that the proceedings of each branch are not interfered with, but their actions are subject to control once they are complete.[104] This suggests that his conception of the principle is similar to that of *The Federalist* in theory. He believed that a significant degree of tension between the executive, legislative, and judiciary powers was necessary to a certain extent. However, his preferred application exhibits stark contrasts to what was implemented in the final product, even in some cases resembling Antifederalist preferences. Wilson's proposals and stances regarding legislative-revisionary power, the absolute veto, and the powers of the Senate highlight the differences in his political thought with those of both sides of the debate.

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101 1 JAMES WILSON, *Of the Law of Nature*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 500, 510.

102 1 JAMES WILSON, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 178, 205.

103 MADISON, *supra* note 26, at 299. Assuming that Madison's records of the Convention are accurate (there has been considerable debate on this), Madison's notes are arguably a stronger source of authority on Wilson's preferences for government than his famous State House Yard Speech shortly after the Convention had adjourned. Similar to *The Federalist*, which does not entirely reflect the views of Hamilton and Madison, Wilson's speech was a pitch for a document that he personally did not agree with in its entirety (with respect to the ideas he proposed at the Convention). However, Wilson did make certain concessions to the Antifederalist faction in the address.

104 1 JAMES WILSON, *Of Government*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 689, 707.

Overall, Wilson was the most outspoken democrat at the Convention, advocating for the popular election of both houses of Congress and the President.[105] In doing so, "he wished that vigorous authority . . . flow immediately from the legitimate source of all authority," "the *mind or sense* of the people at large."[106] Yet, some of his proposals for delegating powers among the three branches of the Constitution were seen as contrary to the whim of the majority. For instance, at the Convention, Wilson suggested that the executive and judiciary branches both ought to have "[r]evisionary power" for all legislation passed by Congress.[107] In essence, this meant that Wilson wanted to go beyond the notion of judicial review subscribed in Hamilton's *Federalist No. 78*, thereby connecting the branches to a greater degree. Many delegates thought that the mixture was a step too far, fearing that it would establish "an improper coalition between the Executive [and] Judiciary departments."[108] Indeed, many delegates felt that judges ought to be "free from the bias of having participated in [the law's] formation."[109] But Wilson believed that when laws, even those approved by the majority, are unjust or destructive (or, in other words, violate natural law), the unelected judges ought to be able to employ their wisdom to counteract them, even before the law is enacted and executed.[110] With regard to the question of law-making then, Wilson urged that the branches be less separate and distinct from one another than Antifederalists and most Federalists had deemed appropriate.

Wilson employed the same justification for his proposal for an absolute executive veto. While the Convention ultimately agreed to grant the President a partial negative that can be overturned by Congress, Wilson wanted to give the President the final word.[111] He warned that without this check, the three branches could not remain distinct and independent, as "the Legislature [could] at any moment sink [the executive] into non-existence."[112] According to the notes, he was even willing to go as far as giving both the executive and

105 1 JAMES WILSON, *Remarks of James Wilson in the Federal Convention, 1787*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 80, 82, 85.

106 *Id.* at 90. Wilson believed that, despite different modes of choosing judges, representatives, and the President, all official authority derives from the same source: the people. In that sense then, even though federal judges are unelected, judicial interference in law-making is not contrary to majority rule under Wilson's framework.

107 *Id.* at 121.

108 *Id.* at 296.

109 *Id.* at 51.

110 *See id.* at 121–22 (providing Wilson's argument for judicial revisionary power).

111 *Id.* at 88.

112 *Id.*

judiciary departments a joint absolute negative.[113] But Wilson believed that the negative would rarely be used because Congress would almost always refrain from passing laws that endanger liberty.[114] However, the check was nevertheless necessary to counter those rare instances.[115] Although Wilson felt that this would help ensure that the branches remain truly separate, he preferred the powers to intermingle more than prescribed in the *Federalist* and desired by most Antifederalists. At the Convention, delegates felt that an absolute veto would give the President too much authority over the Legislature and ultimately rejected Wilson's proposal.[116] Given Antifederalist criticism to the limited veto,[117] it can be inferred that most Antifederalists would object to one individual being able to negate the whim of two legislative bodies without recourse. In his fourth essay, for instance, the Impartial Examiner argued that even the qualified negative was excessive because it afforded the President "a weight [on the legislative scale of government] almost equal to that of two thirds of the whole Congress."[118] This reasoning implies that an executive with an absolute negative would, as the Impartial Examiner put it, "possess the sovereignty of America."[119]

However, for certain elements of governance, Wilson's preferred application of separation of powers was more on par with that of the Antifederalists. As elaborated above, the opponents of the Constitution were especially critical of the powers afforded to the Senate, insisting that the body would be prone to abuses of power under the constitutional framework. To an extent, Wilson agreed with them and he expressed concern about the

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113 *Id.*

114 *Id.*

115 *Id.* This stance epitomizes Wilson's primary political philosophy regarding the ends and means of government, as explained by Mark Hall: In short, according to his *Lectures*, the end of government is the preservation of and adherence to natural law while the means of achieving that is democratic governance. HALL, *supra* note 10, at 146–47. While the democratic majority will almost always conform to this end, Wilson recognized that there are sometimes extenuating circumstances that require this absolute negative veto. *Id.*

116 *See* MADISON, *supra* note 26, at 52 (warning by Benjamin Franklin that, in Pennsylvania, "the [absolute] negative of the Governor was constantly made use of to extort money"); *see also* THE FEDERALIST NO. 73 (Alexander Hamilton) (explaining the advantages of a qualified negative over an absolute one).

117 *See* 1 JAMES WILSON, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 178, 230 (responding to the critique that the presidential veto afforded legislative power to the executive and therefore violated separation of powers).

118 *The Impartial Examiner IV*, VA. INDEP. CHRON. (June 11, 1788), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 2 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2009)

119 *Id.*

Senate on multiple occasions. At the Convention, Gouverneur Morris argued that it was wrong for the Senate to try judges for wrongdoing while filling the vacancies that they created by removing them from the bench.[120] Madison noted that Wilson was of the same opinion for the same reasons.[121] But, in December 1787, Wilson was charged with defending the proposed Constitution at the Pennsylvania Convention. He conceded, however, the validity of the critique "that the powers of the several parts of [the] government are not kept as distinct and independent as they ought to be."[122] Namely, he stated that the powers of the Senate are not as separate as he would have hoped.[123] Indeed, he pointed out that, in this governmental framework, "the distinction and independence of power is not adhered to with entire theoretical precision."[124] While Wilson did not explicitly say which powers he personally disagreed with, it can be reasonably inferred that the combination of appointments and removal from office was one on his mind given his concurrence with Morris. In the same address, he also discussed the treaty power, which he referred to as "a blending of the legislative and executive powers in the senate."[125] Wilson noticed the favorable and unfavorable side of the power, but raised the question of whether "the objectionable parts are of a sufficient weight to induce a rejection of this constitution."[126] These remarks suggest that Wilson acknowledged the objections to the blending because, to an extent, it concerned him as well. Thus, while Wilson sympathized and likely agreed with certain aspects of the Antifederalist position on separation of powers, he emphasized that the Constitution's distribution of power was an improvement over the Articles of Confederation—which afforded nearly all federal power to a unicameral legislature—and all of the state constitutions at the time.[127] Despite the notable defects of the Constitution, Wilson urged even the most strenuous objectors

120 MADISON, *supra* note 26, at 517.

121 *Id.*

122 James Wilson's Summation and Final Rebuttal (Dec. 11, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 832, 842.

123 *Id.*

124 *Id.*

125 *Id.* at 844.

126 *Id.*

127 *See id.* at 842–43 (surveying the defects of various state constitutions in this regard); *see also* 1 JAMES WILSON, *James Wilson's State House Yard Speech* (Oct. 6, 1787), *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 171, 176 (stating that "any thing nearer to perfection could not have been accomplished").

to keep an open mind: "Let the experiment be made; let the system be fairly and candidly tried, before it is determined that it cannot be executed."[128]

CONCLUSION

During the ratification debate, varying applications of Montesquieu's maxim were proposed. Significant differences in the principle existed between advocates and opponents of the Constitution and within the factions as well. The Antifederalists generally argued for a stricter reading of separation of powers, maintaining that the branches ought to be as distinct and separate as possible, to the extent that it can be reconciled with a durable government. Proponents of the Constitution differed with the Antifederalists' sense of practicality. Some Federalists such as Wilson, however, disagreed with numerous aspects of the final compromise. Differences in philosophical outlook account for these differences. Wilson's concept of a national sovereign people was appropriated by Publius and the Federalists as a springboard for abandoning the Articles of Confederation. However, Gordon Wood has argued that the Federalist attachment to popular sovereignty was disingenuous, "exploit[ing] the language that more rightfully belonged to their opponents."[129] Wilson, however, as a general matter, was more sincere. *The Federalist* expresses degrees of distrust in the people at large that Wilson's philosophy lacks.[130] In light of this, it makes sense that Wilson did not share the same degree of fondness towards the mixing of Senate and executive powers as did Publius.[131] He wanted more checks on the legislature, but he was much warmer to the powers of the judiciary, advocating for broader authority than the Constitution afforded to the third branch.[132] A maverick of political thought, Wilson was a devout nationalist, yet his general trust of majority will more closely resembled Antifederalist thought. As applied to separation of powers, his positions at both the Federal and Pennsylvania

128 James Wilson's Summation and Final Rebuttal (Dec. 11, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 832, 838.

129 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 562 (1998).

130 *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (discussing the dangers of an "overbearing majority"); THE FEDERALIST NO. 55 (Alexander Hamilton or James Madison) ("[T]here is a degree of depravity in mankind which requires a certain degree of circumspection and distrust . . . .").

131 *See* William Ewald, *James Wilson and the Drafting of the Constitution*, 10 J. CONST. L. 901, 976 (2008) (explaining that "[Wilson's] trust in the good sense of the *people* was not matched by an equal trust in their elected *representatives*"); *see also id.* at 978 (pointing out that Wilson's priority was the representation of individuals while Madison's priority was the representation of interests).

132 *See, e.g.*, 1 JAMES WILSON, Remarks of James Wilson in the Federal Convention (1787), *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 75, at 80, 121 (advocating for a revisionary power for the Judiciary).

conventions ranged across the span of the debate, many surpassing the checks put into effect by the Constitution and some approaching the degree of separation preferred by his opposition.[133] In essence, while Wilson's democratic priorities were arguably more in line with those of the Antifederalists, his methods of achieving them led him to the Federalist cause. His positions, in relation to those of his contemporaries, reveal complexities in the principle of separation of powers. His ultimate goals for the new government differed from those of Madison and Hamilton in numerous ways, but his way of implementing them were largely in harmony with the Federalist ideology.

133 *See id.* at 88 (proposing an absolute executive veto). *But see* James Wilson's Summation and Final Rebuttal (Dec. 11, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 4, at 832, 842 (explaining that the Senate is not as separate as Wilson would have liked it to be as designed).