

ABSTRACT

Institutionalizing Class Conflict: Gouverneur Morris on the Mediating Class Warfare through Separation of Powers

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This dissertation argues that Gouverneur Morris, one of the primary authors of the Constitution, was driven by a uniquely American political theory, which brought together aspects of the class-based mixed regime with strict separation of powers, but is not reducible to either of those doctrines. Morris thought that class warfare was an inevitable feature of politics, but that separation of powers provided the proper institutional framework for controlling this conflict. He successfully instituted his vision in the Constitution – in particular he was the man most responsible for the creation of a popular, independent, republican executive. In Morris's view, the popular president would balance against the special interests of the wealthy in Congress, mediating the socioeconomic class conflict that he thought was an unavoidable part of politics. The result, according to Morris, would be a peaceful and prosperous society, secure in the blessings of liberty.

Institutionalizing Class Conflict:
Gouverneur Morris on Mediating Class Warfare through Separation of Powers

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DEDICATION

In loving memory of Ronald P. McArthur

"Born to high destinies, he was fashioned for them by the hand of nature. No man could approach him but with respect. None was great in his presence."

CHAPTER ONE

Introduction

This dissertation proposes to explain how Gouverneur Morris's political thought integrated aspects of the ancient mixed regime and modern separation of powers doctrines to create a new, American political theory, and show that Morris's theory provides a unique and valuable way of understanding the American Constitutional order. I contend that Morris saw the idea of socioeconomic class which was the foundation of the mixed regime as integral to the proper understanding of the American regime. In Morris's view, popular sovereignty established by the Constitution is not unilateral, but rather both upper and lower classes are considered sovereign in their own right, and separation of powers provides the proper institutional framework for mediating class warfare and establishing republican government.

Progressive scholars, perhaps most famously Charles Beard, argued that the Constitution was a class-based document and critiqued it on those grounds,¹ while later scholars such as Martin Diamond and Gordon Wood describe the Constitution as classless system founded on separation of powers as described by Madison in the *Federalist*.² John Adams saw an alternative, namely, that class could be the basis for

¹ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, 2nd edition (New York: Macmillan Company, 1935).

² Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, University of North Carolina Press, 1967).

free government.³ But at the Constitutional Convention of 1787 it was Gouverneur Morris who actually put this into practice, and developed a new way of institutionalizing class *through* the separation of powers. This view holds that class-based politics is not necessarily at odds with free government, as both Beard and Wood seem to think, but rather that proper institutions ought to be used to neutralize class warfare and uphold the interests of all without abolishing classes. Morris found that the framework of separation of powers provided the ideal system within which to institutionalize socioeconomic class interests, to protect the poor from the wealthy *and* the wealthy from the poor.

Most scholars, such as Wood, Beard, Bernard Bailyn, and Forrest McDonald who discuss the philosophical and ideological origins of the Constitution fail to devote much attention to Gouverneur Morris's thought, despite the great influence he had at the Convention and on the final draft of the Constitution.⁴ Similarly, scholars such as W.B. Gwyn and M. J. C. Vile, who deal with the history of the mixed regime and separation of powers almost universally recognize the importance of the American regime as a part (or even the pinnacle) of this history.⁵ But their work systematically ignores Gouverneur Morris's political thought. Much of this dissertation will be spent

³ John Adams, "A Defence of the Constitutions of the United States of America," in *Works of John Adams*, ed. Charles Francis Adams, (New York: Little, Brown and Co, 1850)

⁴ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Forrest McDonald, *We the People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958), *Novus Ordo Saeclorum: The Intellectual Origins of the Constitution* (Lawrence: University of Kansas Press, 1985).

⁵ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998); W.B. Gwyn, *The Meaning of Separation of Powers* "Tulane Studies in Political Science" vol. IX (New Orleans, 1965).

arguing that ignoring Morris's contribution has led to frequent misunderstanding of the full evolution of the mixed regime and separation of powers, and especially of the unique place of the American regime.

The debate over the relevance of the mixed regime for American constitutionalism has a long history. As early as John Adams, political thinkers have proposed an American "mixed regime". The theory behind the mixed regime, which was first detailed by Aristotle, holds that a distinction between upper and lower classes is a permanent feature of political life. By definition, there will always be a small number of wealthier, better educated "aristocrats" and a much larger number of less wealthy, less educated citizens. Those at the top will always attempt to rule the rest, while the people, by virtue of their greater numbers, will always attempt to degrade the few highest citizens. For obvious reasons, the notion of institutionalized upper class can seem at odds with the free and republican character of the United States, and Adams was roundly criticized for his supposedly outdated views.⁶

The predominant view, as laid out by James Madison in *Federalist 51*, holds that the American regime is a practical instance of the doctrine of separation of powers. This theory calls for a division of the powers of government, preventing tyranny through decentralization. In such a system it is generally thought that sovereignty is held by the people generally rather than by class, and through election representatives carry out the will of the people. Some scholars, such as Martin

⁶ Wood, *The Creation of the American Republic*, 582.

Diamond and Vile have even argued that the separation of powers is opposed to the mixed regime, because separation of powers requires an equal or classless society.⁷

Despite the predominance of the Madisonian narrative, the notion of institutionalized class in American society did not disappear. The progressive historian Charles Beard argued that the Constitution was essentially a class-based document, designed to protect the interests of the wealthy in the face of the democratic shift of 1776-1787.⁸ In general, the early progressive movement featured an attempt to overcome such supposed class-based politics, and fully democratize the Constitution, for example, through the 17th Amendment. Although obviously Beard and other progressive scholars disapproved of the institutionalization of class interests in the Constitution, they provide a fascinating sign of the resilience of such an interpretation of the Constitution.

Wood, Bailyn, and others, in a response to the progressive critique, returned to the Madisonian separation of powers. Most of these scholars bring up the notion of the mixed regime as an influence, but dismiss it with the same arguments that Adams was dismissed by his contemporaries, saying that clearly the American regime is not supposed to institutionalize class interests.⁹ Vile perhaps takes this farthest, arguing that separation of powers is by definition democratic, and that although elite interests always tried to overcome separation of powers, the Constitution is at its

⁷ Martin Diamond, "The Separation of Powers and the Mixed Regime," *Publius* 8, no. 3 (Summer, 1978): 39-41; Vile, *Constitutionalism and the Separation of Powers*, 14, 147.

⁸ Beard, *An Economic Interpretation of the Constitution*, 324-325.

⁹ Wood, *The Creation of the American Republic*, 582.

heart a democratic document with no institutionalization of class.¹⁰ Nevertheless, Paul Eidelberg resurrected the mixed regime understanding of the Constitution, claiming that it was intended to balance an aristocratic Senate and executive against the democratic House of Representatives.¹¹

The controversy lives on, and the contradiction between the two is not simply a formality. The progressives claimed the Constitution was class-based, and therefore bad. Wood, Vile, and others argue that it is not class-based, and is good. Eidelberg argues that it is class-based, and good. These views also lead to very different interpretations of specific institutions: Vile claims that the President is popular basically from the start, whereas Eidelberg sees that office as monarchic. This has implications beyond the theoretical; the relation the president has with the people is important, and how we view it is deeply affected by whether we think the presidency is a democratic institution or not.

I argue that it is necessary to understand Morris's political theory in order to fully understand the American regime and put it in a historical context. Morris's views are not just unique and interesting – they are the views of one of the most influential Framers. According to Madison, Morris was more responsible than any other man for the wording of the Constitution.¹² Morris personally wrote large sections of the Constitution, including the Preamble and much of Article II, and was

¹⁰ Vile, *Constitutionalism and the Separation of Powers*, 147.

¹¹ Paul Eidelberg, *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* (New York: Free Press, 1968).

¹² James Madison to Jared Sparks, April 8, 1831, Sparks, 1:286.

primarily responsible for the construction of the final draft.¹³ He spoke more often than any other delegate, and was the leading proponent of a popular, independent executive. The presidency, and the corresponding modern notion of executive power, which Harvey Mansfield argues is the most innovative part of the American regime, is greatly in place due to Morris's efforts.¹⁴ Morris's interest in class-based politics and his often harsh language make him a difficult hero, and perhaps this contributes to his relative obscurity. But given the incredible amount of influence he had on the Constitution, it is important to account for his views when discussing the American regime and its place in the history of political thought. The fact that the omission or diminution of Morris is common to Diamond, Wood, Beard, McDonald, Mansfield, Vile, Gwyn, Bailyn, and many other scholars makes it all the more important that Morris's views be brought to light.

My intention is for this dissertation to bring to prominence, in a comprehensive way, the political thought of Gouverneur Morris, and thus to help resolve a long-standing debate on the nature of the American regime and its place in the history of the mixed regime and separation of powers theory. Morris thought that class conflict was a permanent feature of political life, and that one of the primary purposes of any political system is to balance the classes. This is the basic principle of the mixed regime. However, Morris also thought that the best way to provide this balance was in the context of the separation of powers. His theory, therefore, moves

¹³ GM to Timothy Pickering, December 22, 1814, Sparks 3:323; Max Farrand, *The Records of the Federal Convention of 1787*, revised edition (New Haven: Yale University Press, 1966), 3:499.

¹⁴ Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press, 1989), chap. 10-11.

beyond the particulars of both the mixed regime and the separation of powers. Regarding the American regime in particular, Morris's theory had a direct influence on the Constitutional institutions, especially through the creation of a popular executive. Because he thought that the whole legislature would be captured by the special interests of the wealthy class, Morris argued vehemently for a popular executive, independent and separated from the legislature.

Ultimately, it is impossible to fully understand the true nature of the American regime without full attention to Gouverneur Morris. He is one of the first thinkers to envision a balance of the mixed regime and separation of powers, presenting a philosophical and practical culmination to centuries of political thought. But beyond simply presenting a theory, Morris is the first political thinker to institute such a set of principles on a practical level (and to do so successfully). Looking to Morris therefore solves a debate regarding the true nature of the American regime, and reveals an exceptional character to the Constitution, built on a truly American political thought that is not reducible to the traditional division between ancient and modern political thought.

In order to make this argument, in the first chapter I discuss the history of the mixed regime and separation of powers, and begin to place the American regime in a historical context. I show how scholars who have dealt with this subject have failed to account for Morris's theory and influence. In the second chapter, I present an overview of Morris's contributions and his political theory, showing why it is fitting to use Morris to correct the current direction of the scholarly literature. Having established the legitimacy of Morris as an authority, and explained his political theory

in broad terms, I examine in chapters three and four his work at the Constitutional Convention and argue that he intended the Constitution to establish an aristocratic legislature and a popular executive. Lest I (and Morris) be accused of simply throwing together a bundle of compromises in Philadelphia, in the fifth chapter I show how Morris's theory remained consistent during his time in France, although he recommended different institutions there, in order to reflect the different character of the French people.

In summary, I hope to show three interrelated things: First, that the understanding of the American regime and its place in the history of political thought is lacking. Second, that this lack is filled by proper attention to Gouverneur Morris and his political thought. Third, that Morris had a consistent political theory, which is more than a series of compromises, and that this political theory represents a uniquely American political thought that transcends any particular ancient or modern theory.

CHAPTER TWO

The Mixed Regime, Separation of Powers, and the American Regime

The ancient theory of the mixed regime and the modern theory of separation of powers are difficult to define, both in terms of the doctrines themselves and their relationship to one another. But in order to properly discuss the historical place of the American regime and of Gouverneur Morris's political thought, I must first discuss the history of the mixed regime and separation of powers, which is no easy task. As Martin Diamond argued, separation of powers "emerges in ways that are confusingly entangled with the traditional idea of the mixed regime."¹ As Diamond and Mansfield point out, Gwyn and Vile both devoted considerable effort toward disentangling the mixed regime and separation of powers. Therefore I follow these scholars in attempting to define and distinguish the two doctrines.² This will enable me to discuss the historical place of the American regime, and show how political thinkers have debated the relationship between each of the two theories and the American Constitution. Ultimately my discussion raises problems with the current literature, problems which I argue are best resolved by turning to the political thought of Gouverneur Morris, as I will do in the following chapters.

¹ Diamond, "The Separation of Powers and the Mixed Regime", 33.

² Mansfield, *Taming the Prince*, 12; Diamond, "The Separation of Powers and the Mixed Regime", 34.

The Two Doctrines

Martin Diamond complained that many scholars have conflated or confused the doctrines of the mixed regime and separation of powers, and he argued for a “radical” distinction between the two theories.³ He proposed that the two doctrines had different ends, different institutional requirements, and were based on different suppositions about the nature of man and political and social life. According to Diamond, the separation of powers is wholly modern, with no relation to the ancient mixed regime, and the two doctrines should not be “lumped together”.⁴

Diamond credits a few contemporary scholars for similarly attempting to disentangle the two doctrines, even if not as “radically” as he preferred. For example W.B. Gwyn begins his authoritative history of separation of powers, *The Meaning of Separation of Powers*, by acknowledging that some scholars trace the history of separation of powers all the way back to Aristotle and the mixed regime. But Gwyn points out the error of this theory of evolution, arguing that this mistake is founded on coincidental similarities, and that the separation of powers is not truly a descendant of the mixed regime.⁵ Similarly, M. J. C. Vile points out in his landmark *Constitutionalism and the Separation of Powers* that the two theories are often confused, but he rejects this entanglement: “The two doctrines are not merely logically distinct, but to a considerable extent they conflict with one another.”⁶ Vile

³ Diamond “The Separation of Powers and the Mixed Regime”, 34.

⁴ Ibid.

⁵ Gwyn, *The Meaning of Separation of Powers*, 5, 9.

⁶ Vile, *Constitutionalism and the Separation of Powers*, 37.

particularly focuses on the fact that the mixed regime assumes class division, whereas separation of powers deliberately ignores class or assumes a classless society.⁷

Gwyn and Vile do not, however, claim that the two doctrines are so distinct on a practical level, and at least part of the reason that Diamond's distinction is more radical is that his is mostly theoretical. Both Gwyn and Vile are both attempting to trace the history of actual governments as well as the theoretical doctrines, and in practice government rarely provides an instance of the pure form of either a mixed regime or separation of powers. The primary example of this, the British government, Gwyn and Vile agree cannot be clearly described as either a mixed regime or separation of powers system, but rather historically included some aspects of both at different times.⁸ The British system has in turn influenced the evolution of both doctrines, causing further difficulty in defining them.⁹ Thus Vile himself differentiates what he calls the "pure" formulation of the doctrine of separation of powers from the various practical instances and resulting theoretical variations.¹⁰

Because of this, I will primarily emphasize Diamond's radical understanding and Vile's "pure" formulation of the two doctrines, and only secondarily rely on Gwyn and Vile's more historical understanding. I follow this course because I am not

⁷ Ibid., 7.

⁸ Wood, *The Creation of the American Republic*, 199; Vile, *Constitutionalism and Separation of Powers*, 3-5, 43-52.

⁹ For example, Mansfield argues that Locke's form of separation of powers is a "thinly-veiled description" of the British system. But as Vile and Gwyn show, Locke's formulation is one of the earliest, and was written at a time when the British system was still heavily influenced by the mixed regime. Mansfield, *Taming the Prince*, 190.

¹⁰ Vile, *Constitutionalism and the Separation of Powers*, 14.

attempting a practical history but rather trying to explain Morris's thoughts in the context of the history of political thought. Not only do Diamond's "radical disentanglement" and Vile's "purity" provide theoretical clarity, they also mirror the language of Gouverneur Morris himself. While I cannot prove every practical influence on Morris or the Constitution, I can and will show that Morris's language reflects the "radical" or "pure" understanding of the two theories described below. Ultimately I will argue that Morris develops a new theory of politics which is not reducible to either of the doctrines in their pure form, but the pure forms provide the best basis for understanding the causes behind Morris's new theory of politics.

The Mixed Regime

According to Vile, "the major concern of the ancient theorists of constitutionalism was to attain a balance between the various classes of society and so to emphasize the different interests in the community..."¹¹ There have been multiple formulations of the doctrine of the mixed regime, but the basic notion underlying all of them is that different classes have diverse interests, and these have to be balanced against each other.¹² For Aristotle, the "founder" of the theory of the mixed regime, the mixed regime was a combination resulting from his division of simple regimes, which were divided on the basis of both number and purpose.¹³

¹¹ Ibid., 25.

¹² Many formulations included a monarch, others included hereditary aristocracy or theoretically "virtue-based" aristocracy instead of oligarchy, but all formulations are based on the notion of balancing upper and lower classes.

¹³ Compare to Wood, *The Creation of the American Republic*, 197-198.

According to Aristotle oligarchy was the rule of few, whose end was wealth, and democracy was rule of the many, whose end was primarily freedom.¹⁴ Because each class had different interests the regimes governed by each would naturally enact different laws, allow different people to govern, etc. The mixed regime, however, was a combination of two simple regimes, in this case “a mixture of oligarchy and democracy”¹⁵ which would balance the wealthy upper class and the mass of the people, the lower class.¹⁶

The assumption behind this was that the difference between the rich and the poor was one of the basic features of politics, and would lead to conflict: “these are particularly held to be parts of the city, the well off and the poor. Further....these parts appear the most opposed parts of the city.”¹⁷ Thus a simple oligarchy would tend to cause unrest among the lower class, and a simple democracy would tend to oppress the upper class. Aristotle goes into exhaustive detail while discussing all the causes of conflict between classes, and how these differences end up in revolution. The consequence of this long argument is that the conflict between wealthy and poor is a natural part of politics, difficult or impossible to avoid in most regimes. The mixed regime avoids this class conflict, because it gives both classes a share in government and, by balancing the two classes, finds a middle ground.¹⁸

¹⁴ Aristotle, *Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984) 1294a15.

¹⁵ Ibid., 1289b30.

¹⁶ Later Aristotle emphasized the possibility of a middle class becoming dominant in a mixed regime. However, this was not the basic form, but rather a hoped-for evolution. Ibid., 1296b35-40.

¹⁷ Ibid., 1291b5.

¹⁸ Ibid., 1302-1306.

In other words, the mixed regime, and by extension, the legislation thereof, forms a kind of mean between oligarchy and democracy such that in comparison to an oligarchy, it looks and acts democratic, but in comparison to a democracy, the result is oligarchic.¹⁹ Both classes are protected; both interests are institutionalized by the mixed regime. Practically speaking, the result is a regime that ensures that neither class can advance its own interests to the detriment of the other class, and avoids the factional conflict between the rich and the poor that characterizes pure oligarchy or democracy.²⁰ Even after it disappeared for a time, the class-based foundation of the doctrine, and its claim that stability could be achieved by a mixed regime, caused the Aristotelian theory to be resurrected and enlarged in seventeenth century Britain.²¹

The mixed regime, therefore, was thought to solve the problem of class warfare by granting both classes a share in government. The doctrine does not, however, provide any specific arrangements of political institutions, not in Aristotle or other theorists. Nathan Tarcov draws a distinction between social and political institutions, which is useful here – the mixed regime assumes certain social institutions – the wealthy few and the many poor – and intends to perpetuate them, but does not specify the political institutions necessary to do so.²² As Diamond points out: “There was no division at all, or at least no principled division, of the governing

¹⁹ Ibid., 1294b15.

²⁰ Ibid., 1302a1-15.

²¹ Gwyn, *The Meaning of Separation of Powers*, 24.

²² Nathan Tarcov, “The Social Theory of the Founders” in *Confronting the Constitution*, ed. Allan Bloom (Washington: AEI Press, 1990), 167.

power in the mixed regime. Each class...was given, as it were, the *whole* of the governing power...Each dealt with the whole of the governmental business, but each represented a distinctive element in the society. In short the governing power was twinned, so to speak, rather than divided...By virtue of the necessity that the community could act only when the two agree, each had an absolute veto over the other..”²³ Although it is not specified exactly how the upper and lower classes will share authority, it is clear that it will *not* be by dividing the power but by sharing it. In other words, government authority is duplicated rather than divided. To use modern terms, the mixed regime’s purpose is to prevent class warfare, and it does this by institutionalizing both class interests in government, but it does not divide up the powers of government.²⁴

Separation of Powers

In contrast to the mixed regime, separation of powers is explicitly concerned with dividing up the power of government. As Gwyn notes, what those powers are, and what exact institutional constraints are used to effect the separation varies depending on the expositor of the doctrine.²⁵ But a theory can be classified as adhering to separation of powers if it separates government functions and

²³ Diamond, “The Separation of Powers and the Mixed Regime”, 35.

²⁴ There is wide disagreement about how to characterize the Roman republic. It seems fair to call it a mixed regime, since both classes shared in rule, although the fact that the share was unequal causes some difficulty. Nevertheless if it is properly characterized as a mixed regime, Rome substantiates the claim that the mixed regime does not divide up functions – in Rome government functions were not divided by class. (For example, see Vile, *Constitutionalism and Separation of Powers*, 25.) This claim is more obvious in the case of the simpler British system, in which the “mix” occurs within one function, the legislative function.

²⁵ Gwyn eventually identifies five forms of separation of powers.

distinguishes at least “between law-making and the implementations of the law in particular instances” and if it “prescribes certain governmental arrangements which should be created and perpetuated.”²⁶ In earlier formulations, exemplified by John Locke’s *Second Treatise*, the division was made between the legislative and executive powers, although the executive power was not clearly defined.²⁷ As the doctrine of separation of powers evolved, the executive power became better defined, and the judicial power was separated out.²⁸ Thus mature formulations, exemplified by Montesquieu’s *Spirit of the Laws*, listed the functions as legislative, executive, and judicial, leaving us with the familiar modern tripartite division enshrined in the Constitution and defended in the *Federalist*.²⁹ So although Gwyn’s history provides many different ways of understanding separation of powers, the general definition clearly emphasizes the fact that the basic theory at least includes two powers, divided by specific institutions.

Both Diamond and Vile quickly move to discuss what Gwyn considers one of the more mature forms of separation of powers. Diamond argues that the theory of separation of powers is based on a principled division according to the functions of government.³⁰ In other words, the theory takes the principle that government does

²⁶ Gwyn, *The Meaning of Separation of Powers*, 5.

²⁷ For example, Locke defines a third “federative” power, which he admits is connected to executive power, but later formulations subsume the “federative” under “executive”. John Locke, *Second Treatise of Government*, ed. C.B. MacPherson (Indianapolis: Hackett Publishing, 1980), especially §143-148.

²⁸ For a brief account of this evolution, see Gwyn, *The Meaning of Separation of Powers*, 5-10.

²⁹ Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne Cohler, Basia Miller, and Harold Stone (Cambridge: Cambridge University Press, 1989).

³⁰ Diamond, “The Separation of Powers and the Mixed Regime”, 36.

three main things, and sets up separate offices – legislative, executive, and judicial – to carry out each of those functions. Separation of powers merely requires that these three offices not be situated in the same hands. Vile goes into some detail defining a similar view of separation of powers, laying out a “pure” formulation of the doctrine:

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each branch will be a check to the others and no single group of people will be able to control the machinery of the State.³¹

Again, Vile’s formulation helps to emphasize the difference between the separation of powers and the mixed regime. The doctrine here is specifically about dividing up the functions of government, with no attention to socioeconomic classes that may or may not be a part of society. There are three functions, and those functions must be institutionally separate.

The purpose of the separation of powers, as implied by Vile’s definition, is to prevent tyranny and secure liberty.³² As early as the seventeenth century, when separation of powers theory was only just beginning to be explicitly stated, British political thinkers set up an opposition between liberty and tyranny: they “maintained that [separation of powers] was a prerequisite for civil liberty, a condition of life for

³¹ Vile, *Constitutionalism and the Separation of Powers*, 14.

³² Diamond, “The Separation of Powers and the Mixed Regime”, 36.

which England had long been famous.”³³ If tyranny and liberty were opposites, then preventing tyranny would secure liberty. Separation of powers ensures that no one person (and if done correctly, as Vile’s definition states, no single group) can wield the whole power of government; without such a system, “the people will fear for their security and hence there will be no liberty.”³⁴ Thus Madison was not only quoting Montesquieu but stating one of the basic principles of the separation of powers doctrine when he famously wrote, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” And again, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.”³⁵

The differences between the mixed regime and separation of powers should be fairly obvious. The mixed regime does not demand any particular government institutions. The institutions of the mixed regime are primarily social, not political, as the mixed regime institutionalizes socioeconomic classes and allows both a share in government. Separation of powers explicitly demands government institutions, and does not specify social arrangements. The institutions of separation of powers are not social, but are specific governmental or political offices – legislative, executive, and judicial. The purpose of the mixed regime is to establish justice by balancing socioeconomic classes. The purpose of the separation of powers is to secure the

³³ Gwyn, *The Meaning of Separation of Powers*, 11.

³⁴ Ibid., 104.

³⁵ *Federalist* 47.

blessings of liberty and prevent the establishment of tyranny by decentralizing government power. So the mixed regime and separation of powers are both loosely called kinds of regimes but they are clearly very different in terms of both purpose and institutional form.

Diamond and Vile take this even farther, and make the mixed regime and separation of powers *opposed* to one another. Diamond argues that separation of powers is inherently democratic, because it assumes the citizens will be equal, where the mixed regime assumes they will not: “The mixed regime presupposes a mixed society, composed of qualitatively differentiated regime elements; the separation of powers presupposes an individually heterogeneous democracy.”³⁶ Diamond claims that since theoretically any ideological, familial, or other unified interest could overcome the separation of powers, the theory must be based on the idea of a heterogeneous society with no such groups, ruling out the possibility of any strict socioeconomic classes.³⁷ Vile seems to agree with this description of separation of powers, describing much of the history of the separation of powers as a quest for complete democracy. In later chapters I will argue that Gouverneur Morris overcame this problem by giving each socioeconomic class its own branch. In other words, he found a way to preserve a class-based society without endangering the separation of powers in the way that Diamond suggested. Nevertheless, it is important to note just how opposed the two doctrines are, according to Diamond and Vile, as it helps to

³⁶ Diamond, “The Separation of Powers and the Mixed Regime”, 40.

³⁷ *Ibid.*, 39-41.

illustrate the real innovation of Morris's plan at the Convention, and the confusion among commentators who attempt to describe the Constitution simply in terms of either the mixed regime or separation of powers.

Causes of Confusion

Despite the fact that the doctrines of the mixed regime and separation of powers seem so different, some commentators, including Gordon Wood and Richard Hofstadter, have ended up confusing the two, leading to criticism from Diamond, Vile, and Gwyn. There are a number of ways the two doctrines have been confused including: 1) confusing institutional recommendations, especially mistaking the Aristotelian division of functions for separation of powers, 2) relating the two systems as if they are species in the same genus, 3) confusing practical instances with theoretical similarity. I will deal with each of these in turn.

The first cause for confusion between the mixed regime and separation of powers can be traced back to Aristotle himself, who claimed there were three aspects to government power – deliberation, magistracy or offices, and judging. This might initially look similar to the tripartite distinction of separation of powers, but this idea has been mostly discredited. Most contemporary scholars agree that this Aristotelian division does not match up with the tripartite division of separation of powers, and particularly that Aristotle did not discuss the concept of executive power.³⁸ Vile noted, “The function of the deliberative element here did have some relation to the

³⁸ Gwyn, *The Meaning of Separation of Powers*, 9; Diamond, “The Separation of Powers and the Mixed Regime”, 36-37; Mansfield, *Taming the Prince*, 20-24.

modern notion of legislative function...but this must be seen within the general view of the nature of legislation...the deliberative element was also concerned with what we would call judicial and executive functions.”³⁹ Harvey Mansfield goes into great detail in *Taming the Prince* on the difference between the two doctrines, and specifically between the modern executive and the Aristotelian magistrates, saying that the magistrates “are not said to have the power or duty of executing the law...”⁴⁰

Emphasizing the difference between the two doctrines, Mansfield points out that the Aristotelian division mimics the Platonic division in the *Republic*, and is designed to mirror the parts of the human soul, but “by contrast the three parts of the modern schema...do not describe rational functions of the soul. They center on law, which is to be made, enforced, or adjudged.”⁴¹ In other words, the ancient formulation was designed to mimic the different functions of a human being. The separation of powers makes no such claim, and is merely a categorization of the things that need to be done regarding the laws in an ordered society. Finally, not only are the three functions here different from those of separation of powers, but Aristotle himself emphasized that they need not be separated: “Whether these functions...belong to separate groups, or to a single group, is a matter which makes no difference to the argument.”⁴² Again, for Aristotle, there is no intention of

³⁹ Vile, *Constitutionalism and the Separation of Powers*, 24.

⁴⁰ Mansfield, *Taming the Prince*, 48; For a detailed discussion of how executive power relates to the Aristotelian division, see Mansfield, *Taming the Prince*, chap. 3.

⁴¹ Ibid., 53.

⁴² Vile, *Constitutionalism and the Separation of Powers*, 25.

decentralization, and thus separation of the functions is irrelevant. Not only are the functions different, they need not be separated.

A variation of this problem of confusing functions is found in Gordon Wood's *The Creation of the American Republic*. Here Wood notes the relationship between bicameralism and the mixed regime (an evolution of British bicameralism) but ultimately confuses "mixed" bicameralism with bicameralism as a part of separation of powers. In other words, bicameralism is not a necessary part of either doctrine. If the purpose of bicameralism is to institute an aristocratic/oligarchic house and a democratic house, then it seems to fit with the mixed regime. It might be difficult to ensure institutionalized class with only one house, so instead each class is given its own house in the legislature. But if no distinction is made between the two houses of the legislature other than that there are two, for the purpose of dividing power further, then there seems to be nothing except a complex version of separation of powers at work. In such a case, the bicameralism is designed to counteract the fact that the legislature is naturally more powerful than the other branches, and thus needs an institutional restraint even within itself.

Wood continually fails to make this distinction. He focuses on John Adams's 1776 pamphlet *Thoughts on Government* in which Adams critiqued the idea of a single legislative body with committees for executive and judicial functions. Wood argues that Adams was advocating a mixed regime, mostly because he called for a bicameral legislature and independent executive.⁴³ But although it is true that elsewhere Adams

⁴³ Wood, *The Creation of the American Republic*, 208; John Adams, "Thoughts on Government" in *Works of John Adams*, ed. Charles Francis Adams, 4:195-200.

linked bicameralism to the mixed regime, he has a different doctrine in mind here.⁴⁴ His arguments sound like basic separation of power doctrine: "...a single Assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour."⁴⁵ Adams further focuses on independence of the executive as a requirement of separation of powers: "A Representative Assembly...is unfit to exercise the executive power...still less the judicial power."⁴⁶ Adams makes it clear that "the foregoing reasons apply equally to prove that the legislative power ought to be more complex"⁴⁷ that is, why the legislature should be bicameral even once independence of all three branches is secured. His reasons for advocating a bicameral legislature in *Thoughts on Government* are therefore grounded in the doctrine of the separation of powers, and not based on the theory of the mixed regime. Wood makes the mistake of equating the institution of bicameralism with the mixed regime, a move which Adams's arguments in *Thoughts on Government* do not justify.

The second cause for confusion is that, as Diamond argues, commentators such Richard Hofstadter make the mistake of seeing both as "species of the genus division of powers."⁴⁸ In other words, given the existence of government power, the mixed regime divides it between aristocrats/oligarchs and democrats, and separation of

⁴⁴ Adams addressed the mixed regime in "Defence of the Constitutions", which is the primary cause of Adams's reputation as an advocate for the mixed regime. See below, 29-31.

⁴⁵ Adams, "Thoughts on Government", 198.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Diamond, "The Separation of Powers and the Mixed Regime", 34.

powers divides it between legislative, executive and judicial branches. But all political systems involve some division of power; if there is no division at all, then there is no politics – it is simply the rule of one person. So it is not helpful to “classify” the mixed regime and separation of powers as species in such a superficial way. Diamond says it best: “Now just as it is usually foolish to have a class with no members, it is also foolish to have a class or genus of which everything is a member. By lumping together separation of powers and the traditional mixed regime as species of such a single genus, we deceive ourselves because of superficial formal similarities and miss the importance of the deep and distinguishing differences.”⁴⁹ The reality is that they are not dividing the same thing. The mixed regime divides socioeconomic classes who share a whole power, whereas the separation of powers divides functions or powers, shared by the whole, not defined by class.

Finally, historical commentators have caused some confusion on account of the practical examples they necessarily deal with when discussing actual governments. This is most obvious in Gwyn and Vile’s attempts at dealing with checks and balances. While checks and balances seem theoretically distinct from both the mixed regime and separation of powers, it also seems partially connected to both doctrines. Gwyn seems to see the mixed regime in a generic way concerned with balancing interests, and therefore sometimes confuses it with checks and balances. In other words, because the mixed regime is a kind of balanced government, Gwyn seems to confuse any balanced government with the doctrine of the mixed regime,

⁴⁹ Ibid.

ignoring the very specific balance that the mixed regime institutes. But this is not enough, as the mixed regime is specifically designed for balancing socioeconomic classes. Checks and balances obviously involves balance, but if classes are not what is being balanced, the regime cannot be classified as a classical mixed regime.

Vile keeps in mind the fact that the mixed regime centers on socioeconomic class, and initially distinguishes between the mixed regime and checks and balances. He argues that checks and balances evolved out of the early British experiences: “The evident inability of [separation of powers] to control abuses by government led to the modification of the theory by grafting onto it checks and balances derived from the mixed constitution...”⁵⁰ Here Vile is fairly clear that the mixed regime provided the inspiration for a divergence from the pure doctrine of separation of powers, except that in government functions are being balanced, not classes. Thus for Vile, checks and balances takes the “balance” part of the mixed regime and leaves behind the “class” part. This fits with one of his later claims, that the American version of separation of powers “discarded” the class basis of the mixed regime, even while inheriting the checks and balances aspect of that doctrine.⁵¹ Later, however, Vile is not so clear, arguing that checks and balances were a means of safeguarding elite interests, in opposition to the democratic intention of the Constitution. This reawakens thoughts of the mixed regime, although Vile is never clear about how the mixed regime might fit into the Constitutional system. But it seems that perhaps what

⁵⁰ Vile, *Constitutionalism and the Separation of Powers*, 405.

⁵¹ *Ibid.*, 147.

he calls checks and balances might be the effects of a mixed regime, i.e. socioeconomic classes institutionalized in the two political branches by Gouverneur Morris.

By following Diamond's distinctions, and supplementing his views with the research of Vile, Gwyn, Mansfield, and others we should now have a clearer view of what the mixed regime and separation of powers are and are not, as well as how they relate to each another. The mixed regime is a regime which allows both upper and lower classes a share in the whole of government power, balancing the classes in order to establish justice and prevent class warfare. The separation of powers divides the government into offices which correspond to the three functions of government, de-centralizing in order to secure liberty and prevent tyranny.

The Constitution's Historical Place

Having defined and distinguished the theories of the mixed regime and separation of powers, one may examine the scholarly literature which deals with the American regime in particular, and interpret it in light of those two doctrines. Beginning in the early days of the Revolution, American political thinkers debated the value of mixed government, and some even saw the Constitution as an instance of such a regime. But of course over time the theory of separation of powers came to dominate American political consciousness, and most political thinkers have dismissed the notion of an American mixed regime. Here I will attempt to discuss the broad themes as they relate to the Constitution, and particularly to show how various scholars and political thinkers have kept the debate on the nature of the American regime alive for over two hundred years, failing fully to settle on the Constitution as an instance of either the mixed regime or separation of powers.

John Adams and the Mixed Regime

John Adams is generally held to be the standard-bearer for the mixed regime in the United States. Adams was always a political and intellectual leader, predating the Revolution, and his *Thoughts on Government*, published in 1776, was one of the most influential writings of the period.⁵² But Adams's reputation for advocating a mixed regime does not come from *Thoughts on Government* but rather from a later work, *Defence of the Constitutions of the United States*. In fact, contrary to what we might expect from the leading advocate of mixed government, Adams in *Thoughts on Government* never mentioned the ancient doctrine. On the contrary, the pamphlet was a fairly straightforward defense of separation of powers – most of it was spent criticizing the notion of a single representative Assembly with executive and judicial committees attached.⁵³ Of course such a system violates the basic principle of separation of powers by making two branches subservient to the legislature. Adams echoed Montesquieu, and previewed the *Federalist* 47 argument, saying: "...a single Assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour."⁵⁴ This is the definition of tyranny, and directly opposed to the design and purpose of separation of powers, but it has nothing to do with mediating socioeconomic class conflict, and *Thoughts on Government* clearly is not a call for a mixed regime.

⁵² Wood, *The Creation of the American Republic*, 203.

⁵³ Adams, "Thoughts on Government", 195.

⁵⁴ *Ibid.*, 198

The closest *Thoughts on Government* came to discussing the mixed regime was when proposing the constitution of the Assembly. Adams said the Assembly should be a “miniature” replica of the people, “in other words, equal interest among the people should have equal interest in [the Assembly].”⁵⁵ This is hardly the mixed regime – the only reason it merits any attention at all is that the author is known to have an affinity for mixed government. Therefore it should be clear that *Thoughts on Government*, one of Adams’s premier works, did not contain a full exposition of Adams’s thoughts about mixed government; perhaps his thought was not completely developed in 1776. Regardless of the cause, it is important to note that in Adams’s own thought there was a distinction between the mixed regime and separation of powers. He gives different arguments in *Thoughts on Government* than he does in *Defence of the Constitutions*, the former covering separation of powers arguments and the latter shifting focus to the mixed regime.

There was certainly a change in emphasis in Adams’s later work, and although Adams never abandoned the commitment to separation of powers that is evident in *Thoughts*, his later work focused more and more on the principles of the mixed regime. In his 1786 *Defence of the Constitutions of the United States*, Adams argued that in fact, class distinctions were an unavoidable fact: “[These] can never be altered by any, because they are founded in the constitution of nature.”⁵⁶ This is one of the basic tenets of mixed regime theory. According to Adams, the solution to this problem

⁵⁵ Ibid., 195.

⁵⁶ Adams, “Defence of the Constitutions”, 397.

was something like the ancient mixed regime, and he defended this idea in great detail in *Defence of the Constitutions*. He did not completely abandon separation of powers, but integrated it with the mixed regime, resulting in two interacting systems of checks and balances – functions of government balanced against each other *and* classes balanced against each other (within the legislature).⁵⁷ It is worth comparing *Thoughts* and *Defence of the Constitutions* to note that Adams never abandoned separation of powers, but once he became focused on the theory of the mixed regime, he thought the “mixed” part could occur within a bicameral legislature, mediated by an impartial independent executive.

However, despite Adams’s early influence, his views about the mixed regime were not the norm. According to Vile, “[t]he idea of mixed or balanced government...was swept away by the democratic fervor of the Revolution, and [the theory] became totally inadequate to cope with a situation in which resistance to monarchical or aristocratic power was the major characteristic.”⁵⁸ Adams was criticized by Madison, Jefferson, and countless other contemporaries: “It was not long before the *Defence* was being ‘squibbed at in almost every paper.’” A particularly harsh editorial called it “one of the most deep wrought systems of political deception that was ever penned.”⁵⁹ Thomas Paine laughed at Adams’s supposedly anti-republican theory saying, “His head was as full of kings and queens and knaves as a

⁵⁷ Compare to Gwyn, *The Meaning of Separation of Powers*, 117.

⁵⁸ Vile, *Constitutionalism and the Separation of Powers*, 132.

⁵⁹ Wood, *The Creation of the American Republic*, 582.

pack of cards.”⁶⁰ A few political thinkers, most extensively John Taylor, published detailed refutations of Adams.⁶¹ More recently, Gordon Wood, perhaps in an attempt to defend the Constitution against charges of safeguarding elite interests, follows Adams’s contemporaries in claiming that Adams never truly understood American republicanism.⁶²

Much of the rejection of Adams seems justified. As Bernard Bailyn explains it, “The categories within which the colonists thought about the social foundations of politics were inheritances from classical antiquity, reshaped by seventeenth century English thought. The primary units of politics, they believed, were the three basic orders of society corresponding to the three basic forms of government: royalty, the nobility, and the commons.”⁶³ It makes sense to dismiss Adams’s arguments given that he seemed to be following too closely to this “outdated and irrelevant” mode of classifications.⁶⁴ As I will show in the next chapter, Gouverneur Morris made a clear distinction between hereditary aristocracy and a commercial, wealth-based upper class. Since historically the mixed regime had involved the “three basic orders” that Bailyn lists, Morris’s formulation gets to the most basic premise of the mixed regime, and solves the problem of irrelevance that Adams faced.

⁶⁰ Vile, *Constitutionalism and the Separation of Powers*, 163.

⁶¹ John Taylor, *An Inquiry into the Principles and Policy of the Government of the United States* (1814; rpt., New Haven, Yale University Press, 1950).

⁶² Wood, *The Creation of the American Republic*, 567.

⁶³ Bailyn, *The Ideological Origins of the American Revolution*, 274.

⁶⁴ Vile, *Constitutionalism and the Separation of Powers*, 164.

In Adams's writings, however, no such distinction is clear, and the idea of the mixed regime in the United States, and especially of the Constitution itself as an example of such a regime mostly disappeared with Adams's reputation. Vile credits Adams with reintroducing the idea of balance which we find in "checks and balances", but Adams's formulation of the mixed regime was too ancient to make Adams "the author of a truly American political theory."⁶⁵ Wood seems justified in saying "it was Adams's unfortunate fate to have missed the intellectual significance of the most important event since the Revolution. It is ironic that Adams, of all people, should misunderstand the meaning of the Constitution..."⁶⁶ But given the impossibility of admitting the institutions of monarchy and aristocracy into the United States, it was almost self-evident to Adams's critics that the United States could not be founded on the principles of mixed government.

A Gritty Story of Survival

Given the violent backlash against John Adams by his contemporaries it is little wonder that the doctrine of the mixed regime gained little traction in the United States. In fact Wood points out that by the time Taylor's refutation of Adams was published in 1814, Taylor himself called it "almost letters from the dead" because the topic of Adams's mixed regime was no longer really relevant.⁶⁷ And after all, despite Adams's general brilliance, it is fairly easy to discount the authority of a man who did

⁶⁵ Ibid., 164.

⁶⁶ Wood, *The Creation of the American Republic*, 567.

⁶⁷ Taylor, *Inquiry*, 34.

not even attend the Convention, and whose views were far outside the mainstream understanding of those who actually wrote the Constitution (e.g. the interpretation in the *Federalist*). Yet the mixed regime theory refused to die completely.

Around the turn of the nineteenth century, with the rise of the progressive movement, the interest in socioeconomic class and its effect on government reached a new peak in American history. For example, in his landmark work, *An Economic Interpretation of the Constitution of the United States*, Charles A. Beard described the Constitution as “an economic document drawn with superb skill by men whose property interests were immediately at stake.”⁶⁸ Beard raised the possibility that the Framers, most of whom belonged to the wealthy upper class, were primarily concerned with protecting their class interests in the face of the rising cause of liberty: “The members of the Philadelphia Convention...were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from the establishment of the new system.”⁶⁹

Beard recognized the old principle of the mixed regime (that the upper and lower class are always at odds) at work at the Convention. He did not deliberately frame his argument in terms of the mixed regime, but the basic point Beard was trying to make is that the Framers were attempting to institutionalize their class interests to balance out the democratic fever that was taking over the young nation. Given the fact that the old institutions, which favored the wealthy class, were passing away, and

⁶⁸ Beard, *An Economic Interpretation of the Constitution*, 188.

⁶⁹ *Ibid.*, 324.

a democratic spirit was sweeping the young nation, it of course would make sense for the wealthy to be afraid. As many political thinkers, including Aristotle and many delegates at the Convention have observed, the wealthy tend to dislike such drastic change, and instead are inclined to seek stability, partially in order to protect their economic interests. This aspect of Beard's theory is uncontroversial – on the contrary, it would be strange if the men in Philadelphia followed the lead of radical democrats like Thomas Paine, rather than the more conservative route which resulted in the Constitution.

Of course Forrest McDonald has substantially refuted much of Beard's thesis, and shown that there were at least 20 distinct economic interests represented at the Convention.⁷⁰ Nevertheless, even granting that McDonald is correct about the limits of Beard's argument, he does not refute the broader point – that the Framers did in fact attempt to institutionally protect the interests of the upper class. The flaws that McDonald finds in Beard's methodology and argument are substantial, but analysis of Morris's speeches, for example, fully supports Beard's *general* point. Despite the flaws of Beard's work, then, he at least was successful in reinstating a focus on class as an important feature of our Constitutional structure. But in doing so, Beard followed Adams's critics, rather than Adams – Beard thought that such protection of the wealthy ought to have no place in American society, and saw the Constitution as flawed to the extent that it institutionalized elite interests.

⁷⁰ For a description of Beard's views, see Forrest McDonald, *We the People*, chap. 1.

As Vile points out, Beard was not alone. It was characteristic of progressive scholars to emphasize the influence of socioeconomic class on American politics, and to condemn that influence. Vile cites dozens of progressive politicians, historians, and political scientists who, like Beard, critiqued the Constitution on the basis of its supposedly protecting the privileged class, or on the basis of its undemocratic institutions.⁷¹ Although Vile discusses a number of strains of progressive thought, the one of interest here, exemplified by Herbert Croly and Woodrow Wilson, centers on the notion that some aspects of the Constitution are undemocratic, and reform is needed in order to place Constitutional power in the hands of the people. The problem was not with “pure” separation of powers, which in itself is democratic, the problem was with the balance of class interests. According to Vile, this is situated in the “checks and balances” aspect of the Constitution rather than the separation of powers itself. Checks and balances, according to Vile, has often been used even within the framework of the Constitution to protect elite interests, perhaps an effect of the fact that checks and balances evolved out of the mixed regime in the first place.⁷²

The interest in a kind of “mixed regime” Constitution outlasted the early progressives. While scholars such as Wood attempted to rebut the progressive critique by denying the institutionalization of classes in the Constitution, Paul Eidelberg went in the opposite direction. In *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* Eidelberg

⁷¹ For an overview of the progressives on this topic, see Vile, *Constitutionalism and the Separation of Powers*, chap. 10.

⁷² Vile, *Constitutionalism and Separation of Powers*, 78-79.

advances an interpretation much like Adams's vision in *Defence of the Constitutions* and favors an American mixed regime as beneficial. He argues that the Constitution was intended by the Framers to be a mixed regime, that the bicameral legislature would contain an aristocratic Senate and a democratic House, and that the executive and judicial branches would function as a kind of higher power, more connected to the aristocratic, but purportedly helping to create a balance.

Eidelberg first argues that the House of Representatives was supposed to be democratic and the Senate aristocratic: "Its members are elected by the people. Its tenure is of rather short duration. Its general purpose is to represent the interests of the *many*... [The Senate's] members are appointed by the state legislatures. Its tenure is of rather lengthy duration. Its general purpose is to represent the *few*."⁷³ This description of the two branches of the legislature are not uncommon even at the Convention and I will address this in more detail, especially from Morris's point of view, in the following chapters.⁷⁴ But there is nothing surprising about calling the Senate the elite branch and the House popular.

Eidelberg's innovation is in his description of the executive. He argues the executive was intended to be monarchic, and to share in the features of both the classes instituted in the legislature. He points out that the mode of election of the President and his term in office are a kind of mean between the corresponding provisions for the two branches of the legislature. His argument peaks with the

⁷³ Eidelberg, *The Philosophy of the American Constitution*, 168.

⁷⁴ For example, see Farrand, *Records*, 1:150; See below, 89-91.

Electoral College, “the most brilliantly conceived aspect of the Constitution,” which he argues was designed with the intention of keeping the President from becoming too reliant on the people.⁷⁵ The Electoral College incorporates the popular aspect of the House, since it was presumed that the electors would be chosen by the people, and the aristocratic aspect of the Senate, since the small group of electors, not the people, actually chooses the president. Eidelberg claims that the real purpose of the Electoral College was to keep election of the executive from the hands of the people, such that the president’s source of authority and reelection would not be founded on the changeable will of the masses.⁷⁶ On these grounds he condemns any popular interpretation of the executive, as well as modern developments that have made the president attached to the people.

Eidelberg’s interpretation has some serious defects. He starts with the observation that the Electoral College incorporates elements of the House and Senate elections, and jumps to the assumption that the College was intended to insulate the president from the people. Careful attention to the Convention records, however, seems just as much to support the idea that the Electoral College was supposed to make the presidency *more* popular, as compared to legislative election of the president which was the assumed mode for most of the Convention.⁷⁷ Gouverneur Morris in particular was clear that he thought the Electoral College made the

⁷⁵ Eidelberg, *The Philosophy of the American Constitution*, 169.

⁷⁶ *Ibid.*, 190.

⁷⁷ In addition to Chapter Five below, see David Alvis, “The Presidency in the Constitutional Convention of 1787” in *Natural and Political Philosophy: Essays in Honor of Catherine Zuckert and Michael Zuckert*, ed. Ann Ward and Lee Ward (South Bend: Notre Dame Press, 2013), 277-296.

executive's election popular. This is especially important because, as I will show later, Morris was the foremost architect of the Electoral College. Given the primacy that Eidelberg gives to the College, it seems strange that he ignores the opinion of its creator.

Furthermore, one of the supports Eidelberg presents for his interpretation is the Preamble to the Constitution. He argues that the ends listed there are the ends associated with the ancients, not with modern political thought, and that this is a sign of the loftier goals of the Framers.⁷⁸ This is problematic for two reasons – first, it ignores the modern institutional structure, and subordinates it to a part of the document which might be purely rhetorical. Second, and perhaps more importantly, Eidelberg once again ignores Morris, who wrote the Preamble. If the Preamble holds the key to understanding the Constitution, attention must be given to Morris. Ultimately, Eidelberg centers his theory on parts of the Constitution that are especially associated with Morris, but never considers whether Morris intended those parts the way Eidelberg reads them.

Nevertheless, Eidelberg's interpretation is interesting especially because he pushes the argument even farther than Adams. Adams saw class division as inevitable, and the progressives saw it as something to be avoided. But Eidelberg thinks class division should be embraced, that it is a positive force in American society. He thoroughly embraces the aristocratic Senate and monarchic president that he finds in the Constitution. Even though I will eventually argue that attention to

⁷⁸ Eidelberg, *The Philosophy of the American Constitution*, 256-258.

Morris's views shows how Eidelberg misses the full and unique nature of the American mixture, he correctly recognizes that the mixed regime was on the minds of the Framers, and that this is not as bad as Beard and others argue. Eidelberg's work therefore helps to lay the foundation for a reacceptance of the influence of the mixed regime on the Constitution, and by extension, the thought of Gouverneur Morris.

So despite the initial hostile reaction to Adams's proposal of an American mixed regime, the idea that socioeconomic class provides a basis for the American regime has proven resilient. It has taken different forms –Eidelberg and the progressives clearly differ on how we ought to think about class in an American context, but both agree that the Constitution in fact contains elements of both oligarchy or aristocracy and democracy, that it is not simply a democratic system of separation of powers. This view is confirmed by proper attention to the views of Gouverneur Morris.

Gouverneur Morris and the American Regime

Gouverneur Morris, although he partially disagreed with Adams, Eidelberg, and the progressives, did intend the Constitution that he wrote to institutionalize socioeconomic classes. Contrary to the vision of most mixed regime theorists however, Morris intended the Constitution to give a single government power or function to each class – the legislature to the aristocracy and the executive to the people. In other words, Morris *deliberately* conflated the two doctrines, using one to achieve the other. As is clear from the discussion above, this idea of Morris's is innovative by having the institutionalization of classes occur *through* the separation of powers – each class gets one branch of government: they are separated from one

another and balance each other. Obviously this is even more innovative by the inclusion of a *popular* executive, which transcends every previous notion of the nature of executive power. In the next chapter, I will begin describing Morris's contributions and the details of his political theory.

CHAPTER THREE

Gouverneur Morris's Political Theory

Gouverneur Morris is a unique figure in American history, the man who wrote the Constitution but who was until recently was overlooked by students of American politics and history. Study of Morris encounters a twofold problem: some scholars have disregarded or denied Morris's influence, and others have rejected the notion that his proposals were grounded in a unified theory of politics. Some have denied both his contribution and the coherence in his thought. But Morris's contributions to the creation of the American regime were nearly unparalleled, and those contributions were grounded in a remarkable and innovative theory of politics. Proper attention to Morris and his political thought reveals a new interpretation of the Constitution as a groundbreaking type of regime which cannot be described properly as an instance of the mixed regime or separation of powers, but integrates some aspects of both doctrines.

Giving Morris's theory the proper attention involves solving the twofold problem. Therefore, first I will describe Morris's influence and contributions, and argue that his prominent position (especially at the Constitutional Convention) justifies us looking to his thought in order to understand the American regime. Second, I will argue that Morris had a unified political theory that can be simplified into two principles: that politics is supposed to balance socioeconomic classes and that the pure doctrine of separation of powers provides the best political institutions for achieving this goal.

Morris's Life and Contribution

The Morrises were wealthy, although not extraordinarily so, and had been important figures in New York politics for a century.¹ Morris was born in 1750 at his family's estate in what is now the Bronx. His father died when Gouverneur was a child, but stipulated in his will that the young boy should receive the best education available in Europe or America. To that end, Morris was sent to the Academy of Philadelphia before going to King's College (now Columbia University) to earn his bachelor and master's degrees. Here he received a classical education grounded in Greek and Latin texts (and surprisingly little enlightenment philosophy). He then studied law, passing the bar at age 20, and practiced law in New York during the years leading up to the Revolution.

As New York transitioned to self-government starting in 1775, the young Morris, already considered a brilliant and talented man, was elected to serve his district in the First, Third, and Fourth Provincial Congresses. As a member of the Third Provincial Congress he was instrumental in the drafting of a new constitution for the state. Although the records from this time, especially of committee proceedings, are sparse, scholars agree that the constitution was mainly the work of Morris, John Jay, and Robert Livingston. It seems that they produced the first draft,

¹ For a short biography of Morris, see Melanie Randolph Miller, *An Incautious Man: The Life of Gouverneur Morris* (Wilmington: ISI, 2008). The most detailed biography is James J. Kirschke, *Gouverneur Morris: Author, Statesman, Man of the World* (New York: St. Martins, 2005). Other biographies include Richard Brookhiser, *Gentleman Revolutionary: Gouverneur Morris, the Rake Who Wrote the Constitution* (New York: Free Press, 2003); William Howard Adams, *Gouverneur Morris: An Independent Life*, (New Haven: Yale University Press, 2003); Max M. Mintz, *Gouverneur Morris and the American Revolution*, (Norman: University of Oklahoma Press, 1970); Theodore Roosevelt wrote a biography of Morris, although it is more notable for Roosevelt's interpretation of politics than for anything regarding Morris. Theodore Roosevelt, *Gouverneur Morris*, (Boston: Houghton Mifflin, 1892).

and they were certainly the three leading men during floor debates on changes to that draft. To what extent each of three was responsible it is difficult to say.² The records of debates at the state convention which completed the new constitution show that Morris in particular was one of the leading proponents for establishing a powerful, independent (and popularly elected) governor as the chief executive of the state.³ Morris was also the leading delegate arguing for the abolition of slavery in the newly independent state. Not only did Morris's experience here prepare him for his later work at the Philadelphia Convention, it reveals his early opinions on separation of powers and socioeconomic classes, and particularly on slavery. Remarkably, Morris's thoughts on politics seem more or less fully developed already, making the records of his work in New York quite useful for understanding his continuing role as constitution-writer.

In 1777 Morris was sent as a delegate to the Continental Congress for New York, in which capacity he signed the Articles of Confederation. Among numerous other papers and reports, Morris drafted a plan for the reorganization of government which mirrored the executive branch he would later suggest at the Constitutional Convention. After his term as delegate ended, Morris remained in Philadelphia, serving as assistant minister of finance to Robert Morris (no relation), the “financier

² Charles Lincoln, a New York historian, established that Morris, Jay, and Livingston were the primary authors. Most scholars cite Lincoln as saying that Jay was the main author, but this claim of Lincoln's is based on claims by Jay's son William Jay, who wrote after his father's death that John Jay was the primary author, that the first draft was in his handwriting, and that he was chairman of the drafting committee. Lincoln found no independent evidence supporting these claims. See Charles Z. Lincoln's *The Constitutional History of New York*, (Rochester: LC Publishing, 1906), Vol. I, chap. 2, especially 496-498.

³ Kauffman, *The Constitutional Views of Gouverneur Morris*, 179.

of the Revolution”, for the remainder of the war. Gouverneur Morris was Robert Morris’s right-hand man – the elder Morris said of his assistant, “I can do nothing without him.”⁴

The finance office was established to reform the whole American financial system. Disorganization, decentralization, and inflation were obstructing the ability of Congress to effectively supply troops and wage the war. The Morrises were essentially charged with restoring the financial security of Congress and maintaining its ability to finish the war. Together they successfully reformed the currency, established a national bank and a national mint, restoring the public trust that was vitally important, especially to secure the support of the French and win the war. Gouverneur Morris personally authored a series of proposals for finance reform, including a new coinage system, a national bank, tax reform, and an assumption of all war debt by the national government.⁵ The financial genius of the two Morrises was a vital part of the success of the war effort.⁶

After the war ended, Morris continued to practice law in Philadelphia until 1787, when he was elected along with Benjamin Franklin, Robert Morris, and James Wilson to represent Pennsylvania at the Federal Convention. (Morris was chosen during a time of great controversy in Pennsylvania politics. One of the main reasons

⁴ For a detailed account of Morris's time in the Finance Office see Kirschke, *Gouverneur Morris*, chap. 4, 113-157. For an alternate view, see Adams, *Gouverneur Morris*, chap. 7, 123-144. For a short account see Brookhiser, *Gentleman Revolutionary*, 67-74.

⁵ On the coinage system see Kirschke, *Gouverneur Morris*, 138-140; on tax reform see Adams, *Gouverneur Morris*, 135-136.

⁶ Miller, *Incautious Man*, 51; Kirschke, *Gouverneur Morris*, 143.

he was appointed was probably that the ruling faction wanted a powerful national executive.)⁷ At the Constitutional Convention he was one of the leading speakers, frequently delivering long and eloquent soliloquies. He led the nationalist forces, and especially those who favored a strong executive, speaking more often than any other delegate. Besides making controversial comments about class warfare and defending pure separation of powers, he spoke out against those who ignored the national interest in favor of their own state interests, and especially against the southern defense of slavery.⁸

Morris was a member of two important committees towards the end of the Convention, and was given by the Committee on Style the task of transforming the resolutions of the Convention into the crisp, clean Constitution we know today.⁹ He is the originator of the full faith and credit clause, among other things.¹⁰ But his influence was particularly felt in the Preamble, which he wrote on his own, and the formation of the Electoral College (and thus the office of the vice-president), which he inserted through the Committee on Postponed Matters (also called the Brearly Committee).¹¹ He wrote most of Article II (which helps explain why much of it is copied from the New York constitution¹²) and the famous difference in the “vesting

⁷ Donald L. Robinson, “Gouverneur Morris and the Design of the American Presidency,” *Presidential Studies Quarterly* 17, no. 2 (Spring 1987), 322.

⁸ Farrand, *Records*, 1:221-222, 529; Adams, *Gouverneur Morris*, 85.

⁹ James Madison to Jared Sparks, April 8, 1831, Sparks, 1:286.

¹⁰ Walter Wheeler Cook, “The Powers of Congress under the Full Faith and Credit Clause,” *The Yale Law Journal* 28, no. 5 (March 1919): 421-449.

¹¹ GM to Timothy Pickering, December 22, 1814, Sparks 3:323; Farrand, *Records*, 3:499.

¹² Robinson, “Design of the American Presidency”, 321; A detailed comparison of the two constitutions can be found in Joseph Bessette, “The Powers and Duties of the President” in *The*

clauses” of Articles I and II is due to a change made by Morris.¹³ Thus Gouverneur Morris should rightly be called the Father of the American Presidency, if not the Constitution.¹⁴ Perhaps the Constitution has two fathers.

After the Convention, fellow-New Yorker Hamilton asked Morris to share the task of writing the *Federalist Papers*, but Morris demurred (thus Hamilton turned to the Virginian Madison) and instead traveled to Paris. Shortly thereafter Morris was named Minister to France by President Washington to replace the departing Thomas Jefferson. During this time Morris's opinion on French politics was widely sought, and he recorded his thoughts on possible forms for a new French constitution not only in some lengthy documents but also in his diary, which he began keeping religiously when he arrived in Paris. Around this time he also managed to upset Jefferson by his dealings with France, as well as Adams and Hamilton by his dealings with England, enmities which forever damaged Morris's reputation in history.¹⁵

When Morris returned to the United States he settled at his ancestral estate of Morrisania, although he remained active in public life, briefly serving in the U.S. Senate, chairing the commissions that planned the Erie Canal and the streets of New York City, giving funeral orations for Alexander Hamilton and George Washington,

Constitutional Presidency ed. Joseph Bessette and Jeffrey K. Tulis (Baltimore: Johns Hopkins Press, 2009) 39-43.

¹³ Robinson, “Design of the American Presidency”, 326.

¹⁴ For a detailed account of Morris's contributions at the Convention, see Kirschke, *Gouverneur Morris*, chap. 5; for an alternative view see Brookhiser, *Gentleman Revolutionary*, chap. 7; or for a brief account, see Miller, *Incautious Man*, chap. 6.

¹⁵ For example, see Miller, *Incautious Man*, 132-133.

and publishing numerous political and financial articles. He married late, at the age of 50, and was the oldest “founder” to wed and have a child. He died in 1816.

Given Morris's remarkable achievements, it is surprising that for most of American history he has been forgotten. I noted in the previous chapter that scholars who discuss the origins of the Constitution, including Martin Diamond, Gordon Wood, Bernard Bailyn, Charles Beard, Forrest McDonald, Paul Eidelberg, M.J.C. Vile, W.B. Gwyn, Richard Hofstadter, and Harvey Mansfield place little emphasis on Morris. Part of this can be mostly attributed to the fact that many of these scholars are more focused on the *Federalist* and other public writings than on the records of the Constitutional Convention. Morris's contribution is not primarily to be found in such philosophical works. But it is particularly strange that so many scholars who do emphasize the Constitutional Convention, such as Eidelberg, and even some scholars who studied Morris, such as Richard Brookhiser, have failed to credit Morris's significant influence in the debates and in the committees.

This lack of attention towards Morris probably stems from two primary causes. First, Morris never held highly visible offices as more famous founders such as Hamilton and the first four presidents did. His primary work was done at the Convention itself, the records of which were kept secret long past Morris's death. Second, Morris had an obnoxious personality – he was boisterous, and according to Madison, loved to say things and support positions that no one else would.¹⁶ These controversial positions advanced by Morris seemingly hinted at an affinity for

¹⁶ Farrand, *Records*, 3:534.

aristocracy, as I discuss in detail below. During the war he fell into enmity with Thomas Paine, which worsened during his time in France. As mentioned above, Morris's opinions on US foreign policy caused Jefferson, Hamilton, and Adams to turn against him. Various rivalries with friends of Jefferson's exacerbated the problem of Morris's reputation.¹⁷ He was a loud critic of Madison up to and during the War of 1812, going so far as to write that the federal government was so inept that the Constitution was no longer binding, and revolution was justified.¹⁸ Morris's many enemies probably contributed to the fact that he was quickly forgotten once he died.¹⁹

That being said, there has recently been a revival of interest in Morris as a historical figure, although most of the works on Morris have been biographical, and reject (sometimes explicitly) the notion that Morris was a political *thinker* who had a systematic theory of politics. William Howard Adams's *Gouverneur Morris: An Independent Life* provides a detailed description of Morris's life and work, and acknowledges that Morris deserves much credit for his role in writing the Constitution. However, he denies any consistency behind Morris's positions at the Convention.²⁰ Richard Brookhiser's *Gentleman Revolutionary: Gouverneur Morris, the Rake Who Wrote the Constitution* emphasizes Morris's social life and vibrant personality but denies him much credit for the foundation of the new nation, and

¹⁷ Miller, *Incautious Man*, 133.

¹⁸ GM to Rufus King, January 1815, *Diary and Letters*, 2:475-476.

¹⁹ David K. Nichols, "Gouverneur Morris and American Constitutionalism" in *Natural and Political Philosophy: Essays in Honor of Catherine Zuckert and Michael Zuckert*, ed. Ann Ward and Lee Ward (South Bend: Notre Dame Press, 2013), 254.

²⁰ Adams, *Gouverneur Morris*, 165.

ignores the possibility that Morris presented a consistent theory of politics. One reviewer describes Brookhiser as treating Morris like “the eccentric uncle” in the family of Framers.²¹ Neither biographer provides a fully detailed account of the Constitutional Convention or Morris’s part there.

James J. Kirschke’s *Gouverneur Morris: Author, Statesman, and Man of the World* is by far the most complete and comprehensive study of Morris’s life. Kirschke unabashedly praises Morris and provides a full description of Morris’s actions at the Constitutional Convention.²² But while the detail of Kirschke’s account is helpful, like the other biographies it is still primarily descriptive, recounting Morris’s actions without emphasizing his philosophy. If there is a unified political theory underlying Gouverneur Morris’s Constitutional vision, Kirschke makes no attempt to expose it.

Charles Thach’s classic work *The Creation of the Presidency* discusses the Constitutional Convention and Morris’s influential role in detail. Thach traces the origins of the Constitutional Presidency to a tension between effective government and individual rights and liberty.²³ He argues that the framers were initially faced with a dichotomy between legislative supremacy and an unrestrained executive. He focuses on the unity of the executive, the Electoral College, and the qualified veto as some of the primary means of effectively solving the problem. But Thach ultimately concludes that “to James Wilson belongs the credit of crystallizing the concept and

²¹ Nichols, “Gouverneur Morris” 254.

²² Kirschke, *Gouverneur Morris*, chap. 5.

²³ Charles C. Thach, *The Creation of the Presidency 1776-1789*, 2nd edition (Baltimore: Johns Hopkins University Press, 1969), 3.

laying it before the Convention. Gouverneur Morris was but the floor leader...The principle was Wilson's."²⁴ Thach gives primacy to Wilson despite acknowledging the debt the Constitution owes to Morris's New York constitution and Morris's powerful influence in the Convention debates.²⁵ His final analysis collapses Wilson and Morris into one, and places primary credit for the final draft of Article II on Wilson.²⁶ The popularity of Thach's work has helped this error to be perpetuated.

Gouverneur Morris has not been completely ignored. When he is fully credited for influencing the final form of the Constitution, it is often by scholars tracing the evolution of specific resolutions, articles, or ideas at the Constitutional Convention, particularly those involving the presidency or executive power in general. Of course given the focused nature of such scholarship, this literature does not contain any attempt at describing a comprehensive theory of politics in Morris's speeches. Nevertheless is helpful in restoring Morris's reputation. For example, the literature on the role of committees at the Convention, the evolution of the Electoral College as an innovative mode of electing the president, the origins and development of the presidency, historical tensions between legislative and executive power in the face of theories of legislative primacy, the vesting clause, and negotiation and rational choice in the debates at the Convention have all helped to restore Morris's credentials as one of the foremost figures of the Founding and one of the leading influences on the

²⁴ Ibid., 160.

²⁵ Ibid., especially chap. 2.

²⁶ Ibid., 159-61.

Constitution.²⁷ But since these scholars make no attempt to expose Morris's political theory, it still remains for someone to do so, lest it seem that Morris was simply reacting to particular political situations with no unified theory underlying. The balance of this chapter will provide a foundation for this task.

Morris's Theory of Politics

One commentator argued, "Morris was not, by any means, a political theorist; he left no long tracts of philosophical disquisition or commentaries on the political writings of ancient, medieval, or modern political philosophers."²⁸ This is mostly true, insofar as Morris did not write out any long philosophical treatises. But despite what many scholars suggest, Morris did clearly have a theory of politics which can be drawn from his speeches and writings, and which is representative of a uniquely American perspective on politics. Throughout his political career Morris argued that politics is supposed to balance classes by moderating democracy and containing aristocracy, and do this within a strict separation of powers framework. Furthermore, Morris's theory was not simply a rediscovery of the ancient mixed

²⁷ On committees, see John R. Vile, "The Critical Role of Committees at the U.S. Constitutional Convention of 1787," *The American Journal of Legal History* 48, no.2 (April 2006): 147-176; On the Electoral College, see Shlomo Slonim, "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of the President," *The Journal of American History* 73, no.1 (June 1986): 35-58; On legislative primacy, see Judith A. Best, "Legislative Tyranny and the Liberation of the Executive: A View from the Founding," *Presidential Studies Quarterly* 17, no. 4 (Fall 1987): 697-709; On the presidency, see Donald L. Robinson, "Gouverneur Morris and the Design of the American Presidency," *Presidential Studies Quarterly* 17, no. 2 (Spring 1987): 319-328; On debate strategy, see William H. Riker, "The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice," *The American Political Science Review* 78, no. 1 (March 1984): 1-16 and Dana Lansky, "Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787," *Harvard Negotiations Law Review* 5 (2000): 279-338.

²⁸ Arthur P. Kaufman, *The Constitutional Views of Gouverneur Morris*, (PhD diss., Georgetown University, 1992), 19.

regime or modern separation of powers, but was a new understanding of politics, most obvious in the innovation of the popular executive found in the Constitution. Given Morris's influence on the final form of the Constitution, this has major implications for how we interpret the document and by extension, for how we view the American political system and its place in the history of political thought.

Interpretations of Morris

Historically, the primary interpretation of Morris has been that he was an aristocrat, or even a “monarchy man” who was primarily concerned with protecting interests of the upper class.²⁹ Beyond Morris’s lineage from one of the wealthiest and well-connected families of New York, this view mostly stemmed from the fact that at the Convention Morris proposed life terms for Senators and later for the national executive, and then in France advocated for a constitution that included preservation of the hereditary monarchy and a hereditary Senate.³⁰

Contemporary scholars tend to take up this aristocratic interpretation of Morris, bolstering Morris’s constitutional proposals with two primary sources of evidence.³¹ First, Morris wrote a letter to a friend in 1775 discussing the fermenting revolution in which he described the people as “poor reptiles”³² and warned against

²⁹ An extreme example of this is found in Mary-Jo Kline, *Gouverneur Morris and the New Nation 1775-1788* (New York: Arno Press 1978).

³⁰ Gouverneur Morris, “Notes on the Form of a Constitution or France” in *Selected Writings of Gouverneur Morris* ed. J. Jackson Barlow (Indianapolis: Liberty Fund, 2012), 269-284.

³¹ For example, see Brookhiser, *Gentleman Revolutionary*, 84-85.

³² Life lesson: Don’t call people “reptiles”.

the dangers of democracy.³³ For most of Morris's biographers, this letter is the centerpiece of their "aristocratic" description of Morris. Second, James Madison wrote a letter to Jared Sparks (biographer and editor of an early collection of Morris's papers) in which he mentioned Morris "aristocratic" proposals at the Convention and suggested that Morris was opposed to democracy.³⁴ Since most subsequent scholarship on Morris used Sparks' work as a foundation, this letter from Madison has been used by almost every later biography to substantiate the "aristocratic" interpretation of Morris.

This cartoonish version of Morris as an advocate of aristocracy or monarchy is even detailed one of the first non-biographical accounts of Morris's work at the Convention, Jennifer Nedelsky's *Private Property and the Limits of American Constitutionalism*.³⁵ Whereas Madison merely pointed to some of Morris's institutional proposals, Nedelsky analyzes Morris's speeches fully. She then goes farther than Madison by suggesting that Morris's main concern was the protection of wealth, and that he was willing to subordinate concerns for other rights or liberties in favor of property.³⁶ There is much truth to Nedelsky's critique – Morris explicitly stated that protection of property was the "main object of society"³⁷ and he advocated

³³ GM to Thomas Penn, May 20, 1774, Sparks, 1:23.

³⁴ James Madison to Jared Sparks, April 8, 1831, Sparks, 1:286.

³⁵ Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism*, (Chicago: University of Chicago Press, 1990).

³⁶ Nedelsky, *Private Property*, 92.

³⁷ Farrand, *Records*, 1:533.

restricting the vote to those with property³⁸ – but her view is one-sided. Madison and Nedelsky focus on the aspects of Morris’s Convention speeches that look aristocratic, but ignore the fact that he was also the primary critic of the wealthy, the leading opponent of slavery, and the main advocate for popular election of the president. Yet the “aristocratic” interpretation of Morris has been the historical standard and is the main reasons he is excluded from the sanctified air of the Founding Father’s Club.

Therefore Morris’s reputation requires some rehabilitation, which begins with the work of David K. Nichols. Nichols critiques Nedelsky and others, and proposes a more balanced understanding of Gouverneur Morris. Nichols defends Morris against the charges leveled by Nedelsky and sets up a new framework within which to view Morris’s position at the Convention.³⁹ In *The Myth of the Modern Presidency* Nichols describes Morris as situated in a kind of mean between the extremes of James Wilson and Alexander Hamilton: “Wilson at the Convention sees presidential authority as a direct outgrowth of popular support,” whereas Hamilton “links a powerful executive with institutional barriers to popular influence.”⁴⁰ He argues that Morris resolved the Wilsonian and Hamiltonian extremes, and that in doing so Morris was able to a powerful and popular presidency.⁴¹ This idea of Morris as occupying a middle ground

³⁸ Ibid., 2:202.

³⁹ David K. Nichols, “A Marriage Made in Philadelphia: The Constitution and the Rhetorical Presidency,” in *Speaking to the People: The Rhetorical Presidency in Historical Perspective*, ed. Richard E. Ellis (Amherst: University of Massachusetts Press, 1998), 16-34.

⁴⁰ David K. Nichols, *The Myth of the Modern Presidency* (University Parks: Penn State University Press, 1994), 36.

⁴¹ David K. Nichols, “A Marriage Made in Philadelphia”, 19.

between aristocracy and democracy is obviously especially relevant in the context of the doctrine of the mixed regime.

However, while noting that Morris was aware of the mixed regime, Nichols never attempts to resolve Morris's relationship with the doctrine, instead proposing that Morris left behind the mixed regime after failing to create it in the bicameral legislature.⁴² Perhaps Nichols is too attached to his subject, as he is quick to brush aside Nedelsky's idea of Morris as concerned with the protection of wealth, despite Morris's explicit statement that protection of property is the primary purpose of society.⁴³ This causes Nichols to miss the extent to which Morris truly was "prepared to stake his entire political system on the hostility between rich and poor"⁴⁴ and thus to miss the infusion of mixed regime theory in Morris's thought. Thus even while he credits Morris for the creation of a popular executive, Nichols sees the importance of the executive in its *national* character rather than its *popular* character, arguing that the executive was supposed to represent the national interest in opposition to the "special" state interests in the legislature. He misses the fact that Morris identified those special interests with the wealthy, and the national interest with the people.⁴⁵ Ultimately, Nichols never attempts to describe Morris's unified political theory, nor to describe Morris's place in the history of political thought. But not only does Nichols help rehabilitate Morris by moving away from the "aristocratic" interpretation, he

⁴² Nichols, "Gouverneur Morris", 264; I argue against this view in Chapter Five.

⁴³ Nichols, "Gouverneur Morris", 260.

⁴⁴ Nedelsky, *Private Property*, 92.

⁴⁵ See below, 100-109.

also illustrates how elements of the mixed regime are present in Morris, especially by placing Morris in the middle between democratic and aristocratic delegates at the Convention.

Morris's rehabilitation continues in Arthur P. Kaufman's unpublished doctoral dissertation, *The Constitutional Views of Gouverneur Morris* and Melanie Randolph Miller's *An Incautious Man: The Life of Gouverneur Morris*. Kaufman describes Morris's contributions to the New York and United States constitutions in exhaustive and impressive detail, and is invaluable for understanding Morris. He states early on that Morris "addressed" three topics in particular: the American brand of separation of powers (especially the executive), the commercial character of society, and the conflict between aristocracy and equality.⁴⁶ The three principles Kaufman lays out here are the beginning of a coherent vision of Morris, but ultimately he is unable to show how such diverse things relate to each other. Similarly Miller places significant emphasis on Morris's ideas at the Constitutional Convention and attempts to give a full account of Morris's dealing there, proposing that Gouverneur Morris had a clear set of principles for government based on moderating democracy, providing an arena for the wealthy, and keeping the executive independent.⁴⁷ Miller follows these themes through the Convention, although she does not provide an account of Morris's philosophical underpinnings nor of the connection between his seemingly random or unconnected ideas about government.

⁴⁶ Kaufman, *The Constitutional Views of Gouverneur Morris*, 21.

⁴⁷ Miller, *Incautious Man*, 63.

Kaufman and Miller fall short of explaining Morris's coherent constitutional vision, especially in that they fail to explain Morris's popular executive. Diverse principles such as the defense of executive power, belief in aristocracy, and hatred of slavery are all discussed, but ultimately not resolved into a coherent political theory. In other words, they both provide (fairly similar) lists of his principles but never demonstrate the relationship between his concerns about classes, property, and the independent executive, nor how they make up a unified political theory.

However, with the foundation laid by Nichols, Kaufman, and Miller, we can better understand the principles animating Morris's proposals at the Convention. He seemed to be aristocratic, yet he condemned aristocracy more harshly than any other delegate. He has historically been confused with both Hamilton the aristocrat and Wilson the democrat. He championed a powerful independent executive, which even Hamilton admitted seemed at odds with republican government, and yet he consistently insisted at the Convention that this office be a *popular* one. In France he suggested a constitutional hereditary monarchy with bicameral, class-based legislature. And seemingly unrelated, he was violently anti-slavery. We know what animated Morris, but the question remains whether these can be resolved into a unified theory of politics.

I argue that these diverse principles can be resolved by understanding how Morris's political theory synthesizes aspects of the ancient mixed regime with modern separation of powers. Morris can be confused with both aristocrats and democrats for a simple reason: following the doctrine about socioeconomic class that is the basis for the mixed regime, Morris thought that it is an inescapable fact of

politics that upper and lower classes will try to harm one another. So one of the primary ends of politics is to balance the wealthy and the poor against each other, without allowing either to gain complete control. Both classes should be considered sovereign in some sense, and given some share in government, but neither should be allowed to destroy the other. But while the ancient mixed regime provided no specific political institutions to achieve its end, Morris thought that the best political institutional framework through which to achieve this goal is the strict separation of powers – particularly, through strong and independent executive and legislative branches of government. In short, Morris thought one of the primary problems of politics was the need for class balance, and he thought separation of powers is the best way to solve the problem.

Balancing Socioeconomic Classes

Morris's first goal was to balance socioeconomic classes, much like the doctrine of the mixed regime. He believed that there would always be a wealthy Few and a less fortunate Many, and that these two classes by definition have different interests and will come into conflict.⁴⁸ (He acknowledged that the poor might be raised up to a kind of middle class, but not in such a way as to minimize the tension with the highest class.⁴⁹) He thought this division between classes was an unavoidable fact, and his role in writing a constitution was to deal with this reality, to

⁴⁸ Compare to Aristotle, *Politics* 1294a15-25.

⁴⁹ This is different from Aristotle, who thought that a strong "middling element" would make the mixed regime more effective; see Aristotle, *Politics*, 1296b35-40. Clearly Morris saw the difference between the wealthy and poor even more starkly than Aristotle, perhaps because Morris was specifically thinking about a "commercial society". Farrand, *Records*, 1:513.

control it, but not to attempt to destroy or uphold one class rather than the other. On account of the different nature of the classes, each has flaws that need to be remedied in order to achieve balance – the popular element must be moderated and the aristocracy must be contained and directed.⁵⁰

Morris recognized three related dangers of letting democracy run rampant. First, during the early days of the Revolution in New York, Morris experienced and wrote about the danger of mob rule, “the worst of all possible dominions.”⁵¹ This was rule of the people at its extreme, and Morris thought this was the result of popular will left unchecked. His time in France substantiated this fear in a most horrifying way, but he held to this principle long before experiencing the Terror. This kind of “popular” rule was anarchy, not government – a “state of nature” more than a “civilized society”.⁵² It is hardly surprising or controversial that Morris thought this popular force must be moderated.⁵³

Second, the “mob rule” or extreme popular rule would be passionate, changeable, and easily influenced by random circumstances. Even if democracy did not devolve into anarchy, Morris envisioned another extreme just as dangerous – that the popular movements would be co-opted by the wealthy, well-educated, and powerful, who would redirect the interest of the people toward their personal

⁵⁰ Compare to Wood, *The Creation of the American Republic*, 198.

⁵¹ GM to Thomas Penn, May 20, 1774, Sparks, 1:25.

⁵² Farrand, *Records*, 1:545.

⁵³ Compare to Aristotle, *Politics*, 1292a30.

interests.⁵⁴ Again, Morris witnessed just such demagoguery, especially during the early days of the Revolution in New York. In his notorious letter to Thomas Penn, in which he referred to the mob as “reptiles”, Morris actually spent significant space condemning the upper class leaders of the mob, who stirred up the people and deceived them, and predicted that the upper class demagogues “will deceive the people, and again forfeit a share of their confidence.”⁵⁵

Third, Morris thought “that property was the main object of Society.”⁵⁶ After all, he argued, “The savage State was more favorable to liberty than the civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular Govt.”⁵⁷ But the lower classes often desire a re-appropriation of the property of the wealthy.⁵⁸ In many cases this desire is actually the cause of class conflict. Morris saw this was proven by the abuses that occurred even by the democratic movements of some states.⁵⁹

This leads to the other side of class balance – containing aristocracy. Unlike the lower class, the upper class did not need to be moderated. Morris thought great wealth would generally result in good education, and therefore prudence, experience

⁵⁴ Compare to Aristotle, *Politics*, 1304b20.

⁵⁵ GM to Thomas Penn, May 20, 1774, Sparks, 1:23-25. For an extensive analysis of this letter, see Kaufman, *The Constitutional Views of Gouverneur Morris*, chap. 2.

⁵⁶ Farrand, *Records*, 1:533.

⁵⁷ *Ibid.*, 1:534.

⁵⁸ Compare to Aristotle, *Politics*, 1318a20.

⁵⁹ Farrand, *Records*, 1:512.

in politics and business, and other good qualities. This description implies that the aristocratic class would be more able to participate in government, which Morris acknowledged. In particular, the wealth and education of the aristocratic class would encourage them to keep the long-term interests of the nation in mind, sobering the frenetic and changeable masses.⁶⁰

But this did not mean placing the government blindly in the hands of the aristocratic class. On the contrary, Morris said, “The rich will always attempt to establish dominion and enslave the rest.”⁶¹ Just as unchecked popular will devolves into anarchy, unchecked aristocratic rule devolves into tyranny. Great wealth, education, or expertise is no excuse for tyranny, so something must be done to check the upper class and encourage them to use their talents for the national interest.

Still, Morris thought the aristocrats should participate in government, not only because their knowledge and skill would be of great use to the government, but also to prevent the anarchical tyranny of the people as mentioned above. If the people are too changeable, aristocracy provides a “stationary principle” in government.⁶² Because of their education and experience, but also because they are concerned with protecting their wealth, the wealthy tend to seek stability and consistency from government, which benefits the whole nation. Thus the key becomes to isolate the wealthy – if they are given a share in rule such that their personal ambition is turned to the national interest, but kept to just one part of the government, the system will

⁶⁰ Miller, *Incautious Man*, 69; Adams, *Gouverneur Morris*, 151.

⁶¹ Farrand, *Records*, 1:512.

⁶² Kaufman, *The Constitutional Views of Gouverneur Morris*, 314.

simultaneously benefit from their great talents and education and remain secure against their tyrannical tendencies.⁶³

Using Separation of Powers

Miller and Kaufman's list of Morris's interests or principles both contain items reducible to the balance of class. Moderating democracy, tension between aristocracy and equality, providing an arena for the wealthy, are all parts of the ancient mixed regime, and found in Morris's resurrection of that doctrine. But one of the reasons their principles seem somewhat random is that they does not explain Morris's interest in separation of powers, particularly the executive power. In writing three different constitutions, Morris advocated a number of different institutional arrangements, but always emphasized the need for strictly separate and independent executive and legislative branches. This devotion to separation of powers is most evident in his refusal to be swayed by those who sought to subordinate the executive branch to the legislative. As I will detail in the next chapter, there was a widespread bias in favor of the legislative branch, especially between 1776 and 1787 as each state formed new constitutions and the *Articles* were ratified. Morris's devotion to pure separation of powers led him to champion the cause of executive power as an equal branch of government.

As Miller and Kaufman portray it, the need for an independent executive is unconnected to Morris's desire to mediate socioeconomic class warfare. In fact, some of Morris's critics at the time connected his supposed love of the aristocracy to his

⁶³ Farrand, *Records*, 1:513.

love of the executive by accusing him of being elitist, of being a monarchist and aristocrat. But Morris's "un-republican" views are best understood when we see how he actually envisioned the executive. It was Morris, more than any other delegate at the Convention of 1787, who insisted that the executive had to be elected by the people, since he was supposed to be the champion or guardian of the people. This is no monarchy.

Thus for Morris, the independent executive that Miller and Kaufman rightly identify as so important to his thought is inextricably tied to his first principle, which is itself a basic formulation of the theory of the mixed regime. Actually, Morris advocated for a powerful independent executive because he thought that pure separation of powers was the best *institutional* means of ensuring the balance of classes he desired, and he thought the legislature as designed would be aristocratic. Thus, in Morris's ultimate idea for the U.S. Constitution, one government function would be given to each class – the executive to the people, and the legislative to the elites. Morris's formulation of separation of powers was specifically designed to achieve balance between the classes, and in the United States the popular executive was the lynchpin of his plan.

Morris's Consistency in France

Some scholars have suggested that Morris was just reacting to events at the Convention, making political moves to solidify certain practical goals, and therefore it is misleading to characterize his thought as a coherent vision of politics. For example, even Kaufman portrays Morris's interest in balancing aristocracy and democracy in the Constitution in a somewhat disjointed way, tying it to some of

Morris's early principles, but still holding that it was a matter of practical decision-making at the Convention.⁶⁴ But this is contradicted by the work of Miller and even more explicitly by Phillip Ziesche on Americans in revolutionary France. Miller's *Envoy to the Terror: Gouverneur Morris and the French Revolution* and Phillip Ziesche's work on Americans in Revolutionary France provide helpful descriptions of Morris at this stage, showing that he held to universal political principles that he thought transcended the particular situation of the two nations.⁶⁵ The particular nations required very different constitutions, but founded on the same principles.

In *Envoy to the Terror* Miller devotes considerable space to description of Morris's thoughts regarding the possibilities for the new French regime during his time in Paris, especially as he served as Minister to France. Again Miller paints a picture of Morris as a serious intellectual, who worked tirelessly to promote a moderate regime in France while protecting the interests of the United States. As in *Incautious Man*, however, Miller's intention is primarily biographical, with the purpose of rehabilitating the reputation of Morris. She does not attempt in-depth analysis of Morris's philosophical background or political theory, although her description of Morris in Paris complements her other work in providing a helpful starting point for this project.

⁶⁴ Kaufman, *The Constitutional Views of Gouverneur Morris*, chap. 9.

⁶⁵ Melanie Randolph Miller, *Envoy to the Terror: Gouverneur Morris and the French Revolution* (Washington, DC: Potomac Books, 2005); Phillip Ziesche, "Exporting American Revolutions: Gouverneur Morris, Thomas Jefferson, and the National Struggle for Universal Rights in Revolutionary France," *Journal of the Early Republic* 26 (Fall 2006) 419-447; *Compatriot Patriots: Americans in Paris in the Age of Revolution* (University of Virginia Press, 2010).

Ziesche argues in *Exporting American Revolutions* that Morris's constitutional principles in 1787 involved balancing wealthy and poor in the legislature, and a powerful national executive as "guardian of the people."⁶⁶ Morris initially thought these general principles were "equally applicable to Philadelphia and Paris."⁶⁷ Eventually Morris thought class balance would be best accomplished in France by a system with a "mixed" legislature (one chamber for each class) and an independent monarch. Ziesche argues the different formulation of separation of powers was mostly because of differences in the national character between France and America. As he sees it, even in France Morris was unfairly characterized as being anti-democratic, the reality being that Morris, deeply influenced by Montesquieu, thought the French people were not yet ready for complete freedom, and that the violence and chaos bound to ensue was too great a price. Moderation was more important than unbridled liberty.

Indeed, Morris's proposals for France mostly reflect a conservative view towards preserving existing institutions. For this reason Ziesche points out that Morris seems to have become more devoted to the teachings of Montesquieu, as one of the primary marks of Montesquieu's philosophy is a reverence for existing modes and orders, rather than devotion to an abstract model. Montesquieu further emphasizes that different regimes and institutions are needed for different societies and different peoples.⁶⁸ Along these lines, Morris felt comfortable saying that years

⁶⁶ Ziesche, "Exporting American Revolutions", 428.

⁶⁷ Ibid.

⁶⁸ For example, see Montesquieu, *Spirit of the Laws*, Book 1, chap. 3, and Book 19 chap. 5.

of oppression and abuse in France had stifled the political life of the people such that they could not take up self-governance as easily as the Americans had done.⁶⁹

Furthermore, following Montesquieu, Morris also emphasized the fact that historically the monarch had not oppressed the people in union with the aristocracy; rather the monarchy and aristocracy were usually opposed to one another, with each taking the side of the people when it was convenient. Morris believed that a strict separation of powers system provided an institutional design that fit both with the historical and political character of France, respecting French modes and orders while deliberately setting the aristocrats and the people against each other with the independent, powerful executive monarch remaining structurally unaffiliated to either group. The general principles remain the same – to achieve balance of the classes by using the institutional framework of separation of powers.

I have argued that Morris occupies a special place in American political history since not only was he the author of much of the Constitution, but he based his authorship on a unified political theory. Morris essentially had two related principles: to achieve balance between socioeconomic classes, and to use separation of powers to do so. He was not simply reacting to events, but was consistent about these general principles even when very different political climates in the United States and France demanded different application. Furthermore, his political theory was not simply a repetition of the ancient theory of the mixed regime or modern separation of powers

⁶⁹ Gouverneur Morris, “Observations on Government, Applicable to the State of France” in *Selected Writings of Gouverneur Morris*, ed. J. Jackson Barlow (Indianapolis: Liberty Fund, 2012), 232.

doctrine. It had elements of both, and perhaps most importantly, contained something new – the possibility of a popular executive.

Implications of Morris's Theory

The fact that Morris had a unique political theory, which he consistently held to during his career, may be interesting but not seem immediately important. However it certainly has practical implications both for the original form of the Constitution and for the modern understanding of the document. Nowhere is this more obvious than on the issue of the popular executive. The popular executive would not have come to be without Morris's efforts, and Morris insisted on it because of the theory proposed above.

A number of scholars including Gwyn, and perhaps most famously Harvey Mansfield in *Taming the Prince: The Ambivalence of Modern Executive Power* have noted the unique nature of the American executive. According to Mansfield, the history of executive power was fraught with danger, as the "Machiavellian" executive had too much power, leading the citizens to be insecure in their life and liberty. The prince was tamed by the American innovation of an explicitly republican executive: "The American president is neither a revived Roman dictator nor a moderated British monarch; he is one main feature of a new experiment in self-government."⁷⁰ The American president, and especially the popular nature of the executive, is what most

⁷⁰ Mansfield, *Taming the Prince*, 247.

of all makes the Constitution a new regime type in the history of political thought, a moment which shapes all subsequent theory.⁷¹

Now as I mentioned above, Mansfield does not note Morris's role in the establishment of this executive, but it is clear from reading the Convention records as well as from individual accounts of the Convention that Morris was responsible not only for some of the great power in the American presidency, but also for its popular nature. As I will show in the following chapters, Morris insisted on the creation of the Electoral College simply to make the president more popular so that the people could be protected from what he thought was an aristocratic legislature. Thus, to whatever extent we are impressed by the innovation of Article II, we must take seriously not only Morris, but the theory that drove him to create the presidency as we know it.

A proper analysis of Morris's work, therefore, should accomplish two goals. First, this analysis should illustrate that Morris not only held to the principles I described above, but that they were not merely the result of practical compromises needed in constitution-writing. A number of commentators, for example the biographer William Howard Adams, incorrectly argue that Morris saw the Constitution as merely "a bundle of compromises"⁷² and this view must be refuted. Second, this analysis should help to illustrate a new understanding of the origins of the American regime, one based on Morris's American political thought, which is new and innovative. The design of the Constitution is partially based on the mixed regime,

⁷¹ Gwyn, *The Meaning of Separation of Powers*, 121-126.

⁷² Adams, *Gouverneur Morris*, 165.

but not in the way Eidelberg sees it. It is a new evolution of the mixed regime doctrine, and it utilizes separation of powers to achieve its end. The next two chapters will begin the analysis of Morris's work at the Constitutional Convention of 1787, and will demonstrate that not only did Morris have a unified theory of politics, but this theory had a profound influence on the final form of the Constitution. The fifth chapter will compare Morris's work in the United States with his writings in France, showing that his principles remained consistent despite particular circumstances which Morris recognized called for different institutional arrangement.

CHAPTER FOUR

Morris at the Convention: Early Failure on the Legislature

Gouverneur Morris arrived at the Constitutional Convention as a delegate for Pennsylvania in May 1787. During his time at the Convention Morris was a leading speaker with a clearly established set of principles guiding his thoughts and speeches. This is not to say that he was overly stubborn or intransigent. On the contrary, Morris demonstrated “a candid surrender of his opinions when the lights of discussion satisfied him”, according to Madison.¹ Morris frequently adjusted his positions after argument proved him wrong. But adjusting particular positions is not the same as inconstancy or lack of principles, and when Morris switched sides on specific provisions it was when he had been persuaded that the new provision better aligned with the fundamental principles about political and social life that Morris consistently held as true.²

In the previous chapter I discussed some of the central aspects of Morris’s political thought, from which we can draw out two principles Morris followed during his career as constitution-writer. First, he wanted to achieve balance of socioeconomic classes. This meant moderating democracy, lest it devolve into mob rule or be coopted by a few tyrannical men, and containing the upper class and directing it towards the national interest, lest the aristocrats merely pursue their own

¹ James Madison to Jared Sparks, April 8, 1831, Sparks, 1:286.

² Nichols, “Gouverneur Morris”, 253-254.

personal interests, oppressing the poor and depriving the nation of good leaders. Second, Morris believed that the best way of achieving this goal was through a strict separation of powers framework, in which each class would be restrained from tyranny by the institutional structure.

At the Constitutional Convention of 1787, factional conflict in the first few weeks resulted in the so-called Connecticut Compromise, which Morris opposed, because he thought the legislature would be too aristocratic, dominated by the special interests of the wealthy. Instead, he proposed an alternative - an aristocratic Senate balanced against a democratic House. Ultimately, Morris's proposal was rejected, and he feared the new Constitution could result in an aristocratic tyranny entrenched in the national legislature.

Delegates' Attitudes at the Convention

In order to understand Morris's plan, it is necessary to understand the factions that shaped the debates throughout the summer of 1787. Since different delegates had such diverse views on government, which like the views of Morris were highly complex, an explanation of the conflicts at the Convention in terms of individual delegates would be difficult, not to mention unnecessary for the purposes of a study of Morris. Instead of focusing on specific individuals, I will attempt to lay out in a general way five of the prevailing attitudes and major factions that helped influence the discussions in Philadelphia. This list is not exhaustive, but it covers some of the most important divisions, especially those which are of particular relevance for understanding Morris's constitutional vision.

I describe these factions as sets of opposites: 1) executive vs. legislative power, 2) aristocracy vs. democracy, 3) large vs. small state, 4) north vs. south, and 5) nation vs. state. It is worth noting that the disagreement about the proper relationship between executive and legislative branches is explicitly an *institutional* disagreement, about the proper formulation of separation of powers. The other significant differences that helped shape the debates at the Convention were political or philosophical, and only by extension caused conflicts about the institutional arrangements of separation of powers. In other words, the jealousy of the executive described below is explicitly an issue about the proper relationship between executive and legislative institutions, but other conflicts at the Convention were not first of all disagreements about institutional arrangements. They were first political and ideological differences that ultimately caused different formulations of separation of powers doctrine. For example, the small states wanted power to exert the same influence as the large states on national issues; this is not an inherently institutional point. But it led to an *institutional* demand for equal vote in the legislature regardless of population. Understanding each of these dichotomies will help not only in contextualizing Morris's institutional vision but also in seeing the general causes for competing institutional proposals.

Legislative vs. Executive

During the early days of the Convention, debates centered on the nature of the legislative branch of the national government, and for many delegates, the legislature was seen as the most important part of the new constitution. The prevailing formulation of separation of powers in post-Revolutionary America deliberately

subordinated the executive to the legislature. Vile points out that the constitutions written after 1776 were truly intended to institute separation of powers, but a “strong executive” was seen as a contradiction. Generally it was held that an executive ought to do nothing that was not specified by the legislature.³ There are at least two causes for the formulation of separation of powers that grants primacy to the legislative branch, the first grounded on the political history of the colonies, and the second founded on the republican ideology of the Revolution.

First, historically most of the colonies had featured some form of popularly elected assemblies wielding a qualified legislative power, but executive power was retained by exclusively by the British government: “They were derived from a different and a foreign source: they were regulated by foreign maxims: they were directed to foreign purposes.”⁴ Over time, especially as the Revolution approached, the tensions between the British government and the colonies were reflected in disputes between legislative and executive offices throughout the colonies, and the colonists saw the legislatures “as the only means of maintaining their own independence in the face of the powers of the Crown.”⁵ The legislative assemblies, to quote James Wilson, “were chosen by ourselves, they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes.”⁶ They were relied on to place some check on the “swarms of Officers” sent by the Crown “to harass

³ Vile, *Constitutionalism and the Separation of Powers*, 148.

⁴ James Wilson, *The Works of James Wilson*, ed. Robert McCloskey (Cambridge: Harvard University Press, 1967), 1:292.

⁵ Vile, *Constitutionalism and the Separation of Powers*, 142.

⁶ Wilson, *Works*, 1:292.

our people.”⁷ This rivalry produced a dislike for executive authority, along with a corresponding habit of placing as much weight as possible on the legislative branch of government. Revolutionary literature such as *Common Sense* and the *Declaration of Independence* exacerbated this bias, directing complaints and blame towards George III specifically (as opposed to the more nebulous, less rhetorically useful Parliament).⁸ The aversion to executive institutions was strong enough that even after the revolution, when the people gained “parenthood” of the executive, “the people behaved like stepmothers”⁹ and deliberately subjugated the executive offices to the legislature.

Second, the prevailing ideology at the time of the revolution demanded republican institutions, and as Hamilton famously opened *Federalist 70*, “There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government.”¹⁰ In fact, this idea not only had its advocates, but was overwhelmingly accepted prior to 1787. Despite the extreme differences between the perspectives motivating the Virginia and New Jersey plans at the Convention, both plans proposed weak executives as if they assumed republican government required such an executive.¹¹ A strong executive must necessarily *look like* a monarch, at least on the surface, and thus is at least superficially opposed to

⁷ *Declaration of Independence*.

⁸ Vile, *Constitutionalism and the Separation of Powers*, 139-142.

⁹ Wilson, *Works*, 1:293.

¹⁰ *Federalist 70*.

¹¹ Mansfield, *Taming the Prince*, 249.

republicanism. From Tom Paine's diatribes against monarchy ("The nearer any government approaches to a Republic, the less business there is for a King."¹²) to the complaints of Randolph,¹³ Franklin¹⁴ and others at the Convention there was a consistent principle among many American thinkers that any similarity to monarchy should be avoided lest the young nation risk losing its republican character.

Of course, most historical experience of republican government seemed to substantiate this idea – generally past republics had used executive power to deal with temporary or emergency situations; not as permanent, republican institutions.¹⁵ If Mansfield is correct that it is in the Constitutional Convention of 1787 that the novelty of a republican executive is finally formed, and in the *Federalist* that it is first defended,¹⁶ it makes sense that republican adherents with less imagination than Gouverneur Morris would initially be unable to get beyond the supposition that "In republican government, the legislative authority necessarily predominates"¹⁷ and realize the possibility of a formulation of republican separation of powers featuring equal, strong and independent legislative and executive branches. And even after Morris and others established the republican executive in the new Constitution, it

¹² *Common Sense*.

¹³ Farrand, *Records*, 1:66.

¹⁴ *Ibid.*, 1:83.

¹⁵ Mansfield, *Taming the Prince*, 247.

¹⁶ *Ibid.*, 248.

¹⁷ *Federalist* 51.

took all of Hamilton's rhetorical powers to persuade the public that this new kind of executive was, in fact, a *republican* executive.

The legislative primacy formulation of separation of powers was so widely accepted, that with the exception of Morris's constitution in New York, every new state constitution written around 1776 deliberately subordinated the "stepchild" executive to the legislature.¹⁸ In most cases this resulted in an even weaker executive than intended, since the executives usually had no means of defending against legislative encroachments on their already limited executive powers.¹⁹ Similarly, the national executive offices were merely an arm of the Continental Congress, with executive and legislative powers not clearly distinguished at a national level, frequently leading to chaos.²⁰ So on a practical level, it became clear that a different formulation of separation of powers was required, as Thach notes: "the political psychology of the men who framed the Federal Constitution was by no means characterized by that jealousy of the executive which was so prevalent in 1776."²¹ Nevertheless, even with a partial shift, there were still few existing independent executive offices at the state or national level in 1787, and most delegates at the Convention still resisted the idea of a powerful executive, or demanded that the executive be dependent on the legislature.²² A smaller group, led by Morris and

¹⁸ In fact, some criticized the New York constitution for being "aristocratic". Vile, *Constitutionalism and the Separation of Powers*, 154.

¹⁹ Thach, *Creation of the Presidency*, chap. 2.

²⁰ Ibid., chap. 3.

²¹ Ibid., 65.

²² Farrand, *Records*, 1:68.

Wilson, were left in the minority insisting on a formulation of separation of powers featuring a strong, equal, and independent executive. Given that this executive ultimately became the lynchpin of Morris's Constitutional plan, it can hardly be overstated how important the division over legislative and executive power was.

Aristocratic vs. Democratic

As I discussed in the previous chapter, Gouverneur Morris was frequently accused of being too aristocratic, and he did not suffer these attacks alone. Delegates at the Convention frequently used the term "aristocracy" for rhetorical purposes, often to discredit propositions that looked too British or un-republican. Of course in one sense of the word "aristocracy" – the British nobility, not republican but hereditary, independent of the people, with a preeminent share of government – no delegate was completely aristocratic.²³ But as Vile continually points out, not all formulations of separation of powers are equally democratic.²⁴ Some delegates (including Morris) really did focus on the better quality of the upper classes as rulers or electors, on the need for "distinguished characters, distinguished from their rank in life and their weight of property"²⁵ and some deliberately proposed institutions to protect the interests of the upper class. Opposing these "aristocrats", the more democratic delegates emphasized the need for the government to be founded on

²³ For a detailed discussion of attitudes on aristocracy in the United States at this time, see Bailyn, *The Ideological Origins of the American Revolution*, especially 272-301.

²⁴ In particular see Vile, *Constitutionalism and Separation of Powers*, chap. 2-3.

²⁵ Farrand, *Records*, 1:150.

popular will, since “the people are the king”²⁶ and the ability of the people to choose their representatives well. In other words, underlying the rhetoric about aristocracy there was a real distinction – both sides of the mixed regime, aristocracy and democracy, were represented at the Convention.

Democrats such as James Wilson held, “Government ought to flow from the people at large”²⁷ and argued for direct popular election of the legislative²⁸ and executive branches. Such delegates had faith in the people to choose, believing with Morris, “they would never fail to prefer some man of distinguished character, or services.”²⁹ The democrats thought that as a foundation for government, “the people at large was...the fittest in itself.”³⁰ Popular will, Dickenson argued, was “the best and purest source.”³¹ The democrats wanted the ideas of the representative to reflect those of the people. Representatives are necessary on a practical level because there are too many citizens for each to represent himself, but the representative body should mirror the body of the people as closely as possible. Thus the democratic delegates often favored shorter terms, and at least partial ineligibility for reelection, since as Morris argued, “periodical return of the great officers of the State into the mass of the people, was the palladium of Civil liberty.”³² Short terms and periodical

²⁶ Ibid., 2:69.

²⁷ Ibid., 1:151.

²⁸ Ibid., 1:52.

²⁹ Ibid., 2:29.

³⁰ Ibid., 2:56 (Madison)

³¹ Ibid., 2:114.

³² Ibid., 120.

or permanent ineligibility for reelection would discourage career politicians, who are out for their own interests rather than those of the people at large, by sending office-holders back “to that mass from which they were first taken, in order that they may feel & respect those rights & interests”³³ and reminding the office-holders that “in free Government the rulers are servants and the people their superiors & sovereigns.”³⁴

In opposition to the democrats, aristocratic delegates such as Roger Sherman thought, “The people should have as little to do as may be about the Government. They want information and are constantly misled.”³⁵ Of course even the democratic delegates simply thought that the people needed to be involved in electing representatives, they never argued that any random citizen was qualified to hold high office. But the aristocratic delegates carried this principle further, preferring to exclude the people at large even from participating in politics through election, claiming that people were unfit to be trusted with such a duty, because “the people are uninformed”³⁶, would be susceptible to demagoguery, “the dupe of pretended patriots”³⁷ and even bribery, as Morris argued: “give the votes to people who have no property, and they will sell them out to the rich who will be able to buy them.”³⁸ George Mason went so far as to say “it would be as unnatural to refer the choice of a

³³ Ibid., 2:119-20, (Mason).

³⁴ Ibid., 2:120, (Franklin).

³⁵ Ibid., 1:48.

³⁶ Ibid., 2:57, (Gerry).

³⁷ Ibid., 1:48, (Gerry).

³⁸ Ibid., 2:202.

proper character for chief Magistrate to the people, as it would, to refer a trail of colours to a blind man.”³⁹ Rather than emphasizing popular will in elections, aristocratic delegates focused on ensuring that only “men of honor & character”⁴⁰ would be elected to office, and a more refined electorate (state legislatures, etc.) would be more likely to choose the kind of distinguished character needed for good government. This type of wealthy and educated office-holder would counteract the frenetic and changeable tendencies of popular government. Along the same lines, aristocratic delegates often favored longer terms, or even life terms, which would not only aid in stabilizing government, but also enhance expertise in office-holders, and encourage the most qualified men to run: “if the Elections are too frequent, the best men will not undertake the service.”⁴¹ The lack of close connection and explicit consent of the people through elections could be overcome by tacit consent, attained by effective government “as wd. make the people happy and prevent a desire of change.”⁴²

This disagreement between aristocratic and democratic delegates continuously resurfaced throughout the Convention, almost any time term lengths, re-eligibility, or elector qualifications were discussed. Although most delegates did not share the extreme democratic position of Wilson, nor the extreme aristocratic position of Sherman, each delegate was influenced by the extent to which he thought

³⁹ Ibid., 2:31.

⁴⁰ Ibid., 1:50, (Gerry).

⁴¹ Ibid., 2:59, (Williamson).

⁴² Ibid., 2:36; Compare to *Federalist* 17.

the people and the elites ought to be involved in the government. As I argued in the previous chapter, Morris seemingly held *both* extremes – his proposals included some of the most radically aristocratic *and* the most radically democratic. Thus understanding this conflict at the Convention provides a useful framework for seeing Morris's theory, and particularly for understanding his affinity for the mixed regime.

Large State vs. Small State

Delegates from states with meager population such as Delaware and New Jersey felt threatened by states with greater population such as Massachusetts and Virginia, and wanted to avoid a system that would overly restrict the small states' influence in the national government. They argued that since all the states were "equally sovereign and independent"⁴³ they should have equal control over national matters. Delegates from more populous states felt disenfranchised by the equal vote of States under the *Articles*, and had agreed to it only because of the danger and pressure of the war with Britain.⁴⁴ This disagreement over equality of the states primarily affected two institutional questions: the apportionment of representation in the legislature and the method of appointing the executive. In both cases the small state delegates wanted the same vote as the large states, while the large state delegates favored a system based on population.

Madison noted that Gouverneur Morris and others from large states thought they "should unite in firmly refusing to the small States an equal vote" on the grounds

⁴³ Ibid., 1:500, (Bedford).

⁴⁴ Ibid., 1:467, among other places.

that such equality was unreasonable, and that “every good system of government” demanded “a violation of that equality [of the states].”⁴⁵ But as early as May 30th, when the topic was first raised, the Delaware representatives refused to discuss a change in suffrage, and threatened to leave the Convention if such a change were made (there was a question as to whether Delaware’s instructions to its delegates permitted such drastic changes to the *Articles*).⁴⁶ This dispute helped to mold the debates especially for the next month, and to a lesser extent, the whole Convention. The small states argued that their sovereignty would be degraded by being subject to proportional representation, that before the *Articles* and under them the states were equal, and that some concession needed to be made “to the plighted faith under which each State small as well as great, held an equal weight of suffrage” in national matters.⁴⁷ Madison “entreated the gentlemen representing the small States to renounce a principle wch. was confessedly unjust”⁴⁸ and Wilson condemned equality of votes as a renunciation of “the inherent, indisputable, and unalienable rights of men, in favor of the artificial systems of the States.”⁴⁹ If the government was for the citizens, not for “imaginary beings called *States*”⁵⁰ representation by population was the reasonable option. But the small states refused to budge, saying that the equal

⁴⁵ Ibid., I:11.

⁴⁶ Ibid., 1:37.

⁴⁷ Ibid., 1:491.

⁴⁸ Ibid., 1:464.

⁴⁹ Ibid., 1:482.

⁵⁰ Ibid., 1:483, (Wilson).

vote was “essential to their preservation”⁵¹ William Paterson stubbornly argued, “There was no other ground of accommodation. His resolution was fixt. He would meet the large States on that Ground and no other.”⁵² Gunning Bedford even went so far as to suggest, “the small [states] will find some foreign ally of more honor and good faith...who will do them justice.”⁵³

As Madison argued at great length this division was in some sense arbitrary, since the states did not really have distinct political, economic, ideological, religious, or other interests connected to their population, and there was of course no guarantee of future population shifts.⁵⁴ Nevertheless the influence of the past equality under the *Articles* remained, and this conflict had significant influence on the debates and the resulting Constitution. Of particular concern regarding Morris, this debate helped entrench state interests in the legislature through the Connecticut Compromise, and the conflict returned in the debates over the election of the national executive, leading to the Electoral College. Both the Connecticut Compromise and the Electoral College integrate aspects of equal *and* unequal vote, such that the large states have greater influence than the small, but small states have a greater share of the vote than they statistically deserve.

⁵¹ Ibid., 2:10.

⁵² Ibid., 1:551.

⁵³ Ibid., 1:492.

⁵⁴ Ibid., 1:447.

North vs. South

Despite the vehemence with which large and small states disagreed, Madison pointed out “that the states were divided into different interests not by their difference of size...but principally from their having or not having slaves.”⁵⁵ Throughout the Convention the Carolinas and Georgia tended to ally together on the issue of slavery, since these three states were more economically dependent on slavery, and less influenced both other debates (such as large vs. small state). This is obviously not the place to analyze the deep and diverse causes of disagreement between north and south, which have been amply debated elsewhere. It suffices to say that although it was not simply an issue of slave vs. free, (in fact at the time New York had nearly as many slaves as any of the southern states), many delegates noted there was a difference in both climate and economic dependence on slavery, resulting in “an essential difference in interests between the N & S States, particularly in the carrying of trade.”⁵⁶ This distinction caused conflict on a variety of issues, as neither region wanted the national government to be controlled by the other’s interests. Further exacerbating the issue, some delegates agreed with Morris regarding the ethics of slavery: “He never would concur in upholding domestic slavery. It was a nefarious institution--It was the curse of heaven on the States where it prevailed.”⁵⁷ Morris even suggested inserting a clause showing that it was specifically because of

⁵⁵ Ibid., 1:486.

⁵⁶ Ibid., 2:100.

⁵⁷ Ibid., 2:221.

the Carolinas and Georgia that slavery was being protected.⁵⁸ The Southern delegates refused to engage such arguments – “An attempt to take away the right...will produce serious objections to the Constitution...”⁵⁹ – and made it clear that restrictions on the slave trade would cause at least the three southernmost states to reject the Constitution.⁶⁰ As many delegates could foresee, there was bound to be expansion into the west of the nation’s 1787 boundaries, and this would allow one side of this issue to begin to dominate the national scene. Mason pointed out that western states would be more likely to align with the southern ones and use slaves to hasten expansion.⁶¹ It was therefore important to both northern and southern states to have some kind of check at a national level to protect their economic and cultural interests, especially with regard to slavery.

The division between north and south is especially important from Morris’s point of view, because it helped provide the framework for compromise between the large and small states. The Carolinas and Georgia in particular were neither especially large nor small, and these three took sides primarily on the basis of slavery, not state size. The Connecticut Compromise gained southern support through the infamous 3/5 provision, but the controversy was renewed when Morris and Wilson advocated for a popularly elected executive. Popular election was obviously opposed by the small states, since it diluted their influence, but it also placed the medium-sized

⁵⁸ Ibid., 2:415.

⁵⁹ Ibid., 2:371.

⁶⁰ Ibid., 2:364, 371, 373.

⁶¹ Ibid., 2:370.

southern states over to the small state side, because popular election would leave no room for something like the 3/5 clause. Given the hostility towards executive power, and the distrust of the people evident in many delegates, Morris's proposal for a popular and powerful executive was already incredibly controversial, and with both small and southern states opposed, it was virtually impossible to achieve. Ultimately Morris was able to overcome the controversy by using the same basic framework as the Compromise, instituting in the Electoral College the relative benefits that appealed to the large, small, and southern states.

Nation vs. State

After the chaotic experience under the Articles, some delegates wanted a unified nation, with only limited role for the states, while others still saw the states as the fundamental political unit and wanted a system that protected the integrity and sovereignty of each state. The nationalists saw little need for independent states, although the states were useful for dividing up such a large nation. In Hamilton's words, "*As states* they ought to be abolished. But he admitted the necessity of leaving in them, subordinate jurisdictions."⁶² These delegates held, with Morris, "that in all communities there must be only one supreme power, and one only"⁶³ and that the supreme power had to be situated in the national government. Nationalists pointed out "The states were not 'sovereigns' in the sense contended by some..."⁶⁴ and never

⁶² Ibid., 1:323.

⁶³ Ibid., 1:34.

⁶⁴ Ibid., 1:323 (King).

had been,⁶⁵ since they could not make war and peace, alliances and treaties, etc., and that they had become independent of Britain “not *Individually* but *Unitedly*.”⁶⁶ But opposing the nationalists, the state-oriented delegates held that “The separation from G.B. placed the 13 states in a state of nature towards each other...”⁶⁷ and that the states retained the sovereignty even upon entering the confederation, as the language of the *Articles* suggested.⁶⁸ Thus they wanted a system which would preserve the integrity of the states as independent entities. These delegates tended to dismiss the sovereignty of the people as being situated in the states – the people give up their sovereignty by participating in the newly created state. Because of the emphasis on state sovereignty, state-oriented interests were usually concurrent with small state interests.

The division between the nationalist delegates and the more state-oriented delegates does not seem as dramatic as some of the dichotomies listed above, if only because the nationalists controlled the debates from the beginning. The debates started with Randolph submitting Madison’s “Virginia plan” which Morris immediately suggested be changed to explicitly provide for a “*national* government... consisting of a *supreme* Legislative, Executive & Judiciary.”⁶⁹ The Virginia plan provided the basis for the debates for the following month, and in essence, for the rest

⁶⁵ Ibid., 1:467 (Gerry).

⁶⁶ Ibid., 1:324 (Wilson).

⁶⁷ Ibid.

⁶⁸ Ibid., 1:468.

⁶⁹ Ibid., 1:33.

of the Convention. Furthermore, this division did not affect the provision most connected with Morris, such as the Electoral College, to the same extent as the division listed above. Nevertheless, the conflict between nationalist and state interests continually inserted itself into the debates, and was of particular concern to Morris because he identified state interests with the special interests of the wealthy, and connected the national interest to the welfare of the people.

In summary, delegates had individual interests and priorities and on all these significant issues the crossover between the various conflicts allowed for ways around apparent impasses. Few delegates fitted into categories as simply as they are listed above, although such caricatures are helpful for understanding the overall scene at the Convention. But individual delegates or states who shared a position in one of the pairs listed above often disagreed on another. Perhaps the most prominent example of this was that the “slave states” included states of various size, most notably the medium-sized Carolinas and Georgia, helping to overcome the initial impasse regarding “large” versus “small” states in return for concessions on slavery in the Connecticut Compromise. By keeping the various dichotomies in mind, it will be easier to understand the progression of the debates before and after Morris's return, as well as the opposition to his proposals for the constitution of the national legislature and eventually his success in establishing a popular executive.

The Convention before Morris

Morris left Philadelphia on May 31st, and did not return until July 2nd.⁷⁰ Upon his return to the Convention, the Virginia Plan had been thoroughly debated, and the New Jersey and Hamilton plans had quickly appeared and just as quickly been discarded. The Virginia Plan, written by Madison and proposed on the floor by Edmund Randolph had formed the basis for debate since the very beginning. The New Jersey plan was an attempt at moderating the Convention, bringing it closer to the supposed goal of modifying the obsolete Articles of Confederation. But the nationalist side controlled the debates from the first – no sooner had Randolph proposed the initial set of resolutions, than Morris successfully proposed that the plan establish a “*national government... consisting of a supreme Legislative, Executive & Judiciary.*”⁷¹ This understanding of the project at hand was the controlling one for the rest of the summer. Thus while the New Jersey plan, and subsequent compromises regarding the Senate were designed to quiet the small-states and less nationalist interests, those positions were never seriously considered as anything more than a small concession to the minority to convince them to support the new Constitution, as evidenced by the fact that it was only discussed for three days and never mentioned after June 19th. The Connecticut Compromise, having successfully quieted the minority, had established a generally acceptable plan for the national legislature.

⁷⁰ Morris had a history dating back to the Provincial Congress in New York of disappearing for months without explanation. While the reasons for this absence are debated, he was probably dealing with his newly-acquired estate in New York. Some authors have speculated that he may have been bored with the slow pace in the early days, and resolved to leave until things became more interesting.

⁷¹ Ibid.

The plan resulting from the first month of debate was that the first branch,⁷² which became the House of Representatives, was already being described as the more popular branch along the lines of the House of Commons.⁷³ The members of the House were to be elected by the people of each state in some kind of proportion to the populations of each state. House members would be at least twenty-five years of age, be elected for two-year terms, with eligibility for re-election. Besides the power to originate bills, the House was given the duty of appointing the national executive. This branch was obviously built according to democratic specifications.

The most fundamental characteristic of a democratic government, election by the people, was in place. (At the time, probably few delegates envisioned single-member district elections, which did not become the norm for years after the ratification of the Constitution. Popular election here meant the people of the whole state electing however many House members were allotted to that state.) But not only was the general populace to be responsible for selecting their representatives, the membership of the House was proportioned according to population, another democratic principle. The reliance on population first provided a realistic way of creating a relatively large House of Representatives, in line with the democratic idea that the reason for representation is to overcome the practical impossibility of having the whole population meet in one place, with each individual representing himself. A larger body would at least come proportionally closer to the breadth of the people.

⁷² It may cause some confusion to the modern reader that the delegates at the Convention usually referred to the two houses of the legislature as “branches”. For consistency, I follow the language of the Convention.

⁷³ *Ibid.*, 1:48, (Mason).

Frequent elections (every two years) would further democratize the branch. The short terms would keep the people in control of the House, since if a representative was found unsatisfactory, an election would never be far away, at which point he could be replaced with someone whose goals or principles aligned with those of the people. The short terms would encourage frequent turnover, making it less likely that a House member would keep office for so long as to lose touch with life as a simple citizen. Short terms would also allow for a greater variety of individuals to take a turn in the House.

Finally, there were not stringent requirements to hold office in the House. The stipulation that Congressmen must be at least twenty-five years old would barely even prevent prodigies like Morris, Madison, and Hamilton from taking office. Morris was considered extremely young when he served in the Provincial Congress at age twenty-five, and one could hardly make the argument that it was very restrictive to prevent someone younger than that from serving in this high office. Essentially, it was left open for the people to choose anyone they wanted to represent them. Taken together, all these proposals for the House of Representatives fitted with the most democratic ideals, making the House as close to an image of the whole people as practically possible.⁷⁴

The second branch, which became the Senate, was already designed to be dominated by the wealthier, more refined parts of society, “to consist of the most distinguished characters, distinguished for their rank in life and their weight in

⁷⁴ Given the obvious fact that most women and racial minorities could not vote, this sounds ridiculous, but it is what the delegates had in mind.

property, and bearing as a strong likeness to the British House of Lords as possible.”⁷⁵ Members of the Senate were to be elected by the legislature of the state they represented. They would have to be at least thirty years of age, elected for six-year terms with eligibility for reelection. Besides the power to originate bills, they would have the power to appoint justices of the Supreme Court and subordinate judges, as well as other officials. Clearly this branch had the characteristics of aristocracy described above.

Rather than election by the people, the members of the Senate were to be appointed by an already refined body in their respective states. Others have argued that the system still has its source in the people, since the people directly elect some representatives, and every other official traces the source of his authority back to those original, popular elections, and therefore the whole government is still founded on the people. Such an argument could be debated. But what is important here, is that the mode of election is not in fact *democratic*. It is deliberately designed to place the election in the hands of a more refined body instead of allowing the people to actually choose the Senators. Both in terms of social class, and in terms of education, talent, and experience, members of state legislatures could not fail to be more aristocratic than the masses of the people. They would undoubtedly appoint Senators of similar standing, experience, and education. This was made possible (and enhanced) by the small size of the Senate. This helped to ensure that only the best, the most able, would gain office in the Senate. It would be an elite body in every sense.

⁷⁵ Ibid., 1:150.

The sophisticated nature of the second branch would be further heightened by the long term of office. The six-year term would give a Senator time to gain some experience, without quickly “depriving the nation of that experience.”⁷⁶ Obviously this time might also serve to detach the office-holder from the people even further, while already only relying on the state legislature for reappointment. The more severe age requirement further signals the nature of the aristocratic branch. And in keeping with the greater experience, wisdom, and talent assumed to be enshrined here, the Senate was given much broader and potent grants of power. All of these powers assume a refined and capable group of representatives who would plan and carry out a long-term strategy for the future of the nation.

But despite the partially “mixed” nature of the legislature, the cause behind such a constitution was partially accidental. To be sure, most of the delegates were familiar with the doctrine of mixed government, and the influence of that theory in the history of British government. But as mentioned above, the different make-up of each of the branches of the national legislature was also supposed to settle perhaps the most explicit and violent argument of the debates so far – the battle between the large and small states. The division between large and small states had been the primary controversy in the first month of debate. Delegates from large states threatened to carry on without the small states, while a delegate from a small state had even suggested the possibility of seeking the aid of European powers if the small states’ hand was forced by a coalition of large states. The New Jersey Plan was

⁷⁶ Ibid., 2:104.

formulated for the express purpose of representing the small state interests, and the Connecticut Compromise was deliberately designed as a solution to this overwhelming issue. The proportional representation in the lower branch would favor the states with larger populations, and the equal vote in the upper branch would obviously disproportionately favor the smallest states, and give them a kind of veto power. But perhaps the more fundamental division (and one less likely to change over time) among the states was the division between north and south. On June 30th, Madison made a point of this, perhaps in an attempt to reconfigure the coalitions that had formed around the large versus small state debate. Both sides could see here the benefit of the equal Senate, allowing either side to check the spread of the opposite side of the slavery debate. The combination of these two divisions made the Compromise seem like an appropriate way to constitute the legislative branch. This was the state of the Convention when Gouverneur Morris returned.

Morris's Plan for the Legislature

Morris was unconcerned with disputes between individual states, and his plan for the legislature was based on his theory of politics rather than on concern for any special interests.⁷⁷ Immediately upon his arrival he proceeded to object to the current state of affairs, and laid out a comprehensive vision for the construction of a bicameral national legislature, in which the House would be popularly elected for two-year terms, but the Senate appointed for life (perhaps by the national executive), with no compensation so that only the wealthy could afford to hold office there. With

⁷⁷ Miller, *Incautious Man*, 65.

each branch distinct and isolated, both the wealthy and the poor would be safe from the abuses of the other. In other words, at this early stage Morris advocated a type of mixed government in the legislature, and was concerned that the status quo did not properly secure a balance of class interests.

Morris started by noting that part of the purpose of making the Senate more refined, with longer terms, was to check the turbulence of the House: "Every man of observation had seen in the democratic branches of the State Legislatures, precipitation – in Congress changeableness, in every department excesses against personal liberty, private property & personal safety. What qualities are necessary to constitute a check in this case?"⁷⁸ Even radical democrats could agree that there was a need for some moderating effect, something to prevent the legislature from being inconsistent and unsettled. Simply letting a large group of representatives, subject to frequent return for re-election, run the legislature unchecked, was not an option. Public opinion, as well as the membership of the House, would be too changeable and unpredictable. In theory, the Senate's longer term and appointment by State legislatures rather than by the people would allow the upper house to accomplish the goal of moderating the lower house.

But Morris proceeded to argue that the talent and refinement that other delegates envisioned in the Senate were not enough to constitute an efficient check on the House of Representatives – the upper branch would need some *personal* motivation to balance out the lower branch's deficiencies: "Something more then is

⁷⁸ Farrand, *Records*, 1:512.

now wanted. 1. The checking branch must have a personal interest in checking the other branch, one interest must be opposed to another interest. Vices as they exist must be turned against each other.” In particular, Morris focused on the vice of pride: “Pride indeed is the great principle that actuates both the poor & the rich. It is this principle which in the former resists, in the latter abuses authority.”⁷⁹ It was this kind of talk that caused James Madison to complain that Morris was tiresome in his relentless lack of faith in humanity: “on all occasions...inculcated so strongly, the political depravity of men, and the necessity of checking one vice and interest by opposing them to another...”⁸⁰ And to some extent Madison was correct – Morris was convinced that unless the two branches were properly distinguished from one another, either the upper class would abuse its authority and subjugate the lower class, or the lower class would resist and overthrow the authority of the upper class, devolving into mob rule (or demagogic rule). Without proper checks, one class would always consume the other, to the detriment of the whole nation.

Morris thought it more likely that the abuse would come from the wealthy than the poor: “He feared the influence of the rich. They will have the same influence here as elsewhere if we do not by such a Government keep them within their proper sphere.”⁸¹ The rich were more likely to be abusive or tyrannical if only *because* of their greater wealth, education, and power. The greater talents of the upper class prepared them to take advantage of the weaknesses of the people: “We should

⁷⁹ Ibid.

⁸⁰ Ibid., 1:585.

⁸¹ Ibid., 1:514.

remember that the people never act from reason alone. The Rich will take advantage of their passions & make these instruments for oppressing them.”⁸² As I noted in the previous chapter, Morris had already seen this happen in New York in the early days of the Revolution and it had a great effect on him. Once the upper class took tyrannical hold, there was little possibility for a moderate, peaceful society. Instead, Morris argued, “The Result of the Contest will be a violent aristocracy or a more violent despotism.”⁸³ But notwithstanding Madison’s critical comments on this gloomy outlook, he also noted Morris’s “implicit confidence” that the problem could be solved.⁸⁴ To that end, Morris proposed a plan designed to institutionalize and isolate both the rich and the poor in order to balance the two classes and to prevent them from doing any harm.

Morris agreed with the composition of the proposed House, which would clearly be a popular or democratic body. But in his initial speech of July 2nd, he proposed a set of changes to the creation of the Senate, each of which was designed to distinguish it from the House, to make a clearly aristocratic body, with “great personal property...the aristocratic spirit”⁸⁵, and thus to institutionalize and isolate the upper classes in the Senate, leaving the House free and democratic. By making the Senate truly aristocratic and separating it from the House, Morris thought, the “personal interest” in checking each other would be established, and thus true

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid., 1:585.

⁸⁵ Ibid., 1:512.

balance between the legislative houses achieved and the interests of both aligned with the interests of the nation.

The first step in securing this system was to make the Senate truly independent of the House: "The aristocratic body should be as independent & firm as the democratic...If the 2nd branch is to be dependent we are better without it. To make it independent it should be for life."⁸⁶ Life terms, or terms of good behavior would serve not only to protect the Senate from being swallowed by popular interests, but also serve to encourage the best of the wealthy class to seek office: "A Senate for life will be a noble bait."⁸⁷ Morris proposed to further refine the membership in the Senate by making the office unpaid: "He was also against paying the Senators. They will pay themselves if they can. If not they will be rich and can do without it." He wanted only the wealthy to be able to hold office in the Senate: "Of such [the wealthy] the 2nd branch ought to consist and none but such can compose it if they are not paid."⁸⁸ If Senators were paid then a poor person could use the office for its salary, diluting the character and the independence of the branch.

Between life terms and the uncompensated office, Morris not only hoped to make it impossible or impractical for the poor to enter the Senate, but also make it unattractive for the very wealthy to hold office in the House, as it would not be seen as prestigious in comparison to the Senate. (This also helps to clarify exactly what kind of class division Morris was talking about – only the very wealthy would be able

⁸⁶ Ibid.,

⁸⁷ Ibid., 1:514.

⁸⁸ Ibid., 1:513.

to serve terms of good behavior without compensation.) The clear distinction between the two branches was necessary in order to keep each class separate from each other, which Morris thought necessary: "Let the rich mix with the poor and in a Commercial Country, they will establish an oligarchy. Take away commerce, and the democracy will triumph. Thus it has been the world over. So it will be among us."⁸⁹ If either class was allowed to dominate, it would become tyrannical. They had to be balanced against each other, each with a share in government, but neither with the full measure of power.

Morris was clear that he *intended* to institutionalize the upper class in the Senate, and that this would come at a cost: "It will then do wrong, it will be said. He believed so. He hoped so."⁹⁰ It was of course this type of comment (and the whole proposal for the Senate) that opened Morris to charges of aristocratic sympathies. But he quickly followed with an explanation: "The rich will always attempt to establish dominion and enslave the rest. They always did. They always will." Given this unfortunate fact, institutional restraints are needed: "The proper security against them is to form them into a separate interest. The two forces will then control each other."⁹¹ The reality, Morris believed, was that the rich and poor would always be at odds.⁹² The pride of the aristocrats would necessarily devolve into abuse of power, and the pride of democrats would always resist the rule of the upper class. It would

⁸⁹ Ibid., 1:512.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Adams, *Gouverneur Morris*, 151-3; Miller, *Incautious Man*, 167.

only harm both sides to simply let them mix together. If one class would always *attempt* to work against the other, “[Morris’s] endeavor was to keep it as much as possible from doing mischief”⁹³ through institutional restraints that turned both interests away from mischief and towards the general welfare.

Morris described the devolution of the nation if the classes were not properly balanced against each other. It probably would begin with the democrats overcoming the aristocrats in the legislature, on account of their superior numbers: “If the members of [the 2nd branch] are to revert to a dependence on the democratic choice, the democratic scale will preponderate. All the guards contrived in America have not restrained the Senatorial branches of the Legislatures from a servile complaisance to the democratic.”⁹⁴ But upon being denied proper protection of law, seeing their standing and their property in peril, the wealthy and powerful could turn the democratic movement to their advantage: “The Rich will take advantage of [the people’s] passions & make these an instrument for oppressing them.”⁹⁵ As usual, Morris emphasized the greater skill and education of the wealthy class, pointing out: “the schemes of the Rich will be favored by the extant of the Country. The people in such distant parts cannot communicate & act in concert. They will be the dupes of those who have more knowledge & intercourse.”⁹⁶ Instead of this chaotic and ultimately tyrannical scenario, Morris proposed, “combining and setting apart the

⁹³ Farrand, *Records*, 1:545.

⁹⁴ *Ibid.*, 1:512.

⁹⁵ *Ibid.*, 1:514.

⁹⁶ *Ibid.*

aristocratic interest, the popular interest will be combined against it. There will be a mutual check and mutual security.”⁹⁷ Each interest was to be controlled and balanced against each other, to the benefit of both classes, and of the whole nation.

Morris's Failure

Morris's proposals for the Senate, and his vision of a mixed regime through the legislature were rejected, and the Compromise plan remained in place. Despite his best attempts, he thought he had failed in creating a balance between socioeconomic classes in the legislative branch.⁹⁸ Now on the surface it seems that Morris's plan was not such a failure. If we only look at the superficial description of the legislature, we could simply say that Morris wanted an aristocratic Senate and democratic House, and in a general way that is what the Connecticut Compromise supported. The House was elected by the people for short terms and the Senate appointed by a more refined body for longer terms. And yet Morris condemned the proposed plan, saying, “...as it is now before us...it threatens this country with an Aristocracy.”⁹⁹ It is helpful at this point to revisit Morris's meaning of “aristocracy”. Neither Morris nor any other delegates advocated a hereditary aristocracy in the United States. However, while many of his contemporaries saw all class distinction as irrelevant to the American project, Morris continued to insist on class conflict as a fundamental problem of

⁹⁷ Ibid., 1:513.

⁹⁸ Miller, *Incautious Man*, 65; Kline calls Morris's plan “irrelevant”. See Kline, *Gouverneur Morris*, 313.

⁹⁹ Farrand, *Records*, 2:202.

politics.¹⁰⁰ Everyone was worried about the potential oppression that could result from an aristocratic class, but Morris claimed to have a more sophisticated understanding of class than many of his contemporaries: “He had long learned not to be the dupe of words. The sound of Aristocracy therefore had no effect on him. It was the thing, not the name, to which he was opposed.”¹⁰¹ According to Morris, “the thing” exists when the upper class is actually allowed to oppress and enslave the people. In the United States, if this were to happen, it would obviously not be through titles of nobility and hereditary positions. Rather, in a commercial republic, the rich would oppress the poor by controlling the government and preventing the people from being truly represented. Morris identified class division with separate interests, not simply with titles or terms of office, and he thought the very wealthy would always have separate interests from the general interest of the people.¹⁰² As I showed above, this principle was always at the heart of the mixed regime – separate classes have separate interests, but these interests can be balanced to prevent either from overwhelming the other.¹⁰³ Morris’s theory therefore, demanded that “the thing”, i.e. an oppressive aristocratic class, be prevented by instead containing the upper class in a single part of the government where they could be properly balanced.

Morris thought that the plan resulting from the Compromise failed to do this for two reasons. First, he thought that in a commercial society such as the one which

¹⁰⁰ Compare to Diamond, *The Separation of Powers and the Mixed Regime*, 40-42; Wood, *The Creation of the American Republic*, 582; Mansfield, *Taming the Prince*, 254-255.

¹⁰¹ Farrand, *Records*, 2:202.

¹⁰² Compare to Aristotle, *Politics*, 1291b5.

¹⁰³ Compare to *Ibid.*, 1289b30-1294a15.

the United States would become, those who owned no property and were dependent on their employers for sustenance would eventually be controlled by the very wealthy. Even in 1787, when according to Morris only ten percent of the citizens were not freeholders, this was enough to significantly impact the make-up of the legislature.¹⁰⁴ This fits with everything we already know about Morris's theory of class politics – the wealthy will take advantage of the poor if they can.¹⁰⁵

The second way Morris thought the legislature would fail to contain the upper class was through the influence of particular states: "As the 2d branch is now constituted, there will be constant disputes and appeals to the States which will undermine the Genl. Government and control and annihilate the 1st branch."¹⁰⁶ It would be all too easy to explain away Morris's fears by calling him a "nationalist" and indeed he was open that his sympathies were so directed.¹⁰⁷ But this does not explain Morris's principle; why he thought that the States would undermine his vision must be explained in some detail. From the beginning Morris was clear that State interests were overwhelming his plan and detracting from the common good, complaining,

He came here as a Representative of America; he flattered himself he came here a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he had heard, he should suppose that we were assembled to truck and bargain for our particular States. He cannot descend

¹⁰⁴ Farrand, *Records*, 2:207.

¹⁰⁵ *Ibid.*, 1:512

¹⁰⁶ *Ibid.*, 1:530.

¹⁰⁷ *Ibid.*, 1:34.

to think that any gentlemen are really actuated by these views. We must look forward to the effects of what we do. These alone ought to guide us.¹⁰⁸

Despite his supposed unwillingness to “descend” to think so ill of his fellow delegates, Morris was not so gentle only a few days later, proclaiming the reality: “[He r]egretted the turn of the debate. The States he found had many Representatives on the floor. Few he fears were to be deemed the Representatives of America.”¹⁰⁹ Over the course of the Convention, it became clear that Morris identified state interests with the interests of the upper class in opposition to the general welfare, and he had at least two good reasons for doing so.

First, Morris was motivated by the negative experience of the nation under the *Articles of Confederation*. While some delegates seemed all too quick to forget the reasons for the Convention, Morris understood that life under the control of the states was far from idyllic. (The same point resurfaces during the debates on the executive. One of the main flaws of the Articles was the lack of an independent executive, and yet many delegates still resisted Morris’s urging for the creation of such an office.) On the contrary, the state governments were corrupt, and dominated by particular interests that contradicted the common good: “State attachments, and State importance have been the bane of this country. We cannot annihilate; but we may perhaps take out the teeth of the serpents. He wished our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a

¹⁰⁸ Ibid., 1:529.

¹⁰⁹ Ibid., 1:567.

particular spot.”¹¹⁰ In Morris’s view, the states should exist for the sake of the citizens, and yet individual state interests constantly overwhelmed the welfare of the citizens. Returning to the Convention and finding not only that a month had been wasted on disputes about state concerns, but that his plan for mixed government in the legislature was disregarded in favor of a state-oriented legislature further substantiated Morris’s suspicions of the states.

It seemed to Morris that to the extent his fellow delegates “trucked and bargained” for their states, they were ignoring more fundamental political realities than the petty differences between one state and another. As far as Morris was concerned, there was no real need for the States (at least as independent entities, as opposed to administrative districts) if an effective national government was established by the new constitution. According to Morris, the citizens were the true sovereigns and yet the states did not truly act for the benefit of the citizens.¹¹¹ If properly constituted, the government would overcome this deficiency. Furthermore, Morris denied that it really made sense for a delegate to favor the special interests of one state over the good of the whole: “Who can say whether he himself much less whether his children, will the next year be an inhabitant of this or that State.”¹¹² What state a person belonged to was potentially temporary, as were the imbalances of population. Morris wanted a system based on permanent features of political life, to

¹¹⁰ Ibid., 1:535.

¹¹¹ Ibid., 2:65.

¹¹² Ibid., 1:531.

deal with the permanent problems of political society, such as the conflict between socioeconomic classes.

However, Morris's second reason for suspicion of the states may have stemmed from something more specific: the institution of slavery protected in particular by southern states. Morris said "It was the thing, not the name [of aristocracy], to which he was opposed."¹¹³ There was no greater evidence of an oppressive aristocracy than the corrupt slave-based culture that dominated the southern states.¹¹⁴ It was not by accident that Morris critiqued aristocracy in those terms: "The rich will always attempt to establish dominion and *enslave* the rest."¹¹⁵ While in most cases the rich "enslaved" the poor by lowering the quality of their life, or tying them down through low wages, manipulation, etc., real slavery, control over the life, liberty and property of another human being, was the very worst of aristocracy. No other oppression could be as harmful, or as complete. In addition to this, only the wealthiest citizens could afford to own slaves; the institution was not only aristocratic in itself, but served to further the stratification of upper and lower classes even among freemen.¹¹⁶ Though Morris thought some division between classes was inevitable, the institution of slavery would needlessly exacerbate that distinction.

¹¹³ Ibid., 2:202.

¹¹⁴ Ironically, one of the principle apologists for slavery at the Convention, Charles Pinkney of South Carolina, was also one of the foremost critics of Morris's vision of mixed government, saying it would never work because there was no aristocracy in America. Ibid., 1:399. Pinckney clearly missed Morris's point that hereditary or titled nobility is not the only form of aristocracy.

¹¹⁵ Emphasis added.

¹¹⁶ Kirschke, *Gouverneur Morris*, 175.

Morris had always opposed the institution of slavery, going back to his days writing the constitution for New York in 1777, where he argued vehemently for the proposition “that every being who breathes the air of this State shall enjoy the privileges of a freeman”,¹¹⁷ and asked for a constitutional provision to abolish slavery in a “manner consistent with public safety.” The interests of slaveholders in New York were too entrenched, and Morris was forced to back down.¹¹⁸ But his principled opposition to slavery did not die, and of all the delegates at the Constitutional Convention, Morris was the foremost opponent of any provisions supporting the institution of slavery:

He never would concur in upholding domestic slavery. It was a nefarious institution--It was the curse of heaven on the States where it prevailed. Compare the free regions of the Middle States, where a rich and noble cultivation marks the prosperity and happiness of the people, with the misery and poverty which overspread the barren wastes of Va., Maryland, and the other States having slaves. Travel thro’ ye whole Continent and you behold the prospect continually varying with the appearance and disappearance of slavery. The moment you leave ye E. States and enter NY the effects of the institution become visible; passing thro’ the Jerseys and entering Pa. every criterion of superior improvement witnesses the change. Proceed Southwardly and every step you take thro’ ye great regions of slaves, presents a desert increasing with ye increasing proportion of these wretched beings.¹¹⁹

At the time of the Convention, Morris thought just a few states were holding up a national trend towards abolition of slavery. At first Morris expressed his frustration with this situation, saying he was “compelled to declare himself reduced to the dilemma of doing injustice to the Southern States or to human nature, and he must

¹¹⁷ Adams, *Gouverneur Morris*, 84.

¹¹⁸ Kirschke, *Gouverneur Morris*, 62.

¹¹⁹ Farrand, *Records*, 2:221-222; Despite Morris’s efforts, New York still held approximately 23,000 slaves, the 4th most of any state, so Morris contrasts his home state with other Northern states.

therefore do it to the former.”¹²⁰ If the new Constitution was to allow the slave trade, and thus do injustice to humanity, Morris wanted it to include a clause blaming the Carolinas and Georgia explicitly: “This he said would be most fair and would avoid the ambiguity...He wished it to be known also that this part of the Constitution was a compliance with those States.”¹²¹ Therefore not only was Morris opposed to slavery as the primary instance of actual oppressive aristocracy in the nation, but he also saw the institution as inherently tied to special interests in opposition to the national interest. It is no surprise therefore, that he equated state control of the national legislature with a tyrannical aristocracy in that body.

In summary, Morris was afraid that the legislature as constituted would establish an oppressive aristocracy. This would not be done through titles or hereditary offices, but by directing the national government (especially through the states) toward the interests of the wealthy class rather than the general welfare. To use modern terminology, Morris connected the states to the “special interests” of the wealthy, and saw this as opposed to the public interest of the people at large. David Nichols claims that it was Morris’s nationalism and desire for effective government that led him to oppose state interests: “This concern, not a preoccupation with class conflict motivated his arguments.”¹²² But this misses the bigger picture. For Morris, the conflict between state and national interests was intimately connected to the conflict between rich and poor. For Morris, state interests were identified with the

¹²⁰ Ibid., 1:588.

¹²¹ Ibid., 2:415.

¹²² Nichols, “Gouverneur Morris”, 263.

special interests of the wealthy, and the national interest was identified with the welfare of the people. This is most obvious on the issue of slavery, which is an extreme example of an oppressive upper class acting against the public interest. Although Morris did not think it was possible (or wise to try) to destroy the existence of the upper class, he did think that through proper balancing and institutional restraints, each class could be represented in government and a real, oppressive aristocratic rule could be avoided.

Morris intended to balance socioeconomic classes through the separation of powers, initially attempting to satisfy this goal by creating a balance within the national legislature. The House of Representatives was to be democratically elected and hold office for short terms, keeping it dependent on and sensitive to the people. The Senate was to be appointed for terms of good behavior, without pay, so that only the aristocrats could hold office there, and so that by comparison the House would seem unattractive to them. Morris thought the legislature failed to provide real distinction between the House and Senate; the “noble prize” he had tried to institute in the upper branch was absent, leaving each branch vulnerable to infiltration by the other. He tried to make it impossible for the lower class to get into the second branch, and to make the first branch unattractive to the upper classes, but he failed on both counts. More importantly, Morris thought the legislature had been left open to control by special interests, which Morris connected to the upper class, rather than to the people. If the wealthy class was in control of the whole legislature, some other office would have to be used to protect the people and advance the public interest against the entrenched special interests. Therefore as the debates at the Convention

continued, and the discussion turned to the executive power, Morris's plan for the new Constitution shifted towards the creation of a popular executive to balance out the aristocratic legislature.

CHAPTER FIVE

Morris at the Convention: Success through a Popular Presidency

Gouverneur Morris consistently held that division between upper and lower classes is a permanent feature of political life, but that institutionalizing both classes in a separation of powers framework would allow each class to thrive without harming the other. Since he thought the national legislature as constituted after the Connecticut Compromise would be controlled by the special interests of the upper class, Morris needed to establish the popular interest in the executive branch. Following the pure doctrine of separation of powers, he intended to do this by making the executive totally independent of the aristocratic legislature and connected the people, while giving him sufficient power to act with vigor. With this powerful “champion of the people”, Morris thought he could achieve balance of the classes through the separation of powers.

Morris regularly emphasized the executive as an equal part of the separation of powers framework, especially in reaction to legislative primacists. The sources of this emphasis can be traced partially in his family history and his education, the early result of Morris’s principles as enshrined in the New York state constitution, and the reinforcement of his principles during his tenure as delegate to the Continental Congress and assistant minister of finance. In the second half of the Convention of 1787 he advocated for the powerful national executive who would be the guardian of the people, creating a balance between the aristocratic legislature and the democratic executive. It was a difficult task, and nearly the whole body of delegates opposed

Morris's goal, but he was ultimately successful: as one commentator said, "[Morris] was determined to play for high stakes – and the remarkable thing is that he won on almost every point."¹

Morris's Attitude toward Executive Power

Executive power always seems to have been an emphasis for Morris. And he was fairly unusual in this regard, since there was a widespread bias in favor of legislative power in the young nation on account of abuses by the British executives and commitment to republican principles. (The same mindset prevailed in France a few years later, for similar reasons.) This jealousy of executive power resulted in extraordinarily weak or subservient executives in states other than New York, as well on the national level.

But Morris did not show favor to the executive over the legislature, although it might appear that way as he constantly had to defend the independence of the executive against legislative primacists. Miller argues that Morris's constitutional vision centered on the executive, and this is partially true but somewhat misleading. There is no evidence that Morris actually preferred executive power to legislative; rather in the face of widespread jealousy of the executive branch he ended up emphasizing it more than most men of his day. Morris may have even thought that the executive was the most important or interesting part of a good government. He did not, however, argue for its supremacy or superiority to the legislature, in contrast to those of his opponents who openly argued that the legislature should be supreme

¹ Robinson, "Design of the American Presidency", 320.

over the executive. He consistently held that the proper formulation of separation of powers demanded independent, equal branches, which is exactly in line with the pure doctrine I discussed in Chapter Two. The source of this principle for Morris predated even his work on the New York constitution, and was substantiated both by Morris's personal experiences and by the state and national experiences of government from 1776 to 1787.

Early Influences

Morris does not seem to have ever shared the widespread fear of executive power. He was already convinced of the need for a powerful independent executive by age 25 when he (together with John Jay and Robert Livingston) helped write a new constitution for the state of New York. The fact that Morris had already developed his political theory at this early age, as some Morris scholars note,² makes it difficult to explain the sources for his political theory as it relates to executive power. Some scholars have mentioned that Morris was a “conservative” in an attempt to explain his early focus on executive power.³ Although the term “conservative” is nebulous, in this context it seems to refer to the fact that Morris did not share many of his contemporaries’ thirst for revolution, nor their distaste for the British system. On the contrary, as late as 1774 Morris thought it possible to maintain relations with Britain, and hoped for reconciliation.⁴ By 1776, when it became clear that such a

² Mintz, *Gouverneur Morris*, 72; Adams, *Gouverneur Morris*, 82.

³ Thach, *Creation of the Presidency*, 23; Adams, *Gouverneur Morris*, 81.

⁴ For an analysis of Morris’s reasons for caution, see Kaufman, *The Constitutional Views of Gouverneur Morris*, chap. 2-3; For an alternative view, see Willi Paul Adams, “The Spirit of Commerce

reconciliation was impossible, Morris immediately demanded that a new constitution be written for the state, lest liberty turn into anarchy. But the new constitution was not to be a revolution in itself; on the contrary, Morris wanted to retain most of the old institutions unchanged.⁵ Clearly some new executive needed to be set up to replace what had been first the prerogative of the Crown, and then the Provincial Congress and various *ad hoc* or emergency committees.⁶ It was at this point that a “conservative” like Morris could advocate for a powerful executive, free from the mistrust and jealousy of executive power that characterized many revolutionaries, as I mentioned in the previous chapter.⁷ As Theodore Roosevelt pointed out: “[Morris] did not let the memory of the wrong-doing of the royal governors blind him; he saw that the trouble with them lay, not in the power they held, but in the source from which that power came. Yet few or none of his companions could see this...”⁸ But calling Morris a conservative fails to give a cause, it merely gives us an easier label to apply. There are two more specific factors mentioned in the literature on Morris, causes which might also help us understand the term “conservative” as applied to Morris and how this term explains his emphasis on executive power.

Brookhiser implies that Morris's affinity for executive power might come from his familial connections to powerful governors. Gouverneur Morris's grandfather

Requires that Property Be Sacred”: Gouverneur Morris and the American Revolution,” *American Studies* 21, no. 2 (1976): 309-334.

⁵ Kaufman, *The Constitutional Views of Gouverneur Morris*, 252; Adams, *Gouverneur Morris*, 81.

⁶ Mintz, *Gouverneur Morris*, 74; Adams, *Gouverneur Morris*, 81.

⁷ Brookhiser, *Gouverneur Morris*, 32.

⁸ Roosevelt, *Gouverneur Morris*, 54.

Lewis was a famously powerful governor of New Jersey, and his uncle was similarly dominant as governor in Pennsylvania. Conversely, Morris's family had famously clashed with an oppressive governor in New York.⁹ According to Brookhiser, this differentiated Morris from other members of the convention who “had all the Morris’ bad memories of bad governors, without their experience of being good ones.”¹⁰ There is no doubt that the Morris family experienced more directly the benefits of executive authority. And certainly Gouverneur Morris was able to approach the topic of executive power in a balanced way – he knew that tyranny did not follow necessarily from a strong executive, and that an unchecked legislature could easily devolve into tyranny without a proper executive.¹¹ Ultimately, Morris's family history does not seem to be enough to explain Morris's affinity for executive power. Every biographer of Morris discusses his family and attaches some importance to the character or status of his ancestors, and Morris was both aware and proud of his grandfather’s influential place in the colonies of New York and New Jersey.¹² But he did not personally know his gubernatorial ancestors, and his own father died when Gouverneur was still a child. That being said, his familial connections do help to explain why Morris might be considered a “conservative”. His family had long been one of the elite factions of New York political and social life, which certainly must have helped Morris feel more comfortable with institutions that

⁹ The famous Zenger trial resulted from a Morris-sponsored newspaper opposing the governor. Lewis Morris paid for Zenger’s defense.

¹⁰ Brookhiser, *Gentleman Revolutionary*, 32.

¹¹ Roosevelt, *Gouverneur Morris*, 54.

¹² Miller, *Incautious Man*, 3, Adams, *Gouverneur Morris*, 11.

seemed less republican, including independent and powerful executives at the state and national level.

Beyond his ancestral ties, in trying to understand why Morris possessed an affinity for powerful executive institutions, some scholars have emphasized the education Morris received at King's College, and how this influenced Morris as early as the 1777 New York state convention.¹³ In particular, Morris was steeped in Greek and Roman classics from an early age. Some scholars have emphasized the classical nature of Morris's education in an attempt to explain his political leanings: the experience of Athens and republican Rome point to a basis for Morris's persistent emphasis on the need to allow the educated elites a particular place in government, and generally helps to explain Morris's affinity for the mixed regime.¹⁴ Morris's formal education did not include much modern philosophy, but at some point Morris clearly read Locke and Montesquieu, among other modern philosophers, and seems to have developed a particular affinity for Montesquieu.¹⁵

Whichever of these influenced Morris, by the time he came to Kingston to frame a new state constitution he was already determined to defend the pure separation of powers doctrine against those who sought to subordinate the executive in the newly independent state. It may actually be unfair to Morris to say he was preoccupied by executive power; his positions were always in line with a strict

¹³ Adams, *Gouverneur Morris*, 80; for the most detailed account of Morris's education see Kirscke, *Gouverneur Morris*, 5-13.

¹⁴ Kirscke, *Gouverneur Morris*, 11.

¹⁵ Ziesche, "Exporting American Revolutions", 441.

formulation of the doctrine of separation of powers. Independence of each branch from the other is necessary, but Morris was constantly forced to defend the executive's integrity against the attacks of over-enthusiastic democrats who were too willing to leave behind the separation of powers framework. Morris never argued for the supremacy of the executive, only for its independence from the legislature. Since he did not share their fear of seeming too British (Morris did have a reputation for not caring what people thought of him), and since he maintained a conservative respect for old institutions, Morris was able to consistently defend the executive's independence in the separation of powers framework against legislative primacy.

Morris's Experience in New York

Morris's experience in framing the New York state constitution, and seeing over the following decade the beneficial results of his handiwork, further solidified his principle of protecting executive independence and authority in the face of attacks from legislative primacists.¹⁶ The governor Morris advocated in New York would have been made the commander-in-chief of the militia and navy of the state, and given the power to convene and prorogue the legislature, to grant reprieves and pardons, to address and make recommendations to the legislature, to veto legislation and to make appointments.¹⁷ The last two provisions proved most controversial, and a council of revision consisting of the governor, chancellor, and supreme court judges

¹⁶ For a complete analysis of Morris's work on the New York constitution, see Kaufman, *The Constitutional Views of Gouverneur Morris*, chap. 4; Compare to Lincoln, *A Constitutional History of New York*, Vol. I, chap. 2.

¹⁷ Kauffman, *The Constitutional Views of Gouverneur Morris*, 206.

replaced the individual veto, and a council of appointment, on which the governor presided with only a single vote, replaced the individual appointment power. It appears that there was little discussion of these – although records are incomplete, Morris seems to have been basically alone in advocating individual veto and appointment powers for the governor, and neither proposition ever had a chance of passing the convention. Morris was disappointed by his partial failure, and complained to Hamilton, “I think it deficient for the Want of Vigor in the executive” which he blamed on “suspicious caution.”¹⁸

However, despite that fact that Morris would have preferred an even more powerful governor, New York established an executive with more authority and independence than in any other state.¹⁹ As Thach shows, the other state constitutions differed from New York’s by including “almost every conceivable provision for reducing the executive to a position of complete subordination.”²⁰ The executive was often elected by the legislature or another intermediary body, and limited to a term of single year, sometimes without re-eligibility.²¹ Many states subordinated the executive either to a list of enumerated powers, or to the legislative will.²² No state other than New York allowed the governor even a qualified veto.²³ According to

¹⁸ Gouverneur Morris to Alexander Hamilton, May 16, 1777; For a summary of Morris’s hopes for the New York executive, see Kaufman, *The Constitutional Views of Gouverneur Morris*, 206-207.

¹⁹ Robinson, “Design of the American Presidency”, 320; For a complete discussion of state executives 1776-1787, see Thach, *Creation of the Presidency*, chap. 2.

²⁰ Thach, *Creation of the Presidency*, 16.

²¹ Ibid.

²² Ibid., 17.

²³ Thach, *Creation of the Presidency*, 29; Kirschke, *Gouverneur Morris*, 59.

Thach's analysis, separation of powers in the states simply meant executive subordination to the legislature, but New York was an important exception to this rule.²⁴ The New York state constitution vested the "supreme executive power and authority of the state"²⁵ in the hands of a governor. (New York was the only state with such a vesting clause, which Morris copied into Article II of the US Constitution.²⁶) He was elected for a three-year term by the people, not the legislature, as well as given the shared power of appointment and veto. Unlike in most other states, the governor was not given these powers with some kind of qualification by the legislature; rather, "They are the governor's, by direct grant of the people, and his alone."²⁷ The governor was not only in office for three years, as long or longer than in any other state, but always re-eligible for office, so that rather than being isolated from the citizens as in other states, the governor of New York was directly responsible to the people, and dependent only on them for his continued term in office. (The first governor under this constitution, George Clinton, was re-elected six times, despite widespread opposition from powerful men such as Hamilton and Livingston.) The result was that the legislature was limited in theory *and* practice by the constitution, and by extension, the constitution in New York was truly a governing document in a way that was not true in other states.²⁸

²⁴ Thach, *Creation of the Presidency*, 17-18, 23.

²⁵ New York constitution of 1777, art. 17 as cited in Thach, *Creation of the Presidency*, 24.

²⁶ Bessette, "Powers and Duties", 39.

²⁷ Thach, *Creation of the Presidency*, 25.

²⁸ Thach, *Creation of the Presidency*, 30-31.

The success of the New York executive became evident in the years following the 1777 ratification of the constitution, and some states had already moved toward following New York's example. Other states had "thrown all power into the legislative vortex," and that vortex was their destruction: "if no effective check be devised for restraining the instability and encroachment of the [legislatures], a revolution of some kind or the other would be inevitable."²⁹ As Thach observes, attitudes about executive power were not the same in 1787 as they had been in 1776³⁰ and this was greatly due to the success of the New York executive and the relative failure of the other state constitutions.³¹ Thus Morris's early position regarding strict separation of powers and the executive was confirmed by a decade of ineffective state executives and the unique success of the New York state executive.

Experience in Philadelphia

Beyond the accomplishment of the 1777 New York constitution, Morris's experience both as a delegate to the Continental Congress and later as assistant minister of finance under Robert Morris must have further substantiated his belief that a strong and independent executive was at the foundation of a good government. The nature of the institutions of the national government under the *Articles* can be confusing. There were no *constitutional* executive offices, any executives being mere creatures of the Congress. But despite the fact that Congress was named and

²⁹ Farrand, *Records*, 2:35.

³⁰ Thach, *Creation of the Presidency*, 63.

³¹ *Ibid.*, 43.

structured as a legislature, it was not a legislature in the strict sense, since it could not pass and enforce policies except over the officers that it created. The proceedings of the Congress had no binding effect on the states. The result was that there was no true executive or legislature, but an administrative body in Congress which carried out its business (which generally concerned foreign policy or the war effort) through committees or officers appointed by the Congress for (sometimes absurdly specific) purposes.³² This was undeniably chaotic and disorganized. Not only were there dozens of special committees, but each worked within the instructions that came with its creation with varying amounts of independence.

In one sense, then, Thach is correct to say that the experience at the national level was more or less the same as at the state level, and it created a demand for an independent and powerful executive. In both cases, lack of a strong executive led to disorder and ineffective government. But given the difference in purpose and structure between the national and state governments, an attempt was made to partially remedy the problem at the national level in a way it never was in the states, through the use of executive committees. As the problematic lack of a real executive authority became clear, the Congress simply relied more and more on committees and individuals appointed for specific executive functions. But even as the difficulty of having a working government without an independent executive was slowly accepted, a solution within the *Articles* was difficult, since any executive (even a

³² For a detailed account of executive power 1776-1787, see Thach, *Creation of the Presidency*, chap. 3; See also Richard B. Morris, "The Origins of the Presidency," *Presidential Studies Quarterly* 17 no. 4 (Fall 1987): 673-687.

committee of one) would have to be created by the legislature, a fundamental violation of the doctrine of separation of powers. Thus true independence for the executive could not be accomplished within the bounds of the *Articles*. This structural impasse served as a convincing proof that an independent constitutional executive was needed to replace the system of the *Articles*.

Beyond the widespread understanding of the systemic failure of the *Articles*, Morris had numerous personal experiences that substantiated his early belief in executive power. Morris arrived in Yorktown in January 1778, where Congress was waiting out the British occupation of Philadelphia, and was immediately sent to Valley Forge on committee.³³ Morris wasted no time in submitting plans to Congress not only for restructuring the army's procurement system, but also for reorganizing the whole Army. As the year progressed Morris chaired or served on more than a dozen important committees, allowing him to experience first-hand the chaos of the system. Later in 1778 Morris drafted a plan for reorganizing the executive committee system with boards of expert officers to deal with war, admiralty, and commercial issues, all under a committee of three or one officer, the "Chief of the States Who should superintend the Executive Business." So within less than a year of taking his seat in Congress Morris was already attempting to establish the kind of executive he advocated at the Constitutional Convention nine years later.³⁴ Clearly Morris's tenure as a delegate to Congress from 1778-80 exposed him to the inefficiency and

³³ For a detailed account of Morris's service in the Continental Congress, see Kirschke, *Gouverneur Morris*, chap. 3, 68-120.

³⁴ Kirschke, *Gouverneur Morris*, 56.

disorganization of the national institutions, and helped to remind him of the need for reformation of the executive.

As if this was not enough, Morris was reminded of the need for executive reform while serving as assistant minister of finance from 1781-1784 under the great financier of the Revolution, Robert Morris.³⁵ According to Robert Morris, the office was established to remedy numerous pressing difficulties: "The Derangement of our Money Affairs. The Enormity of our public Expenditures. The Confusion in all our Departments. The Languour or our general System. The complexity and consequent Inefficiency of our Operations."³⁶ The war had been financed partly through foreign loans and requisitions on the states, but primarily from domestic loans raised by issuing paper money. Inflation was rampant, and this was obstructing Congress's ability to effectively supply troops and wage the war. The Morrises were essentially charged with restoring the financial security of Congress and maintaining its ability to finish the war.³⁷

The disastrous state of the nation's finances required prompt and energetic executive action, and the Morrises were up to the task. Robert Morris wielded executive power as few others did at the time – he was probably one of the most powerful men in the country.³⁸ He ruled his department with an iron fist. When he

³⁵ For a detailed account, see Kirscke, *Gouverneur Morris*, chap. 4, 113-157; For an alternate view, see Adams, *Gouverneur Morris*, chap. 7, 123-144; For a short account of Morris's time in the Finance Office see Brookhiser, *Gentleman Revolutionary*, 67-74.

³⁶ Kirscke, *Gouverneur Morris*, 113.

³⁷ Brookhiser, *Gentleman Revolutionary*, 68.

³⁸ Adams, *Gouverneur Morris*, 130.

was given charge of the Office of Finance, he demanded a broad executive power, to be allowed to make all appointments within his department, and to dismiss anyone in any department who handled public property. When the national bank was created, he was given full control of it.³⁹ Gouverneur Morris was Robert Morris's right-hand man – the elder Morris said of his assistant, "I can do nothing without him". Together the Morrises planned a radical reform to "pull the bands of authority together, establishing the power of Government...and confirming the Federal union...by correcting defects in the general Constitution."⁴⁰ Gouverneur Morris personally authored a series of proposals for finance reform including a new coinage system, a national bank, tax reform, and assumption of all war debt by the national government.⁴¹ Much of this served as an inspiration for Hamilton's more famous *Report on the Public Credit*.⁴²

Using the considerable executive power situated in their office, the Morrises made immediate progress. In less than two years, they had accomplished a reform of the currency, established a national bank (partially funded by Robert Morris's private fortune), and started a national mint.⁴³ This helped restore the public's confidence in the national government which in turn provided additional foreign and domestic

³⁹ Kirschke, *Gouverneur Morris*, 126, 136.

⁴⁰ Robert Morris to Benjamin Franklin, as cited in Adams, *Gouverneur Morris*, 132.

⁴¹ On the coinage system see Kirschke, *Gouverneur Morris*, 138-140. On tax reform see Adams, *Gouverneur Morris*, 135-136.

⁴² Kirschke, *Gouverneur Morris*, 114, 137; Miller, *Incautious Man*, 53.

⁴³ Kirschke, *Gouverneur Morris*, 140.

sources of financing.⁴⁴ By no means did the Morrises solve all the financial problems, and indeed Gouverneur Morris suspected that some problems could not be effectively solved without changes to the *Articles*.⁴⁵ But, mostly on account of the independence and broad executive power they held, the Morrises managed to stabilize the finances of the young nation. Given the executive character of the Finance Office, Gouverneur Morris's personal experience as assistant minister of finance could only have further solidified his belief (if he needed any more convincing) in the necessity of a strong independent executive for an effective government and peaceful society.

In summary, Morris's history of emphasizing executive power, grounded in the history of his family and his education, and most importantly in his devotion to the pure doctrine of separation of powers, led him to advocate an independent and powerful popular executive as early as 1777 when he helped write the New York state constitution. The success of the New York governor as compared to other state executives, the failure of the *Articles* in this regard, and Morris's personal experience on the national level in Congress and in the Finance Office served to substantiate Morris's early views in favor of pure separation of powers and his emphasis on executive power in the face of legislative bias.

⁴⁴ Miller, *Incautious Man*, 52-53.

⁴⁵ Adams, *Gouverneur Morris*, 135.

Morris's Plan for the Executive

Gouverneur Morris arrived at the Constitutional Convention with ample personal and national experience demonstrating the need for the executive to be independent and powerful.⁴⁶ But as I argued in the previous chapter, the national legislature resulting from the Connecticut Compromise gave Morris an additional motivation for advocating on behalf of the executive – he thought that the legislature would be controlled by the wealthy, driven by special interests rather than the general welfare. A popular president was needed to represent the popular interest and balance out this aristocratic legislature. Thus the central point of Morris's whole plan for the Constitution was to make the president elected by the people. This would secure both aspects (mixed government and separation of powers) demanded by his political theory.⁴⁷

The Role of the Executive

The national executive had barely been discussed while Morris was absent from the Convention, but the debates shifted to that branch of government on July 17. At this point, the conversation followed a similar path as that on the legislature, covering election, term of office, and eligibility.⁴⁸ Morris signaled his particular

⁴⁶ For an alternate account of Morris's role in the formation of the presidency, see Robinson, "Gouverneur Morris and the Design of the American Presidency" or R. Gordon Hoxie, "The Presidency in the Constitutional Convention," *Presidential Studies Quarterly* 15, no. 1 (Winter 1985): 25-32; For a brief description, see Nichols, "Gouverneur Morris", 264-268; For a detailed account, see Kaufman, *The Constitutional Views of Gouverneur Morris*, chap. 10.

⁴⁷ Besides the previous chapter, for an analysis of Morris's fear of the legislature and plan for the executive, see Best, "Legislative Tyranny".

⁴⁸ Slonim points out these issues form a kind of "tripod" whereby changing one "leg" can create an imbalance with the other two. This is worth keeping in mind moving forward.

interest in the executive on July 19, saying, “This subject [of executive power] was of so much importance that he hoped to be indulged in an extensive view of it.”⁴⁹ (It was certainly not the only time Morris shared “extensive views” at the Convention, but it is the only time recorded that he made note of the importance of a topic and asked on that account to be indulged at length.) Morris was clearly aware of the widespread jealousy of the executive, and knew he would need to lead the fight for an independent and powerful executive just as he had done a decade earlier in New York, if strict separation of powers was to be secured. He thus gave a broad overview of his plan for the constitution of the executive.

Morris wanted the president to be the “guardian of the people” and an independent, energetic check on the aristocratic legislature. He began this project by laying out the details of his view on the executive branch: “It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy and utility of the Union among the present and future States.” This theory centered on the notion of the executive as a restraint on the aristocratic legislature, which according to Morris “will continually seek to aggrandize and perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose.” In particular the legislature would advance the interests of the wealthy, and it would be up to the executive to guard against “Legislative Tyranny, against the Great and the wealthy who in the course of things will necessarily compose--the Legislative body.” Morris

⁴⁹ Farrand, *Records*, 2:53.

argued that if the upper class indeed controlled the legislative branch, tyranny was bound to occur, because despite their good qualities, the wealthy could not be trusted to restrain themselves, nor to thwart their own vice: "Wealth tends to corrupt the mind and to nourish its love of power, and to stimulate it to oppression. History proves this to be the spirit of the opulent."⁵⁰

Morris went on to describe how theoretically the Senate and House might indeed act as a check on one another, but as described in the previous chapter, the lower house was too susceptible to "seduction" by the upper, and there are no intra-institutional mechanisms to prevent this. Even organized in the way that Morris's opponents understood the future of the legislature, Morris said, the Senate "was not meant as a check on Legislative usurpations of power, but on the abuse of lawful powers, on the propensity in the 1st branch to legislate too much...It was no check on Legislative tyranny." In other words, the Senate might moderate the unstable elements in the House, preventing it from passing imprudent laws, but there was no check inside the legislature to prevent the whole legislative body from becoming tyrannical, acting against the interest of the people at large. Since Morris thought it was unavoidable that the legislature as constituted would be dominated by special interests, and composed of the "great and wealthy", he responded with a proposal for a popular executive: "The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people."⁵¹

⁵⁰ Ibid., 2:52-54.

⁵¹ Ibid.

The Institutional Structure

In order to allow the executive to act as “guardian of the people, even of the lower classes, against Legislative Tyranny”, it was first of all necessary to make him independent of the legislature. As noted above, this seemingly obvious principle that the executive should be independent of the legislature, which is the whole basis for the theory of separation of powers, was not assured at the time – the only state with an executive truly independent of the legislative branch was New York, and the executives under the *Articles* were created and controlled by the Congress. And there were still delegates like Sherman, who was “for making [the executive] absolutely dependent on the legislature”, and went so far as to claim, “An independence of the executive...was the very essence of tyranny.”⁵² To be sure State and national experiences leading up to 1787 showed the need for independent executive power, and certainly attitudes were different at the Convention than they had been around 1776. Sherman was an outlier – most delegates wanted the executive to have some measure of independence, and generally wanted the executive branch to be constitutionally established separate from the legislature. Still, there was wide disagreement on what exactly constituted “independence” of the executive, and how it would be properly achieved.

In particular, there was deviation on whether the independence would simply consist of a separate constitutional grant, or whether it would also be grounded in a structural separation. As I noted above, the New York state constitution stood out for

⁵² Ibid., 1:68.

its time partially because the *constitution* gave the executive his power, not the legislature. It was clear from the language of the constitution alone that the governor was *not* a mere tool of the legislature. This vesting of independent authority was secured institutionally by putting the election of the governor in the hands of the people. The constitution and the people therefore worked together to maintain a true separation of powers framework in the state of New York. The problem Morris faced at the Convention was that although most delegates, because of the experience 1776-1787, favored a constitutional independence (the constitution, not the legislature would explicitly grant executive power to the president without dependence on the legislature) they were not so overwhelmingly in favor of supporting that independence with institutional protections. In other words, even the delegates who theoretically believed in making the executive independent were often not committed to the institutional structure needed to make such an executive a practical reality.

So there was serious controversy over the exact constitution of the executive branch, with the debate on the structure of the office centered on three inter-related parts – the electors, term lengths/re-eligibility, and impeachability.⁵³ Although the exact method of the election was debated (whether one branch of the legislature or both would vote, whether representatives would vote as individuals or by state, etc.), the most popular plan which held for much of the Convention was that the president

⁵³ There was never a serious challenge to the idea of a unitary executive. This was one of the main results of the experience from 1776-1787.

would be appointed and impeachable by the national legislature.⁵⁴ Morris's opposed this plan from the start: "[He] was pointedly against his being so chosen. He will be the mere creature of the Legislature."⁵⁵ Morris proceeded to discuss the corruption that he thought would follow from legislative appointment: "If the Legislature elect, it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment."⁵⁶ Morris advocated popular election instead, saying that not only would this ensure that the executive protected the interests of the people, it would also ensure that men of true merit would be elected.

At first it might seem that Morris's attachment to popular election needs no explanation – the guardian of the people should be chosen by the people. But Morris's reasons for arriving at that conclusion are more complex, and require some discussion. Morris wanted the executive to be the guardian of the people against the legislature and held that this would require serious independence from the legislature. And he thought that the generally accepted system of legislative appointment did not provide real independence. It is on this issue that we see the fullness of Morris's political theory, and how he incorporated elements of both the doctrines of the mixed regime and of separation of powers. Morris wanted the executive to be democratic, which meant keeping him independent and separate from

⁵⁴ Election by state legislatures was discussed, but the idea never gained much traction. Interestingly, in July the Convention moved to a system of electors chosen by the state legislatures, instead of direct election by the national legislature, before reverting to the latter three days later.

⁵⁵ Farrand, *Records*, 2:29.

⁵⁶ *Ibid.*

the aristocratic legislature, which meant having him elected by the people, which would make the president responsible to the people, and thus make the office democratic, which was the whole purpose in the first place. This point cannot be overstated – popular election of the executive was *the central idea* in Morris's plan for mixed government through separation of powers. Without popular election, the system would fail to balance socioeconomic classes, and would fail to provide proper separation of government functions.

Initially Morris went so far as to argue against the plan to make the executive impeachable by the legislature: "This [making the president impeachable] is a dangerous part of the plan." Morris linked the "danger" to the popular nature of the executive he envisioned: "It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest." Rather than representing the people, the national executive would be captured by special interests and no longer represent the public interest: "He will be the tool of a faction, of some leading demagogue in the Legislature."⁵⁷ He said that it was enough of a safeguard against corruption in the executive branch to make subordinate executive officers impeachable, since the chief executive would be handicapped if his subordinates were constantly being replaced. But Morris wanted the executive himself to be immune from any further influence by the legislature.

However a few days later he changed his mind: "He had been opposed to the impeachment, but was now convinced that impeachments must be provided for...No

⁵⁷ Ibid., 2:52-54.

man would say that an Executive known to be in the pay of an Enemy, should not be removable in some way or other.”⁵⁸ But if impeachment was necessary, then the executive *could not* also be appointed by the legislature. If the legislative branch had both powers of appointment and impeachment, then any president who did not exactly follow the legislature’s wishes could be removed, with the knowledge that the same legislature could choose his successor immediately. On a practical level this institutional structure would make the executive nothing but a tool of the legislature, despite the constitutional vesture of executive power in the president. Since Morris was now convinced that the executive had to be impeachable, lest a traitor to his country be allowed to remain in office, he argued for another change in the system so that the executive could be impeachable while remaining independent and able to represent the people.

Morris had already said on July 19th that he preferred either election by the people or election for life by the legislature rather than election for a limited term by the legislature.⁵⁹ But once he had changed his mind on the matter of impeachment, such a change became a necessity. In other words, if the executive were appointed by the legislature but not impeachable, then at least he could act with independence during his term. This would only be a partial independence, since he would still be dependent on the legislature for reelection. But once Morris was convinced of the need for impeachment, some other device was needed to ensure the independence

⁵⁸ Ibid., 2:103.

⁵⁹ Ibid., 2:42-54.

which is the basis for a functional separation of powers system. Popular election or a life term would secure the independence of the office.

If the executive was elected for life, it would not matter who elected him, and he would not have to subordinate himself to the legislature for the sake of remaining in office. He would be more secure in his office than the legislators ever could be, and so would be able to safely balance against them, to work as the guardian of the people in the interest of the whole nation. This system still presented some difficulty, since in theory the legislature could constantly keep removing and replacing the president, making the life term irrelevant. Morris does not seem to have considered the full implications of this proposal – he may have simply mentioned it reflexively, since it was commonly held that a life term would insulate an officer from undue influence (thus the life terms of Supreme Court justices). But it seems doubtful that a life term for the national executive would accomplish Morris's goal of independence. He seemed to realize this later, when he pointed out that with a limited term the legislature had two options for dealing with a difficult president – impeach him, or simply wait until he is out of office.⁶⁰ Presumably without the second option the legislature would be far more interested in the first. However seriously or flippantly Morris mentioned the idea, a life term for the national executive was never a realistic possibility. As I showed in the previous chapter, sentiment against monarchy was so strong that any appearance of similarity caused controversy, so there was no chance of a unitary executive with a life term getting approved.

⁶⁰ Ibid., 2:551.

This left Morris with no option other than to pursue popular election, or leave the executive completely subordinate to the legislature. It is somewhat ironic that although his detractors called Morris aristocratic for proposing an executive with life tenure, he proposed this only because most delegates refused to sanction popular election – he never proposed a popularly elected executive with a life term. Morris preferred popular election, but the life term was an *alternative* to popular election, designed to achieve the same goal – independence for the executive, which would allow him to represent the people. Morris’s first principle was that the executive was to be the champion of the people. This could best be accomplished through the separation of powers, which demanded independence from the legislature. And if impeachment was to be allowed, independence would come only from either popular election or life terms. Since few delegates would ever agree to life terms, the only method left for making the executive the guardian of the people was to have him elected by the people.

Of course as Morris made clear popular election of the national executive had been his preference all along and obviously popular election is the most natural means, given that the end is a popular presidency. Morris thought the executive’s role was to protect the people against the tyranny of the legislature, and it makes sense that the people should choose their own champion. As early as July 17th, Morris had already made clear his preference for popular election of the executive: “He ought to be elected by the people at large, by the freeholders of the Country...Appointments made by numerous bodies, are always worse than those made...by the people at

large.”⁶¹ Unlike the legislature, which because of intrigue and personal interests would not choose the best man, Morris argued, “If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man...of continental reputation.”⁶² Instead of being susceptible to the special interests and plots of the legislative branch, where anyone willing to do the bidding of the legislature might get elected, the election of the executive would be based on merit: “It cannot be possible that a man shall have sufficiently distinguished himself to merit this high trust without having his character proclaimed by fame throughout the Empire.”⁶³ Popular election was not just fitting or natural – it would ensure the selection of the best choice for chief executive.⁶⁴

Furthermore, if the executive was appointed by the legislature, all the problems Morris had with the legislature, especially state and personal special interests overwhelming the national interest, would become a defect of the executive as well. Popular election would necessarily mean *national* election, rather than election by state. Thus Morris's focus on the extent of the nation as a redeeming factor in popular election: “The people...cannot combine. If there be any combination it must be among their representatives in the Legislature. It is said the people will be led by a few designing men. This might happen in a small district. It can never happen

⁶¹ Ibid., 2:29-31.

⁶² Ibid., 2:29.

⁶³ Ibid., 2:52-54.

⁶⁴ Alvis, “The Presidency at the Constitutional Convention”, 290.

throughout the continent.”⁶⁵ Unlike the smaller body of the legislature, the extent of the country would prevent any one group among the people from conspiring to elect a puppet, or an unqualified candidate. As mentioned earlier, Morris was certainly a nationalist, but this was partly because he thought the breadth of and attachment to the nation was needed to properly preserve the balance between upper and lower classes. To the extent the election of the executive failed to be a national election, it would fail to achieve the balance Morris believed was necessary for a good Constitution.

Altogether, Morris preferred popular election of the executive over any other mode because it best secured the position of the executive as guardian of the people, and because he thought the people would choose the best candidates, whereas legislative election would lead to subordination of the executive, corruption, and intrigue in elections, and inferior men holding the executive office.

But Morris's preference for popular election, which after his shift on the impeachment question became a necessity, was only slightly less controversial than his suggestion for life terms. There were various ideological and practical reasons that election by the legislature, rather than by the people, had such broad support. In some cases, delegates made it clear that they favored such a mode of appointment out of distrust of popular election, objecting that the people “will never be sufficiently informed of characters”⁶⁶ making popular election like “refer[ing] a trial of colours to

⁶⁵ Farrand, *Records*, 2:30-31.

⁶⁶ *Ibid.*, 2:29.

a blind man.”⁶⁷ Even more dangerous, the supposed ignorance of the people might cause them to “be led by a few active and designing men,”⁶⁸ corrupting the electoral process. Perhaps more importantly, the same divisions that thwarted Morris's original vision of the legislative branch influenced the constitution of the executive branch. If the election of the president was to be made by the people, the same problem would arise that the Compromise was made to circumvent – a popular election would obviously put extra influence on the large states (and the northern states, since the southern states would presumably lose their 3/5 extra vote). Just as the small states refused to approve a legislature in which their vote was overwhelmed by the large states, they disliked the mode of electing the executive in which the votes of their citizens would be overwhelmed by the citizens of the large states. As mentioned in the previous chapter, Morris and others continually argued that it made no sense to think that the large states would form some kind of alliance to oppress the smaller, but the delegates from the small states remained firm in their position. Of course Morris also pointed out the difference between representation in the legislature and the election of the executive – the people of distant states could not possibly be organized to the point of conspiring against particular (small) states. The extent of the populace would ensure that only widely known and respected national figures could be elected, not some puppet for Massachusetts and Virginia, as the small state delegates seemed to fear. Nevertheless, between the “aristocratic” delegates

⁶⁷ Ibid., 2:31.

⁶⁸ Ibid., 2:30.

who opposed allowing the people to choose, and the small state and southern delegates who feared a population-based election, Morris's proposal for popular election was never likely to be approved.⁶⁹

Ultimately Morris was not satisfied with a constitutional independence, secured by the separate “vesting” of power. This merely made the executive independent on paper – a proper institutional structure was needed to protect this independence. Even if the Constitution granted the executive his own power, appointment by the legislature meant control by the legislature, which would result in an oppressive regime in which the interests of the people would never be represented. The mode of election of the executive proved to be one of the most controversial and long-lasting disputes at the Convention, and Morris would spend the balance of the Convention fighting to free the president by changing the mode of election in order to allow him to act as guardian of the people. Much like the failure of his plan for the legislature, Morris's plan for the executive was too controversial, and popular election of the executive was never approved. Although he kept proposing popular election, it became increasingly clear that some kind of compromise would be needed.⁷⁰

⁶⁹ Alvis, “The Presidency in the Constitutional Convention”, 290.

⁷⁰ As Mansfield notes, it is somewhat misleading to characterize the Electoral College as an alternative to popular election, since (as I have shown) popular election was never a viable option at the Convention. It was to be election by Congress, until the Electoral College was proposed. From Morris's point of view, however, the goal was popular election, and therefore the Electoral College was a compromise or alternative *for him*. Mansfield, *Taming the Prince*, 264.

Morris's Executive Decision

One of Morris's primary goals at the Constitutional Convention was to make the executive an independent champion of the people, and he settled on popular election as the best means of achieving this. This would not only free him from the legislature, but tie him directly to the people. There was extensive, bitter debate on the appointment of the executive throughout the Convention, with appointment by the national legislature, by the state legislatures, by the people, by electors chosen by the people, and by electors chosen by the state legislatures all discussed. Morris and Wilson continually argued for popular election, but never gained much support. For most of the summer, appointment by the national legislature was by far the most widely accepted option.⁷¹

But although the Convention seemed to agree on legislative appointment, the exact method of appointment other than the vague “by the national legislature” caused great controversy. Possibilities included appointment by the House, the Senate, or a joint Congress, and for each of those choices there was the additional option of having the legislators vote as either individuals or by state (with one vote per state). But as mentioned above, the same factions that had demanded the Connecticut Compromise still existed, and thus there was difficulty in reaching an agreement on how the legislature would elect the president.

Morris sensed that there was still an opportunity, and, amidst this confusion, on August 24th proposed that the president “be chosen by Electors to be chosen by

⁷¹ For detailed analysis of the many votes on the method of election, see Riker, “The Heresthetics of Constitution-Making”.

the people of the several states.”⁷² Even this motion narrowly failed, however, and the question of presidential election postponed. Thus as late as August 31st, the issue was still undetermined, and Morris took final, decisive action. First, he moved that the clause giving Congress the appointment of the President be removed, on account of the issue “not being yet finally determined”⁷³ and this motion passed easily. Legislative election was no longer necessarily the standard, but an alternative had not been determined. Instead the issue was referred, along with numerous other undecided issues, to the Committee on Postponed Matters, of which Morris was a member.⁷⁴ Within four days, the Committee presented the plan for the Electoral College to the Convention.⁷⁵

Morris's Substitute Plan

Thach credits a small group, especially Morris and Wilson, with finally achieving the goal of a strong and independent popular executive, saying that they reached their end by “forwarding their plan at every juncture that afforded a possibility.”⁷⁶ This description is seconded by numerous other scholars.⁷⁷ Indeed, it is remarkable how often the Convention voted on the mode of election of the

⁷² Farrand, *Records*, 2:404.

⁷³ *Ibid.*, 2:480.

⁷⁴ Sometimes called the Committee on Unfinished Parts, or the Brearly Committee.

⁷⁵ For a detailed analysis of the formation of the Electoral College, see Shlomo Slonim, “The Electoral College” and Alvis, “The Presidency in the Constitutional Convention of 1787”.

⁷⁶ Thach, *Creation of the Presidency*, 91.

⁷⁷ Robinson, “Design of the American Presidency”, 323; Hoxie, “The Presidency in the Constitutional Convention”, 29; Nichols, “Gouverneur Morris”, 266-267.

president, to a great extent because Morris and Wilson continually proposed election by the people or by electors. And yet ultimately, the most influential moments came, not during the floor debates, but in committee with Morris.

Many scholars have noted that as the Convention progressed, it relied more and more on committees to work out important decisions for the sake of efficiency and to break gridlock in the Committee of the Whole.⁷⁸ There is probably nowhere that the vital role of committees is more obvious than in the Committee on Postponed Matters. Appointed on August 31st, the committee reported on September 4th a completely new plan for the executive which had not yet been proposed on the floor.⁷⁹ The president of the United States was to be elected by an electoral college, with electors chosen according to rules set by each state, with each elector voting for two candidates, one of whom was from a different state. Just when Morris seemed doomed to fail again in his attempt to establish his unique government and a popular executive, he inserted a new plan here that others at the Convention could stomach, and the Electoral College was born.

The Electoral College that came out of the Committee on Postponed Matters represented a compromise between the various factions that had up until this point delayed a final method of electing the president. Up until this point, Morris had led Pennsylvania and Virginia in favor of popular election, while the southern states had

⁷⁸ For a detailed discussion of the committees, see Vile, "The Critical Role of Committees"; Also see Dana Lansky, "Proceeding to a Constitution".

⁷⁹ Vile, "The Critical Role of Committees", 170. Electors had been proposed but not in this way. Vile points out that the Electoral College is so complex that it probably never would have passed if first proposed on the floor. It is a system that had to be completely planned out before anyone discussed it.

insisted on legislative election and the small states wanted equal vote. Electors had been proposed a number of times, including by Morris and Wilson, but this was never seen as different from popular election. If Morris and his allies were to gain the kind of election they wanted, they would need to win over the small states without upsetting the southerners. The Electoral College was invented by the Committee to mimic the Connecticut Compromise.⁸⁰

The Electoral College achieved this in three ways. First of all, electors would be apportioned according to each state's number of total representatives in the national legislature. This preserved the essence of the Connecticut Compromise – the large states would still have greater influence due to their population, but the small states would have a disproportionately high number of electors compared to their population. This provision ensured that the 3/5 compromise was subtly inserted into the election of the president, ensuring that the three southern states would approve of the new system. The Southern states were particularly against popular election because it deprived them of their extra weight.⁸¹ Second, if the Electoral College failed to choose a president, the Senate would choose him.⁸² Once again this secured the consent of both the small states and the southern states which was so crucial in effecting the Connecticut Compromise. Some delegates thought that the Electoral College would frequently fail to choose a president, and the resulting election by the

⁸⁰ Alvis, "The Presidency in the Constitutional Convention", 290.

⁸¹ Robinson, "Design of the American Presidency", 324; Slonim, "The Electoral College", 41.

⁸² This was changed to the House, voting by state. The effect was the same as far as achieving a compromise, the principle being equality of votes.

Senate would be a major gain on the part of the small states, without upsetting the southerners who wanted legislative election.⁸³ Morris was not one of these; he thought the College would always choose the president.⁸⁴ Generally it seems that most delegates thought it would turn out in whatever way favored their interest, a systematic bias noted by Riker.⁸⁵ Finally, the provision that each elector must cast at least one vote for someone from another state helped convince the small states to join. In fact, Morris said this was the greatest gain the small states made, because it helped ensure against collusion by the large states. In a legislative election, every elector would be in one place, conspiring together. But the Electoral College spread the election out across the country, making it a national affair, instead of a corrupt election full of intrigue, “like the college of cardinals.”⁸⁶

The Sufficiency of the Electoral College

Gouverneur Morris preferred popular election of the executive, but the alternative of the Electoral College still fulfilled his constitutional vision: one commentator calls it Morris’s “most significant victory at the Convention.”⁸⁷ Morris made it clear that he thought mode of election was sufficient to secure the independence of the executive, and thus the role of the executive as guardian of the people. As argued in the previous chapter, for any system to be acceptable to Morris,

⁸³ Robinson, “Design of the American Presidency”, 325.

⁸⁴ Slonim, “The Electoral College”, 53; Farrand, *Records*, 2:500-523.

⁸⁵ Riker, “The Heresthetics of Constitution-Making”, 13.

⁸⁶ Farrand, *Records*, 2:28.

⁸⁷ Nichols, “Gouverneur Morris”, 267.

it had to be free from too much state control. Furthermore, in addition to wanting to keep the legislature out of the appointment process for the sake of executive independence, Morris also thought that legislative election would be filled with corruption, and that the best men would not get elected. He wanted a system that kept the executive free from state control and legislative intrigue, isolating the process from control by special interests, and the Electoral College fulfilled both of those goals.

It is first worth noting that most delegates, including Morris, expected that the states would allow the people to choose the electors, and thought of the Electoral College as establishing a kind of popular election.⁸⁸ Madison said of the president “he is now to be elected by the people”⁸⁹ and this understanding was repeated in the *Federalist 68* by Hamilton. Wilson, the most radical democrat at the Convention was the first delegate to support something like the Electoral College, and he seemed to think of this as a popular election.⁹⁰ Morris clearly endorsed this type of system in the first place *because* he saw it as close enough to popular election. Finally, as expected, within a few years the College no longer had any role but making official the choice of the people.⁹¹ Nevertheless, it is worth looking at the reasons behind this in more detail.

⁸⁸ Slonim, “The Electoral College”, 57; Kaufman, *The Constitutional Views of Gouverneur Morris*, 362; Also see Ralph Ketcham “Executive Leadership, Citizenship and Good Government,” *Presidential Studies Quarterly* 17, no. 2 (Spring 1987), 274.

⁸⁹ Farrand, *Records*, 2:587.

⁹⁰ Ibid., 1:77; Wilson proposed to divide the nation into districts, and let each district choose electors, who would then elect the executive; Slonim, “The Electoral College”, 38.

⁹¹ Gwyn, *The Meaning of Separation of Powers*, 124.

The Electoral College helped free the appointment of the president from undue state influence by making the election a truly national affair (as opposed to legislative election). As I mentioned above, Morris often connected the breadth of the nation to popular election. The more national the election, the less likely that it would be controlled by any particular interest, or any one state. The unitary nature of the office already helps to encourage the national nature of the election, since the president is the president of the whole nation, not just of one state (as with a representative or senator). All that was needed then was to secure the election against undue state influence. Now even if the state legislatures appointed the electors, the Electoral College ensured that a far wider group of people would be involved with the election than simply the national legislators, who, according to Morris, would represent the special interests of the wealthy class.

Furthermore, the Electoral College system demands *two* votes from each elector, one of which must be given to a candidate not from the elector's state. In fact, the Committee created the office of the vice-presidency "only for the sake of a valuable mode of election which required two to be chosen at the same time."⁹² Morris had first proposed such a system on July 25th, although it had not gained any traction at the time, and it seems likely that it was Morris who reinserted this provision in committee.⁹³ Not only did this system prevent state influence on the election, but it helped ensured a positive goal – that highly qualified candidates would

⁹² Farrand, *Records*, 2:537. Vile, "The Critical Role of Committees", 170.

⁹³ Williamson has suggested something similar on July 25, Morris adjusted it and made a formal proposal. See Farrand, *Records*, 2:32

be elected. Barring widespread collusion, which Morris said was impossible⁹⁴ in this case, electors would have to cast at least one vote for nationally known figures, “characters eminent and generally known”⁹⁵ rather than simply influential local men. Since a majority is needed to win the election, no one would want to throw away that second vote. In other words, even if every elector cast one vote for the foremost man in his own state, the national “second votes” would go to the prominent, respected men whose character transcended any particular state’s boundaries. This type of man Morris thought would act in the interests of the people against encroachments by the upper class.

The Lasting Effect of Morris’s Theory

From the beginning of his career, Gouverneur Morris emphasized the need for an independent executive equal to the legislature, in keeping with the strict doctrine of separation of powers. At the Constitutional Convention, he was the leader of the group who favored a powerful, independent executive, who, on account of the “aristocratic” legislature would need to be democratic or popular if class balance was to be achieved. This executive would best be able to act as guardian of the people, Morris argued, by allowing the people at large to choose the president themselves.

Despite once again being partially thwarted by state interests (and anti-democratic sentiment), Morris eventually took control by inserting his vision in committee. Although the records of the Committee on Postponed Matters are not as

⁹⁴ Ibid., 2:500.

⁹⁵ Ibid., 2:512.

extensive as those of the Committee of the Whole, there is ample evidence that it was Morris who led the Committee to accept the Electoral College.⁹⁶ This is corroborated by the fact that it was Morris who had always been the floor leader and the parliamentary mastermind behind the popular executive movement, it was Morris who initially proposed the two-vote system, it was Morris who continually proposed a system of electors and lobbied against legislative election, and it was Morris who was chosen by the Committee to give a defense of the new system to the Convention and who responded with seeming offense to criticism of the plan. As Riker points out, we cannot be completely sure what happened in the Committee, but all evidence points to the idea that Morris was the architect of the Electoral College.⁹⁷ To whatever extent the American presidency is popular, therefore, it seems correct to give Gouverneur Morris the greater share of the credit.⁹⁸

Morris thought that the Electoral College was popular enough to allow the executive to fulfill the role of champion of the people because it made the elections truly national – not only was the president elected by electors from every state, but they had to vote for at least one person from another state, diluting the influence of any one state. Furthermore, Morris thought that the elections would be truly national in character, with only men of wide and great reputation being considered for an

⁹⁶ Kaufman, *The Constitutional Views of Gouverneur Morris*, 361-362.

⁹⁷ Riker, "The Heresthetics of Constitution-Making", 14.

⁹⁸ In support of this view, see Alvis, "The Presidency in the Constitutional Convention" and Riker, "The Heresthetics of Constitution-Making". This is not to suggest that the *idea* of the Electoral College was Morris's. Various aspects of it were already present in some state constitutions, and many different methods had been discussed on the floor, some of which included electors. But Morris was the leading proponent of the system and seems to have been the primary agent in getting it accepted.

office of such prestige, meaning that the executive would be protected from the influence of special interests. Given the remarkable innovation of the popular executive, the importance of Morris's political theory here can hardly be overstated.⁹⁹ Popularization of the executive was the central point in his plan for the Constitution, because after the Connecticut Compromise, popular election of the executive was the *only* way to secure socioeconomic class balance through separation of powers.

By using the Electoral College to create a popular presidency, Morris completed the innovative task of blending separation of powers and the mixed regime in a new, American way. As I noted above, Vile argues that the class aspect of the mixed regime was discarded in American political thought.¹⁰⁰ Similarly, Mansfield argues, "The American Constitution is not a mixed constitution giving different classes separate powers, nor does it make any concessions to this idea."¹⁰¹ But Morris did not simply make a concession to the mixed regime – he really did base his whole political theory on the conflict between the rich and poor, and he thought that in the Constitution he institutionalized both classes in order to mediate the inevitable conflict. Because of his political theory, Morris instituted the first democratic executive in the history of politics, balancing it against an aristocratic legislature, using separation of powers to fulfill the end of the mixed regime, to allow both upper and lower class a full share in government. This is truly innovative, and especially so

⁹⁹ On the importance of a popular executive, see Best, "Legislative Tyranny", 707-708; Gwyn, *The Meaning of Separation of Powers*, 121-126; Mansfield, *Taming the Prince*, 248; Alvis, "The Presidency at the Constitutional Convention", 293.

¹⁰⁰ Vile, *Constitutionalism and Separation of Powers*, 147.

¹⁰¹ Mansfield, *Taming the Prince*, 254-255.

because it led to a popular executive, and it is not *merely* a mixed regime or separation of powers.

CHAPTER SIX

Morris in France: Applying the Theory

I argued above that many scholars have claimed, whether explicitly or implicitly, that Morris did not adhere to a coherent political theory. Morris's work at the Convention, they argue, can easily be explained in terms of a series of compromises. And certainly even successful delegates like Morris had to make some compromises – in fact, I argued that Morris's failure in setting up a mixed legislature was part of the motivation for his persistent drive toward establishing a popular foundation for the executive. And I have admitted that Morris's preference was for direct popular election, and that the Electoral College was designed as a compromise.

So it makes some sense to wonder whether a “political theory” might be fabricated simply by reverse engineering the positions held at the Convention. In other words, perhaps the theory I have proposed in the previous chapters is nothing more than a description of random, practical compromises which are a necessary part of finishing a constitution, rather than a coherent set of principles in Morris's mind. On the other hand if the principles identified through Morris's speeches at the Convention illuminate a coherent political theory rather than a series of practical, particular propositions, then there should be evidence of Morris holding to the same principles despite different particular circumstances, and we should find Morris adjusting his institutional vision to fit both his theory and the particulars with which he was confronted.

By looking to Morris's work in France in the years after the Convention, it is possible to identify the same political principles that moved him at the Convention - that division between upper and lower classes is a permanent feature of political life, but that separation of powers provides the institutional framework to allow both some share in government, allowing each class to thrive without class conflict causing the destruction of either. In France, because of the different political and historical situation, Morris envisioned a balance between classes in a bicameral legislature, with the hereditary and religious aristocracy contained in one house, and the popular representatives contained in the other. He further argued that the hereditary monarchy ought to be preserved as an independent executive institution, not affiliated with either class but mediating a balance between the people and the aristocrats. Circumstances caused Morris to reject the notion of a popular executive here, instead setting up "mixed government" in the legislature with the monarch institutionally encouraged to stay outside class conflicts as an unbiased office uniting both classes as one nation.

Morris's Role in France

Gouverneur Morris arrived in Paris in January 1789, a private citizen intending to build his fortune through a variety of commercial ventures including land speculation and purchasing American war debt. He already spoke fluent French, and had plenty of contacts in French society from his days in Congress and in the

Finance Office. He carried with him letters from Washington, Madison, and Franklin introducing Morris to Jefferson and to prominent French politicians.¹

But Morris's reputation as a political thinker, constitution-writer, and financial genius preceded him. Not only was it well-known that he had great influence at the Constitutional Convention, but Morris's work for the Continental Congress both as a delegate and in the Finance Office had frequently brought him international attention. Some of his public writings, including his pseudonymous papers (published as "An American") on the proposals of the Carlisle Commission and on the public finances of America had gained him much respect and notoriety even in Europe. On this account his thoughts on the political situation in France were in high demand – the French were eager to learn from the American Revolution and Constitution, and of course improve on the supposed mistakes or deficiencies of the United States.²

Morris recognized the similarity between the French situation and the recent American experience, and although he was initially surprised at such requests, he thought his personal experience and insight into politics could prove valuable to the French as they attempted to craft a new regime.³ Of course Morris rarely lacked confidence in his own abilities and ideas when it came to political or economic matters, but his interest in French politics went beyond his personal conceit or belief

¹ For a detailed account of Morris's time in France see Miller, *Envoy to the Terror*; For an alternate account, see Kirschke, *Gouverneur Morris*, 201-247; Adams, *Gouverneur Morris*, 171-250; Brookhiser, *Gentleman Revolutionary*, 97-155.

² Ziesche, *Compatriot Patriots*, 19, Miller, *Envoy to the Terror*, 12-13.

³ Ziesche, *Compatriot Patriots*, 21; GM to the comte de Moustier, Feb 23, 1789, *Diary of the French Revolution*, 1:42.

that the French needed his advice. Morris also recognized the political and economic benefits to be gained from strengthening the French regime. He was in France as a businessman, and wanted stability and an economy favorable to trade – as he often emphasized, the first result of anarchy or instability was “loss of commerce, a delay of manufacturers, a lack of agriculture”, in short, economic collapse.⁴ Morris therefore had a great personal interest in helping France to institute a free, stable, and prosperous new regime.⁵ Throughout 1789-91 Morris therefore shared his thoughts fairly freely with friends, especially in the court, including with the king and queen themselves.

In early 1789, French politics was already in flux – Louis XVI had called the Estates General (consisting of representatives of the aristocracy, church, and common people) which had not convened in almost 200 years. The country’s finances were in dire straits, and major reforms were needed to stabilize the economic and political situation. The Estates General was supposed to deliberate on a new constitution and bill of rights, which would almost certainly involve curtailing the traditional privileges of the aristocratic class. Morris wrote to his brother shortly after arriving in France: “[O]ur Contest has given a *confused* Notion of Liberty to this Country. But there are many Persons whose Views are very clear and distinct. It is highly probable that a Constitution will be established as free as is consistent with their Manners and Situation.”⁶ This optimism was short-lived. Over the next few years, Morris was

⁴ Morris, “Observations on Government”, 237.

⁵ Ziesche, *Compatriot Patriots*, 21.

⁶ Diary entry, June 12, 1789, *Diary of the French Revolution*, 1:113.

continually frustrated by what he saw as the naiveté of the French, complaining “It is dreadfully tiresome to explain down to the first Principles for one of those Half Way Minds which see just far enough to bewilder themselves.”⁷

The Estates-General convened on May 5th, 1789 with Morris in attendance at the opening ceremony. Events moved quickly from this point. By the middle of June, much of the First and Second Estates had joined with the popular representatives and declared a new National Assembly. The general attitude in France was in favor of establishing a radically “free” government, rectifying the “defects” of the American constitution by creating a legislature-centric system with little or no role for a powerful constitutional executive. (Note that this vision is reminiscent of most state governments formed in 1776-7, the defects of which the Convention attempted to solve). Furthermore, the “leaders of liberty” wanted to abolish social hierarchy, which Morris called “extremely problematic...it is wrong and cannot eventuate well.”⁸ On June 23rd, having been locked out of their normal meeting place, the delegates met on a tennis court and swore not to adjourn until they had drafted a suitable new constitution. Violence ensued over the following weeks, culminating in the storming of the Bastille on July 14th.

Morris was especially disturbed by the violence, noting the relative calm with which the American Revolution had been carried out. He was also worried by the radical nature of the proposals being discussed by the National Assembly. In late July,

⁷ Diary entry, October 11, 1789, *Diary of the French Revolution*, 1:255.

⁸ Diary entry, June 12, 1789, *Diary and Letters*, 1:81.

when an Assembly member asked Morris to write up some comments on the potential constitution, Morris wrote a detailed essay, laying out his theory of politics and explaining why it would be dangerous and impossible to abolish the social hierarchy as popular sentiment desired. But Morris recognized that it would be difficult, if not impossible, to fight the popular sentiment dominating the National Assembly.⁹

Morris left for London on a diplomatic mission, returning in late 1790. During his absence, and after his return, chaos continued. By summer of 1791, the new constitution, which established a unicameral legislature and an extremely limited executive with only a suspensive veto, was almost ready. As Miller put it, “The problems with the constitution were patently obvious to a man who had helped design constitutions.”¹⁰ Morris wrote a draft speech for the king to give, laying out the flaws of the constitution, but his recommendations were ignored, as the king’s advisors found it too harsh. The king never saw the draft until after he had given his own speech. In September 1791, the Assembly ratified the first written French constitution. Morris called it “inexecutable” and began work on an alternate plan. The “inexecutable” French constitution was discarded less than a year later.

In January of 1792, George Washington named Morris as minister plenipotentiary to France. Morris, unlike his predecessor Jefferson, thought it inappropriate to be involved in French politics once he held an official position representing the United States. After late 1791, therefore, Morris generally refrained

⁹ On the Assembly, see GM to George Washington, Jan. 24, 1790, *Papers of George Washington*, 5:49-50; See also GM to William Short, Aug. 13, 1792, *Diary of the French Revolution*, 2:505, as cited in Ziesche, “Exporting American Revolutions”, 445.

¹⁰ Miller, *Incautious Man*, 128.

from expressing his views on the French constitution he had condemned as a private citizen, not to mention the subsequent attempts at republican constitutions. As Minister, Morris attempted even privately to remain an impartial observer of the anarchy which would continue throughout his time in that office. He stayed in France until late 1794, more than enough to witness the terror that resulted from the failed French attempt at republican government.

Morris on the French Constitution

As I mentioned above, between his arrival in 1789 and his appointment in 1792, Morris wrote three pieces on the French constitution, all of which fit with the theory he upheld at the Convention. The first was an essay entitled *Observations on Government, Applicable to the Political State of France*, written in July 1789, shortly after the Estates-general convened. This is a theoretical essay, one of the clearest expositions of Morris's political theory. It is clearer than other sources primarily because here Morris explicitly attempted to lay out some theoretical principles, in an organized fashion. Despite the utility of the Convention records, the speeches there were intended to address specific issues, rather than to trumpet a theory of politics, not to mention the fact that the records we have are paraphrases. By contrast, in *Observations* Morris deliberately proposed a theory of politics in the first part of the essay and only later discussed the particulars of France. This essay is exceedingly valuable, therefore, not only as a check against incorrect interpretation of the theory behind the Convention speeches but also as a demonstration of a different application of Morris's theory of politics.

Morris's second piece on France was the draft speech written in the summer of 1791 for the king of France to give regarding the proposed constitution. Morris disliked the French plan, and proposed that the king discuss his objections to the constitution, voicing his disapproval while accepting it as the will of the people. Morris thought that the constitution was bound to fail, and that the king would be blamed for its failure unless he expressed his objections beforehand. By appearing humble and open to the will of the people while distancing himself from the particular constitution, the king would be seen as wise and popular when the constitution collapsed. This document therefore not only discusses specific objections to the French constitution but also proposes some broad principles for an alternative.

The third document is Morris's vision for an alternative, an undated rough draft for a new French constitution in which Morris detailed an institutional structure built on a strong independent executive in the monarch, and a bicameral legislature divided by class.¹¹ The draft illustrated Morris's typical concern for separation of powers and protection of class interests, while remaining sensitive to the particulars of French society.

Morris's Theory

Morris began his *Observations* by bluntly stating, "That the French have not those manners, which are suited to free government, is a reflection by no means dishonorable to that nation."¹² Morris thought that France had lived for too long

¹¹ The original manuscript is undated, but Morris's diaries suggest that he wrote it after the ratification of the new constitution, but before December, 1791.

¹² Morris, *Observations on Government*", 232.

under a despotic government to be suddenly made totally free, giving them a “tyrannical” disposition.¹³ This was not the fault of the French people (thus Morris’s comment that it is not “dishonorable” that they lack the disposition) but an unfortunate fact of history. According to Morris this was the main difference between the French and American situations. The Americans had long experienced free government in the colonies, most of which had popular assemblies long before 1776. The historically free character of British government made this possible in the first place. This was reflected in the early actions of Morris and other revolutionaries, who, as Morris frequently pointed out, had acted much more moderately than the French during the period of revolution. In fact, the early actions toward the eventual revolution were demands that the colonists be treated equally as British citizens, not that any new rights or privileges be granted; the Americans already regarded themselves as being free by virtue of being British citizens. For example, the *Declaration and Resolves* of 1774 stated that certain rights were due to the colonists according to “the principles of the English constitution.” It calls on “the foundation of English liberty, and of all free government” to justify the claims. According to Morris, France had no such principles; the history of French government was one of despotism. Thus rather than immediately leaping to a completely free regime, it would be better for France to move gradually while growing in the habits of liberty. But if the revolution and resulting constitution were not carried out with care, France would merely trade one form of despotism for another.

¹³ GM to Mrs. Robert Morris, July 22, 1789, as cited in Ziesche, “Exporting American Revolutions”, 436-437.

Morris was clear about the negative effect that years of despotism can have on a people. Echoing Montesquieu, Morris stated, “The laws and manners have a mutual influence on one another.” A despotic regime makes men worse, and worse men make the regime despotic. Similarly a free regime makes men better, and better men contribute to the liberty of the regime. Morris said that all men desire the good opinions of others. In a despotic system, this results in everyone attempting to flatter and gain the good graces of his superiors, and the people, “at the base of the pyramid”, end up cravenly worshipping “the idol that is raised for their devotion”, that is, the highest classes or the monarch. These upper classes are not held to a standard of virtue or accomplishments, and the lower classes are merely “dazzled by their splendor”, lowering the actual worth of both classes. In a free government, it is not enough to dazzle – instead “those who wish to be great must begin by obtaining the good opinion of their equals” by virtue and education. Just as a despotic regime actually debases all, including the upper classes, free government uplifts all, even the lower classes.¹⁴

That being said, Morris argued that the laws and manners have a *mutual* influence. So it is not enough simply to leap into a free government. The dispositions of the citizens must be changed gradually, allowing the laws and manners to be gradually lifted up together. Of course Morris was ready with a solution. Having described the effects of despotism on a people, Morris immediately moved to the principle that by now should be familiar: “A body constantly opposed to the popular

¹⁴ Morris, “Observations on Government”, 232.

wish, nay, constantly laboring to oppress, will save them from their most dangerous enemy. It will save them from themselves.”¹⁵ The people will be raised up from the depths by being institutionally opposite the aristocracy: “They and their representatives will always be as desirous of oppressing the nobility, as that nobility can possibly be of debasing the people.”¹⁶ This will force the people to look to the “steady and constant support of the rights of mankind.”¹⁷ Although Morris’s words are harsh, just as they were at the Convention, he left no doubt that by this struggle the people will be ennobled, and the aristocracy prevented from debasing them, while they are prevented from overthrowing the upper classes. It will create a balance, to the benefit of all: “In the legislative struggle, where each having a veto neither can prevail, the good of all must be consulted, to obtain the consent of each.”¹⁸ Morris went on to point out that merely abolishing the noble orders will not do anything for the democratic cause – even if there is no official aristocracy, the wealthy will constitute a *de facto* aristocracy. They will still be the upper class on account of their wealth even when deprived of their titles.¹⁹

Morris proceeded to defend his proposition by arguing that a great mass of the people will always want to overthrow the status quo. This is a permanent fact, and

¹⁵ Ibid., 234

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ It is worth noting that Morris (and I) use the word “aristocracy” differently in the French context than at the Convention. As I mentioned earlier, at the Convention the word “aristocracy” was almost always used to refer to a tyrannical upper class, or simply to refer to the wealthy. In the French context Morris (and I) use it to refer to the actual institution of hereditary titles, which may or may not be tyrannical.

therefore “To balance this permanent interest, another must be raised equally permanent. An order of men with distinct privileges will feel a constant and regular desire to prevent innovations and change.”²⁰ Of course Morris did not think that all change is bad, but “frequent variations in the law are a serious evil”.²¹ Such constant change would cause economic decline and general misery.

Now, as the title suggests, Morris considered his observations to be universal, although he applied them to the particular French situation.²² In France, unlike in America, Morris thought it would certainly take some time for the people to be able to use their freedom responsibly. But he was adamant that it is dangerous in *any* society to try to abolish class distinction (never mind impossible to finally accomplish), and that the best means of dealing with the unavoidable class conflict is to give both classes some share in government, forcing them to work together for the good of all. Morris was clear that the principle is universal; the only real difference is in particular application.

Morris's Plan for France

The particular application of Morris's principles become evident through analyzing the other two of Morris's writings on the French situation. Of these, the first was his memoir for the French king, which included a draft speech, detailed

²⁰ Ibid., 237.

²¹ Ibid.

²² Ibid., 235.

problems with the actual French constitution.²³ Morris was sure that the constitution would fail, so it was best if the king voiced his reservations beforehand, thus appearing wise and prudent when the system collapsed.²⁴ The king (who was not given Morris's draft until after he had already approved the new constitution) did not follow this advice. The second document is an undated draft for an alternative constitution that Morris wrote around the same time, proposing a bicameral, "mixed regime" type of legislature, and an independent, sovereign monarch.²⁵

After outlining why the king should make clear the problems with the new constitution, Morris provided a draft speech for the king outlining those objections that went through the constitution article by article with objections attached. He began by objecting to the structure of the legislative branch. The plan was for a unicameral, popularly elected assembly. The king was given only a suspensive veto – if two consecutive legislatures passed a bill, it would suffice to override the veto. Each member of the Assembly was to be held inviolable under the law, as long as the Assembly itself did not prosecute them. The Assembly was given control of such armed forces as they should see fit, without any check by the executive. All subordinate executive officials were subject to the Assembly's authority by being

²³ Gouverneur Morris, "Memoir Written for the King of France Respecting the New Constitution" and "Observations on the New Constitution of France", in *Selected Writings of Gouverneur Morris* ed. J. Jackson Barlow (Indianapolis: Liberty Fund, 2012), 239-268.

²⁴ *Ibid.*, 247-248.

²⁵ Morris, "Form of a Constitution for France", 269-284.

prosecutable by the Assembly, and only that body. The judicial power was also vested in the Assembly.²⁶

According to Morris's analysis this plan meant that the members of the Assembly really had the right not only to make laws but also "the application and execution" of the law and the ability to secure themselves "from the pursuit of justice". They were "dependent only on their own will".²⁷ Obviously this violates the basic principle of separation of powers, and Morris strenuously objected to such legislative supremacy. The unicameral, majority-driven legislature meant that "the leaders of the majority may dictate such laws as they think proper"²⁸ without any check. A bicameral legislature would constitute a check on such authority. More importantly, Morris thought the suspensive veto was no real check on the legislature, that it was not dangerous to give the executive an absolute veto, but that given the likelihood of long-standing factions it made little difference if he could suspend a law for such a short time.²⁹

As it stood, there was nothing to prevent a majority from simply carrying out their will without limit, even to the point of treason or collusion with foreign powers. The fact that the legislature was immune from prosecution except by themselves further ensured that members of the majority faction would remain in power regardless of their conduct: "there seems to be no means of terminating their session,

²⁶ Morris, "New Constitution for France", 254-255.

²⁷ *Ibid.*, 258.

²⁸ *Ibid.*, 255.

²⁹ *Ibid.*, 256.

nor of punishing the guilty, but by general insurrection, or civil war". It would be better if there was an independent executive or judiciary to check the legislature, but in the proposed constitution "the King has no constitutional means of appealing to the people, neither can any tribunal punish the traitors." Furthermore, it would mean that any minority group could be constantly suppressed – if they threatened the majority, the minority could simply be prosecuted and removed by that majority.³⁰

The plan for administrators being subject to prosecution and removal only by the legislature rather than the executive was a blatant and harmful violation of separation of powers. This would have two effects: First, because the legislature was authorized to judge the acts of these officials, it would also be able to judge the actions of the chief executive, which would usually be carried out by these subordinates. Similarly, it encouraged executive officials to ignore the chief executive, Morris said: "Administrators protected by the leaders of the Assembly...may not only disregard [the king's] orders, but even dictate to him the policy he shall pursue."³¹ This would mean that there was no separation of powers at all; the executive branch would merely be an arm of the legislative branch. And given the problem of the unicameral legislature, this would mean that a simple majority in the legislature could control the whole of the government. Given all these problems, it is hardly even necessary to discuss how dangerous it would be to give the Assembly control over a private military force, which the constitution did by allowing them whatever troops they

³⁰ Ibid.

³¹ Ibid., 257.

deemed necessary. Given that there was no other check, the executive might have to resort to force to stop a traitorous or tyrannical legislature. But he was not even given that option. Again, the result of all of this was that once any faction gained a majority in the Assembly, the only way to contain them would be civil war.³²

Morris found the constitution of the executive similarly problematic. The executive was charged with maintaining the safety of the kingdom, dealing with foreign policy and international commerce, enforcing the laws, and preserving the public safety.³³ But, Morris argued, the king was made absurdly weak, almost completely lacking in real authority, since he had no control over his own subordinate officers or of the whole armed forces. Morris continued, "Where there is no authority there can be no accountability. Where the executive power is feeble, anarchy must ensue."³⁴ Morris presciently pointed out that when such anarchy ensued, despotism would follow, and that likely the king would be the first victim, not the despot. The real despot would probably be the leader of the Assembly. Much as he had in New York and Philadelphia, Morris argued that the executive must be given the appointment and removal power – administrators chosen by the people or the legislature would have no reason to follow the orders of the executive, whether or not the constitution said they should. They would be responsible to those who controlled their political future. In general, the executive as proposed would be little more than

³² Ibid., 256-257.

³³ Ibid., 258-259.

³⁴ Ibid., 263.

a figurehead, and perhaps a scapegoat for the legislature, but certainly not a co-equal part of a separation of powers system.³⁵

Of course Morris was ready with an alternative. He did not, however, simply defend the status quo – he granted that the aristocracy and the monarchy had in turn been oppressive, and that the people needed to be given a legitimate share in government. However Morris pointed out that there was no reason that popular leaders could not also become oppressive if left unchecked. The solution would be found in balancing the diverse interests: the French constitution ought to institutionalize the monarchy, aristocracy, and the popular will: “It is by a just combination of the three, where each having an absolute veto on the other the particular interest of neither can prevail and the general interest of the whole society will best be known and pursued...”³⁶ This is the same principle which Morris advocated in Philadelphia, the ancient mixed regime’s theory of balancing the classes against each other for the greater good.

Beyond that broad principle, the details of such a constitution were not included in the king’s speech, but Morris did write a (very) rough draft of a constitution for France, probably sometime in fall 1791, shortly after the draft speech discussed above. This constitution, although unpolished, presents some of the clearest applications of Morris’s political principles. In fact, he began with a list titled

³⁵ Ibid., 257.

³⁶ Ibid., 266.

“Principles”, many of which are familiar both from the Preamble and Constitution and from Morris’s other speeches and writings.

Morris started by saying that the government ought to procure “the greatest possible good”, which begins with preservation of the state itself. “Tranquility and liberty...” can only be sustained on the basis of justice.”³⁷ Echoing Montesquieu once again, Morris pointed out that the place, climate, size, history, habits, and manners of a people all influence what form of government it should have, and for France this form ought to be monarchical, and this should be hereditary, “because an elective monarchy is incompatible with order and liberty.”³⁸

Morris then moved to the familiar defense of the pure doctrine of separation of powers. The executive needed to be independent: “It is essential to the free exercise of executive power that the chief be inviolable, but it is likewise essential...that his agents be responsible for his conduct.” The legislature needed to be independent, stable, and motivated to act for the common good: “It is requisite then to form a legislative body, whose members shall be specially interested in the maintenance of the established order of things...in a separate body.” The whole nation should be represented in the legislature, and the right of suffrage “ought to depend only on general rules.” The judiciary must be as independent as the other two branches.³⁹

³⁷ Morris, “Form of a Constitution for France”, 269-70.

³⁸ Ibid., 270.

³⁹ Ibid., 270-271.

Having proposed these principles, the institutional structure Morris proposed is recognizable through its relation to his theory of politics, despite the monarchical basis in France. He began, “The executive power belongs to the King” who would be granted complete power of appointment of his subordinate officers. He would be given control over making war and peace, treaties, and dealing with foreign policy, in addition to being commander-in-chief of the armed forces. All officials would take an oath of fidelity to the King, with the stipulation that “to obey an order of the monarch contrary to the laws and the Constitution, is to violate the oath of fidelity.” The written constitution would thereby act as a real limit on the authority of the king and his subordinates. Morris followed this with an outline of a Cabinet (always a pet project of his), whom the king could appoint and dismiss unilaterally.⁴⁰

Moving to the legislature, Morris divided the legislature into two houses. First, the Senate would be composed of 90 hereditary seats, appointed, and in case of vacancy re-filled by the king. The Senators would have a life term except in cases of misconduct, but would need to be 30 years old to take up a seat. Senators could be removed from office for misconduct by the Senate itself. The king could not reappoint a Senator who was removed from office.⁴¹ Second, the National Assembly would be composed of members elected by provincial department or city. (The exact number of representatives would have come to 396. It is not clear whether Morris calculated the exact number his proposals required, although he specified that 100 would

⁴⁰ Ibid., 272-273.

⁴¹ Ibid., 277-280.

constitute a quorum). The representatives would have terms of eight years, with one fourth up for election every two years. In the country, all freeholders 25 years and older would have the vote, while in the city the electorate would consist of all taxpayers who were married and in good legal standing.⁴² All legislation would be required to pass both houses of the legislature, and gain the approval of the king. Both houses could originate and amend bills, but revenue bills would have to originate in the popular house. Both houses would determine their own rules, police their own interior, punish their own members, and determine when to adjourn.⁴³

Comparing Morris's Two Constitutions

Ziesche, while recognizing that Morris's theory remains consistent between the United States in 1787 and France in 1791, might overemphasize the extent to which Morris's practical proposals are similar. Despite some surface similarities between the United States constitution and Morris's draft for a French constitution, the institutional arrangements are significantly different. The consistency of the theory is clear – upper and lower classes must be balanced against each other, lest they destroy one another. The strict doctrine of separation of powers provides an institutional framework within which this balance can be achieved. But because of the differences Morris notes between the characters of the two nations, distinctions must be made in the specifics of the institutions. As Morris wrote:

Different constitutions of government are necessary to the different societies on the face of this planet. Their difference of position is, in itself, a powerful

⁴² Ibid.

⁴³ Ibid.

cause, as also their manners their habits. The scientific tailor, who should cut after Grecian or Chinese models, would not have many customers, either in London or Paris ; and those who look to America for their political forms are not unlike those tailors in the island of Laputa, who, as Gulliver tells us, always take measure with a quadrant. He tells us, indeed, what we should naturally expect from such a process, that the people are seldom fitted.⁴⁴

Morris thought that just as the French would be ill-fitted for an American style constitution with a substitution of “a king for a president”, they would be unable to handle the even more radically democratic systems (“I am opposed to the Democracy from regard to Liberty.”⁴⁵) that were actually favored. His proposals for France therefore contain extremely different institutional arrangements, with special care for the preservation of French historical institutions.

In particular, the difference in the executive should be noted. For the United States, with a free people accustomed to self-government, Morris advocated a popular executive. In France, dealing with an oppressed people who were used to despotic rule and not familiar with real political participation, Morris preferred a preservation of the monarchy in the executive. This results in an extremely different formulation of separation of powers: in the United States the executive is the champion of the people, intended to remain independent of the aristocratic legislature and protect the general welfare interest against special interests of the upper class, whereas in France the legislature contains the balance between aristocrat and democrat, with the executive an impartial overseer. (It is worth noting here that in the American context Morris is explicit that the executive will *not* be impartial, but is to fight against the

⁴⁴ GM to Carmichael, July 4, 1789, *Diary of the French Revolution*, 1:136

⁴⁵ Diary entry, June 23, 1789, *Diary of the French Revolution*, 1:121.

upper class interest in the legislature.) In France, the king remains the sovereign, he is the ruler, and the acts of the legislature are done in his name. In America, sovereignty is situated in the citizens, albeit divided by class and the executive is supposed to represent the democratic element of the sovereign people. According to Morris, the French people were not yet suited to have such an important office trusted to them.

But contrary to his critics (he is a “monarchy man”) and some of his biographers, Morris was not just obsessed with executive power. He maintained in both the American and French systems that strict separation of powers was important, and that this required a strong and independent executive. But the structure of the executive is very different in the two cases, as are the reasons for creating the executive in a certain way. The French king is not only granted much broader powers, but is deliberately supposed to be impartial to the classes – the conflict should be between the aristocrats and the people, not between the people and the king. The American president is designed to be dependent on the people, and to be more partisan, to protect the people against the legislature.

Furthermore, in France Morris explained more fully why he thought class conflict was really permanent. In *Observations* he addressed the issue of the abolition of social classes in France. Besides his suspicion that it did not fit with the *natural* political order, Morris argued that even if the hereditary nobility and titles were abolished, there would still be a few individuals wealthier than the masses, and that equalization of all wealth was clearly impractical. In other words, he thought it is not possible to do away with the upper class, but it is possible to destroy “aristocracy” in

the sense Morris meant it at the Convention, that is, a despotic ruling class. Thus in the American context, where there is no hereditary aristocracy, Morris was still concerned with “not the name [aristocracy], but the thing [tyranny]”. In France, where there was a hereditary upper class, Morris saw no point in trying to abolish it, but wants to prevent it from acting despotically. In both cases, the goal is to contain the upper class within a certain part of government and use institutional means to force them to turn their greater talents towards the common good while using their higher upbringing and long-term interests to stabilize the changeable lower classes.

Morris’s political theory remained consistent throughout his career, even in the different contexts in which he proposed constitutional plans. He wanted to balance upper and lower class interests, containing the inevitable class conflict, and he wanted to use a strict separation of powers framework to make the balance effective. Clearly he was not simply reacting to particular events or making compromises. He was explicit in his writings on France that the principles remain the same, but that because of difference historical circumstances, different institutional arrangements are necessary. He never varied on the notion that class conflict is permanent, and that strict separation of powers should be inviolable.

CHAPTER SEVEN

Conclusion: A New American Political Thought

In the beginning, I proposed to show that Gouverneur Morris had a coherent theory of politics, which represents a uniquely American political thought that transcends any particular ancient or modern theory, and was the basis for his unmatched influence on the final form of the Constitution. Further, I proposed that there is some inconsistency and confusion regarding the nature of the American regime and its place in the history of political thought, and that attention to Morris's theory provides a solution to these difficulties. I wish to conclude by briefly summarizing how I have shown these things, before offering some final thoughts on Morris's place in history.

In describing the nature of the American regime, there are three options. It can be described as an instance of separation of powers, or as an instance of the mixed regime, or it might be described as the result of a new evolution in the history of political thought, which is not simply described in terms of either doctrine. The first view, which seems most common, is advanced by Diamond. He emphasizes the democratic basis for American society and argues that the Constitution is an example of simple separation of powers. He claims that the American regime left behind the ancient doctrine of the mixed regime.¹ This view seems to be supported by Gordon Wood, who critiques John Adams for adhering to the supposedly outdated class-based

¹ Diamond, *The Separation of Powers and the Mixed Regime*, 40-42.

theory, saying that Adams misunderstood the American regime.² Paul Eidelberg exemplifies the second option. He argues that the Constitution is a modern example of the ancient mixed regime, contending that the House institutionalizes the democratic element and the Senate institutionalizes the aristocratic element.³ Overseeing all, according to Eidelberg, is the monarchic element in the president, deliberately isolated from the people through the Electoral College.⁴ I have argued for the third option, that the American regime is the result of a new, American political thought, of which Gouverneur Morris is the prime example. This view is supported to varying degrees by the theories of Gwyn, Vile, and Mansfield, each of whom argue for the uniqueness of the American regime and trace this special character back to those aspects of the Constitution that are most of all connected to Morris. By now it should be clear how great Morris's influence was at the Convention, so I will examine each of these three options by the light of Morris's political theory.

In regard to the first possibility, attention to Morris substantially complicates the interpretations of Diamond and Wood, i.e. the prevailing view that the Constitution does not institutionalize class interests and is simply a system of separation of powers. Although he never thought there would be titled or hereditary aristocracy in the United States, Morris was clear that he thought that conflict between upper and lower classes is a permanent feature of political life, and he deliberately planned for the Constitution to institutionalize that conflict through a

² Wood, *The Creation of the American Republic*, 567.

³ Eidelberg, *The Philosophy of the American Constitution*, 167-169.

⁴ Ibid., 190.

legislature representing the special interests of the wealthy, and a national executive protecting the welfare of the people.⁵ Morris did not think that this diluted the republican nature of the Constitution, but rather thought that it was *only* by providing such a balance that a republican government could be preserved.⁶ Clearly there was something more at work than simple separation of powers.

Neither is the Constitution simply an instance of the ancient mixed regime, as Eidelberg argues. Eidelberg notices that the lynchpin of the Constitutional system is found in the presidency, and points to the remarkable nature of the method of appointment.⁷ But he and Morris have opposite views of that office. Eidelberg sees the executive as a monarchical institution, purposely isolated from the influence of the people. Morris saw the president as the guardian of the people, responsive to their needs and preferences. In fact, the Electoral College that Eidelberg so admires was Morris's creation, designed to keep the president attached to the people and independent of the interests entrenched in the legislature.⁸ Generally speaking, Morris's interpretation supports the notion that the mixed regime influenced the Constitution, mostly by providing a theory of class warfare and balance.⁹ But this

⁵ Farrand, *Records*, 2:52-54

⁶ For example, see *Ibid.*, 2:103-105.

⁷ Eidelberg, *The Philosophy of the American Constitution*, 169.

⁸ Alvis, "The Presidency in the Constitutional Convention of 1787".

⁹ Farrand, *Records*, 1:512.

balance, according to Morris, would not come within the legislature, but between the executive and legislative branches.¹⁰

Based on my description of Morris's theory and its results at the Constitutional Convention, I have argued in favor of the third option, that the American regime is the result of a new, American political theory. Morris's political theory synthesizes some aspects of both the ancient mixed regime and modern separation of powers, and cannot be reduced to either. The basic principles of Morris's theory, which remained consistent despite varying circumstances, were that socioeconomic class warfare is inevitable, and that separation of powers provides the best institutional framework for mediating class conflict. As one of the leading delegates at the Constitutional Convention of 1787, Morris significantly influenced the final form of the Constitution, making it fit his theory of politics. He thought that the composition of the legislature after the Connecticut Compromise made that branch susceptible to control by the wealthy. Specifically Morris thought that state interests would capture the legislative branch; the danger of this was most evident in the slave-holding interest. In modern terminology, we would say that Congress is controlled by special interests. Morris used different terms but was always clear that the problem with the Compromise plan was that elite interests would dominate the legislature.

Given the danger of such a constitution, Morris thought it vital to establish democratic interests in the executive branch. He attempted to do this by making the executive independent of the aristocratic legislature and connected to the people,

¹⁰ Ibid., 2:75-76.

while giving him sufficient power to act with vigor in the interest of the people. Over the latter part of the Convention, Morris was able to significantly enhance the power of the presidency, even changing the “vesting clause” to reflect a difference between the Constitutional grants of legislative and executive powers. Most importantly, however, Morris thought the appointment of the president needed to be independent of the legislature, and for this purpose he led the push towards popular election. Although factional interests prevented direct popular election, Morris was able to gain a compromise which the democratic delegates thought was close enough – the Electoral College. This system not only removed the election from the hands of the aristocratic legislature, but also (through the two-vote provision) prevented state interests from controlling the election. Thus Morris “tamed the prince” and created a truly popular executive.

In my view, not only did Morris adhere to a unique political theory, but this theory also inspired much of the great innovation in the Constitution. I am by no means alone in claiming that the Constitution is the result of a specifically American evolution in constitutional theory: this view is shared to varying degrees by Vile, Gwyn, and Mansfield, although none of them pay much attention to Morris. Vile argues that American constitutionalism provides a new blend of separation of powers with checks and balances.¹¹ Gwyn points to the popular presidency as one of the unique marks of American separation of powers.¹² Mansfield claims that separation

¹¹ Vile, *Constitutionalism and Separation of Powers*, 147.

¹² Gwyn, *The Meaning of Separation of Powers*, 121-126.

of powers was unworkable until the creation of the popular executive.¹³ My argument regarding Morris broadly speaking fits nicely with this third group of scholars, but also calls for a partial modification, namely, a recognition of the influence of Morris's thoughts about class conflict.

For example, Vile argues that early state constitutions in fact attempted to institute "pure" separation of powers, but that it became evident that such a system does not work well on a practical level.¹⁴ Thus, checks and balances (which originally was part of the mixed regime) was reintroduced in later state constitutions and more importantly, in the national Constitution that emerged from the Convention of 1787.¹⁵ In other words, Vile notices that there is a special American brand of separation of powers, which integrates checks and balances, but which he claims does not include the class basis that was found in the ancient mixed regime.¹⁶ Unfortunately, Vile fails to account for Morris. Morris, one of the primary authors of the Constitution, the man most responsible for the *balancing* between the legislature and executive branches in the Constitution, explicitly stated that class interests was the reason such a balance was needed.¹⁷ It seems that Vile goes too far in dismissing the influence of class on American "balancing". Nevertheless, my argument supports Vile's general point that American constitutionalism is unique on account of its blend of separation of powers

¹³ Mansfield, *Taming the Prince*, 12, 247-248.

¹⁴ Vile, *Constitutionalism and Separation of Powers*, 2-3

¹⁵ *Ibid.*, 78-79.

¹⁶ *Ibid.*, 147.

¹⁷ Farrand, *Records*, 2:52.

and checks and balances. However, I have shown that this blending is greatly due to Morris's political theory and his resulting efforts at the Convention.

Mansfield follows Vile in claiming that pure separation of powers is impractical, and like Gwyn situates the innovation of the American brand of separation of powers in the popular executive. Since, as I have shown, Morris was the leading proponent of popular election of the president, and the delegate most responsible for the eventual construction and acceptance of the Electoral College as an alternative to legislative election, Mansfield's position greatly enhances Morris's status. Basically, although Gwyn and Mansfield take little notice of Morris, their interpretation of American separation of powers centering on a popular executive demands that Morris receive primary credit for making the American regime innovative and workable. Of course, like Vile, Mansfield denies any class basis for this unique American moment.¹⁸ But Morris specifically envisioned the popular executive as a class-based institution. His primary arguments for the popular executive had to do with class warfare and he consistently emphasized that the president had to be independent and strong enough to balance the aristocratic legislature for the sake of the people.

In summary, Gwyn, Vile, and Mansfield all recognize the unique and innovative nature of the American regime. However, in line with the predominant view of the Constitution, each of them overlooks Morris's influence and deny the institutionalization of class that Morris thought was integral to the Constitutional

¹⁸ Mansfield, *Taming the Prince*, 254-255.

framework. Since it was Morris who was primarily responsible for the aspects that these scholars find most important, it seems that their theories ought to be modified at least slightly to reflect his interpretation of the Constitution – that it balances the special interests of the upper class in the legislature against the general interest of the people in the executive.

All that being said, this exposition of Morris's theory goes beyond merely correcting problems with the literature on American constitutionalism; Morris's vision is interesting in its own right, and it provides a new and exciting paradigm for understanding the Constitution. Morris's plan for synthesizing the doctrines of the mixed regime and separation of powers, centering on a popular executive, is totally unique. Whether the historical place of the American regime comes from its special blend of checks and balances with separation of powers, or from the popular executive that makes separation of powers a practical reality, Morris must be considered the primary cause. The balance in the Constitution, achieved *through* the popular executive probably never would have been a reality if Morris had not been driven by his theory of class conflict and his desire to balance socioeconomic classes using the separation of powers.

Gouverneur Morris makes for a difficult hero, and his theory is not designed to please the modern ear. It is challenging to accept, as Morris did, that society will always be divided between the wealthy and the rest, and that each class will always have distinct interests, causing conflict between the classes. Perhaps it is even harder to accept that the Constitution of the United States institutes the vision that Morris built on that premise, which includes a resignation to the fact that special interests

influence or control Congress. Those who, like Beard, notice the class-based aspects of the Constitution, tend to critique it on those grounds, while most deny Morris's interpretation altogether. Of course if it is impossible to destroy the wealthy (and unwise to try) it is actually best for the people and the nation if the elites are contained and balanced against. Morris thought the president as constituted would be the "champion of the people", which is a vision of the executive that democratic thinkers should be able to support. Morris's interpretation of the Constitution saves it from being *simply* an aristocratic document, while explaining why some scholars have seen elitist interests present in it.

Of course, Morris did not institute his vision by trying to please his audience, but by saying things no else would say, and promoting positions that no one else would defend. So it is not surprising that Morris's theory emphasizes the darker side of human nature, illustrated in the inevitability of class warfare. To those who criticize his emphasis on class warfare, Morris would simply say that attempting to abolish classes will unintentionally hurt the people, but that institutionalizing the conflict ensures that all citizens thrive.

But despite his seeming negativity, Morris's vision did not *end* with class warfare. He had great confidence in the ability of separation of powers and his Constitution to mediate the conflict. The result would be more than a mere dilution of class warfare. The man who said that the rich would always attempt to enslave the poor did not leave Philadelphia thinking he had helped establish a despotic aristocracy. On the contrary, he thought he had negated the danger of class conflict by balancing the special interests in the legislature against the popular interest in the

executive. The future that could be achieved now that the primary danger of political life had been neutralized, according to Morris, was one of justice, tranquility, and the blessings of liberty.

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