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ON THE SEPARATION OF POWERS: LIBERAL AND PROGRESSIVE CONSTITUTIONALISM

By Michael Zuckert

I. Introduction

We live in an age when *Pride and Prejudice and Zombies* is a best seller, when *The Zombie Survival Guide* draws 617 customer reviews on Amazon, when we can celebrate the holidays with *The Zombie Night Before Christmas,* and, if all of this seems too low brow, when we can read *Zombie: A Novel* by Joyce Carol Oates, one of our most high-brow authors. The early years of the twenty-first century are clearly "The Age of the Living Dead." It is little wonder then that our politics now seem to be oriented around a political movement itself among the living dead. On both sides of the political spectrum, partisans are more and more orienting themselves around the Progressives, a political movement that had its good times on earth in the late nineteenth and early twentieth centuries, but now, a century later, has crawled out of its grave to walk the earth and, it might appear, ravage (or whatever Zombies do) our politics. Those more or less on the left have increasingly come to call themselves Progressives, at least in part because the term "liberal" had became something of a political liability. It has now come to designate more specifically those on the further left segment of the Democratic Left. It has the advantage of eschewing the dreaded "L" word and of distinguishing those who carry this insignia into political battle from an older Left, which was Marxist or Marxist tinged.

Those on the right half of the political spectrum, of course, do not call themselves "Progressives." They are "conservatives," although, ironically, most of them more firmly believe in progress, i.e., in the benignity of the direction that more or less unfettered economic and technological development are taking us, than do the so-called "Progressives," who fear the direction of technological change and economic development. Consider the respective positions of our Progressives and our conservatives on issues like climate change. In any case, Progressives are increasingly important for the non-Progressives, for it is they against whom the conservatives are more frequently defining themselves. A case in point is Glenn Beck, surely the hottest conservative figure of the day. He obsesses about the Progressives, and speaks often of how much he "hates them," and especially how much he hates that arch-Progressive, Woodrow Wilson.

Indeed, while the Left has revived the term "Progressive" it is the Right that has resurrected the Progressives themselves and which thus contrib-

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utes more deeply to the Zombieness of the twenty-first century. The conservatives are not doing battle against the dead they have summoned from their graves merely as a historical matter. They see the Progressives as the source of contemporary liberalism, New Deal and beyond, and apparently see Progressivism as a deeper, more philosophical, and more dangerous movement. The conservatives see the Progressives along the line of the title of one recent text, that is, as *Texas Biker Zombie(s) from Outer Space.* American conservativism is, of course, a variegated thing and not all sorts of conservatives are equally concerned about the Progressives. Those who are more concerned seem to be those who are most attached to some form of past-liberalism—classical liberals, admirers of the American Founding, and such-like conservatives. The Progressives are important to these conservatives because the Progressives were the ones who mounted an attack on classical liberalism and on the political principles and political work of the American Founders. Their heirs, the liberals of the post-New Deal era, took for granted and as accomplished the Progressive critique of the earlier liberalism. Conservatives, many of whom are would-be liberals of a different stripe from George McGovern or Barack Obama, return to the Progressives because they wish to refight the old fight our contemporary liberals believe was won long ago by the Progressives.

This essay shares something of that aspiration. I wish to explore an aspect of the Progressive critique of liberal constitutionalism, the focused Progressive attack on the separation of powers as the essential feature of constitutionalism as embodied in the American Constitution and endorsed by the American Founders, and by their intellectual authorities John Locke and Charles de Secondat, Baron de Montesquieu. This paper is inspired by the suspicion that the Progressives' critique of the separation of powers was based primarily on a deficient understanding of that doctrine and secondarily on a misplaced analysis of potential substitutes for the separation of powers. I wish to mount, in other words, a tentative defense of the separation of powers against its past and present critics.

My defense is "tentative" for a number of different reasons, but most immediately for its limited scope. In order to achieve some depth of understanding I am limiting myself to the chief Progressive critic of the separation of powers, Woodrow Wilson. He was both President of the American Political Science Association, testifying to his credentials as a political analyst as judged by his fellow political scientists, and President of the United States, testifying to his credentials as a political leader as judged by his fellow citizens.

I will hold up to this critic of liberal constitutionalism its originator, John Locke. In Locke's *Second Treatise* we find the first theoretical statement of the separation of powers idea as it comes to define liberal constitutionalism. My focus on Locke is not meant to deny the significance of other contributors to the theory of separation of powers—Montesquieu,

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Blackstone, de Lolme, and the American Founders chief among them. Locke's is not the final or even most sophisticated form of the separation of powers theory, but his is crucial for bringing out the connection of the doctrine to the foundational ideas of natural rights and modern natural law, which were so formative for liberal constitutionalism.

II. The Progressive Critique: Woodrow Wilson

There is perhaps no better ingress to our problem than the observation, now becoming commonplace, that for the Progressives, and especially for Wilson, the distinction between politics and administration was intended to supplant the old and traditional notion of the separation of powers.[1] Wilson's critique of the separation of powers begins with his account of what that institutional structure was intended to accomplish, accompanied by an account of its failure to accomplish its end. That is, he began with a critique of the separation of powers as a means or instrument of governance. He moves on, however, to a critique of the ends sought in the system of separation as well. The critique is completed with Wilson's theory of the end that ought to be sought and his presentation of why the politics-administration distinction and institutional embodiments thereof is a superior system of governance.

Like other Progressive critics—Charles Beard comes to mind—Wilson was bold and open in announcing his desire to challenge the political science and the political achievement of the American Founding generation. He was struck by the fact that although the Constitution was intensely controversial when first proposed, that changed almost immediately upon ratification. Political debate from then on was between what Wilson called "two rival sects of Pharisees, professing a more perfect conformity and affecting greater 'ceremonial cleanliness' than the other."[2] All criticism of the Constitution ceased and was replaced by an "almost blind worship of its principles," with the result that "the general scheme of the Constitution went unchallenged."[3] A further result was the growth of the insular "conviction that our institutions were the best in the world, nay more, the model to which all civilized states must sooner or later conform."[4]

[1] The first scholar that I know of who made this important observation was Herbert Storing in his 1964 essay on "Political Parties and the Bureaucracy" in Joseph Bessette, ed., *Toward a More Perfect Union: Writings of Herbert Storing* (Washington, DC: The AEI Press, 1995), 319. A similar point about the Progressives was made by M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis, IN: Liberty Fund, 1998, 2d. ed.), 304–5, 308–9; Dennis Mahoney, "The Separation of Powers," in Sarah B. Thurow, ed., *E Pluribus Unum: Constitutional Principles and the Institutions of Government* (Lanham, MD: University Press of America, 1988), 25; Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman and Littlefield, 2005), Kindle edition, loc. 3503.

[2] Woodrow Wilson, *Congressional Government,* (Cleveland, OH: Meridian Books, 1956 [1885]), 26.

[3] Ibid., 27.

[4] Ibid.

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Wilson, well read in European history and political science, particularly in British history and German political science, felt he had freed himself from this Americentric view of the world. Understating his own break from the American consensus on American political superiority, Wilson claims to speak as but one voice among many in his generation: "we of the present generation are in the first season of free, outspoken, unrestrained constitutional criticism. We are the first Americans to hear our own countrymen ask whether the Constitution is still adapted to serve the purposes for which it was intended; the first to entertain any serious doubts about the superiority of our own institutions as compared with the systems of Europe."[5] As M. J. C. Vile points out, one of the very first voices of his generation to engage in this "outspoken, unrestrained constitutional criticism" was Wilson himself, for "only fourteen years after the end of the civil war the young Woodrow Wilson wrote his essay proposing the adoption of cabinet government in America" in place of the separation of powers.[6] Wilson may have been one of the first, but he was soon joined by many others, who, as American political scientist Dwight Waldo put it, had "almost complete lack of sympathy" for the constitutional system of separated powers.[7]

Americans were not only "Pharisaical" in their attachment to the fundamental law of the Constitution, but they were "still reading *The Federalist* as an authoritative constitutional manual."[8] One of the reasons Americans were so attached to the Constitution is that they thought it operated as *The Federalist* prescribed it. But *The Federalist*, Wilson claimed, presented only the "literary theory" of the Constitution. Wilson sought to give a realistic portrait of the actual workings of American government. Americans had to first understand that the constitutional system did not operate as it was intended and as they persisted in believing that it did.

Wilson shared much with his fellow Progressives, but on the question at hand he had a subtler and more nuanced view than many. For example, "J. Allen Smith and Charles A. Beard both believed that the doctrine of separated powers was a part of a coherent scheme of wealthy conservatives to build into the American constitutional structure devices to frustrate the popular majorities that would otherwise use the national government to the disadvantage of the wealthy in general (Smith) or of

[5] Ibid.

[6] Vile, *Constitutionalism*, 291. Vile is referring to Wilson's essay "Cabinet Government in the United States," *International Review*, Aug. 1879. Vile sees the Civil War as the "turning point." It ushered in a long intense period of criticism and attack upon the established constitutional theory, of an unprecedented ferocity conducted alike by practical politicians, journalists, and academics." Vile, *Constitutionalism*, 290.

[7] Dwight Waldo, *The Administrative State* (New York: Ronald Press Co., 1948) 105; quoted in Vile, *Constitutionalism*, 294.

[8] Woodrow Wilson to Ellen Axson as quoted in Walter Lippmann's "Introduction" to Wilson's *Congressional Government*, 11.

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the class of speculators in government bonds (Beard)."[9] They thought the separation of powers was part of an antidemocratic, countermajoritarian plan, whereas Wilson saw the separation of powers as part of a set of "checks and balances" meant to prevent the concentration of power in any one set of hands or institution. Thus, he saw federalism—a device for dividing power between the central government and the states—and the separation of powers—a device for dividing powers within the central government—as simply parallel and inspired by a fear of concentrated power.[10] By and large, Wilson endorsed the conclusion of one of his literary heroes, the English political analyst Walter Bagehot: "They [the American Founders] shrank from placing sovereign power anywhere. They feared it would generate tyranny."[11] The Founders, Wilson concluded, "would conquer, by dividing, the power they so much feared in a single hand."[12]

More specifically, Wilson saw the separation of powers as a device adapted from British Whig attempts to clip the wings of the irresponsible monarchy by setting a checking Parliament alongside the king. In the eighteenth century, when the Americans were setting off on their constitution-making enterprise, many Whigs in both England and American were distressed at the way the British constitution was operating in practice. The Parliament was supposed to be an independent checking agency, but the monarch had instruments in hand with which he could overcome parliamentary independence and exercise the kind of concentrated power that Whigs feared. The king could appoint ministers and give position and place to members of Parliament or their connections, and thereby make Parliament nominally independent but factually subservient. "It was something more than natural that the Convention of 1787 should desire to erect a Congress which would not be subservient and an executive which would not be despotic. And it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end."[13]

Wilson, inimical as he was to the separation of powers, was nonetheless happy to concede that the American Founders made a great advance on the English Constitution as it was in their day. But, as we will see, this concession did not prevent him from affirming that "the English Consti-

[9] Mahoney, "Separation of Powers," 27. Mahoney is referring to J. Allen Smith, a University of Washington political scientist, who published *The Spirit of American Government* in 1907 and Charles A. Beard, Columbia University historian, who published *An Economic Interpretation of the Constitution of the United States* in 1913.

[10] Wilson, *Congressional Government,* 31–34; Woodrow Wilson, *Constitutional Government in the United States* in Pestritto, ed., *Essential Political Writings,* 202.

[11] Wilson, *Congressional Government,* 202, quoting Bagehot, *The English Constitution.*

[12] Ibid.

[13] Ibid., 201.

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tution . . . is now superior" to the American.[14] Haven't we had enough, Wilson asked rhetorically, "of the literal translation of Whig theory into practice, into Constitutions?"[15]

Wilson considered the system of separation of powers a failure in the first instance because it failed so completely to accomplish its intended aims. In his first and still most programmatic book, *Congressional Government,* Wilson set out to show that the Founders aimed at a system of checks and balances through dividing and separating the institutions of power in the federal system and in the separated powers of the central government. Instead, they had created a system of consolidated government. The Founders failed at their own game and produced not quite the monstrosity they feared—it was a different monstrosity—but it was definitely not the order they had aimed at. Wilson saw his task to be to awaken his fellow citizens from their conceptual slumbers, slumbers in which, because of the veneration in which the Constitution and the Founders were held, Americans persisted in believing that *The Federalist,* the "literary theory of the Constitutions," adequately described their political arrangements.

Whether he quite believed it himself or not, one way in which Wilson hoped to awaken his readers was by attempting to convince them that they were misunderstanding the Founders. The authors of *The Federalist,* for example, wrote "to influence *only* the voters of 1787," not to lay out an eternally valid plan of government.[16] The Constitution the authors of *The Federalist* were defending was itself "a thing of action rather than of theory, *suited to meet an exigency.*"[17] The American of the nineteenth century, said Wilson, needs to turn away from misplaced piety, "to escape from theories and attach himself to facts, not allowing himself to be confused by a knowledge of what that government was intended to be."[18] In order to understand the "reality" of his system of government, the American needed to seek out "the real depositary and the essential machinery of power."[19]

Americans believed that they had a decentralized, dispersed system of power, but in reality "there is always a centre of power."[20] "The balances of the Constitution are for the most part only ideal. For all practical purposes the national government is supreme over the state govern-

[14] Ibid., 202.

[15] Wilson, *Constitutional Government,* 221. Wilson does not, then, accuse the Founders of designing a system in which "government would act slowly and inefficiently." Pestritto, *Wilson,* loc. 3494–3495.

[16] Wilson, *Congressional Government,* 30. Emphasis added.

[17] Woodrow Wilson, "Fourth of July Address on the Declaration of Independence." (1907), reprinted in Scott Hammond, Kevin Hardwick, and Howard J. Lubert, eds., *Classics of American Political and Constitutional Thought* (Indianapolis, IN: Hackett Publishing Co., 2007), vol. II, p. 318.

[18] Wilson, *Congressional Government,* 30; Vile, *Separation of Powers,* 295.

[19] Wilson, ibid.

[20] Ibid.

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ments, and Congress predominant over its so-called co-ordinate branches." The separation of powers along with federalism is the target of Wilson's attack, in the first instance, not because it disperses power, as many of the other Progressives, like Herbert Croly or Theodore Roosevelt argued, but because it fails to disperse power as it was intended to do. The "checks and balances which once obtained are no longer effective. . . . [T]he actual form of our present government is simply a scheme of congressional supremacy."[21]

Wilson devotes a fair amount of his text to probing the reasons for this concentration of power in Congress, so contrary to the original intentions of the Founders. The chief causes seem to be three in number. First, the "natural, the inevitable tendency of every system of self-government like our own and the British is to exalt the representative body, the people's parliament, to a position of absolute supremacy."[22] Although he does not do it, he could have quoted James Madison on the "legislative vortex." This "political law . . . written in our hearts," overrides the merely written parchment law of the Constitution. The power to make laws and the power to control taxing and spending overwhelms all other powers; it "practically sets [the popular legislative] assembly to rule the nation as supreme overlord."[23] Although Wilson does not explicitly draw the conclusion, his point is that experience has shown that the Constitution's Framers did not adequately understand the dynamics of democratic politics. They established a representative popular democracy with huge powers centered in the branch closest to the people. The result—congressional supremacy—was inevitable, or nearly so.

But quite another set of factors at work in the world pushed in the same directions. "The times seem to favor a centralization of governmental functions such as could not have suggested itself as a possibility to the framers of the Constitution."[24] Wilson has in mind technological changes that on the one hand make possible a degree of centralization that would have been completely impossible in the eighteenth century, and on the other hand generate a set of problems that would not have existed in the eighteenth century, and that now call for centralized address. He refers explicitly, on the one side, to technologically inspired changes in transportation and communication that make central action possible. Like James Madison before him, Wilson sees that these various technological advances in effect make the nation smaller, and make it ever more possible for the center and the periphery to become better integrated.[25] At the same time,

[21] Ibid., 53.
[22] Ibid., 203.
[23] Ibid.
[24] Ibid., 54.
[25] See, for example, James Madison to _____ (1833), reprinted in Marvin Myers, *The Mind of the Founder* (Waltham, MA: Brandeis University Press, 1981), 411.

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"questions of policy which manifestly demand uniformity of treatment and power of administration such as cannot be realized by separate, unconcerted actions of the states" become ever more prevalent as transportation, communication, and commerce create thicker ties and connections across state lines.[26]

Finally, Congress has adapted itself so as to be the unchallenged beneficiary of these centralizing forces. "Congress was very quick and apt in learning what it could do and in getting into thoroughly good trim to do it."[27] In particular it developed a system of standing committees, possessing "very comprehensive and thorough-going privileges of legislative initiative and control."[28] Through its very effective internal organization, Congress was able to extend its power into the executive branch and has proven able to counter the power of the presidency through its superior means of action.[29] Because Congress has attained preeminence in the system, the presidency is not able to attract to it the caliber of man who could make that office strong. Weakness begets further weakness.[30]

The Courts, Wilson concedes, retain some power, but it is largely to control the presidency, not Congress. The courts too "are for the most part in the power of Congress."[31] He takes very seriously congressional power to control the size of the Supreme Court, the very existence of a lower federal court system, and the jurisdiction of the federal courts. It is worth recalling that these are all powers Congress had exercised in the recent past when Wilson was formulating his thoughts on congressional supremacy.[32]

Despite his belief that constitutional regimes like America's tend inevitably toward legislative supremacy, Wilson finds the pattern of congressional government in America to be troubling. He has a long list of complaints against the system. First, so far as there is value in a system of checks and balances, of which, we shall see, he has some doubts, this arrangement does not produce these goods.[33] Receiving more emphasis, however, is, secondly, his concern that congressional government actually consists in "government by standing committees of Congress."[34] The centralization of power in Congress is not matched by centralization of power within Congress. The results of the diffusion of power to the

[26] Wilson, *Congressional Government*, 54–55.
[27] Ibid., 49.
[28] Ibid.
[29] Ibid., 48–49.
[30] Ibid., 48.
[31] Ibid., 45.
[32] Ibid., 45–46. With the admission of new states, Congress regularly changed the shape of the lower federal court system. Congress had increased the size of the Supreme Court to ten in 1863 and lowered it again to nine in 1866. In 1868 Congress had stripped the Supreme Court of its jurisdiction to hear appeals in habeas corpus cases, a law upheld in *Ex Parte McCardle* 74 U.S. 506 (1869).
[33] Ibid., 49–50.
[34] Ibid., 56.

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committees in turn produces a number of now familiar complaints about the way Congress does its job, ranging from the toehold this arrangement provides to special interests to legislation by logrolling and aggregating compromise.[35] The result is that "legislation is without consistency. Legislation is conglomerate. The absence of any concert of action amongst the committees leaves legislation with scarcely any trace of determinate party course."[36] The system lacks "intelligent cooperation;" it also lacks "intelligent differences and divisions." In a word, the system of congressional government in the United States produces a Congress that "has no common mind."[37] Wilson takes it for granted that rational, consistent, and coherent policy is preferable to irrational, inconsistent, and incoherent policy. It is hard to see that the Founders would disagree.

Incoherent policy is bad enough, but the system of government by standing committee falls short in yet another way that Wilson seems to find even more distressing. Incoherent legislation is matched or preceded by incoherent debate. Incoherent debate, in turn, leads to failure in one of the chief functions of the representatives of the people—public political education and enlightenment. Wilson took this aspect of governmental responsibility very seriously: "The informing function of Congress should be preferred even to its legislative function."[38] Government should not merely reflect public opinion but should help to shape it.

Some critics take this to be an example of Wilson's elitism and undemocratic commitments. As Ronald J. Pestritto puts it, "the rhetoric is intensely popular and democratic, yet the reality of the argument is to put political power into the hands of governing elites."[39] That political leaders should take the lead in informing and shaping public opinion in the way Wilson commends, through free discussion among partisans with different points of view, is not undemocratic. It is certainly not contrary to the spirit of American representative democracy as voiced by the American Founders. A conception of leadership by the representatives of the people may strike some as undemocratic, but we must recall that even Jean-Jacques Rousseau, the patron saint of radical democracy, conceded the role of political leadership. Wilson is quite clear: "thought and opinion, like conscience, should be free."[40]

As Wilson saw it, coherent, principled debate within Congress could help educate public opinion and enable it to exercise better its ultimate role as "sovereign" in the system of democratic governance. He did not have in mind a single-voiced government controlling opinions, but a number, preferably two, of organized and coherent parties formulating

[35] Ibid., 208–11.
[36] Ibid., 211.
[37] Ibid. Vile, *Separation of Powers,* 292.
[38] Wilson, *Congressional Government,* 198.
[39] Pestritto, *Woodrow Wilson,* loc. 3059 (ch. 6).
[40] Woodrow Wilson, *The State* (Boston: D.C. Health and Co., 1900), 637–38.

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analyses of problems and bringing proposals before the country for its judgment.[41] There are other possible theories of what democracy requires, but Wilson's is well within the pale of American theory and practice.

According to Wilson, then, the separation of powers scheme failed as a means to the Founders' own aim of limiting government by means of checking and balancing powers. But it is significant that, unlike the seventeenth and eighteenth century Whigs who saw the failure of separated powers to check the king, Wilson did not call for a revitalization of separated powers. Instead, in his younger days, he called for the institution of cabinet government on the model of the late nineteenth century Parliamentary system, and in his later years, he looked to the presidency, together with a purified party system, to provide the unity and leadership in the American context that the cabinet system supplied in Britain.[42]

Wilson did not seek a "new and improved" version of the separation of powers because he did not believe that the ends the Founders were seeking were any longer the appropriate ends in the industrial age. As Wilson put it in *Congressional Government:*

> The government of a country so vast and various must be strong, prompt, wieldy, and efficient. Its strength must consist in the certainty and uniformity of its purposes, in its accord with national sentiment, in its unhesitating actions, and in its honest aims. It must be steadied and approved by open administration diligently obedient to the more permanent judgments of public opinion.[43]

It should be evident that a system of separated powers functioning as the Founders wished would not operate to accomplish the political needs of the day. As Pestritto comments, "Wilson saw the separation of powers as a key obstacle to America's progress as a nation."[44] It should be just as evident that the system of "government by Congressional Committee" that was the actual consequence of the Founders Constitution would not suffice either.

[41] Consider, for example, Pestritto's own account of Wilson on political parties and party competition: *Woodrow Wilson,* locs. 2720–2910.

[42] As Walter Lipmann points out in his Introduction to *Congressional Government,* Wilson did not quite come out for cabinet government in that book, but he surely hinted at it in the concluding chapter. For Lippmann's claim, see *Congressional Government,* 13. Wilson was much more explicit in seminal essays he published prior to *Congressional Government.* See "Cabinet Government in the United States" (1879) in Woodrow Wilson, *Papers of Woodrow Wilson,* vol. I (Princeton: Princeton University Press), 493–510; and "Committee or Cabinet Government" (1884), in *Papers of Woodrow Wilson,* vol. 2, 614–40. For his later position, the locus classicus is his *Constitutional Government.*

[43] Wilson, *Congressional Government,* 206.

[44] Pestritto, *Woodrow Wilson,* loc. 2053.

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Although some important scholars argue that Wilson was hostile to the political vision of the American Founders, the evidence better supports the conclusion that he was ambivalent.[45] For example, Pestritto says that "Wilson attacked those who were devoted to the principles of the Declaration of Independence" in his book *The New Freedom.*[46] Wilson indeed spoke of citizens who "never get beyond the Declaration of Independence," but his point is not to urge Americans to forget or reject the Declaration, but rather to urge them to ask how it applies to the problems of their own day, how it translates into policies for the early twentieth century. "[I]t means nothing unless one can translate its terms into examples of the present day and substitute these" for the particulars with which the Declaration deals.[47] "The Declaration of Independence, so far as I recollect, did not mention any of the issues of 1911," said Wilson in 1911.[48] Wilson was consistent in his view that many of the specific political maxims endorsed by the Founding generation were no longer of beneficial use to America, but at the same time, he insisted, "the business of every true Jeffersonian is to translate the terms of those abstract portions of the Declaration of Independence into the language and problem of his own day." The task is "to realize the conceptions of the author of the Declaration of Independence in our own day."[49] Or, as he said on another occasion: "We return to Jefferson not to borrow policies but to renew ideals."[50]

But how does Wilson understand these "ideals"; how does he understand the "principles" and "abstract portions of the Declaration" that he does commend to the nation? Wilson did not understand the Declaration in the way many contemporary readers do, or at least he did not mean to affirm the reading that these scholars give it. The leading view of the Declaration sees it as an expression of Lockean social contract philosophy, affirming the familiar ideas of natural rights as the foundation, basis, and purpose of government, the social contact operating via consent of the governed as the rightful origin of government, and the right of revolution

[45] Pestritto is most forceful in making the case for hostility. Ibid., passim. But he is joined by Kesler: Charles Kesler, "Separation of Powers and the Administrative State," in *The Imperial Congress,* ed., Gordon S. Jones and John A. Marini (New York: Pharos Books, 1988), 20–40; Charles Kesler, "The Public Philosophy of the New Freedom and the New Deal" in *The New Deal and Its Legacy,* ed. Robert Eden (New York: Greenwood Press, 1989), 155–66; and Charles Kesler, "Woodrow Wilson and the Statesmanship of Progress," in *Natural Right and Political Right,* ed. Thomas B. Silver and Peter W. Schramm (Durham, N.C.: Carolina Academic Press, 1984), 103–27. And of course there is Glenn Beck.

[46] Pestritto, *Woodrow Wilson,* loc. 1884.

[47] Woodrow Wilson, *The New Freedom* in Ronald J. Pestritto, ed., *Woodrow Wilson: The Essential Political Writings* (Lanham, MD: Lexington Books, 2005), 122.

[48] Woodrow Wilson, "Address to the Jefferson Club of Los Angeles" (1911), reprinted in Scott Hammond, Kevin R. Hardwick, and Howard J. Lubert, eds., *Classics of American Political Thought,* (Indianapolis, IN: Hackett Publishing Co., 2007) vol. 2, p. 323.

[49] Ibid.

[50] Wilson, "Address to Jefferson Club," 93.

as a corollary of those starting points. In his most theoretical work, *The State,* Wilson made it clear that he had no sympathy with Lockean social contract theory, even though it was "once of almost universal vogue."[51]

Wilson understands the social contract theory to be, literally, a history of political society, and thus readily falsifiable by "modern research into the early history of mankind."[52]

> The defects of the social compact theory are too plain to need more than a brief mention. That theory simply has no historical foundation. The family was the original, and *status* the fixed basis of primitive society. The individual counted for nothing; society—the family, the tribe—counted for everything. Government came, so to say, before the individual and was coeval with his first human instincts. There was no place for contract.[53]

Wilson then finds the social contact theory of the Declaration unacceptable as a descriptive matter; he also finds it unacceptable as a normative matter. In an essay on one of his political and intellectual heroes, Edmund Burke, Wilson endorsed Burke's vehement rejection of the "French revolutionary philosophy," which was the same philosophy that found expression in the Declaration. "That philosophy," Wilson said "is in fact radically evil and corrupting. That is, it is not only incorrect as a matter of fact; it is morally repugnant as well, "evil."[54] "No state," Wilson went on,

> can ever be conducted on its principles. For it holds that government is a matter of contract and deliberate arrangement whereas in fact it is an institute of habit, bound together by innumerable threads of association, scarcely one of which has been deliberately placed.[55]

Wilson has a more historical or even sociological view of the origin and ongoing basis of government. The contract theory is not only false in fact, but is pernicious in effect for it encourages men to believe that deliberate action can accomplish more than it does; it encourages men to step outside the web of "habit" and "threads of association" that truly hold society together and substitute a contractual perspective, that is, an approach that emphasizes the quid pro quo character of common life and governance. Citizens who approach common life in that way always ask, "What's

[51] Wilson, *The State,* 9.
[52] Ibid., 11.
[53] Ibid., 12.
[54] Woodrow Wilson, "Edmund Burke: The Man and his Times," in Mario DiNunzio, *Woodrow Wilson: Essential Writings and Speeches of the Scholar-President* (New York, NYU Press, 2006), 89.
[55] Ibid.

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in it for me." They do not, as a matter of course, see themselves as members of an ongoing organic whole.

Although Wilson seldom spoke of the natural law or natural rights affirmed in the "abstract portions of the Declaration," it is evident that his historical critique implies deep skepticism about them as well. Natural rights are said to be the possessions of individuals in the pre-political state antedating the social contract. But, as Wilson has it, there is no antecedent pre-political state, and there are no individuals prior to government. Individuals and individualism are the result, not the cause, of government.

The idea of a contractual basis for government coheres well with another aspect of the Founders' political theory of which Wilson was also regularly critical. The contract view implies that political life is consciously constructed. It misses or denies what Wilson sees as the truth—that society is mostly "grown" not "made." He frequently spoke of both government and society as "organic," as responding to the laws of life as articulated by Darwin, rather than the laws of Newtonian mechanics, as embodied in the theories of Montesquieu and the authors of *The Federalist* and intended to be the law of operation of the Constitution and its scheme of separation of powers.[56] The "mechanics" of the Constitution was the system of "checks"—one element in the system "checking" another through a collision of forces. As a goal, checking fits well with the individual rights-oriented social contract theory. It led to the view that "good government just had a policeman role" in society, with the "ideal . . . to let every man alone and not interfere." Wilson associates the American Founding theory with the formula "that government is best which governs least," a formula he thinks no longer descriptive of the kind of government needed for America.[57]

Wilson rejects the theory in the "abstract portions of the Declaration," the Newtonian principles of political construction the American Founders used to make their Constitution, the Constitution's system of separation of powers, and the overall conception of governmental function on which the Founders acted. Are not Pestritto and the others correct to see Wilson as hostile to American Founding principles and practices? Not quite. When Wilson spoke of the need to "return to [Jefferson's] ideals," he had something real in mind. Jefferson, as Wilson put it, had two principles: "the right of the individual to opportunity and the right of the people to a free development." Jefferson's "creed" was one of "individualism not socialism."[58] The Jeffersonian—and Wilsonian—principle was hostile not to the individual but to the "socialist" principle. Adopt socialism and

[56] See Wilson, *The New Freedom,* 120–21; *Constitutional Government,* in Pestritto, ed., *Essential Political Writings,* 176; "The Study of Administration," in Pestritto, ed., *Essential Political Writings,* 242.

[57] Wilson, *The New Freedom,* 112.

[58] Wilson, "Address on Jefferson," 92.

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"you would enslave the individual by making him subject to the organization. You would make the biggest, most dangerous, corruptible organization that you could possibly conceive." A collectivist future would turn each man into a "fraction" of the state, not allowing him to be a "whole man."[59]

In Wilson's view, Jefferson endorsed very limited government in order to "vitalize individuals." The threats to individuals in Jefferson's day came from too intrusive government and the project of restraining government made sense in that context. But in Wilson's day the threat to the individual comes from elsewhere also. The modern corporation and the modern system of production expose the individual to dwarfing forces of which the Founding generation knew nothing. The specifics of their constitutional and political intentions no longer speak to public needs, and so Wilson favors political reform and a more positive role for government. But the Founders' principle, the commitment to individualism as both end and means of government, still stands.

Wilson may reject the Founders' understanding in some very important ways, but he still plausibly sees himself as carrying on their work. Thus, Herbert Storing could say that "Woodrow Wilson . . . saw himself as building upon and to some extent restoring the work of the Founders."[60] Wilson's emphasis on the individual, on free competition, and restoring markets, while not expressed in the specific terms of the Declaration nonetheless can claim descent from those doctrines. Accordingly, for Wilson, individual liberty was the end of government: he took as the slogan that captured his political aims "the new freedom." Well before his entry into politics he provided his most general statement on the proper "objects [aims] of government":

> Government . . . is the organ of society . . . its objects must be the objects of society. What then are the objects of society? What *is* society? It is an organic association of individuals for mutual aid. Mutual aid to what? To self-development. The hope of society lies in an infinite individual variety, in the freest possible play of individual forces.[61]

Although Wilson believed that government had to be more active and less limited in the twentieth century than in the eighteenth, he nonetheless strongly affirmed "natural and imperative limits to state action."[62] Contrary to the claims of some of his recent detractors, he took his bear-

[59] Ibid., 93.
[60] Herbert J. Storing, "American Statesmanship: Old and New," in Joseph Bessette, ed., *Toward a More Perfect Union: Writings of Herbert J. Storing* (Washington, DC: The AEI Press, 1995), 411.
[61] Wilson, *The State,* 633.
[62] Ibid., 636.

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ings by the liberty and self-development of the individual and recognized specific areas where the state should not go. "The state, for instance, ought not to supervise private morals because they belong to the sphere of separate individual responsibility, not to the sphere of mutual dependence. Thought and conscience are private. Opinion is optional [i.e., voluntary]. The state may intervene only where common action, uniform law are indispensible. Whatever is merely convenient is optional, and therefore not an affair of the state."[63]

Wilson's ambivalence toward the political philosophy and constitutional theory of the Founding should now be clear. He had a nested set of disagreements with the Founders, as applied to his day, if not to theirs. He disagreed with their commitment to a constitution organized around the separation of powers, for that constitution proved neither to achieve what it set out to achieve—limited government through dispersed power—nor did it seek the aim needed for the present day—active and responsible government. The Founders sought the end they did in their constitutionalism because they accepted the political theory of the social contract, along with its accompanying doctrines of natural rights and the state of nature. Wilson could not accept this version of political philosophy. He saw this philosophy however, as an attempt to articulate a yet more general and higher-level goal: individual liberty for the sake of individual development as harmonized with the social whole as the only context in which such liberty could be realized. It is in this respect that Wilson believed his understanding of the aims of political life converged with that of the Founders. In fact, he and the Founders had a common ultimate goal; for both, this goal required a highlighting and safeguarding of the individual; for both, this goal required limits on the state. But for Wilson, as opposed to the Founders, at least as he understood them, this goal meant more positive government, more tasks to be done, and a government better fitted to do them.

As we have already seen, Wilson held the view that "we must think less of checks and balances and more of coordinated power, less of separation of functions and more of synthesis of action."[64] Wilson frequently urged that America would do well to look to Europe for guidance on how to achieve the "coordinated power" and "synthesis of action" he sought. In his seminal essay on "The Study of Administration" Wilson explained much of what he meant by urging his fellow citizens to look to Europe. The Europeans, particularly the French and Germans, had developed both a "science" of administration and an administrative apparatus that Wilson believed were worthy of imitation and cultivation in America. Both the science and the apparatus were developed within political con-

[63] Ibid., 637–38.
[64] Wilson, *Constitutional Government,* 202.

texts very different from the American context; but, Wilson argued, the distinction between politics and administration made it possible to transplant both to America, with some necessary adaptation to the new world context. The politics-administration distinction was to be fundamental for Wilson's thinking about politics and central to his hopes for institutional transformation of the American system. That distinction, and not that of the separation of powers—between legislative, executive, and judicial—was to be fundamental.

Hardly anything Wilson ever said has been more controversial than the conceptual distinction he drew between politics or policy and administration. A century of political scientists have challenged it as conceptually unworkable and descriptively false in the American context. Despite their importance, I leave such questions aside. My interest is in Wilson's interest in advocating this new political schema. Some critics of Wilson's have urged that his point was to take power from the people and turn it over to a group of elite experts, who could discern the people's good and fashion policies to achieve it. That is, these critics see the distinction as part of an allegedly elitist, antidemocratic, antiliberty Wilsonian agenda. This view misses Wilson's aims.

The distinction between politics and administration arises for Wilson in the first place because he wishes to borrow administrative techniques and practices from political systems decidedly unlike ours. German administration began under the Kaisers; French under the Napoleonic regime. These practices and techniques are not thereby disqualified from being adapted to American democracy because administration is a matter of means, which in many essentials is neutral between political regimes. "Administrative questions are not political questions." As Wilson said in one of his more picturesque metaphors: "If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots."[65] In what I believe even he sees as an overstatement, Wilson goes so far as to claim that there is "but one rule of good administration for all governments alike."[66]

Wilson's adumbration of the politics-administration dichotomy is a direct result of his analysis of the tasks facing modern democratic states. These tasks can be stated as two: first, the efficient accomplishment of the tasks of positive governance, and second, democratic responsibility. As we have seen, Wilson believed that America fell short on both tasks. The system of government by standing committee of Congress led to both ineffective administration and irresponsible politics. The politics-

[65] Wilson, "The Study of Administration," 240, 247.
[66] Ibid., 245.

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administration dichotomy responds directly to those two tasks. Administration, depoliticized, staffed by individuals with relevant expertise, and generally rationalized, can provide efficiency in meeting the tasks facing government. But government can only be responsible if the political side, the side responsible directly to the people, both is able to translate popular mandates into policy, which it can then pass on to administration, and is able at the same time to oversee, supervise and hold the administration responsible. The existing system, as Wilson saw it, fell short on all these tasks because the institutional structure led to political meddling in, but not control of, the administration. It led to fragmented policy that neither spoke to the needs of the nation nor responded well to the preferences of the people.

Wilson's political thought attempted to coordinate three entities—the genuine needs of the nation, public opinion, and policy output. In a well-working system the three are connected. Public opinion focuses on the genuine needs of the nation and formulates relatively clear-cut policy responses to these needs. The policy responses are then administered to properly produce policy effectively responsive to the needs. The political side of the politics-administration dichotomy is essential to the proper working of this projected system. In the kind of political debate Wilson believed occurred within the British Parliamentary system, public opinion was focused on the problems and given a menu of policy options from which the ruling democratic populace could choose by electing a government. The government, not separated from but merged at the top with the administration, could formulate policy which the nonpolitical expert administration could implement, always under the watchful eye of the political authorities. The administrators, as experts, could of course be given a certain amount of discretion in implementing the policies with which they were charged. Many matters of modern policy are, after all, technical matters. That there should be a policy for testing new drugs before they are brought to market is an appropriate decision for the political branches, but how to design tests for drug safety is a matter for experts. There are of course gray areas which Wilson admitted would always need to be worked out. For example, what level of risk would be acceptable for a new drug—is this a policy or an administrative matter? Clearly it partakes of both, but an alert and effective political directorate should be able to work this problem through.

It must be remembered, as some of the generations of political scientists who have criticized Wilson's scheme have sometimes not done, that the whole idea depended on reforms of various sorts on the political side of the dichotomy. Thus, he first looked to a cabinet system and later to a presidential system operating through a much-reformed responsible party system. It must also be remembered that as Wilson sought to liberate administrative expertise from political meddling (but not political control), so he sought to focus responsibility in order that the people could

better exercise the democratic control to which they had a right, and in order that the whole could better serve the purposes of securing the liberty of the individual.

III. Lockean Liberalism and Separation of Powers

Wilson makes a powerful case for rethinking the separation of powers. In brief, that case includes rejection of what we might call the infrastructure of the doctrine in the liberal theory of natural rights, state of nature, and social contract. These are rejected as "unhistorical." Wilson implicitly connects the theoretical infrastructure with the constitutional doctrines of separation of powers through the notion that the chief or even sole end of the scheme of separated powers is to limit government by checking power; the political task of checking power is set by the notion that the point of government is, as Jefferson's Declaration of Independence puts it, "to secure" the preexisting rights through the Whiggish devices of restraining and restricting governmental threats to rights.

In the modern age, if not always, this negative understanding of the chief aim of constitutional design is too narrow, avers Wilson. The need in an age of commerce and industry, of huge conglomerates of private power, which themselves threaten liberty, is not weak and checked government, but strong, active, national government. That kind of government has not been achieved, Wilson believed, by the American system as it came from the hands of its Framers, nor as it developed over time. Indeed, by the late nineteenth century Wilson saw that American government had developed so as to produce the worst of all possible worlds. It did not achieve the nicely limited government of the Founders' hopes because power was not divided and checked, but concentrated in Congress. This did not, however, produce the potent, coordinated and national governance Wilson looked to, but a different sort of fragmentation from what the Founders sought and a government more often than not captured by the interests that needed to be controlled in the interests of the democratic majority; those who should be controlled were instead controlling, using government to reinforce their "natural" advantages.

Wilson's solution was to advocate a political structure more capable of the kind of rational, democratic action he thought was needed; the separation of powers as understood by the Founders was no part of his plan for the future of the American constitutional order. Wilson's guiding idea reached academic expression in the "two pyramids" model of governance as developed by Frank Goodnow, an American political scientist and pioneer of the study of public administration that Wilson had called for.[67] The first pyramid of Goodnow's model was a disciplined party system, in which visions and policy goals could be formulated and brought before

[67] Frank J. Goodnow, *Politics and Administration* (Charleston, SC: Nabu Press, 2007).

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the public for deliberation, consideration, and choice. The public choice would be carried up the pyramid via the party system into government, where policy goals achieve concrete formulations as policies. The second pyramid is the administration side, to which formulated policies are passed on via an executive head, who is also, on the Goodnow's model, legislative-party head. That is, the system depends not on a separation of legislative and executive, but a combination of the two at the apex of both pyramids. An administrative structure responsible to the legislative-party leadership then implements policy, exercising much discretion as it brings to bear the particular kinds of expertise the administrators possess. In theory at least, that discretion and expertise are in service to, ministerial to, the democratically selected policies as formulated up the steps of the first pyramid. Thus, the distinction and partial separation of politics and administration is to replace the classical liberal theory of separation of powers.

I propose to examine Wilson's critique of classical liberal constitutionalism in two phases: first, to consider his (and other Progressives') rejection of the infrastructure of liberal theory, and then to consider the superstructure of the separation of powers scheme. To begin then: can the Lockean theory—can the ideas of a state of nature, social contract, and all the rest—be salvaged from the potent critique by Wilson and the other Progressives. I believe the answer is yes.

We must begin by asking: Does Locke mean his narrative about the state of nature to be historical—i.e., descriptive of what actually happened at some point in human history? Locke goes out of his way in many places to suggest that the answer is yes. He defines the state of nature as a condition of "men living together . . . without a common superior on Earth, with authority to judge between them" (sec. 19).[68] It is a very common experience that there are men in such a state. Locke gives the example of "all Princes and rulers of independent governments all over the world" as in a state of nature (sec. 14). Or two otherwise unconnected men who meet on a desert island, or "Swiss and an Indian in the woods of America"—these are all men in a state of nature. If he had been around in the twenty-first century Locke might have added the survivors of the plane crash on the television program *Lost*—but then John Locke was among those survivors and knew their situation well. From these examples, Locke concludes that "the world never was, nor ever will be, without a number of men in that state" (sec. 14). So, Locke's state of nature is meant as a real historical situation—no doubt about that.

However, the examples Locke gives are not the sort that proves the historicity of his main narative—of all men starting out in a state of nature and making a social contract, and so on. The examples he gives are clearly

[68] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988). References to Locke's book will be in the text by section number. All references are to the *Second Treatise.* All emphasis is in the original text.

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exceptions to the way the normal run of men live and the examples all take for granted as a background condition the existence of political communities such as those the rulers of independent governments rule. The Progressive critiques of state of nature thinking that I mentioned earlier could be correct and still Locke would be right to say that heads of state, men on a desert island, and so on are in a state of nature. But this of course says nothing about the main issue.

Another way to understand the state of nature doctrine is to see it as purely hypothetical, not at all historical.[69] As one recent book on Locke put it—the state of nature is like a thought experiment: imagine away the state and see what happens as a way of coming to understand what difference government and the state make in human life. This understanding of the state of nature is not sufficient either, for it misses out on the main thing Locke uses his state of nature/social contract narrative to establish—the outlines of the legitimate state. His is a normative, almost a legislative project. He seeks to discover the good or rightful state and not a merely descriptive account of the state. So while the theory that the state of nature is a merely hypothetical construct saves Locke from the criticisms of the idea of a historical state of nature, it does not capture his main use of the doctrine.

Let me put forward a third idea then, an idea that I think both absolves Locke from the criticisms and fits his own agenda better. For want of a better term I call this a "conceptual account," in contrast to both the historical and the hypothetical accounts I have mentioned.

To understand the conceptual account, we must step back a bit and remind ourselves of Locke's chief affirmations about the state of nature. It is, first of all, a state of equality and freedom, by which Locke means a state of no authority, a state where nobody has the right to rule or command another. This is actually merely another way to say what Locke says when he defines the state of nature as the situation where there is no common superior. There is no common superior because there is no superior whatsoever. When Locke refers to the situation in which there is no superior as the natural state, he is saying that authority, the right to rule or govern, is not natural. His notion of the state of nature is thus a thoroughly normative idea, by which I mean it is not meant to describe how men live. It does not say anything about whether men live in society or not, or whether men live under others who command or rule them. He is saying that neither nature nor God produces authority, i.e., the right to rule. There are no natural or divine right rulers.

Now, why does Locke say that? To answer that question we must notice the other main feature of the state of nature. It is a state in which human beings possess rights. There is no rule by nature, but there are rights by nature. And what are these rights? The famous triad: life, liberty, and

[69] Eric Mack, *John Locke* (New York: Continuum Publishing, 2009).

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property. Men have a right to these three things, which Jefferson in the Declaration of Independence sums up as the "right to pursuit of happiness": That is to say, men have a right to give a shape to their own lives such as they believe might lead them to happiness, the thing that all men seek. I think most of us, even in our post-Progressive age, can accept the idea of human rights such as Locke affirms here.

My claim is that for Locke the state of nature follows necessarily from the affirmation of these natural rights. We can understand the relation between the rights and the state of nature in two different but completely complementary ways. Let us think for a moment of what a right in the full sense is. Let us take something more concrete than Locke's rights—my right to my car. My right to my car has two aspects: first, I have a right—a morally valid power—to control my car, to do with it what I will, subject of course to any limitations that the rights of others may impose. Thus, I may drive it or leave it in my garage. I may sell it, or I may even take a sledgehammer to it and smash it up. Just as I have these rights of control, so others are excluded from these same rights. That is, there is something exclusive about rights. So—without my permission *you* do not have a right to drive my car, to say nothing of your lacking a right to bash my car with a sledgehammer.

Now let us transfer this idea to the rights Locke affirms. I have a right to life and liberty. This does not mean that you are obliged to give me life, or even to give me the means to living, but you are obliged not to interfere with my life. If you kill me, you have committed a wrong by interfering with my right. More generally, we note that life depends on the body. My right to life must translate into a right of bodily integrity, a part of which is an immunity against others interfering with my body or, related to my right to liberty, with my actions. My basic rights translate into an immunity against others using violence or coercion against me. But as Locke points out in the early pages of his *Second Treatise,* political power or authority is *precisely* the right to command and apply coercion. If we all possess these natural rights and thus a natural immunity from the application of coercion, then it cannot be that there is natural authority, for natural authority would be a negation of our natural rights, of our natural immunity from coercion.

We can look at the relationship between rights and the state of nature in yet another way also. Taking Jefferson as a good interpreter of Locke, we can say that the basic rights sum up to a right of pursuit of happiness. Such a comprehensive right means that I have a comprehensive right to give shape to my own life, as I have already mentioned. If I have such a right by nature, then that is incompatible with someone having a natural authority over me, for if someone has a right to rule me by nature, then I do not have the right to give my own life its own comprehensive shape. Thus, starting with the idea of rights as including immunities from interference and coercion or simply with the right to pursue happiness as a

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comprehensive right of self-direction, we end up at the same place—the claim that nature does not supply authority, or that no one has a natural right to command and coerce others; and all have a right to command themselves. In other words, if we have natural rights, we are created equal, i.e., in a state of nature.

This is a conceptual beginning point, derived from a reflection on the moral situation of human beings as possessors of natural or human rights. Note that this is not a historical account, nor is it a mere hypothesis. It is a description of basic moral reality. The nature of moral reality is such that political power, government, and the state must be seen to be artificial—made things, which Locke will go on to show can be made only via consent of the governed. Locke shows that human beings can therefore rightfully consent to only *certain* sorts of political authority. Authority cannot be absolutist; it cannot be indifferent to the basic rights of its citizens. Indeed it must be devoted first and foremost to "securing these rights." It must be government devoted to liberty and embodying the consent of the governed. In its developed form, the Lockean doctrine of the state of nature and rights points to the sole legitimacy of the kind of regime we have come to call liberal democracy. The American Founders were the first in the world to follow out the implications in the Lockean philosophy and create an almost fully legitimate government. They fell short in at least one very crucial way—the institution of slavery was a violation of rights and an exercise of authority that could not be legitimate on Lockean grounds.

Please note that this conceptual account of the state of nature does not require that we think of human beings in the state of nature understood as a literally historical condition of asociality. Locke knows that human beings qua human are and always have been social beings. He knows that men have almost always lived under institutions vested with political power. Thus Locke does not have to deny Wilson's "historical" knowledge that government began in the family and first evolved into monarchy. Indeed, Locke presents a version of that very theory as his account of the actual historical origins of government (secs. 107–112). But he also knows that men have often misunderstood their true natural condition, or their true moral claims, and have most often lived under and accepted false claims to rule and have constructed or accepted the wrong sorts of governments. Once we understand the moral situation of human beings better we can establish public and political institutions that correspond better to that moral situation. That is what the American Founders believed they were doing when they took Locke as their guide in making what James Madison called "a revolution which has no parallel in the annals of human society" and then went on to "rear fabrics of government which have no model on the face of the globe."[70]

[70] *Federalist No. 14* (J. Madison), in Clinton Rossiter, ed. *The Federalist Papers* (New York: New American Library, Mentor Books, 1961).

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Neither Locke nor the American Founders thus fall to the Wilsonian critique of social contract theory as patently false, once one understands the claims actually being made.

The constitutional structure the Americans built on this foundation was indeed the separation of powers scheme that Wilson and the Progressives criticized. It is a striking fact about the Founding era that all sides in the debates over the Constitution—Federalists and Antifederalists alike—favored the separation of powers. They often disagreed about the best way to effectuate the scheme and Antifederalists often claimed that the proposed Constitution did not go far enough in separating the powers. But the near universal agreement on the separation of powers belies one major strand of Progressive critique of the Founding, the strand that identifies the complicated institutional structure as a device whereby wealthy-creditor-sponsors of the Constitution attempted to get an advantage over the poorer-debtor-opponents of the Constitution.

Without question, the intellectual authority to whom Federalists and Antifederalists both looked for insight on the separation of powers was the French philosopher Montesquieu, who had presented the classic version of the doctrine in the account of the British Constitution in his *The Spirit of the Laws.* Montesquieu did not, however, invent the doctrine. There is a fair amount of debate over who did invent it, but it is not necessary to settle that debate for the purposes of this essay. It is fairly clear that the doctrine emerged in the seventeenth century in England, perhaps under pressure of the need to rethink the nature of the English Constitution after the regicide of 1649. Previous to that the English Constitution was most often conceived in terms of the theory of the mixed regime, that is, the description of the constitution as a mix of classical regime elements—monarchy, aristocracy, and democracy—with the three main institutions of government corresponding nicely to the three regimes. With no king, and soon no aristocratic House of Lords, it was necessary to conceptualize the constitution in some others terms. At the same time, the surge in republican or at least antimonarchic sentiment led to an effort to develop nonmonarchical constitutional designs. The English republicans like John Milton, and the levelers like John Lilburne and Richard Overton, were prominent among those who did this. Some scholars believe that genuine separation of powers systems emerged or were proposed at this time.[71]

I propose to set these candidates for the original version of separation of powers aside and instead concentrate attention on John Locke. There are two reasons that suggest that strategy in this context. First, it remains debatable whether these earlier candidates do indeed qualify as genuine separation of powers proponents; there is no such debate about Locke. Moreover, in Locke, the separation of powers is linked to, indeed derived

[71] I am following the account of Vile, *Constitutionalism.* 58–82.

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from, what we have called the infrastructure of liberal theory. Wilson and other Progressives criticize the entire package, i.e., the constitutional arrangement of separated powers and the theoretical construct of natural rights and social contract. To look at Locke rather than, say, the Levelers, gives us an account at the same level of comprehensiveness as the Progressive critique.

Locke's most revealing reflections on the separation of powers come not in the section of the *Second Treatise* where he is delineating the legislative, executive, and what he calls the "federative power" (chaps. 11–14), but rather in his chapter on "The Ends of Political Society and Government" (chap. 9). Separation of powers seems not to be only a means to, but also to be closely associated with, the ends of political life. Locke begins that chapter with a recapitulation of the first half of the *Treatise,* the half that in effect deals with the pre-political aspects of political life. He begins with a question that readers who have been struck by the very non-Hobbesean character of Locke's description of the state of nature must have been asking: "If man in the State of Nature be so free, as has been said; if he be absolute Lord of his own Person and Possessions, equal to the greatest, and subject to no Body, why will he part with his Freedom? Why will he give up this Empire, and subject himself to the Dominion and Control of any other Power?" (sec. 123). Locke's answer, contrary to the impression he sometimes gives us (cf. sec. 19 esp.), is that the state of nature is not in fact such an idyllic place. "For all being Kings as much as he, every Man his Equal, and the greater part no strict Observers of Equity and Justice, the enjoyment of the property [i.e., life, liberty, and estate] he has in this state is very unsafe, very unsecure." Men have the right of complete self-command in the state of nature, "yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others" (sec. 123). Given that uncertainty and insecurity men rationally opt to give up the independence and equality of the state of nature in exchange for the promise of rights and property protection under government.

Life in the state of nature is not conducive to the enjoyment of property in Locke's extended sense, because "in the state of nature there are many things wanting." Locke proceeds to list the chief things lacking in the state of nature; this is the moment when the conceptual foundations of his doctrine of separation of powers comes to light. "First, there wants an *establish'd,* settled, known *Law,* received and allowed by common consent to be the standard of Right and Wrong, and the common measure to decide all controversies between them." (sec. 124; emphasis in the original). "Secondly, in the state of nature there wants a *known and indifferent Judge,* with Authority to determine all differences according to the established law" (sec. 125; emphasis in original). "Thirdly, in the state of nature there often wants Power to back and support the sentence when right, and to *give* it due *Execution*" (sec. 126; emphasis in original). What are lacking in the state of nature are the three powers, lawmaking, law-

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adjudicating, and law-executing. It is the lack of those three that make the state of nature a condition where rights are thoroughly insecure.

The first and surely the most important point to notice in Locke's identification of the three powers as the *sine qua non* of securing rights is how differently he conceptualizes the point of the powers from the way Wilson and the Progressives do. Wilson, it will be recalled, saw the separation of powers scheme as identical to, its point exhausted by, the related idea of checks and balances in the service of the aim of limiting governmental power. Locke will later speak of "well-order'd Commonwealths" where the legislative power is put in hands separate and different from those into which the executive power is placed (secs. 143–144, and esp. 159).[72] For Locke, checking and balancing may have a part, but the primary point is first the identification of the different powers as functions and then the placement of these in suitable political bodies. According to Wilson's conception of separation of powers, how powers are divided and separated matters hardly or not at all; what matters is merely that they are separated and can check each other.

This initial difference suggests that Locke and Wilson have two quite different things in mind under what has come to be one label. If we say that Locke has divided powers as functions, we need to ask: functions of what? The answer is clear from his initial statement: these are functional aspects of the effective rule of the law of nature. In the state of nature, these functions are not performed, and therefore the law of nature is not an effective guardian of the rights of men in that state. Government must supply the content, the execution, and the adjudication of law that is lacking in the state of nature. That is to say, the separation of powers is, in the first instance, an identification of the separate and essential aspects of the rule of law. It is in service to the rule of law, for it is the rule of law that can accomplish the end of civil society, the security of human rights.

Lockean separation of powers does not take its bearings from limiting government but from accomplishing the positive tasks government must accomplish to justify its existence. Locke, despite affirming natural rights and despite his deep concern that government not threaten or infringe on those rights, emphasizes governmental tasks and governmental powers. The most striking example occurs at the end of his famous chapter on

[72] It is a well-known fact that Locke's version of separation of powers falls short of the theory as Montesquieu, the American Founders, and American government textbooks expound it in that he does not have a fully developed conception of the independence of the judiciary. He explicitly calls for the separation of legislative and executive powers but he more or less takes for granted that the judicial power is part of the executive (Cf. Grant, *Locke's Liberalism,* 75). Montesquieu not only made the case for the separation of the judicial power, but gave special prominence to the independent judicial power. This must be considered an important advance in liberal constitutional theory (see Montesquieu, *Spirit of the Laws,* Bk. XI, ch. 6). Nonetheless, Locke indicates in various places that the judiciary should be independent of the executive head, without, however, specifying an institutional means to effectuate that independence. (See Locke, *Second Treatise,* secs. 125, 131, 136.)

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property. Having gone to great lengths to establish the naturalness of property and a natural right to property, he nonetheless concludes his chapter with the affirmation that "in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions." (sec. 50) Neither property nor the other rights are untouchable by government. The chief point of constructing government is not to immunize rights from government but to empower government to regulate them. The "Laws of the Society in many things confine the liberty he had by the Law of Nature" (sec. 129).

This is not to say that natural rights and natural law have no lingering effect, no point in civil society, as opposed to their formative effect in the state of nature. As Locke summarily puts it: "But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the state of nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in everyone the better to preserve himself his Liberty and Property; . . . the power of the Society, or Legislative constituted by them, *can never be suppos'd to extend farther than the common good;* but is obliged to secure every ones Property by providing against those defects above mentioned, that made the State of Nature so unsafe and uneasie." (sec. 131; emphasis in the original, cf. sec. 135); "The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer" (sec. 135). As Locke makes clear throughout, government is to secure not threaten rights; but it must, in the first instance, do so through acting to effect "the Publick Good" (sec. 3). Rather than the single agenda Wilson believes the classical liberal constitution is to serve—protecting rights from government oppression through a system of separated powers checking and balancing each other—the Lockean constitution faces a much more difficult task: being strong enough to act to serve rights and the public good without, at the same time, being a greater threat to these rights than continued life in the state of nature would be.

The history of constitutional theory since Locke is the history of successive attempts to achieve that dual aim. In Locke that achievement requires building institutions around the theoretically identified aspects of the rule of law. The first element in the constitution is the legislative power. It makes the laws that regulate behaviors and property and normally makes levies on the property of citizens in the form of taxes. Locke does not set out limitation on the legislative power in the form of enumerated powers, or of explicit limitations in the form of reserved rights, devices one find in the American Constitution. Instead Locke insists on a number of structural and institutional features that are intended to produce the rule of law. He is most insistent on one thing: "the *Legislature,* or Supreme Authority, cannot assume to itself a power to rule by extemporary Arbitrary Decrees, but *is bound to dispense Justice,* and decide the

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Rights of the Subject *by promulgated standing* Laws" (sec. 136). "Absolute Arbitrary Power, or Governing without *settled standing Laws*, can neither of them consist with the ends of society and government" (sec. 137). These "*promulgated establish'd Laws*" are to apply equally to all; they are "not to be varied in particular cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough" (sec. 142). In particular, the laws must also apply to the legislators themselves and to their near and dear as well (sec. 138).

Locke combines his emphasis on the character of legislative output with strictures on the proper structure of the legislative. The ideal legislature appears to be one where "the *legislative* consists, wholly or in part, in Assemblies which are variable, whose Members upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest."(sec. 138) He puts a lot of weight on the combination of the structural features of the legislature with the mandate to govern by general, neutral, settled, standing, promulgated law. That combination maximizes the chances that the legislature will seek the common good and minimize the risk that it will be oppressive to the rights of the governed. It will also satisfy the requirement that the government, when taking, rather than just regulating, the property or rights of the citizens operates via the consent of those whose property is being taken in the form of taxation or the consent of their representatives. The property owners themselves are to be the ones to make the judgment whether the sacrifice of some part of their property is worth the amount of public good the government can supply in return.

Another way Locke describes the legislative power is to say that it "has a right *to direct* how the *Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it" (sec. 143). It is very undesirable, however, "for the same Persons who have the Power of Making Laws, to have also in their hands the power to execute them." (sec. 143). He has several reasons for insisting on separate institutions for these two functions. The first and most important relates to the central purpose of the separation of powers scheme. If the same persons both direct the use of community force (i.e., make the laws), and exercise that force, "they may exempt themselves from Obedience to the Laws" (sec. 143). Exempting themselves means in the first instance that the society is no longer marked by the rule of law, for some are not bound by law. In the second instance, it inevitably affects the character and quality of the laws, producing law that does not serve the public good but rather the good of the leaders.

There is another set of reasons for the separation of power as well. As we have seen, the legislative is best composed of many individuals, selected as representatives from the society, who periodically return to the society and feel directly and personally the impact of the laws they adopt. The legislative need not and should not be "always in being" (secs. 151, 153),

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"but absolutely necessary that the *Executive Power* should, because there is not always need of new Laws to be made, but always need of Execution of the Laws that are made" (sec. 153). Locke speaks regularly of the executive as a "Prince" and as "him." This does not commit Locke to a hereditary executive, for he nowhere sets that as a feature of the executive, but it does seem to commit him to "unity in the executive." In so far as that is so, the executive must be structured differently from the legislative, or, put otherwise, the legislative structure is not fit to exercise the executive power. The main business of the legislative is making law, which requires deliberation and information, best provided by many heads. The main business of the executive is action—deployment of the force of the community; unity of command better conduces to effective enforcement of law than does multiplicity. The considerations pointing to executive unity are accentuated when we take account of two powers Locke associates with the executive head. First is the so-called "federative power," the power to employ the force of the community in relation to foreign states and entities. Although the source of this power is different, says Locke, nonetheless, it, like the executive power proper, involves the forces of the community and so this power must reside in the same hands as the executive power. The executive also has a wide-ranging discretionary power, called prerogative, to act without or even against the law in certain kinds of extraordinary situations. The federative power and the prerogative share the quality that they are the places where the government faces emergencies. They put a premium on the kind of quick, decisive, and disciplined action a unified office with power of command over its subordinates can effect.

The legislative and the executive should be separate and should be constructed quite differently in order to accomplish their respective tasks. The separation and the difference are not, I must emphasize again, for the sake of limiting government, the task that Wilson thought exhausted the point of the separation of powers. As much as anything the separation and the difference of powers are for the sake of effective action.

Given the emphasis on separation and difference, given the fact that lawmaking was appropriately a task only for a body not possessing in its own hands coercive authority, and only for a body constructed as Locke said the legislature was to be constructed, it followed for Locke that the legislature could not transfer or delegate its legislative power to any other body. In particular, the executive was on both counts not to wield legislative power. So Locke propounded on multiple occasions the nondelegation of legislative power principle that became an integral part of separation of powers doctrine—until the Progressive Era. Although Wilson's politics (or policy)-administration dichotomy bears a family resemblance to the distinction between legislative and executive powers in Locke, one place where there is a great difference is on the issue of lawmaking or rulemaking administrative power. As Wilson makes clear, he anticipates that

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administration will exercise far more discretion and rulemaking authority than the orthodox doctrine of separation of powers would allow. At the extremes, this could amount to the massive delegation the Natural Industrial Recovery Act provided for, a delegation that the Supreme Court invalidated in *Schechter Poultry Co. v. U.S.* This act probably went beyond anything Wilson contemplated as acceptable, but his rejection of the separation of powers certainly opened the door to it. And, it must be noted, although the Court, in a gesture to orthodox doctrine, rejected that delegation, Courts and Congresses since have accepted great amounts of delegation.[73]

IV. Conclusion

We might now summarize some of the differences between Lockean, or classical liberal, and Wilsonian, or Progressive Liberal, constitutionalism. Wilson blurs and even tends to obliterate both the conceptual and the institutional aspects of the separation of powers. In the latter's constitutionalism there is no clear line between legislature and administration. One result in the post-Progressive era has been much more delegation, or administrative exercise of rulemaking, or legislative authority, which, contrary to Wilson's intentions, has diminished responsibility in government by producing politically irresponsible rulemaking power in the administration and the shirking of its proper legislative role by Congress. Wilson's blurring of the lines is related to his inadequate understanding of liberal constitutionalism, although he can be partially excused by the fact that much thinking about governmental power had hardened in the post-Civil War era into a rigid notion of limited government in service of a laissez-faire theory of the proper handling of the economy.

Wilson's various shortcomings regarding the separation of powers derive in large part from his having a less clear notion of the business of government than Locke, for example, had. As argued above, Wilson was not the socialist, communist, collectivist many contemporary conservative critics accuse him of being. He stands as an heir—though a much modified one—of the liberal tradition: he seeks to protect and foster individual freedom in new and unprecedented circumstances, but his notion of the end and the means to that are much vaguer and less capable of disciplined thought and action than Locke's. In order to free the nation from the strictures of laissez-faire orthodoxies and to empower needed governmental action, he goes so far as to reject or at least ignore the doctrine of natural rights, and thus gives up the guidance these rights supply.

[73] For a reaction against this trend from within contemporary political science, see Theodore J. Lowi, *The End of Liberalism* (New York: Norton, 1969).

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From this comparison of the traditional constitutionalism that affirmed separation of powers and the Progressive constitutionalism that rejected it, it has become apparent that the Wilsonian critique, which has had tremendous impact in political life as well as in political science, does not merit the sway it has held in public and professional minds. Based on an inadequate understanding of what it opposed, lacking an appreciation of the real goods and aims of the separation of powers, it fell—and falls—far short of its alleged achievements.

Political Science, University of Notre Dame

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