
Arthur E. Wilmarth, Jr.*

The bicentennial of *Marbury v. Madison*\(^1\) has encouraged scholars to offer new perspectives on the historical development of judicial review in the United States.\(^2\) *Marbury* provided the cornerstone for the modern doctrine of judicial review, as it was the first case in which the Supreme Court struck down an act of Congress on constitutional grounds.\(^3\) In his opinion for the Court, Chief Justice John Marshall articulated the following basic rationale for judicial review: (1) the Constitution is the “fundamental and paramount law of the nation” because it incorporates the sovereign people’s will; (2) the Constitution therefore is “superior to any ordinary act of the legislature”; and (3) it is “emphatically the province and duty of the judicial department” to decide, in an appropriate case, that a statute is “repugnant” to the Constitution and “void.”\(^4\)

As described *infra* Part I.A, Marshall based his defense of judicial review in *Marbury* on the doctrine of popular sovereignty, which he found to be inherent in the new American instrument of the “written Constitution.” Marshall contended that the courts had an unavoidable “duty” to exercise

---

* * Professor of Law, The George Washington University Law School. B.A., Yale University; J.D., Harvard University. I wish to thank Dean Michael K. Young and The George Washington University Law School for a summer research grant that supported my work on this article. I acknowledge with gratitude the excellent research assistance provided by my former student, Matthew Bronson, and by Germaine Leahy, Head of Reference at the Jacob Burns Law Library. I am also grateful for very helpful comments I received from Brad Clark and Renee Lettow Lerner, and for additional suggestions made by other participants in The George Washington Law Review’s symposium on “Marbury and Its Legacy,” held on April 10, 2003.


4 *Marbury*, 5 U.S. (1 Cranch) at 177–80; see, e.g., White, *supra* note 2, at 1477–84 (describing the “syllogism” that Marshall used to defend judicial review in *Marbury*).
judicial review in order to prevent Congress from violating the people’s sovereign will, as expressly declared in the Constitution. In Marshall’s view, a denial of the power of judicial review would “giv[e] to the legislature a practical and real omnipotence,” thereby “reduc[ing] to nothing what we have deemed the greatest improvement on political institutions—a written constitution.”

Viewed in historical perspective, Marbury conclusively established the authority of federal courts “to enforce the clear commands of our written constitutions against contrary legislation.” However, “[t]here is no comparable consensus on the question of whether we have a supplementary, judicially enforceable unwritten constitution.” Legal historians have long debated whether, at the time of Marbury, Americans widely accepted the authority of courts to invalidate statutes that conflicted with unwritten “higher law” principles derived from the common law and natural law. Scholars have noted, for example, that eighteenth century American lawyers and judges were familiar with Dr. Bonham’s Case, a decision that seemingly asserted the power of English courts to strike down legislation “against common right and reason.” The academic debate over the extent of “higher

---

5 Marbury, 5 U.S. (1 Cranch) at 178.


This is not to say that Marbury established the modern theory of “judicial supremacy” in matters of constitutional interpretation. The Supreme Court’s first explicit assertion of that theory occurred in Cooper v. Aaron, 358 U.S. 1 (1958), where the Court declared that “the federal judiciary is supreme in the exposition of the law of the Constitution . . . .” Id. at 18. Several commentators have concluded that Marshall followed a principle of “departmental discretion” in Marbury and his subsequent opinions. See, e.g., Edward Corwin, Marbury v. Madison and the Doctrine of Judicial Review, 12 Mich. L. Rev. 538, 571 (1914); White, supra note 2, at 1468–69. Under that principle, the Court did not interfere with the ability of either the President or Congress to interpret the Constitution in matters that were discretionary or “political.” See White, supra note 2, at 1469, 1473–75. Instead, the Court claimed the power to act as “ultimate expositor” of the Constitution only in “cases and controversies” that came within the Court’s recognized jurisdiction under Article III of the Constitution. Id. Marbury, however, arguably did suggest a qualified form of judicial supremacy. As G. Edward White has noted, Marshall’s opinion created the implication that the Court should have the final say on whether a question of constitutional interpretation was properly a matter for judicial cognizance. Id. at 1474–76, 1480–84. For additional discussions of Marshall’s adherence to a concept of “departmental discretion” in constitutional interpretation, see Hobson, supra note 3, at 66–71; William E. Nelson, Marbury v. Madison: The Origins and Legacy of Judicial Review 60–72 (2000); David E. Engdahl, John Marshall’s “Jeffersonian” Concept of Judicial Review, 42 Duke L.J. 279, 279–82, 324–29 (1992).

7 Grey, supra note 6, at 145 (emphasis added).


9 Id. at 652. In the late 1920s, Edward S. Corwin examined the “higher law” sources of American constitutional doctrines in a landmark, two-part article. See Edward S. Corwin, The “Higher Law” Background of American Constitutional Law (pts. 1–2), 42 Harv. L. Rev. 149, 365 (1928–1929). Corwin argued that Sir Edward Coke’s opinion in Dr. Bonham’s Case was widely interpreted as an assertion of judicial authority to invalidate acts of Parliament contrary to “common right and reason.” See id. at 367–73 (discussing Coke’s opinion, and explaining that Coke’s concept of “common right and reason” embraced principles derived from common law and natural law); infra note 203 (referring to James Wilson’s agreement with Cicero’s description.
law” judicial review at the time of Marbury has been particularly intense during the past three decades.10

The historians’ colloquy regarding the nature of judicial review in the early Republic has an obvious connection to contemporary issues dealing with the Supreme Court’s authority to enforce “unenumerated rights”—i.e., individual rights whose content “is not expressed as a matter of positive law in the written constitution.”11 For example, judges and scholars have expressed sharp disagreements over the legitimacy of Griswold v. Connecticut12 and its progeny, which invoked the rights of “privacy” and “liberty” in striking down state laws.13 Participants on both sides of this question have re-

---


11 Thomas C. Grey, Do We Have An Unwritten Constitution?, 27 Stan. L. Rev. 703, 706 (1975) [hereinafter Grey, Unwritten Constitution]; see also Grey, supra note 6, at 165. Professor Grey, for example, contends that historical developments in America from the late eighteenth century to the end of the nineteenth century indicate “an original understanding . . . that unwritten higher law principles had constitutional status.” Grey, Unwritten Constitution, supra, at 717. This “original understanding,” he submits, is one of “the conventional and accepted categories of this legal argument” that should be employed in “resolving” the issue of whether the contemporary Supreme Court has “legal authority” to engage in “noninterpretive judicial review,” id. at 715—a form of judicial scrutiny in which “the Court is quite openly not relying on constitutional text for the content of the substantive principle it is invoking to invalidate legislation,” id. at 709.

12 Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the “right of privacy” protected the ability of married couples to obtain and use contraceptives).

viewed historical materials to determine whether the Founders endorsed the power of courts to enforce "unenumerated rights." As discussed infra Part I.B, Marshall's opinions in Fletcher v. Peck and subsequent cases indicate that he was not willing to rely on "unwritten" constitutional principles as an independent basis for striking down legislation. Instead, Marshall based his constitutional decisions on the supreme authority of the Constitution's written text, even though he interpreted that text in light of principles drawn from the common law and natural law. As shown infra Part I.C, Marshall's approach was similar to earlier views expressed by James Iredell and by "Publius" in The Federalist. Like Marshall, Iredell and Publius chose to defend the legitimacy of judicial review by linking it to the concept of popular sovereignty inherent in written constitutions. Iredell and Publius shared Marshall's evident belief that the doctrine of judicial review could not survive, as a political matter, unless it was articulated and exercised in defense of the people's sovereign will as explicitly declared in the Constitution's written text.

Marshall's reluctance to rely on "unwritten" constitutional norms is even more striking when one recognizes that an alternative concept of judicial review, based on unwritten "higher law" principles, did exist at the time of Marbury. James Wilson was a prominent exponent of this approach. Wilson's theories of judicial review warrant careful examination because he played a prominent role in drafting and defending the Constitution, and in interpreting the Constitution as a member of the first Supreme Court.

liberty . . . [and] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

For discussions of the impact of Griswold and its progeny in stimulating scholarly analysis of the enforceability of "unenumerated rights," see, for example, Geoffrey R. Stone et al., Constitutional Law 819-21, 829-35 (4th ed. 2001); Goldstein, supra note 10, at 52-53; Grey, Unwritten Constitution, supra note 11, at 703-09. Historical analysis of this question has focused especially on the Ninth Amendment, which provides: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For judicial and scholarly views contending that the Ninth Amendment recognizes the courts' authority to enforce "unenumerated rights," see, for example, Griswold, 381 U.S. at 486-99 (Goldberg, J., concurring); Massey, supra note 10; Sotiros A. Barber, The Ninth Amendment: Inkblot or Another Hard Nut to Crack?, 64 Chi.-Kent L. Rev. 67, 80 (1988); Randy E. Barnett, Reconceiving the Ninth Amendment, 74 Cornell L. Rev. 1, 1-3 (1988); Grey, supra note 6, at 164-67. For opposing views, see, for example, Griswold, 381 U.S. at 518-27 (Black, J., dissenting); id. at 529-30 (Stewart, J., dissenting); McAfee, supra note 10, at 2-3, 137-73; Raoul Berger, The Ninth Amendment: The Beckoning Mirage, 42 Rutgers L. Rev. 951 (1990); Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223 (1983).

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
Part II.A.1 explains that Wilson’s concepts of popular sovereignty and judicial review were drawn from his natural law philosophy and moral epistemology. Wilson aimed to create a new “science of law,” based on the eternal principles of natural law and the psychological insights he derived from the Scottish Enlightenment theories of moral sense and common sense. These philosophical sources convinced Wilson that every citizen in republican society could understand his rights and civic duties by obtaining a proper education, by participating in the lawmaking process as an elector and a juror, and by responding to the guidance of the moral sense. Based on these assumptions, Wilson had a highly optimistic view of the people’s capacity for social harmony and self-government.

As discussed infra Part II.A.2, Wilson’s view of natural law and natural rights led him to insist that all governments must derive their authority from the consent of their citizens. In shaping his doctrine of consent, Wilson used Locke’s social compact theory but also went beyond it. Under Wilson’s approach, the people do not surrender their sovereign power when the social compact is formed. Rather, the people are perpetually sovereign and are free to abolish or reconstitute their federal and state governments at any time. Wilson’s novel concept of perpetual popular sovereignty allowed him to develop a revised theory of separation of powers. In place of the traditional theory of “mixed government,” in which the people were represented only in the legislative branch, Wilson contended that all three branches of government should be based on the principles of representation. Under Wilson’s new scheme, the judiciary possessed co-equal status and authority as a representative and agent of the sovereign people.

Wilson believed that judges and juries, acting on behalf of the people, could make continuous improvements in the law by applying the experimental techniques of common-law adjudication together with enlightened principles of equity. Wilson was also confident that judges could protect and improve the Constitution by drawing on Cokean principles of natural law as well as the text and purposes of the Constitution. Wilson actively supported the creation of a national Council of Revision, which would have given judges a direct role in evaluating the policy and wisdom of proposed federal legislation. The Constitutional Convention’s rejection of the proposed Council should have warned Wilson that his expansive view of the judiciary’s role was not shared by most Founders. Wilson, however, continued to promote an energetic role for the courts, based on natural-law principles, during the remainder of his career.

Part II.B reviews three occasions on which Wilson tried to persuade the public to adopt his methodology for harmonizing natural law and popular sovereignty—namely, his defense of the Framers’ decision to omit a bill of rights from the original Constitution, his opinion in Chisholm v. Georgia,17 and his instructions to the grand and petit juries in Henfield’s Case.18 In all three situations, Wilson’s efforts were rejected, and he was accused of undermining the Constitution, threatening the residuary sovereignty of states, and

---

17 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
18 Henfield’s Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).
subverting the people's liberties. The concluding section offers some suggested reasons why Wilson failed, and why Marshall is generally viewed as the principal founder of the American doctrine of judicial review.

I. John Marshall's Reliance on Popular Sovereignty as the Primary Justification for Judicial Enforcement of the "Written Constitution"

A. Marshall's Opinion in Marbury v. Madison

Marshall's opinion in Marbury is "the only occasion in which [he] expressed in detail his understanding of the doctrine of judicial review." Even so, Marshall's opinion failed to lay out a carefully reasoned methodology for deciding whether a particular statute is "repugnant" to the Constitution. As David Currie has observed, Marshall's opinion exhibited his general "tendency to resolve difficult questions by aggressive assertion of one side of the case, and an absolute certainty in the correctness of his conclusions." Nevertheless, Marshall's repeated references to the "written Constitution" in Marbury indicate that he favored a text-based approach to the problem of identifying "repugnant" statutes. Marshall began his defense of judicial review by proclaiming that the Constitution's text embodies a definitive statement of the American people's "original and supreme will," including their decision to place "certain limits" on the powers of each branch of the federal government. Under the Constitution, Marshall declared, "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Because the written Constitution contains a "permanent" expression of the people's will, it must be considered a "superior, paramount law" that overrules any "repugnant" statute adopted by Congress.

For Marshall and like-minded American leaders, the Constitution's written text provided a crucial link between popular sovereignty—the political theory justifying the Declaration of Independence and the Constitution it-
self—and the power of judicial review. Marshall made this linkage especially clear in two passages in his opinion. First, like Publius in *The Federalist,* Marshall proclaimed that “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . . The principles, therefore, so established, are deemed fundamental.” By referring to the people’s “original right” to establish “fundamental” principles for their “future government,” Marshall echoed the Revolutionary generation’s reliance on the social contract theory of John Locke. Building on the theories of Locke and other political thinkers, American leaders developed a distinctive version of popular sovereignty during the latter half of the eighteenth century. As reflected in the Declaration of Independence and the Constitution, this American version (1) declared that all governments must derive their authority from the people’s affirmatively stated consent, and (2) embraced the written Constitution as the best way to incorporate the specific terms of the people’s consent.

In the second passage of his opinion linking judicial review to popular sovereignty and the written Constitution, Marshall declared that judges had an unavoidable “duty,” in appropriate cases, to strike down statutes that

---

26 See Hobson, supra note 3, at 58 (stating that “[t]he doctrine of judicial review spelled out in *Marbury* was based squarely on the ideas of popular sovereignty and of a written constitution as the positive and permanent expression of that sovereignty”); see also, e.g., Van Horne’s Lessee v. Dorrance, 28 F. Cas. 1012, 1014–15 (C.C.D. Pa. 1795) (No. 16,857) (jury instructions by Paterson, C.J.) (declaring that a constitution is “the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established . . . . [I]t contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature . . . . [T]he legislative act oppugns a constitutional principle . . . . in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.”); infra Part I.C (discussing similar arguments advanced by James Iredell, and by Publius in *The Federalist*).

27 *Marbury,* 5 U.S. (1 Cranch) at 176 (emphasis added); see also, e.g., *The Federalist* No. 40, at 200–01 & n.1 (James Madison) (Garry Wills ed., 1982) (declaring that the people’s authority to ratify the proposed Constitution was based on “the transcendent and precious right of the people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness’” (quoting *The Declaration of Independence* (U.S. 1776))).


were "repugnant to the [C]onstitution." He rejected any notion that courts were bound to enforce unconstitutional laws in deference to the legislature. Such an approach, he argued, would give the legislative branch "a practical and real omnipotence," thereby "subvert[ing] the very foundation of all written constitutions." Marshall was convinced that judicial review provided the most effective method of defending the sovereign people's will, as explicitly declared in the Constitution, against "repugnant" statutes. Without judicial review, citizens would be able to challenge unconstitutional laws only by using the unwieldy channel of electoral politics or the drastic Locke\textsuperscript{n} remedy of revolution.

Moreover, Marshall was confident that courts were in the best position to compare the "fundamental principles incorporated by the people into the written text of the Constitution . . . with the text of legislation." In \textit{Marbury}, Marshall observed that judges were frequently called upon to "decide" the governing "rule" in cases where "two laws conflict with each other."\textsuperscript{36}

\textsuperscript{30} \textit{Marbury}, 5 U.S. (1 Cranch) at 177.
\textsuperscript{31} \textit{See id.} at 178.
\textsuperscript{32} \textit{Id.} (emphasis added).
\textsuperscript{33} \textit{See id.} at 177-78 (declaring that, without judicial review, the Constitution would be "an absurdity" because it would have the effect of "prescribing limits, and declaring that those limits may be passed at pleasure" by Congress); \textit{see also}, e.g., \textit{William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth} 216-20 (1995) (discussing James Iredell's similar defense of judicial review in 1786-1787); \textit{Hobson, supra} note 3, at 58-66 (discussing arguments made by advocates of judicial review prior to \textit{Marbury}); \textit{Snowiss, supra} note 3, at 45-89 (same).
\textsuperscript{34} At the Virginia ratifying convention in 1788, Marshall forcefully argued that judicial review would provide the best means for enforcing limitations on federal power under the proposed Constitution, thereby avoiding any need for popular resistance:

If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void . . .

. . . . What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?

To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.


For discussions of the Locke\textsuperscript{n} theory of revolution (which Locke referred to as the "appeal . . . to heaven"), which provided an alternative remedy for governmental violations of the constitution, see, for example, \textit{Dunn, supra} note 28, at 54-57; \textit{Locke, supra} note 28, §§ 199-230, 240-43 (quote at ¶ 242); Philip A. Hamburger, \textit{Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood}, 94 Colum. L. Rev. 2091 (1994).

\textsuperscript{35} \textit{Nelson, supra} note 6, at 64.

\textsuperscript{36} \textit{Marbury}, 5 U.S. (1 Cranch) at 177. Publius and Iredell also used this "conflict of laws" analogy in contending that judges had a "duty" to determine whether a statute was "repugnant" to the Constitution. See \textit{The Federalist} No. 78, at 395-96 (Alexander Hamilton) (Garry Wills
Marshall and like-minded Founders believed that the training, experience, and temperament of judges gave them special skills in comparing legal texts and resolving legal issues. Accordingly, Marshall and his supporters sought to promote the view that judges were disinterested “savants” who could be trusted to decide, on “nonpolitical” grounds, whether a particular statute embodied a lawful “rule” or, instead, was void because of its “opposition” to the Constitution.\(^37\)

The following well-known excerpt from Marshall’s opinion in *Marbury* reflected his confidence in the disinterested expertise and responsibility of judges:

> It is emphatically the province and duty of the judicial department to say what the law is. Those [judges] who apply the rule to particular cases, must of necessity *expound and interpret* that rule . . . .
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case . . . the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.*\(^38\)

---

\(^37\) As Professor White has observed, Marshall believed that judges were “better suited, in fact, to find and declare the law” by acting as nonpartisan “savants” in comparing the text of the Constitution with the terms of a potentially conflicting statute. White, *supra* note 2, at 1482–84, 1486–87; see also *The Federalist* No. 81, at 410 (Alexander Hamilton) (Garry Wills ed., 1982) (stating that federal judges would be “selected for their knowledge of the laws, acquired by long and laborious study” and would be less subject to “the pestilential breath of faction,” compared with legislators); Nelson, *supra* note 6, at 63–64, 67, 70–73 (similarly concluding that Marshall crafted his opinion in *Marbury* in order to defend judicial review based on “fixed principles” that were viewed as “not political”).


> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect . . . to the will of the law.
In sum, Marshall believed that the primary justification for judicial review was its usefulness in preserving "what we have deemed the greatest improvement on political institutions—a written constitution." Almost as an afterthought, Marshall cited three provisions of the Constitution that provided "additional arguments" in favor of judicial review. He rested his case, however, primarily on "the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." That principle, Marshall noted, arose out of the special "reverence" that Americans felt for their "written constitutions.

B. Marshall's Reluctance to Base Judicial Review on "Unwritten" Principles of Common Law and Natural Law

John Marshall and other Founders were familiar with Coke's and Blackstone's writings on the common law of England, as well as the natural law treatises of Grotius, Locke, Pufendorf, Vattel and Burlamaqui. These materials were the basic stock in trade of American lawyers and judges at the time of Marbury. During that period, American advocates and jurists viewed the common law and natural law as being generally harmonious sources of legal maxims. In fact, both Coke and Blackstone had affirmed that English common law incorporated principles of natural law.


Marbury, 5 U.S. (1 Cranch) at 178 (emphasis added).

Id. at 178–80 (citing the "arising under" clause of U.S. Const. art. III, § 2, the judicial oath required by U.S. Const. art. VI, cl. 2, and the Supremacy Clause of U.S. Const. art. VI, cl. 1); see also Currie, supra note 3, at 72–74 (discussing Marshall's reliance on those provisions); Holston, supra note 3, at 57 (same).

Marbury, 5 U.S. (1 Cranch) at 180 (emphasis added).

Id. at 178.


In keeping with his legal training and experience, Marshall frequently referred to background principles drawn from the common law and natural law when he interpreted the meaning of constitutional and statutory provisions. For example, Marshall agreed with Blackstone, Pufendorf, Grotius, and Vattel that the first principle of legal interpretation was to determine the "plain" or "natural" or "usual" meaning of the relevant legal text.\(^{46}\) In addition, Marshall agreed that an interpreter should take account of contextual and purposive factors, such as (1) the relation of a particular provision of law to other parts of the same code, (2) the provision's intended purpose (when that purpose could be fairly discerned), and (3) the avoidance of constructions that would have absurd or destructive consequences, which the provision's drafters could not reasonably have intended.\(^{47}\)

Marshall's most forceful use of background principles occurred in cases involving the doctrine of "vested rights"—a concept deeply rooted in the common law and natural law.\(^{48}\) In *Marbury*, after concluding that Marbury had a "vested legal right" to receive his commission as a justice of the peace,\(^{49}\) Marshall quoted Blackstone's maxim that "every right, when withheld, must have a remedy, and every injury its proper redress."\(^{50}\) Marshall also cited Blackstone (as well as Blackstone's mentor, Lord Mansfield) to support his conclusion that a writ of mandamus would be a "proper remedy" for Marbury's injury.\(^{51}\) Nevertheless, Marshall was *not* willing to use the gen-

---

\(^{46}\) For Blackstone's principles of statutory construction, see 1 *Blackstone*, *supra* note 45, at *59–62* (stating that (1) "to interpret the will of the legislator . . . the most natural and probable . . . signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law," and (2) "[w]ords are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use"; making reference also to Pufendorf's views on statutory construction); see also Clinton, *supra* note 44, at 945–59 (discussing principles of textual interpretation followed by Blackstone, Pufendorf, Grotius and Vattel).


\(^{49}\) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

\(^{50}\) *Id.* at 163 (quoting 3 *Blackstone*, *supra* note 45, at *109*). See generally *id.* at 163, 165 (citing 3 *Blackstone*, *supra* note 45, at *223, 255*, respectively).

\(^{51}\) See *id.* at 168–69 (citing 3 *Blackstone*, *supra* note 45, at *110*). For Mansfield's role as a mentor to Blackstone, see, for example, Nolan, *supra* note 43, at 733–35, 749–50. For Marshall's admiration of Mansfield, see Hobson, *supra* note 3, at 36–37.
eral theory of “vested rights” to overcome what he viewed as an *express constitutional limitation* on the Supreme Court’s power to issue that writ.

Marshall also invoked the doctrine of “vested rights” in his second major opinion on judicial review—*Fletcher v. Peck.*52 In *Fletcher,* the Court invalidated the Georgia legislature’s repeal of a prior bill that had granted land to Peck’s predecessor in interest. Marshall began his opinion by determining that Peck held a “vested legal estate[ ]” in the land because Peck bought it for a valuable consideration and without any knowledge of the fraud surrounding the legislature’s original grant.53 Once again, however, Marshall did not rest his decision on a general appeal to “vested rights” theory. Instead, as in *Marbury,* Marshall turned to a specific provision of the Constitution—the Contract Clause.54

Marshall’s strategic choice of the Contract Clause becomes especially clear when one considers his elliptical treatment of three other jurisprudential principles on which he *might* have based his opinion. First, Marshall noted that the Georgia legislature appeared to act as “judge in its own case,” because it rescinded its prior grant by enacting a statute instead of challenging Peck’s title through a judicial proceeding.55 Coke had declared in *Dr. Bonham’s Case* that it was “against common right and reason”56 for a person to act as “judge in his own case.”57 Accordingly, Marshall conceivably could have based his opinion in *Fletcher* on Coke’s well-known maxim of natural law. At one point, Marshall did mention that, while the Georgia legislature “might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.”58 Nevertheless, Marshall sidestepped any conclusive analysis of this potential Cokean argument.

Similarly, Marshall chose not to rely on the doctrine of separation of powers. Marshall observed that the Georgia legislature’s repeal of its land grant appeared to violate the doctrine by usurping a function that properly belonged to the judiciary.59 Nevertheless, Marshall apparently concluded that neither the Georgia constitution nor the federal Constitution provided a specific textual mandate for using separation of powers principles to strike down Georgia’s repeal statute. In this regard, he stated that “[h]ow far the

---

52 *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810). *Fletcher* was the first case in which “the Supreme Court pronounced a state law void as repugnant to the Constitution.” HOBSON, *supra* note 3, at 82.
54 See U.S. CONST. art. I, § 10, cl. 1; NEWMYER, *supra* note 53, at 135.
55 *Fletcher,* 10 U.S. (6 Cranch) at 132–33.
58 *Fletcher,* 10 U.S. (6 Cranch) at 133.
59 *Id.* at 136. In this connection, Marshall observed that although “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” *Id.* (emphasis added).
power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.\footnote{60}{Id. at 136 (emphasis added). The federal Constitution guarantees to each state “a republican form of government.” U.S. Const. art. IV, § 4. It does not, however, specify particular requirements as to the governmental structure that a state must adopt in order to establish a “republican” government. See The Federalist No. 43, at 220–21 (James Madison) (Garry Wills ed., 1982) (stating that Article IV, Section 4 would prevent state governments from adopting “aristocratic or monarchical innovations,” but would leave them free to “substitute other republican forms”); The Federalist No. 39, at 190 (James Madison) (Garry Wills ed., 1982) (noting that “political writers” had not agreed on any “satisfactory” definition of a republican government, while general “principles” defined a “republic” to include any “government which derives all its powers directly or indirectly from the great body of the people”); Hobson, supra note 3, at 82, 84 (observing that Marshall “did not invoke separation of powers” in deciding Fletcher, because “he appears to have concluded that separation of powers was too vague a standard to be applied by the courts as a constitutional limitation on state legislatures”).}

Finally, Marshall turned to a third possible reason for invalidating Georgia’s repeal of its original land grant—namely, that Georgia could not lawfully “devest those rights” that had “vested” ultimately in Peck.\footnote{61}{Fletcher, 10 U.S. (6 Cranch) at 135.} At this point, Marshall alluded to principles of natural law by stating that (1) “[i]t may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power,” and (2) any such principled “limits” would be placed in question “if the property of an individual, fairly and honestly acquired, may be seized without compensation.”\footnote{62}{Id. at 136–37 (citing Blackstone, without a page reference).}

Once again, however, Marshall did not pursue this possible line of analysis to its ultimate conclusion. Instead, he turned to the question of whether Georgia’s repeal violated the Contract Clause. Citing Blackstone, Marshall held that Georgia’s “grant” amounted to an executed “contract.”\footnote{63}{Id. at 137. But see Newmyer, supra note 53, at 229–30, 234–35 (questioning whether Marshall was correct in asserting that a public grant could be treated as a “contract” within the meaning of the Contract Clause).} Marshall then declared that such a “contract” came within the language of the Contract Clause because the terms of that clause “are general, and are applicable to contracts of every description.”\footnote{64}{Id. at 137.} Marshall also relied on the historical purpose of the Contract Clause and other provisions of Article I, Section 10 that barred the states from enacting ex post facto laws and bills of attainder.\footnote{65}{Fletcher, 10 U.S. (6 Cranch) at 137–38.} Taken together, he argued, those provisions “may be deemed a bill of rights for the people of each state,” because the “framers of the constitution” wanted to “shield themselves and their property from those sudden and strong passions” that had too often taken hold of state legislatures during the 1780s.\footnote{66}{Id. As Marshall noted, the Framers intended that the Contract Clause and other provisions of Article I, Section 10 would prohibit state legislatures from enacting paper money laws and debtor relief statutes. See id. at 138. Such laws, the Framers believed, had severely undermined the interests of domestic and foreign creditors during the 1780s, thereby injuring the new nation’s creditworthiness and retarding its economic development. See, e.g., The Federalist No. 44, at 226–27 (James Madison) (Garry Wills ed., 1982); McDonald, supra note 28, at}
of the Contract Clause was fortified by that clause's purpose of ensuring that "the power of the [state] legislature[s] over the lives and fortunes of individuals is expressly restrained."\textsuperscript{67}

Marshall ended his constitutional analysis in \textit{Fletcher} by stating:

> It is, then, the unanimous opinion of the court, that . . . the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of . . . [Peck was] rendered null and void.\textsuperscript{68}

At first glance, Marshall's decision to include a holding based on natural law, as an alternative basis for the Court's conclusion, seems highly surprising. As shown above, his discussion of natural law principles in \textit{Fletcher} was equivocal and inconclusive. In contrast, his application of the Contract Clause was confident and definitive.\textsuperscript{69} What could have prompted Marshall to frame the Court's conclusion in this curious, "either . . . or" format?

In answering this question, one must take into account the concurring opinion of Justice William Johnson. In contrast to Marshall, Johnson believed that the Contract Clause did not apply to a completely performed contract like Georgia's land grant.\textsuperscript{70} Also unlike Marshall, Johnson was confident that natural law principles abrogated Georgia's repeal law. Johnson did not find it necessary to review the requirements of natural law in any detail. He simply proclaimed that "a state does not possess the power of revoking its own grants," because of "the reason and nature of things: a principle that will impose laws even on the deity."\textsuperscript{71}

Given Johnson's rejection of the Contract Clause as a basis for deciding \textit{Fletcher}, Marshall may have chosen an "either . . . or" construction so that the Court's "unanimous" conclusion would incorporate Johnson's views on natural law but avoid any strong endorsement of those views.\textsuperscript{72} Marshall probably intended that his "either . . . or" conclusion would be ambiguous. Such an approach would have been in keeping with Marshall's general policy

\textsuperscript{67} \textit{Fletcher}, 10 U.S. (6 Cranch) at 138 (emphasis added).

\textsuperscript{68} \textit{Id.} at 139 (emphasis added).

\textsuperscript{69} Sylvia Snowiss has similarly described the marked contrast in \textit{Fletcher} between Marshall's "noticeably hesitant" discussion of natural law principles and his lack of any "equivocation" with regard to the Contract Clause. See \textit{Snowiss}, supra note 3, at 127-28.

\textsuperscript{70} \textit{Fletcher}, 10 U.S. (6 Cranch) at 144-45 (Johnson, J., concurring). Johnson evidently believed that a completely performed ("executed") contract did not create any continuing "obligation" that could be "impaired" by state action within the meaning of the Contract Clause. \textit{Id.} (Johnson, J., concurring). In addition, as R. Kent Newmyer has observed, Justice Johnson was seriously troubled by evidence suggesting that Fletcher's lawsuit against Peck was a "feigned" collusive suit designed to invoke federal diversity jurisdiction, thereby avoiding the difficulties involved in suing the state of Georgia in its own courts. \textit{Id.} at 147-48 (Johnson, J., concurring); see \textit{Newmyer}, supra note 53, at 225-28, 233.

\textsuperscript{71} \textit{Fletcher}, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).

\textsuperscript{72} See, e.g., \textit{Currie}, supra note 3, at 132 & n.43; \textit{Hobson}, supra note 3, at 85-86.
of promoting an appearance of unanimity on the Court, especially in cases that might provoke opposition from advocates of states' rights or legislative supremacy.\textsuperscript{73}

Read as a whole, Marshall's opinion in \textit{Fletcher} appears to have consciously "avoided direct sanction of natural law as judicially enforceable law."	extsuperscript{74} Any doubt on this point is removed by Marshall's opinions for the Court in three subsequent cases involving the Contract Clause. In striking down state laws that interfered with vested property rights, all three of Marshall's opinions relied exclusively on the Contract Clause and did not include any holdings based on natural law.\textsuperscript{75}


\textsuperscript{74} \textit{Snowiss, supra} note 3, at 127.


Marshall's dissent was joined by Justices Gabriel Duvall and Joseph Story. In contending that the prospective application of New York's statute violated the Contract Clause, Marshall relied on two major premises—namely, (1) the "original intrinsic obligation" of every contract is created pursuant to "the laws of nature" and, therefore, the existence of that obligation does not depend on state law, and (2) the New York statute impaired the "original obligation" of contracts made by persons who subsequently were declared bankrupt, because the statute discharged such persons from any further duty to perform their contracts. \textit{See Ogden, 25 U.S. (12 Wheat.)} at 345–54 (Marshall, C.J., dissenting). Marshall rejected the majority's claim that a "contract is the mere creature of society, and derives all its obligation from human legislation." \textit{Id.} at 344. In Marshall's view, "the obligations created by contract . . . exist anterior to, and independent of society, . . . [and,] like many other natural rights, [are] brought with man into society." \textit{Id.} at 345. Accordingly, the states could "regulate the remedies afforded by their own Courts" for breach of a contract, but the Contract Clause forbade the states from impairing the "original intrinsic obligation" of a contract created under natural law. \textit{Id.} at 353–54.

As R. Kent Newmyer has observed, it was "striking" and "un-Marshallian" for Marshall to make natural law the "primary determinant" of his argument in \textit{Ogden}. \textit{Newmyer, supra} note 53, at 262. Newmyer suggests that Marshall's unusual argument reflected his "undying distrust of state legislative government and unqualified respect for the rights of private property," \textit{id.} at
In short, Marshall’s textual interpretation of the Constitution in *Fletcher* and three subsequent Contract Clause cases repeated the same basic themes he had introduced in *Marbury*—namely, (1) his treatment of the written text as the most authoritative source of the Constitution’s meaning, and (2) his firm belief in the Court’s duty to defend the rights of the sovereign people by enforcing the Constitution’s express limitations on legislative power. Marshall reiterated the primacy of the Constitution’s text by appealing in *Fletcher* (and in subsequent cases) to a “fair construction of the constitution” based on “[t]he words themselves” and “the natural meaning of [those] words.”

It is true, as Professor White has observed, that Marshall’s decisions often “packed” the text of the Constitution “with meaning drawn from extratextual sources such as the common law or general principles of natural justice.” Marshall used interpretive “principles” drawn from these “ex-

264, as well as his belief in “the duty of the Court . . . to preserve the integrity of the contracting process,” id. at 265. It also seems quite possible that Marshall relied on natural-law principles in *Ogden* for the pragmatic reason that such principles offered the strongest support for his argument. Marshall probably would have preferred to advance the text-based argument that Congress possessed a power to enact uniform bankruptcy laws, under U.S. Const. art. I, § 8, cl. 4, which preempted by implication *all* of the states’ authority to adopt insolvency laws. However, Marshall had previously been obliged to concede, in *Sturges v. Crowninshield*, that the states retained authority to pass insolvency laws within the limits established by the Contract Clause, at least until Congress *did* enact a bankruptcy statute. See White, *Marshall Court, supra* note 38, at 633–37.

In response to Marshall’s natural-law claims in *Ogden*, all four Justices in the majority contended that the Founders had never expressed an intent to bar the states from adopting prospective legislation affecting future contracts. The majority also asserted that Marshall’s position would seriously infringe upon the reserved powers of the states under the Constitution. See *Ogden*, 25 U.S. (12 Wheat.) at 258–60, 266–68 (Washington, J.); id. at 277–92 (Johnson, J.); id. at 294–309 (Thompson, J.); id. at 318–22, 329–31 (Trimble, J.). Thus, in *Ogden*—the one case where Marshall *did* unequivocally rely on natural-law principles—Marshall’s argument provoked the same kind of intense opposition and suffered the same type of defeat that James Wilson’s natural-law claims had encountered in the 1780s and 1790s. See infra Part II.B.

76 *Fletcher*, 10 U.S. (6 Cranch) at 137–38. For example, in *Dartmouth College*, Marshall declared that a “literal construction” of the Constitution should be followed unless it would lead to a result that was “so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.” *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 644–45. In *Sturges*, Marshall reaffirmed the supreme authority of the Constitution’s text by warning that “although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.” *Sturges*, 17 U.S. (4 Wheat.) at 202 (emphasis added). To emphasize this point, Marshall said that the Court would adhere to the “plain meaning” of the Constitution’s text unless a literal interpretation would lead to “monstrous” results:

> It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. . . . [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.


extratextual sources” to establish what he considered to be the “operative meaning” of specific constitutional provisions.78 As shown above, Marshall used this approach most successfully in defending his expansive reading of the Contract Clause. It is, however, important to note that both the language and original intent of the Contract Clause validated Marshall’s use of “vested rights” theory as an interpretive source. The clause’s language prohibiting the states from “impairing the obligation of contracts”79 reflected a widely shared understanding among Americans—both at the time of the Constitution and during the early 1800s—that “a legislature could not arbitrarily divest propertyholders of their holdings.”80

In sum, Marshall was willing to use “extratextual sources” as interpretive tools in confirming the widely accepted meaning and purpose of a constitutional provision. He generally declined, however, to give “constitutional status” to natural rights that he did not find to be “expressly codified in the text of the Constitution” through a process of “fair construction.”81 By insisting on a textual basis for enforceable constitutional rights, Marshall’s interpretive methodology reflected his belief that courts had an “obligation to stay within the boundaries of the text in constitutional interpretation.”82

Probably the most notable display of Marshall’s self-imposed “obligation” of interpretive restraint occurred in his opinion for the Court in The Antelope.83 In that case, the Court held that the law of nations did not prohibit the international slave trade. Marshall acknowledged that the slave trade was “contrary to the law of nature,” because it violated the “generally admitted” principle affirming each person’s “natural right to the fruits of his own labour.”84 Nevertheless, Marshall found that the slave trade was “sanctioned by the usages, the national acts, and the general assent” of many na-

78 Id. at 8, 626–27, 637–39, 670–75, 965–66.
79 U.S. Const. art. I, § 10.
80 White, Marshall Court, supra note 38, at 595–602, 670–74, 936–42; see also Hobson, supra note 3, at 24–25, 78–80, 86–87; Nelson, supra note 6, at 79–83; supra note 66 (discussing the Framers’ purpose in drafting the Contract Clause). Of course, as discussed supra note 75, Marshall’s defeat in Ogden showed that there were limits to his ability to persuade the Court to accept his broad reading of the Contract Clause.
81 Hobson, supra note 3, at 78–80, 199–200; White, Marshall Court, supra note 38, at 675, 965.
82 White, Marshall Court, supra note 38, at 675.
84 Id. at 120.
tions, both in antiquity and modern times.85 Marshall believed that a single country could not “rightfully impose a rule on another,” given the “universally acknowledged” axiom regarding the “perfect equality of nations.”86 Accordingly, in Marshall’s view, the trade “remains lawful to those whose governments have not forbidden it,” and, to that extent, “is consistent with the law of nations.”87 In rendering his opinion, Marshall declared that he could not act as “a moralist”88 and, similarly, the Court could not “yield to feelings which might seduce it from the path of duty.”89 Instead, Marshall felt compelled to act as “a jurist [who] must search for [a] legal solution”90 that would enable the Court to “obey the mandate of the law.”91

Marshall’s opinion in The Antelope clearly indicates his reluctance to rely on natural law as a free-standing source of authority for judicial review. Marshall referred in general terms to the Constitution’s provision authorizing Congress to abolish the slave trade after 1808,92 but he did not find that provision to be dispositive. In addition, he apparently could not discern any other textual support in the Constitution for the “abstract natural justice argument” presented by the Attorney General of the United States on behalf of the appellant slaves.93 The Antelope provides persuasive support for the view that Marshall (1) consistently sought to rest his constitutional analysis on the supreme authority of the Constitution’s text, and (2) used principles drawn from the common law and natural law for the relatively limited purpose of defining the “usual” (i.e., generally understood) meaning of lan-

85 Id. at 121.
86 Id. at 122.
87 Id.
88 Id. at 121.
89 Id. at 114.
90 Id. at 121.
91 Id. at 114. Marshall’s refusal to follow the dictates of natural law in The Antelope stood in sharp contrast with an earlier circuit court opinion of his close friend and colleague, Joseph Story. In United States v. La Jeune Eugénie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15.551), Story declared that the slave trade did violate the law of nations because it was “repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice.” Id. at 846. For insightful discussions of Marshall’s and Story’s differing approaches to the legality of the slave trade under international law, see Hobson, supra note 3, at 166–70; R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 347–50 (1985); White, Marshall Court, supra note 38, at 692–703. See also White, Marshall Court, supra note 38, at 699–700 n.92 (noting that Story did not issue a dissenting opinion in The Antelope, but Story did acknowledge his disagreement with The Antelope in a private letter written seventeen years later).

Story’s belief that natural law imposed binding obligations on nations and their citizens, through the application of the law of nations, was shared by a number of American judges and lawyers in the early nineteenth century. Attempts by American judges to enforce such obligations, however, proved to be highly controversial. See infra notes 303–10, 415–35 and accompanying text (discussing James Wilson’s understanding of the law of nations and his unsuccessful attempt to enforce that law in Henfield’s Case). See also generally Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819 (1989).

92 See U.S. Const. art. I, § 9, para. 1; The Antelope, 23 U.S. (10 Wheat.) at 115 (stating that the slave trade “received its first check in America”).

93 White, Marshall Court, supra note 38, at 693–98, 701–03; see also Hobson, supra note 3, at 166–70.
language used in that text.\textsuperscript{94} In Professor White's view, Marshall's text-based interpretation “separated constitutional from natural law . . . and ultimately paved the way for the demise of natural law as an authoritative basis for legal decisions in American jurisprudence.”\textsuperscript{95}

C. Why Did Marshall and Other Founders Choose a Textual Strategy in Defending the Legitimacy of Judicial Review?

1. James Iredell's Defense of Judicial Review

Marshall was not alone in defending the legitimacy of judicial review by declaring that courts had an unavoidable “duty” to follow the sovereign people’s will as explicitly declared in written constitutions. During 1786–1787, James Iredell became perhaps the first Founder to articulate this theory of judicial review in a public forum. During that period, Iredell was acting as counsel for the plaintiffs in Bayard v. Singleton.\textsuperscript{96} In Bayard, the plaintiffs sought to recover property that the North Carolina government had confiscated from Loyalists and sold to the defendants. Iredell’s clients challenged a state statute, which denied the right of jury trial to anyone who questioned the legality of North Carolina’s confiscation or sale of Loyalist-owned property. Iredell contended that the North Carolina court should treat the statute as void, because it violated the North Carolina Constitution’s explicit guarantee of a jury trial in civil cases.\textsuperscript{97}

In August 1786, while the case remained pending for decision, Iredell published an anonymous newspaper essay addressed “To the Public,” in which he defended the doctrine of judicial review based on principles of popular sovereignty that Marshall would later echo in Marbury. In his essay, Iredell declared that the North Carolina Constitution “sprang from the deliberate voice of the people” and protected “the security of every individual” by placing “defined” limits on the powers of the state Assembly.\textsuperscript{98} Accordingly, the constitution was a “fundamental law, and unalterable by the legislature,

\textsuperscript{94} See HOBSON, supra note 3, at 78–80, 83–100; White, Marshall Court, supra note 38, at 196–98, 627–28, 670–76.

\textsuperscript{95} White, Marshall Court, supra note 38, at 676 (emphasis added); see also id. at 702 (stating that Marshall’s constitutional analysis “apparently foreclosed unwritten natural law as a substantive source of positive legal rules”) (emphasis added). Suzanna Sherry is a prominent exponent of the view that the “unwritten Constitution” has strong historical roots. See supra note 10 (citing works by Professor Sherry). She acknowledges, however, that by the time of Dartmouth College, “all traces of references to natural law had disappeared from Marshall’s opinion, despite Daniel Webster’s eloquent defense of fundamental rights at oral argument.” Sherry, Unwritten Constitution, supra note 10, at 1172.

\textsuperscript{96} Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787). Scholars have generally viewed Iredell’s arguments in 1786–1787 as the first clear public statement of the version of judicial review that Marshall ultimately embraced in Marbury. See, e.g., CASTO, supra note 33, at 216–20; HOBSON, supra note 3, at 63–64; WOOD, supra note 28, at 460–62. But see SNOWISS, supra note 3, at 45–53, 66, 70–72 (acknowledging that Iredell’s arguments were an important source for Marshall’s concept of judicial review, but contending that Iredell’s presentation differed from Marshall’s version in significant ways).

\textsuperscript{97} See Bayard, 1 N.C. (Mart.) at 5; SNOWISS, supra note 3, at 45, 67.

\textsuperscript{98} Letter from “An Elector” to “the Public” (Aug. 4, 1786), reprinid in 2 Life and Correspondence of James Iredell, supra note 36, at 145, 146. Iredell’s letter was published on August 17, 1786, by a newspaper in New Bern, North Carolina. See Letter from A. Maclaine to
which derives all its powers from it.” In view of the constitution’s status as “fundamental” law, “an act of Assembly, inconsistent with the constitution, is void and cannot be obeyed, without disobeying the superior law [of the constitution] . . . . The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution.”

Iredell contended that the judges’ duty to refuse to enforce an unconstitutional statute was “one inevitably resulting from the constitution of their office, they being judges for the benefit of the whole people, not mere servants of the Assembly.” The courts had no choice but to uphold the sovereign people’s will, as expressed in the Constitution’s text, because the text demonstrated that “[t]he people have chosen to be governed under such and such principles . . . and the Assembly have no more right to obedience on other terms than any different power on earth has a right to govern us.”

In 1787, the North Carolina court accepted Iredell’s argument and held that his clients were entitled to a jury trial. The judges stated, in terms similar to Marshall’s invocation of judicial “duty” in Marbury, that “the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject.” The court concluded that “the judicial power was bound to take notice of [the North Carolina Constitution] standing in full force as the fundamental law of the land.” In view of the constitution’s explicit guarantee of a jury trial, the challenged statute must “in that instance, stand as abrogated and without any effect.”

The court’s decision in Bayard provoked strong criticism from Richard Spaight, who was then serving as a delegate from North Carolina to the Constitutional Convention in Philadelphia. Writing to Iredell in August 1787, Spaight condemned Bayard as a “usurpation” of judicial authority. Spaight argued that the court’s exercise of judicial review “operated as an absolute negative on . . . the Legislature, which no judiciary ought ever to possess.” In Spaight’s opinion, the power asserted by the court subjected the people of North Carolina to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys, and would be more despotic than the Roman Decemvirate, and equally as insufferable. If they possessed the power, what check or control would there be to their proceedings?

James Iredell (Aug. 24, 1786), reprinted in 2 Life and Correspondence of James Iredell, supra note 36, at 149, 150.

100 Id.
101 Id.
102 Id. at 146 (emphasis added).
103 Bayard v. Singleton, 1 N.C. (Mart.) 5, 6 (1787).
104 Id. at 7.
105 Id.
106 Letter from Richard Spaight to James Iredell (Aug. 12, 1787), reprinted in 2 Life and Correspondence of James Iredell, supra note 36, at 168, 169.
107 Id.
108 Id.
Spaight lamented that the North Carolina constitution "has not provided a sufficient check, to prevent the intemperate and unjust proceedings of our Legislature." He believed, however, that the people's "only" recourse was to use the "annual election" to remove legislators who abused their trust.

In his reply to Spaight, Iredell repeated many of the points that he had advanced in his newspaper essay the previous year. Iredell once again emphasized the significance of North Carolina's written constitution, because [w]ithout an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed, not inconsistent with natural justice (for that curb is avowed by the judges even in England) would have been binding on the people.

While the foregoing passage referred both to the "express Constitution" and to a Cokean power of judicial review based on "natural justice," the rest of Iredell's letter relied on the authority of the written constitution and did not cite natural law principles. For example, Iredell contended that "[t]he Constitution, therefore, being a fundamental law, and a law in writing of the most solemn nature . . . the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority." Iredell also emphasized the importance of the written constitution when he described it as "not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves."

For Iredell, the written constitution "unavoidably" placed a duty on the judges, "when an act is necessarily brought in judgment before them," to decide whether the statute was "unwarranted by and inconsistent with" the constitution. Iredell acknowledged the possibility that courts might abuse their power of judicial review. He noted, however, that "[i]t can be no [judge's] interest certainly to make himself odious to the people by giving unnecessary and wanton offense." In addition, because the constitution was a "written document to which all may have recourse," the people would be able to evaluate whether judges' decisions were based on a "false construction" of the constitution.

Iredell's essential claim for judicial review was one of necessity, because "once you establish the necessary existence of any power, the argument as to abuse ceases to destroy its validity, though in a doubtful matter it may be of great weight." Iredell maintained that, without judicial review, the consti-

---

109 Id.
110 Id. at 169–70.
112 Id. at 173.
113 Id. at 174 (emphasis added).
114 Id. at 173.
115 Id. at 175.
116 Id. at 174–75.
117 Id. at 173–74.
tutional rights of individuals would be subject to deprivation “on the casual whim or accidental ideas of a majority,” since Spaight’s suggested remedy of elections would only “secure the views of a majority.”118 Iredell had previously argued in his newspaper essay that the alternative remedy of armed resistance would be a “dreadful expedient,” which could not succeed without a rising of the “whole people.”119 Accordingly, in his view, armed rebellion would not be effective in protecting the rights of “the minority” from the “pleasure of a majority of the Assembly.”120

Thus, Iredell was firmly convinced that judicial review was both legitimate and necessary, as long as courts remained faithful to their duty of enforcing “the deliberate voice of the people” as “defined by the constitution.”121 Iredell also believed that “[m]ost of the lawyers” agreed with his defense of judicial review.122 At the same time, however, Iredell recognized that judicial review was strongly contested by influential political leaders and distrusted by ordinary citizens. He understood that there was “much alarm” among the general public, and that “many” agreed with Spaight’s fear that the courts would exercise a “usurped or discretionary power” for the purpose of becoming final “arbiters” of all questions of governmental authority.123

In view of the tenuous political foundation for judicial review, Iredell readily agreed that the courts should uphold statutes in “all doubtful cases” and should intervene only when a law was “unconstitutional beyond dispute.”124 Subsequently, during his tenure as a Justice of the Supreme Court, Iredell declared that courts had no authority to invalidate statutes based solely on principles of natural law. In two cases decided in 1798, Iredell determined that the Ex Post Facto Clause of the Constitution125 prohibited the states from enacting retroactive criminal laws.126 He concluded, however, that the clause did not apply to the retrospective civil statutes challenged in those cases.127

In his opinions in both cases, Iredell declared that the principles of “natural justice” did not provide a sufficient constitutional basis to strike down laws. In Minge v. Gilmour, Iredell noted that the courts, “being bound to give the most reasonable construction to acts of the legislature, will, in con-

118 Id. at 174–75; see also id. at 173 (stating that “[t]he majority, having the rule in their own hands, may take care of themselves,” but the minority must rely on “express [constitutional] provisions for the personal liberty of each citizen”).
119 Letter from “An Elector” to “the Public” (Aug. 4, 1786), supra note 98, at 147.
120 Id.
121 Id. at 146, 148.
123 Letter from “An Elector” to “the Public” (Aug. 4, 1786), supra note 98, at 148; Letter from James Iredell to Richard Spaight (Aug. 26, 1787), supra note 111, at 173; see also infra notes 138–53, 169–70, 175 and accompanying text (discussing opposition to judicial review based on concerns about judges’ lack of political accountability and broad discretion).
124 Letter from James Iredell to Richard Spaight (Aug. 26, 1787), supra note 111, at 175.
125 U.S. CONST. art. I, § 10, para. 1.
127 Calder, 3 U.S. (3 Dall.) at 399–400 (Iredell, J., concurring); Minge, 17 F. Cas. at 443.
struing an act, do it as consistently with their notions of natural justice . . . as the words and context will admit.”128 He quickly added, however, that if the words are too plain to admit of more than one construction, and the provisions not inconsistent with any articles of the constitution, I am of the opinion . . . that no court has authority to say the act is void because in their opinion it is not agreeable to the principles of natural justice.129

Thus, like Marshall, Iredell was willing to consider principles of “natural justice” as part of a methodology of “reasonable construction,” but he would not rely on natural law to invalidate a statute whose “plain” terms were “not inconsistent” with the constitution’s text. Iredell argued that the maxims of “natural justice” could not provide an independent basis for judicial review, because they did not establish any definite or generally accepted standards on which courts could rely as “authority” for their constitutional decisions:

The words ‘against natural justice’ are very loose terms, upon which very wise and upright members of the legislature and judges might differ in opinion. If they did, whose opinion is properly to be regarded—those to whom the authority of passing an act is given, or a court to whom no authority, in this respect, necessarily results?130

Similarly, in Calder v. Bull, Iredell argued that if a legislature chose to pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.131

128 Minge, 17 F. Cas. at 444.
129 Id.
130 Id. (emphasis added).
131 Calder, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring) (emphasis added). Iredell’s comments regarding the unenforceability of abstract principles of “natural justice” in Calder v. Bull were evidently provoked by obiter dicta expressed in Justice Chase’s opinion. While Chase did not find that the Connecticut law violated “natural justice,” he did declare:

An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Id. at 388.

It is not entirely clear whether Chase’s dicta were actually intended to promote a Cokean theory of judicial review. On the one hand, his remarks may simply have been designed to suggest a principle of constitutional interpretation, because he stated that “[i]t is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.” Id. (emphasis added). On the other hand, the following statements could reasonably have led Iredell and other readers to conclude that Chase was advo-
Iredell acknowledged in *Calder* (with obvious reference to Coke) that "some speculative jurists have held, that a legislative act against natural justice must, in itself, be void."\textsuperscript{132} However, as Iredell pointed out, Cokean judicial review was no longer accepted in England. Blackstone—whose *Commentaries* were the most authoritative treatise on English law at the time—declared that Parliament was supreme. Accordingly, Blackstone maintained, English courts could not "defeat the intent of the Legislature," even if Parliament chose to violate Coke’s maxim by making a person judge in his own case.\textsuperscript{133}

Iredell explained that the American people had avoided the dangerous consequences of legislative omnipotence by adopting written constitutions "to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries."\textsuperscript{134} Each written constitution established "a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act."\textsuperscript{135} Still, Iredell warned, the power of a court to declare statutes unconstitutional was of such a "delicate and awful nature, [that] the Court will never resort to that authority, but in a clear and urgent case."\textsuperscript{136}

2. Publius’s Defense of Judicial Review in *The Federalist*

Iredell’s restrained, text-based version of judicial review was echoed in Publius’s essays defending judicial review in *The Federalist*, which were pub-

\begin{quote}
\begin{footnotes}
\footnotesize
\textsuperscript{132} *Calder*, 3 U.S. (3 Dall.) at 398; see *supra* notes 8–9, 56–57 and *infra* notes 319–20 and accompanying text (discussing Coke’s opinion in *Dr. Bonham’s Case*).

\textsuperscript{133} *Calder*, 3 U.S. (3 Dall.) at 398–99 (quoting 1 BLACKSTONE, *supra* note 45, at *91*). For evidence that Americans generally viewed Blackstone’s *Commentaries* as the most authoritative statement of English law during the late eighteenth century and early nineteenth century, see Alschuler, *supra* note 43, at 5–16; Nolan, *supra* note 43, at 738–67; see also *infra* notes 318–22, 388–89 and accompanying text (discussing James Wilson’s emphatic rejection of Blackstone’s theory of parliamentary supremacy and Wilson’s defense of Cokean judicial review).

\textsuperscript{134} *Calder*, 3 U.S. (3 Dall.) at 399 (emphasis added).

\textsuperscript{135} Id. (emphasis added).

\textsuperscript{136} Id. (emphasis added).
\end{footnotes}
\end{quote}
lished in New York City on May 28, 1788.\textsuperscript{137} Publius's essays on judicial review appeared shortly after (and in probable response to) essays published in a New York newspaper by the Antifederalist writer, "Brutus." The essays of "Brutus" are generally viewed as the most comprehensive and penetrating critique of the Constitution's proposed arrangements for the federal judiciary.\textsuperscript{138}

Brutus warned that the proposed Constitution would establish a "complete system, not only for making, but for executing laws," and that the "real effect" of the new national government "will . . . be brought home . . . through the medium of the judicial power."\textsuperscript{139} Federal judges, he claimed, would be "totally independent, both of the people and the legislature," because of their tenure during good behavior and their guaranteed salaries.\textsuperscript{140} In addition to the judiciary's unprecedented independence from the political process, Brutus predicted that federal judges would possess awesome powers and exercise an uncontrollable discretion under the Constitution.

Brutus focused particularly on the opening clause of Article III, Section 2, stating that the federal judicial power would extend to "all cases in law and equity" arising under the Constitution and under federal statutes and treaties.\textsuperscript{141} Based on this explicit grant of equity jurisdiction, Brutus claimed that federal judges would not be obliged to give the Constitution a "legal construction" based on restrained, common-law methods of interpretation.\textsuperscript{142} Instead, judges would have authority "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."\textsuperscript{143} Quoting Blackstone, Brutus warned that "there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to a positive law."\textsuperscript{144} Thus, Brutus concluded, federal judges "will not confine themselves to any fixed or established rules, but will deter-

\textsuperscript{137} See Garry Wills, Introduction: The Fight for New York to The Federalist, at x (Garry Wills ed., 1982).

\textsuperscript{138} Essays of Brutus, reprinted in 2 The Complete Anti-Federalist 358 (Herbert Storing ed., 1981). For scholarly assessments of Brutus's essays, see, for example, id. (editorial note); Casto, supra note 33, at 20–22 (noting that Publius's essays on the judiciary in The Federalist were almost certainly intended as a response to "Brutus's sophisticated assault"); White, Coercious Power Theory, supra note 38, at 75–83.

\textsuperscript{139} Essay XI of Brutus, reprinted in 2 The Complete Anti-Federalist, supra note 138, at 417, 418.

\textsuperscript{140} Id. For Brutus's further arguments regarding the "independence" to be enjoyed by federal judges, see infra notes 150–51 and accompanying text.

\textsuperscript{141} U.S. Const. art. III, § 2; Essay XI of Brutus, supra note 139, at 418.

\textsuperscript{142} Essay XI of Brutus, supra note 139, at 419.

\textsuperscript{143} Id.

\textsuperscript{144} Id. at 419–20 (quoting 1 Blackstone, supra note 45, at *61–62). It is noteworthy, however, that Brutus did not quote Blackstone's following caveat regarding the proper exercise of equitable discretion:

[The liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator.

1 Blackstone, supra note 45, at *62. See also Jonathan T. Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural
mine, according to what appears to them, the reason and spirit of the constitution.”\textsuperscript{145}

Brutus predicted that the federal judiciary would “lean strongly in favour of the general government,” and would broadly construe the “general and indefinite terms” of the Constitution so as to expand their own powers and the powers of Congress.\textsuperscript{146} Thus, the federal judiciary would have a clear self-interest in adopting a “construction” of the Constitution that would “extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.”\textsuperscript{147}

In addition to the danger faced by the states, Brutus warned that the politically unaccountable federal judiciary would threaten the rights of private citizens.\textsuperscript{148} Anticipating the doctrine of judicial supremacy announced in \textit{Cooper v. Aaron}, Brutus contended that the Supreme Court would have “the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution.”\textsuperscript{149} The Court would be “independent” of Congress by virtue of the Justices’ life tenure and secure salaries. Accordingly, the Court’s power of judicial review would be “uncontrollable” and would establish “the rule to guide the legislature in their construction of their powers.”\textsuperscript{150} Thus, unlike the situation in England, “the judicial [branch] under this system have a

\begin{flushleft}
\end{flushleft}

\textsuperscript{145} Essay XI of Brutus, \textit{supra} note 139, at 420. The “Federal Farmer,” another prominent Antifederalist writer, expressed similar concerns about the federal judiciary’s authority to decide all cases arising “in law and equity” under the Constitution and federal statutes and treaties:

\begin{quote}
It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be \textit{mere discretion}.
\end{quote}


\textsuperscript{146} Essay XI of Brutus, \textit{supra} note 139, at 420–21. As G. Edward White has observed, Brutus’s essays set forth a “coterminous power theory” under which each branch of the federal government would have incentives to expand the authority of the other branches at the expense of the states. White, \textit{Coterminous Power Theory}, \textit{supra} note 38, at 75–83. For example, Brutus noted that “[e]very body of men invested with office are tenacious of power,” and that “[e]very extension of the power of [Congress], as well as of the judicial powers, will increase the powers of the courts,” so that “the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it.” Essay XI of Brutus, \textit{supra} note 139, at 421–22. For additional evidence of Brutus’s belief that the federal judiciary and Congress would work in concert to expand the federal government’s power, see \textit{infra} note 152.

\textsuperscript{147} Essay XII of Brutus, \textit{reprinted in 2 The Complete Anti-Federalist}, \textit{supra} note 138, at 422, 423.


\textsuperscript{149} Essay XII of Brutus, \textit{supra} note 147, at 423; see \textit{supra} note 6 (discussing \textit{Cooper v. Aaron}).

\textsuperscript{150} Essay XII of Brutus, \textit{supra} note 147, at 423–24.
power which is above the legislative, and which indeed transcends any power before given to a judiciary by any free government under heaven.”

Brutus warned that the untrammeled power of the federal judiciary presented a far more insidious danger to the states and the people than even an omnipotent Congress might have posed. Under the Constitution, the people would still retain the power to remove faithless members of Congress through elections, but they could exercise no such check over judges. Accordingly, Brutus warned,

[When this [judicial] power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but with a high hand and an outstretched arm.”

Publius responded to Brutus’s critique by insisting that the federal judiciary would exercise a restrained form of judicial review that fully respected the sovereign people’s will as embodied in the written Constitution. Pub-

---

151 Essay XV of Brutus, reprinted in 2 The Complete Anti-Federalist, supra note 138, at 437, 438. Brutus declared that “there is no power above [the federal judges] that can controul their decisions, or correct their errors.” Id. at 439. In contrast with English courts, the new federal courts would not be “bound to decide [cases] according to the existing [statutory] laws of the land” and, instead, could “controul [statutes] by adjudging that they are inconsistent with the constitution.” Id. at 438. Moreover, unlike the House of Lords in England, which exercised the authority to review judicial decisions, Congress could not overturn federal court judgments. Id. at 438–39. Finally, Congress could not lower the salaries of federal judges and could remove them only by impeachment. Impeachment, however, would be a drastic remedy reserved for “high crimes and misdemeanors,” and it therefore would not allow Congress to remove judges for mere “[e]rrors in judgement, or want of capacity to discharge the duties of the office.” Instead, Congress would have to show that an accused judge rendered an erroneous judgment from “wicked and corrupt motives.” Id. at 439–40.

152 In reiterating the danger to the states, Brutus again described the symbiotic relationship that he believed would develop between the expansive interpretations of the Constitution by federal judges and the enactment of new laws by Congress in reliance on those interpretations: Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degress, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted . . . . In this situation, the general legislature, might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial [branch] to whom the constitution has committed the power of explaining the constitution.

Id. at 441.

153 Id. at 442. In this passage, Brutus was obviously referring to the Lockeian remedy of revolution. See supra note 34; infra note 221 and accompanying text.

154 In referring to the statements of “Publius” regarding the proper limits of judicial review, I accept Publius’s statements at face value and I do not try to determine whether Alexander Hamilton (the drafter of the relevant essays) actually believed in those limits. In at least two of his cases as a private lawyer, Hamilton presented arguments that seemed to support a Cokean form of judicial review based on principles of natural law. In each case, Hamilton may simply have been making the best possible argument for his clients. On the other hand, Hamilton’s expansive view of the implied powers of Congress during the Washington Administration might indicate that he also would have embraced a broad concept of judicial review that included reference to “unwritten” principles of natural law. See 1 The Law Practice of Alexander
lius agreed with Brutus's view that federal judges would enjoy a high degree of independence and would have the power, in appropriate cases, to determine the constitutionality of federal and state legislation. Unlike Brutus, however, Publius argued that judicial review was essential to enforce the rights of citizens and the limits on legislative power enshrined in the written Constitution. Echoing Iredell's arguments, Publius contended that an independent judiciary

is peculiarly essential in a limited constitution . . . which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.\textsuperscript{155}

Thus, in Publius's view, independent judges would serve as "the bulwarks of a limited constitution against legislative encroachments," and would "guard the constitution and the rights of individuals."\textsuperscript{156} Rejecting Brutus's claim of judicial supremacy, Publius argued that the doctrine of judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."\textsuperscript{157} Using agency concepts, Publius argued that Congress must act in accordance with "the tenor of the [people's] commission," and the judiciary would serve as an "intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority."\textsuperscript{158}

Publius was confident that federal judges would uphold the sovereign people's will as expressed in the Constitution. He explained that the Constitution "is, in fact, and must be, regarded by the judges as a fundamental law," and, therefore, the judges would be "governed" by "the will . . . of the people declared in the constitution."\textsuperscript{159} Publius's references to the "manifest tenor" of the Constitution and the "declared" will of the people indicate that he expected federal judges to follow a text-based approach to judicial review.\textsuperscript{160}

\textsuperscript{155} The Federalist No. 78, supra note 36, at 394 (emphasis added).
\textsuperscript{156} Id. at 397.
\textsuperscript{157} Id. at 395.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 395–96 (emphasis added).
\textsuperscript{160} In two cases decided in 1804, the Supreme Judicial Court of Massachusetts held that an indictment for forgery that referred to the "tenor" of the forged bill was required to provide a "strict recital" of all the terms of the bill. Commonwealth v. Stevens, 1 Mass. (1 Will.) 203, 204 (1804); Commonwealth v. Bailey, 1 Mass. (1 Will.) 62, 62 (1804). Thus the word "tenor" as used in those cases referred to the express terms of the forged negotiable instrument. Similarly, Pub-
Consistent with his emphasis on the primacy of the Constitution, Publius contended that the federal judiciary would not have unbounded discretion to strike down statutes. While it “belongs to [judges] to ascertain [the Constitution’s] meaning as well as the meaning of any [statute],” the judges could not invalidate a statute unless they found an “irreconcilable variance between the two.”161 The judges would have no right, “on the pretense of a repugnancy, [to] substitute their own pleasure to the constitutional intentions of the legislature.”162 Instead, “[t]he courts must declare the sense of the law,” in accordance with “the intention of the people” as set forth in the Constitution.163 Otherwise, the courts would be guilty of “exercis[ing] WILL instead of JUDGMENT,” thereby violating their constitutional trust.164

While Publius provided a plausible account of the Constitution’s intended limits on judicial discretion, he was less persuasive in explaining how the people, the president or Congress could deter or punish an abuse of that discretion. Publius readily acknowledged—and in fact lauded—the “complete independence” that federal judges would enjoy by reason of their tenure during good behavior and their guaranteed salaries.165 It was this “independence” that Brutus had emphasized in making his claim that federal judges would be “uncontrollable” by the political process.166 Publius responded that, as a practical matter, the judiciary would be politically weak and would not dare to invade the constitutional prerogatives of the other two branches.167 Although impeachment was the sole legal check on the judiciary, Publius expected Congress to use this check against any judges who committed “a series of deliberate usurpations on the authority of the legislature.”168

---

161 The Federalist No. 78, supra note 36, at 395. Publius pointed out that courts were often called upon to clarify the “meaning and operation” of two statutes that appeared to be “contradictory.” In such cases, “reason and law conspire to dictate” that the statutes should be “reconciled to each other” by the courts, if a harmonious interpretation could be achieved by “any fair construction.” Id. at 396. Publius’s conflict of laws analogy implied that federal judges would harmonize statutes with the Constitution wherever possible, under a process of “fair construction,” in order to minimize the occasions for exercising judicial review.

162 Id. at 396.

163 Id. at 395–96.

164 Id. at 396. For an insightful analysis of Publius’ argument that federal judges would not have unlimited interpretive discretion, and would be subject to constraints such as stare decisis and “canons of construction that demanded consistency in interpretation,” see Molot, supra note 144, at 30–41 (quote at 35).

165 Id. at 394; The Federalist No. 79, at 400–01 (Alexander Hamilton) (Garry Wills ed., 1982).

166 See supra notes 139–53 and accompanying text (describing Brutus’s view of the dangers caused by the independence and lack of political accountability of federal judges).

167 In this context, Publius made his well-known statement that the judiciary would be the “least dangerous” branch, because it would have “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” The Federalist No. 78, supra note 36, at 393–94.

168 The Federalist No. 81, supra note 37, at 411; The Federalist No. 79, supra note 165, at 401. Publius did not attempt to explain how the states could exert meaningful political pressure against the federal judiciary, so as to prevent judicial encroachments on state preroga-
As Brutus argued, however, and as James Wilson also predicted, the drastic remedy of impeachment was not likely to provide an effective check on judicial discretion, except in a very unusual case where it could be shown that a judge decided cases in bad faith and in knowing disregard of the law. Brutus also warned that federal judges would enjoy considerable latitude in interpreting the Constitution, due to its “general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning.” On the whole, Publius did not effectively rebut Brutus’s claims regarding the likely political consequences of investing the Supreme Court with broad powers of judicial review and interpretative discretion. Brutus proved to be quite accurate in his predictions that the Court would play a key role in expanding the federal government’s power at the expense of the states, and would become a political lightning-rod in the process.

In sum, Publius’s defense of judicial review largely followed the lines of Iredell’s arguments and anticipated Marshall’s opinion in *Marbury*. Like Iredell and Marshall, Publius rested his case for judicial review primarily on an argument from necessity, linked to the idea of popular sovereignty. All three Founders contended that judicial review provided the only effective (and peaceful) method of defending the sovereign people’s will—as expressly “declared” in the written Constitution—against legislative encroachments. Publius also agreed with Iredell and Marshall that judges should exercise only a limited discretion in reviewing the constitutionality of statutes.

Although Publius did not explicitly reject a Cokean power to invalidate statutes based on natural law, his statements clearly indicated that judicial review would require a careful comparison of the Constitution’s text with the relevant statute(s). Thus, for example, Publius said that a statute should be

---

169 See James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 Documentary History of the Ratification of the Constitution 467, 492 (Merrill Jensen ed., 1976) [hereinafter Ratification History]; James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 7, 1787), in 2 Ratification History, supra, at 514, 517; supra note 151 (discussing Brutus’s belief that impeachment would not be effective in limiting the federal judiciary’s powers because a judge could not be convicted without evidence that he had acted based on “wicked and corrupt motives”). During 1804–1805, the Jeffersonian party in Congress impeached, but failed to convict, Justice Samuel Chase, in spite of (1) Chase’s arguably injudicious conduct during his oversight of three highly charged political trials in 1800, and (2) Chase’s delivery of an inflammatory grand jury charge in 1803, which accused the Jeffersonians of turning the nation into a “mobocracy.” See, e.g., Ellis, supra note 73, at 76–82, 91–107 (providing a critical evaluation of Chase’s behavior); Presser, supra note 131, at 108–58 (presenting a more sympathetic appraisal of Chase’s conduct); see also Stone et al., supra note 15, at 77 (noting that (1) “[n]o Supreme Court justice has been removed from office in the nation’s history,” and (2) “the device of impeachment has not been used as a means of obtaining political control over the Supreme Court”).

170 Essay XI of Brutus, supra note 139, at 421.

171 Compare, e.g., Currie, supra note 3, at 69–71; Hobson, supra note 3, at 63–66; Nelson, supra note 6, at 65–66, with Snowiss, supra note 3, at 45–53, 66, 70–71, 77–83 (agreeing that Iredell and Publius influenced Marshall, but contending that their concept of judicial review differed in significant respects from his).
declared void only if it is "contrary to the manifest tenor of the constitution," or "stands in opposition to [the will] of the people declared in the constitution,"172 or is in "manifest contravention of the articles of union."173 All these statements, together with Publius's use of the conflict of laws analogy drawn from statutory interpretation, suggest that Publius agreed with Iredell's and Marshall's text-based concept of judicial review—a concept that required judges to demonstrate a "repugnancy" between the challenged statute and the Constitution's "manifest" terms.174

The three Founders chose to rationalize judicial review as a defense of the sovereign people's will because they recognized the political vulnerability of the courts. They understood that legislators and ordinary citizens generally distrusted any exercise of judicial discretion in the late eighteenth century and the early nineteenth century. Americans venerated juries and prized the right to trial by jury as an essential guarantee of personal and political liberty. In contrast, ordinary Americans feared judges as politically unaccountable figures who wielded vast discretionary powers and used lawyerly sophistry to justify their arbitrary decisions.175 Marshall, Iredell and

174 See supra notes 35–38, 114, 161 and accompanying text (discussing the conflict of laws analogy used by Marshall, Iredell, and Publius).
175 Brutus was hardly alone in warning of the dangers of judicial discretion. For example, the Federal Farmer cautioned:

[J]udicial power is of such a nature, that when we have ascertained and fixed its limits, with all the caution and precision we can, it will yet be formidable, somewhat arbitrary and despotic—that is, after all our cares, we must leave a vast deal to the discretion and interpretation—to the wisdom, integrity, and politics of the judges . . . . [W]e may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department than in any other.


The American veneration for juries, and distrust of judicial discretion, mirrored the views expressed by Montesquieu. Montesquieu declared that the "judiciary power ought not to be given to a standing senate" and should instead be exercised by temporary juries drawn from "the body of the people." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 202 (David Wallace Carrithers ed., Univ. of California Press 1977) (1748). In that way, he suggested, "the power of judging, a power so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People . . . fear the office, but not the magistrate." Id. at 203 (emphasis added). Montesquieu also warned that "th'o' the tribunals ought not to be fixt, yet the judgments ought, and to such a degree, as to be always conformable to the exact letter of the law. Were they to be the private opinion of the judge, people would then live in society without knowing exactly the obligations it lays them under." Id.

Thus, Montesquieu was no friend of professional judges or of judicial discretion. It was with reference to citizen juries, and not professional judges, that Montesquieu stated that "the judiciary is in some measure next to nothing" compared with the powers of the executive and legislative branches. Id. at 206; see also McDonald, supra note 28, at 85. Publius, of course, did not point out this distinction between juries and judges when he quoted Montesquieu's dictum in support of his claim that the judiciary would be "beyond comparison the weakest of the three departments of power" under the Constitution. THE FEDERALIST NO. 78, supra note 36, at 394 & n.1.

For valuable accounts of the Americans' views of juries and judges during the late eighteenth and early nineteenth centuries, sec, e.g., Ellis, supra note 73, passim; Hobson, supra note
Publius personally experienced the power of this antijudicial sentiment, and they responded with a rationale for judicial review that (1) presented the doctrine as the best defense of the Constitution and the people's liberties enshrined therein, and (2) minimized the discretion that judges could exercise in interpreting the Constitution.176

Several scholars have concluded that the doctrine of judicial review survived in America mainly because Marshall and others successfully linked it to the idea of popular sovereignty as reflected and embodied in the new “fundamental law” of the written Constitution. These scholars believe that the Cokean theory of judicial review, based on unwritten natural law, would probably have fallen prey to legislative supremacy in America in the nineteenth century, as it did in England during the eighteenth century.177 Further evidence for this conclusion is provided in Part II, which describes James Wilson's unsuccessful efforts to construct and apply an essentially Cokean concept of judicial authority.

II. James Wilson's Failed Attempts to Reconcile Popular Sovereignty and Natural Law Jurisprudence

A. Wilson's Commitment to Popular Sovereignty and Judicial Review

Probably no Founder gave greater attention to the theories of popular sovereignty and judicial review than James Wilson. Wilson conducted his entire public career at the intersection of politics and law. He served in the Second Continental Congress and was one of only six men who signed both the Declaration of Independence and the Constitution. Historians have generally viewed Wilson's contributions at the Constitutional Convention as being second only to those of James Madison. Wilson was the Federalists' chief spokesman and leader in Pennsylvania, the first major state to ratify the Con-


176 See supra notes 106–24 and accompanying text (discussing Iredell's response to Spaight's attack on judicial review); supra notes 154–74 and accompanying text (discussing Publius's reply to Brutus's attack on the proposed federal judiciary); supra notes 36–38, 73, and 78–82 and accompanying text (describing Marshall's efforts to defend the Supreme Court against political attacks).

177 See, e.g., Hobson, supra note 3, at 58–71, 78–80, 169–70, 207–08, 213–14, 251–52; Nelson, supra note 6, at 34–40, 62–83; Snowiss, supra note 3, at 3–5, 174–75; Wood, supra note 28, at 455–63; Corwin, supra note 9, at 379–80, 404–09; White, Marshall Court, supra note 38, at 120–37, 674–80, 701–03, 739–40, 965–66, 974–75. The concurrence of Sylvia Snowiss in the foregoing conclusion is both noteworthy and ironic. While recognizing that Marshall's text-based rationale was a crucial step in preserving judicial review in America, Professor Snowiss has urged the Supreme Court (1) to discard “Marbury's law enforcement rationale” for judicial review, (2) to recognize that “the written Constitution is closer to an unwritten one than to a statute,” and (3) to adopt an expansive form of judicial review involving ongoing “judicial adaptation [that] is . . . indistinguishable from legislative adaptation,” based on the substantive due process methodology described by the second Justice Harlan in Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting). Sylvia Snowiss, Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch, 33 J. Marshall L. Rev. 973, 973–77, 1010–21 (2000).
stitution. Wilson’s speeches on behalf of the Constitution in Pennsylvania were distributed throughout the nation, and Federalists in other states relied on many of his arguments.\(^{178}\) In addition to his political career, he was one of the preeminent lawyers in America both before and after the Revolution, and he was generally considered as “the most learned and profound legal scholar of his generation.”\(^{179}\) Wilson’s undisputed prominence as a lawyer-statesman convinced President Washington to appoint him as one of the first Associate Justices of the Supreme Court.\(^{180}\)

At the time he was appointed to the Supreme Court, Wilson’s lofty reputation can be gleaned from two events. First, he was given the honor of presenting an oration in Philadelphia on July 4, 1788, before more than 17,000 people, in celebration of America’s independence and the ratification of the Constitution.\(^{181}\) Second, on December 15, 1790, when he delivered his inaugural “Lecture on Law” at the College of Philadelphia (currently the University of Pennsylvania), the attendees included President and Mrs. George Washington, Vice President John Adams, members of “both houses of Congress[,] [t]he President and both houses of the Legislature of Penn-

\(^{178}\) For example, after reviewing a copy of Wilson’s “State House Yard” speech of October 6, 1787, George Washington immediately forwarded the speech to his friend, David Stuart. Washington stated that Wilson was “as able, candid, and honest a Member as any in the [Constitutional] Convention,” and that Wilson’s speech “will place most of Col. [George] Mason’s objections [to the Constitution] in their true point of light. . . . The re-publications (if you can get it done) will be of service at this juncture.” Charles P. Smith, James Wilson: Founding Father, 1742–1798, at 265 & 406 n.2 (1956) (quoting Letter from George Washington to David Stuart (Oct. 17, 1787)); see also infra notes 342–44 and accompanying text (discussing Wilson’s “State House Yard” speech). For additional evidence of Wilson’s significant contributions to the Federalists’ campaign to ratify the Constitution, see Smith, supra, at 206–07, 265–66, 279–80.


\(^{181}\) Hall, supra note 180, at 24 (also noting that Wilson’s oration “was reprinted throughout the nation”); Smith, supra note 178, at 208 (same); id. at 287–95 (describing the circumstances surrounding Wilson’s oration). The oration is reprinted in 2 Wilson’s Works, supra note 179, at 773–80.
sylvania, together with a great number of ladies and gentlemen . . . the whole comprising a most brilliant and respectable audience.”

In his first law lecture, Wilson described the theory of popular sovereignty as a “revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please.” By establishing this new principle of “melioration, contentment and peace,” the new American nation had solved the problem of sovereignty that had bedeviled statesmen and philosophers for centuries. In America, “[t]he dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.”

For Wilson, the American concept of popular sovereignty reflected the “virtues . . . descriptive of the American character—the love of liberty, and the love of law.” Wilson, however, warned, “law and liberty cannot rationally become the objects of our love, unless they first become the objects of our knowledge.” Neither law nor liberty could continue to exist without the other. Law without liberty would become “oppression,” and liberty without law would degenerate into “licentiousness.” Fortunately, Wilson reassured his audience, the proper knowledge of both liberty and law could be acquired by studying “the science of law.” Accordingly, Wilson declared:

The science of law should, in some measure, and in some degree, be the study of every free citizen . . . . Every free citizen . . . has duties to perform and rights to claim. Unless, in some measure, and in some degree, he knows those duties and those rights, he can never act a just and an independent part.

In a single paragraph, Wilson had outlined the heart of his political and legal enterprise. Throughout his career, he sought to harmonize the democratic implications of “liberty”—as embodied in his cherished theory of popular sovereignty—with the restraining influence of the “law,” including not only positive law but also the immutable principles of natural law. Wilson fervently believed that the American people—educated in legal “science” and represented in all three branches of government—could achieve this grand integration of liberty and law. His unbounded optimism, and the

---


183 1 Wilson's Works, supra note 179, at 79.

184 See 1 id. at 79–81 (quote at 79).

185 1 id. at 81.

186 1 id. at 72.

187 1 id.

188 1 id.

189 1 id.

190 1 id.

191 See 1 id.

192 See 1 id.
moral epistemology on which that optimism was based, are reflected in his very next statement in his first lecture:

Happily, the general and most important principles of law are not removed to a very great distance from common apprehension. It has been said of religion, that though the elephant may swim, yet the lamb may wade in it. Concerning law, the same observation may be made.\(^{193}\)

To understand Wilson’s concept of politics and government, one must first appreciate his theories of moral obligation and psychology. Those theories explain Wilson’s abiding faith in the people and also his conviction that the judicial branch should play a co-equal role with the other branches of government in perfecting America’s republican society.

1. Wilson’s Belief in the Authority of Natural Law and the Moral Sense

Wilson advocated a theory of law that was explicitly based on the supreme authority of God. Wilson explained the divine origin of law at the beginning of his second lecture:

Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made. . . . Man, . . . composed of a body and a soul, possessed of faculties intellectual and moral, finds or makes a system of regulations, by which [he] . . . may be preserved, improved, and perfected. The celestial as well as the terrestrial world knows its exalted but prescribed course. This angels and the spirits of the just, made perfect, do “clearly behold and without any swerving observe.” Let humble reverence attend us as we proceed. The great and incomprehensible Author, and Preserver, and Ruler of all things—he himself works not without an eternal decree. Such—and so universal is law. “Her seat . . . is the bosom of God; her voice, the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power. Angels and men, creatures of every condition . . . with uniform consent, admiring her as the mother of their peace and joy.”\(^{194}\)

Wilson did not view God as a detached deity who repaired to a remote place in Heaven after setting his clockwork universe in motion. On the contrary, Wilson’s God is an active force Who formulates His laws to ensure the happiness and perfection of His creation and His creatures. This “solemn truth” requires all people to recognize God’s “supreme right of prescribing laws for our conduct, and our indispensable duty of obeying those laws.”\(^{195}\)

Wilson happily embraced the “duty” to obey God’s laws, because God is a benevolent Creator Who desires to promote the well-being of humankind:

\(^{193}\) 1 id.
\(^{194}\) 1 id. at 97 (quoting Richard Hooker).
\(^{195}\) 1 id. at 128.
Let us join, in our weak conceptions . . . infinite power—infinitesimal wisdom—infinitesimal goodness; and then we shall see, in its resplendent glory, the supreme right to rule: we shall feel the conscious sense of the perfect obligation to obey.

His infinite power enforces his laws, and carries them into full and effectual execution. His infinite wisdom knows and chooses the fittest means for accomplishing the ends which he proposes. His infinite goodness proposes such ends only as promote our felicity. . . .

The rule of his government we shall find to be reduced to this one paternal command—Let man pursue his own perfection and happiness.

What an enrapturing view of the moral government of the universe! Over all, goodness infinite reigns, guided by unerring wisdom, and supported by almighty power.\footnote{1 id. at 128–29.}

Wilson believed that God communicates His laws to people through “revelation . . . contained in the holy scriptures” and through “moral precepts” derived from “the law of nature.”\footnote{1 id. at 143.} Scriptural revelation is of great assistance in helping individuals to understand their relationship with God and the “future state” to which they are destined.\footnote{1 id. at 143–44.} Wilson doubted, however, whether the Bible’s “instructions” could solve most of the moral problems that confront people in their daily lives.\footnote{1 id.} At the same time, he believed that “the scriptures support, confirm, and corroborate, but do not supercede the operations of reason and the moral sense.”\footnote{1 Wilson's Works, supra note 179, at 6–20, 42, 48, 315–23.} Accordingly, for Wilson, reason and the moral sense are man’s best instruments for understanding and following “the will of God” as embodied in His “immutable” law of nature.\footnote{1 id. at 144. This passage indicates that, despite Wilson’s strongly stated belief in God, he had moved far from the strict Calvinist beliefs of his parents during the years following his emigration from Scotland to America in 1765. See SmitH, supra note 178, at 6–20, 42, 48, 315–23. Even so, Wilson’s lectures indicate that he believed in the divinity and resurrection of Christ as well as the afterlife, and he agreed with Blackstone that Christianity was part of the common law. See 1 Wilson’s Works, supra note 179, at 376, 144, 201; 2 id. at 671 (citing 4 Blackstone, Commentaries, supra note 45, at *59). Wilson’s version of Christianity reflected “a new form of evangelical cosmopolitanism” that developed in Scotland and America during the eighteenth century. This moderate Presbyterian outlook recognized that “the polite learning and manners of the Enlightenment and the economic prosperity secured by commerce and industry were not necessarily evil and not necessarily incompatible with true religion; rather they could be instruments of improvement or even signs of divine favour, if joined with the Calvinist piety and political liberty that America offered.” Richard B. Sher, Introduction: Scotland-American Cultural Studies, Past and Present, in Scotland and America, supra note 180, at 1, 15.}

\footnote{1 id. at 144.}
Wilson declared that the “law of nature is universal,” because it “has an essential fitness for all mankind, and binds them without distinction.”\footnote{202} Wilson agreed with Cicero that natural law is “right reason,” because “[b]y its commands, it calls men to their duty: by its prohibitions, it deters them from vice.”\footnote{203} It would be impossible “[t]o diminish, to alter, much more to abolish this law . . . for God, who is its author and promulgator, is always the sole master and sovereign of mankind.”\footnote{204}

Wilson believed that God places an “innate moral sense” in “our own breasts” as a “guide” and “witness” to lead us to a proper understanding of His “law of nature.”\footnote{205} Wilson maintained that “[t]his moral sense, from its very nature, is intended to regulate and control all our other powers.”\footnote{206} Moral sense is superior to reason, because “[m]orality, like mathematicks, has its intuitive truths, without which we cannot make a single step in our reasonings on the subject.”\footnote{207} In Wilson’s view, moral sense, together with “common sense” (a broader concept that encompassed the “common judgment” of people regarding matters of sensory perception and aesthetics), enabled individuals to make “judgments” about the existence of “selfevident truths” and “axioms.”\footnote{208} These “first principles” derived from “judgments” made it possible for people to use their reasoning powers to reach additional truths through a “chain of reasoning.”\footnote{209} For Wilson, “reason has no other root than the principles of common sense; it grows out of them; and from them it draws its nourishment.”\footnote{210} Similarly, Wilson believed that reason

\footnote{202} 1 id. at 145.\footnote{203} 1 id. (quoting Cicero in part).\footnote{204} 1 id. at 145–46 (quoting Cicero in part).\footnote{205} 1 id. at 130, 132. For Wilson, our “moral sense or conscience” is “an original power” that gives us “conceptions of merit and demerit, of duty and moral obligation. . . . We have the same reason to rely on the dictates of this faculty, as upon the determinations of our senses, or of our other natural powers.” 1 id. at 132–34.\footnote{206} 1 id. at 136; see also 1 id. at 379 (stating that the moral sense “is far superior to every other power of the human mind”); infra note 277 (quoting similar descriptions of the human conscience by Thomas Reid, Wilson’s intellectual mentor).\footnote{207} 1 Wilson’s Works, supra note 179, at 133.\footnote{208} See 1 id. at 223, 225, 378–79, 392–94. For Wilson, the moral sense, as manifested in “judgment,” is a “gift of heaven,” because it is “common to all men; and for this reason is frequently denominated common sense.” See 1 id. at 213, 375, 393–94.\footnote{209} 1 id. at 209–10, 212–13, 392–96.\footnote{210} 1 id. at 213. Wilson deplored the radical skepticism of philosophers like David Hume, who denied the possibility that men could apprehend objective truth by using their powers of intuition and perception. In Wilson’s view, we must understand “that to make nothing selfevident, is to take away all possibility of knowing any thing; that without first principles, there can be neither reason nor reasoning. . . . [C]onsequently, all sound reasoning must rest ultimately on the principles of common sense—principles supported by original and intuitive evidence.” 1 id.; see also 1 id. at 205; 1 id. at 216–17 (concursing with Thomas Reid’s attack on the skepticism of Hume); 1 id. at 224. In addition to his firm belief in the “selfevident truths” conveyed by the internal moral sense, Wilson declared that “the existence of the objects of our external senses, in the way and manner in which we perceive that existence, is a branch of intuitive knowledge and a matter of absolute certainty.” 1 id. at 202 (emphasis added); see also 1 id. at 224 (declaring that
would become dangerous if it was ever detached from the moral sense, because "[t]he ultimate ends of human actions, can never . . . be accounted for by reason. . . . It is necessary that reason should be fortified by the moral sense; without the moral sense, a man may be prudent, but he cannot be virtuous."²¹¹

Wilson’s belief in the divine origin of moral sense and common sense, and his conviction that reason must be subordinated to these two faculties of “judgment,” were drawn from the ideas of Francis Hutcheson and, especially, Thomas Reid. The moral sense and common sense theories of Hutcheson and Reid supported Wilson’s faith in the natural equality of all people, and in their God-given capacity to comprehend and accept (with appropriate education) their moral duties as virtuous citizens in a free society.²¹²

Wilson was confident that man’s progressive discovery of the principles of moral sense and common sense would establish a true “philosophy of the human mind,” and thereby perfect “the science of law.”²¹³ In Wilson’s view, “law can never attain either the extent or the elevation of science, unless it be raised upon the science of man.”²¹⁴ Wilson looked forward to an age in which the science of morals would be “founded upon first principles, as upon a rock,” in the same manner that Sir Francis Bacon and Sir Isaac Newton had established universally accepted “axioms” of mathematics and physics.²¹⁵ “If the same unanimity concerning first principles could be” established in morality, as had already been attained in the natural sciences, “this might be considered as a new era in the progress of human reason.”²¹⁶ Thus, Wilson expected “progress in virtue” to accompany “progress in knowledge,” with

²¹¹ 1 WILSON’S WORKS, supra note 179, at 142–43. Wilson warned that “[r]eason, even with experience, is too often overpowered by passion” and therefore must be restrained by “the vigorous and commanding principle of duty.” 1 id. at 137. He was acutely aware of the need for government and laws by reason of the “fallen state” of man. 1 id. at 87. Without proper laws, man’s “ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would . . . become a prey to all the distractions of licentiousness and war.” 1 id. at 130.

²¹² Wilson had probably read Hutcheson, Reid, and other philosophers of the Scottish Enlightenment during his university studies at St. Andrews, and he continued to do so thereafter. He also drew on many other philosophical sources, including Cicero, Bacon, Grotius, Hooker, Locke, Shaftesbury, Pufendorf, Bolingbroke, and Kames. Compare 2 id. at 849–56 (“Bibliographical Glossary”), with 2 id. at 857–75 (“Index”). For discussions of the philosophical sources for Wilson’s concepts of natural law and moral epistemology, see, for example, HALL, supra note 180, at 41–45, 68–78; SMITH, supra note 178, at 13, 16, 206–07, 319–22; Conrad, Polite Foundation, supra note 180, at 376–81; Stimson, supra note 180, at 194–201. For a perceptive analysis of Hutcheson and Reid, and the sharp contrast between the theological roots of their views and the skepticism of Hume, see HAAKONSSON, supra note 210, at 5–7, 64–85, 100–10, 182–205.

²¹³ 1 WILSON’S WORKS, supra note 179, at 195–96.

²¹⁴ 1 id. at 197. Wilson added that “[t]he laws, which God has given to us, are strictly agreeable to our nature; they are adjusted with infallible correctness to our perfection and happiness.” Accordingly, it is imperative that “we study and know our nature.” 1 id. at 199.

²¹⁵ 1 id. at 225–26.

²¹⁶ 1 id. at 226. Wilson noted that “we find no sects, or contrary systems” in mathematics,
the happy result that “the law of nature, though immutable in its principles, will be progressive in its operations” and lead humankind to “a still higher degree of perfection.” 217

2. The Influence of Wilson's Moral Philosophy on His Theory of Government

a. Popular Sovereignty and the Formation and Structure of Government

Wilson combined both natural law and moral sense philosophy in articulating his new concept of popular sovereignty. Wilson followed Locke in arguing that civil society must be based on a voluntary “compact,” which affirms the rights of its members to enjoy equal freedom, to exercise rights and to discharge duties derived from the “laws of God and nature.” 218 Wilson also agreed with Locke that a lack of security in the state of nature encourages people to enter a civil society. In addition, our moral sense and our natural “sympathy” for other people produce an inherent “sociability,” which strongly inclines us toward a social existence. 219

Wilson also seconded Locke’s view that government, or political society, must be based on the “consent of the members, who compose it.” For Wilson, “[c]onsent is the sole principle, on which any claim, in consequence of human authority, can be made.” 220 Wilson, however, proceeded well beyond Locke’s theory of popular consent as the foundation of legitimate government. Under Locke’s theory, the people exercised a sovereign (i.e., lawmaking) power only at the time of forming government. Once the people created the “legislative” power in government, that law-giving body would exercise “supreme” power until government was dissolved. 221 In contrast, Wilson ar-

due to general acceptance of the “first and selfevident principles” established by Bacon and Newton. 1 id. at 225–26.

217 1 id. at 147.

218 1 id. at 239, 241. For discussion of Locke’s theory of the social compact as the foundation of legitimate government, see supra note 28, infra notes 220–21, and accompanying text.

219 1 WILSON'S WORKS, supra note 179, at 231–37 (quotes at 234). Wilson rejected the Hobbesian view that “the only natural principles of man are selfishness, and an insatiable desire of tyranny and dominion.” 1 id. at 228. Wilson argued that this gloomy view of human nature “is totally repugnant to all human sentiment, and all human experience.” 1 id. at 229. In his view, God “intended us to be social beings; and has, for that end, given us social intellectual powers.” 1 id. at 230. “Nature has endowed [huminkind] with a principle of . . . sociability,” and “the social operations and emotions of the mind . . . promote and are necessary to our happiness.” 1 id. at 236; see also 1 id. at 285 (recognizing that the insecurity of the state of nature provides a strong incentive for the creation of civil government).

Locke also referred to humankind’s inherent sociability as a factor encouraging people to form social compacts, but he placed greater emphasis on the insecurity (including the likelihood of violent attacks by outlaws) that people experience in the state of nature. See LOCKE, supra note 28, §§ 7–13, 16–21, 77–89, 95–99, 123–31.

220 1 WILSON'S WORKS, supra note 179, at 187; see also 1 id. at 239. For Locke’s belief that government derives its legitimacy from the consent of a political society, embodied in the social compact, see LOCKE, supra note 28, §§ 95–99, 119–21.

221 Locke declared that the “legislative” power is “the supreme power of the commonwealth . . . sacred and unalterable in the hands where the community have once placed it.” LOCKE, supra note 28, § 134. According to Locke, the legislative power would lose its supreme (and therefore sovereign) authority only if either (1) government was dissolved due to an unlawful alteration of the legislative power without the people’s consent, or (2) the legislative or exec-
gued, the people do not give up their sovereign power when they enter into a political society and confer powers on government. Instead, the people retain at all times their sovereign power, and they therefore have the right at all times to create or alter the form of their government. At the Pennsylvania ratifying convention, Wilson declared that the proposed Constitution's preambles recognized this new idea of perpetual popular sovereignty:

[T]he supreme power of government was the inalienable and inherent right of the people, and the system before us opens with a practical declaration of that principle. Here, sir, it is expressly announced, “We the people of the United States do ordain, constitute and establish,” and those who ordain and establish may certainly repeal or annul the work of government, which, in the hands of the people, is like clay in the hands of the potter and may be molded into any shape they please.222

A few days later, Wilson reiterated his view that “the supreme, absolute, and uncontrollable authority remains with the people.”223 In articulating this new understanding of sovereignty, he emphasized that “[t]he practical recognition of this truth was reserved for the honor of this country.”224 Wilson acknowledged that “[t]he great and penetrating mind of Locke seems to be the only one that pointed towards even the theory of this great truth.”225 As indicated by Wilson's statement, however, his description of the people as perpetual sovereign marked a significant extension of Locke's principle of popular consent.

Wilson was confident that his new understanding of perpetual popular sovereignty, enshrined in the Constitution, would serve as “the great panacea of human politics.”226 Whenever the people found “errors in government” they would have “the right not only to correct and amend [such errors], but likewise totally to change and reject [government's] form.”227 As a result, there would be a popular “remedy” for “every distemper in government,” so long as the “people [are not] wanting to themselves.”228

Gordon Wood has observed that “[m]ore boldly and more fully than anyone else, Wilson developed the argument that would eventually become

222 James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 Ratification History, supra note 169, at 382, 383.
223 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 467, 472.
224 Id.
225 Id.
226 James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787), in 2 Ratification History, supra note 169, at 339, 348–49.
227 Id.
228 Id. at 362.
the basis of all Federalist thinking. . . . The sovereignty always stayed with the people-at-large . . . "229 Wilson’s new theory offered solutions to three major problems that the Federalists confronted. First, by establishing the sovereign right of the people to “alter or abolish” their form of government at any time, Wilson’s theory defused the Antifederalists’ charge that the Constitutional Convention had violated its mandate by proposing an entirely new form of federal government, instead of merely recommending amendments to the existing Articles of Confederation.230 At the Constitutional Convention, and again during the Pennsylvania ratifying debates, Wilson argued that (1) the Convention was free to propose whatever form of government it believed would best serve the American people’s interests, and (2) the sovereign people’s approval, if obtained, would remove all questions regarding the Convention’s authority.231

Second, Wilson’s theory allowed the Federalists to argue that the Constitution’s separation of powers would be entirely consistent with a republican form of government. Under the traditional political theory of “mixed government,” the executive power and the upper house of the legislative branch were associated with the “monarchical” and “aristocratic” elements of society. In addition, the judiciary was generally viewed as an adjunct of the executive branch. Accordingly, most state constitutions drafted before 1787 had granted the lion’s share of power to the lower house of the legislature, who were deemed to be the people’s only true representatives. Wilson’s home state of Pennsylvania, in its constitution of 1776, manifested an extreme dis-

229 Wood, supra note 28, at 530.

230 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 473. During the Pennsylvania ratifying convention, Wilson quoted the “alter or abolish” language from the Declaration of Independence as proof of “the inherent and unalienable right” of the American people to change, at any time, the manner in which they “delegate” portions of their “supreme power” to the federal and state governments. Id. at 472–73. Regardless of any prior delegations, Wilson contended, the “fee simple [of sovereign power] continues, resides, and remains in the body of the people.” Id. For the Antifederalists’ attack on the Constitutional Convention’s authority to propose the Constitution, see, for example, Robert Whitehill, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 Ratification History, supra note 169, at 394.

231 James Madison’s Notes on the Federal Convention (June 16, 1787), in 1 Records of the Federal Convention of 1787, at 249 (Max Farrand ed., 1937) [hereinafter Convention Records] (notes of Wilson’s speech); Rufus King’s Notes on the Federal Convention (June 16, 1787), in 1 Convention Records, supra, at 265, 266 (same); James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 483–84. Subsequently, Publius presented a closely similar argument. Like Wilson, Publius quoted the Declaration of Independence to demonstrate the people’s “transcendent and precious right” to “abolish or alter” their form of government by ratifying the proposed Constitution. The Federalist No. 40, at 200–01 (James Madison) (Garry Wills ed., 1982). In fact, Madison had underscored Wilson’s argument when he revised his notes when Wilson’s remarks at the Philadelphia Convention. See James Madison’s Notes on the Federal Convention (June 16, 1787), supra, at 253 n.8; see also Wood, supra note 28, at 533–34 (noting that Wilson’s argument placed the Antifederalists on the defensive, because the latter group “found themselves in the embarrassing position of seeming to deny the voice of the people”).
trust of the executive and the upper house by vesting all power in a unicameral legislature, elected annually.\textsuperscript{232}

Wilson vigorously opposed the Pennsylvania Constitution of 1776 for many of the same reasons that he attacked the British doctrine of Parliamentary supremacy. Wilson argued that an all-powerful legislature (especially one consisting of a single house) was likely to produce “sudden and violent fits of despotism, injustice, and cruelty.”\textsuperscript{233} Wilson advocated a system of separated powers that would include a strong unitary executive, a bicameral legislature, and an independent judiciary possessing the power of judicial review.\textsuperscript{234} Echoing Publius, Wilson argued that separated powers would “guard against the consequences of [men’s] frailties and imperfections” and “make it advantageous even for bad men to act for the public good.”\textsuperscript{235} The distinctive features of Wilson’s approach were (1) his insistence on establishing the broadest possible popular base for the executive and legislative branches, and (2) his belief that all three branches enjoyed co-equal status as representatives and agents of the people.

Scholars have described Wilson as the most “democratic” leader among the Federalists and, perhaps, among all the Founders.\textsuperscript{236} At the Constitutional Convention, Wilson was the most consistent advocate for direct popular election of the House of Representatives, and he also pushed hard (but unsuccessfully) for direct popular election of the Senate and the president. Subsequently, when Wilson led the successful campaign to amend Pennsylvania’s constitution in 1790, he prevailed (over the opposition of many conservative friends) in securing the people’s right to elect both houses of the legislature and the governor.\textsuperscript{237}

\textsuperscript{232} See McDonald, supra note 28, at 80–87; Wood, supra note 28, at 150–61, 197–255, 434–53.

\textsuperscript{233} 1 Wilson’s Works, supra note 179, at 291; see also, e.g., 1 id. at 77–78, 168–93 (attacking Blackstone’s theory of Parliamentary supremacy). At the Pennsylvania ratifying convention, Wilson declared:

\begin{quote}
[T]o give permanency, stability, and security to any government, I conceive it of essential importance, that its legislature should be restrained . . . for of all kinds of despotism, this is the most dreadful and the most difficult to be corrected. With how much contempt have we seen the authority of the people treated by the legislature of this state . . . .
\end{quote}


\textsuperscript{235} 1 Wilson’s Works, supra note 179, at 289–90; see also The Federalist No. 51, at 262–63 (James Madison) (Gary Wills ed., 1982) (“Ambition must be made to counteract ambition. . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights.”).

\textsuperscript{236} Hall, supra note 180, at 90; see also authorities cited infra note 237.

\textsuperscript{237} See Hall, supra note 180, at 107–21; Read, supra note 180, at 91–92, 101–05; Smith,
Wilson’s popularly based theory of separation of powers gave the Federalists a powerful answer to the Antifederalists’ claim that the Constitution would create an “aristocratic” form of government. The Antifederalists asserted that the House of Representatives would be too small to represent the ordinary people, while dangerous powers would be vested in a remote president, an aristocratic Senate, and an unaccountable judiciary.\textsuperscript{238} Wilson responded that each branch of the government would have a genuinely popular base and, therefore, would faithfully reflect the will of the people. The president “may be justly styled THE MAN OF THE PEOPLE; being elected by the different parts of the United States, he . . . will watch over the whole with paternal care and affection.”\textsuperscript{239} Although Wilson admitted his disappointment with the Senate’s lack of proportional representation and its indirect mode of selection, he lauded the fact that (1) the House and Senate would “serve as checks upon each other,”\textsuperscript{240} and (2) “the true principle of representation is carried into the House of Representatives, and into the choice of the President.”\textsuperscript{241}

In defending the provisions of Article III, Wilson contended that the new federal judiciary must have “independence” so that it could uphold the “superior power of the Constitution” against legislative encroachments;\textsuperscript{242} while guarding “private property . . . and personal liberty . . . with firmness and watchfulness.”\textsuperscript{243} Wilson argued that the new federal judges would act as the people’s agents in carrying out their duties, because the judges would be selected by the people’s representatives in the presidency and the Senate.\textsuperscript{244} Accordingly, Wilson declared, the Constitution ensures that “all authority of every kind is derived by REPRESENTATION from the people, and the DEMOCRATIC principle is carried into every part of the government.”\textsuperscript{245}


\textsuperscript{239} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1787), supra note 233, at 452.

\textsuperscript{240} Id. at 450–52.

\textsuperscript{241} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1787), supra note 234, at 560–69 (quote at 565).

\textsuperscript{242} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1787), supra note 233, at 451.

\textsuperscript{243} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 495; see also infra notes 311–23 (discussing Wilson’s concept of judicial review).

\textsuperscript{244} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 7, 1787), supra note 169, at 519.

\textsuperscript{245} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 497.
Wilson was confident that America had made a great advance in "the science of jurisprudence and government" by extending "the theory and practice of representation through all the different departments of the state."\footnote{1} There was no longer any reason for popular "aversion and distrust" of the executive and judicial branches, because "the executive and judicial powers are now drawn from the same [popular] source ... [and] are as much the servants, and therefore as much the friends of the people, as they who make [the laws]."\footnote{2} Wilson's new theory of representative democracy was adopted by other Federalist leaders and provided a strong rationale for the Constitution.\footnote{3}

Wilson's concept of the perpetually sovereign people also responded to a third challenge raised by the Antifederalists—namely, that the Constitution would create an unresolvable conflict between the sovereign power of the new federal government and the existing sovereignty of the states. The Constitution, declared Samuel Adams, would establish the absurd contradiction of competing sovereigns within a single nation—an "Imperia in Imperio justly deemed a solecism in Politicks."\footnote{4} James Winthrop agreed that "[w]e shall find it impossible to please two masters."\footnote{5} Wilson replied to such attacks by affirming that neither the federal government nor the states would be sovereign. Instead, Wilson explained, "when we take an extensive and accurate view of the streams of power that appear through this great and comprehensive plan . . . we shall be able to trace them all to one great and noble source, THE PEOPLE."\footnote{6} Under Wilson's novel theory, the sovereign people could "delegate [power] in such proportions, to such bodies, on such terms, and under such limitations as they think proper . . . [T]he People, therefore, have a right . . . to accommodate [the federal and state governments] to one another; and by this means preserve them all."\footnote{7}

Wilson's third argument proved to be his least persuasive. His attempt to transfer all sovereign power from the government to "the people" did not answer the question of which "people" were sovereign—the collective people of the nation or the individual political societies of the separate states. Wil-

\footnote{1} Wilson's Works, supra note 179, at 311.
\footnote{2} Id. at 292–93.
\footnote{3} See, e.g., Read, supra note 180, at 93–105 (observing that "[t]he frequency with which defenders of the Constitution in every state employed the rhetoric of the sovereignty of the people probably owes much to the clarity and centrality Wilson gave this principle during the ratification debate in Pennsylvania"); Wood, supra note 28, at 593–606 (stating that "[p]erhaps no one earlier or better described the 'new and rich discoveries in jurisprudence' Americans had made than did Wilson"); McCloskey, Introduction, supra note 179, at 1–6, 24–26.
\footnote{4} Wood, supra note 28, at 528 (quoting Adams).
\footnote{5} Id. (quoting Winthrop); see also Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1581 (2001) (discussing the Antifederalists' argument).
\footnote{6} James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787), supra note 226, at 349.
\footnote{7} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 472; see also Wood, supra note 28, at 530 (stating that "[i]t was left to James Wilson . . . to deal most effectively with the Antifederalist conception of sovereignty. . . . The supreme power, Wilson emphasized . . . resides in the PEOPLE, as the fountain of government." (quoting Wilson)).
son would confront *that* issue, with a notable lack of success, in *Chisholm v. Georgia*, where he proclaimed that the national people were sovereign over those of any state.\(^{253}\) In contrast to Wilson, most Federalist leaders chose a more moderate and ambiguous position. They argued that the new federal government would have sovereign powers only as "to certain enumerated objects" of national significance, and they assured the people that the states would retain a "residuary and inviolable sovereignty over all other objects" of a more local character.\(^{254}\)

This moderate Federalist theory of "dual" or "concurrent" sovereignty ppered over the most intractable area of disagreement regarding the Constitution. While this equivocal doctrine allowed the Constitution to be ratified, it also contained the seeds of a political controversy that continued until the Civil War regarding the location of sovereign power in the new federal republic.\(^{255}\)

*b. The Problem of Reconciling Individual Rights and the Common Good*

Wilson's belief in the collective sovereignty of the people did not cause him to overlook the importance of protecting individual rights. Wilson agreed with Locke that individuals did not surrender all of their natural rights when they formed a social compact and entered civil society. While individuals in society gave up certain natural rights that were not consistent with the public good, they retained the residue of those rights.\(^{256}\)

\(^{253}\) *Compare Read*, supra note 180, at 106–17, and infra Part II.B.2 (discussing Wilson's opinion in *Chisholm* and the popular reaction against that opinion), *with McDonald*, supra note 28, at 280–81 (contending that the Constitution was a "compact among political societies" due to its ratification by separate conventions, which "unmistakably implied that the source of sovereignty was the people of the states").

\(^{254}\) The Federalist No. 39, at 194 (James Madison) (Garry Wills ed., 1982); see also The Federalist No. 9, at 41 (Alexander Hamilton) (Garry Wills ed., 1982) (stating that the Constitution would reserve to the states "certain exclusive and very important portions of their sovereign power"); The Federalist No. 32, at 152 (Alexander Hamilton) (Garry Wills ed., 1982) (declaring that the states "would clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] exclusively delegated to the United States"); id. at 154 (stating that "all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour"); The Federalist No. 45, at 236 (James Madison) (Garry Wills ed., 1982) (stating that the "powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State").


\(^{256}\) Wilson firmly believed that people were "entitled" to natural rights "by the immediate gift, or by the unerring law, of our all-wise and all-beneficent Creator." *2 Wilson's Works*, supra note 179, at 585. Wilson agreed with Locke that society was obliged to respect these rights to the maximum extent consistent with the "publick interest." *See* 1 *id.* at 239–42; 2 *id.* at...
and wise” government should actually increase the “natural liberty” of its citizens, because the “primary and principal object” of a “legitimate” government is “to secure and to enlarge the exercise of the natural rights of its members.”

In defining the scope of natural rights, Wilson first identified a right of “natural liberty,” which allowed each person in society to pursue “his own happiness, and the happiness of those, for whom he entertains such tender affections,” as long as “he does no injury to others; and provided more publick interests do not demand his labours.” In addition, Wilson believed that each citizen possessed natural rights to preserve, defend and enjoy his life, property and “character” (i.e., reputation). Although Wilson recognized the natural right of individuals to accumulate and possess property, he did not venerate property rights as most other Founders did. At the Constitutional Convention (and again in his inaugural lecture on law), he denied that “property was the sole or the primary object of Govern[men]t & Society.” Instead, he declared, “[t]he cultivation & improvement of the human mind was the most noble object.”

Wilson was convinced that the improvement of each citizen’s mind was closely linked to the improvement of society. He agreed with Cicero that the highest calling of a lawyer-statesman was to pursue “the science of law,” while promoting a “proper education” of the public in the essential principles.

---

585–95. Wilson also rejected the opinions of Blackstone and Edmund Burke, who believed that all natural rights were surrendered when individuals entered society, and that citizens of a society enjoyed only those “civil liberties” granted by the society’s legislative power. See 2 id.; see also 1 BLACKSTONE, supra note 45, at *119–25; LOCKE, supra note 28, §§ 95–99, 123–42.

257 2 WILSON’S WORKS, supra note 179, at 587–88, 585, 592. For Locke’s theory that government is obligated to respect the people’s natural rights of life, liberty, and property, and abuses its trust if it fails to do so, see LOCKE, supra note 28, §§ 123, 131, 134–42, 149, 168, 221–22, 229–30.

258 1 WILSON’S WORKS, supra note 179, at 242.

259 2 id. at 592–97, 608–10. For a detailed discussion of Wilson’s theory of natural rights, see HALL, supra note 180, at 49–62. Wilson affirmed that “life, and whatever is necessary for the safety of life, are the natural rights of man . . . With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb.” 2 WILSON’S WORKS, supra note 179, at 596–97. Wilson therefore denounced the “barbarity” of the practice of infanticide followed in ancient Athens and Sparta. 2 id. For a discussion of Wilson’s conception of the right of character, see infra note 273 and accompanying text.

260 See 1 WILSON’S WORKS, supra note 179, at 233; 2 id. at 593. Wilson defended the institution of private property primarily on pragmatic grounds. In Wilson’s view, exclusive ownership of property rewarded “industry” and encouraged “economy” and the “division of labour.” 2 id. at 718–19. In contrast, he believed, common ownership of property promoted waste and sloth, as well as “fierce and ungovernable competitions for the possession and enjoyment of things.” 2 id.; see also HALL, supra note 180, at 49–51 (discussing Wilson’s understanding of property rights).

261 James Madison’s Notes on the Federal Convention (July 13, 1787), in 1 CONVENTION RECORDS, supra note 231, at 605 (notes of Wilson’s speech).

262 Id.; see also 1 WILSON’S WORKS, supra note 179, at 84 (stating that property, while “highly deserving security,” is, nevertheless, “not an end, but a means,” because the “progressive state” of society depends on “preparing tender and ingenious minds for all the great purposes, for which they are intended”); 1 id. at 159 (declaring that “[t]he education of youth, therefore, is of prime importance to the happiness of the state”).
of law and "manners." Wilson declared that "[i]t is the glorious destiny of man to be always progressive... In the order of Providence... the progress of societies towards perfection resembles that of an individual." In the case of America, Wilson predicted that the principles of self-government embodied in the Constitution would bring unprecedented prosperity and fame to the nation, and would also "lay a foundation for erecting temples of liberty in every part of the earth."

By linking the enlightenment and moral perfection of the individual citizen with collective social improvement, Wilson's political philosophy exhibited an unresolved tension between individual rights and the public good. Wilson declared the "private will" of every citizen must be "subordinate and submissive" to "the publick will of the society... in matters respecting the social union." In addition, each citizen must make a "devoted sacrifice" of his "private will" and "private interest" whenever that sacrifice is "indispensably require[d]" by the "will and... interest of the community." Accordingly, as noted above, the community may "demand [a citizen's] labours" for a legitimate public purpose without violating his "natural liberty."

For Wilson, the public good was defined by majority rule. Each citizen was therefore bound by the social compact to submit to the will of the majority, unless the Constitution affirmatively required the consent of a supermajority to enact a particular rule. Wilson warned that any citizen who pursued selfish interests that "sever him from the common good and public interest, works, in reality, towards his own misery." In contrast, a citizen "who operates for the good of the whole, as is by nature and by nature's God appointed him, pursues, in truth, and at the same time, his own felicity."

Wilson's qualified view of individual liberty is reflected in his statement that each citizen should enjoy "liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the..."

---

263 1 Wilson's Works, supra note 179, at 83–85; see also 1 id. at 81 (stating that "in a free government, the principles of a law education are matters of the greatest publack consequence"); Conrad, Polite Foundation, supra note 180, at 381–83 (describing Wilson's efforts to formulate "a new model of citizenship in the American Republic," based on a "scientific evaluation of the capabilities of the moral sense" and a "refinement of public manners through the routines of polite culture").

264 1 Wilson's Works, supra note 179, at 146.

265 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1787), supra note 234, at 584. For Wilson's grand vision of the future success of the new American republic, see, for example, id. at 582–84; 2 Wilson's Works, supra note 179, at 779–80 (Wilson's oration on July 4, 1788).

266 2 Wilson's Works, supra note 179, at 574.

267 2 id. at 577–78. Wilson noted, however, that the community would be guilty of "tyranny" if it sought a sacrifice of private interests that was not justified by "advantage" to the public. 2 id. at 578–79.

268 1 id. at 242 (also quoted supra note 258).

269 1 id. at 239, 242–43. Wilson's view in this regard was similar to Locke's belief that the legislative power, established by majority consent, has authority to circumscribe liberty and property rights for the "public good." Locke, supra note 28, §§ 95–99, 134–42.

270 1 Wilson's Works, supra note 179, at 238.

271 1 id.
Accordingly, while citizens could freely express their opinions, they owed a “dignified respect” to government officials and they should be punished for libels that disturb the public peace or injure a person’s reputation. The community should also prosecute indecency, profanity and blasphemy, because “Christianity is a part of the common law.”

In sum, Wilson believed that society had a vital interest in requiring citizens to fulfill the duties prescribed by natural law and the moral sense, because “licentiousness” and “dark ambition” were the “enemies of liberty.” Citizens could not aspire to “perfection and happiness” unless they recognized their “indispensable duty of obeying those laws . . . of the Divinity.” In Wilson’s view, “[a]s virtue is the business of all men, the first principles of it are written on their hearts, in characters so legible, that no man can pretend ignorance of them, or of his obligation to practice them.”

Wilson thus invoked the divine sanction of natural law and the moral sense in order to reconcile “the private, self-regarding sphere in the life of each citizen . . . with the obligation of the People at large to perform the public-regarding duties of citizenship.” Unlike Madison, Wilson did not seem to recognize that popular self-government created a new type of threat to individual rights, due to the “tension between majority rule and civil liberties.” Wilson assumed that, through education and moral development, the people would collectively reach an enlightened, harmonious will, thereby resolving “all serious conflict between the power of government and the liberty of citizens.”

This perfectionist strain in Wilson’s thinking contained ominous hints of a coercive “politics of Utopia,” which his intellectual men-

---

272 2 id. at 649 (emphasis added).
273 2 id. at 596, 649–52; see also James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1787), supra note 233, at 455 (stating that “liberty of the press” requires that “there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual”). Wilson defined a libel as “a malicious defamation of any person, published . . . and tending to expose him to publick hatred, contempt, or ridicule.” 2 WILSON’S WORKS, supra note 179, at 650. He condemned libels as “a violation of the [personal] right of character.” 2 id. at 651. Wilson apparently agreed with Blackstone that truth should not be a defense in a criminal prosecution for libel, because of “the tendency which all libels have to create animosities, and to disturb the publick peace.” 2 id. (citing 4 BLACKSTONE, supra note 45, at *150).
274 2 WILSON’S WORKS, supra note 179, at 671 (citing 4 BLACKSTONE, supra note 45, at *59, where Blackstone stated that blasphemy should be punished because “Christianity is part of the laws of England”).
275 2 id. at 777–78 (Wilson’s oration of July 4, 1788); see also 2 id. at 777 (exhorting the people to practice frugality, temperance, and industry, and to avoid “[i]dleness . . . the nurse of villains”).
276 1 id. at 128–29.
277 1 id. at 136–37. Similarly, Wilson’s intellectual mentor, Thomas Reid, stated that “conscience which is in every man’s breast, is the law of God written in his heart, which he cannot disobey without acting unnaturally, and being self-condemned.” HAACKONSSON, supra note 210, at 200 (quoting Reid). The dictates of conscience “not only make the duty we owe to [God] obvious to every intelligent being, but likewise add the authority of a Divine law to every rule of right conduct.” Id. (quoting Reid).
278 Conrad, Poltie Foundation, supra note 180, at 383.
279 READ, supra note 180, at 113; see also id. at 27–51 (describing Madison’s attempts to deal with this “tension” between “power and liberty”).
280 Id. at 113, 115.
tor, Thomas Reid, ultimately embraced. That coercive potential became evident in Wilson’s instructions to the grand and petit juries in *Hinfield’s Case.*

c. *The Common Law, Equity, and Judicial Review*

Wilson praised the common law, because it embodied “long and general custom” and was produced by “[e]xperience, the faithful guide of life and business.” For Wilson, the common law was America’s “dearest birthright and richest inheritance,” because (1) its authority rested upon the people’s “free and voluntary consent,” and (2) it was “progressive” in nature and reached “higher and higher degrees of perfection, resulting from the accumulated wisdom of ages.” Because the common law continually adapted and accommodated to social changes, it operated as a “science founded on experiment,” similar (in Wilson’s view) to Newtonian physics. The common law therefore incorporated the “natural progress of the human mind” and “the common dictates of nature, refined by wisdom and experience.”

Wilson believed that the common law’s superiority owed much to the jury, which he viewed as “the most excellent method for the investigation and discovery of truth; and the best guardian of both publick and private liberty, which has been hitherto devised by the ingenuity of man.” Trial by jury was essential to “the idea of just government,” because it ensured that the rules of common law would be drawn from “the fountain of justice” and “the fountain of freedom.” Wilson agreed with the general view of his contemporaries that juries possessed the right to “decide the law as well as the fact” in issuing their verdicts, particularly in criminal cases. He warned, however, every jury must determine legal questions “according to law” (i.e., in

281 See *Haakonsen,* supra note 210, at 84 (stating that Reid’s philosophy reflected “a strong temptation towards the total politics of Utopia”); *id.* at 218 (“[T]he overriding element in Reid’s notion of the common good is moral perfection. . . . Against this, individual rights have no force.”).

282 See infra Part II.B.3.

283 1 WILSON’S WORKS, supra note 179, at 183.

284 1 id. at 183–84, 354.

285 1 id. at 356.

286 1 id.

287 1 id. at 332.

288 2 id. at 510; 1 id. at 357.

289 2 id. at 540. Wilson believed that the judge should decide a question of law if it could be clearly separated from issues of fact. He noted, however, in many cases “the question of law is intimately and inseparably blended with the question of fact.” 2 id. at 540–41. This situation was especially likely to occur in criminal cases, where the defendant’s “motive” was often an important issue. 2 id. For discussions of the eighteenth-century view that juries generally possessed the right to decide questions of law as well as questions of fact, see, for example, *Nelson,* supra note 6, at 16–22; Harrington, supra note 175, at 381–405. Indeed, Justice Samuel Chase created a political firestorm when he barred the jury in *United States v. Callender* from deciding upon the constitutionality of the Sedition Act or other legal questions. Chase’s rulings in *Callender* contributed to the Republicans’ decision to impeach him in 1805. See *Presser,* supra note 131, at 133–41, 156–58; *Preyer,* supra note 175, at 179–89 (discussing Chase’s impeachment and acquittal).
accordance with applicable legal principles and precedents), and no jury had the right to nullify the law by exercising "discretionary powers." 290

Wilson's optimistic view of the common law and juries reflected his confidence in the ability of lawyers, judges and statesmen to develop a progressive "science of the law," and to impart the essential principles of that "science" to citizens acting as jurors and grand jurors. 291 Wilson frequently included excerpts from his law lectures in the instructions he delivered to grand juries. 292 In addition to technical matters of law, the grand jury instructions delivered by Wilson and other Federalist judges included general discussions of republican theory and appeals to the patriotic duties of citizens. During the 1790s, federal judges used their grand jury instructions, which were frequently published in newspapers, as a method of informing the public about the principles and operations of the new federal government. 293 For Wilson, the judge's role in instructing jurors was similar to the statesman's role in educating citizens about the essential principles of law and republican manners. In Wilson's optimistic scheme, well-informed jurors would decide cases based on sound principles of justice, while well-educated electors would choose meritorious candidates and reject demagogic "flatterers of the people." 294 Thus, Wilson believed that the common law, implemented by the jury, would operate as "an indispensable complement of electoral representa-

290 2 Wilson's Works, supra note 179, at 542 (stating that the "precedents, and customs, and authorities, and maxims [of the law] are alike obligatory upon jurors as upon judges, in deciding questions of law"); see also 2 id. at 503 (stating that "the discretionary power vested in juries is a power to try the truth of facts").


292 See, e.g., James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (Feb. 21, 1791), in 2 Documentary History of the Supreme Court of the United States, 1789–1800, at 140, 140 n.1 (Maeva Marcus ed., 1988) [hereinafter Supreme Court History] (stating that a "number of passages" in Wilson's grand jury charges of February 21, 1791, are "parallel" to "passages in [Wilson's] law lectures"); James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (Aug. 15, 1791), in 2 Supreme Court History, supra, at 197, 198 n.2 (stating that a "number of passages" in Wilson's grand jury charges of August 15, 1791, are "parallel" to "passages in [Wilson's] law lectures"); see also infra notes 415–17 and accompanying text (noting the close similarity between Wilson's discussion of the common law and law of nations in his instructions to the grand jury in Henfield's Case and his treatment of the same subjects in his law lectures).

293 See, e.g., James Wilson's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, Pa. Gazette, Apr. 12, 1790, reprinted in 2 Supreme Court History, supra note 292, at 33, 40 (Wilson stating, after discussing the role of grand and petit juries in law enforcement and the administration of justice, that "[w]e now see the circle of government, beautiful and complete. By the people, its springs are put in motion originally. By the people, its administration is consummated: At first; at last; their power is predominant and supreme"). For discussions of the Federalist judges' use of grand jury instructions to inform the public regarding constitutional and legal developments, republican principles, and patriotic duties, see, for example, Ralph Lerner, The Supreme Court as Republican Schoolmaster, 1967 Sup. Ct. Rev. 127, 131–55; David J. Katz, Note, Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s, 14 Cardozo L. Rev. 1045, 1054–62, 1072–83 (1993).

294 1 Wilson's Works, supra note 179, at 73–75, 153 (quote), 157–59, 403–07; 2 id. at 545–46, 560–65 (stating that every lawyer "ought to know men and societies of men, in every state and in every relation in which they can be placed . . . he ought to know what appertains to justice—to comprehensive morality").
tion," and both institutions would provide "the means and ends of republican government."  

While Wilson clearly admired the common law and the central role of the jury, he also advocated an active role for judges. Wilson believed that all courts of law should follow principles of "equity" by considering "the spirit of the law," based on a "true and sound construction . . . [of] the intention of those, who made it." In Wilson's view, the principles of common law and equity were "founded equally on the same principles of justice." Accordingly, common law judges should not display a "narrow and unjust . . . contracted spirit" by rigidly adhering to precedent. Wilson acknowledged that "every prudent and cautious judge . . . will remember, that his duty and business is, not to make the law, but to interpret and apply it." At the same time, however, "[i]mplicit deference to authority . . . [is] the bane of science," and "to adhere rigidly to [established rules and precedents], at all times, would be to commit injustice under the sanction of law." Thus, Wilson believed that a judge should take account of "the immediate sentiments of justice" and should implement "principles and rules of genuine policy and natural justice" for the purpose of promoting a true "science of law." He urged common law judges to apply equitable principles in the interest of "continual progression," because "equity may well be deemed the conductor of law towards a state of refinement and perfection."

Wilson also advocated a new, uniform law for mercantile transactions, administered by equity courts. He wanted to promote interstate and foreign commerce, and he greatly admired the innovations in commercial law accomplished by Lord Mansfield in England. Wilson proposed that a separate branch of equity jurisdiction, similar to admiralty, should be established so that American courts could develop and apply a "liberal system of mercantile jurisprudence," based on the law of nations. Wilson wanted to assign this new "system" to the superintendence of equity courts because he felt that juries were not well suited to decide cases involving complex mercantile transactions.

---

295 Conrad, Common-Law Mind, supra note 180, at 211. As Stephen Conrad has observed, Wilson believed that the role of properly instructed jurors in shaping the common law would contribute to "the republican manners of the People." Id. at 213. Wilson viewed "republican manners" as an essential "condition of the feasibility of liberal representative democracy." Id.

296 2 Wilson's Works, supra note 179, at 478–79.

297 2 id. at 480.

298 2 id. at 482.

299 2 id. at 502.

300 2 id. at 486, 502.

301 2 id. at 486, 562.

302 2 id. at 486. In contrast to Wilson, Jefferson was unalterably opposed to any such exercise of equitable discretion by common-law judges. Jefferson denounced Lord Mansfield's view that common-law courts should "revive the practice of construing their text equitably." Wood, supra note 28, at 304 n.75 (quoting Jefferson's letter to Philip Mazzei of Nov. 28, 1785). Jefferson warned, "Relieve the judges from the rigour of text law, and permit them with pretorian discretion, to wander into it's [sic] equity, and the whole legal system becomes uncertain." Id. (quoting same letter); see also Hobson, supra note 3, at 36–37, 221 n.20 (same).

303 See 1 Wilson's Works, supra note 179, at 278–83; 2 id. at 488–92 (quote at 491).

304 2 id. at 492.
Wilson's advocacy of a uniform mercantile law, based on equitable principles recognized under the law of nations, anticipated Justice Joseph Story's adoption of "the general principles and doctrines of commercial jurisprudence" in *Swift v. Tyson*.\(^{305}\) Wilson, like Story, believed that equity and natural law formed an essential part of the law applied by American judges. In his law lectures, Wilson declared that "[t]he law of nations, as well as the law of nature, is of obligation indispensably ... [and] of origin divine."\(^{306}\) In Wilson's view the law of nations was unquestionably incorporated in the common law.\(^{307}\)

Wilson lamented that the "execution" of the law of nations by "human authority" had previously been "ineffective."\(^{308}\) He declared, however, the new Constitution gave federal courts "the exalted power of administering judicially the law of nations."\(^{309}\) As a result, the law of nations, which embodied principles of natural law, had become a "rule of conduct" for "every citizen of the United States" and "a rule of decision" for judges and jurors.\(^{310}\) As discussed *infra* Part II.B.3, Wilson's enthusiastic embrace of the law of nations as a "rule of decision" would have fateful consequences in *Henfield's Case*.

Wilson's firm belief in the power of federal courts to enforce principles of natural law had a strong influence on his theory of judicial review. On several occasions, Wilson expressed his opinion that the federal courts could strike down a federal or state law as unconstitutional. For example, in his law lectures, Wilson affirmed the right of a federal court to invalidate an act of Congress that was "manifestly repugnant to some part of the constitution," provided "the operation and validity of both should come regularly ... before a court," for its decision.\(^{311}\) In terms that would be echoed by Marshall, Wilson declared that a federal court in such a case would possess "the right and ... the duty" to invalidate the statute, because the "supreme power in the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void, and has no operation."\(^{312}\) For Wil-

---


306 1 WILSON'S WORKS, *supra* note 179, at 149; see *infra* note 417 and accompanying text (discussing Wilson's similar statement in his grand jury charge in *Henfield's Case*); *supra* note 91 and accompanying text (discussing Story's belief that American jurisprudence should incorporate principles of natural law); see also NEWMYER, *supra* note 91, at 186–87, 281–97 (describing Story's effort, similar to Wilson's, to create a new American "science of law" based on universal, rational principles derived from common law, equity and natural law); White, *Marshall Court*, *supra* note 38, at 103–94, 146–56, 360–63 (same).

307 1 WILSON'S WORKS, *supra* note 179, at 357 (citing Coke's opinion in *Calvin's Case*); see also *supra* note 45 and accompanying text (discussing Coke's opinion).

308 1 WILSON'S WORKS, *supra* note 179, at 280.

309 1 id. at 282.

310 1 id.; see *infra* notes 428–50 and accompanying text (describing the strong opposition to Wilson's theory that federal courts could enforce the law of nations as a matter of federal common law).


312 1 id. at 330. See *supra* notes 30–38 and accompanying text (describing Marshall's similar articulation in *Marbury* of the courts' "duty" of judicial review).
son, judicial review was a “noble guard against legislative despotism” and a “salutary regulation, necessarily resulting from the constitution,” because it established an “effectual and permanent” method of preventing a “transgression” of “the bounds of the legislative power . . . marked in the system itself.”

The foregoing statements indicate that Wilson supported a text-based approach to judicial review. Under this approach (which Marshall followed in *Marbury*), the court would determine whether the terms of a statute were “manifestly repugnant to some part of the constitution” and, therefore, violated the “bounds” of congressional power “marked” in the Constitution. Wilson articulated a similar concept of judicial review at the Pennsylvania ratifying convention, where he explained:

If a law should be made inconsistent with those powers vested by [the Constitution] in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law.

Here again, Wilson’s reference to the “defined” powers of Congress indicated his support for a text-based approach to judicial review. Wilson generally followed such an approach in *Hayburn’s Case* and *Ware v. Hylton*.


314 *See 1 Wilson’s Works*, supra note 179, at 329.

315 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 7, 1787), supra note 169, at 517 (emphasis added).

316 *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792). In *Hayburn’s Case*, Wilson, Justice John Blair, and District Judge Richard Peters, serving as the circuit court for the district of Pennsylvania, addressed a letter to President Washington. In that letter, the judges declined to review pension claims submitted by disabled war veterans pursuant to the Invalid Pensioners Claim Act of 1792. Although the letter did not use the term “unconstitutional,” it clearly indicated the judges’ opinion that the 1792 Act violated the Constitution.

In terms similar to those used by Marshall in *Marbury*, the judges’ letter to President Washington began by declaring that “the people . . . ordained and established the Constitution . . . [as] the Supreme Law of the Land . . . [which] all judicial officers of the United States are bound, by oath or affirmation, to support.” *Id.* at 411 n.2. The judges next recited the “principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department.” *Id.* The judges contended that the 1792 Act contravened this “important principle” of separated powers and judicial independence in two respects: (1) the Act assigned to the circuit courts a duty that was “not of a judicial nature . . . [and] forms no part of the power vested by the Constitution in the courts of the United States,” and (2) the circuit courts’ decisions under the Act would be subject to review and revision by the Secretary of War and Congress, an arrangement that was “radically inconsistent with the independence of that
Wilson, however, did not restrict the power of judicial review to a conventional, text-based methodology. In his law lectures, Wilson stated that the "legislative authority" is also subject to a "control . . . arising from natural and revealed law."\(^{318}\) Quoting Coke's decision in *Dr. Bonham's Case*, Wilson declared:

[In many cases, the common law will control acts of parliament; and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed; the common law will control it, and adjudge such act to be void.\(^{319}\)]

Wilson recognized that Blackstone had denied the authority of English courts "to defeat the intention of the legislature." In Blackstone's view, any power of judicial review would "place the judicial power above that of the judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States." \(^{Id.}\)

Based on the foregoing considerations, Wilson, Blair, and Peters stated that the circuit court had no "constitutional authority" to discharge the duty prescribed by the 1792 Act. \(^{Id.}\) Their letter and two similar letters sent to the President by other circuit courts "were clearly keyed to the express words of the Constitution" and reflected the judges' concerns with "maintain[ing] separation of powers" and "preserv[ing] federal judicial independence." \(^{Casto, supra note 33, at 173, 175–77.}\) For further discussion of the circumstances surrounding the circuit courts' letters in *Hayburn's Case*, as well as subsequent proceedings in the Supreme Court and Congress' repeal of the 1792 Act, see, for example, \(^{Id.}\) at 175–78; \(^{Curtis, supra note 3, at 6–11;}\) Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History* in *Marbury v. Madison*, 1986 Wis. L. Rev. 301, 304–18; Maeva Marcus & Robert Tier, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 529–41; McCloskey, *Introduction, supra note 179*, at 30–31.

\(^{317}\) *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). In *Ware*, the Supreme Court struck down Virginia's sequestration statute of 1777, which allowed Virginians to satisfy their debts to British creditors by making payments (typically in depreciated paper currency) to the state government. In his lead opinion, Justice Chase held that the Virginia statute was possibly invalid under Article IX of the Articles of Confederation, and was certainly void under the Supremacy Clause of the Constitution. Chase determined that the Virginia statute violated Article IV of the Treaty of Paris of 1783 (a provision barring all legal impediments to the recovery of bona fide debts owed to British creditors) and, therefore, was invalid by reason of the Treaty's supremacy over state law under the Articles of the Confederation and/or the Constitution. \(^{See id. at 235–45;}\) U.S. Const. art. VI, para. 2 (giving supremacy to "all Treaties made, or which shall be made, under the Authority of the United States").

Wilson delivered a very short opinion in *Ware*, in which he did not rely on the Constitution. Instead, he summarily indicated that Virginia's statute was void because it violated the Treaty of Paris, to which Virginia was bound under the Articles of Confederation. \(^{See Ware, 3 U.S. (3 Dall.) at 281 (stating that his opinion was "[i]ndependent . . . of the Constitution")}.\) Wilson also raised the question of whether the Virginia statute should be declared invalid under the law of nations, but he did not expressly decide that issue. For discussions of the background of *Ware* and the opinions issued by Wilson and the other Justices, see, for example, \(^{Casto, supra note 33, at 8–9, 72–73, 98–101;}\) \(^{Curtis, supra note 3, at 37–41;}\) McCloskey, *Introduction, supra note 179*, at 31–32.

\(^{318}\) *1 Wilson's Works, supra note 179*, at 329.

\(^{319}\) \(^{1 id. at 326–27.}\) Immediately following the above excerpt, Wilson summarized the apparent holding of *Dr. Bonham's Case* by stating that "an act of parliament made against natural equity, as to make a man judge in his own cause, is void in itself," and he then quoted a Latin phrase translated as "{[t]he laws of nature are immutable, and they are the laws of laws.}" \(^{1 id. at 327 & n.q (editor's translation, see 1 id. at 49); see also supra notes 8–9 and accompanying text (discussing Dr. Bonham's Case and its influence on eighteenth-century American leaders).}\)
legislature, which would be subversive of all government.\textsuperscript{320} Wilson, however, rejected Blackstone's claim of Parliamentary supremacy. Wilson contended that "the parliament may, unquestionably, be controlled by natural or revealed law, proceeding from divine authority."\textsuperscript{321} Wilson then proclaimed:

> When the courts of justice obey the superiour authority [of God], it cannot be said with propriety that they control the inferior one [of Parliament]; they only declare, as it is their duty to declare, that this inferior one is controlled by the other, which is superiour. They do not repeal the act of parliament: they pronounce it void, because contrary to an overruling law. From that overruling law, they receive the authority to pronounce such a sentence. In this derivative view, their sentence is of obligation paramount to the act of the inferior legislative power.\textsuperscript{322}

Thus, Wilson believed that courts possessed a "divine" mandate to exercise a Cokean form of judicial review based on the tenets of natural law. Wilson's expansive concept of judicial review was consistent with his belief that judges should exercise equitable powers and promote legal principles derived from natural law and the moral sense in order to assist in the perfection of law and republican society. Presumably, Wilson expected that a properly educated and informed citizenry would embrace his judicial and social philosophy. When Wilson articulated his theories in the political arena and judicial cases, however, he encountered strenuous popular opposition and ultimate defeat.\textsuperscript{323}

Wilson should have anticipated the opposition that an activist federal judiciary would encounter, given the widespread popular distrust of judicial discretion and equity powers at the time of the Founding.\textsuperscript{324} In addition, Wilson could not persuade the Constitutional Convention to establish a Council of Revision, an institution that would have granted judges a broader role in the legislative process. As proposed by Wilson, Madison, and George Mason, this Council of Revision would have included the president and members of the Supreme Court, and it would have exercised a veto power over federal legislation. Advocates of the Council argued that the combined strength of the executive and judicial branches was needed to offset the power of the legislative branch, which represented the greatest threat to liberty.\textsuperscript{325}

\textsuperscript{320} 1 Wilson's Works, supra note 179, at 327 (quoting 1 Blackstone, supra note 45, at *91).
\textsuperscript{321} 1 id. at 329; see also 1 id. at 168–93 (declaring that Blackstone's theory of Parliamentary sovereignty was "dangerous and unsound" and contained the "seeds of despotism").
\textsuperscript{322} 1 id. (emphasis added).
\textsuperscript{323} See infra Part II.B.
Supporters also contended that the Council would allow judges to play a broader and more beneficial role in reviewing the wisdom and justice of legislation. Instead of being limited to questions of constitutional repugnancy, under their power of judicial review, judges who were members of the Council could also evaluate the policy and fairness of proposed laws. Wilson, for example, acknowledged that "the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights." He warned, however:

Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let [the judges] have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.

Mason agreed with Wilson that the power of judicial review did not go far enough. Mason explained that federal judges could declare an unconstitutional law void. But with regard to every law however unjust[,] oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law.

Some opponents of the Council of Revision agreed that the new federal judiciary would possess the power of judicial review. They were not, how-


326 New York's Council of Revision provided a "blueprint" for the national Council of Revision proposed by Madison, Mason, and Wilson at the Convention. James T. Barry III, Comment, The Council of Revision and the Limits of Judicial Power, 56 U. Chi. L. Rev. 235, 244 (1989). In vetoing bills proposed by the state legislature, the New York Council frequently determined that the disallowed bills were "inconsistent with the spirit of the Constitution," or "inconsistent with the public good," or contrary to "the fundamental laws of every civilized nation." Id. at 245–46 (citation omitted). Thus, the New York Council applied many of the principles of natural law and natural justice that were important to Wilson.


328 Id. (remarks of Wilson) (emphasis added).

329 Id. at 78 (remarks of Mason) (emphasis added). Oliver Ellsworth also supported the Council because it would give judges broader authority to review legislation. He expected that the "law of Nations" would "frequently come into question" in the new republic, and only judges would have "competent information" regarding this important body of international law. Id. at 73–74 (remarks of Ellsworth).

330 See, e.g., James Madison's Notes on the Federal Convention (June 4, 1787), in 1 Convention Records, supra note 231, at 96, 97 (remarks of Elbridge Gerry); James Madison's Notes on the Federal Convention (July 21, 1787), supra note 313, at 76 (remarks of Luther Martin). This view was not unanimous, however. John Mercer "disapproved of the Doctrine that the Judges as expositors of the Constitution should have the authority to declare a law void." James Madison's Notes on the Federal Convention (Aug. 15, 1787), supra note 325, at 298 (remarks of John Mercer). John Dickinson agreed with Mercer that "no such power ought to exist" in the judiciary. Id. (remarks of John Dickinson). Dickinson was "at a loss what expedient to
ever, willing to grant judges any broader role in the legislative process. Opponents warned that the Council would improperly transform judges into arbiters of “the policy of public measures,” and would destroy their ability to interpret legislation impartially, due to their “bias of having participated in its formation.” Critics also argued that the Council would create “an improper mixture of powers” and would cause judges to lose “the confidence of the people” by involving them in partisan politics. The Convention therefore rejected the Council of Revision on three separate occasions.

The debates over the Council of Revision indicate that most Framers were prepared to recognize the authority of federal courts to exercise a judicial review function limited to striking down laws that clearly violated the terms of the Constitution. Most Framers, however, rejected any notion that judges should evaluate the wisdom or “policy” of statutes. In his discussion of the reasons why the Convention rejected the proposed Council of Revision, Publius noted the Framers’ concerns that the Council might inject “bias” into the judiciary and also induce judges to “embark too far in the political views of [the President].” The Framers concluded, according to Publius, that “[i]t is impossible to keep the Judges too distinct from every other avocation than that of expounding the laws.” While Publius may have understood the significance of the Council’s rejection, it soon became apparent that Wilson did not.

B. Wilson’s Failed Attempts to Reconcile Popular Sovereignty and Natural Law Jurisprudence

In responding to three important issues that arose after the Constitutional Convention, Wilson offered a grand synthesis of popular sovereignty and natural law jurisprudence. In each situation, Wilson believed that his

331 James Madison’s Notes on the Federal Convention (June 4, 1787), supra note 330, at 97–98 (remarks of Gerry and Rufus King).
332 Id. at 140 (remarks of John Dickinson); see also James Madison’s Notes on the Federal Convention (July 21, 1787), supra note 313, at 75 (remarks of Elbridge Gerry).
333 Id. at 77 (remarks of Luther Martin).
334 James Madison’s Notes on the Federal Convention (July 21, 1787), supra note 313, at 77 (remarks of Martin and Pinckney); James Madison’s Notes on the Federal Convention (Aug. 15, 1787), supra note 325, at 298; see also id. at 300 (remarks of Roger Sherman, stating that he opposed “Judges meddling in politics and parties”).
335 For an excellent account of the proposed Council of Revision and the implications of its rejection, see Barry, supra note 326. For the Convention’s votes on the Council, see id. at 257.
336 See id. at 259–60. Compare James Madison’s Notes on the Federal Convention (Aug. 15, 1787), supra note 325, at 299 (remarks of Gouverneur Morris, indicating that judges should refuse to enforce any law that was in “direct violation of the Constitution”), with James Madison’s Notes on the Federal Convention (July 21, 1787), supra note 313, at 75 (remarks of Gerry, stating that the proposed Council would make “the Expositors of the Laws, the Legislators which ought never to be done”), and James Madison’s Notes on the Federal Convention (Aug. 15, 1787), supra note 325, at 301 (remarks of Hugh Williamson, stating that judges should not be involved in “the business of legislation”).
337 The Federalist No. 73, at 376 (Alexander Hamilton) (Garry Wills ed., 1982).
338 Id.
approach would serve the best interests of the people and contribute to the perfection of constitutional law. In each case, however, Wilson’s synthesis provoked widespread popular opposition and ultimately failed. Thus, Wilson’s attempt to establish natural law as a cornerstone of American politics and jurisprudence proved to be unworkable.

1. Opposition to a Federal Bill of Rights

The original Constitution’s omission of a bill of rights provided the Anti-federalists with their strongest argument against ratification. Elbridge Gerry and George Mason, who took part in the Constitutional Convention, refused to sign the proposed Constitution and published essays opposing its ratification. Each of them cited the absence of a bill of rights as a leading complaint. Mason drafted his “Objections” at the close of the Convention, and he sent copies of that document to political leaders in several states. On October 5, 1787, the Antifederalist author “Centinel” published his first essay in Philadelphia, in which he attacked the proposed Constitution on many grounds, including the fact that “there is no declaration of personal rights, premised in most free constitutions.”

In response to this growing chorus of opposition to the Constitution, particularly on the bill of rights issue, Wilson delivered his famous “Speech in the State House Yard” in Philadelphia. In that speech, and in subsequent speeches before the Pennsylvania ratifying convention, Wilson strenuously defended the absence of a bill of rights. Under the Constitution, he declared, “everything which is not given [to the federal government] is reserved [by the people].” He pointed to the preamble of the Constitution, which proclaimed the authority of “the people” to “ordain and establish” the Constitution. The preamble, Wilson declared, “is tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised.” Under the principles of popular sovereignty affirmed in the preamble, “the fee simple of freedom and government is declared to be in the people, and it is an inheritance with which they will not part.”

Based on his new concept of the perpetually sovereign people, Wilson confidently proclaimed that “a bill of rights is neither an essential nor a nec-

339 See, e.g., Wood, supra note 28, at 536–37, 540–43; Wilmarth, supra note 14, at 1280–84.
343 James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 222, at 383–84.
344 Id. at 384; see also James Wilson, Speech in the State House Yard, Philadelphia (Oct. 6, 1787), supra note 342, at 168 (stating that “it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence”) (emphasis added).
necessary instrument in framing a system of government, since liberty may exist and be as well secured without it.\textsuperscript{345} Wilson explained that, under the proposed Constitution, the powers of the federal government “are particularly enumerated,” and “the implied result is, that nothing more is intended to be given, than what is so enumerated, unless it results from the nature of the government itself.”\textsuperscript{346} Thus, Wilson affirmed, “on my principle, the people never part with their power.”\textsuperscript{347}

Wilson further argued that it would be dangerous to add a bill of rights to the Constitution, because any enumeration of the people’s rights would imply that those not included were surrendered to the federal government. Wilson asserted that a complete listing of the people’s rights was “impracticable,” because the people were entitled to a wide array of rights under natural law, and those rights were effectively reserved under the silent terms of the Constitution:

[Who will be bold enough to undertake to enumerate all the rights of the people? And when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government is not so dangerous as an omission in recapitulating the rights reserved by the people. . . . The inhabitants of the United States . . . by the Revolution have regained all their natural rights and possess their liberty neither by grant nor contract. . . . A bill of rights . . . would imply that whatever is not expressed, was given, which is not the principle of the proposed Constitution.\textsuperscript{348}

In explaining why the Constitution did not include a bill of rights, Federalist leaders throughout the nation repeated Wilson’s arguments about the inherent rights of the sovereign people, the danger of any attempt to list those rights, and the implicit protections provided by the Constitution’s specific enumeration of federal powers.\textsuperscript{349} Wilson’s claims, however, rested

\textsuperscript{345} James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 222, at 390–91. Wilson contrasted the proposed Constitution with the British constitution. Under the former, the American people would reserve all rights and privileges that were not surrendered to the federal government. Under the latter, the British people enjoyed only those rights and privileges that were affirmatively secured by written concessions from the British monarch, such as the Magna Carta and the Bill of Rights of 1689. \textit{id.} at 383–84, 391.

\textsuperscript{346} James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 470.

\textsuperscript{347} Id. (emphasis added).

\textsuperscript{348} James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 222, at 391; see also id. at 388 (“If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration [of rights] would throw all implied power on the scale of the government; and the rights of the people would be rendered incomplete.”); James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 470 (“Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.”).

\textsuperscript{349} See, e.g., Wood, supra note 28, at 539–40; Clark, supra note 2, at 337–42; Wilmeth, supra note 14, at 1285.
upon several highly contestable premises. First, his argument that the Constitution created a government of “enumerated” powers overlooked the broad powers granted to Congress under several provisions, particularly the Necessary and Proper Clause of Article I, Section 8. For example, John Smilie declared at the Pennsylvania ratifying convention that the federal government’s powers were “[s]o loosely, so inaccurately . . . defined, that it will be impossible, without a [bill of rights], to ascertain the limits of authority and to declare when government has degenerated into oppression.”

Wilson replied that the Necessary and Proper Clause did not give Congress a “general legislative power” but only “the power of carrying into effect the laws, which they shall make under the powers vested in them by this Constitution.” Wilson did not, however, explain how this “carrying into effect” criterion would place definite and enforceable limits on the powers of Congress. His bland assurance was therefore rejected by the Antifederalists.

---

350 John Smilie, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 Ratification History, supra note 169, at 391, 392; see also Letter XVI of the Federal Farmer (Jan. 20, 1788), reprinted in 2 The Complete Anti-Federalist, supra note 138, at 323, 325 (contending that a bill of rights was essential to establish “fixed known boundaries” to the federal government’s authority, because the Constitution would otherwise grant “general undefined powers to congress”); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633, 656 (1993) (noting that the “Anti-Federalists . . . hammered at what they viewed as the studied ambiguity of the Constitution’s definitions of [federal] power”).

351 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1787), supra note 233, at 454. Wilson’s ostensibly narrow reading of the Necessary and Proper Clause was not only vague, but also probably disingenuous. In 1785, he published a pamphlet declaring that the Confederation Congress possessed, by implication, “all the rights, and powers, and properties” that were “incident” to its status as the executive and legislative power of an “independent nation” under the “law of nations.” Those implied powers, Wilson argued, included the authority to grant a corporate charter to the Bank of North America. Wilson wrote the pamphlet in an unsuccessful effort to dissuade the Pennsylvania legislature from revoking the Bank’s state charter. Scholars have concluded that Wilson’s expansive theory of implied powers influenced the arguments that Alexander Hamilton subsequently presented in his opinion defending the power of Congress to incorporate the First Bank of the United States in 1791. See James Wilson, Considerations on the Bank of North America, in 2 Wilson’s Works, supra note 179, at 824, 829–31. For discussions of the circumstances surrounding Wilson’s preparation of the pamphlet, and its likely influence on Hamilton, see, for example, Hall, supra note 180, at 17–18; Smith, supra note 178, at 146–58; McCloskey, Introduction, supra note 179, at 21–23; see also McDonald, supra note 28, at 273 (stating that Hamilton “represented stockholders after Pennsylvania had revoked the charter of the Bank of North America in 1785”).

352 See James Wilson, Summary of Objections to the Constitution, in 2 Ratification History, supra note 169, at 467, 467–69 (Wilson’s notes listing objections raised by the Antifederalists, including (1) the Necessary and Proper Clause would allow the federal government to abolish the states and “destroy the liberty of the press,” because the Clause would grant an unlimited “power of self-preservation” that would justify “the exercise of all other powers”; and (2) the “powers of Congress are unlimited and undefined. They will be the judges of what is necessary and proper”); see also Essays I and V of Brutus, reprinted in 2 The Complete Anti-Federalist, supra note 138, at 363, 367, 388, 388–89 (stating that the Necessary and Proper Clause “may receive a construction to justify the passing [of] almost any law” and, when combined with the Constitution’s preamble, “amounts to a power to make laws at discretion: No terms can be found more indefinite than these”). In fairness to Wilson, Madison was hardly more successful in articulating definite and ascertainable limits to the scope of implied congressional powers under the Necessary and Proper Clause. See Wilmarth, supra note 14, at 1287, 1299–1303.
Second, Wilson’s argument as to the danger of enumerated rights was undermined by the fact that the original Constitution did protect a limited set of personal rights. Smilie and other Antifederalists charged that, under Wilson’s own theory, this partial list of guarantees implied that all other personal rights would be surrendered to the federal government unless a “full and explicit declaration of rights” was added to the Constitution.

Third, Wilson did not provide a convincing explanation of how the sovereign authority of the people could effectively defend the unwritten natural rights of individuals. Without much elaboration, Wilson and other Federalist leaders argued that the federal judiciary would strike down any attempt by Congress to “transgress the bounds assigned to it” by the “superior power of the Constitution.”

The Antifederalists, however, replied that Wilson’s “mode of reasoning is rather specious than solid,” and “mere sound without substance.” They were unwilling to rely on a “mere matter of opinion,” in view of the broad powers granted to Congress, because the painful lessons of history showed that “men who govern, will, in doubtful cases, construe laws and constitutions most favourably for encreasing their own powers.”

---

353 See Wilmarth, supra note 14, at 1272 & n.47 (observing that the original Constitution adopted a narrow definition of treason, prohibited Congress from suspending habeas corpus (except in case of rebellion or invasion) or passing bills of attainder or ex post facto laws, guaranteed trial by jury in criminal cases, and barred any religious qualifications for federal office). In fact, Wilson had supported Ellsworth’s unsuccessful efforts to omit the Ex Post Facto Clause from article I, section 9. Ellsworth argued that “ex post facto laws were void of themselves. It cannot then be necessary to prohibit them.” James Madison’s Notes on the Federal Convention (Aug. 22, 1787), in 2 CONVENTION RECORDS, supra note 231, at 369, 376. Wilson agreed that ex post facto laws violated “principles of justice” and were “contrary to common sense.” Id. at 378–79. Therefore, he urged, a clause barring Congress from enacting such laws would “proclaim that we are ignorant of the first principles of Legislation.” Id. at 376. Wilson’s argument on this point was consistent with his general view that natural law and natural rights could be adequately enforced without any textual incorporation in the Constitution. The majority of the delegates, however, took a different view. See infra note 364.

354 John Smilie, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 350, at 391–92; see also Robert Whitehill, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 230, at 398; Wilmarth, supra note 14, at 1287 & n.121.

355 James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1787), supra note 233, at 450–51; see also Wood, supra note 28, at 538 (quoting similar statement by Ellsworth at the Connecticut ratifying convention). At the Massachusetts ratifying convention, Theophilus Parsons stated that “[n]o power . . . was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity and could not be enforced.” Wood, supra note 28, at 538.

356 Essay II of Brutus, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 138, at 372, 374; John Smilie, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 350, at 385; see also An Officer of the Late Continental Army, in 2 RATIFICATION HISTORY, supra note 169, at 213 (denouncing the “pitiful sophistry and evasions” of Wilson’s “pretended arguments”).

357 Letter IV of the Federal Farmer (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 138, at 245, 247–48; see also Essay I of Brutus, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 138, at 363, 367–68 (stating that “it is a truth, confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it. This disposition, which is implanted in human nature, will operate in the federal legislature”); Robert Whitehill, Speech at the Pennsylvania Ratifying Conven-
The Antifederalists therefore argued that the people must establish “constitutional barriers for their permanent security” that would serve as “visible boundaries” to the federal government’s power and “centinels for the people at all times.” In addition, as the Federal Farmer pointed out, an explicit declaration of rights would help to educate and remind the people about the importance of their liberties:

[Declarations of rights] give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. . . . What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people, and has their assent . . . it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations. When the people of England got together, at the time they formed Magna Charta, they did not consider it sufficient, that they were indisputably entitled to certain natural and unalienable rights, not depending on silent titles, they . . . made an instrument in writing, and enumerated those they then thought essential, or in danger.

Writing to Madison from Paris, Thomas Jefferson rejected Wilson’s reasoning on similar grounds. Jefferson insisted that “a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse, or rest on inference.” In a subsequent letter, Jefferson echoed the Federal Farmer by stating that a bill of rights would be “of great potency” in informing a people “educated in republicanism” about their rights. Jefferson also felt that the “jealousy” of the states would be a “precious reliance” for the people against potential abuses by the federal government. He warned, however, the states must have “principles furnished them whereon to found their opposition,” and a “declaration of rights will be the text by whereby they will try all the acts of the federal government.”

---

358 Letter VI of the Federal Farmer (Dec. 25, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 138, at 256, 258; see also John Smilie, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 350, at 392 (contending that a bill of rights was needed to establish “a plain, strong and accurate criterion by which the people might at once determine when, and in what instance, their rights were violated”).


360 Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955) (emphasis added). In dismissing Wilson’s argument regarding the omission of a bill of rights, Jefferson described it as “gratis dictum, opposed by strong inferences from the body of the [Constitution], as well as from the omission of [Article II] of our present [Articles of] confederation which had declared [a general reservation of rights and powers] in express terms.” Id. (emphasis added).


362 Id. at 660.

363 Id.
Jefferson further argued that a written bill of rights would place a "legal check . . . into the hands of the judiciary," a body that merited "great confidence" if "rendered independent, and kept strictly to their own department."364 Jefferson’s appeals, together with the strength of the Antifederalists’ opposition to the Constitution, persuaded Madison to introduce a bill of rights in the first Congress. In his statement introducing the bill, Madison repeated Jefferson’s argument that a declaration of rights, "incorporated into the constitution," would enable the states to "jealously and closely watch the operations of [the federal] Government" and to act as "sure guardians of the people’s liberty."365 In addition, drawing on Jefferson’s reference to judicial review, Madison contended that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."366 Madison addressed Wilson’s warning about the possible danger of a bill of rights by including a provision that ultimately became the Ninth Amendment.367

The adoption of the Bill of Rights represented a clear defeat for Wilson’s theory of implied rights derived from natural law and protected by popular sovereignty. Many Founders, and a majority of the first Congress, were not persuaded by Wilson’s argument that individual liberties would be adequately secured by the political principles of popular sovereignty and the implicit restraints of natural law. In addition, as indicated by the comments of Jefferson, Madison and certain delegates at the Constitutional Convention, a number of Founders believed that the judiciary could defend and enforce the Constitution’s explicit terms, but could not (or should not) exercise a broader,

---

364 Id. at 659. At the Constitutional Convention, Hugh Williamson raised a similar argument in favor of inserting the Ex Post Facto Clause in Article I, Section 9. Wilson and others had opposed the clause as superfluous and unnecessary, because ex post facto laws were invalid based on principles of natural law. James Madison’s Notes on the Federal Convention (Aug. 22, 1787), supra note 353, at 376, 378–79. Williamson replied that such a clause appeared in the North Carolina constitution and “has done good there & may do good here. because the Judges can take hold of it.” Id. at 376 (emphasis added); see also supra note 353 (discussing Wilson’s opposition to the Ex Post Facto Clause).

365 Wilmurt, supra note 14, at 1293 (quoting James Madison, Speech in the House of Representatives (June 8, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1023, 1031–32 (Bernard Schwartz ed., 1971)).

366 Id. For a more detailed discussion of the correspondence between Jefferson and Madison, and its apparent influence in helping to persuade Madison to propose a bill of rights, see id. at 1289–94.

367 See id. at 1297–98. Madison’s provision stated that the enumeration of specific rights in the Constitution “shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” Id. at 1297. Madison and other Founders believed that the Ninth and Tenth Amendments would work in tandem to protect the rights of the people by (1) preserving the unenumerated rights of the people against any implied surrender to the federal government, and (2) reserving to the states (which were considered more accountable to the people) all powers not granted to the federal government under the Constitution. See id. at 1269–76, 1296–98, 1301–02; see also AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 123 (1998); Clark, supra note 2, at 342–47.
Cokean power of enforcing *unwritten* principles of natural law. Wilson apparently did not recognize the political vulnerability of his synthesis of popular sovereignty and natural law, because he used it again with similar zeal, and similarly unsuccessful results, in both *Chisholm* and *Henfield's Case*.

2. *Chisholm v. Georgia and State Sovereign Immunity*

The Supreme Court's first major constitutional decision, and its first political defeat, occurred in *Chisholm v. Georgia*. In *Chisholm*, the Supreme Court held, in a four-to-one decision, that Georgia did not enjoy sovereign immunity and was subject to the Court's jurisdiction under Article III, Section 2. Georgia refused to appear before the Court in response to a suit filed by Chisholm, a citizen of South Carolina, to recover a debt that Georgia had allegedly incurred in purchasing military supplies during the Revolution. All five Justices wrote individual opinions, and Wilson's was the most extensive opinion he wrote in any judicial case.

In *Chisholm*, Wilson touched on all of the major themes of political theory and jurisprudence that he had developed during his career. He began by noting that the legal question in the case was whether "a state . . . claiming to be sovereign . . . is amenable to the jurisdiction of the Supreme Court." He declared, however, that this legal question could not be "resolved" unless it was restated as an issue "no less radical than this—do the people of the United States form a nation?" By restating the issue in this manner, Wilson ensured that the public would view *Chisholm* as an inherently political case. He also deliberately placed himself in the middle of the sovereignty debate that had not been settled by the Constitution, and that would continue to bedevil American politics until the end of the Civil War.

The unresolved sovereignty issue that Wilson confronted in *Chisholm* was whether the states had retained attributes of sovereignty, as separate political societies, after they ratified the Constitution. The Antifederalists and their Republican successors argued that, like the Articles of Confederation, the Constitution should be viewed as a "compact" and the separate political societies of the states should be recognized as the "parties" to that

---

368 See *supra* notes 330–38, 364–66 and accompanying text.

369 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). For discussions of the events leading up to this case, see, for example, *Cato, supra* note 33, at 188–90; Nelson, *supra* note 250, at 1561–62 (describing *Chisholm* as the Court's "first major decision."); *Id.*


371 See McCloskey, *Introduction, supra* note 179, at 33 (stating that Wilson "poured into the opinion a distillation of the ideas that had been ripening since his days at St. Andrews [University]").

372 *Chisholm*, 2 U.S. (2 Dall.) at 453.

373 *Id.*

374 See *supra* notes 249–55 and accompanying text (discussing the Founders' failure to settle the question).
compact.\textsuperscript{375} The Antifederalists and Republicans pointed out that the states had ratified the Constitution in separate conventions, and no state could have been bound to the Constitution without its own ratification under Article VII.\textsuperscript{376} Therefore, they argued, the Constitution did not strip the states of their pre-existing sovereign rights and privileges, \textit{except} to the extent that the Constitution \textit{expressly} delegated sovereign and exclusive powers to the federal government.\textsuperscript{377} Not surprisingly, they also argued for the narrowest possible construction of the federal government's powers based on a strict reading of the Constitution's text.\textsuperscript{378}

Publius provided important support for this "compact" theory of Constitutional formation. He stated that the people would ratify the Constitution not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves.

\ldots

That [ratification] will be a federal and not a national act, as these terms are understood by the [Antifederalists], the act of the people as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration that [ratification] is to result neither from the decision of a \textit{majority} of the people of the Union, nor from that of a \textit{majority} of the States. It must result from the \textit{unanimous} assent of the several States that are parties to it. \ldots Were the people regarded in the transaction as forming one nation, the will of the majority of the whole people of the United States, would bind the minority. \ldots Each State in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new Constitution will \ldots be a \textit{federal} and not a \textit{national} Constitution.\textsuperscript{379}

In addition, Publius supported the notion that the states would retain significant aspects of their sovereignty after the Constitution was ratified. For example, he affirmed that the federal government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."\textsuperscript{380}

\begin{footnotesize}
\begin{enumerate}
\item See U.S. CONST. art. VII; MCDONALD, \textit{supra} note 28, at 279–81.
\item See Powell, \textit{supra} note 375, at 706–27.
\item See, e.g., CORNELL, \textit{supra} note 238, at 166–91, 238–43; Jay, \textit{supra} note 255, at 1241–44, 1286–87; Powell, \textit{supra} note 375, at 698–727.
\item The Federalist No. 39, \textit{supra} note 254, at 192–93.
\item Id. at 194; see also CORNELL, \textit{supra} note 238, at 243–44, 268–69, 280–82, 286–87 (showing how Republican defenders of state sovereignty used Publius's assurances to support their narrow interpretation of federal power under the Constitution); \textit{supra} note 254 (quoting other assurances by Publius that the states would retain all portions of their pre-existing sovereignty and authority that were not explicitly surrendered to the federal government in the Constitution).
\end{enumerate}
\end{footnotesize}
Wilson held a very different view. At both the Constitutional Convention and the Pennsylvania ratifying convention, he denied that the Constitution would create a “compact” among the states or that the states would retain any attributes of sovereignty. Instead, he argued that (1) the people of the United States had formed a single political community at the time of the Declaration of Independence, and (2) this national community had held all of the sovereign power in their hands since that time. Accordingly, in Wilson’s view, the sovereignty of the states was extinguished in 1776, long before they ratified the Constitution.\footnote{See, e.g., James Madison’s Notes on the Federal Convention (June 8, 1877), \textit{in 1 Convention Records}, \textit{supra} note 231, at 164, 166 (Wilson stating that “[w]e are now one nation of brethren. We must bury all local interests and distinctions”); James Madison’s Notes on the Federal Convention (June 19, 1877), \textit{in 1 Convention Records}, \textit{supra} note 231, at 313, 324 (remarks of Wilson); James Madison’s Notes on the Federal Convention (June 25, 1877), \textit{in 1 Convention Records}, \textit{supra} note 231, at 397, 406 (same); James Madison’s Notes on the Federal Convention (June 30, 1877), \textit{in 1 Convention Records}, \textit{supra} note 231, at 481, 483 (same); James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 1, 1877), \textit{supra} note 233, at 448 (denying that “the sovereign power resides in the state governments” and affirming that “the sovereignty resides in the people; they have not parted with it”); James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1877), \textit{supra} note 169, at 472 (declaring that “I consider the people of the United States, as forming one great community”); James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1877), \textit{supra} note 234, at 556 (proclaiming that the Constitution “is not a compact or contract . . . it is an ordinance and establishment of the people”).}

In \textit{Chisholm}, Wilson used both natural law and his political theory of the sovereign people to attack the concept of state sovereign immunity. In the first portion of his opinion, he invoked “the principles of general jurisprudence,” and he also quoted Thomas Reid’s statement that “any innovation in our philosophy concerning the mind and its operations, [requires] using new words or phrases, or giving a different meaning to those that are received.”\footnote{Chisholm \textit{v. Georgia} 2 U.S. (2 Dall.) 419, 453–54 (1793); \textit{see supra} notes 210, 212, and 277 and accompanying text (discussing Reid’s influence on Wilson).} Wilson argued that such a reconstitution of language was needed to establish the true identity of the “sovereign” power in the new federal republic.

Wilson rejected the “feudal” notion that the term “sovereign” should be associated with a monarch or other governmental power that imposed laws on the people. In the United States, such a “degrading” notion of sovereignty could never be applied.\footnote{\textit{Id.} at 454. Wilson stated that the people had not called themselves “sovereign” in the Preamble out of “delicacy,” and because, “serenely conscious of the fact, they avoided the ostentatious declaration.” \textit{Id.} In view of the vehement opposition that the words, “We the People of the United States,” provoked among the Antifederalists, Wilson’s suggestion that the Framers could easily have added the word “sovereign” to the Preamble seems disingenuous or oblivious. \textit{See Wood, supra} note 28, at 526 (quoting Antifederalist attacks on the Preamble’s use of those words); Wilmarth, \textit{supra} note 14, at 1276–77 (same).} Although the Constitution did not use the word “sovereign,” Wilson contended that there was only “one place, where it could have been used with propriety. . . . They might have announced themselves [in the Preamble as the] ‘sovereign’ people of the United States.”\footnote{\textit{Id.}} Thus, in America the people, and not their agents in government, were the true sovereign power. Wilson argued that the American principle of popular
sovereignty was consistent with God's design, because "Man, fearfully and wonderfully made, is the workmanship of his all perfect creator." From this "divine" perspective, it was clear that "States and Governments were made for man," and "a state [must] be considered as subordinate to the people." 385

As a state, therefore, Georgia was a "feigned and artificial person," and it could never be proper for a state to claim "precedence" over the people. 386 Based on "general principles of right," how could it be argued that "a State, any more than the men who compose it, ought not to do justice and fulfill engagements?" No one doubted that an individual obligor was "amenable to [the] Court[s] of Justice" in a suit alleging breach of contract, and the same "principles of right and equality" should apply to Georgia. 387

Wilson also rejected the claim that Georgia was entitled to rely, as a matter of common law, on the sovereign immunity allegedly enjoyed by the British monarch. Wilson argued that the conventional common-law understanding of sovereign immunity was derived from the tainted source of Blackstone's Commentaries. Wilson once again declared that Blackstone's theory of sovereignty was false and inapplicable to the United States. Blackstone's theory was reprehensible because it justified the "systematic despotism" of Parliament and violated principles of "equality and justice," which mandated that all laws "must be founded on the consent of those whose obedience they require." 388 Based on these transcendent "principles of general jurisprudence," Wilson declared that the Supreme Court must reject Blackstone's erroneous views of Parliament's supremacy and the King's sovereign immunity. In America, Wilson emphasized, the principle of "CONSENT," derived from "sound and genuine jurisprudence," required that "[t]he sovereign, when traced to his source, must be found in the man." 389

385 Chisholm, 2 U.S. (2 Dall.) at 455-56. Later in his opinion, Wilson repeated this idea when he declared: "A state, I cheerfully admit, is the noblest work of Man: But Man himself, free and honest, is, I speak as to this world, the noblest work of God." Id. at 462-63.

386 Id. at 455-56.

387 Id. at 456. Wilson had explained in his law lectures that natural law (in the case of individuals) and the law of nations (in the case of states) required men and nations to fulfill their voluntary obligations. 1 Wilson's Works, supra note 179, at 166; 2 id. at 608. He had also asserted in his lectures that the federal courts were authorized to enforce the law of nations against sovereign nations. 1 id. at 281-82. Some of Wilson's language in Chisholm could be interpreted as suggesting that the Supreme Court could assert jurisdiction over Georgia based on the law of nations. See Chisholm, 2 U.S. (2 Dall.) at 465 (stating that (1) "principles of general jurisprudence" establish that "a State, for the breach of a contract, may be liable for damages," and (2) the "law of nations . . . will be enforced among the several States, in the same manner as municipal law," by the federal judiciary). That possibility, however, seems inconsistent with Wilson's view that Georgia was not a "sovereign" entity. See id. at 453 (stating that the law of nations would provide "little or no illustration" of the issues in the case, because the law of nations applied only to a "society" of sovereign states, not a single "nation").

388 Chisholm, 2 U.S. (2 Dall.) at 458.

389 Id.; see also id. at 462 (launching a second attack on Blackstone's "despotie theory of Parliamentary sovereignty"); id. at 460 (arguing that the British monarch, in fact, did not enjoy sovereign immunity from suit); Massey, supra note 370, at 87-90 (suggesting, in a manner similar to Wilson, that the British monarch was compelled, as a matter of practice, to respond to a "petition of right" filed by a subject who had been unlawfully injured by the Crown). For Blackstone's views on the absolute sovereignty of Parliament (consisting of the King, Lords, and Commons, acting in concert), and the sovereign immunity enjoyed by the King against private suits,
In addition to his explicit reliance on natural law, Wilson drew upon his political theory of the perpetually sovereign people. He declared:

[T]he citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'People of the United States,' did not surrender the supreme or sovereign power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign state.\(^{390}\)

Not only had the people of Georgia retained their sovereign power, they had used that power to form a national government that possessed an authority superior to that of Georgia's government. The Preamble to the Constitution confirmed that the "People of the United States" had exercised their sovereign authority "to form a more perfect union . . . establish justice . . . [and] ensure domestic tranquility."\(^{391}\) In answer to his original question, Wilson declared that "the general texture of the constitution" established the intention of "the people of the United States . . . to form themselves into a nation for national purposes."\(^{392}\) By ratifying the Constitution, the people of Georgia exercised their sovereign power to join this unified and sovereign national people. In doing so, the people of Georgia agreed to "extinguish or transfer" many of the "former state powers" they had previously conferred on their state government.\(^{393}\) Accordingly, the only question was whether the federal powers granted by the Constitution gave the Supreme Court jurisdiction to hear Chisholm's case against Georgia.\(^{394}\)

In a single paragraph at the end of his opinion, Wilson turned to the specific language of Article III, Section 2. Wilson noted that this provision granted jurisdiction to the federal judiciary over "controversies . . . between a state and citizens of another state," and also over "controversies between two states."\(^{395}\) Wilson argued that these explicit grants of original jurisdiction confirmed that the Supreme Court could exercise compulsory jurisdiction over a case such as Chisholm, in which a state was the defendant. As Wilson noted, the grant of jurisdiction over suits between states necessarily applied to cases in which a state would be sued as the defendant. Accordingly, Wilson held that Georgia's claim to sovereign immunity must be rejected based on "the principles of general jurisprudence" and "the constitution of the United States."\(^{396}\)

---

\(^{390}\) See 1 BLACKSTONE, supra note 45, at \(*155–57, *234–36; 3 id. at *254–57; see also supra notes 320–22 and accompanying text (discussing Wilson's previous attacks on Blackstone's theory of Parliamentary sovereignty).

\(^{391}\) Id. at 462–63, 465.

\(^{392}\) Id. at 465.

\(^{393}\) Id. at 464.

\(^{394}\) Id. at 463–64.

\(^{395}\) Id. at 466.

\(^{396}\) Id. Wilson also referred to the "laws and practices" of ancient Greece, Saxon England, and other nations. Id. at 459–61. These historical references may have been intended to bolster Wilson's arguments based on natural law. It is, however, doubtful whether many Americans in 1793 were persuaded by Wilson's parade of rather arcane references. See CASTO, supra note 33, at 194–95; CURRIE, supra note 3, at 15–16.
Wilson’s opinion has received mixed reviews among recent scholars. There is, however, little doubt that it provoked strong opposition among many of his contemporaries. His opinion and that of Chief Justice John Jay were similar in their reliance on natural-law reasoning, the political theory of popular sovereignty, and the broad purposes stated in the Constitution’s Preamble. By citing the Preamble as proof that the Constitution recognized only a single sovereign power—the national people—and provided the federal government with undoubted supremacy over the states, Wilson and Jay had confirmed the worst fears of the Antifederalists. In addition, the majority in Chisholm overlooked two important points made by Justice Iredell in his dissent, including Iredell’s warning about the likely public response to the majority’s decision.

First, Iredell contended that, prior to the Constitution, state governments enjoyed a general immunity at common law from suits by individuals for money damages, unless they agreed to waive that immunity. Iredell also maintained that no provision of the Constitution or the Judiciary Act affirmatively revoked the states’ traditional immunity from such suits. A recent article by Caleb Nelson supports Iredell’s position in both respects. For example, Article IX of the Articles of Confederation authorized the Confederation Congress, upon a state’s petition, to appoint a special tribunal to resolve that state’s dispute with another state. The Articles of Confederation, however, did not subject states to suits by individuals, and the general understanding was that such suits could not be brought at common law, or under the law of nations, without the consent of the defendant state.

---

397 See, e.g., Casto, supra note 33, at 195 (describing Wilson’s opinion as a “tour de force in natural-law reasoning”); Currie, supra note 3, at 17 (stating that Wilson’s conclusion is a “plausible deduction” from the language of Article III); id. at 15–16 (noting critical views of Wilson’s opinion among scholars, and suggesting that much of Wilson’s opinion would be considered by “[t]oday’s observer” as “persiflage”).

398 See Chisholm, 2 U.S. (2 Dall.) at 469–79 (Jay, C.J.); Currie, supra note 3, at 14–17 (comparing Wilson’s and Jay’s opinions); Peter J. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 89 Va. L. Rev. 1, 56–58 (2003) (same). In contrast, the brief opinions of Justices Blair and Cushing primarily focused on the specific language of Article III in finding that Georgia could not invoke a defense of sovereign immunity. See Chisholm, 2 U.S. (2 Dall.) at 450–53 (Blair, J.); id. at 466–69 (Cushing, J.); Casto, supra note 33, at 190; Currie, supra note 3, at 14.

399 For Wilson’s and Jay’s reliance on the Preamble, see Chisholm, 2 U.S. (2 Dall.) at 454, 463, 465 (Wilson, J.); id. at 474–75, 477 (Jay, C.J.). Many Antifederalists had predicted that the federal government would construe the general terms of the Preamble as authority to exercise unlimited power over the states and their citizens. See, e.g., Essay V of Brutus, supra note 352, at 388–89; John Smilie, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 350, at 407–08; Robert Whitehill, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), supra note 230, at 393.

400 Chisholm, 2 U.S. (2 Dall.) at 433–51 (Iredell, J., dissenting). For an insightful discussion of Iredell’s dissent, see Massey, supra note 370, at 106–111.

401 See Nelson, supra note 250, at 1567–78. Thus, Article III’s grant of original jurisdiction over “controversies between two or more states” could be justified by referring to the precedent created in the Articles of Confederation for the exercise of compulsory federal jurisdiction over suits between states. In contrast, there was a widespread understanding at the time of ratifying the Constitution that a state could not be subjected to suits by individuals for money damages without its consent. See id. at 1574–80, 1585–87, 1592–94.
standing was followed in a Pennsylvania case in 1781, where the state court dismissed a suit by a creditor to recover a debt owed by the Commonwealth of Virginia.\footnote{See id. at 1578–79 (discussing Nathan v. Virginia, 1 Dall. 77 (Pa. C.P. 1781), in which the court declared that it had no jurisdiction over the case, based on principles of sovereign immunity under the law of nations); Smith, supra note 398, at 33–34 (same). Wilson had represented the unsuccessful plaintiff in Nathan. Accordingly, he could hardly claim ignorance of the general understanding as to the sovereign immunity of states prior to the Constitution. See Nelson, supra note 250, at 1579 n.92.}

Second, Iredell warned that a decision in favor of Chisholm would surprise the nation and create a political firestorm.\footnote{See Chisholm, 2 U.S. (2 Dall.) at 430 (noting that the Court’s exercise of jurisdiction over Chisholm’s claim was contrary to the principles of sovereign immunity applied to the King of England and the federal government of the United States); id. at 432 (stating that Chisholm’s claim was based on a “construction [of the Constitution], I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation”); id. at 450 (warning that a decision in favor of Chisholm would be “pregnant” with “evils”). For discussions of Iredell’s well-justified fears regarding the likely political reaction to Chisholm, see Casto, supra note 33, at 196–97; Massey, supra note 370, at 110 n.257.}

In stating his misgivings, Iredell was well aware of the discussions of state sovereign immunity during the ratification of the Constitution. Antifederalist leaders had repeatedly claimed that Article III, Section 2 of the Constitution would remove the states’ immunity against suits by individuals for money damages. In response, Hamilton, Madison, Marshall and most other Federalist leaders had assured the people that the Constitution would have no such effect.\footnote{See Nelson, supra note 250, at 1574–78, 1592–94; Pfander, supra note 369, at 1304–13 & n.198 (concluding that Edmund Randolph, who later represented Chisholm, and Wilson were the only Federalists to indicate that Article III would make states “freely suable by diverse parties”). Wilson defended Article III, Section 2 at the Pennsylvania ratifying convention by stating that there should be “a just and impartial tribunal” that would allow citizens and states to stand “on a just and equal footing” in the diversity cases listed in that provision. James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 7, 1787), supra note 169, at 518–19. Wilson’s remarks suggested, although he did not explicitly say so, that Article III would remove any immunity that the states might have enjoyed against such suits.}

Thus, Professor Nelson believes the most likely understanding of the American people in 1793 was that Article III, Section 2 provided subject matter jurisdiction to the Supreme Court in cases like Chisholm, but it did not subject states to the Court’s personal jurisdiction without their consent.\footnote{Nelson, supra note 250, at 1565–68, 1573–94. Akhil Amar and James Pfander have offered somewhat different explanations for why Chisholm contradicted the general expectations of most Americans in 1793. Professor Amar believes that Article III, Section 2, and the Judiciary Act of 1789 did not create a substantive, federal-law rule of liability for states in assumpit cases like Chisholm. Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1469–73 (1987). Therefore, even though the Supreme Court had subject matter jurisdiction over Chisholm’s suit, the common law of Georgia did not permit Chisholm’s assumpit claim to proceed against the state without its consent. Id. Professor Pfander argues that the Constitution embodied the Founders’ clear understanding that states would not be subjected, without their consent, to suits by individuals for recovery of debts that were incurred prior to the Constitution’s ratification. The plaintiff in Chisholm was seeking to recover just such a debt, and the Court’s decision therefore violated the Founders’ understanding. Pfander, supra note 369, at 1275–313.}
As Iredell had expected, the public response to *Chisholm* was overwhelmingly negative. William Davie, a prominent North Carolina Federalist and a friend of Iredell’s, described Wilson’s opinion as the “rhapsody of some visionary theorist,” which read “more like an epic poem than a Judge’s argument” and was completely lacking in “legal principles or logical conclusions.” Davie also contended that Wilson’s reliance on “[t]he supposed spirit or design of the Constitution is a dangerous guide in a case of this sort, where mere general principles or objects are expressed in general terms.”

In more political terms, newspaper essays and resolutions of state legislatures declared that *Chisholm* would lead to the destruction of state governments, the consolidation of the nation under the federal government’s arbitrary power, and the subversion of the people’s liberties. Thus, *Chisholm* revived many of the fears expressed by the Antifederalists before the Constitution was ratified, and the decision also called into question the sincerity of representations made by Federalist leaders at the ratifying conventions.

In response to the widespread opposition to *Chisholm*, Congress “overwhelmingly” approved the Eleventh Amendment and the states ratified it. Although scholars have long debated the precise scope of the Eleventh Amendment, there is no dispute that the Amendment overruled the majority decision in *Chisholm*. Once again, Wilson had misread the political mood.

406 In his classic history of the Supreme Court, Charles Warren declared that “[t]he decision fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court . . . .” 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1923); see also, e.g., MASSEY, supra note 370, at 111 (describing the “fierce” public reaction to *Chisholm*); Nelson, supra note 250, at 1564 (stating that “many contemporary observers lambasted the decision as illogical and unlawfully”); Pfander, supra note 369, at 1278 (agreeing that “[t]he *Chisholm* decision does appear to have fallen upon the country with a profound shock”).

407 Letter from William Davie to James Iredell (June 12, 1793), reprinted in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, supra note 36, at 382, 382.

408 Id. (also criticizing Wilson’s opinion for “the tawdry ornament and poetical imagery with which it is loaded and bedizened,” and stating sarcastically that Wilson’s opinion was as “original” as it was “profound”). Davie and Iredell were leading supporters of the Constitution at North Carolina’s ratifying convention. Davie was also a delegate to the Constitutional Convention in Philadelphia. See Pfander, supra note 369, at 1308–09; see also Letter from John Wrewat to Edward Telfair (Feb. 21, 1793), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 222, 223 (Maeva Marcus ed., 1994) [hereinafter 5 SUPREME COURT HISTORY] (reporting that Representative Theodore Sedgwick had remarked, in a private conversation, that “he could not have beileved [sic] that any professional Gentleman would have risked his reputation on such a forced construction of the clause in the Constitution”).


410 The Eleventh Amendment was approved in the Senate by a vote of 23–2, and in the House by a vote of 81–9. Nelson, supra note 250, at 1602–08; see also CASTO, supra note 33, at 197–202; 1 WAREEN, supra note 406, at 100–02; Pfander, supra note 369, at 1270–71, 1333–40.

411 See, e.g., Amar, supra note 405, at 1473 (stating that the Eleventh Amendment “was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding”);
of the nation. A large majority, in both Congress and the states, rejected Wilson's claim that (1) all of the nation's sovereign authority resided in a single national people, and (2) no residual sovereignty remained in the separate political societies of the states.


Henfield's Case\textsuperscript{412} arose in 1793, at a time of growing political tensions in the new federal republic. Disagreements over issues of national policy (particularly with respect to the chartering of the First Bank of the United States) were spurring the creation of the nation's first political parties—\textit{viz.}, the Federalists, centered around Hamilton, and the Republicans, led by Jefferson and Madison. In addition, the outbreak of war between France's revolutionary regime and Great Britain had further divided the nation. The Republicans strongly sympathized with what they viewed as the French cause of liberty, while the Federalists reacted with horror against the bloody excesses and disorder that they believed were occurring in France. In an effort to keep the United States out of the European war, President Washington issued a Neutrality Proclamation on April 22, 1793. This Proclamation prohibited American citizens, under pain of "punishment or forfeiture," from "committing, aiding, or abetting, hostilities" against either France or Great Britain.\textsuperscript{413} In defiance of Washington's edict, Citizen Genêt, the new French minister, commissioned privateers to sail out of American ports against British shipping and recruited American citizens to serve aboard such privateers. In May 1793, Gideon Henfield, a captain of one of Genêt's privateers, was arrested for violating the Neutrality Proclamation after he brought a captured British ship to Philadelphia.\textsuperscript{414}

Wilson delivered a charge to the Philadelphia grand jury that was responsible for deciding whether to indict Henfield. Wilson began by praising the common law as "the wisest of laws," with an "accommodating principle" that allowed it to reach "higher and higher degrees of perfection, resulting from the accumulated wisdom of ages."\textsuperscript{415} Citing Coke and Blackstone, Wilson explained that the common law adopted the "law of nations . . . in its full extent," and, therefore, the "infractions of that law form a part of her code of criminal jurisprudence."\textsuperscript{416} Wilson then declared that the "law of nations as

\textsuperscript{412} Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).
\textsuperscript{413} Id. at 1102.
\textsuperscript{414} For discussions of the events described in the foregoing paragraph, see, for example, George Washington, Neutrality Proclamation (Apr. 22, 1793), \textit{quoted in Henfield's Case}, 11 F. Cas. at 1102; Casto, supra note 33, at 130; Cornell, supra note 238, at 166–99; James R. Sharp, \textit{American Politics in the Early Republic: The New Nation in Crisis 69–80} (1995); Jay, supra note 324, at 1022–31, 1042–48.
\textsuperscript{415} Henfield's Case, 11 F. Cas. at 1106.
\textsuperscript{416} Id. at 1107; \textit{see also supra} notes 283–86, 306–07 and accompanying text (discussing Wilson's similar commendation of the common law, including its incorporation of natural law and the law of nations, in his law lectures).
well as the law of nature, is of obligation indispensable [and] 'origin divine.'”

Under the law of nations, Wilson noted, each state had a “primary duty” of “self-preservation.” In addition, each state was prohibited from “exciting disturbances in another” and was “commanded to do good to one another.” Given these obligations, a state could not allow itself to be drawn into conflicts by the “unauthorized” or “unlicensed” conduct of its citizens. Accordingly, Wilson declared, “a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country.”

After the grand jury indicted Henfield, the federal prosecutor, William Rawle, argued at trial that Henfield had committed “an offense against our own country at common law, because the right of war is vested in our government only . . . [and the] law of nations is part of the law of the land.” Counsel for Henfield raised various defenses, including the claim that “as there was no statute giving jurisdiction, the court could take no cognizance of the offense.” This defense probably amounted to an argument that (1) Congress had not outlawed Henfield’s conduct by statute, and (2) federal courts had no jurisdiction to try common-law crimes.

Wilson (who tried the case with Justice Iredell and District Judge Peters) evidently understood Henfield’s defense as contesting the authority of federal courts to exercise jurisdiction over alleged common-law crimes. In his charge to the petit jury, Wilson declared that Henfield had been properly indicted for an offense against the law of nations:

> It has been asked by [Henfield’s] counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law but a law that was in existence long before Gideon Henfield existed.

---

417 Henfield’s Case, 11 F. Cas. at 1107; see also supra note 306 and accompanying text (quoting essentially the same statement made by Wilson in his law lectures).
418 Henfield’s Case, 11 F. Cas. at 1107.
419 Id.
420 Id. at 1108.
421 Id. Wilson also instructed the grand jury that the treaty of amity and commerce between France and the United States did not allow American citizens to assist France’s military efforts against Great Britain. Id.
Chief Justice John Jay had delivered a similar charge to a grand jury in Richmond, Virginia, on May 22, 1973. Jay pointed out that, under the law of nations, each nation possessed the same natural right to enforce the law of nature that individuals would enjoy in a state of nature. See id. at 1102-03 (Jay’s charge). Under the views presented by Wilson and Jay, federal courts possessed authority to prosecute all crimes against the law of nations that implicated the sovereign interests of the United States. See Jay, supra note 324, at 1045-55, 1061-65.
422 Henfield’s Case, 11 F. Cas. at 1117.
423 Id. at 1119.
424 See Casto, supra note 33, at 134.
425 Henfield’s Case, 11 F. Cas. at 1120. Wilson had expressed similar views in his law lectures. See 1 Wilson’s Works, supra note 179, at 166-67, 277.
Wilson also charged the jury that Henfield had violated treaties with Great Britain and other countries at war with France, which were part of the “supreme law of the land” under Article VI of the Constitution.426 Wilson stated that Henfield’s participation in “an act of hostility” against Great Britain “has been clearly established by the testimony,” and the relevant treaties were “in the most public, the most notorious existence” before Henfield committed the act.427 Wilson acknowledged that the jury was entitled to “decide both law and fact,” but he warned that “this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges.” Nevertheless, the jury acquitted Henfield.428

*Henfield’s Case* was the first major federal prosecution of a common law crime, and the case attracted wide public attention. The constitutional basis for Wilson’s position was highly contestable, because Article I, Section 8 authorized Congress to “define and punish . . . offences against the law of nations,” while Article III did not confer any similar power on the federal courts.429 A Philadelphia newspaper criticized Wilson’s jury charge for “introducing motives of policy to influence the decisions of our courts of justice.”430 Writing about the case some fourteen years later, John Marshall said that the Republican newspapers “sounded the alarm, and it was universally asked, ‘what law had been offended, and under what statute was the indictment supported?’”431 Marshall also recalled that Henfield’s acquittal was “celebrated with extravagant marks of joy and exultation.”432 In response to the acquittal, President Washington requested, and Congress enacted, a neutrality statute with criminal sanctions.433

As Stewart Jay has noted, “[w]hen Henfield came down, the controversy over federal common-law jurisdiction was still in an embryonic stage. Yet the suggestion had been made that the court was exceeding its power under the Constitution . . . .”434 During the 1790s, Federalist judges continued to apply and extend Wilson’s view that federal courts could exercise jurisdiction over common-law crimes based on principles of natural law, including the federal government’s right and duty of “self-preservation” under the law of nations.435

426 *Henfield’s Case*, 11 F. Cas. at 1120.
427 *Id.* at 1121.
428 *Id.* at 1122; see also *supra* notes 289–90 and accompanying text (discussing Wilson’s similar statements regarding the jury’s role in his law lectures).
429 See Presser, *supra* note 131, at 78 (noting that defense counsel pointed to this discrepancy between Article I and Article III in a subsequent prosecution of an alleged common-law crime in *United States v. Worrall*, 2 Dall. 384, 391–92 (C.C.D. Pa. 1798) (argument by Alexander Dallas, counsel for defendant)).
430 *Id.* at 73 (quoting NAtl. Gazette, Aug. 3, 1793).
431 5 JOHN MARSHALL: LIFE OF GEORGE WASHINGTON 41–42 (1807).
432 5 id.; see also 1 Warren, *supra* note 406, at 114 & n.2 (quoting Massachusetts Mercury (Aug. 9, 1793) (stating that the jury acquitted Henfield “amidst the acclamations of their fellow citizens,” but also reporting that one juror “was induced to the verdict because he heard threats made out of doors against anyone who should oppose the acquittal”)).
435 In addition to numerous prosecutions of common-law crimes, Federalist judges (as well as their counterparts in Congress) invoked the common-law crime of seditious libel and the
Republicans declared that the Federalists' attempt to establish a federal common law of crimes represented a gross perversion of the Constitution. In 1800, Madison alleged that the Federalists' doctrine threatened to remove all limitations on congressional authority, and to "confer on the judicial department a discretion little short of a legislative power."\(^{436}\) Jefferson was even more vehement in his denunciations:

Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. . . . The bank law, the treaty doctrine, the sedition act, alien act . . . have been solitary, un consequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U.S., without the adoption of their legislature, and so infinitely beyond their power to adopt.\(^{437}\)

Destroying the federal common law of crimes became a key objective of the Jeffersonian Republicans during their campaign against the federal judiciary in the early 1800s. In the Republicans' view, this Federalist doctrine provided conclusive evidence that the Federalists wanted to create an all-powerful federal government.\(^{438}\) Although Wilson had died in 1798, the ideas he articulated in *Chisholm* and *Henfield's Case* were at the core of Federalist jurisprudence. In 1802, William Giles, a Republican congressman, identified *Chisholm* and the federal common law of crimes as the most blatant examples of overreaching by Federalist judges. In Giles's opinion, the Federalist judges were asserting that "their jurisdiction extends to the *lex non scripta*, or rather to the *lex non descripta*, or common law . . . [a law that] is unlimited in its object, and indefinite in its character. Legalize this unassuming claim of jurisdiction by the judges, and they have before them every object of legislation."\(^{439}\)

Thus, the Federalist judges' claim of jurisdiction over common-law crimes helped trigger the political backlash that led to Jefferson's election as President in 1800, and the repeal of the Federalists' Judiciary Act of 1801 in principle of national self-preservation as justification for Congress's decision to adopt the Sedition Act in 1798. See *Presser*, *supra* note 131, at 89–94; *Jay*, *supra* note 324, at 1013–20, 1067–89; *Jay*, *supra* note 255, at 1246–50, 1272–73.

\(^{436}\) James Madison's Report on the Virginia Resolutions (1799–1800), in *4 Debates of the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787 546, 566 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*]. Madison argued that the power to enforce the common law claimed by Federalist judges created an "immense field for judicial discretion." *Id.* In addition, if Congress exercised a similar authority to modify or enforce the common law, "[t]hey would be authorized to legislate in all cases whatsoever." *Id.* As a result, "the limitations [on congressional power] marked out in the Constitution" would be obliterated, thereby "overwhel[m]ing the residuary sovereignty of the states." *Id.*

\(^{437}\) *Jay*, *supra* note 324, at 1092 (quoting letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), *reprinted in 9 The Works of Thomas Jefferson 73* (P. Ford ed., 1905)).

\(^{438}\) See *id.* at 1103–13.

\(^{439}\) *Id.* at 1109–10 (quoting 11 *Annals of Cong.* 595–96 (1802)).
the following year.\footnote{See 1 Warren, supra note 406, at 158–68, 185–230; Jay, supra note 324, at 1067–113; Jay, supra note 255, at 1241–50.} Justice Johnson, who was appointed to the Supreme Court by Jefferson in 1805, subsequently wrote the opinions for the Court in United States v. Hudson & Goodwin,\footnote{United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32 (1812).} and United States v. Coolidge.\footnote{United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).} which denied the authority of federal courts to exercise jurisdiction over common-law crimes.\footnote{See Newmyer, supra note 91, at 100–05 (describing the Court’s opinions in Hudson and Coolidge, including the Court’s rejection of Justice Story’s unsuccessful attempt to revive the federal common law of crimes in Coolidge); Jay, supra note 255, at 1241, 1291–99 (same); White, Marshall Court, supra note 38, at 137–38, 865–67 (same).} In Hudson, Johnson declared that it was “long since settled in public opinion” that federal courts lacked any authority to prosecute common-law crimes. In Johnson’s view, the Constitution required that Congress “must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.”\footnote{Hudson, 11 U.S. (7 Cranch) at 34.} Notably, Chief Justice Marshall did not dissent in either Hudson or Coolidge.\footnote{Legal historians have expressed somewhat divergent views on the question of whether Marshall ever supported federal court jurisdiction over common-law crimes. Stewart Jay finds that “Marshall never made a public statement . . . directly on a question of federal common-law crimes,” and that he deliberately “avoided reaching the question of the precise scope of federal common-law jurisdiction.” Jay, supra note 255, at 1329, 1333 app.B. Professor Jay believes that Marshall decided not to dissent in Hudson or Coolidge because he “saw little to gain by filing a dissenting opinion, and something to be lost by an overt display of division on a sensitive issue.” Id. at 1329. R. Kent Newmyer concludes that Marshall rejected the federal common law of crimes as a matter of political realism. “Keen strategist that he was, Marshall had determined [in an 1807 case] that the Court should not fight on losing ground.” Newmyer, supra note 53, at 186–87. In contrast, G. Edward White believes that Marshall did support, at one time, a federal common law of crimes. However, White finds that Marshall had “soft-pedaled that position by 1809” and decided, on pragmatic grounds, to keep a “distinctly low profile” in Hudson and Coolidge. White, Marshall Court, supra note 38, at 865.} The demise of the federal common law of crimes represented a third major defeat for Wilson’s attempt to harmonize natural law and popular sovereignty. Wilson believed that his application of the law of nations in Henfield’s Case was essential to preserve peace between the United States and the warring European powers, to maintain domestic harmony, and to fulfill the United States’ divinely ordained duties as an independent nation.\footnote{See Presser, supra note 131, at 70–72; Smith, supra note 178, at 362–64.} His instructions called upon the grand jury and petit jury to carry out their civic duties, and to perfect the common law and the Constitution, by applying the eternal principles of natural law. Yet, as in Chisholm, his underlying legal theory was widely assailed as unconstitutional and as a threat to the sovereignty of the states and the rights of citizens. In Henfield’s Case, as in Chisholm, Wilson’s invocations of natural law and the broad purposes of the Constitution failed to build a consensus and, instead, were viewed as intensely partisan.

Moreover, Wilson’s application of the law of nations in Henfield’s Case had a distinctly coercive flavor. He instructed the grand jury that citizens of

\footnote{See Presser, supra note 131, at 70–72; Smith, supra note 178, at 362–64.}
the United States were required by the law of nations to comply with "all the obligations due to the universal society of the human race," and to abstain from any conduct that might endanger their country's "self-preservation." Unless every citizen complied with the law of nations, Wilson warned that the United States could not hope to accomplish its mission of "diffus[ing] reformation . . . and happiness over the whole terrestrial globe" in accordance with "the sacred precepts of nature, and of nature's God." Yet how could Gideon Henfield, an ordinary seaman, be expected to comprehend all of the requirements of the unwritten law of nations? Wilson never addressed that issue. Wilson apparently assumed that Henfield either knew his conduct violated the law of nations—based on his moral sense and rational faculties—or chose to ignore the dictates of conscience and reason. In either case, Henfield deserved to be prosecuted and punished.

Wilson's instructions in Henfield's Case indicate that his moral perfectionism could readily lead to a prosecutorial attitude toward citizens who failed to recognize and fulfill their moral duties under natural law. In addition, Wilson hinted in two other cases that the law of nations might impose binding constraints on state governments as well as citizens. Not surprisingly, Republicans feared that the natural law jurisprudence of Wilson and other Federalist judges would be used to justify a coercive federal power that could overwhelm state sovereignty and destroy personal liberty. This fear led the Republicans to mount a sustained attack on the federal judiciary during the late 1790s and early 1800s.

Conclusion

It is no accident that Marshall's opinion in Marbury is generally regarded as the cornerstone of American judicial review. In Marbury, as in his other landmark opinions, Marshall displayed a unique ability to articulate constitutional principles by using direct and persuasive reasoning that drew upon widely shared political assumptions. Marshall's opinion in Marbury skillfully invoked the distinctive American concept of popular sovereignty and linked that concept to the written Constitution. Marshall also chose the most widely accepted rationale for judicial review, in keeping with the previous arguments of Iredell and Publius. Marshall wisely defended judicial review on the pragmatic basis that it provided the best means for enforcing the Constitution's text without resort to the drastic remedy of revolution. By

447 Henfield's Case, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6360).
448 Id. at 1107–08.
449 See supra notes 317 and 387 (discussing Wilson's inconclusive references to the law of nations in Ware v. Hylton and Chisholm).
450 For example, George Nicholas, a Republican member of Congress, denounced the Federalists' claim that the Sedition Act was constitutional because it represented a "necessary and proper" exercise of the federal government's natural right of self-defense. Jay, supra note 255, at 1248. Nicholas declared that the Federalists' natural-law theory of self-preservation would "entitle them to assume a general guardianship over the morals of the people of the United States" and justify the federal government's exercise of unlimited power, thereby causing "the prostration of the State Governments." Id. (quoting 9 Annals of Cong. 3004–05 (1799) (Rep. Nicholas)); see also supra notes 73, 436–40 and accompanying text (discussing the Republicans' assault on the federal judiciary).
conceiving of judicial review as a restrained and nonpartisan defense of the Constitution's text, Marshall began the process of insulating the Supreme Court from the ongoing political battles between the Federalists and the Republicans. The masterful rhetoric and political diplomacy of Marbury warrant the decision's place of honor within the constitutional canon.451

In contrast to the clarity and power of Marshall's language in Marbury, Wilson's discursive and highly ornamented opinion in Chisholm seems fussy and pedantic.452 Wilson's reckless speculation and ultimate financial disgrace tarnished his reputation, while his aloof personality and high-toned manners undermined his efforts to muster popular support for his political and judicial principles.453 Marshall's eminence, by contrast, was enhanced by his unques-

451 See, e.g., HASKINS & JOHNSON, supra note 73, at 182–204; HORSON, supra note 3, at 47–71, 150–63, 212–14; NELSON, supra note 7, at 38–40, 56–84; NEWMYER, supra note 53, at 173–75, 206–09; WHITE, supra note 3, at 1468–89.

452 See McCloskey, Introduction, supra note 179, at 36 (observing that Wilson "was unable to match the lucidity, simplicity, and persuasiveness of Marshall's prose style").

453 Wilson's compulsive speculation in a wide variety of land development schemes and industrial ventures kept him on the verge of insolvency for much of his career. Like Robert Morris, Wilson's close friend and business associate, Wilson was ruined by the sharp economic slump that began in 1796. Despite his status as a Supreme Court Justice, he was twice thrown into debtors' prison, and he died in a seedy North Carolina tavern while attempting to flee from his creditors. See HALL, supra note 180, at 31–32; SMITH, supra note 178, at 159–68, 306, 369–75, 384–88; McCloskey, Introduction, supra note 179, at 17–23, 43–45 (stating that, at the time of his death in 1798, Wilson had become "an object of derision to his enemies and an embarrassment to his friends").

Wilson also had a disturbing tendency to issue legal opinions on matters in which he held a direct financial interest. He was deeply in debt to the Bank of North America when he wrote his pamphlet arguing that the Bank held a valid charter from the Confederation Congress and that Pennsylvania had no right to repeal the Bank's state charter. McCloskey, Introduction, supra note 179, at 21–22. When Wilson wrote his opinion denying state sovereign immunity in Chisholm, he held a significant financial interest in the Indiana Company, a land company that had filed a lawsuit against the Commonwealth of Virginia. That lawsuit was ultimately dismissed, following ratification of the Eleventh Amendment, in Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). See CASTO, supra note 33, at 190, 195. Wilson also attracted public criticism for holding a large interest in the Yazoo land grants, at a time when Georgia's repeal of those grants was likely to be challenged in the Supreme Court (as it eventually was in Fletcher v. Peck). See HALL, supra note 180, at 32–33; 5 SUPREME COURT HISTORY, supra note 408, at 504–07 (editorial note, citing criticisms of Wilson's Yazoo interest by James Madison and others). Wilson's financial entanglements and doubts about his personal ethics may explain why President Washington bypassed him on three different occasions for selection as Chief Justice of the Supreme Court, despite Wilson's unquestioned legal brilliance. See McCloskey, supra note 180, at 92.

Wilson's ability to attract support for his ideas was also hampered by his native shyness and his stiff, formal manner. He inspired affection within a devoted circle of family members and friends, but he never enjoyed wide popularity. He was accused by his political opponents of harboring aristocratic pretensions because of his self-conscious displays of erudition, his refined manners, his avid pursuit of material wealth, his close relationships with the mercantile elite of Philadelphia, his opposition to the Pennsylvania Constitution of 1776, and his support for the federal Constitution. See HALL, supra note 180, at 13–17, 23–25, 30–31, 127–31; SMITH, supra note 178, at 202–06, 280–84; McCloskey, Introduction, supra note 179, at 17–26.

At one point during the Pennsylvania ratifying debates, Wilson offered remarks that demonstrated his inability to appreciate the force of his opponents' populist ideas. John Smilie claimed that the proposed federal government would establish the rule of a "natural aristocracy," which would not adequately represent "the common mass of the people." John Smilie,
tioned integrity and his warm, congenial personality. With the conspicuous exception of Jefferson and some devoted adherents of state sovereignty, Marshall’s contemporaries viewed him with great admiration and affection.454

Nevertheless, Marshall’s superior forensic skills and his sterling personal qualities do not fully explain why his judicial reputation has endured and Wilson’s has faded. The contrast between their respective judicial philosophies is also a very significant factor. Marshall recognized that the Supreme Court’s authority as interpreter of the Constitution depended on the willingness of society to accept the Court’s interpretations. He also understood that there were significant political constraints on the Court’s interpretive power. He therefore sought to expound the Constitution by invoking principles that were widely shared by his contemporaries and that could be reasonably connected to the Constitution’s text, structure or original purpose. At the same time, he disclaimed the Court’s authority to resolve controversies that fell outside the Court’s recognized “legal” jurisdiction, and he avoided interpretations of the Constitution’s text that conflicted with generally accepted understandings of the Constitution’s meaning or purpose.

Marshall’s articulation of a theory of “departmental discretion” in Marbury,455 and his refusal to act as “a moralist” by outlawing the international slave trade in The Antelope,456 provide evidence of the first prudential limitation on his constitutional jurisprudence. Similarly, his decision that the Bill of Rights could not be applied to the states in Barron v. Mayor of Baltimore457 is an example of the second restraint. As an opponent of the slave

Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 Ratification History, supra note 169, at 465, 465–66. Wilson responded by asking how the Antifederalists could consider it “objectionable” if the new government actually made it possible for “men [to] be employed that are most noted for their virtue and talents?” James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), supra note 169, at 488. Wilson also echoed Publius’s claim that large electoral districts for the new House of Representatives would ensure the election of men with “real weight of character,” instead of the petty demagogues who too often prevailed in small districts. Id. at 489; see The Federalist No. 10, at 46–47 (James Madison) (Garry Wills ed., 1982). Wilson’s remarks provoked a sharp rebuttal from William Findley, who declared that Wilson’s natural aristocracy would surely have “a separate interest from the community,” while his large electoral districts would undermine the “very end of elections” by isolating representatives from their constituents. William Findley, Speech at the Pennsylvania Ratifying Convention (Dec. 5, 1787), in 2 Ratification History, supra note 169, at 505, 505. For insightful discussions of the elitism (and obtuseness) expressed by Wilson and other Federalist leaders toward their Antifederalist opponents, see Wood, supra note 28, at 486–99; Gordon S. Wood, Interests and Disinterestedness in the Making of the Constitution, in Beyond Confederation: Origins of the Constitution and American National Identity 69, 92–95, 100–03 (Richard Beeman et al. eds., 1987).


455 See White, supra note 2, at 1469, 1474 (discussing Marshall’s statement in Marbury that the Court would never intervene in “political” matters in which “the executive possesses a constitutional or legal discretion,” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803)).

456 The Antelope, 23 U.S. (10 Wheat.) 66 (1825); see supra notes 83–93 and accompanying text (discussing Marshall’s opinion in this case).

457 Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833). For discussions of Marshall’s belief that the original understanding of the Bill of Rights precluded any attempt to apply its provisions to the states, see Hobson, supra note 3, at 109–10; White, Marshall Court, supra note 38, at 589–93; Wilmarth, supra note 14, at 1262–64.
trade, and as a strong nationalist and defender of vested rights, Marshall probably would have preferred different outcomes in The Antelope and Barron. His understanding of the institutional and political constraints on the Supreme Court, however, prevented him from attempting to establish such preferences as constitutional doctrine. By consistently portraying the Court as a faithful, nonpartisan agent of the people’s will embodied in the Constitution’s text, Marshall encouraged popular acceptance of the Court as interpreter and guardian of the Constitution.

Wilson, on the other hand, had far more ambitious aspirations for the federal judiciary. He articulated a noble vision in which federal judges would work in concert with jurors and elected officials to improve moral and civic culture, thereby bringing society closer to the perfection intended by human-kind’s divine Creator. Wilson believed that proper education and the involvement of individuals in civic deliberations, as both jurors and electors, would ultimately produce a collective moral sense regarding the essential requirements of natural law and the moral duties of citizenship. Thus, Wilson envisioned a grand moral consensus that would “reconcile the venerable Western idea of a binding higher law with the relatively new idea of the will of the people.”

Wilson fundamentally differed from Marshall and most other Founders, because his political theory was not designed merely to “secure” the rights of individuals but also sought to “enlarge” those rights by creating a more perfect society. Publius and Jefferson, for example, expressed serious doubts about the ability of any human society to reach a general consensus on moral or religious values, or to persuade its citizens to regulate their conduct by the enlightened dictates of morality and reason. In contrast, Wilson’s confi-

458 Marshall owned only a small number of household slaves, he condemned the slave trade, and he was a moderate opponent of the institution of slavery. He opposed any rapid movement toward abolition, but he took a leading role in the American Colonization Society’s efforts to purchase the freedom of slaves and encourage their resettlement in Africa. Compare Hobson, supra note 3, at 164; and White, Marshall Court, supra note 38, at 689–90, with Newmyer, supra note 53, at 414–26 (offering a more critical assessment of Marshall’s attitude toward slavery, and noting that Marshall never challenged the institution directly).

In The Antelope, Marshall felt obliged by “the mandate of the law” to reach “a politic disposition of its sensitive issues” by crafting an opinion that would “condemn the slave trade abstractly, but yet admit its legitimacy under the law of nations.” White, Marshall Court, supra note 38, at 698. Similarly, in Barron, Marshall’s nationalism and his concern for vested rights yielded to a clear historical understanding that the Bill of Rights did not apply to the states. Id. at 589–92; see also Newmyer, supra note 53, at 408, 435.

459 McCloskey, Introduction, supra note 179, at 38.
460 Conrad, Polite Foundation, supra note 180, at 383.
461 White, supra note 28, at 248–56.
462 See, e.g., The Federalist No. 6, at 21–22, 24 (Alexander Hamilton) (Garry Wills ed., 1982) (declaring that “[a] man must be far gone in Utopian speculations who can . . . forget that men are ambitious, vindictive and rapacious,” and warning that “momentary passions and immediate interests have a more active and imperious control over human conduct than general or remote considerations of policy, utility or justice”); The Federalist No. 10, supra note 453, at 43–44 (stating “[a]s long as the reason of man continues fallible, and he is at liberty to exercise
dence in the divine authority of the moral sense led him to view federal judges as pathfinders for the rest of society in discovering and enforcing the unwritten dictates of natural law. He was convinced that, with the help of the courts, these noble principles would eventually be written on the hearts of the people.

Unfortunately for Wilson, America was becoming increasingly pluralistic in its political and religious views during the 1790s.\textsuperscript{463} The Jeffersonian Republicans denounced the natural-law jurisprudence of Federalist judges as an illegitimate scheme to impose a uniform, compulsory code on the states and their citizens, in clear violation of the limits on federal power established by the Constitution. Madison declared that the Federalist judges’ attempt to adopt and enforce a federal common law would “erect them into legislators . . . overwhelm the residuary sovereignty of the states, and . . . new-model the whole political fabric of the country.”\textsuperscript{464} Madison’s apparent reference to Cromwell’s “New Model Army,” with its overtones of military coercion and despotic rule,\textsuperscript{465} indicated the extent to which Republicans viewed federal courts as oppressive, undemocratic institutions. The Republicans’ electoral victory of 1800 represented a decisive defeat for Wilson’s expansive principles of jurisprudence, and it also set the stage for Marshall’s more restrained concept of the federal judiciary’s role.

---

\textsuperscript{463} See, e.g., Philip Hamburger, Church and State 89–129 (2002) (describing (1) the growing demands by religious dissenters for religious liberty and nondiscrimination during the late eighteenth century, and (2) the political backlash against Federalist clergy who denounced Republicans in general, and Jefferson in particular, as anti-Christian during the electoral campaigns of the late 1790s and 1800); Sharp, supra note 414, at 3, passim (stating that (1) “the pluralist individualism of liberal republicanism was reflected in the economic, social, and political realities of the 1790s with its many competing interests and divisions”; and (2) the events of the 1790s “aggravated the already deep political and sectional divisions in the country”).

\textsuperscript{464} See James Madison’s Report on the Virginia Resolutions (1799–1800), supra note 436, at 566; see also supra notes 436–40, 450 and accompanying text (discussing Republican attacks on the Federalist judges’ assertion of jurisdiction over common-law crimes).

\textsuperscript{465} See, e.g., Christopher Hill, A Century of Revolution, 1603–1714, at 95–99, 113–19 (1980) (discussing Oliver Cromwell’s creation of the New Model Army during the English Civil War, and describing the military government that held power during Cromwell’s protectorate).
Panel Two

**Marbury v. Madison and the Revolution of 1800**

*Marbury v. Madison* and the Madisonian Vision

*Bernard W. Bell*

197

When Congress Commands a Thing to be Done: An Essay on

*Marbury v. Madison*, Executive Inaction,

and the Duty of the Courts to Enforce the Law

*Mary M. Cheh*

253

John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801-1803

*Charles F. Hobson*

289

Comment on the Papers of Professors Hobson, Cheh, and Bell

*R. Kent Newmyer*

309