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James Wilson and the Moral Foundations of Popular Sovereignty

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INTRODUCTION

The 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. This truth, so simple and natural, and yet so neglected or despised, may be appreciated as the first and fundamental principle in the science of government.

—*James Wilson*¹

Even most constitutional originalists now concede that important pieces of our founding text are too vague to settle many legal controversies without modern judicial construction.² To most observers, this must seem a concession

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1. JAMES WILSON, *Introductory Lecture. Of the Study of the Law in the United States* [hereinafter WILSON, *Of the Study of the Law*], in 1 COLLECTED WORKS OF JAMES WILSON 431, 445-46 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter COLLECTED WORKS].

2. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999) (describing interpretation/construction distinction); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 418-420 (2013) (distinguishing constitutional interpretation and construction); Lawrence B. Solum, *Originalism*

to the obvious, even if a few quixotic dissenters still roam the academic landscape.³ Textual construction is, after all, the peculiar craft or genius of the constitutional judge in whom Article III places our collective political trust.⁴ If we did not value this particular areté, we might better have turned over our constitutional controversies to a panel of esteemed historians, or to linguists, or, nowadays, to a squadron of research assistants armed with vast databases and powerful search engines.⁵ But we did not do this—nor would we, if asked to decide all over again—because we know that constitutional construction has its own virtuosity, and that its most able practitioners are statesmen: seasoned navigators of the myriad norms, theories, rhetoric, and realities in which constitutional law consists.⁶ Indeed, as some commentators have observed, it is this very trust in the practiced craft of constitutional construction that legitimates the entire institution of judicial review.⁷ If the text itself—or some algorithm thereof—entirely determined the Constitution’s legal meaning, the judge would be, at best, superfluous.

Many of the questions that remain for the constitutional theorist, then, regard the proper foundations or scope of judicial construction. Some suggest that historical practices should set presumptive boundaries on modern legal outcomes, while others adhere to a strong sense of stare

and Constitutional Construction, 82 FORDHAM L. REV. 453 (2013) (outlining theory of constitutional construction).

3. See, e.g., Richard S. Kay, *Constitutional Construction and the (In)Completeness of the Constitution* (Sept. 7, 2014) (unpublished manuscript) (on file with the Buffalo Law Review) (arguing that historical intentions can fully determine constitutional applications).

4. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . arising under this Constitution . . .”).

5. Randy Barnett undertook just such a search in 2001. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

6. Sean Wilson has likened these to “connoisseur judgments” of the kind Ludwig Wittgenstein discussed in the context of aesthetics. SEAN WILSON, *THE FLEXIBLE CONSTITUTION* 89-98 (2014).

7. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 27 (1991).

decisis.⁸ Still others contend that the judge should take into primary account the real world implications of her constitutional decisions.⁹ Another constructive methodology—one that finds a good deal of support across the ideological spectrum—draws inferences from the structural relationships that the Constitution establishes between relevant institutions and actors.¹⁰ Charles Black persuasively outlined this approach, now commonly called structuralism, in his Edward Douglass White Lectures at Louisiana State University in 1968.¹¹ At that time, structural arguments were made infrequently enough that Black labeled it “The Neglected Method,” but that has undoubtedly changed.¹² In the run up to *NFIB v. Sebelius*, the most high profile and controversial constitutional case decided this decade, commentators made a number of compelling structural arguments both for and against the constitutionality of the Affordable Care Act’s “individual mandate.”¹³ Thus, in 2016, structuralism is very much alive, and, as Black predicted, it has given rise to a whole new set of constitutional controversies and claims.¹⁴ This Article is an effort to inform those debates by providing a richer historical and theoretical context for a particular species of structural arguments—those surrounding the controverted concept of popular sovereignty.

8. *E.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286-87 (1990).

9. *E.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (highlighting the importance of judges interpreting law to help solve current problems).

10. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1985) (1969).

11. *Id.* at ix.

12. *Id.* at 3.

13. *See, e.g.*, Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 MERCER L. REV. 608 (2011); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 185 n.243 (2010).

14. BLACK, *supra* note 10, at 48-49 (noting that structural arguments will differ, but at least they will be “differing on exactly the right thing, and that is no small gain in law”).

This structural innovation, upon which the Constitution purports to rest, posits that, in the United States, ultimate sovereignty lies with “the People.”¹⁵ In ratifying the Constitution, the People delegated certain enumerated powers to a federal government organized into specified institutions and procedures.¹⁶ The People also reserved the right to alter the Constitution’s terms through an established amendment process.¹⁷ Unlike the Hobbesian social contract model, wherein the people surrendered sovereignty itself to the commonwealth,¹⁸ the American People retained some essential features of sovereign dignity and autonomy, and appointed the government only as their agent. This innovation seemed to resolve, *inter alia*, the problem that Hobbes had identified with efforts to bring the sovereign state under the rule of law, namely that such attempts, if successful, only replicate sovereignty at a higher level.¹⁹ In America, the sovereign People willingly obligated themselves to the rule of the Constitution, while reserving through specified legal processes the ultimate sovereign authority to, as Carl Schmitt has famously declared, “decide[] on the exception.”²⁰

With that said, however, the doctrine of popular sovereignty remains somewhat enigmatic and controversial in modern constitutional theory. Scholars have built a number of different, and sometimes conflicting, theories of the Constitution and judicial construction around divergent structural conceptions. Akhil Reed Amar, for example, has made popular sovereignty the centerpiece of a powerful critique of the federal courts’ reluctance—rooted in

15. U.S. CONST. pmbl.

16. *See* U.S. CONST. arts. I, II, III.

17. U.S. CONST. art. V.

18. THOMAS HOBBS, *LEVIATHAN* 109 (Edwin Curley ed., Hackett Pub. Co. 1994) (1651). For an earlier account of indivisible sovereignty, see JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M. J. Tooley ed. & trans., Barnes & Noble 1967) (1576).

19. HOBBS, *supra* note 18, at 213.

20. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Univ. Chi. Press 2005) (1922) (“Sovereign is he who decides on the exception.”).

misguided notions of federalism and sovereign immunity—to remedy state violations of constitutional rights.²¹ Amar traces the American conception of popular sovereignty back to the pseudo-corporate colonial charters, which provided the political structure for many of the early settlements.²² These contractual arrangements, in which the shareholding People delegated limited authority to “governors” and boards of “assistants,” established that common law principles could both limit governmental power and bind political officials as agents of the People.²³ The charters laid the theoretical groundwork for the state constitutions, which often expressly located sovereignty in the People, and eventually for the federal Constitutional Convention.²⁴ Amar suggests that, in the years after ratification, two competing accounts of popular sovereignty arose: the Federalist version, in which the People of the United States formed a single sovereign, and the Anti-Federalist or Republican version, in which the People of each state formed thirteen separate sovereigns, bound together in a close confederation.²⁵ The latter version—while never a correct description of constitutional structure—had some currency in American politics until the Civil War put it definitively to rest.²⁶ Nonetheless, Amar contends that the federal courts have marshaled this discredited “Confederate” account of popular sovereignty in support of a deferential brand of federalism that insulates state governments from constitutional suits and remedies.²⁷

21. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

22. *See id.* at 1432-35.

23. *See id.* at 1433-34.

24. *Id.* at 1437-40.

25. *Id.* at 1451-52.

26. *See id.* at 1451-55, 1464.

27. *See id.* at 1519-20. Bruce Ackerman has also made popular sovereignty the focal point of a compelling theory of American constitutionalism. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). He describes a “dualist” constitutional architecture, in which lawmaking proceeds along two hierarchical tracks. *Id.* at 6. The sovereign People ratified the Constitution as the “higher law” that structures the procedures and limits of “normal politics,” which in turn produces the lower track of law that governs our everyday lives. *See id.* A “preservationist” Supreme Court ensures that normal politics do not trespass

More recently, Randy Barnett has used the doctrine of popular sovereignty to reach somewhat different conclusions about judicial construction.²⁸ Barnett rejects the concept of “majoritarian popular sovereignty,” in which a majority’s exercise of sovereign consent legitimately binds a non-consenting minority.²⁹ In its place, he presents an “individualist” structure of popular sovereignty in which a legitimate government must actually receive every single citizen’s consent.³⁰ Within this structure, the purpose of government is to ensure our basic natural rights, and each individual retains these rights unless she expressly delegates them away.³¹ There will, of course, always be individuals who do not expressly consent to government action, and so we must have at least some conception of presumed or constructive consent to general laws.³² But Barnett argues that we can only legitimately presume such consent to those exercises of governmental power that do not violate an individual’s retained natural rights.³³ It is the court’s job to protect these rights from legislative or executive encroachment, which ensures “that the government actually conforms to the consent it claims as the source of its just

constitutional boundaries, and the amendment process allows the sovereign People to re-enter the conversation and alter the “higher law” as necessary. *See id.* at 60, 69-70. More controversially, Ackerman also contends that, under the right conditions, the People can exercise sovereign authority outside of the Article V process. *See id.* at 267-68. Indeed, he claims that the People have modified the higher law at several important “constitutional moments” in the nation’s history—among them the New Deal and the Civil Rights Era. *See id.* at 266-67, 283-84. It is the Court’s job to synthesize these moments and the defining features of each constitutional “regime” when it constructs constitutional meaning in modern cases. *See id.* at 114-16.

28. Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576 (2014) [hereinafter Barnett, *We the People*].

29. *Id.* at 2591-92, 2594-96.

30. *See id.* at 2599, 2602.

31. *See id.* at 2600.

32. *Id.* at 2599-600.

33. *Id.* at 2602.

powers.”³⁴ Without adequate protection for retained natural rights, a government based on popular sovereignty slides into illegitimacy.³⁵

While scholars generally agree, then, on the structural centrality of popular sovereignty, they sometimes reach different conclusions about the lessons this structure holds for constitutional construction. This is at least partly because popular sovereignty is an inherently contradictory—some would say a “fictional”—sort of notion.³⁶ How can the People be both sovereign and subject? If the individual is truly sovereign, how can she be bound to laws she, herself, neither authored nor to which she consented? What does it mean to delegate some, but not all, elements of sovereign authority? If the idea of popular sovereignty is more than just a creative legal fiction—if it is not simply an inventive riposte to Anti-Federalist objections—then these questions deserve answers. But to make matters even more difficult, it often seems the founders themselves were uncertain about the concept. Popular sovereignty’s most thoughtful and determined advocate among that generation—James Wilson of Pennsylvania—was a conflicted man, whose constitutionalism seems, on the surface at least, to manifest contradictory ideas about the doctrine’s entailments.³⁷ He was devoted both to unalienable natural rights *and* the obligatory force of majority consent.³⁸ He argued tirelessly for broad popular representation within a powerful federal legislature but remained committed to a strong vision of counter-majoritarian judicial review.³⁹ He believed both in the liberating authority of the rule of law *and* the sovereign

34. *See id.* Barnett does not explicitly invoke the Court here, but the judiciary’s role is implied, and he relies upon judicial intervention over the remainder of the article.

35. *See id.* at 2601-02.

36. *See* EDMUND S. MORGAN, *INVENTING THE PEOPLE* 15 (1988).

37. *E.g.*, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 530 (1969) (arguing that Wilson developed the American theory of popular sovereignty “[m]ore boldly and more fully than anyone else”).

38. *See infra* Part II.A.

39. *See infra* Part II.A.

power of the People to revolt.⁴⁰ It is perhaps no wonder, then, that modern scholars hold a range of views on the constitutional entailments of popular sovereignty.

With this in mind, I suggest that a return to true first principles—in this case, fundamental liberal ideas about human morality and sociability—can provide helpful clarity. Popular sovereignty as a political idea has a rich historical lineage in legal and political philosophy—with origins in classical Greece, intimations in early Enlightenment thinkers such as Jacques Bodin and Johannes Althusius, and modern roots in the social contracts of Hobbes, Locke, and Rousseau;⁴¹ I intend here to explore a different intellectual history. Instead of looking to political theory, this Article examines historical developments in moral philosophy, particularly the moral sentimentalism that emerged from the Scottish Enlightenment, which would ground James Wilson's ideas about popular sovereignty.

On a moment's reflection it is difficult to imagine how one could place such determined faith in our individual capacity for self-governance without a broadly egalitarian account of moral epistemology solidly underfoot. I suggest that a refocused assessment of these epistemological underpinnings can help resolve some of the contradictions that seem to persist in our modern ideas about popular sovereignty. I have used Wilson as a lens in this assessment for several reasons. First, as a transplanted Scotsman and one of the young nation's leading intellectuals, Wilson seems to personify moral sentimentalism's westward migration into American political thought. Second, Wilson's arguments at the Constitutional Convention and in the ratification debates manifest some of the very structural contradictions—the counter-majoritarian difficulty among others—that still puzzle theorists today. Third, in his *Lectures on Law*, Wilson committed to paper his evolving ideas about morality and law

40. See *infra* pp. 279-82.

41. For a fascinating account of popular sovereignty's emergence from Roman property law concepts, see Daniel Lee, *Civil Law and Civil Sovereignty: Popular Sovereignty, Roman Law and the Civilian Foundations of the Constitutional State in Early Modern Political Thought* (June 2010) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

in a more complete and sophisticated way than any other member of the founding generation.⁴² Finally, in the Supreme Court's first great decision, *Chisholm v. Georgia*, Wilson carefully outlined popular sovereignty's entailments for certain elements of the federalist structure.⁴³

To begin, I must acknowledge a robust literature exploring the intellectual impact of the Scottish Enlightenment on the founding generation. Garry Wills, particularly in his books *Inventing America* and *Explaining America*, has made perhaps the most visible and controversial arguments of this kind,⁴⁴ but there are many other important contributions.⁴⁵ It is probably fair to say that Wills overstated his case for common-sense philosophy as the *predominant* philosophy of the founding,⁴⁶ but few would deny that the Scots were an *important* influence on American political and moral theory. There is also an excellent (and rapidly growing) literature examining the influence of Wilson's Scottish philosophical education on his later political ideas.⁴⁷ This Article seeks to make two contributions

42. See Kermit L. Hall, *Introduction* to COLLECTED WORKS, *supra* note 1, at xxi [hereinafter Kermit Hall, *Introduction*].

43. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.).

44. See GARRY WILLS, *EXPLAINING AMERICA* (1981) (placing David Hume's work at the center of Madison's republican theory); GARRY WILLS, *INVENTING AMERICA* (1978) (largely discounting Locke's influence on the Declaration of Independence in favor of Francis Hutcheson's). For powerful criticisms of Wills's scholarship, see Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence*, 36 WM. & MARY Q. 503 (1979); Harry V. Jaffa, *Inventing the Past: Gary Wills's Inventing America and the Pathology of Ideological Scholarship*, 33 ST. JOHN'S REV. 3 (1981).

45. *E.g.*, Susanna L. Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 LAW & HIST. REV. 99 (2008); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 17-19 (1987); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 441-44 (1991); Daniel N. Robinson, *The Scottish Enlightenment and the American Founding*, 90 MONIST 170 (2007).

46. See Hamowy, *supra* note 44; Jaffa, *supra* note 44, at 17-20.

47. Among others, see MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742-1798*, at 68-72 (1997); WILLIAM F. OBERING,

to that scholarship. First, I reexamine several of the most important Scottish moral sentimentalists with a particular focus on the specific ontological and epistemological accounts that influenced Wilson. Second, I hope to dissolve the seeming contradictions in Wilson's political thought by showing that, while he understood that representative bodies were essential to legitimate government, he nonetheless distrusted these institutions because they work to obscure, or even subvert, their members' individual experience of moral obligation. In short, power—particularly the self-reinforcing normativity of a group power dynamic—tends to corrupt. Thus, I conclude that, at the most fundamental structural level, American popular sovereignty exists as a manifestation of the founders' belief in our common, independent ability to understand morality and experience moral obligation.

THE PHILOSOPHY OF LAW OF JAMES WILSON (1926); CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER 1742-1798 (1956) [hereinafter SMITH, JAMES WILSON: FOUNDING FATHER]; Randolph C. Adams, *The Legal Theories of James Wilson*, 68 U. PA. L. REV. 337, 342-43 (1920) (discussing Wilson's rejection of British political and legal ideals); Lucien Hugh Alexander, *James Wilson, Patriot, and the Wilson Doctrine*, 183 N. AM. REV. 971 (1906); Stephen A. Conrad, *James Wilson's "Assimilation of the Common Law Mind"*, 84 NW. U. L. REV. 186, 203, 206 (1990); Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUP. CT. REV. 359, 371, 376-77; George M. Dennison, *The "Revolution Principle": Ideology and Constitutionalism in the Thought of James Wilson*, 39 REV. POLITICS 157, 186-87 (1977); William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053 (2010); Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 221-30, 265-68 (2014); Arnaud B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394, 396, 404 (1942); Shannon C. Stimson, *'A Jury of the Country': Common Sense Philosophy and the Jurisprudence of James Wilson*, in SCOTLAND AND AMERICA IN THE AGE OF ENLIGHTENMENT 193, 193-208 (Richard B. Sher & Jeffrey R. Smitten eds., 1990); Garry Wills, *James Wilson's New Meaning for Sovereignty*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 99, 102 (Terence Ball & J. G. A. Pocock eds., 1988); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 144-51, 162 (2003) (noting the influence of Scottish philosophy on Wilson's conception of natural law and moral sense); Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257, 261-62, 264, 307 (2010).

With an eye towards the first objective, this Article begins with a summary of philosophical developments during the Enlightenment in Scotland. The first Part identifies sentimentalism's defining themes and suggests that those ideas provided the necessary foundation for the American understanding of John Locke's social contract. The second Part traces these ideas as they came to inform Wilson's evolving thoughts in the constitutional debates, in his *Lectures on Law* at the College of Philadelphia, and as an Associate Justice of the Supreme Court. I argue that Wilson's conception of popular sovereignty recognized the necessity of institutionalized government but placed its ultimate faith and authority in ordinary, individual humans—Wilson's "free and independent" men—and their lived experiences of moral obligation.⁴⁸ The final Part suggests some ways that a better understanding of this intellectual history might clarify the sorts of structural inferences we should draw from the doctrine of popular sovereignty as we construct modern constitutional meanings. I draw two conclusions in particular. First, the sentimentalist account of popular sovereignty suggests we should look to the federal government—and not to the states—as the primary guardian of individual rights. Second, the focal point of our efforts to construct unenumerated or fundamental rights should shift from conceptions of *privacy* to notions of retained *sovereignty*; this, in turn, suggests an attitudinal move from *tolerating* individual moral judgment to *fostering* it.

I. THE SCOTTISH ENLIGHTENMENT AND MORAL SENTIMENTALISM

There is certainly much literature to suggest that the intellectual revolutions that took place in Scotland over the course of the eighteenth century had a broad influence on the American founding.⁴⁹ The goal of this discussion, however, is to narrow the focus somewhat in an effort to draw out the particular relationship between the Scottish Enlightenment and the American conception of popular sovereignty. Of particular relevance in this regard is the emergence of the

48. WILSON, *Of the Study of the Law*, *supra* note 1, at 445-46.

49. *See supra* notes 44-47 and accompanying text.

philosophy known as moral sentimentalism, which had largely supplanted moral or ethical rationalism by the end of the eighteenth century. Moral sentimentalism shares some basic elements of what is often called Scottish common-sense philosophy—which rejected empirical skepticism in favor of “self-evident” truths—in that both approaches rely on our universal, or near universal, ability to sense and understand the fundamental features of the natural world. But the fact that David Hume—often the target of the common-sense empiricists—was among the leading moral sentimentalists is evidence enough of the important differences between the Scottish approach to the two subject matters.⁵⁰ The aim of this Part is to draw out the defining features of the Scottish moral philosophy so that we might better understand its influence on the theoretical foundations of American popular sovereignty.

Similar to the period of European Enlightenment, the Scottish experience began with a gradual rejection of the dogmatic theological and scholastic doctrines that had closely cabined the continent’s intellectual life for centuries.⁵¹ The scientific method, brought powerfully home to the United Kingdom in the works of Francis Bacon and Isaac Newton, had revolutionized the physical sciences, and many hoped it could produce similar results in the social sciences.⁵² And, as William Ewald has observed, intellectual developments were particularly dramatic in Scotland: “In previous centuries there had been educated Scots; but the country was poor, and barren, and in many ways backward. But in the eighteenth century all that changed. For a few decades, Scotland became

50. For a fascinating take on Hume’s split philosophical persona, see DAVID FATE NORTON, *DAVID HUME: COMMON-SENSE MORALIST, SCEPTICAL METAPHYSICIAN* (1982).

51. See LOUIS DUPRÉ, *THE ENLIGHTENMENT AND THE INTELLECTUAL FOUNDATIONS OF MODERN CULTURE* 18-26 (2004) (mapping the changes in Europe in the understanding of physics during the Enlightenment). For an excellent survey of Scottish political and cultural history leading up to the Enlightenment period, see Ewald, *supra* note 47, at 1065-81.

52. FRANCIS BACON, *THE NEW ORGANON* (Lisa Jardine & Michael Silverthorne eds., Cambridge Univ. Press 2000) (1620); ISAAC NEWTON, *1 PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA* (Alexandre Koyré & I. Bernard Cohen eds., Harvard Univ. Press 3d ed. 1972) (1687).

the intellectual leader of Europe.”⁵³ Among the principal drivers of Scotland’s ascendance were a cadre of philosophers who wrote on everything from economics, to politics, to metaphysics, and, most relevantly for these purposes, to morality and ethical theory.⁵⁴ On this front, the move away from theological dogmas had given rise to a deeply important question: Is morality possible without religion?⁵⁵ This question presents both ontological⁵⁶ and epistemological puzzles. Ontologically speaking, if morality exists, what does it consist in? Is it absolute or relative? How does it come into being? And, as an epistemological matter, how are we able to know its content?⁵⁷ The Scots would eventually engage both of these puzzles, and the answers they arrived at would deeply inform the American founding.

A. *Moral Rationalism and Moral Sentimentalism*

The curtain must go up somewhere on any historical narrative, and, in telling the story of Scottish moral sentimentalism, Thomas Hobbes seems as good a place to start as any. A good deal of Enlightenment moral philosophy—at least in the English speaking world—emerged as a reaction to the *Leviathan*, which seemed to

53. Ewald, *supra* note 47, at 1081-82.

54. See *id.* at 1082 (discussing Adam Smith, David Hume, Francis Hutcheson, Thomas Reid, Dugald Stewart, Adam Ferguson, and Hugh Blair, among others).

55. Although this question may bring to mind Ivan Karamazov’s famous claim that, with the death of God, “everything would be permitted,” FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 69 (Richard Pevear & Larissa Volokhonsky trans., North Point Press 1990) (1880), the Enlightenment philosophers were (generally) not doubting the existence of God. Rather, the effort was to abandon blind adherence to particularized religious dogma and to account for moral obligation with perspicuous logical arguments.

56. I recognize that categorizing this question as “ontological” may be idiosyncratic. Perhaps it would be more appropriate to call it a generally “metaphysical” question—as many do—but I think that “ontology” best describes the specific inquiry here: Does moral law exist, and if so, in what form, and with what meaning for us? In any case, I will use the ontological vocabulary throughout.

57. See ANTHONY ASHLEY COOPER: *THIRD EARL OF SHAFTESBURY, AN INQUIRY CONCERNING VIRTUE, OR MERIT* 18-19 (David Walford ed., Manchester Univ. Press 1977) (1699) [hereinafter *SHAFTESBURY*].

present a stark and unsettling account of moral egoism.⁵⁸ Hobbes argued that, in the state of nature, humans are motivated almost entirely by self-interest and fear—and many contemporaries construed his moral theory as reducing into the same terms.⁵⁹ Thus, we construct and comply with a moral code for the same reason we have entered into a social contract—because, all things considered, it is in our self-interest to do so. Indeed, in the politics of the *Leviathan*, we must surrender individual moral judgment to the sovereign in order to avoid the division and unrest that ethical pluralism inevitably brings⁶⁰:

I observe the *diseases* of a commonwealth that proceed from the poison of seditious doctrines, whereof one is: *That every private man is judge of good and evil actions*. . . . From this false doctrine men are disposed to debate with themselves, and dispute the commands of the commonwealth, and afterwards to obey or disobey them, as in their private judgments they shall think fit. Whereby the commonwealth is distracted and *weakened*.⁶¹

To his critics, then, it seemed that Hobbes had resolved both the ontological and epistemological puzzles of morality with a single, dehumanizing stroke: Ontologically, morality exists if and because the sovereign so declares; and, epistemologically, we know moral content because the sovereign reveals it to us.⁶²

This account was unsatisfying for at least two reasons. First, it made morality contingent upon sovereign judgment—if the sovereign so decreed, it could be morally permissible to murder innocent children—which does not align with most people's experience of the human condition.⁶³

58. Julia Driver, *Moral Sense and Sentimentalism*, in *THE OXFORD HANDBOOK OF THE HISTORY OF ETHICS* 358, 358-59 (Roger Crisp ed., 2013).

59. Michael B. Gill, *Moral Rationalism vs. Moral Sentimentalism: Is Morality More Like Math or Beauty?*, 2 *PHIL. COMPASS* 16, 18 (2007). Gill points out that this almost certainly misconstrued Hobbes's position. *Id.* at 18, 27 n.9.

60. See, e.g., HOBBS, *supra* note 18, at 113-14.

61. *Id.* at 212.

62. Again, it is worth noting that Hobbes's critics likely had his account of morality—and his putative Atheism—wrong. Gill, *supra* note 59, at 18, 27 n.9.

63. *Id.* at 18.

Second, the phenomenology of moral approval or disapprobation is not always closely related to matters of self-interest. We might, for example, feel great moral affection for a character in an ancient poem—who has very little impact on our lives—or, indeed, we know of (and may admire) people who give up their lives on moral principle.⁶⁴ For these reasons and others, many moral theorists were deeply critical of Hobbes, among them John Locke, whose general critique of the *Leviathan* emerged from his fundamentally different view of human nature.⁶⁵

While Hobbes doubted that civil society could exist without a powerful government, Locke believed that humans are social animals that coexist pretty agreeably in their natural state—honoring promises, respecting property rights, and basically keeping the peace—even without sovereign supervision:

The Promises and Bargains for Truck, [etc.] between the two Men in the Desert Island, . . . or between a *Swiss* and an *Indian*, in the Woods of *America*, are binding to them, though they are perfectly in a State of Nature, in reference to one another. For Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society.⁶⁶

Most relevant to this discussion, Locke's confidence in humanity arose from his belief that a universal body of natural law exists, and that we can know its content through the faculty of reason.⁶⁷ In his *Essays on the Law of Nature*, Locke began with an omnipotent God and then reasoned out "scientific" sorts of answers to the ontological and epistemological puzzles of morality.⁶⁸ First, he argued that the existence of a universal "Rule of Morals, or Law of Nature" was self-evident and derived from God's divine authority: "No one will easily [deny] this, who has reflected

64. *Id.* at 19-20.

65. *But see* LEO STRAUSS, NATURAL RIGHT AND HISTORY 226-33 (1953).

66. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 295 (Cambridge Univ. Press 1960) (1690) [hereinafter LOCKE, TWO TREATISES].

67. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 111, 113 (W. von Leyden ed., 2002) (1664).

68. *Id.* at 109-21.

upon Almighty God, or the unvarying consensus of the whole of mankind at every time and in every place, or even upon himself or his conscience.”⁶⁹ Second, he claimed that this “natural law can be known by the light of nature,” by which he meant our rational powers of “reason and sense-perception.”⁷⁰ Indeed, as Locke scholar John Lenz has observed, the resolution of these two puzzles refer to each other in a complementary account of moral ontology and epistemology: “Man’s nature reveals his obligations only because God has given him it to indicate what is expected of him. Man’s inherent potentialities are the declaration of God’s will, the law of nature itself.”⁷¹ In other words, we know that God has willed a moral law, and what it is, precisely because He has equipped us with the ability to identify and fulfill it.⁷² Where Locke’s account ultimately falls short, however, is in failing to adequately explain how or why the rational ability to *identify* moral law actually motivates us to *obey* it.⁷³

This same shortcoming plagued the accounts of several important moral philosophers—the moral rationalists—who would build on Locke’s basic ideas. For these theorists, moral good and evil were *a priori* truths, which we can discover through the exercise in reason, in very much the same way a mathematician might devise a geometric proof.⁷⁴ Thus, Anglican clergyman Samuel Clarke claimed:

69. *Id.* at 109.

70. *Id.* at 147. Locke here discarded two other possible sources of moral knowledge: “tradition” or “some inward moral principle written in our minds”—which are, after all, *tabulae rasae*. *Id.*

71. John W. Lenz, *Locke’s Essays on the Law of Nature*, 17 PHIL. & PHENOMENOLOGICAL RES. 105, 107 (1956).

72. If you are thinking this sounds a little bit circular, you are not alone. See J.B. Schneewind, *Locke’s Moral Philosophy*, in THE CAMBRIDGE COMPANION TO LOCKE 199, 199-201 (Vere Chappell ed., 1994).

73. *See id.*

74. Among the most prominent of the early moral rationalists was the English philosopher Ralph Cudworth, whose *A Treatise Concerning Eternal and Immutable Morality* confronted Hobbes’s egoism in essentially Platonic terms. See RALPH CUDWORTH, A TREATISE CONCERNING ETERNAL AND IMMUTABLE MORALITY 13-27 (London, 1731). Clarke’s *A Discourse Concerning the Unalterable Obligations of Natural Religion* continued the purely rationalistic account of

For a Man endued with *Reason*, to deny the Truth of [universal moral obligations]; is the very same thing, as if a Man that has the use of his *Sight*, should at the same time that he beholds the *Sun*, deny that there is any such thing as *Light* in the World; or as if a Man that understands *Geometry* or *Arithmetick*, should deny the most obvious and known *Proportions of Lines* or *Numbers*, and perversely contend that the *Whole* is not *equal to all its parts*, or that a *Square* is not *double to a triangle* of equal base and height.⁷⁵

Again, while such purely rationalist accounts of moral epistemology could certainly overcome the problem of Hobbesian moral egoism or contingency, they failed to explain the visceral experience of moral obligation—the innate desire to act morally—with which most humans are familiar.⁷⁶ Thus, while rationalism offered an account of moral epistemology (albeit an intellectually elitist one), it largely failed to explain how moral knowledge could motivate moral conduct.

While this was a vexing problem for moral philosophy in its own right, it also raised important difficulties for Locke's theory of the social contract and legitimate government. To put the point briefly, unlike Hobbes, Locke argued that we are unable to consent away our fundamental natural rights because those rights implicate duties we owe to God, and are thus not ours to bargain.⁷⁷ Without some general confidence, however, that the great majority of people will both know *and* honor the correlative moral duties of their own accord—without state supervision—Locke's contract model seems destined for chaotic failure. In other words, for Locke's optimistic account of the social contract and the state to make sense, we must have some reason to believe that moral duties are both evident to most people, and that most people will

moral epistemology. SAMUEL CLARKE, *A Discourse Concerning the Unalterable Obligations of Natural Religion*, in 2 THE WORKS OF SAMUEL CLARKE 595, 609 (René Wellek ed., Garland Publishing 1978) (1738). Like Cudworth, Clarke maintained that “the indispensable necessity of all the great moral [o]bligations . . . [is] deducible even demonstrably, by a [c]hain of clear and undeniable reasoning.” *Id.* at 598.

75. CLARKE, *supra* note 74, at 609.

76. See STEPHEN DARWALL, THE BRITISH MORALISTS AND THE INTERNAL ‘OUGHT’: 1640–1740, at 8 (1995); Gill, *supra* note 59, at 16.

77. See LOCKE, TWO TREATISES, *supra* note 66, at 301-03.

experience and act upon a sense of moral obligation.⁷⁸ It was in this context that moral sentimentalism would come to make a fundamental contribution to American political theory.

Anthony Ashley Cooper, better known as the Third Earl of Shaftesbury, would sow the early seeds of sentimentalism in his treatise *An Inquiry Concerning Virtue, or Merit*.⁷⁹ Shaftesbury, whom Locke tutored as a boy, rejected the rationalists' mathematical approach, and instead analogized our experience of morality to the aesthetic experience of harmony or beauty.⁸⁰ Thus, each of us has the natural ability to appreciate virtue unmediated by our rational senses, in much the same way that we experience beauty, without the need—or perhaps even the ability—to explain or “prove” it. Julia Driver has summarized Shaftesbury's thought in this way:

We have a “natural” tendency to respond favourably to certain perceptions. This is true in morality as well as aesthetics. Moral beauty, like aesthetic beauty, involves harmony. We immediately recognize good and bad, without intervening considerations, just as we recognize beauty and deformity immediately. These perceptions of beauty and deformity of character rest on our reflections, or perceptions, of our own mental states and those of others.⁸¹

Moral judgment thus proceeds as follows: we first perceive our own or another's motives in undertaking an action, and we then experience a second-order approval or disapproval of those motives as they fit into our aesthetic conceptions of systemic harmony.⁸² It is this second-order phenomenon—man's ability to, as Shaftesbury says, “reflect on what he himself does, or sees others do, so as to take notice of what is *worthy* or *honest*”—that constitutes the “moral

78. Elsewhere I have called this difficulty the “paradox of public virtue.” Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 N.Y.U. J. L. & LIBERTY 311, 312 (2007).

79. SHAFTESBURY, *supra* note 57.

80. *See id.*; accord Gill, *supra* note 59, at 16-17.

81. Driver, *supra* note 58, at 361-62.

82. *Id.*

sense”; which ultimately distinguishes us from other animals.⁸³

Where Shaftesbury broke most sharply with the rationalist tradition was in shifting the focus away from moral laws learned or imposed from without, and onto internal mental states and affections.⁸⁴ As Stephen Darwall has observed:

If the model of law is significantly revised in . . . Cudworth, it is almost entirely absent from Shaftesbury. What makes conduct virtuous and virtue obligating appears to have nothing at all to do with even a reformed idea of law. Rather, morality primarily concerns what Shaftesbury calls the agent’s *affections*. A person (or any “sensible creature”) is good only if her affections are. And whether her conduct is right or wrong depends entirely on whether it springs from good or bad affections.⁸⁵

His approach here would presage the Kantian assessment of morality—not in terms of *what* one does, but rather *why* one does it.⁸⁶ Further, this “internal” shift allowed Shaftesbury to offer what the rationalists could not—an account of moral motivation or feelings of obligation.⁸⁷ Unlike rational proofs, internal emotions or passions are capable of evoking the visceral sorts of responses (or affections) to which moral questions seem to give rise.⁸⁸ Thus, Shaftesbury would supplement our rational faculty with the moral sense—which we each possess regardless of our rational or intellectual

83. SHAFTESBURY, *supra* note 57, at 18. This is not to say that Shaftesbury believed that our rational faculties or powers of reason never enter into the process of moral evaluation. Indeed, we must employ reason to help determine the ultimate moral value of our systemic actions within the larger human endeavor. Thus, for Shaftesbury—unlike some later sentimentalists—the moral sense allows us only to identify and appreciate virtuous motivations, and it is left to our rational faculties to discover the larger Platonic Good. See Driver, *supra* note 58, at 362; accord DARWALL, *supra* note 76, at 187-88.

84. DARWALL, *supra* note 76, at 182; accord Driver, *supra* note 58, at 362.

85. DARWALL, *supra* note 76, at 182.

86. *Id.* at 177; accord IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 10 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993) (1785).

87. DARWALL, *supra* note 76, at 193.

88. Gill, *supra* note 59, at 16.

abilities—in order to account fully for our lived experience of moral responsibility.⁸⁹

Shaftesbury's sentimentalism would evolve and migrate north to Scotland in the person of Francis Hutcheson.⁹⁰ After graduating from the University of Glasgow, Hutcheson started an academy in Dublin, Ireland, where he wrote many of what would become his most influential works.⁹¹ He later returned to Glasgow as Chair of Moral Philosophy, where he was a popular and influential professor to a generation of Scottish intellectuals.⁹² Shaftesbury's aestheticism had a deep influence on Hutcheson's moral philosophy, and he began his own moral account by distinguishing between internal and external senses.⁹³ He focused in particular on our ability to perceive complex ideas like beauty and harmony via an innate sense that operates separately from the perception of simple ideas like color or musical pitch⁹⁴:

I should rather chuse to call our Power of perceiving these [complex] Ideas, an Internal Sense, were it only for the Convenience of distinguishing them from other Sensations of Seeing and Hearing, which men may have without Perception of Beauty and Harmony. It is plain from Experience, that many Men have in the common meaning, the Senses of Seeing and Hearing perfect enough; they perceive all the simple Ideas separately, and have their Pleasures . . . And yet perhaps they shall find no Pleasure in Musical Compositions, in Painting, Architecture, natural Landskip; or but a very weak one in comparison of what others enjoy from the same Objects. This greater Capacity of receiving such pleasant Ideas we commonly call a fine Genius or Taste.⁹⁵

89. SHAFTESBURY, *supra* note 57, at 72-76.

90. *See* DARWALL, *supra* note 76, at 207.

91. WILLIAM ROBERT SCOTT, FRANCIS HUTCHESON: HIS LIFE, TEACHING, AND POSITION IN THE HISTORY OF PHILOSOPHY 21, 23, 25-36 (1900).

92. *See id.* at 65-68.

93. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE (Wolfgang Leidhold ed., rev. ed. 2008) (1725); Luigi Turco, *Moral Sense and the Foundations of Morals*, in THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT 136, 136-37 (Alexander Broadie ed., 2003).

94. On complex ideas, see HUTCHESON, *supra* note 93, at 21-22.

95. *Id.* at 23 (internal editorial revisions omitted).

While clearly our perceptions of beauty or harmony depend in some measure upon the external senses of sight and hearing, we also possess a distinct ability to experience the organization of external data like color, shape, or pitch as more or less aesthetically appealing.⁹⁶ Where Locke or the rationalists might describe this aesthetic appreciation as a second order judgment of the rational mind, Hutcheson argued that our actual experience of beauty or harmony does not seem to arise out of reason or explanation.⁹⁷ Rather, we experience these qualities in much the same way we do light or pain—as unmediated sense data—and it is in this way that we might describe morality as self-evident.⁹⁸

For Hutcheson, the moral sense was closely related to these innate aesthetic abilities, and we thus experience direct pleasure in perceiving virtuous action, even in others, and even when that action has no bearing on our rational ideas of self-interest:

We are all then conscious of the Difference between that Love and Esteem, or Perception of moral Excellence, which Benevolence excites toward the Person in whom we observe it, and that Opinion of natural Goodness, which only raises Desire of Possession toward the good Object. Now what should make this Difference, if all Approbation, or Sense of Good be from Prospect of Advantage? . . . The Reason . . . must be this[:] That we have a distinct Perception of Beauty, or Excellence in the kind Affections of rational Agents; whence we are determin[e]d to admire and love such Characters and Persons.⁹⁹

Thus, where the earlier rationalists conceived of moral reasoning in terms of logical outcomes like “true” or “false,” Hutcheson’s sentimentalism described morality as consisting in the emotional experiences of “love” or “hate.”¹⁰⁰ Again, these emotions can motivate us to action where the mere knowledge of a moral truth cannot; but, just as importantly,

96. *See id.*

97. *See id.* at 88.

98. *Id.*

99. *Id.* at 89-90 (internal quotations and editorial revisions omitted).

100. *Id.* at 102 (“The Affections which are of most Importance in Morals are Love and Hatred.”) (internal editorial revisions omitted).

“love” is not an affection that arises out of self-interest.¹⁰¹ Indeed, in describing the moral qualities that actually stir the moral sense, Hutcheson focused primarily on the concept of “Benevolence,” whose “very Name excludes Self-Interest.”¹⁰²

We might thus summarize Shaftesbury and Hutcheson—whom many credit as the progenitors of moral sentimentalism—as follows: On the ontological question of what morality consists of, both men basically adhered to something like a traditional natural law view. They believed that there are certain objective moral principles that we can know and follow, and these principles do not derive from Hobbesian self-interest, but are instead rooted in some form of benevolence. On the epistemological question, however, the early sentimentalists rejected rationalist accounts, and argued instead that we come to know moral truth directly through the “moral sense,” which is akin to our aesthetic sense of beauty or harmony. Further, this internal, emotional experience is what gives rise to feelings of moral obligation that in turn motivate moral conduct. Thus, early sentimentalism presented an epistemological challenge to moral rationalism, but did not question the inherited ontology of moral naturalism. The sentimentalists that followed Hutcheson, however, would diverge on this fundamental question.

101. *Id.* at 112-15.

102. *Id.* at 103. It is true, however, that Hutcheson’s approach is sometimes described as proto-utilitarian, *see* Driver, *supra* note 58, at 365, due largely to a passage that seems to presage Bentham and Mill. HUTCHESON, *supra* note 93, at 125 (internal editorial revisions omitted). He did not explore these thoughts in great depth, however, and his utilitarianism—to the degree it exists—was always in service of the grounding quality of benevolence. Driver, *supra* note 58, at 365. That is, the utility calculation was meant only to illustrate a manifestation of benevolence (or malice), which remains the virtue (or vice) we apprehend directly through the moral sentiments. It is not the case, in other words, that we rationally calculate utilities and arrive thus at moral decisions; rather, the moral sense perceives the benevolent motivation immediately, and utility is merely a post hoc explanation.

B. *The Ontological Divide: David Hume and Thomas Reid*

David Hume presented what many consider the most systematic and broadly influential account of Scottish moral sentimentalism.¹⁰³ While he agreed with much of Hutcheson's sentimentalist epistemology, Hume would in the end conclude that "benevolence" was too narrow a quality to ground all moral judgment.¹⁰⁴ He argued instead that some moral norms or virtues—most notably "justice"—are *not* based in benevolence, and, though he detested Hobbesian egoism, Hume conceded that the concept of "justice" reflects self-interest, inasmuch as a well-ordered society with suitable protections for private property serves that interest.¹⁰⁵ This may explain why Hutcheson's comments on a draft of Hume's *A Treatise of Human Nature* suggest that the book "wants a certain warmth in the cause of virtue."¹⁰⁶ To be sure, Hume's account of political justice would explicitly emphasize and explore the utilitarianism at which Hutcheson had only hinted.¹⁰⁷ To understand Hume's systematic approach, we must begin with his sentimentalism and his distinction between "natural" and "artificial" virtues, and then examine the existential grounds for each type.

Hume's treatment of morality appears largely in the third volume of the *Treatise*, and in the later *An Enquiry Concerning the Principles of Morality*. Though these accounts sometimes diverge, it is possible to sketch a reasonably complete picture of Humean morality by reading the two together. In each account, he was devoted, as a matter of first principle, to a defense of sentimentalism.¹⁰⁸ Hume's proof that

103. Driver, *supra* note 58, at 365-66.

104. See DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALITY* 16-20 (J.B. Schneewind ed., Hackett Publishing Co. 1983) (1751) [hereinafter HUME, ENQUIRY].

105. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 480-81 (L. A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1738) [hereinafter HUME, TREATISE].

106. Letter from David Hume to Francis Hutcheson (Sept. 17, 1739), in 1 DAVID HUME, *THE LETTERS OF DAVID HUME* 32, 32 (J. Y. T. Greig ed., 1932), *quoted in* DARWALL, *supra* note 76, at 211 n.8.

107. See HUME, ENQUIRY, *supra* note 104, at 23.

108. See *id.* at 87; *accord* HUME, TREATISE, *supra* note 105, at 455.

“[m]oral [d]istinctions [are] not deriv[e]d from [r]eason” relied on the same problems of moral motivation that had troubled Shaftesbury and Hutcheson: “Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of our reason.”¹⁰⁹ But, like Anglican Bishop Joseph Butler—another contemporary sentimentalist—Hume did not believe that *all* of the virtues we experience could be reduced to Hutcheson’s completely selfless quality of “benevolence.”¹¹⁰

Hume observed that while many virtues do emerge from benevolence, there are others—honesty, chastity, and justice, for example—that do not seem rooted in this, as he would call it, “sympathy.”¹¹¹ Thus, “honesty” may require us to hurt or expose another; “justice” may demand that we punish those who step out of line; and “chastity” (for women) seems to have little relation at all to the idea of benevolence. This led Hume to divide the virtues into two classes: the *natural* and the *artificial*.¹¹² The “natural” virtues are those that arise out of motivations we feel simply as humans, without reference to society or conventions.¹¹³ He offered the example of a father’s duty to care for his child, which arises out of the “natural affection” that parents feel for their children.¹¹⁴ It is, in that case, a natural sympathy or benevolence that defines the

109. HUME, TREATISE, *supra* note 105, at 455, 457.

110. Although I do not discuss Bishop Butler in detail here, he was certainly another important figure in moral sentimentalism, and he had a profound influence on Hume. *Id.* at xvii n.1. In particular, his correspondence with the rationalist Samuel Clarke and his sermons on moral epistemology are instructive. Butler is perhaps most famous for arguing that the moral sense is not merely a distinct apparatus, but rather the most important and divine of our senses—even giving to it the name “conscience.” See BISHOP JOSEPH BUTLER, *Upon Humane Nature, Natural Supremacy of Conscience*, in THE WORKS OF BISHOP BUTLER 55, 55 (David E. White ed., 2006). For Butler’s argument that both benevolence and “self-love” help define our perceptions of virtue and morality, see BISHOP JOSEPH BUTLER, *Upon the Love of Our Neighbour*, in THE WORKS OF BISHOP BUTLER, *supra*, at 110, 115-16.

111. HUME, ENQUIRY, *supra* note 104, at 51-54.

112. HUME, TREATISE, *supra* note 105, at 477.

113. *Id.* at 484.

114. *Id.* at 478.

content of the father's moral duty. But Hume was less optimistic about our natural affection for "justice," at least in the fairly narrow, transactional sense that he defined it.¹¹⁵ While we might, in a pre-political state of nature, sometimes feel a natural affection for the property rights of those closest to our hearts, "there is no such passion in human minds, as the love of mankind, merely as such, independent of personal qualities, of services, or of relation to oursel[ves]."¹¹⁶ Thus, the moral duty of justice cannot be grounded in the same sort of "natural" affection that defines the parental duty of care. Justice is instead an "artificial" virtue, one "not deriv[e]d from nature, but aris[ing] artificially, tho[ugh] necessarily from education, and human conventions."¹¹⁷

In his later *Enquiry*, Hume argued that these conventions, in turn, are rooted in larger scale utilitarian judgments.¹¹⁸ To illustrate this claim, he juxtaposed two hypothetical societies: one with "such profuse abundance of all external conveniences, that . . . every individual finds himself fully provided with whatever his most voracious appetites [could] want"; the other that has "fall[en] into such want of all common necessaries, that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery."¹¹⁹ Neither of these societies, Hume argued, would experience justice as a virtue. In the former society, the "jealous virtue of justice would never once have been dreamed of," because the need to claim an individual interest in property or goods would simply never arise.¹²⁰ In such a circumstance, "[j]ustice . . . being totally USELESS, would be an idle ceremonial, and could never possibly have [a] place in the

115. Hume's "justice" is largely the appropriate respect for private property rights and the state's authority to regulate them. See HUME, *ENQUIRY*, *supra* note 104, at 20-34.

116. HUME, *TREATISE*, *supra* note 105, at 481.

117. *Id.* at 483.

118. See HUME, *ENQUIRY*, *supra* note 104, at 23.

119. *Id.* at 21-22 (emphasis omitted).

120. *Id.* at 21.

catalogue of virtues.”¹²¹ In the latter society, mere survival would require that the “strict laws of justice are suspended . . . and give place to the stronger motives of necessity and self-preservation.”¹²² This is because “the USE and TENDENCY of [justice] is to procure happiness and security,” and, in circumstances where it no longer serves those purposes, it would succumb to more urgent necessities.¹²³

Most societies, however, fall somewhere on the spectrum between these extremes, and it is these societies that begin to understand justice as a virtue:

The common situation of society is a medium amidst all these extremes. We are naturally partial to ourselves, and to our friends; but are capable of learning the advantage resulting from a more equitable conduct. Few enjoyments are given us from the open and liberal hand of nature; but by art, labour, and industry, we can extract them in greater abundance. Hence the ideas of property become necessary in all civil society: Hence justice derives its usefulness to the public: And hence alone arises its merit and moral obligation.¹²⁴

By speculating upon the conventions that would arise given these hypothetical circumstances, Hume concluded that “artificial” virtues, like justice, are utilitarian (and so relative) at heart: “Thus, the rules of equity or justice depend entirely on the particular state and condition, in which men are placed, and owe their origin and existence to that UTILITY, which results to the public from their strict and regular observance.”¹²⁵

While Hutcheson’s most famous student, Adam Smith, would follow in his good friend Hume’s utilitarian footprints, his successor at Glasgow, Thomas Reid, would stick more

121. *Id.*

122. *Id.* at 22.

123. *Id.* at 23.

124. *Id.* at 24.

125. *Id.* at 23.

closely to objective ideas about moral ontology.¹²⁶ Though perhaps not as well-known as Hume, Reid's thoughts are particularly relevant here—and it is with them that my narrative curtain will fall—because he, as much as any sentimentalist, seems to have influenced James Wilson, whose ideas about popular sovereignty are the focus of this Article's second act.¹²⁷

Reid's moral philosophy actually represents a complex blend of rationalist and sentimentalist ideas.¹²⁸ On the one hand, he argued that moral first principles—basic moral propositions such as the idea that it is wrong to murder an innocent person—are both ontologically objective and self-evident to the ordinary person.¹²⁹ “Thus,” he wrote in his *Essays on the Active Powers of Man*, “we shall find that all moral reasonings rest upon one or more first principles of morals, whose truth is immediately perceived without reasoning, by all men come to years of understanding.”¹³⁰ Reid did not believe in one master moral principle—such as Kant's categorical imperative or Hutcheson's benevolence—but rather suggested that many such principles exist, are irreducible, and at times may even seem to conflict.¹³¹ Importantly, however, we do not arrive at these principles through reasoning or rational dialectic, but instead apprehend them through a common moral faculty or sense:

126. For Adam Smith's principal work in moral theory see ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

127. There is some debate on this point, cf. GEOFFREY SEED, *JAMES WILSON* 16-17 (1978), but after reading Wilson's *Lectures on Law*, I agree with those who suggest that Reid served as Wilson's principal inspiration.

128. See generally Terence Cuneo, *Reid's Ethics*, STAN. ENCYCLOPEDIA PHIL. (Jan. 4, 2011), <http://plato.stanford.edu/archives/spr2011/entries/reid-ethics> (arguing Reid believed that moral first principles are self-evident, but that we nonetheless make rational moral judgments).

129. See THOMAS REID, *Essays on the Active Powers of Man* [hereinafter REID, *Essays on the Active Powers*], in THOMAS REID'S INQUIRY AND ESSAYS 297, 322 (Ronald E. Beanblossom & Keith Lehrer eds., 1983) [hereinafter REID, INQUIRY AND ESSAYS].

130. *Id.*

131. See *id.* at 352-60.

I call these *first principles*, because they appear to me to have in themselves an intuitive evidence which I cannot resist. I find I can express them in other words. I can illustrate them by examples and authorities, and perhaps can deduce one of them from another; but I am not able to deduce them from other principles that are more evident.¹³²

And,

[w]hen men differ about deductions of reasoning, the appeal must be to the rules of reasoning, which have been very unanimously fixed from the days of Aristotle. But when they differ about a first principle, the appeal is made to another tribunal—to that of *Common Sense*.¹³³

In this regard, then, Reid's approach is very much like Hutchesonian moral sentimentalism—objective moral ontology coupled with sentimentalist epistemology—and unlike Hume's utilitarian account of justice.

On the other hand, however, Reid was not persuaded by earlier sentimentalist accounts of moral motivation, which he instead believed required initial rational judgment. Motivations (or reasons for acting) derive from what Reid called the "rational principles of action," which he distinguished from mere "animal" or instinctual desires.¹³⁴ Unlike animals or "brutes," Reid argued that human beings have the rational ability to organize certain reasons for action into a hierarchy, judge their relative worth or importance, and then choose which action to take.¹³⁵ Within this hierarchy, reasons grounded in first moral principles are superior and should enjoy motivational primacy, but humans are autonomous creatures and may, in the end, take other actions for other reasons—this is the very essence of rational judgment.¹³⁶ Thus, while direct sensory perception allows us to know certain moral propositions as self-evidently true, how we come to judge the motivational status of these principles in our practical deliberations is a matter of

132. *Id.* at 358.

133. *Id.* at 352.

134. *Id.* at 314-15.

135. *See id.* at 345-46.

136. *See id.* at 345-47.

rational evaluation.¹³⁷ Indeed, we cannot hold a person without both the ability to perceive a moral rule *and* the rational power to choose a course of action accountable for violating a moral obligation:

Brute-animals are incapable of moral obligation, because they have not that degree of understanding which it implies. They have not the conception of a rule of conduct and of obligation to obey it, and therefore, though they may be noxious, they cannot be criminal. Man, by his rational nature, is capable both of understanding the law that is prescribed to him, and of perceiving its obligation.¹³⁸

If, as Reid took earlier sentimentalists to argue, the direct sensory perception of a superior moral truth in and of itself moves us to action—without the possibility of rational reflection and choice—we cannot properly assess moral credit or blame.¹³⁹ We do, however, make these assessments every day, and in so doing we rely again upon our sensory experience of moral approbation or demerit. Thus, for Reid, the paradigmatic sentimentalist view of moral reasoning is reversed: First, we make rational choices between competing principles of action, and *then* our moral sense experiences those choices (in both ourselves and others) as pleasing or displeasing.¹⁴⁰

In the end, then, Reid believed that the moral sense interacts with the rational faculties at several points in the process of moral reasoning and self-governance. First, it is through the moral sense that we are able to immediately perceive first moral principles.¹⁴¹ These first principles are objective and self-evident; that is, we perceive them immediately as a matter of sensory experience—just as we know fire is hot—and no further rationalizing is required or

137. *See id.* at 344-47.

138. *See id.* at 345-46, 352.

139. *Id.* Reid labeled this way of thinking, which he attributed to Hume among others, the “System of Necessity.” Cuneo, *supra* note 128. He rejected this approach because he did not believe it could account for purposeful human autonomy. *Id.*

140. Cuneo, *supra* note 128.

141. REID, *Essays on the Active Powers*, *supra* note 129, at 351-52, 360.

possible.¹⁴² Second, we engage our rational powers as these principles, among others, enter into our practical deliberations as potential reasons for acting.¹⁴³ It is in this sense that moral action can be the voluntary product of an autonomous will, and thus properly the subject of moral judgment.¹⁴⁴ Finally, our moral sense reenters the process as the source of our judgments about the quality of the choices that we perceive in both others and ourselves.¹⁴⁵ The resulting experiences of approbation or disapproval—particularly for ourselves—then inform our future rational deliberations between various reasons for acting, and provide a powerful incentive or motivation to moral self-governance.¹⁴⁶ It is this final step that we come to experience as moral obligation or duty.¹⁴⁷

With these ideas in mind, it is possible to identify some defining features of Scottish moral sentimentalism, and to understand how that philosophy provided the intellectual bridge between Lockean social contract theory and the American conception of popular sovereignty. As an initial matter, the sentimentalists believed that we all possess an innate “moral sense” of virtue and vice—much like an aesthetic sense—and that we require no specialized education or superior rational facility to understand and experience morality. In this way, moral qualities are self-

142. See THOMAS REID, *Essays on the Intellectual Powers of Man*, in INQUIRY AND ESSAYS, *supra* note 129, at 127, 266-67 [hereinafter REID, *Essays on the Intellectual Powers*].

143. See REID, *Essays on the Active Powers*, *supra* note 129, at 346.

144. See *id.* at 327.

145. *Id.* at 361-66.

146. See *id.* at 316-18.

147. *Id.* A short, personal story may be illustrative. For my 10th birthday I got a BB gun, with strict instructions to shoot only at paper targets. I did so for a short time, and then thought it would be more fun to shoot at the barn swallows that sat nearby on the telephone wire. I considered possible reasons for and against shooting at the birds. I'd been told not to. But it would be a lot cooler than the targets. The bird would likely die. But it's just a bird. In the end, though I knew it was (as they say) “against my better judgment,” I shot at the birds. It took a few weeks, but I finally hit and killed one. When I picked up the body, I immediately felt an overpowering sense of remorse and shame, without—I don't think—any rational mediation. I never did it again.

evident, and moral judgment is more like an *art* than a *science*. Second, sentimentalism is concerned with the internal experience of morality as a sensory response to our own and others' moral motivations and choices. That is to say, virtue or vice are the human qualities that our moral sense registers with approval or disapproval; and it is these pleasing or displeasing experiences that in fact motivate us to moral self-government. Thus, where Locke's social contract envisioned individuals consenting to the rule of an enlightened sovereign—whose exercise of corrective coercion would be grounded in educated moral judgment—the American sentimentalist model could safely entrust sovereignty to the common mass of the People themselves.

It is then on these grounds that the Declaration of Independence would assert our moral prerogative—our *duty*—to reserve certain “unalienable” rights from the social contract.¹⁴⁸ Indeed, the Declaration's moral force derives from the claim that these natural rights are “self-evident” to all persons of normal sensibilities.¹⁴⁹ Equally evident are institutional violations of those rights, which compel the People to “alter or to abolish” their government when it “evinces a design to reduce them under absolute Despotism.”¹⁵⁰ Finally, the Declaration recognizes in the People—all of the People—the moral authority “to institute [a] new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”¹⁵¹ To Jefferson's generation, this philosophy seemed to require an institutional structure founded in the radical notion of popular sovereignty.

148. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

149. *Id.*

150. *Id.*

151. *Id.*

II. JAMES WILSON, MORAL SENTIMENTALISM, AND POPULAR SOVEREIGNTY

On a Saturday evening in early October of 1787, just nineteen days after the close of the Constitutional Convention, a large crowd gathered in the yard of the Pennsylvania State House to nominate new delegates to the state assembly.¹⁵² Already, vigorous opposition to the proposed federal union had surfaced in the local press—just a day earlier the pseudonymous “Centinel” had published the first of several influential attacks in Philadelphia’s *Independent Gazetteer*—and local Federalists urged their most learned spokesman to seize the opportunity to present a public defense of the new Constitution.¹⁵³ James Wilson, a transplanted Scotsman and one of the young nation’s preeminent attorneys, was among the Constitution’s principal architects,¹⁵⁴ and the speech he gave that night would become perhaps the single most influential and important contribution to the ratification debates.¹⁵⁵ Indeed, Bernard Bailyn has suggested that “in the ‘transient circumstances’ of the time it was not so much the *Federalist [Papers]* that captured most people’s imagination as James

152. PENNSYLVANIA AND THE FEDERAL CONSTITUTION: 1787-1788, at 1, 9, 142 (John Bach McMaster & Frederick D. Stone eds., 1888).

153. *Id.* at 6-7, 9, 565. “Centinel,” likely anti-federalist Samuel Bryan, wrote a series of widely read essays in opposition to the proposed Constitution, the first of which appeared on October 5, 1787. *Id.* at 6-7; Centinel, *To the Freemen of Pennsylvania*, INDEP. GAZETTEER, Oct. 5, 1787.

154. Max Farrand, the great documentarian of the Constitutional Convention, called the Pennsylvanian James Madison’s “ablest supporter,” which, on reflection, perhaps does not give Wilson quite *enough* credit. See MAX FARRAND, THE FRAMING OF THE CONSTITUTION 197-98 (1913). For an even more complimentary account of Wilson’s role, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008). One researcher has even uncovered a very early handwritten draft in the Wilson papers at the Pennsylvania Historical Society, which suggests that he may have been the charter’s principal draftsman. See Lorianne Updike Toler, *Missing Documents and Constitutional Treasures: (Re)Discoveries in Volume 2 of James Wilson’s Papers at the Pennsylvania Historical Society 4* (2010) (unpublished manuscript) (on file with author).

155. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 328 (enlarged ed. 1992).

Wilson's speech of October 6, 1787, the most famous, to some the most notorious, federalist statement of the time."¹⁵⁶

In just a few minutes, Wilson outlined the general structure of the uniquely American concept of popular sovereignty as he understood it—and he understood it more completely and systematically than any other of the Constitution's framers.¹⁵⁷ Wilson summarized plans for a federal government of enumerated powers—one whose authority was limited to “the positive grant[s] expressed in the instrument of union”¹⁵⁸—founded upon a novel theory of political authority. Under the Constitution, the *People* would retain “supreme” or “original” sovereignty, and would vest local, state, and national governments with only “derivative” authority.¹⁵⁹ This innovation rejected the classical account of the indivisible and unlimited sovereign, and embodied a uniquely American conception of the social contract.¹⁶⁰ Wilson's political and moral philosophy emerged from his education in Scotland, evolved through the Constitutional Convention and ratification debates, and matured in his *Lectures on Law* at the College of Philadelphia and in his opinion as Associate Justice in the case of *Chisholm v. Georgia*.¹⁶¹ The effort in this Part is to understand how the foundational moral ideas Wilson brought with him from

156. *Id.*

157. See Randy E. Barnett, *The People or the State: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1731-35 (2007) [hereinafter, Barnett, *The People or the State*] (discussing Wilson's analysis of “sovereignty” in his opinion in *Chisholm v. Georgia* and Wilson's significant role in the Constitutional Convention).

158. James Wilson's State House Yard Speech (Oct. 6, 1787), in COLLECTED WORKS, *supra* note 1, at 171, 171-72 [hereinafter State House Yard Speech].

159. As I discuss later, other framers conceived of the states as independent sovereigns possessing plenary power over their citizens, and that it was the *states* that then bestowed limited authority on the federal government. This conception conflicted with Wilson's idea of a popular sovereignty delegated only in part to the state governments. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 461-63 (1793) (opinion of Wilson, J.). The tension between these two constructions lives on in our constitutional discourse to this day. See Amar, *supra* note 21, at 1435-37.

160. On the classical account, see HOBBS, *supra* note 18, at 115-18.

161. See *Chisholm*, 2 U.S. (2 Dall.) at 453, 453-64 (opinion of Wilson, J.); Kermit Hall, *Introduction*, *supra* note 42, at xv-xxi.

Scotland would inform his vision of popular sovereignty and the structures of American constitutionalism.

Wilson was born in 1742 at Carskerdo, Scotland, to devoutly religious parents, who sent him to grammar school and the University of St. Andrews with hopes he would enter the ministry of the Church of Scotland.¹⁶² While the complete scope of his academic training is a matter of some dispute, it is possible that Wilson also spent time at the universities of Glasgow and Edinburgh—where he might have encountered first-hand the teachings of Thomas Reid.¹⁶³ In any event, his courses at St. Andrews focused on moral and natural philosophy, and he undoubtedly passed through the work of Locke, Shaftesbury, Hutcheson, Hume, and Reid, among others.¹⁶⁴ Indeed, his learning and erudition were later evident enough to the faculty at the College of Philadelphia that it appointed him a tutor and granted him an honorary master's degree just a few months after his arrival in that city in 1765.¹⁶⁵

The circumstantial evidence thus suggests that Wilson was steeped in the Scottish Enlightenment from an early age, and a number of scholars have suggested that moral sentimentalism influenced his thoughts on democracy in a general way.¹⁶⁶ Kermit Hall, who co-edited the foremost modern collection of Wilson's papers, has observed, "[t]he Scottish Moral Enlightenment and the Common Sense school of philosophy associated with it pervaded [St. Andrews] and deeply influenced Wilson."¹⁶⁷ His co-editor, Mark David Hall, has likewise suggested that Wilson's views on democracy were rooted in "the realization that the common person could

162. Ewald, *supra* note 47, at 1062-64.

163. *See id.* at 1062-63, 1109-10.

164. *See* HALL, *supra* note 47, at 7. It is also worth noting that the four Scottish universities of the day far outstripped their English counterparts, which had become "little more than finishing schools for the aristocracy." Ewald, *supra* note 47, at 1083. Thus, "when James Wilson attended St. Andrews he received a far better education than anything that would have been available to him in England or in North America." *Id.*

165. SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 21-23.

166. *See, e.g.,* Kermit Hall, *Introduction*, *supra* note 42, at xv-xvi, xxi.

167. *Id.* at xvi.

know truth, particularly that of a moral nature, without the aid of expert jurists, priests, or philosophers.”¹⁶⁸ And biographer Geoffrey Seed has noted that “the influence of the Scottish common-sense philosophy which Wilson absorbed in his youth remained with him throughout his life.”¹⁶⁹ The aim of this Part, however, is to go beyond the circumstantial evidence of his education to examine several important moments in Wilson’s political life in America; and to assess the specific ways that sentimentalist philosophy may have influenced his thinking about popular sovereignty at those times.

The first of these moments is Wilson’s participation in, and considerable influence upon, the proceedings at the Constitutional Convention and the ratification debates that followed. Virtually every scholar of the Convention has credited Wilson with being, at the very least, the second most important delegate in Philadelphia; and, as noted above, there is reason to believe that he drafted the bulk of the actual document himself.¹⁷⁰ The second moment is Wilson’s *Lectures on Law*, which he composed for students at the College of Philadelphia in the early 1790s.¹⁷¹ The *Lectures*, which fill nearly seven hundred pages, were intended to cement Wilson’s reputation as the “American Blackstone,”¹⁷² and were thus, in one editor’s words, “long on theory and short on the kinds of blackletter law issues that might be of practical value to students.”¹⁷³ All the better for this discussion, however, as that theoretical approach has made the *Lectures*, “one of the most notable examples in American thought of the purported link between popular will and moral

168. See HALL, *supra* note 47, at 77.

169. See SEED, *supra* note 127, at 4.

170. See *supra* note 154. Pedersen, *supra* note 47, at 269. Pedersen observes wryly that, given James Madison’s reputation as the Constitution’s putative “father,” it might “be time to conduct a constitutional paternity test.” *Id.*

171. Mark David Hall, *Bibliographical Essay: History of James Wilson’s Law Lectures*, in COLLECTED WORKS, *supra* note 1, at 401, 401-03 [hereinafter Mark David Hall, *Bibliographical Essay*].

172. *Id.*

173. Kermit Hall, *Introduction*, *supra* note 42, at xx.

sense philosophy.”¹⁷⁴ Two ideas Wilson developed in the *Lectures* are of particular interest: First, is his grounding of American democracy in a Lockean concept he would call the “revolution principle”; second is his emphasis on juries’ critical functions in the structure of popular sovereignty. The third and final moment is Wilson’s opinion in *Chisholm v. Georgia*, which plainly and persuasively outlines the doctrine of popular sovereignty, as he understood it.¹⁷⁵ Hailed by some as “the first great constitutional case decided by the Supreme Court,” *Chisholm*, and particularly Wilson’s opinion, detailed a notably progressive conception of popular sovereignty—one that ultimately proved too radical for its time.¹⁷⁶ With these moments in mind, we can try to reconstruct a holistic and coherent account of Wilson’s popular sovereignty as it evolved over time—one that dissolves some of the seeming contradictions in his political thought.

A. *The Constitutional Convention*

It is perhaps ironic that James Wilson should emerge as the most determined populist among the delegates that assembled in Philadelphia in the summer of 1787. Not even ten years earlier, he had been forced to barricade himself inside his home as a drunken mob—angry at his legal defense of twenty-three British loyalists—raged outside.¹⁷⁷ And, in truth, he had built something of a reputation as an elitist and political conservative with his opposition to the Pennsylvania Constitution of 1776; his initial reluctance—based on strict orders of delegation—to vote in favor of the *Declaration of Independence*; and his support for the Bank of North America.¹⁷⁸ But, by a narrow margin, the Pennsylvania

174. *Id.* at xxi.

175. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.).

176. Barnett, *The People or the State*, *supra* note 157, at 1730.

177. For a detailed account of these events, popularly known as the siege of “Fort Wilson,” see SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 129-39.

178. On Wilson’s perceived elitism and opposition to the 1776 Pennsylvania Constitution (on the grounds of inadequate separation of powers), see SEED, *supra* note 127, at 92-93, 104-05. On the Pennsylvania delegation’s resistance to

Congress voted to include Wilson among its seven delegates to the Constitutional Convention, and that decision was to have a profound impact on the theory and structure of the document that emerged.¹⁷⁹ According to James Madison's notes, Wilson rose to speak over 140 times, more than any other delegate save his notoriously loquacious colleague Gouverneur Morris.¹⁸⁰ And he made by far the lengthiest and most vigorous of those remarks in defense of various forms of popular suffrage and equal representation.¹⁸¹

The general narrative of the Constitutional Convention is well documented, and I will not rehearse it in depth here. Rather, I will focus on Wilson's contributions, and in particular his steadfast dedication to three constitutional objectives. First and foremost, he repeatedly argued that the Constitution should implement as broad a scheme of popular suffrage and representation as possible, in order that the new government might rest firmly on the Lockean bedrock of popular consent.¹⁸² Second, he advocated for a strong federal government, which would absorb much of the authority then exercised by state governments.¹⁸³ Third, he pushed for a vital and empowered institution of combined judicial and executive revision of legislation.¹⁸⁴ Much of Wilson's thoughts on these issues emerged during what we might call the Convention's first phase, which was the presentation and debate of the Randolph Resolutions, or what would come to be known as the Virginia Plan.¹⁸⁵ It was during these early

independence, see Pedersen, *supra* note 47, at 265-66. On Wilson's support for the Bank, see SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 140-58.

179. SEED, *supra* note 127, at 42.

180. See, e.g., *Remarks of James Wilson in the Federal Convention, 1787*, in COLLECTED WORKS, *supra* note 1, at 80, 80-170.

181. See, e.g., *id.* at 93-95, 106-09.

182. See Leavelle, *supra* note 47, at 404-05.

183. *Id.* at 404-06.

184. *Id.* at 404, 406-07.

185. FARRAND, *supra* note 154, at 68; SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 219-20. Initially called the Randolph Resolutions after Virginia spokesman Edmund Randolph, the substance of the Virginia Plan was likely the work of James Madison. See SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 220.

weeks that Wilson began to earn his later reputation as Madison's "ablest supporter."¹⁸⁶

Wilson's defense of popular suffrage reached across several different structural contexts, beginning with the election of the legislative branch. The Virginia Plan provided for a bicameral legislature, with the People electing the members of the lower chamber.¹⁸⁷ That chamber would then choose the members of the upper chamber from among names nominated in the state legislatures.¹⁸⁸ Almost immediately several New England delegates—with Shays' and similar rebellions still fresh in mind—rose to oppose the popular election of the lower house.¹⁸⁹ Roger Sherman of Connecticut warned that "[t]he people . . . should have as little to do as may be about the Government,"¹⁹⁰ and Massachusetts's Elbridge Gerry quickly agreed, pointing to "the excess of democracy" his state had recently experienced.¹⁹¹ After Virginian George Mason spoke, Wilson jumped at the opportunity to defend the structural importance of popular suffrage, which he thought should extend to *both* houses.¹⁹² He employed a metaphor—likely borrowed from English political theorist James Stewart¹⁹³—to which he would return repeatedly during the ratification debates. The federal government, he said, was a "pyramid" which he hoped to raise "to a considerable altitude, and for that reason wished

186. FARRAND, *supra* note 154, at 198.

187. Resolutions Proposed by Mr. Randolph in Convention (May 29, 1787) [hereinafter Resolutions Proposed by Mr. Randolph], in JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 30, 30-31 (W.W. Norton & Co. 1987) (1840) [hereinafter MADISON'S NOTES].

188. *Id.* at 31.

189. *See, e.g.*, Remarks of Mr. Sherman (May 31, 1787), in MADISON'S NOTES, *supra* note 187, at 39.

190. *Id.*

191. Remarks of Mr. Gerry (May 31, 1787), in MADISON'S NOTES, *supra* note 187, at 39.

192. Remarks of Mr. Wilson (May 31, 1787), in MADISON'S NOTES, *supra* note 187, at 40.

193. SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 276.

to give it as broad a basis as possible.”¹⁹⁴ And he particularly disliked the idea of nominations to the upper house arising from the state legislatures, whose “interference” with the federal government he thought “should be obviated as much as possible.”¹⁹⁵

Like many of Virginia’s most contentious proposals, the question of popular suffrage was tabled for later debate,¹⁹⁶ but Wilson stuck doggedly to his guns whenever the topic was resumed. Indeed, a week later, he gave an even fuller defense of popular suffrage and sovereignty:

The Gov[ernmen]t ought to possess not only [fir]st the *force*, but [secon]dly the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.¹⁹⁷

Though the Committee eventually accepted his ideas in the lower house,¹⁹⁸ it soon became clear that the delegates’ sentiments were decidedly against a popularly elected Senate. Even so, Wilson repeatedly stood to object, characterizing direct election “not only as the corner Stone, but as the foundation of the fabric” of a constitutional republic.¹⁹⁹ On June 7th, he argued again that both branches ought “to be elected by the people,” and moved to postpone the debate to another time.²⁰⁰ Despite his best efforts, however, the state delegations voted unanimously to have the state legislatures elect the members of the Senate.²⁰¹

194. Remarks of Mr. Wilson (May 31, 1787), in MADISON’S NOTES, *supra* note 187, at 40.

195. *Id.*

196. MADISON’S NOTES, *supra* note 187, at 43.

197. Remarks of Mr. Wilson (June 6, 1787), in MADISON’S NOTES, *supra* note 187, at 74.

198. MADISON’S NOTES, *supra* note 187, at 79.

199. Remarks of Mr. Wilson (June 21, 1787), in MADISON’S NOTES, *supra* note 187, at 167.

200. Remarks of Mr. Wilson (June 7, 1787), in MADISON’S NOTES, *supra* note 187, at 82-83, 85.

201. MADISON’S NOTES, *supra* note 187, at 87. It is perhaps worth noting that Wilson had much greater success on this point in reforming the Pennsylvania

A related but far more contentious issue was the question of legislative apportionment. The Virginia Plan called for proportional representation in both houses, meaning that each state would send a number of representatives commensurate with its population.²⁰² The smaller states, led by George Read of Delaware, Luther Martin of Maryland, and William Paterson of New Jersey, vehemently opposed this proposal as “striking at [their] existence,” and insisted that each state enjoy equal representation in the federal legislature.²⁰³ This question, of course, also implicated popular suffrage and the structures of popular sovereignty, though in slightly different ways. First, equal state representation would work a serious malapportionment, giving a distinct representative advantage to the individual citizens of the less populous states. Second, it struck at the very heart of the sovereignty question: Was it to be lodged in the state governments—as equal representation supposed—or, as Wilson hoped, in the People at large? When the topic came to the floor in earnest, Wilson reiterated his belief that “all authority was derived from the people, [thus] equal numbers of people ought to have an equal n[umber] of representatives,” and he strenuously urged the members to correct this principle, which had “been improperly violated in the [Articles of] Confederation.”²⁰⁴ This was to become the single most controverted point in the Convention, and, again, Wilson never relented.²⁰⁵

With the sides seemingly intransigent, Connecticut’s Roger Sherman proposed to split the difference, with proportional representation in the House and equal

Constitution shortly after federal ratification. There he defeated his colleague’s plan to have the lower house elect the members of the upper. SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 300-03.

202. Resolutions Proposed by Mr. Randolph, *supra* note 187, at 30.

203. Remarks of Mr. Patterson [sic] (June 9, 1787), in MADISON’S NOTES, *supra* note 187, at 95.

204. Remarks of Mr. Wilson (June 9, 1787), in MADISON’S NOTES, *supra* note 187, at 97. It can be no surprise, then, that the Supreme Court would appeal to Wilson’s arguments at the Convention in support of the “one person, one vote” structure it upheld in *Reynolds v. Sims*, 377 U.S. 533, 564 n.41, 568 (1964).

205. SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 220-21.

representation in the Senate.²⁰⁶ The smaller states were willing to go no further than Sherman's compromise—even threatening to walk out or adjourn the Convention²⁰⁷—but Wilson refused to yield; and in the course of these discussions he would make some telling remarks on the relative status of the states and the People.²⁰⁸ First, to treat the states as though it were they, and not the People, whose consent authorized government was to replicate one of the great failings of the British system:

The leading argument of those who contend for equality of votes among the States is that the States as such being equal, and being represented not as districts of individuals, but in their political & corporate capacities, are entitled to an equality of suffrage. According to this mode of reasoning the representation of the boroughs in Engl[an]d which has been allowed on all hands to be the rotten part of the Constitution, is perfectly right & proper.²⁰⁹

Second, he cautioned the delegates that equal representation would disenfranchise the People—the true source of sovereign authority—in favor of artificial political institutions:

It would be in the power then of less than 1/3 [of the people] to overrule 2/3 whenever a question should happen to divide the States in that manner. Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called *States*[?]²¹⁰

Wilson's clear implication—that those who opposed proportional representation placed their own offices above the principle of popular sovereignty—can hardly have been

206. Remarks of Mr. Sharman [sic] (June 11, 1787), in MADISON'S NOTES, *supra* note 187, at 103.

207. Remarks of Mr. Patterson [sic] (July 16, 1787), in MADISON'S NOTES, *supra* note 187, at 299-300.

208. *See, e.g.*, Remarks of Mr. Wilson (July 7, 1787), in MADISON'S NOTES, *supra* note 187, at 254.

209. Remarks of Mr. Wilson (June 28, 1787), in MADISON'S NOTES, *supra* note 187, at 208; *accord* Remarks of Mr. Wilson (June 16, 1787), in MADISON'S NOTES, *supra* note 187, at 126 (discussing the "poison" of equal representation in Great Britain).

210. Remarks of Mr. Wilson (June 30, 1787), in MADISON'S NOTES, *supra* note 187, at 221.

lost on the smaller state delegations. And, even as conciliation began to form around Sherman's compromise, Wilson made a final effort to persuade the Committee: "If equality in the 2d branch was an error that time would correct, he should be less anxious," but, he feared that such a flaw in the mechanics of representation would instead render a "fundamental and a perpetual error."²¹¹ But, again, he was ultimately outvoted;²¹² lamenting to the very end, "nothing [is] so pernicious as bad first principles."²¹³

Wilson's advocacy of popular suffrage extended also to the Executive branch, where he had notably fewer supporters. Under the Virginia Plan, Congress would elect one or more people to the Executive, for an undetermined term of years.²¹⁴ Wilson was concerned with both the suggested method of election and the possibility of a plural Executive. He opposed legislative appointment for two reasons. First, he (again) hoped that the sovereign People would have as direct a voice as possible in the new government.²¹⁵ Though he knew his thoughts would sound "chimerical," Wilson said, "at least . . . in theory he was for an election by the people."²¹⁶ Second, he cautioned that the proposed scheme would make the Executive dependent on the Legislature, which would undermine the Montesquieuan separation of powers necessary to check potential abuses of

211. Remarks of Mr. Wilson (July 14, 1787), in MADISON'S NOTES, *supra* note 187, at 295.

212. MADISON'S NOTES, *supra* note 187, at 297.

213. Remarks of Mr. Wilson (July 14, 1787), in MADISON'S NOTES, *supra* note 187, at 296. It is perhaps interesting to note that Wilson viewed the small states' ostensible concession—that all money bills would originate in the House—as another potentially destructive mistake. See Remarks of Mr. Wilson (Aug. 13, 1787), in MADISON'S NOTES, *supra* note 187, at 444. He found this structure "pregnant with altercation" between the two branches, and predicted that, "[t]he House of Rep[resentatives] will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate." *Id.* On this, as on other matters, we may consider Wilson prescient.

214. Resolutions Proposed by Mr. Randolph, *supra* note 187, at 31.

215. Remarks of Mr. Wilson (June 1, 1787), in MADISON'S NOTES, *supra* note 187, at 49.

216. *Id.* at 48.

power.²¹⁷ Though he could not persuade the Committee to turn the Presidential election over to the People directly, he was ultimately able to wrest the appointment power away from the legislative branch.²¹⁸ As a second-best alternative, he proposed that the states be divided into districts, wherein the People would choose “Electors of the Executive magistracy,” who would meet at an appointed time and cast ballots for the Presidency.²¹⁹ With just a few modifications, Wilson’s plan would come to form the Electoral College, which, for better or worse, still decides our presidential elections.²²⁰

Wilson found more sympathy with his colleagues regarding the number of people that would form the Executive. When the issue came to the floor, Wilson spoke immediately in favor of a single President.²²¹ On the other side, Edmund Randolph “strenuously oppose[d] a unity in the Executive,” which he regarded as “the foetus of monarchy,” and suggested instead a three person body.²²² Wilson responded, as he would repeatedly, that—contrary to Randolph’s thinking—the best way to check Executive power is to lodge it in a single person: “In order to controul the Legislative authority, you must divide it. In order to controul the Executive you must unite it. One man will be more responsible than three.”²²³ By “responsible,” Wilson meant, in part, that the electorate could hold a single President directly accountable, whereas the individual members of a plural

217. See, e.g., Remarks of Mr. Wilson (July 17, 1787), in MADISON’S NOTES, *supra* note 187, at 309.

218. MADISON’S NOTES, *supra* note 187, at 590 (vote approving Electoral College).

219. Remarks of Mr. Wilson (June 2, 1787), in MADISON’S NOTES, *supra* note 187, at 50.

220. MADISON’S NOTES, *supra* note 187, at 590 (vote approving Electoral College).

221. Remarks of Mr. Wilson (June 1, 1787), in MADISON’S NOTES, *supra* note 187, at 45.

222. Remarks of Mr. Randolph (June 1, 1787), in MADISON’S NOTES, *supra* note 187, at 46.

223. Remarks of Mr. Wilson (June 16, 1787), in MADISON’S NOTES, *supra* note 187, at 127.

executive could find some political “cover” for their actions.²²⁴ Structurally speaking, then, it is often difficult for the independent voter to trace to the root those moral shortcomings that may befall professional politicians in assembled camaraderie, and, with popular accountability thus weakened, the Constitution must divide and weaken the institution’s power accordingly. In the case of a single President, however, whose conduct is quite apparent to the ordinary, independent (in Wilson’s plan) voter, electoral accountability remains the most appropriate check on power.²²⁵

If Wilson’s first great cause at the Convention was to increase popular suffrage and representation, his second—and not unrelated—goal was to enlarge federal authority at the expense of the state governments. In the months leading up to Philadelphia, Madison had concluded that it was essential that the new government have absolute veto power over any state legislation.²²⁶ The great deficiency of the Articles of Confederation was the relative powerlessness of the central government, which had allowed the states to fall into self-interested disarray.²²⁷ In his search for political solutions to this problem, Madison’s study of historical democracies had led him to believe—contrary to Montesquieu’s well-known thoughts on the matter²²⁸—that a

224. See Remarks of Mr. Wilson (June 4, 1787), in MADISON’S NOTES, *supra* note 187, at 60.

225. Wilson would repeat this argument about individual “responsibility” in arguing that the Executive, and not the Senate, should appoint federal judges. Remarks of Mr. Wilson (June 5, 1787), in MADISON’S NOTES, *supra* note 187, at 67.

226. See, e.g., Letter from James Madison to George Washington (Apr. 16, 1787), in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 344, 346 (Gaillard Hunt ed., 1901) [hereinafter WRITINGS OF JAMES MADISON]. For a more complete account of Madison’s thoughts here, see Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 20-23 (2010) [hereinafter Bartrum, *Constructing the Constitutional Canon*].

227. For a thorough discussion of this period, see generally WOOD, *supra* note 37, at 393-430.

228. See MONTESQUIEU, THE SPIRIT OF THE LAWS 124 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“It is in the nature of a republic to have only a small territory . . .”).

large, diverse republic would be more stable than a small homogeneous nation.²²⁹ In a small polity, a minor cabal or faction might disrupt, or even control, the government with relative ease, but in a large republic, the sheer number of people and diversity of interests would insulate the government from committed minorities.²³⁰ Thus, when he arrived at the Convention, Madison was convinced that the new federal government must possess enough power to diffuse the corruption that was likely to poison the smaller state governments.²³¹ To this end, he ensured that the Virginia Plan empowered the federal Legislature to “negative all laws passed by the several States,”²³² and he found in Wilson a staunch ally to this cause.²³³

In nearly all of his structural proposals, Wilson urged the Committee, in one way or another, to “obviate[]” the states’ ability to “interfere[]” with federal prerogatives,²³⁴ so that “the members of the Nat’l Gov’t should be left as independent as possible of the State Gov’ts in all respects.”²³⁵ When Sherman and Read accused him and Madison of endeavoring

229. See JAMES MADISON, *Vices of the Political System of the United States* [hereinafter MADISON, *Vices*], in WRITINGS OF MADISON, *supra* note 226, at 361, 368. This insight likely came to Madison through his reading of David Hume’s *Idea of a Perfect Commonwealth*. See Bartrum, *Constructing the Constitutional Canon*, *supra* note 226, at 20 n.37.

230. This, of course, is the insight described in *Federalist 10*. THE FEDERALIST NO. 10 (James Madison). Madison also presented these thoughts during the early days of the Convention, though it is unclear how many of the delegates grasped his ideas. See Bartrum, *Constructing the Constitutional Canon*, *supra* note 226, at 23.

231. MADISON, *Vices*, *supra* note 229, at 366-68. Madison also undoubtedly drew some inspiration for these thoughts from Book VII of Aristotle’s *Politics*. See, e.g., Peter L. P. Simpson, *Aristotle’s Regime of the Americans*, in ARISTOTLE’S POLITICS TODAY 109, 109-27 (Lenn E. Goodman & Robert Talisse eds., 2007).

232. Resolutions Proposed by Mr. Randolph, *supra* note 187, at 31.

233. See, e.g., Remarks of Mr. Wilson (June 8, 1787), in MADISON’S NOTES, *supra* note 187, at 90; accord Remarks of Mr. Wilson (Aug. 23, 1787), in MADISON’S NOTES, *supra* note 187, at 518 (calling some version of the federal negative “the key-stone wanted to complet the wide arch of Government”).

234. Remarks of Mr. Wilson (May 31, 1787), in MADISON’S NOTES, *supra* note 187, at 40.

235. Remarks of Mr. Wilson (June 22, 1787), in MADISON’S NOTES, *supra* note 187, at 172.

“to abolish the State Gov’ts,”²³⁶ Wilson responded that he had no objection to the states’ continued existence “provided [they] were restrained to certain local purposes.”²³⁷ When fellow Pennsylvanian John Dickinson renewed the accusation, Madison recounted Wilson’s use of an astronomical metaphor:

He did not see the danger of the States being devoured by the Nation’l Gov’t. On the contrary, he wished to keep them from devouring the national Gov’t. He was not however for extinguishing these planets as was supposed by Mr. D.—neither did he on the other hand, believe that they would warm or enlighten the Sun. Within their proper orbits they must still be suffered to act for subordinate purposes for which their existence is made essential by the great extent of our Country.²³⁸

Thus, Wilson well understood that localized governments would be much more practical and efficient across a large nation, and so assumed that the People would delegate a portion of their sovereign authority to the states and another portion to the federal government.²³⁹ But his language—the states must be “suffered to act” within their “proper orbits”²⁴⁰—speaks volumes about his general discomfort with recognizing and respecting additional political constructions at the possible expense of the sovereign People.

Indeed, Wilson repeatedly made it clear that it was definitively with the People—not the states—that sovereignty lay, and it was only in the federal government

236. Remarks of Mr. Sherman (June 6, 1787), in MADISON’S NOTES, *supra* note 187, at 74; *accord* Remarks of Mr. Read (June 6, 1787), in MADISON’S NOTES, *supra* note 187, at 78.

237. Remarks of Mr. Wilson (June 6, 1787), in MADISON’S NOTES, *supra* note 187, at 78-79.

238. Remarks of Mr. Wilson (June 7, 1787), in MADISON’S NOTES, *supra* note 187, at 85.

239. Remarks of Mr. Wilson (June 7, 1787) & (June 19, 1787), in MADISON’S NOTES, *supra* note 187, at 85, 151-52; *accord* State House Yard Speech, *supra* note 158, at 174-75.

240. Remarks of Mr. Wilson (June 7, 1787), in MADISON’S NOTES, *supra* note 187, at 85.

that the People as a whole were represented.²⁴¹ At the Pennsylvania ratifying convention, he would make the point emphatically, quoting words he himself had penned in Philadelphia²⁴²:

This, Mr. President, is not a government founded upon compact [between the states]; it is founded upon the power of the people. They express in their name and their authority—“*We, the people, do ordain and establish*” &c.; from their ratification alone it is to take its constitutional authenticity.²⁴³

To this end, Wilson argued for a far broader swath of federal legislative power than the Articles of Confederation had conferred.²⁴⁴ He “wished for vigor in the [federal] Gov’t,” and he “wished [for] that vigorous authority to flow immediately from the legitimate source of all authority”—that is, the People, without the potential interference of state institutions.²⁴⁵ And, although he and Madison would ultimately fail to persuade the Convention to adopt a federal veto on state legislation, they were at least able to ensure that it was their version of the Supremacy Clause—not

241. See, e.g., Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), in COLLECTED WORKS, *supra* note 1, at 178, 184 (“If a difference can be discovered between [state and federal governments], it is in favour of the federal government; because that government is founded on a representation of the whole union . . .”).

242. The earliest extant draft of the Preamble is, at least, drafted in Wilson’s hand. Pedersen, *supra* note 47, at 259.

243. 2 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497-98 (Jonathan Elliot ed., 2d ed. 1888). It is worth noting that the Anti-Federalists kept the “compact” conception of the Union alive for many years; indeed, this debate forms the not-so-hidden subtext of *McCulloch v. Maryland*, giving perhaps a richer context to Marshall’s famous reminder that “it is a *constitution* [not a compact] we are expounding.” 17 U.S. (4 Wheat.) 316, 407 (1819).

244. Compare Report of the Committee on Detail, Sec. VII (Aug. 6, 1787), in MADISON’S NOTES, *supra* note 187, at 389-90, and Remarks of Mr. Wilson (June 16, 1787), in MADISON’S NOTES, *supra* note 187, at 124-25 (comparing broad powers in Virginia Plan to narrow formulation in the New Jersey plan), with ARTICLES OF CONFEDERATION of 1781, art. IX.

245. Remarks of Mr. Wilson (June 6, 1787), in MADISON’S NOTES, *supra* note 187, at 74.

Luther Martin's far more deferential language—that made it into Article VI.²⁴⁶

Wilson's third great cause at the Convention seems, at first blush, to conflict with his general effort to promote a constitutional structure designed to realize majoritarian popular will. He and Madison pushed repeatedly for a Council of Revision (similar to what New York had created in its Constitution of 1777) empowered to assess the constitutionality of legislative acts before they became law.²⁴⁷ The Council, which Randolph presented as part of the Virginia Plan, would be composed of "the Executive and a convenient number of the National Judiciary," and would have the power to veto any act of the federal Legislature.²⁴⁸ The Legislature would then have the opportunity to overcome the Council's veto by an undetermined supermajority in each house.²⁴⁹ While the Executive, at least in Wilson's formulation, was to be popularly elected, the Judiciary's inclusion gave the Council a distinctly counter-majoritarian flavor. Given Wilson's otherwise stout advocacy of popular decision-making, his efforts here provoke at least some curious thought.

The proposed Council ran into immediate opposition from Elbridge Gerry, who thought the Judiciary's input unnecessary given the inherent power of judicial review: "[The Judiciary] will have a sufficient check ag[ain]st encroachments on their department by their exposition of the laws, which involve[s] a power of deciding on their Constitutionality."²⁵⁰ While Wilson, too, undoubtedly assumed the power of judicial review—he would have beaten John Marshall to the punch had congressional revision not mooted the first *Hayburn's Case*—he was quick to respond.²⁵¹

246. Amar, *supra* note 21, at 1458.

247. N.Y. CONST. of 1777, art. III.

248. Resolutions Proposed by Mr. Randolph, *supra* note 187, at 32.

249. *See id.*

250. Remarks of Mr. Gerry (June 4, 1787), in MADISON'S NOTES, *supra* note 187, at 61.

251. For a thorough discussion of the "first Hayburn Case," see Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281 (1908). It is perhaps of interest that Farrand also notes that the Court actually wrote an opinion

Quite contrary to Gerry's thoughts, Wilson argued that the Council's authority, as proposed, did not "go far enough":

If the Legislative[,] Exe[cutive] & Judiciary ought to be distinct & independent. The Executive ought to have an absolute negative [on legislation]. Without such a self-defense the Legislature can at any moment sink it into non-existence. [I am] for varying the proposition in such a manner as to give the Executive & Judiciary jointly an *absolute negative*.²⁵²

Not many agreed with Wilson, however, and the states unanimously voted down his proposal, allowing instead a two-thirds majority vote in each chamber to override an exclusively Executive veto.²⁵³

Wilson would not abandon judicial involvement in the revision process, however, and he renewed his proposal after the dust had settled on the question of Senate apportionment.²⁵⁴ Though he acknowledged that he had been outvoted before, he thought the idea important enough that he should offer a fuller defense:

The Judiciary ought to have an opportunity of remonstrating ag[ain]st projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them 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.²⁵⁵

exercising a form of judicial review—*Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795)—eight years before *Marbury* was decided. Farrand, *supra*, at 285.

252. Remarks of Mr. Wilson (June 4, 1787), in MADISON'S NOTES, *supra* note 187, at 61 (emphasis added).

253. MADISON'S NOTES, *supra* note 187, at 66 (recording unanimous no vote on the absolute veto, and approval of supermajority sub silentio).

254. Remarks of Mr. Wilson (July 21, 1787), in MADISON'S NOTES, *supra* note 187, at 336-37.

255. *Id.*

Gerry objected again, claiming that this would create an overpowering alliance between the Executive and Judicial branches,²⁵⁶ and his Massachusetts colleague Nathaniel Gorham reiterated earlier worries that the Judges must remain independent of the law making process, so that they would “carry into the exposition of the laws no prepossessions with regard to them.”²⁵⁷ Wilson’s proposal for a joint Council was thus voted down again.²⁵⁸ Three weeks later, Madison and Wilson would make one final, unsuccessful, motion to reconsider.²⁵⁹

In the end, then, Wilson did not see a number of his ideas make it into the Constitution that was sent out to the state conventions. He conceded during the ratification process that he was “not a blind admirer of this plan of government, and . . . there are some parts of it, which if my wish had prevailed, would certainly have been altered.”²⁶⁰ Indeed, the government that Wilson wished for would have consisted of two popularly elected and proportionally representative legislative chambers, empowered to veto any state legislation; a popularly elected President; and a Council of Revision—made up of the President and the Judiciary—with an absolute veto over federal legislation. If subsequent developments in our constitutional ethos make his radically populist plans for the elective branches seem generally prescient, we must also concede that Wilson’s views on the judicial role in legislative revision likely grate on modern sensibilities. One need not be a strict constructionist to fairly shudder at the thought of a *Lochner* Court empowered to veto—without recourse—Congress’s “improper views” as expressed in “unwise” or “destructive” legislation.²⁶¹ His divergent structural ideas—at once broadly populist and

256. Remarks of Mr. Gerry (July 21, 1787), in MADISON’S NOTES, *supra* note 187, at 342.

257. Remarks of Mr. Ghorum [sic] (July 21, 1787), in MADISON’S NOTES, *supra* note 187, at 342.

258. MADISON’S NOTES, *supra* note 187, at 343 (recording vote).

259. *Id.* at 461-62 (recording vote on Madison’s motion, which Wilson seconded).

260. State House Yard Speech, *supra* note 158, at 176.

261. See *supra* note 255 and accompanying text.

narrowly elitist—thus present something of a puzzle for the modern theorist of popular sovereignty. It is a puzzle that I hope to resolve below in terms of Wilson’s beliefs about individual moral epistemology and obligation.

B. Lectures on Law

Late November of 1790 brought bustle and buzz to Philadelphia, as the first United States Congress prepared to assemble in its temporary home on Chestnut and Sixth Streets.²⁶² National luminaries such as George Washington, John Adams, Thomas Jefferson, and Alexander Hamilton began to take up residence around town, as Wilson’s home city played host to the birth of the new nation.²⁶³ Amid the excitement, the College of Philadelphia announced that the first lecture in a new course on law—the brainchild of young lawyer, and new Provost, Charles Smith—would take place on December 15th in the school’s main hall.²⁶⁴ Law courses had already been offered at the College of William & Mary, and at Judge Tapping Reeve’s library (what would become Yale Law School) in Litchfield, Connecticut, and it made perfect sense that the seat of a new government dedicated to the rule of law should offer legal education at its resurgent university.²⁶⁵ It also made perfect sense that Wilson—the city’s preeminent lawyer and a newly minted Supreme Court justice—should be the first professor.²⁶⁶

Wilson undoubtedly relished the opportunity to compose and deliver lectures on what he believed was a wholly new entry in the annals of systemic legal theory: the structures of American popular sovereignty and the rule of law.²⁶⁷ An

262. See SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 309-10.

263. *Id.* at 308-10.

264. *Id.*

265. *Id.* at 308-11. On Litchfield, see ANTHONY T. KRONMAN, HISTORY OF THE YALE LAW SCHOOL 17-36 (2004).

266. See SMITH, JAMES WILSON: FOUNDING FATHER, *supra* note 47, at 309-11. There was some discussion of a joint offering between Wilson and Edmund Randolph, but, for whatever reason, that did not materialize. *Id.* at 309.

267. See Mark David Hall, *Bibliographical Essay*, *supra* note 171, at 401 (describing Wilson’s ambition “to be remembered as America’s Blackstone”).

earlier committee report—which Wilson likely drafted himself—had outlined the *Lectures*' purpose:

The object of a system of law lectures in this country should be to explain the Constitution of the United States—its principles—its parts—its powers & the distribution & operation of these powers,—to ascertain the merits of that Constitution by comparing it with the Constitutions of other states—with the principles of government, with the rights of men—to point out the spirit, the design & the probable effect of the laws & treaties of the United States²⁶⁸

With this in mind, Wilson must have been profoundly satisfied to address his introductory lecture—*Of the Study of the Law in the United States*—to “[t]he President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen . . . the whole comprising a most brilliant and respectable audience.”²⁶⁹ Indeed, he expressed “[a]nxiety and selfdistrust” at addressing a “fair audience so brilliant as this is,” and entreated the distinguished attendees bestow upon him “an uncommon degree of generous indulgence.”²⁷⁰

Sadly, this first day proved to be the high point of Wilson’s professorship, as he was never in fact able to deliver many of the lectures he prepared.²⁷¹ That does not detract, however, from the thoughtfulness and erudition of the written *Lectures*, which remain a rich resource for those hoping to understand the theoretical connections between popular sovereignty and American constitutional design. As Aaron Knapp has put it, “we cannot understand the intellectual origins of American legal thought without first understanding James Wilson’s law lectures on their own

268. *Id.* at 402. Hall notes that, while Wilson “probably” wrote the report, there is no actual evidence of his authorship. *Id.* at 402 n.4.

269. PENNSYLVANIA PACKET, AND DAILY ADVERTISER, Dec. 25, 1790, at 3, quoted in Mark David Hall, *Bibliographical Essay*, *supra* note 171, at 403.

270. WILSON, *Of the Study of the Law*, *supra* note 1, at 431.

271. SEED, *supra* note 127, at 150.

terms and according to their own stated objectives.”²⁷² Principal among those objectives was to explain and justify the foundations of the new American jurisprudence, and to do what Wilson believed necessary to root the architecture of popular sovereignty in more fundamental considerations of natural law and the human condition.²⁷³ From these first principles, he built out the basic theoretical and institutional commitments of the new American doctrine. Of chief relevance in this regard, at least for these purposes, are Wilson’s discussion of an American “revolution principle,” and his determined emphasis on the structural significance of the American jury.²⁷⁴

From early on, the *Lectures* put to rest any doubts we might harbor about Wilson’s dedication to moral sentimentalism, or, more particularly, to the teachings of Thomas Reid.²⁷⁵ In just his third lecture, *Of the Law of Nature*, he presented the ontological and epistemological questions at the heart of Enlightenment moral theory, though he gave them different names: “[P]rincipum essendi—the principle of existence; the principle which *constitutes* obligation” and “principum cognoscendi—the principle of knowing it; [or how] it may be *proved* or *perceived*.”²⁷⁶ In giving life to these “principles,” he offered an almost verbatim account of Reid’s views:

Having thus stated the question—what is the efficient cause of moral obligation?—I give it this answer—the will of God. . . . His just and full right of imposing laws, and our duty in obeying them, are the sources of our moral obligations. If I am asked—why do you obey the will of God? I answer—because it is my duty so to do. If I am asked again—how do you know this to be your duty? I answer again—because I am told so by my moral sense or conscience. If I am asked a third time—how do you know that you ought to do that, of which your conscience enjoins the performance? I can only say, I

272. Knapp, *supra* note 47, at 194.

273. See JAMES WILSON, *Of the Law of Nature*, in COLLECTED WORKS, *supra* note 1, at 500, 500 [hereinafter WILSON, *Of the Law of Nature*].

274. Here I am particularly indebted to Aaron Knapp’s excellent recent work emphasizing Wilson’s dedication to juries. See Knapp, *supra* note 47.

275. See WILSON, *Of the Law of Nature*, *supra* note 273, at 508.

276. *Id.* at 507.

feel that such is my duty. Here investigation must stop; reasoning can go no farther.²⁷⁷

Thus, Wilson shared both Reid's ontological commitment to absolute and objective first principles, and his epistemological commitment to an inherent moral sense and the feelings or affections—and thus the obligations—it produces.²⁷⁸ In particular, Wilson made clear his belief in mankind's universal, or near universal, possession of the moral sense, which he located at the very center of our theoretical capability—and duty—of self-government.²⁷⁹

To this end, Wilson argued forcefully for an optimistic state of nature, in which nearly all humans possess the essential moral qualities and act accordingly.²⁸⁰ Indeed, it is often the very effort to establish political institutions and government that obscures our natural potential, and inclination, to behave morally:

In the most uninformed savages, we find the *communes notitiae*, the common notions and practical principles of virtue These same savages have in them the seeds of the logician, the man of taste, the orator, the statesman, the man of virtue, and the saint. . . . [N]ations that have been supposed stupid and barbarous by nature, have, upon fuller acquaintance with their history, been found to have been rendered barbarous and depraved by institution. When, by the power of some leading members, erroneous laws are once established, and it has become the interest of subordinate tyrants to support a corrupt system; error and iniquity become sacred. Under such a system, the multitude are fettered by the prejudices of education, and awed by the dread of power, from the free exercise of their reason.²⁸¹

Thus, in Wilson's moral epistemology it is the "free and independent" man who is most reliably awake and accountable to natural law and the experience of moral

277. *Id.* at 508.

278. Compare *id.*, with REID, *Essays on the Active Powers*, *supra* note 129, at 352, 358.

279. WILSON, *Of the Law of Nature*, *supra* note 273, at 512 ("Never was there any of the human species above the condition of an idiot, to whom all actions appeared indifferent.")

280. *Id.* at 517.

281. *Id.*

obligation, and so it is in him that the wise society places its ultimate trust.²⁸² Conversely, it is in establishing and working within the institutions and structures of power that we often become alienated from the moral sentiments, and begin to act instead on the sorts of self-interested and fearful motivations that Hobbes saw at work in the state of nature.²⁸³ For Wilson, then, it is in the corrupting politics of unchecked power—not in the state of nature—that mankind eventually succumbs to “the war of all against all.”²⁸⁴

It is only when we understand this underlying moral philosophy—what we may call reverence for “Independent Man” and distrust of “Political Man”—that some of Wilson’s seemingly radical ideas about American popular sovereignty begin to make sense. The first of these ideas, which he would call the “revolution principle,” he introduced in his very first lecture to the gathered luminaries of the new republic.²⁸⁵ It was in demonstrating the ways that the American system was “materially *better* than the principles of the constitution and government and laws of England” that he began to make his case:

Permit me to mention one great principle, the *vital* principle I may well call it, which diffuses animation and vigour through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.²⁸⁶

Though Blackstone treated “this great and fundamental principle . . . as a political chimera, existing only in the minds of some theorists,” Wilson argued that the American

282. *Id.*; see WILSON, *Of the Study of the Law*, *supra* note 1, at 445-46. In this Article, I call this man “Independent Man.”

283. HOBBS, *supra* note 18, at 78.

284. *Id.* at 76, 78 (providing the equivalent translation of “a war . . . of every man [is] against every man”). In this Article, I call this man “Political Man.”

285. WILSON, *Of the Study of the Law*, *supra* note 1, at 443. Among later scholars, see, for example, Dennison, *supra* note 47, at 157; Knapp, *supra* note 47, at 252-53.

286. WILSON, *Of the Study of the Law*, *supra* note 1, at 440-41.

experience had proven that it could serve as the basis for a very real and successful jurisprudence.²⁸⁷ Indeed, as Knapp observes, the revolution principle is clear evidence that “Wilson did not consider Article V the exclusive mechanism by which the American people could change or replace the Constitution in the future. The People themselves . . . retained an unqualified right to direct revolutionary action notwithstanding formal amendment procedures.”²⁸⁸ This certainly seems a radical assertion from a man dedicated to the rule of law.

In truth, however, Wilson believed that the rule of law *necessarily incorporates* the revolution principle; indeed, revolution is a fundamental feature of that rule: “[A] revolution principle certainly is, and certainly should be taught as a principle of the constitution of the United States, and of every State in the Union.”²⁸⁹ These assertions must have presented something of a puzzle to the classically educated lawyers and statesmen in the room. In fact, Blackstone, whose *Commentaries on the Laws of England* were read widely in America, flatly rejected the idea, in language that Wilson himself quoted: “No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation, nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.”²⁹⁰ How can we reconcile law’s claim to authority—the obligatory force it is thought to exercise over citizens—with the notion that those same citizens have a legal right to cast off those obligations whenever and however they see fit? To understand Wilson’s seemingly paradoxical argument here, we must return again to his views on moral epistemology and obligation.

The just rule of law, in Wilson’s thought, is one that manifests the rule of *nature’s* law as nearly as is possible in

287. *Id.* at 441-43.

288. Knapp, *supra* note 47, at 243-44.

289. WILSON, *Of the Study of the Law*, *supra* note 1, at 443.

290. 1 WILLIAM BLACKSTONE, COMMENTARIES *162, *quoted in* WILSON, *Of the Study of the Law*, *supra* note 1, at 441.

human political institutions.²⁹¹ In politics, however, Independent Man grows alienated from his innate moral sensibilities—his experience of obligation to natural law—and eventually sloughs toward the self-interested intrigue of Political Man.²⁹² This, sadly, is true even in the best political systems, and even of the best men; and so a just conception of the rule of law must self-consciously leave open the avenues of reformation. And in Wilson's epistemology, those avenues should lead back to the most reliable source of moral knowledge—and the true fount of legitimate political power—the ordinary, independent citizen. When, in other words, our politics and positive law stray too far from the self-evident truths of natural law, our Constitution relies on the moral sentiments of Independent Man to provide the corrective. Thus, Blackstone's fears that a revolution principle would destabilize, and eventually destroy, the hard won foundations of political and social life, were, to Wilson, utterly misplaced.

Indeed, Blackstone had matters exactly backwards: it is the politics of unaccountable power that pave the road to social destruction; and in common, independent moral experience lies our best hope for meaningful justice. After all, if ordinary citizens cannot understand and respond to their moral obligations and the natural law—“[f]or a people [thus] wanting to themselves”—there is little hope that a democratic government can succeed in any case.²⁹³ And so Wilson responded to Blackstone directly:

This revolution principle—that, the sovereign power residing in the people; they may change their constitution and government whenever they please—is not a principle of discord, rancour, or war: it is a principle of melioration, contentment, and peace. It is a

291. See OBERING, *supra* note 47, at 192-93.

292. See *infra* note 348 and accompanying discussion.

293. JAMES WILSON, Speech Delivered on 26th of November, 1787, in the Convention of Pennsylvania (Nov. 26, 1787), in 2 THE WORKS OF JAMES WILSON 759, 771 (Robert Green McCloskey ed., 1967). Wilson put the point this way: “[f]or a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal: to their error, there is no superior principle of correction.” *Id.* This, again, is where Locke's inability to account for moral motivation undercut his political theory. See *supra* notes 72-73 and accompanying text.

principle not recommended merely by a flattering theory: it is a principle recommended by happy experience.²⁹⁴

It is in this profound sense, then, that our constitutional structure relies upon a virtuous citizenry; indeed, as John Adams famously observed, it is “wholly inadequate to the government of any other.”²⁹⁵

Still, a sensible political structure must provide some opportunity short of actual revolution for the People to reassert their sovereign authority. It is in this capacity that Wilson believed the jury served its central function in American constitutionalism—as the basic repository of sovereign discretion. “In all states,” he wrote, “discretionary powers must be placed somewhere. The great body of the people is their proper permanent depository. But on some occasions, and for some purposes, they must be delegated.”²⁹⁶ When placed in juries, as “nature and original justice” recommend,²⁹⁷ this authority is “one of the greatest blessings— . . . one of the greatest securities—which can be enjoyed under any government.”²⁹⁸ For these reasons, Wilson repeatedly claimed to “love and admire the trial by jury,”²⁹⁹ 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.”³⁰⁰

In fact, the American system placed in the jury a “tremendous” authority—one “interdicted even to the legislature[]” itself—that of applying the law to the world

294. WILSON, *Of the Study of the Law*, *supra* note 1, at 443.

295. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 228, 229 (Charles Francis Adams ed., AMS Press 1971) (1854).

296. JAMES WILSON, *The Subject Continued. Of Juries* [hereinafter WILSON, *Of Juries*], *in* 2 COLLECTED WORKS, *supra* note 1, at 954, 961.

297. *Id.* at 963.

298. JAMES WILSON, *Comparison of the Constitution of the United States, with that of Great Britain*, *in* COLLECTED WORKS, *supra* note 1, at 718, 745 [hereinafter WILSON, *Comparison*].

299. WILSON, *Of Juries*, *supra* note 296, at 954.

300. WILSON, *Comparison*, *supra* note 298, at 746.

with individual particularity: “Neither congress nor the general assembly of this commonwealth, can pass any act of attainder for treason or felony.”³⁰¹ Only the sovereign itself, instantiated in the jury, could decide an individual’s fate before the law. With the precautions of the institutionalized jury thus in place, Wilson argued that the popular sovereign “might, with an almost literal propriety, be said to try himself.”³⁰² What better recourse to the original source of sovereign authority than to give the People—the nation’s conscience, so to speak—the final word on the law’s application to concrete, practical circumstances?

It is true that some historiography has mistakenly undervalued or underestimated the pivotal role of the jury in Wilson’s conception of popular sovereignty.³⁰³ Kermit Hall, for example, has characterized Wilson as a “strong critic of jury nullification, the practice by which juries interposed their interpretation of the law in place of that of a judge,”³⁰⁴ and Arthur Wilmarth has made similar claims.³⁰⁵ Aaron Knapp, however, has carefully rebutted these arguments with a thorough review of all Wilson’s comments on juries throughout the *Lectures*.³⁰⁶ And, in revisiting Knapp’s research, I concur in his final assessment: “Wilson’s explicit pronouncement on more than one occasion that juries possessed discretionary power to overrule court instructions on the law refutes any interpretation that finds him categorically opposing jury nullification.”³⁰⁷ Indeed, given the larger structure of Wilson’s thought about popular sovereignty, it would be very surprising—almost inexplicable, in fact—to discover that he opposed jury nullification in any systematic way. While he did, at times, make statements like, “[t]o a question of law the judges, not

301. WILSON, *Of Juries*, *supra* note 296, at 1009.

302. *Id.* at 961.

303. *See* Knapp, *supra* note 47, at 272.

304. Kermit Hall, *Introduction*, *supra* note 42, at xxii.

305. *See* Wilmarth, *supra* note 47, at 162.

306. *See* Knapp, *supra* note 47, at 274-75.

307. *Id.* at 275.

the jury, shall answer,”³⁰⁸ he summarized his more typical views well in his introductory lecture: “It is true, that, in matters of law, the jurors are entitled to the assistance of the judges; but it is also true, that, after they receive it, they have the right of judging for themselves”³⁰⁹

Indeed, the particular characteristics of the American jury suited it especially well to serve as a moral sentimentalist safeguard in Wilson’s structural account of popular sovereignty. The jury’s authority—that momentous public power of “administering justice under the laws”—is “exercised in person” by the “people at large,” as made manifest in temporary delegations of ordinary, common citizens.³¹⁰ To “the unbiased and unadulterated sentiments” of average, independent people, then, we entrust these ultimate moral and legal decisions: “[I]t is tremendous to those who behold it. A man, or a body of men, habitually clothed with a power over the lives of their fellow citizens!”³¹¹ Further, like the moral sense itself, the American instantiation of this sovereign prerogative lies dormant until called upon: “[t]he contrivance is so admirably exquisite concerning this tremendous jurisdiction, that, in the general course of things, it exists actually no where. But no sooner does any particular emergency call for its operations, than it starts into immediate existence.”³¹² And then, once the jury has exercised its sovereign moral authority in a discreet legal controversy, this “abstracted selection [of the sovereign] disappears among the general body of the citizens.”³¹³ Again in this way, as in others, the American constitutional structure devolves onto the moral sentiments of ordinary citizens the ultimate sovereign discretion to “decide[] on the exception.”³¹⁴

308. WILSON, *Of Juries*, *supra* note 296, at 980.

309. WILSON, *Of the Study of the Law*, *supra* note 1, at 437.

310. WILSON, *Of Juries*, *supra* note 296, at 1008.

311. *Id.* at 1004, 1008-09.

312. *Id.* at 1009.

313. *Id.* at 1008.

314. SCHMITT, *supra* note 20, at 5.

Wilson's *Lectures*, then, begin to reveal the somewhat obscured theoretical underpinnings of the constitutional structure he envisioned and championed at the convention in Philadelphia. Recall, for example, the puzzle that Wilson's simultaneous support of broad, egalitarian popular suffrage *and* a vigorous institution of judicial and executive review seemed to present. Even the best form of legislature—that rooted firmly in the equal suffrage of ordinary, independent citizens—can render only an imperfect representation of the sovereign.³¹⁵ And, once installed within the self-reinforcing normative structures of institutionalized government, our representatives inevitably begin the unfortunate transformation from Independent to Political Man. One check on this problematic eventuality is to divide the legislative authority between two independent houses, thus making it more difficult to build consensus around any legislation.³¹⁶ This procedural check restrains good ideas as well as bad, however, while ordinary moral sentiments provide more substantive guidance. And so there is a second check, of course: The representatives must go back to the People for periodic elections.

As Wilson observed, however, it is more difficult for the People to assign responsibility to individuals acting within a plural institution than it is to hold an individual accountable.³¹⁷ For this reason, the Constitution provides yet another check on legislative power in the form of judicial review. Here, a smaller group (in Wilson's formulation) of both elected and unelected officials are empowered to enforce the Constitution against legislative acts. In the case of the elected official—the President—he is directly and individually responsible to the People at the ballot box. In the case of the life-tenured judges, they are—one hopes—less likely to fall victim to the moral infirmities of Political Man. Seen this way, judicial review is simply the first level of

315. See Remarks of Mr. Wilson (June 6, 1787), in MADISON'S NOTES, *supra* note 187, at 74 (arguing representation is a necessary, though, imperfect way to express collective sentiments).

316. Remarks of Mr. Wilson (June 16, 1787), in MADISON'S NOTES, *supra* note 187, at 124, 127.

317. See *id.*

structural recourse to the People. The jury then represents a second level of recourse—this time directly to common sense moral epistemology³¹⁸—and the revolution principle is a third (and, one hopes, last-ditch) possibility.

C. Chisholm v. Georgia

In the fall of 1777, early in the Revolutionary War, American troops quartered near Savannah, Georgia, found themselves desperately in need of supplies.³¹⁹ The Georgia Executive Council thus authorized state commissioners, Thomas Stone and Edward Davies, to purchase a large shipment of clothing and blankets from South Carolina merchant Robert Farquhar.³²⁰ In exchange for delivery by December 1st, the commissioners contracted to pay Farquhar nearly \$170,000, which they were empowered to draw from the state treasury.³²¹ Although Farquhar made timely delivery, Stone and Davies refused his repeated requests for payment, and it appears they may have kept and squandered monies appropriated to them for that purpose.³²² In 1784, Farquhar drowned in a shipping accident in Savannah harbor, and the executors of his estate began to make plans to recover from the State.³²³ The estate fell to his young daughter.³²⁴ The executors petitioned the Georgia legislature in 1789, but were refused on the grounds that the money had already been appropriated to Stone and Davies.³²⁵ One of the executors, Alexander Chisholm, then filed suit against the State of Georgia in federal Circuit Court; but, in October of

318. Knapp does an excellent job surveying the debate over whether Wilson's account of judicial review permits judges to correct violations of *natural* as well as constitutional law. He concludes, rightly I think, that it does not. See Knapp, *supra* note 47, at 278-79.

319. Doyle Mathis, *Chisholm v. Georgia, Background and Settlement*, 54 J. AM. HIST. 19, 20 (1967).

320. *Id.* at 20-21.

321. *Id.* at 21.

322. See *id.* 21, 22 n.14.

323. *Id.* at 21.

324. *Id.*

325. *Id.* at 22.

1791, Justice James Iredell and Judge Nathaniel Pendleton denied jurisdiction on separate grounds.³²⁶ Given the asserted damages of \$500,000, however, it is hardly surprising that Chisholm decided to take an appeal.³²⁷

Georgia failed to appear at oral arguments in the Supreme Court the following August, but, “to avoid every appearance of precipitancy and to give the [S]tate time to deliberate on the measures she ought to adopt,” Attorney General Edmund Randolph moved the matter be continued to the February Term.³²⁸ At that time, the State sent a written remonstrance denying federal jurisdiction, and the Court took the matter under consideration without oral argument from Georgia.³²⁹ Just two weeks later, the Justices delivered their opinions seriatim, concluding 4-1 (with Iredell in dissent) that the Constitution did, in fact, empower the Court to hear a suit brought against a state government by an individual from a different state.³³⁰ Perhaps needless to say, Georgia objected in the strongest possible terms: The State’s assembly passed a resolution calling on her sister states to demand “an explanatory amendment” to the Constitution,³³¹ and further provided that any Federal Marshal attempting to help Chisholm claim his award shall “be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged.”³³² And Georgia was not

326. *Id.* at 22-23. Iredell concluded that Article III vests original jurisdiction in the Supreme Court in cases “where a State is a party.” It appears from Iredell’s opinion that, while Pendleton agreed in the judgment, he did so “for different reasons”—likely on the grounds of sovereign immunity—but his separate opinion seems to have been lost to history. *Farquar’s Executor v. Georgia* (Oct. 21, 1791) (opinion of Iredell, J.), reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 148, 154-55 (Maeva Marcus ed., 1994) [hereinafter DHSC].

327. See Mathis, *supra* note 319, at 23.

328. *Supreme Court of the United States*, DUNLAP’S AM. DAILY ADVERTISER, Feb. 21, 1793, at 3 [hereinafter DUNLAP’S].

329. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 94 (rev. ed. 1926).

330. See DUNLAP’S, *supra* note 328, at 3.

331. *Proceedings of the Georgia House of Representatives*, AUGUSTA CHRON., Nov. 9, 1793, reprinted in DHSC, *supra* note 326, at 235, 235-36.

332. *Id.* at 236.

alone. The Massachusetts General Court had already considered the matter and had urged legislators to “use their utmost influence” to see the Constitution amended, and a flurry of opposition arose in editorial pages across the Union.³³³ In January, the United States Senate proposed a constitutional amendment overruling *Chisholm*, and the House voted overwhelmingly to approve.³³⁴ By the following February, the requisite twelve state legislatures had ratified the proposal, and the Eleventh Amendment became law.³³⁵

By almost any account, then, the Court’s decision in *Chisholm* was well out of step with popular sentiments about the structure of the new federal arrangement. That is not to say, however, that the holding was inconsistent with the *actual* constitutional structure as ratified, or, at the very least, James Wilson’s understanding of that structure.³³⁶ And, though the Court’s clerk was apparently better impressed with Chief Justice John Jay’s resolution of the case,³³⁷ Wilson’s like-minded opinion has been the subject of at least as much commentary and analysis over time.³³⁸ This is likely true for two reasons: first, the case directly addresses the constitutional entailments of popular sovereignty, upon which subject Wilson was an acknowledged expert among the founding generation.³³⁹ Second, Wilson clearly understood the case’s grand scale, and thus addressed himself directly to the profound theoretical—and at least partly extra-textual—questions the other Justices treated with perhaps less sophistication. Indeed, he opened by acknowledging the “uncommon magnitude” of the matter before the Court,

333. *Report of a Joint Committee of the Massachusetts General Court*, INDEP. CHRON., June 20, 1793, reprinted in DHSC, *supra* note 326, at 230, 230-31. For a sampling of the editorial pages, see DHSC, *supra* note 326, at 227-272.

334. 4 ANNALS OF CONG. 30, 477 (1795).

335. Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 227-28 (1968).

336. Randy Barnett, among others, has argued persuasively that the Eleventh Amendment *altered*—rather than *restored*—the Constitution’s original meaning. Barnett, *The People or the State*, *supra* note 157, at 1744-45.

337. See DUNLAP’S, *supra* note 328, at 3.

338. See, e.g., Barnett, *We the People*, *supra* note 28, at 2599.

339. See *id.* at 2597-99.

which he suggested turned on a question “no less radical than this—‘do the people of the United States form a Nation?’”³⁴⁰ He proposed to approach that question from several perspectives, including both the principles of general jurisprudence and the express terms of the United States Constitution.³⁴¹

In introducing the first subject, Wilson found occasion to include an appropriate quotation from our old friend Thomas Reid, whom he presented as “an original and profound writer, who, in the philosophy of mind . . . has formed an era not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon.”³⁴² He invoked Reid to the effect that new philosophies—in this case a new political science—often require us to adopt new language, or at least to alter our understanding of existing terms and concepts.³⁴³ In the context of Enlightened legal theory, Wilson claimed that both “state” and “sovereignty” were concepts that needed updating.³⁴⁴ In fact, he lamented that previous theorists had often used these terms to justify “pernicious” political doctrines, by which “States and Governments . . . made for man . . . have first deceived, next vilified, and, at last, oppressed their master and maker.”³⁴⁵ Thus, in the “old world” there were those who not only claimed that the state was superior to the People, but also that the “Government” (meaning the magistrate) was, in turn, superior to the state.³⁴⁶ It was in service of these claims that the older concept of “sovereignty” had been put to its most destructive use, and it was largely for this reason that the word

340. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.) (emphasis omitted).

341. *Id.*

342. *Id.* (emphasis omitted).

343. *See id.* at 453-54. Many years later, Thomas Kuhn would describe this process as a necessary part of a “paradigm shift” in scientific inquiry. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 148-49 (1st ed. 1962).

344. *See Chisholm*, 2 U.S. (2 Dall.) at 454-55.

345. *Id.* (emphasis omitted).

346. *Id.* at 455.

“sovereign” was omitted from the Constitution.³⁴⁷ To restore the natural hierarchy, Wilson argued, we must remember that, “Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man.”³⁴⁸

He then began his jurisprudential assessment with a common sense definition of a “state”:

By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and interests: It has its rules: It has its rights: And it has its obligations. . . . In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men.³⁴⁹

Nothing in this definition, Wilson argued, suggests that a state is any less amenable to the laws or courts than are its constituent citizens.³⁵⁰ Indeed, if an individual binds herself to the law by consent, certainly an aggregation of similarly situated citizens does the same.³⁵¹ If a state should nonetheless escape suit on its legal obligations, then, it can only be because it enjoys some special status as a “sovereign”: a claim that would, Wilson thought, need authentication.³⁵² Authentication, of course, requires some jurisprudential account of sovereignty: Who or what counts as a “sovereign,” and what privileges or immunities attach to that designation?³⁵³

Wilson conceded that he could not explore every possible perspective on these questions, and so limited himself to a

347. *See id.* at 454-55.

348. *Id.* at 455 (emphasis omitted). This, of course, reflects Wilson’s sentimentalist commitment to the moral superiority of Independent (over Political) man.

349. *Id.* at 455-56 (emphasis omitted).

350. *See id.* at 456.

351. *Id.*

352. *Id.*

353. *Id.*

few of the more promising avenues.³⁵⁴ First, he observed that we might identify a “sovereign” by reference to its correlative relationship with “subjects.”³⁵⁵ Neither the Constitution nor the State of Georgia recognize any “subjects,” however—only “citizens”—and so, in this grammatical sense at least, neither claims to be a “sovereign.”³⁵⁶ In a broader sense, though, we might recognize as “sovereign” any state “which governs itself without any dependence on another power.”³⁵⁷ Though he disavowed knowledge of Georgia’s specific claims in this regard, Wilson suggested that a republican form of government (which, of course, the Constitution demands of the states) is one in which “the Supreme Power resides in the body of the people.”³⁵⁸ Further, he asserted that:

the citizens of Georgia, when they acted upon the large scale of the Union, as 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.³⁵⁹

Thus, if Supreme Court jurisdiction over cases like *Chisholm* should count as one of the “purposes of the Union,” then Georgia could make no claim to sovereignty on these grounds.³⁶⁰

A third sense of the term “sovereign”—indeed, the one to which Wilson thought Georgia intended its appeal—is a vestige of European feudalism.³⁶¹ William the Conqueror brought the French feudal structure to England, and with it the maxim that “the King or the sovereign is the fountain of Justice.”³⁶² This account not only “vested him with jurisdiction over others, it [also] excluded all others from

354. *Id.*

355. *Id.*

356. *Id.* at 456-57.

357. *Id.* at 457.

358. *Id.*

359. *Id.* (some emphasis omitted).

360. *Id.* (emphasis omitted).

361. *Id.*

362. *Id.* at 458 (emphasis omitted).

jurisdiction over him.”³⁶³ Thus, William Blackstone could claim that, in England at least, “no suit or action can be brought against the King, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power.”³⁶⁴ But, Wilson argued, while Blackstone was widely read and admired in the United States, his account has its roots in the “despotic” principle that “all human law must be prescribed by a superior,” and it was thus fundamentally inconsistent with the “genuine jurisprudence” of the American model: “[L]aws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.”³⁶⁵ With these proper principles in place, Wilson could find no general jurisprudential grounds for Georgia’s claim to a special “sovereign” immunity from the Court’s jurisdiction.³⁶⁶

After presenting several historical examples of suits brought against even traditional sovereigns—including Columbus’s claims against the Spanish Crown—Wilson brought these jurisprudential principles home to the specific case of the United States Constitution.³⁶⁷ He broke the constitutional issue down into two separate questions: (1) whether the Constitution had the authority to vest the Supreme Court with jurisdiction over Georgia; and (2) whether it had, in fact, done so.³⁶⁸ He began his first answer by repeating his grievances against the unfortunate jurisprudential trend in Europe, whereby “the state has assumed a supercilious preeminence above the people, who have formed it.”³⁶⁹ Worse yet, in some nations the King had

363. *Id.*

364. *Id.* (quoting 1 BLACKSTONE, *supra* note 290, at *242) (emphasis omitted) (minor alterations to Blackstone’s original punctuation). This, recall, is consistent with Hobbes’s account of sovereignty. See HOBBS, *supra* note 18, at 213.

365. *Chisholm*, 2 U.S. (2 Dall.) at 458, 462 (some emphasis omitted).

366. *Id.* at 458.

367. *Id.* at 459-61.

368. *Id.* at 461.

369. *Id.* (emphasis omitted).

taken the same “haughty” attitude towards both the state and the people.³⁷⁰ In such circumstances, the natural political order was turned completely on its head, so “that Kings should imagine themselves the final causes, for which men were made, and societies were formed.”³⁷¹ It was in this political perversion, Wilson argued, that the doctrine of sovereign immunity had its old world roots.³⁷²

In America, the revolutionary spirit and the democratic principles underlying the United States Constitution had largely corrected these mistaken assumptions; but, Wilson warned, some otherwise Enlightened theorists still “go one step farther than [they] ought to go in this unnatural and inverted order of things.”³⁷³ Undoubtedly still under the sway of the estimable Blackstone, Wilson saw these theorists laboring under some of the same misconceptions with which he had done battle at the Constitutional Convention:

The States, rather than the PEOPLE, for whose sakes the States exist, . . . arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States.³⁷⁴

Even given Wilson and Madison’s concessions in Philadelphia, however, the ratified Constitution still ranks the People as the true source of all political power, and the state—and then its officers—as the mere delegates of that authority.³⁷⁵ Wilson’s succinct summary of the first principles underlying this constitutional arrangement elegantly captures his belief in the moral superiority of independent individual sentiments over the artificial contrivances of politics: “A State I cheerfully admit, is the noblest work of

370. *Id.* In particular, he recalled Louis XIV’s insistence that his councilors not refer to “L’Etat” in their conversations with him. *Id.* at 461-62.

371. *Id.* at 462 (emphasis omitted).

372. *See id.*

373. *Id.* (emphasis omitted).

374. *Id.* (some emphasis omitted).

375. This structure is, of course, most evident in the document’s opening words: “We the People of the United States . . . do ordain and establish this Constitution” U.S. CONST. pmbl.

Man: But, Man himself, free and honest, is, I speak as to this world, the noblest work of God."³⁷⁶

With these moral principles stoutly in place, Wilson believed the question of the Constitution's jurisdiction was quite straightforward: "[C]ould the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested?"³⁷⁷ Unavoidably, Wilson thought, the answer was yes.³⁷⁸ Again, in just the same way that an individual might bind herself to law by consent, so an aggregate of individuals might bind itself by means of a majority vote.³⁷⁹ And, because it was the people of Georgia that had created that State, those same people, "could alter, as they pleased, their former work: To any given degree, they could diminish as well as enlarge it. Any or all of the former State-powers, they could extinguish or transfer."³⁸⁰ This, in fact, is exactly what happened when Georgia's ratifying convention—pointedly *not* the Georgia legislature—unanimously ratified the United States Constitution on January 2, 1788.³⁸¹ Thus, Wilson concluded, "[t]he inference, which necessarily results, is, that the Constitution ordained and established by . . . the *people* of Georgia, could vest jurisdiction or judicial power over . . . the *State* of Georgia."³⁸²

The remaining question, then, was whether the Constitution actually *had* vested the Supreme Court with jurisdiction to hear a suit brought against a state government by a citizen of a different state. Although he briefly considered the intentions outlined in the Preamble, Wilson

376. *Chisholm*, 2 U.S. (2 Dall.) at 458, 462-63 (emphasis omitted).

377. *Id.* at 463 (emphasis omitted).

378. *Id.*

379. *Id.* at 456.

380. *Id.* at 464 (emphasis omitted).

381. *See id.* On ratification, see Letter from Governor of Georgia Transmitting Ratification of New Constitution (Jan. 5, 1788), in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1786-1870, H.R. NO. 56-529, at 65, 65-66, 83-85 (1894).

382. *Chisholm*, 2 U.S. (2. Dall.) at 464 (emphasis added, original emphasis omitted).

ultimately believed that the text of Article III resolved the issue fairly unambiguously.³⁸³ As an initial matter, he quickly did away with the misconceived (though still asserted) notion that in authorizing the federal government to operate directly on the People—a power the previous Congress had lacked—the Constitution had removed federal authority to regulate the states.³⁸⁴ “When,” he observed, “certain laws of the States are declared to be ‘subject to the revision and controul of the Congress;’ it cannot, surely, be contended that the Legislative power of the national Government was meant to have no operation on the several States.”³⁸⁵ With the same principle in mind, Article III expressly recognizes federal Judicial power over “[c]ontroversies between two or more States” and—even more specifically—extends that power to controversies “between a *State and Citizens of another State*.”³⁸⁶

While some had argued that these clauses refer only to cases in which a state appears as a *plaintiff*, Wilson pointed to other text that plainly contradicts such a reading:

“The judicial power of the United States shall extend . . . to controversies *between two States*.” Two States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this “controversy between two States” can be brought before a Court of law; and yet neither of those States be a Defendant?³⁸⁷

383. *Id.* at 464-66.

384. *See id.* This argument—that “the defect remedied, on one side, was balanced by a defect introduced on the other”—Wilson characterized as “altogether unfounded.” *Id.* at 464. As noted, however, this somewhat bizarre notion lives on in some modern constitutional doctrine. *See New York v. United States*, 505 U.S. 144, 164-66 (1992).

385. *Chisholm*, 2 U.S. (2. Dall.) at 464 (emphasis omitted) (footnote omitted) (quoting U.S. CONST. art. I, § 10, cl. 2).

386. U.S. CONST. art. III, §§ 1-2 (emphasis added).

387. *Chisholm*, 2 U.S. (2. Dall.) at 466 (emphasis added, some emphasis in original omitted) (quoting U.S. CONST. art III, § 2, which actually states that “[t]he judicial power shall extend . . . to controversies between two *or more* states” (emphasis added)).

With both general jurisprudential principles and the explicit constitutional text thus aligned, Wilson easily concluded that the Court had constitutional jurisdiction to hear Chisholm's claim for breach of contract.³⁸⁸ In America, at least, "[c]auses, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind."³⁸⁹

Wilson's opinion in *Chisholm*, then, stands as perhaps the capstone in his larger structural account of popular sovereignty. As in his other, more explicitly theoretical, writings, he made clear that human beings—equipped with the moral sentiments as epistemic tools—are creatures of God, while even the best of political institutions remain the inferior creatures of man. It is thus with the free and Independent Man that ultimate moral and sovereign judgment must remain. Because "states" and "governments" operate only as agents of this superior authority, these institutions cannot claim to be "sovereign" in a feudal, or even an Enlightened, sense. Without this special standing, the states are no more immune to suit than any other party; this, indeed, is a defining feature of the American conception of the rule of law. We might question, to be sure, Wilson's "originalist" bona fides here—after all, the Eleventh Amendment swiftly repudiated his views—but subsequent practical history has been much kinder to his underlying ideas. The modern doctrinal apparatus surrounding the Eleventh Amendment and "sovereign immunity" is so riddled with exceptions, rationalizations, and transparent fictions as to appear every bit the Ptolemaic foil to Wilson's simple Copernican insight.³⁹⁰ Indeed, from its basic moral

388. *See id.* In Wilson's words, "[w]hen so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court." *Id.* at 465-66 (emphasis omitted).

389. *Id.* at 466 (emphasis omitted).

390. *See, e.g.,* *United States v. Georgia*, 546 U.S. 151, 159 (2006) (permitting citizen to sue state when alleging a constitutional violation); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (granting Congress greater authority under Section 5 of Fourteenth Amendment to remedy discrimination or rights violations that receive heightened scrutiny); *Pennsylvania v. Union Gas Co.*,

foundations all the way up to its technical parapets, Wilson's structural account of American popular sovereignty remains, I suggest, among the most coherent and compelling on record.

III. POPULAR SOVEREIGNTY AND CONSTITUTIONAL CONSTRUCTION

The remaining task, then, is to understand these interdependent moral and legal structures in a way that might prove useful to modern constitutional construction. There are at least two general areas—or “construction zones”—in which this holistic approach to the concept of popular sovereignty can provide valuable structural guidance.³⁹¹ First, the notion that Independent Man—responding directly to the moral sentiments—occupies a place of epistemological superiority over Political Man helps to clarify the functions of the relevant institutions in our constitutional architecture. More specifically, by emphasizing the relative importance of the People as a load-bearing institution, this account lends support to Akhil Amar's arguments about the federal government's primacy in protecting individual rights.³⁹² Second, moral sentimentalism gives fuller shape and content to the nature of the “sovereignty” the People have reserved, and thus offers us a new way to think about the substance of unenumerated or fundamental rights. In particular, instead of focusing our inquiry on conceptions of *privacy* (or “emanations,” “penumbras,” and “reasonable expectations” thereof), the sentimentalist understanding suggests we should build our

491 U.S. 1, 22-23 (1989) (discussing Congress's power to authorize suits against state governments pursuant to any enumerated power), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-66 (1996) (same); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (acknowledging that states may waive sovereign immunity, despite Eleventh Amendment's removal of jurisdiction); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (permitting Congress to authorize suits against state governments pursuant to Section 5 of the Fourteenth Amendment); *Ex parte Young*, 209 U.S. 123, 160 (1908) (permitting suits against state officials but not state governments); Lincoln Cty. v. Luning, 133 U.S. 529, 531 (1890) (permitting suits against local governments).

391. On “construction zones,” see Solum, *supra* note 2, at 469-72.

392. See Amar, *supra* note 21, at 1439-41.

constructions around notions of retained moral *sovereignty*. This may, in turn, align with Randy Barnett's ideas about the kinds of governmental intrusions to which we can presume individuals have consented.³⁹³

On the first class of questions—those surrounding the relative function of various democratic institutions—Wilson's sentimentalist account brings into clearer focus the structural importance of Independent Man, and the corresponding superiority of the federal government over the states. In this account, the un-politicized, free, and independent citizen occupies a crucially important space in the constitutional architecture, precisely because she operates outside of the corrupting sphere of power politics. Free to respond to the “unadulterated” moral sentiments—and thus to experience a purer, and perhaps more robust feeling of moral obligation—Independent Man is the ship of state's epistemological anchor to the natural law. This anchor attaches to government at several structural points, among which are Frederick Douglass's famous three boxes of liberty—the ballot box, the jury box, and the cartridge box.³⁹⁴ While Wilson's theoretical *Lectures* do much to reemphasize the importance of the latter two boxes—juries and revolutions—his more practical approach (at both the Convention and in *Chisholm*) leaned heavily on the protections of popular representation and suffrage. He repeatedly argued that, on these grounds, the federal government enjoys a clear advantage over the states. After all, it is only at the federal level that the whole of the People

393. See Barnett, *We the People*, *supra* note 28, at 2602. Indeed, Professor Barnett's most recent book, set for publication at around the same time as this Article, expressly suggests that we frame our discussions of “privileges or immunities” or “unenumerated rights” in terms of retained sovereignty. See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (forthcoming Apr. 2016). He has in mind, I think, the more legalized incidents of sovereignty—so that we might expect the government to give an individual all the deference it would another sovereign nation. See *id.* What I suggest is that we conceive of this retained sovereignty in moral terms, and particularly in sentimentalist terms, so that the fundamental sovereign prerogative is freedom to exercise the moral sense and make individual, independent moral judgments.

394. FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS: FROM 1817 TO 1882*, at 333 (1882).

participate in government; and, of course, if Wilson had had his way, that participation would have been even broader and more representative than it is now.

The sentimentalist account, however, reveals that Wilson's representative preference for federal authority had even deeper theoretical roots. When we understand Independent Man's moral superiority over Political Man as the basis for Wilson's claim that "[r]epresentation is made necessary only because it is impossible for the people to act collectively," it becomes evident that we should seek to minimize the number of political "contrivances" we place between independent moral sentiments and the enacted law.³⁹⁵ The state governments, in this sense, are additional contrivances, and thus provide additional opportunities for independent moral judgment to degrade into political intrigue. Further, the state governments themselves are likely to compete or collude with each other in politicized ways, so that the distortion of moral judgment produced by *intrastate* politicking is multiplied by the potential corruptions of *interstate* politicking. Even if the states are, as Wilson conceded, necessary political contrivances, "made essential by the great extent of our Country," it is critical that they remain in "their proper orbits."³⁹⁶ It is thus left to the federal government, in which the whole People's sentiments are but one level removed from the law, to check state intrusions on individual sovereign freedoms. Again, this account does much to support Amar's criticism of judicial constructions that invoke popular sovereignty in support of a "states' rights" brand of federalism, which works to shield state governments from constitutional accountability.³⁹⁷

The second way the sentimentalist account can inform judicial construction is by clarifying the structural reasons why we protect individual rights against government intrusion. In particular, if we understand *sovereignty*, rather than *privacy*, as the common theme underlying the Bill of

395. Remarks of Mr. Wilson (June 6, 1787), in MADISON'S NOTES, *supra* note 187, at 74.

396. Remarks of Mr. Wilson (June 7, 1787), in MADISON'S NOTES, *supra* note 187, at 85.

397. See Amar, *supra* note 21, at 1519-20.

Rights, the sentimentalist account gives us a better way to conceive of the essential authority that the constitutional structure reserves to the People.³⁹⁸ The reason, in other words, that an independent individual must retain the freedom to speak, worship, assemble, bear arms, decline unreasonable searches, serve on juries, receive due process, and so on is not so that he can remain *private*, but rather because he is *sovereign* in some essential respect. And the sentimentalist account suggests that the fundamental justification for popular sovereignty lies in our shared capacity to experience the principles of natural law via the moral sentiments. Seen in this way, the sovereign prerogative is not just “to be let alone” in and of itself, but rather to enjoy the necessary freedom to respond to the moral sentiments, experience moral obligation, and achieve humanity’s highest end—moral reasoning and flourishing—without the suffocating oversight of the State.³⁹⁹ Indeed, it is only in the absence of this oversight—when she is free to do otherwise—that an individual’s moral choice can have an authentic meaning beyond simple obedience to coercive legal power.

From this perspective, the question becomes not whether the government should respect or tolerate particular claims of individual privacy, but rather what means it might best employ to foster and encourage individual moral reasoning, judgment, and responsibility. Making this genuine sort of moral agency possible, it turns out, is actually the final cause of legitimate government.⁴⁰⁰ Thus, even to the extent our constitutional constructions look to balance individual rights against the need for order and security, we must remember that the real question is whether, and how, a particular species of state intervention or coercion works to further individual rights and moral agency, all things considered. And when asked to decide what sorts of “unenumerated”

398. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

399. *See* *Olmstead v. United States*, 277 U.S. 438, 471, 478 (1928) (Brandeis, J., dissenting) (describing the “right to be let alone” as “the most comprehensive of rights and the right most valued by civilized men”).

400. Though they have differed on the details, philosophers from Aristotle, to Augustine, to Aquinas, to Ronald Dworkin have roughly agreed upon this basic purpose of politics and the state.

rights the Ninth Amendment guarantees, we should likewise ground our constructions in notions of sovereign moral reasoning and autonomy. The lodestar of fundamental rights, then, is not (at least not necessarily) cultural tradition or ideas about ordered liberty—it is whether a particular sort of question should be reserved to sovereign moral judgment. In this way, the sentimentalist account may lend support to Randy Barnett’s arguments that the presumption of individual consent cannot legitimate state intrusions into natural rights.⁴⁰¹ In fact, the presumption must run the other way—if the state wants to substitute its moral judgment for that of free and independent citizens, it must justify that decision in terms of the benefits to individual moral freedom writ large.

To illustrate how these structural principles might play out in a concrete constitutional decision, it may be useful to revisit a controverted Supreme Court case. There are many possibilities, to be sure—including abortion cases, sexual orientation cases, free speech cases, and search and seizure cases—but perhaps the simplest and most straightforward example emerges from a religious freedom case. In 1990, Justice Antonin Scalia delivered the majority opinion in *Employment Division v. Smith*, which asked the Court to decide whether the Free Exercise Clause required Oregon to exempt members of a Native American Church from a state law criminalizing the use of peyote.⁴⁰² Most observers believed the question fell within the scope of well-established doctrine, which rigorously scrutinized laws that incidentally burden religious practices.⁴⁰³ Scalia, however, drew two important distinctions between *Smith* and that doctrine: First, *Smith* involved violations of a criminal law, where the earlier cases did not;⁴⁰⁴ Second, Scalia suggested that the cases applying strict scrutiny actually involved “hybrid” claims, which implicated both the Free Exercise Clause and

401. See *supra* note 393 and accompanying text.

402. 494 U.S. 872, 874 (1990). The precise issue in the case was whether Oregon could deny unemployment benefits to two men fired for using criminalized peyote for religious purposes. *Id.*

403. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

404. *Smith*, 494 U.S. at 876.

another constitutional right.⁴⁰⁵ Given these distinctions, Scalia concluded that the Constitution does not protect religious practice against incidental burdens imposed by a “valid and neutral law of general applicability.”⁴⁰⁶ Revisiting the Court’s first Free Exercise case, which denied protection to Mormon polygamy, Scalia suggested that recognizing the Native Americans’ religious rights would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”⁴⁰⁷

The structural lessons of the sentimentalist account of popular sovereignty strongly suggest a different result in *Smith*. The first principle—federal primacy in rights cases—is no longer controversial in this context. Since its incorporation in 1940, the Free Exercise Clause has applied equally against both state and federal legislation.⁴⁰⁸ In *Smith*, however, the second principle—government must not intrude on sovereign moral autonomy except to foster greater moral autonomy for all—should have been of central importance. Despite Scalia’s borrowed rhetorical protestations, sentimentalist popular sovereignty forthrightly claims that every citizen *is*, in fact, “a law unto himself”; at the very least on questions of moral epistemology, which the constitutional structure reserves to sovereign judgment. This, in fact, is precisely the bargain struck in the Lockean/sentimentalist social contract. The Constitution definitively lodges sovereignty in the People, thus placing its ultimate trust in our common ability to experience feelings of moral obligation and act accordingly. Unless the religious use of peyote

405. *Id.* at 881-82. It is certainly worth noting that Scalia’s observation about “hybrid” claims—even if perhaps descriptively accurate—does not actually distinguish *Smith*, whose respondents might easily have asserted both religious and associative rights. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (Souter, J., concurring).

406. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

407. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

408. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Before incorporation, of course, the states were free to deal with religion in whatever ways they saw fit, and several states established official churches well into the nineteenth century. *See* JAMES F. HARRIS, *THE SERPENTINE WALL: THE WINDING BOUNDARY BETWEEN CHURCH AND STATE IN THE UNITED STATES* 96-99 (2013).

threatens to substantially undermine moral freedom writ large—perhaps by seriously threatening the general peace—the government simply has no authority to intervene. No evidence of such a threat was presented in *Smith*, thus the state failed to overcome the presumption of moral autonomy, and the case was wrongly decided.

CONCLUSION

Henry David Thoreau once famously asked, “Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? . . . Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator?”⁴⁰⁹ The sentimentalist account of popular sovereignty suggests that the American constitutional project is, in important ways, an experiment designed to test those questions. Viewed this way, moral sentimentalism allows us to go beyond describing the structure of popular sovereignty, and begins to provide a historically contextualized normative account of that structure’s purpose and value. In other words, if popular sovereignty is the *what*, moral sentimentalism offers a way to answer the *why*. I have suggested two answers here: First, the free and independent citizen must remain sovereign because she has the most reliable epistemological connection to natural law and natural rights; second, the very purpose of a democratic government is to ensure citizens the necessary freedom to make uncoerced moral judgments, and thus to experience truly autonomous moral agency. In turn, a normative account of popular sovereignty can provide structural guidance for modern judicial construction. Again, I offer two prescriptions: First, the federal government—not the state—is the primary and presumptive guardian of individual rights; second, the underlying purpose of those rights, whether textual or unenumerated, is not to protect privacy, but instead to reserve the space necessary for autonomous moral judgment. Such judgments, after all, are the most fundamental incidents of the sovereign prerogative,

409. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), *reprinted in* THE WORKS OF THOREAU 789, 790 (Henry S. Canby ed., 1937).

and the most constitutive experiences of the human condition.