James Wilson and the Moral Foundations of Popular Sovereignty

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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

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. To most observers this must seem a concession to the obvious, even if a few quixotic dissenters still roam the academic landscape. Textual construction is, after all, the peculiar craft or genius of the constitutional judge in whom Article III places our collective political trust. If we did not value this particular areté, we might better have turned our constitutional controversies over to a panel of esteemed historians, or linguists, or (nowadays) to a squadron of research assistants armed with vast databases and powerful search engines. But we did not do this—nor would we, if asked to decide all over again—because we

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1 James Wilson, Introductory Lecture: Of the Study of the Law in the United States, in 1 Collected Works of James Wilson 431, 445-46 (Kermit Hall & Mark David Hall, eds. 2007).


3 See, e.g., Richard S. Kay, Constitutional Construction and the (In)Completeness of the Constitution (forthcoming) (on file with author) (arguing that historical intentions can fully determine constitutional application).

4 U.S. Const. art III (“The Judicial Power shall extend to all Cases ... arising under the Constitution.”).

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. 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. If the text itself—or some algorithm thereof—entirely determined the Constitution’s legal meaning, the judge would be, at best, a superfluity.

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 decisis.* Still others contend that the judge should take into primary account the real world implications of her constitutional decisions. 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. Charles Black persuasively outlined this approach, now commonly called structuralism, in his Edward Douglass White lectures at Louisiana State University in 1968. At that time, structural arguments were made infrequently enough that Black labeled it “the neglected method,” but that has undoubtedly changed. 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.” In 2015, then,
structuralism is very much alive, and, as Black predicted, it has given rise to a whole new set of constitutional controversies and claims.\textsuperscript{14} This paper 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.

This structural innovation, upon which the Constitution purports to rest, posits that, in the United States, ultimate sovereignty lies with “the People.”\textsuperscript{15} In ratifying the Constitution, the People delegated certain enumerated powers to a federal government organized into specified institutions and procedures.\textsuperscript{16} The People also reserved the right to alter the Constitution’s terms through an established amendment process.\textsuperscript{17} Unlike the Hobbesian social contract model, wherein the people surrendered sovereignty itself to the commonwealth,\textsuperscript{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, \textit{inter alia}, the problem that Hobbes had identified with efforts to bring the sovereign state under the rule of law, which is that such attempts, if successful, only replicate sovereignty at a higher level.\textsuperscript{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 famously declared, “decide[] on the exception.”\textsuperscript{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.

\textsuperscript{14} BLACK, supra note \_\_\_ 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”).

\textsuperscript{15} U.S. CONST. pmbll.

\textsuperscript{16} U.S. CONST. art. I, II, III.

\textsuperscript{17} U.S. CONST. art. V.

\textsuperscript{18} Thomas Hobbes, Leviathan, Chap. XVII (13), (14) 109 (Edwin Curley, ed. 1994) (1651). For an earlier account of indivisible sovereignty, see Bodin

\textsuperscript{19} Thomas Hobbes, Leviathan, Chap. XXIX (9) 213 (Edwin Curley, ed. 1994) (1651).

\textsuperscript{20} Carl Schmitt, The Concept of the Political 19 (George Schwab, trans., expanded ed. 2007) (“Sovereign is he who decides on the exception.”).
Akhil Reed Amar, for example, has made popular sovereignty the centerpiece of a powerful critique of the federal courts’ reluctance—rooted in 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

22 Id. at 1432-34.
23 Id. at 1434.
24 Id. at 1437-40.
25 Id. at 1451-66.
26 Id.
27 Id. at 1519-20. Bruce Ackerman has also made popular sovereignty the focal point of a compelling theory of American constitutionalism. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (2008). He describes a “dualist” constitutional architecture, in which lawmaking proceeds along two hierarchical tracks. Id. 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. Id. A “preservationist” Supreme Court ensures that normal politics do not trespass constitutional boundaries, and the amendment process allows the sovereign People to reenter the conversation and alter the “higher law” as necessary. Id. More controversially, Ackerman also contends that, under the right conditions, the People can exercise sovereign authority outside of the
More recently, Randy Barnett has used the doctrine of popular sovereignty to reach somewhat different conclusions about judicial construction.\textsuperscript{28} Barnett rejects the concept of “majoritarian popular sovereignty”, in which a majority’s exercise of sovereign consent legitimately binds a non-consenting minority.\textsuperscript{29} In its place, he presents an “individualist” structure of popular sovereignty, which claims that a legitimate government must actually receive every single citizen’s consent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{33} It is the Court’s job to protect these rights from legislative or executive encroachment, thus ensuring “that the government actually conforms to the consent it claims as the source of its just powers.”\textsuperscript{34} Without adequate protection for retained natural rights, a government based on popular sovereignty slides into illegitimacy.\textsuperscript{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. 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 consented? What does it mean to delegate some, but not all, the 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. He was devoted both to unalienable natural rights and the obligatory force of majority consent. He argued tirelessly for broad popular representation within a powerful federal legislature, but remained committed to a strong vision of counter-majoritarian judicial review. He believed both in the liberating authority of the rule of law and the sovereign power of the People to revolt. 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. While 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 like Jacques Bodin and Johannes Althusius, and modern roots in the social contracts of Hobbes, Locke, and Rousseau—I intend here to explore a different intellectual history. Instead of

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37 E.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 530 (1969) (arguing that Wilson developed the American theory of popular sovereignty "more boldly and more fully than anyone else").
38 Discussion infra.
39 Discussion infra.
40 Discussion infra.
41 For a fascinating account of popular sovereignty's emergence from Roman property concepts, see Daniel Lee, Civil Law and Civil Sovereignty: Popular Sovereignty, Roman Law, and the Foundations of
looking to political theory, this paper 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 in a more complete and sophisticated way than any other member of the founding generation. Finally, in the Supreme Court’s first great decision, Chisolm v. Georgia, Wilson carefully outlined popular sovereignty’s entailments for certain elements of the federalist structure.

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, but there are

42 Kermit Hall, Introduction, in 1 COLLECTED WORKS OF JAMES WILSON xxi (Kermit Hall & Mark David Hall, eds. 2007).
43 Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (Wilson, J., concurring).
44 See GARRY WILLS, INVENTING AMERICA (1978) (discounting, almost entirely, Locke’s influence on the Declaration of Independence in favor of Francis Hutcheson’s); GARRY WILLS, EXPLAINING AMERICA (1981) (placing David Hume’s work at the center of Madison’s republican theory). For powerful criticisms of Wills’ scholarship see, Harry V. Jaffa, Inventing the Past, 33 ST. JOHN’S REVIEW 3 (1981);
many other important contributions. It is probably fair to say that Wills overstated his case for common-sense philosophy as the predominant philosophy of the founding, 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. I hope that this paper can make two contributions 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,


46 See Jaffa, *supra* note ___ at ___; Hamowy, *supra* note ___, at ___.

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.

With an eye towards the first objective, this paper begins with a summary of philosophical developments in Enlightenment Scotland. The first section identifies sentimentalism’s defining themes, and suggests that those ideas provided the necessary foundation for an American reconstruction of John Locke’s social contract. The second section 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. The final section 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 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; which in turn suggests an attitudinal move from tolerating individual moral judgment, to fostering it.

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48 Mark Noll insightfully describes this intellectual development as the emergence of a “Christian Republicanism”; which saw a liberalized Calvinism merge with Scottish moral sentimentalism—particularly the ideas of Frances Hutcheson and Thomas Reid—and give rise to an egalitarian Christianity, in which people might derive basic morality from their own senses. NOLL, AMERICA’S GOD, supra note __, at 73-113. This new American theology then entered into a kind of dialectical, and symbiotic, relationship with the emerging principles of democratic civil government. Id. at 113.

49 Wilson, On the Study of Law, supra note 1 at 445-46.
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. 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 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. The aim of this section 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.

Like the period of European Enlightenment more generally, 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. The scientific method, brought powerfully home to the United Kingdom in the work of Francis Bacon and Isaac Newton, had revolutionized the physical sciences, and

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50 See notes 49-52 supra.
51 For a fascinating take on Hume’s split philosophical persona, see DAVID FATE NORTON, DAVID HUME: COMMON-SENSE MORALIST, SCEPTICAL METAPHYSICIAN (Princeton Univ. Press, 1982).
many hoped it could produce similar results in the social sciences.\textsuperscript{53} 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 that all changed. For a few decades, Scotland became the intellectual leader of Europe.”\textsuperscript{54} 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, morality and ethical theory.\textsuperscript{55} On this front, the move away from theological dogmas had given rise to a deeply important question: Is morality possible without religion?\textsuperscript{56} This question presents both ontological’ 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?\textsuperscript{57} The Scots would eventually engage both of these questions, and the answers they arrived at would deeply inform the American founding.

\textit{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

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\item[\textsuperscript{53}] \textit{Isaac Newton, Princpia Naturalis Mathematica} (1687) (A. Koyre & I.B. Cohen, eds. 1972); \textit{Francis Bacon, Novum Organum} (1620) (Lisa Jardine & Michael Silverthorne, eds. 2000).
\item[\textsuperscript{54}] Ewald, \textit{Scottish Enlightenment, supra note ___}, at 1081-82.
\item[\textsuperscript{55}] See id. (discussing Adam Smith, David Hume, Francis Hutcheson, Thomas Reid, Dugald Stewart, Adam Ferguson, and Hugh Blair, among others).
\item[\textsuperscript{56}] Although this question may bring to mind Ivan Karamazov’s famous claim that, with the death of God, “everything would be permitted,” \textit{Fyodor Dostoevsky, The Brothers Karamazov} 69 (1880) (Richard Pevear & Larissa Volokhonsky, trans. 1990), 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.
\item[\textsuperscript{57}] 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.
\item[\textsuperscript{58}] \textit{Shaftesbury, supra note ___}, at 18-19.
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speaking world—emerged as a reaction to the *Leviathan*, which seemed to 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 brings:60

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 judgment 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 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

61 *Id.* Pt. II, Chap. 19, Sec. 6.
62 Again, it is worth noting that Hobbes’s critics likely had his account of morality—and his putative Atheism—wrong. Gill, *supra* note __, at n.9.
63 Gill, *supra* note __, at 18.
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 Soldania, in 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. 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 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.”68 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.”69 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

64 Gil?
65 But see, LEO STRAUSS, NATURAL RIGHTS AND HISTORY (1953).
66 JOHN LOCKE, TWO TREATISES ON GOVERNMENT, Bk. II, Chap. 2, Sec. 14 (1690)(___ed. ___).
68 Id. at ___.
69 Id. at ___. 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 rasaetabulae rasa.
nature reveals his obligations only because God has given it to him to indicate what is expected of him. Man’s inherent potentialities are the declaration of God’s will, the law of nature itself.”\textsuperscript{70} 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.\textsuperscript{71} Where Locke’s account ultimately falls a bit short, however, is in the attempt to explain how or why the rational ability to identify moral law actually motivates us to obey it.\textsuperscript{72}

This same shortcoming plagued the accounts of an important school of moral philosophers—the moral rationalists—who would build on Locke’s basic ideas. For these theorists, moral good and evil were \textit{a priori} truths, which we can discover through the exercise reason, in very much the same way a mathematician might devise a geometric proof.\textsuperscript{73} Thus, Anglican clergyman Samuel Clarke claimed,

For a man endued with \textit{Reason}, to deny the Truth of [universal moral obligations]; is the very same thing, as if a Man that has the use of his \textit{Sight} at the same time that he beholds the \textit{Sun}, deny that there is any such thing as \textit{Light} in the World; or if a Man that understands \textit{Geometry} or \textit{Arithmetick}, should deny the most obvious and known \textit{Proportions} of \textit{Lines} or \textit{Numbers}, and perversely contend that the \textit{Whole} is not equal to all \textit{its parts}, or that a \textit{Square} is not \textit{double to a triangle} of equal base and height.\textsuperscript{74}

Again, while such purely rationalist accounts of moral epistemology might certainly overcome the problem of Hobbesian moral egoism or contingency, they largely failed to explain the visceral experience of moral obligation—the innate desire to act


\textsuperscript{71} If you are thinking this sounds a little bit circular, you are not alone. See J.B. Schneewind, “Locke’s Moral Philosophy” in \textit{THE CAMBRIDGE COMPANION TO LOCKE} 199 (Vere Chappell, ed. 1994).

\textsuperscript{72} See Schneewind, \textit{supra} note \_, at 199.

\textsuperscript{73} Among the most prominent of the early moral rationalists was the English philosopher Ralph Cudworth, whose \textit{A Treatise Concerning Eternal and Immutable Morality} confronted Hobbes’s egoism in essentially Platonic terms. \textit{RALPH CUDWORTH, A TREATISE CONCERNING ETERNAL AND IMMUTABLE MORALITY} 13-27 (James & John Knapton, ed. 1731). Clarke’s \textit{A Discourse Concerning the Unalterable Obligations of Natural Religion} continued the purely rationalistic account of moral epistemology. \textit{SAMUEL CLARKE, A DISCOURSE CONCERNING THE UNALTERABLE OBLIGATIONS OF NATURAL RELIGION, IN THE WORKS OF SAMUEL CLARKE, VOL. II} 595, 609 (James & John Knapton, ed. 1738). Like Cudworth, Clarke maintained that “the indispensable necessity of all the great moral obligations … [is] deducible even demonstrably by a chain of clear and undeniable reasoning." \textit{Id.} at 598.

\textsuperscript{74} \textit{CLARKE, supra} note \_, at 609.
morally—with which most humans are familiar. 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 presented important difficulties for Locke’s theory of the social contract and legitimate government. To put the point briefly, unlike Hobbes, Locke argued that we cannot consent away our fundamental natural rights because those rights implicate duties we owe to God, and are thus not ours to bargain. 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 Hobbesian supervision—Locke’s social contract seems destined for dissolution. 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 experience and act upon a sense of moral obligation. 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. 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. 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:

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75 Gill, Moral Rationalism vs. Moral Sentimentalism, supra __, at 16; Stephen Darwall, The British Moralists and the Internal Ought __.
76 Locke, Second Treatise, supra note __, at Chap. 4 (other?).
78 Shaftesbury, supra note __.
79 Id.; accord Gill, Moral Rationalism v. Moral Sentimentalism, supra note __, at __.
We have a ‘natural’ tendency to respond favourably to certain perceptions. This is true in morality as in 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 rest on our reflections, or perceptions, of our own mental states and those of others.\(^8^0\)

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.\(^8^1\) 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 sense”; which ultimately distinguishes us from other animals.\(^8^2\)

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.\(^8^3\) 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.\(^8^4\)

\(^8^0\) Driver, *Moral Sense*, supra note ___, at 361-62.
\(^8^1\) Id. at 362.
\(^8^2\) SHAFTESBURY, supra note ___, at 39. This is not to say that Shaftesbury believed that our rational faculties or powers of reason never enter into the process of moral evaluation.\(^8^2\) 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. Driver, *Moral Sense*, supra note ___, at 362; accord DARWALL, supra note ___, at 187-88.
\(^8^3\) DARWALL, supra note ___, at 182; accord Driver, *Moral Sense*, supra note ___, at 362.
\(^8^4\) DARWALL, supra note ___, at 182.
His approach here would presage the Kantian assessment of morality not in terms of what one does, but rather why one does it.\textsuperscript{85} Further, this “internal” shift allowed Shaftesbury’s to offer what the rationalists could not—an account of moral motivation or feelings of obligation.\textsuperscript{86} Unlike rational proofs, internal emotions or passions are capable evoking the visceral sorts of responses (or affections) to which moral questions seem to give rise.\textsuperscript{87} Thus, Shaftesbury would supplement our rational faculty with a moral sense—which we each possess regardless of our rational or intellectual abilities—in order to account fully for our lived experience of moral responsibility.\textsuperscript{88}

Shaftesbury’s sentimentalism would evolve and migrate north to Scotland in the person of Francis Hutcheson.\textsuperscript{89} 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.\textsuperscript{90} He later returned to Glasgow as Chair of Moral Philosophy, where he was a popular and influential professor to a generation of Scottish intellectuals.\textsuperscript{91} Shaftesbury’s aestheticism had a deep influence on Hutcheson’s moral philosophy, and he began his own moral account of by distinguishing between internal and external senses.\textsuperscript{92} 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 pitch:\textsuperscript{93}

\begin{quote}
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.
\end{quote}

\textsuperscript{85} Id. at 177; accord IMMANUEL KANT, THE GROUNDING OF THE METAPHYSICS OF MORALS 10 (James Ellington, trans. 1993).
\textsuperscript{86} DAWALL, supra note ___, at 193.
\textsuperscript{87} Gill, Moral Rationalism vs. Moral Sentimentalism, supra ___, at 16.
\textsuperscript{88} SHAFTESBURY, supra note ___, at 47-49.
\textsuperscript{89} DAWALL, supra note ___, at 207.
\textsuperscript{90} WILLIAM ROBERT SCOTT, FRANCES HUTCHESON: HIS LIFE, TEACHING, AND POSITION IN THE HISTORY OF PHILOSOPHY 25-36 (Cambridge Univ. Press, 1900)
\textsuperscript{91} Id. at 65-68.
\textsuperscript{93} On complex ideas, see HUTCHESON, INQUIRY, supra note ___, at 22 (I.I.VII).
which men may have without Perception of Beauty and Harmony. It is plain from Experience, that many Men have in the common meaning, the Sense 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.\textsuperscript{94}

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.\textsuperscript{95} 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. 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."\textsuperscript{96}

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 that has no bearing on our rational ideas of self-interest:

We are all then conscious of the Difference between that Love or 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 or 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 determined to love such Characters and Persons.\textsuperscript{97}

\begin{footnotes}
\item\textsuperscript{94} Id. at 23 (I.I.X)
\item\textsuperscript{95} Id.
\item\textsuperscript{96} Id. at 88 (II.I).
\item\textsuperscript{97} Id. at 90 (II.I.I).
\end{footnotes}
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.” 98 Again, these emotions can motivate us to action where the mere knowledge of a moral truth cannot; but, just as importantly, “love” is not an affection that arises out of self-interest. 99 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.” 100

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 in, 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.

98 Id. at 102 (II.II.II) (“The Affections which are of most Importance in Morals are Love and Hatred.”).
99 Id. at 112-115 (II.II.IX).
100 Id. at 103 (II.II.III). It is true, however, that Hutcheson’s approach is sometimes described as proto-utilitarian, see Driver, Moral Sentimentalism, supra note __ at 364, due largely to a passage that seems to presage Bentham and Mill. HUTCHESON, INQUIRY, supra note __, at 125 (II.III.VIII). 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, Moral Sentimentalism, supra note __, 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.
David Hume presented what many consider the most systematic and broadly influential account of Scottish moral sentimentalism. 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. 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 protection for private property serves that interest. 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.” To be sure, Hume’s account of political justice would explicitly emphasize and explore the utilitarianism at which Hutcheson had only hinted. To understand Hume’s systematic approach, we must begin with his sentimentalism and his distinction between “natural” and “artificial” virtues, and then examine the ontology of 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, I think, 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. Hume’s proof that “moral distinctions are not derived from reason” 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

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101 Id. at 365-66.  
102 DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALITY (J.B. Schneewind, ed. 1983) (1751).  
103 HUME, TREATISE, supra note ___ at 480-81.  
104 DARWALL, supra note ___, at 211 n. 8.  
105 See HUME, ENQUIRY supra note ___, at 23.  
our reason.” 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.”

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.” 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. The “natural” virtues are those that arise out of motivations we feel simply as humans, without reference to society or conventions. 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. It is, in that case, a natural sympathy or benevolence that defines the 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. 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

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107 Hume, Treatise, supra note ___, at 457 (III.I.I).
108 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. Hume, Treatise supra note ___, 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” reprinted in The Works of Bishop Butler 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” reprinted in The Works of Bishop Butler 110, 115 (David E. White, ed. 2006).
109 Hume, Enquiry supra note ___, at ___.
110 Hume, Treatise supra note ___, at 477 (III.I.I).
111 Id. at 484 (III.II.II).
112 Id. at 478 (III.II.I).
113 Hume’s “justice” is largely the appropriate respect for private property rights and the state’s authority to enforce them. Hume, Enquiry, supra note ___, at 20-34.
relation to oursel[ves].”

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 derived from nature, but aris[ing] artificially, though necessarily, from education, and human conventions.”

In his later Enquiry, Hume argued that these conventions, in turn, are rooted in larger scale utilitarian judgments. 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 from perishing, and the whole from extreme misery.” Neither of these societies, Hume argued, would experience justice as a virtue. In the former society, the “jealous virtue of justice would never have been dreamed of,” because the need to claim an individual interest in property or goods would simply never arise. In such a circumstance, “Justice ... being totally USELESS, would be an idle ceremonial, and could never have a place in the catalogue of virtues.” In the latter society, mere survival would require that the “strict laws of justice are suspended ... and give rise to the stronger motive of necessity and self-preservation.”

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.

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

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114 HUME, TREATISE supra note __, at 481 (III.II.I).
115 Id. at 483 (III.II.I).
116 HUME, ENQUIRY, supra note __, at 23.
117 Id. at 21-22.
118 Id. at 21.
119 Id.
120 Id. at 22.
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. 121

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.” 122

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 closely to objective ideas about moral ontology. 123 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 paper’s second act. 124

Reid’s moral philosophy actually represents a complex blend of rationalist and sentimentalist ideas. 125 On the one hand, he argued that moral first principles—basic moral propositions such as “it is wrong to murder an innocent”—are both ontologically objective and self-evident to the ordinary person. 126 “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 reason, by all men come to years of understanding.” 127 Reid did

121 Id. at 24.
122 Id. at 23.
123 Footnote on Smith.
124 There is some debate on this point, SEED, supra note __, at 17, but after reading Wilson’s Lectures On Law, I agree with those who suggest that Reid served as Wilson’s principal inspiration.
125 See, generally, Terence Cuneo, Reid’s Ethics, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2011) (arguing Reid believed that moral first principles are self-evident, but that we nonetheless make rational moral judgments).
127 Id.
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. 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:

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.

And,

When 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.

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. 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. 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.\textsuperscript{133} 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 rational evaluation.\textsuperscript{134}

Indeed, we cannot hold a person without both the ability to perceive a moral rule \textit{and} the rational power to choose a course of action accountable for violating a moral obligation:

\begin{quote}
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 the 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.\textsuperscript{135}
\end{quote}

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.\textsuperscript{136}

We do, however, make these assessments everyday, 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.\textsuperscript{137}

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.\textsuperscript{138} These first principles are objective and self-

\begin{footnotes}
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 344-347.
\textsuperscript{135} Id. at 345-46.
\textsuperscript{136} Id. Reid labeled this way of thinking, which he attributed to Hume among others, the “System of Necessity.” Cuneo, supra note ___, at 4-5. He rejected this approach because he did not believe it could account for purposeful human autonomy. Id. at 6-7.
\textsuperscript{137} Id. at 32.
\textsuperscript{138} at 297.
\end{footnotes}
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 possible.\textsuperscript{139} Second, we engage our rational powers as these principles, among others, enter into our practical deliberations as potential reasons for acting.\textsuperscript{140} 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.\textsuperscript{141} 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.\textsuperscript{142} 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.\textsuperscript{143} It is this final step that we come to experience as moral obligation or duty.\textsuperscript{144}

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 Locke’s social contract 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-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 other’s moral motivations and choices. That is to say, virtue or vice are the

\textsuperscript{139} Id. at 352.
\textsuperscript{140} Id. at 346.
\textsuperscript{141} Id. at 327.
\textsuperscript{142} Id. at 361-66.
\textsuperscript{143} Id. at 316-17.
\textsuperscript{144} Id. A short, personal story may be illustrative. For my 10\textsuperscript{th} 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.
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 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 itself 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.\(^{145}\) Indeed, the Declaration’s moral force derives from the sentimentalist claim that these natural rights are “self-evident” to all persons of normal sensibilities.\(^{146}\) Equally evident are institutional violations of those rights, which compel the People to “alter or abolish” their government when it "evinces a design to reduce them under absolute Despotism.”\(^{147}\) Finally, the Declaration recognizes in the People—all of the People—the moral authority “to institute a new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”\(^{148}\) To Jefferson’s generation, this philosophy seemed to require an institutional structure founded upon the radical bedrock of popular sovereignty.

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.\(^{149}\) 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

\(^{145}\) The Declaration of Independence para. 2 (U.S. 1776).

\(^{146}\) Id.

\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) Pennsylvania and the Federal Constitution: 1787-1788 9, 142 (John Bach McMaster & Frederick D. Stone eds., 1888) [hereinafter “McMaster & Stone”].
Federalists urged their most learned spokesman to seize the opportunity to present a public defense of the new Constitution.\textsuperscript{150} James Wilson, a transplanted Scotsman and one of the young nation’s preeminent attorneys, was among the Constitution’s principal architects,\textsuperscript{151} and the speech he gave that night would become perhaps the single most influential and important contribution to the ratification debates.\textsuperscript{152} Indeed, Bernard Bailyn has suggested that “in the transient circumstances of the time it was not so much the \textit{Federalist} papers that captured most people’s imagination as James Wilson’s speech of October 6, 1787, the most famous, to some the most notorious, federalist statement of the time.”\textsuperscript{153}

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.\textsuperscript{154} 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”\textsuperscript{155}—founded upon a novel theory of political authority. Under the Constitution, the \textit{People} would retain “supreme” or “original” sovereignty, and would vest local, state, and national governments with only “derivative” authority.\textsuperscript{156} This innovation rejected the classical account of the indivisible and

\textsuperscript{150} \textit{Id.} at 9. “Centinel,” likely anti-federalist Samuel Ryan, wrote a series of widely read essays in opposition to the proposed Constitution, the first of which appeared on October 5, 1787. \textit{Centinel, “An Address to the Citizens of the United States,” \textit{The Independent Gazetteer}, (Oct. 5, 1787).}

\textsuperscript{151} 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 \textit{enough} credit. \textit{Max Farrand, \textit{The Framing of the Constitution} 198 (1913).} For an even more complimentary account of Wilson’s role, see William Ewald, \textit{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, \textit{Missing Documents and Constitutional Treasures: (Re)Discoveries in Volume 2 of James Wilson’s Papers at the Pennsylvania Historical Society} (2010) (unpublished manuscript on file with author).


\textsuperscript{153} \textit{Id.}


\textsuperscript{155} James Wilson, \textit{State House Yard Speech} (Oct. 6, 1787) \textit{in} \textit{1 Collected Works, supra} note 1, at 171.

\textsuperscript{156} As I discuss later, other framers conceived of the states as independent sovereigns possessing plenary power over their citizens, and that it was the \textit{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. \textit{Chisolm}, 2 U.S. (2 Dall) at ___. The tension between
unlimited sovereign, and embodied a uniquely American conception of the social contract.\textsuperscript{157} Wilson’s political and moral philosophy emerged from his education in Scotland, evolved through the Constitutional Convention and ratification debates, and matured in his \textit{Lectures On Law} at the College of Philadelphia and in his opinion as Associate Justice in the case of \textit{Chisolm v. Georgia}.\textsuperscript{158} The effort in this section is to understand how the foundational moral ideas Wilson brought with him from 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 both grammar school and the University of St. Andrews with hopes he would enter the ministry of the Church of Scotland.\textsuperscript{159} 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.\textsuperscript{160} 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.\textsuperscript{161} 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.\textsuperscript{162}

The circumstantial evidence thus suggests that Wilson was steeped in the Scottish Enlightenment from an early age, and a number of scholars have suggested

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\textsuperscript{157} On classical account, see HOBES, supra note \_\_\_, at \_\_\_.
\textsuperscript{158} See note 42 supra; \textit{Chisolm}, 2 U. S. (2 Dall.) at 158.
\textsuperscript{160} \textit{Id.} at 1061-66.
\textsuperscript{161} MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 7 (1997). 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, \textit{Scottish Enlightenment, supra} note \_\_\_ 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 North America.” \textit{Id.}
\textsuperscript{162} CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER 20-21 (1956).
that moral sentimentalism influenced his thoughts on democracy in a general way. Kermit Hall, who coedited the foremost modern collection of Wilson’s papers, has observed that “[t]he Scottish Moral Enlightenment and the Common Sense school of philosophy associated with it deeply pervaded [St. Andrews] and deeply influenced Wilson.” His coeditor, Mark David Hall, has likewise suggested that Wilson’s views on democracy were rooted in “the realization that the common person could know truth, particularly that of a moral nature, without the aid of expert jurists, priests, or philosophers.” 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.”

The aim of this section, 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. The second moment is Wilson’s Lectures On Law, which he composed for students at the College of Philadelphia in the early 1790s. The Lectures, which fill nearly seven hundred pages, were intended to cement Wilson’s reputation as “the American Blackstone,” and were thus, in one editor’s

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163 See note 42 supra and accompanying discussion.
164 Kermit Hall, Introduction, in 1 COLLECTED WORKS OF JAMES WILSON xiii, xvi (Kermit Hall & Mark David Hall, eds. 2007).
165 Hall, Political and Legal Philosophy, supra note __, at 77.
167 Pedersen, The Lost Founder, supra note __, 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.
168 Mark David Hall, Bibliographical Essay: History of James Wilson’s Law Lectures, in 1 COLLECTED WORKS OF JAMES WILSON 401 (Kermit Hall & Mark David Hall, eds. 2007) [hereinafter Bibliographical Essay].
169 Id.
words, "long on theory and short on the kinds of blackletter law issues that might be of practical value to students."\textsuperscript{170} All the better for this discussion, however, as that theoretical approach has made the Lectures, "one of the most notable examples of the link between popular will and moral sense philosophy."\textsuperscript{171} 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 function in the structure of popular sovereignty. The third and final moment is Wilson's opinion in Chisolm \textit{v. Georgia}, which plainly and persuasively outlines the doctrine of popular sovereignty, as he understood it.\textsuperscript{172} Hailed by some as "the first great constitutional case decided by the Supreme Court," \textit{Chisolm}, and particularly Wilson's opinion, detailed a notably progressive conception of popular sovereignty—one that ultimately proved too radical for its time.\textsuperscript{173} 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.

\textit{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 23 British loyalists—raged outside.\textsuperscript{174} 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

\footnotesize{\textsuperscript{170} Kermit Hall, \textit{Introduction}, in \textit{1 Collected Works of James Wilson} xiii, xx (Kermit Hall & Mark David Hall, eds. 2007).}
\footnotesize{\textsuperscript{171} Id. at xxi.}
\footnotesize{\textsuperscript{172} Chisolm, 5 U.S. (1 Cranch) at 137.}
\footnotesize{\textsuperscript{173} Barnett, \textit{The People or the State}, \textit{supra} note ___, at 1730.}
\footnotesize{\textsuperscript{174} For a detailed account of these events, popularly known as the siege of "Fort Wilson", see \textit{Smith}, \textit{supra} note ___, at 129-139.}
Declaration of Independence; and his support for the Bank of North America. But, by a narrow margin, the Pennsylvania 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.

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. And he made by far the lengthiest and most vigorous of those remarks in defense of various forms of popular suffrage and equal representation.

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. Second, he advocated for a strong federal government, which would absorb much of the authority then exercised by state governments. Third, he pushed for a vital and empowered institution of combined judicial and executive revision of legislation. Much of Wilson’s thought on these issues emerged during what we might call the Convention’s first phase, which was the presentation and debate of the Randolph Resolves, or what would come to be known as the Virginia

175 On Wilson’s perceived elitism and opposition to the 1776 Pennsylvania Constitution (on the grounds of inadequate separation of powers), see SEED, supra note ___, at 92-93. On the Pennsylvania delegation’s resistance to independence, see Pedersen, supra note ___, at 265-66. On Wilson’s support for the Bank, see SMITH, supra note ___, at 140-58.

176 SEED, supra note ___, at 42.

177 Remarks of James Wilson in the Federal Convention, 1787, reprinted in 1 COLLECTED WORKS OF JAMES WILSON 80-170 (Kermit Hall & Mark David Hall, eds. 2007).

178 Id.

179 Leavelle, supra note ___, at 404.

180 Id.

181 Id.
Plan. It was during these early weeks that Wilson began to earn his later reputation as Madison’s “ablest supporter.”

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. That chamber would then choose the members of the upper chamber from among names nominated in the state legislatures. 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. Roger Sherman of Connecticut warned that “the people directly should have as little to do as may be about the Government,” and Massachusetts’s Elbridge Gerry quickly agreed, pointing to “the excess of democracy” his state had recently experienced. 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. He employed a metaphor—likely borrowed from English political theorist James Stewart—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 to give it as broad a base as possible.” 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.”

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182 SMITH, supra note __, at __. Initially called the Randolph Resolves after Virginia spokesman Edmund Randolph, the substance of the Virginia Plan was likely the work of James Madison. Id.
184 Speech of Mr. Randolph (May 29, 1787), in NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 30-31 (Bicentennial ed., Ohio Univ. Press, 1987) [hereinafter Madison’s Notes].
185 Id.
186 Remarks of Mr. Sherman (May 30, 1787), in id. at 39.
187 Remarks of Mr. Gerry (May 30, 1787), in id. at 39.
188 Remarks of Mr. Wilson (May 30, 1787), in Madison’s Notes, supra note __, at 40.
189 SMITH, supra note __, at 276.
190 Remarks of Mr. Wilson (May 29, 1787), in Madison’s Notes, supra note __, at 40.
191 Id.
Like many of Virginia’s most contentious proposals, the question of popular suffrage was tabled for later debate, but Wilson stuck doggedly to his guns whenever the topic was resumed.\textsuperscript{192} Indeed, a week later, he gave an even fuller defense of popular suffrage and sovereignty:

\begin{quote}
The Government ought to possess not only first the \textit{force}, but secondly the \textit{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.\textsuperscript{193}
\end{quote}

Though the Committee eventually accepted his ideas in the lower house,\textsuperscript{194} 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 Cornerstone, but as the foundation of the fabric” of a constitutional republic.\textsuperscript{195} On June 7\textsuperscript{th}, he argued again that both branches ought “to be elected by the people”, and moved to postpone the debate another time.\textsuperscript{196} Despite his best efforts, however, the state delegations voted unanimously to have the state legislatures elect the members of the Senate.\textsuperscript{197}

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.\textsuperscript{198} 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.\textsuperscript{199} This question, of

\textsuperscript{192} Id. at 43.
\textsuperscript{193} Remarks of Mr. Wilson (June 6, 1787), in Madison’s Notes, supra note ___, at 74.
\textsuperscript{194} Madison’s Notes, supra note ___, at 79.
\textsuperscript{195} Remarks of Mr. Wilson (June 21, 1787) in Madison’s Notes, supra note ___, at 167.
\textsuperscript{196} Remarks of Mr. Wilson (June 7, 1787), in Madison’s Notes, supra note ___, at 82-83, 85.
\textsuperscript{197} Madison’s Notes, supra note ___, at 87. It is perhaps worth noting that Wilson had much greater success on this point in reforming the Pennsylvania Constitution shortly after federal ratification. There he defeated his colleagues plan to have the lower house elect the members of the upper. Smith, supra note ___ at ___.
\textsuperscript{198} Speech of Mr. Randolph (May 29, 1787), in Madison’s Notes, supra note ___, at 30.
\textsuperscript{199} Remarks of Mr. Patterson [sic] (June 9, 1787), in Madison’s Notes, supra note ___, at 95.
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 number of representatives,” and he strenuously urged the members to correct this principle, which had “been improperly violated in the [Articles of Confederation.”

This was to become the single most controverted point in the Convention, and, again, Wilson never relented.

With the sides seemingly intransigent, Connecticut’s Roger Sherman proposed to split the difference, with proportional representation in the House and equal representation in the Senate. The smaller states were willing to go no further than Sherman’s compromise—even threatening to walk out or adjourn the Convention—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.

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

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200 Remarks of Mr. Wilson (June 9, 1787), in Madison’s Notes, supra note __, 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 (1964).
201 SMITH, supra note __, at __.
202 Remarks of Mr. Sharman [sic] (June 11, 1787), in Madison’s Notes, supra note __, at 103.
203 Remarks of Mr. Patterson [sic] (July 16, 1787), in Madison’s Notes, supra note __, at 299-300.
204 See, e.g., Remarks of Mr. Wilson (July 7, 1787) in Madison’s Notes, supra note __, at 254.
boroughs in England, which has been allowed on all hands to be the rotten part of the Constitution, is perfectly right & proper.205

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 ⅓ [of the people] to overrule ⅔ whenever a question should happen to divide the states in that manner. Can we forget for whom we are framing a Government? Is if for men, or for imaginary beings called States? ... We talk of States until we forget what they are composed of.206

Wilson’s clear implication—that those who opposed proportional representation placed their own offices above the principle of popular sovereignty—can hardly have been 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 2nd branch was an error that time would correct, he would be less anxious,” but, he feared that such a flaw in the mechanics of representation would instead render a “fundamental and a perpetual error.”207 But, again, he was ultimately outvoted;208 lamenting to the very end, “nothing is so pernicious as bad first principles.”209

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.210

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205 Remarks of Mr. Wilson (June 28, 1787) in Madison’s Notes, supra note __, at 208; accord Remarks of Mr. Wilson (June 15, 1787) in Madison’s Notes, supra note __, at 126 (discussing the “poison” of equal representation in Great Britain).
206 Remarks of Mr. Wilson (June 30, 1787) in Madison’s Notes, supra note __, at 221.
207 Remarks of Mr. Wilson (July 15, 1787) in Madison’s Notes, supra note __, at 295.
208 Madison’s Notes, supra note __, at 297.
209 Remarks of Mr. Wilson (July 15, 1787) in Madison’s Notes, supra note __, 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 (August 13, 1787), in Madison’s Notes, supra note __, at 444. He found this structure “pregnant with altercation” between the two branches, and predicted that, “The House of Rep’s 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.
210 Speech of Mr. Randolph (May 29, 1787), in Madison’s Notes, supra note __, at 31.
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.²¹¹ Though he knew his thoughts would sound “chimerical,” Wilson said, “at least ... in theory he was for an election by the people.”²¹² Second, he cautioned that the proposed scheme would make the Executive dependent on the Legislature, which would undermine the Montesquieuian separation of powers necessary to check potential abuses of power.²¹³ 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.²¹⁴ As a second-best alternative, he proposed that the states be divided into districts, wherein the People would choose “Electors of the Executive Magistry,” who would meet at an appointed time and cast ballots for the Presidency.²¹⁵ 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.²¹⁶

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.²¹⁷ On the other side, Edmund Randolph strenuously “oppose[d] a unity of the Executive,” which he regarded as “the foetus of monarchy,” and suggested instead a three person body.²¹⁸ 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

²¹¹ Remarks of Mr. Wilson (June 1, 1787), in Madison’s Notes, supra note ___, at 49.
²¹² Remarks of Mr. Wilson (June 1, 1787), in Madison’s Notes, supra note ___, at 48.
²¹³ E.g., Remarks of Mr. Wilson (July 17, 1787), in Madison’s Notes, supra note ___, at 309.
²¹⁴ Madison’s Notes (September 6, 1787), supra note ___, at 590 (vote approving Electoral College).
²¹⁵ Remarks of Mr. Wilson (June 2, 1787), in Madison’s Notes, supra note ___, at 50.
²¹⁶ Madison’s Notes (September 6, 1787), supra note ___, at 590 (vote approving Electoral College).
²¹⁷ Remarks of Mr. Wilson (June 1, 1787), in Madison’s Notes, supra note ___, at 45.
²¹⁸ Remarks of Mr. Randolph (June 1, 1787), in Madison’s Notes, supra note ___, at 46.
Executive you must unite it. One man will be more responsible than three.”  

By “responsible,” Wilson meant, in part, that the electorate could hold a single President directly accountable, whereas the individual members of a plural executive could find some political “cover” for their actions. 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.

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. 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. In his search for political solutions to this problem, Madison’s study of historical democracies had led him to believe—contrary to Montesqueieu’s well-known thoughts on the matter—that a large, diverse republic would be more

219 Remarks of Mr. Wilson (June 16, 1787), in Madison’s Notes, supra note ___, at 127.
220 Remarks of Mr. Wilson (June 4, 1787), in Madison’s Notes, supra note ___, at 60.
221 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 ___, at 67.
224 See Charles de Montesquieu, The Spirit of the Laws Bk. VIII 124 (Anne Cohler, et. al. eds., Cambridge Univ. Press 1989) (1748) (“It is in the nature of a republic to have only a small territory ...”).
stable than a small homogeneous nation.225 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.226 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.227 To this end, he ensured that the Virginia Plan empowered the federal Legislature to “negative all laws passed by the several States,”228 and he found in Wilson a staunch ally to this cause.229

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,230 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.”231 When Sherman and Read accused he and Madison of endeavoring “to abolish the State Governments,”232 Wilson responded that he had no objection to the states’ continued existence “provided [they] were restrained to certain local purposes.”233 When fellow Pennsylvanian John Dickinson renewed the accusation, Madison recounts Wilson’s use of an astronomical metaphor:

He did not see the danger of the States being devoured by the Nat’l Gov’t. On the contrary, he wished to keep them from devouring the

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225 James Madison, Vices of the Political System of the United States, in WRITINGS OF MADISON, supra note __, at 361, 368. This insight likely came to Madison through his reading of David Hume’s Idea of a Perfect Commonwealth. See Bartrum, supra note __, at 20 n.37.

226 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. Bartrum, supra note __, at 23.


228 Speech of Mr. Randolph (May 29, 1787), in Madison’s Notes, supra note __, at 31.

229 E.g., Remarks of Mr. Wilson (June 8, 1787), in Madison’s Notes, supra note __, at 90; accord Remarks of Mr. Wilson (August 23, 1787), in Madison’s Notes, supra note __, at 518 (calling some version of the federal negative “the key-stone wanted to compleat the wide arch of Government”).

230 Remarks of Mr. Wilson (May 29, 1787), in Madison’s Notes, supra note __, at 40.

231 Remarks of Mr. Wilson (June 22, 1787), in Madison’s Notes, supra note __, at 172.

232 Remarks of Mr. Sherman (June 6, 1787), in Madison’s Notes, supra note __, at 74; accord Remarks of Mr. Read (June 6, 1787), in Madison’s Notes, supra note __, at 78.

233 Remarks of Mr. Wilson (June 6, 1787), in Madison’s Notes, supra note __, at 78-79.
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 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.234

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.235 But his language—the states must be “suffered to act” within their “proper orbits”—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 that the People as a whole were represented.236 At the Pennsylvania ratifying convention, he would make the point emphatically, quoting words he himself had penned in Philadelphia:237

This, Mr. President, is not a government founded upon a compact [between the states]; it is founded upon the power of the people. They express it in their name and their authority, “We, the people, do ordain and establish” &c.; from their ratification alone is it to take its constitutional authenticity.238

234 Remarks of Mr. Wilson (June 7, 1787), in Madison’s Notes, supra note __, at 85.
235 Remarks of Mr. Wilson (June 7, 1787) & (June 19, 1787), in Madison’s Notes, supra note __ at 85, 151; accord Wilson, State House Yard Speech, supra note __, at 174-75.
236 See, e.g., Speech in the Pennsylvania Convention (Nov. 26, 1787) in Collected Works, supra note __, at 184 (“If a difference can be discovered between [state and federal governments], it is in favor of the federal government; because that government is founded on a representation of the whole union....”).
237 The earliest draft of the Preamble is, at least, drafted in Wilson’s hand. Pedersen, supra note __, at 259.
238 J. Elliot, The Debates of the Several State Conventions on the Adoption of the Federal Constitution 497-98 (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 McCullough 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).
To this end, Wilson argued for a far broader swath of federal legislative power than the Articles of Confederation had conferred. 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. 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 Luther Martin’s far more deferential language—that made it into Article IV.

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. 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. The Legislature would then have the opportunity to overcome the Council’s veto by an undetermined supermajority in each house. 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 sufficient check against encroachments on their

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239 Compare Report of the Committee on Detail, S. VII (August 6, 1787), in Madison’s Notes, supra note ___, at 389-90 with ARTS. OF CONFED. art. IX (1778); accord Remarks of Mr. Wilson (June 16, 1787), in Madison’s Notes, supra note ___, at 95 (comparing broad powers in Virginia Plan to narrow formulation in the New Jersey plan).

240 Remarks of Mr. Wilson (June 6, 1787), in Madison’s Notes, supra note ___, at 74.

241 Amar, supra note ___, at 1458.

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

243 Speech of Mr. Randolph (May 29, 1787), in Madison’s Notes, supra note ___, at 32..

244 Id.
department by their exposition of the laws, which involve[s] a power of deciding on their Constitutionality.”245 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.246 Quite contrary to Gerry’s thoughts, Wilson argued that the Council’s authority, as proposed, did not “go far enough”:

If the Legislative Exetv & 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.247

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.248

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.249 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’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

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245 Remarks of Mr. Gerry (June 4, 1787), in *Madison’s Notes*, supra note ___, at 61.
246 For a thorough discussion of the “first Hayburn’s 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 exercising a form of judicial review—*Van Horn’s Lessee v. Dorrance*, 2 U.S. (Dall.) 304 (1795)—eight years before *Marbury* was decided. Id. at 285.
247 Remarks of Mr. Wilson (June 4, 178, in *Madison’s Notes*, supra note ___, at 61.
248 *Madison’s Notes*, supra note ___, at 66 (recording unanimous no vote on the absolute veto, and approval of supermajority sub silentio).
249 Remarks of Mr. Wilson (July 21, 1787), in *Madison’s Notes*, supra note ___, at 336-37.
of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.\footnote{Id.}

Gerry objected again, claiming that this would create an overpowring alliance between the Executive and Judicial branches,\footnote{Id.} 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.”\footnote{Remarks of Mr. Gerry (July 21, 1787), in Madison’s Notes, supra note ___, at 342.} Wilson’s proposal for a joint Council was thus voted down again.\footnote{Remarks of Mr. Gorham [sic] (July 21, 1787), in Madison’s Notes, supra note ___, at 342.} Three weeks later, Madison and Wilson would make one final, unsuccessful, motion to reconsider.\footnote{Madison’s Notes, supra note ___, at 343 (recording vote).}

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.”\footnote{Id. at 462 (recording vote on Madison’s motion, which Wilson seconded).} 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 \textit{Lochner} Court empowered to veto—without recourse—Congress’s “improper views” as expressed in “unwise” or “destructive” legislation.\footnote{Wilson, State House Yard Speech, supra note ___, at 176.} His divergent structural ideas—at once broadly populist and narrowly elitist—thus present something of a puzzle for the modern theorist of

\footnote{See note 289 supra and accompanying text.}
popular sovereignty. It is a puzzle that I hope to resolve below in terms of Wilson’s beliefs about individual moral epistemology and obligation.

*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. 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. 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 15 in the school’s main hall. 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. It also made perfect sense that Wilson—the city’s preeminent lawyer and a newly minted Supreme Court justice—should be the first professor.

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. An 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 States . . .

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 “the President of 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.” Indeed, he expressed “anxiety 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.”

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. 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 terms and according to their own stated objectives.” Principal among those objectives was to explain and justify the foundations of the new American jurisprudence, and to do that Wilson believed it necessary to root the architecture of popular sovereignty in more fundamental considerations of natural law and the human condition. From these first principles, he built out the basic theoretical

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

264 *Pennsylvania Packet and Daily Advertiser* p.3, col. 2 (December 25, 1790) quoted in id. at 403.


266 *SEED*, supra note ___, at 150.


268 James Wilson, *On the Natural Law*, in 1 COLLECTED WORKS, supra note ___, at
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.\(^{269}\)

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.\(^{270}\) In just his third lecture, On 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.”\(^{271}\) 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 to do so. 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 you ought to do that, of which your conscience enjoins? I can only say, I feel that such is my duty. Here investigation must stop; reasoning can go no farther.\(^{272}\)

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.\(^{273}\) In particular, Wilson made clear his belief in mankind’s universal, or near universal, possession of

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\(^{269}\) Here I am particularly indebted to Aaron Knapp’s excellent recent work emphasizing Wilson’s dedication to juries. See Knapp, supra note __, at __.


\(^{271}\) Id. at 507 (emphasis in original).

\(^{272}\) Id. at 508 (emphasis in original).

\(^{273}\) Compare id. with Reid, supra note __, at 352, 358.
the moral sense, which he located at the very center of our theoretical capability—and duty—of self-government.\textsuperscript{274}

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.\textsuperscript{275} 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 \textit{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 be 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 reason.\textsuperscript{276}

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 obligation, and so it is in him that the wise society places its ultimate trust.\textsuperscript{277} 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.\textsuperscript{278} 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.”\textsuperscript{279}

\textsuperscript{274} Wilson, \textit{On the Law of Nature}, \textit{supra} note 308, at 512 (“Never was there any of the human species above the condition of an idiot, to whom all actions appeared indifferent.”).
\textsuperscript{275} \textit{Id.} at 517.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.;} Wilson, \textit{Introductory Lecture: Of the Study of the Law in the United States}, in 1 \textit{Collected Works}, \textit{supra} note 1, at 445–46.
\textsuperscript{278} See note ___ \textit{supra}, and accompanying discussion.
\textsuperscript{279} \textit{Hobbes, Leviathan} \textit{supra} note ___, at Chap. XIII ---
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.\(^{280}\) 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.\(^{281}\) 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 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 expedient.\(^{282}\)

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 experience had proven that it could serve as the basis for a very real and successful jurisprudence.\(^{283}\) 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.”\(^{284}\) 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

\(^{280}\) Reference to Rousseau...
\(^{281}\) Wilson, Introductory Lecture: Of the Study of the Law in the United States, in 1 COLLECTED WORKS, supra note 1, at 443. Among later scholars, see e.g., George M. Dennison, The ‘Revolution Principle’: Ideology and Constitutionalism in the Thought of James Wilson, 39 REV. POL. 157 (1977); Knapp, supra note __, at 253.
\(^{282}\) Wilson, Introductory Lecture: Of the Study of the Law in the United States, in 1 COLLECTED WORKS, supra note 1, at 440-41 (emphasis in original).
\(^{283}\) Id. at 442-43.
\(^{284}\) Knapp, supra note __, at 243-44.
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.” 285 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.” 286 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 human political institutions. 287 In politics, however, Independent Man grows alienated from his innate moral sensibilities—his experience of obligation to natural law—and eventually sloughs towards the self-interested intrigue of Political Man. 288 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

285 Wilson, Of the Study of the Law, supra note 1, at 443.
286 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 (J.B. Lippincott & Co., Philadelphia, 1859) quoted in id. at 441.
287 Obering, Smith
288 See note 318 infra and accompanying discussion.
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.\footnote{Wilson put the point this way, “For a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal: to their errour, there is no superior principle of correction.” James Wilson, \textit{Speech to the Pennsylvania Ratifying Convention} (Nov. 26, 1787), \textit{reprinted in 2 The Works of James Wilson} 757, 771 (Robert Green McCloskey, ed. 1967). This, again, is where Locke’s inability to account for moral motivation undercut his political theory. \textit{See infra} note 71 and accompanying discussion.} And so Wilson responded to Blackstone directly:

The revolution principle—that the sovereign power residing in the people; they may change their constitution whenever they please—is not a principle of discord, rancor, or war: it is a principle of melioration, contentment, and peace. It is principle not recommended merely by a flattering theory: it is a principle recommended by happy experience.\footnote{Wilson, \textit{Of the Study of the Law}, supra note 1, at 443.}

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.”\footnote{Letter from John Adams to the Massachusetts Militia (Oct. 11, 1798) \textit{reprinted in 9 Works of John Adams} 229 (Charles F. Adams, ed., AMS Press 1971).}

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.”\footnote{James Wilson, \textit{Of Juries, in 2 Collected Works}, supra note ___, at 961.} When placed in juries, as “nature and original
justice” recommend, this authority is “one of the greatest blessings—... one of the greatest securities—which can be enjoyed under any government.” For these reasons, Wilson repeatedly claimed to “love and admire the trial by jury,” 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.”

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 with individual particularity: “Neither congress nor the general assembly of this commonwealth, can pass any act of attainder for treason or felony.” 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 almost literal propriety, be said to try himself.” What better recourse to the original source of sovereign authority then 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. 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,” and Arthur Wilmarth has made similar claims. Aaron Knapp, however, has carefully rebutted these arguments with a thorough review of all Wilson’s comments on juries throughout the Lectures. And, in

293 Id. at 963.
294 James Wilson, Comparison of the Constitution of the United States, with that of Great Britain, 1 COLLECTED WORKS, supra note ____, at 745.
295 Wilson, Of Juries, supra note ____, at 954.
296 Wilson, Comparison of the Constitutions, supra note ____, at 746.
297 Wilson, Of Juries, supra note ____, at (548).
298 Wilson, Of Juries, supra note ____, at 961.
299 Knapp, supra note ____, at 272.
301 Knapp, supra note ____, at 274-75.
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.”302 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 the jury shall answer”; 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.”303

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.304 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!”305 Further, like the moral sense itself, the American instantiation of this sovereign prerogative lies dormant until called upon: “The 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 a particular emergency call for its operations, than it starts into immediate existence.”306 And then, once the jury has exercised its sovereign moral authority in a discreet legal controversy, this “abstracted selection [of the sovereign] disappears

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302 Id. at 275.
303 Wilson, Of the Study of Law, supra note __, at 437.
304 Wilson, Of Juries, supra note __, at (547).
305 Id. at (544, 547-48).
306 Id. at (548).
back among the general body of citizens."\textsuperscript{307} 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.”\textsuperscript{308}

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 \textit{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.\textsuperscript{309} 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.\textsuperscript{310} But this check seemingly restrains “good” ideas as well as “bad,” and so it does not provide the kind of substantive corrections that resort back to ordinary moral sentiments might. 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.\textsuperscript{311} For this reason, the Constitution provides yet another check on legislative power in the form of judicial review. Here, a smaller group of (in Wilson’s formulation) 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

\textsuperscript{307} Id. at (547).
\textsuperscript{308} Recall, again, Carl Schmitt’s assertion that sovereignty resides with “he who decides on the exception.” \textsc{schmitt, supra note ___}, at 19.
\textsuperscript{309} See Remarks of Mr. Wilson (June 6, 1787), \textit{in Madison’s Notes, supra note ___}, at 74 (arguing representation is a necessary, though, imperfect way to express collective sentiments).
\textsuperscript{310} Remarks of Mr. Wilson (June 16, 1787), \textit{in Madison’s Notes, supra note ___}, at 127.
\textsuperscript{311} Id.
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 structural recourse to the People. The jury then represents a second level of recourse—this time directly to common sense moral epistemology\textsuperscript{312}—which serves as the legal embodiment of Wilson’s theoretical dedication to a Lockean “revolution principle” undergirding legitimate government.

\textit{Chisolm v. Georgia}

In the fall of 1777, early in the Revolutionary War, American troops quartered in Savannah, Georgia found themselves desperately in need of supplies.\textsuperscript{313} 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.\textsuperscript{314} In exchange for delivery by December 1, the commissioners contracted to pay Farquhar nearly $170,000, which they were empowered to draw from the state treasury.\textsuperscript{315} 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.\textsuperscript{316} In 1784, Farquhar drowned in a shipping accident in Savannah harbor, and the executors of his estate—which fell to his young daughter—began to make plans to recover from the State.\textsuperscript{317} They petitioned the Georgia legislature in 1789, but were refused on the grounds that the money had already been appropriated to Stone and Davies.\textsuperscript{318} One of the executors, Alexander Chisolm, then filed suit against the State of Georgia in federal Circuit Court; but, in October of 1791, Justice James

\textsuperscript{312} 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. Knapp, supra note __, at (33).
\textsuperscript{314} \textit{Id.} at 21.
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} \textit{Id.} 21, 22 n. 14.
\textsuperscript{317} \textit{Id.} at 21.
\textsuperscript{318} \textit{Id.} at 22.
Iredell and Judge Nathaniel Pendleton denied jurisdiction on separate grounds.\footnote{Id. at 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 (Opinion of James Iredell) reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 155 (Maeva Marcus, ed. 1994) [hereinafter DHSC].

\footnote{Mathis, supra note ___, at 23.}

\footnote{Dunlap’s American Daily Advertiser, p.3 (Feb. 21, 1793).}

\footnote{Charles Warren, The Supreme Court in United States History, v. 1, 94 (1926).}

\footnote{Dunlap’s American Daily Advertiser, p.3 (Feb. 21, 1793).}

\footnote{“Proceedings of the Georgia House of Representatives,” Augusta Chronicle (Nov. 9 & Nov. 19, 1793) reprinted in DHSC, supra note ___, at 235-36.}

\footnote{“Report of a Joint Committee of the Massachusetts General Court,” Independent Chronicle (June 20, 1793) reprinted in DHSC, supra note ___ at 230. For a sampling of the editorial pages, see DHSC, supra note ___ at 227-272.}

Given the asserted damages of $500,000, however, it is hardly surprising that Chisolm decided to take an appeal.\footnote{Id. at 23.}

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.\footnote{Id. at 23.} 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.\footnote{Id. at 23.}

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.\footnote{Id. at 23.} 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, and further provided that any Federal Marshal attempting to help Chisolm claim his award shall “be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged.”\footnote{Id. at 23.} And Georgia was not 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.\footnote{Id. at 23.} In January, the United States Senate proposed a constitutional amendment overruling
Chisolm, and the House voted overwhelmingly to approve.\textsuperscript{326} By the following February, the requisite twelve state legislatures had ratified the proposal, and the Eleventh Amendment became law.\textsuperscript{327}

By almost any account, then, the Court’s decision in Chisolm 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.\textsuperscript{328} And, though the Court’s clerk was apparently better impressed with Chief Justice John Jay’s resolution of the case,\textsuperscript{329} Wilson’s like-minded opinion has been the subject of at least as much commentary and analysis over time.\textsuperscript{330} 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.\textsuperscript{331} 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, which he suggested turned on a question “no less radical than this, ‘do the people of the United States form a Nation?’”\textsuperscript{332} 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.\textsuperscript{333}

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

\textsuperscript{326} 4 \textsc{Annals of Congress} 30, 477 (1795).
\textsuperscript{327} Doyle Mathis, \textit{The Eleventh Amendment: Adoption and Interpretation}, 2 \textsc{Ga. L. Rev.} 207, 212 (1968).
\textsuperscript{328} Randy Barnett, among others, has argued persuasively that the Eleventh Amendment altered—rather than restored—the Constitution’s original meaning. Barnett, \textit{The People or the State}, supra note \ldots, at 1744-45.
\textsuperscript{329} Dunlap’s \textit{American Daily Advertiser}, p.3 (Feb. 21, 1793).
\textsuperscript{330} See, e.g., Barnett, \textit{We the People}, supra note \ldots, at \ldots.
\textsuperscript{331} Id. at \ldots.
\textsuperscript{332} Chisolm, 2 \textsc{U.S.} (2 Dall.) at 453 (Wilson, J. concurring).
\textsuperscript{333} Id.
not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon."\textsuperscript{334} 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.\textsuperscript{335} In the context of Enlightened legal theory, Wilson claimed that both “state” and “sovereignty” were concepts that needed updating.\textsuperscript{336} 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.”\textsuperscript{337} 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. It was in service of these claims that the older concept of “sovereignty” had been put to it most destructive use, and it was largely for this reason that the word “sovereign” was omitted from the Constitution.\textsuperscript{338} 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.”\textsuperscript{339}

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.\textsuperscript{340}

\textsuperscript{334} Id.
\textsuperscript{335} Id. Many years later Thomas Kuhn would describe this process as a necessary part of a “paradigm change” in scientific inquiry. \textit{Thomas S. Kuhn, The Structure of Scientific Revolutions} 148-49 (1st ed. 1962).
\textsuperscript{336} \textit{Chisolm}, 2 U.S. (2 Dall.) at 454-55 (Wilson, J. concurring).
\textsuperscript{337} Id.
\textsuperscript{338} Id. at 455.
\textsuperscript{339} Id. This, of course, reflects Wilson’s sentimentalist commitment to the moral superiority of Independent (over Political) man.
\textsuperscript{340} Id. at 455.
Nothing in this definition, Wilson argued, suggests that a state is any less amenable to the laws or courts than are its constituent citizens.\textsuperscript{341} Indeed, if an individual binds herself to the law by consent, certainly an aggregation of similarly situated citizens does the same.\textsuperscript{342} 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.\textsuperscript{343} 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?\textsuperscript{344}

Wilson conceded that he could not explore every possible perspective on these questions, and so limited himself to a few of the more promising avenues.\textsuperscript{345} First, he observed that we might identify a “sovereign” by reference to its correlative relationship with “subjects.”\textsuperscript{346} 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.”\textsuperscript{347} In a broader sense, though, we might recognize as “sovereign” any state “which governs itself without any dependence on another power.”\textsuperscript{348} 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.”\textsuperscript{349} Further, he asserted that:

[T]he 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

\textsuperscript{341} Id. at 456.
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
\textsuperscript{347} Id.
\textsuperscript{348} Id. at 457.
\textsuperscript{349} Id.
of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.350

Thus, if Supreme Court jurisdiction over cases like Chisolm should count as one of the “purposes of the Union,” then Georgia could make no claim to sovereignty on these grounds.351

A third sense of the term “sovereign”—indeed, the one to which Wilson thought Georgia intended its appeal—is a vestige of European feudalism.352 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.”353 This account not only “vested him with jurisdiction over all others, it [also] excluded all others from jurisdiction over him.”354 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.”355 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 proscribed 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.”356 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.357

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

350 Id. (emphasis in original).
351 Id.
352 Id.
353 Id.
354 Id. at 458.
355 1 BLACKSTONE, supra note __, at 242 quoted in id. This, recall, is consistent with Hobbes’s account of sovereignty. See HOBBES, supra note __, at 213.
356 Chisolm, 2 U.S. (2 Dall.) at 458 (Wilson, J., concurring).
357 Id.
United States Constitution. 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. 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.” Worse yet, in some nations the King had taken the same “haughty” attitude towards both the state and the people. 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 formed.” It was in this political perversion, Wilson argued, that the doctrine of sovereign immunity had its old world roots.

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 in this unnatural and inverted order of things.” 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.” Even given Wilson and Madison’s concessions in Philadelphia, however, the ratified Constitution, of course, 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.

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358 Id. at 461.
359 Id.
360 Id. In particular, he recalled Louis XIV’s insistence that his councilors not refer to “L’Etat” in their conversations with him. Id.
361 Id. at 462.
362 Id.
363 Id.
364 Id.
365 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.
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 Man. But Man himself, free and honest, is, I speak as to this world, the noblest work of God.”

With these moral principles stoutly in place, Wilson believed the question of the Constitution’s jurisdiction was quite straightforward: “Could 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?” Unavoidably, Wilson thought, the answer was yes. 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. 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.” 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. 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.”

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 ultimately believed that the text of

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366 Id. at 463.
367 Id.
368 Id.
369 Id. at 456.
370 Id. at 464.
371 Id. On ratification, see “Ratification of the Constitution by the State of Georgia” (Jan. 2, 1788), 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 65-66 (1894).
372 Chisolm, 2 U.S. (2. Dall.) at 464 (Wilson, J., concurring) (emphasis added).
Article III resolved the issue fairly unambiguously. 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. “When,” he observed, “certain laws of the States are declared to be ‘subject to the revision and control of Congress’; it cannot, surely, be contended that the Legislative power of the national Government was meant to have no operation on the several States.” With the same principle in mind, Article III expressly recognizes federal Judicial power over all cases in which “a State shall be a Party,” and—even more specifically—extends that power to controversies “between a State and citizens of another State.”

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?

With both general jurisprudential principles and the explicit constitutional text thus aligned, Wilson easily concluded that the Court had constitutional jurisdiction to hear Chisolm’s claim for breach of contract. In America, at least, “[c]auses, and

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373 Id. at 464-66.
374 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. 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 (1992).
375 Chisolm, 2 U.S. (2. Dall.) at 464 quoting U.S. CONST. art. I, s. 10, cl. 2 (1789).
376 U.S. CONST. art. III, ss. 1 & 2. (1789) (emphasis added).
377 Id. at 466 (Wilson, J., concurring).
378 Id. In Wilson’s words, “When 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, the State of Georgia is amenable to jurisdiction of this Court.” Id.
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.”

Wilson’s opinion in *Chisolm*, 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.

Indeed, from its basic moral 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.

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379 *Id.*

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 guidance.\(^\text{381}\) 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.\(^\text{382}\) 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 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.\(^\text{383}\)

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

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\(^{381}\) On “construction zones” see Solum, Originalism and Constitutional Construction, supra note 2, at 469.

\(^{382}\) Amar, Of Sovereignty and Federalism, supra note __, at __.

\(^{383}\) Barnett, We the People, supra note __, at 2600.
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. 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 Chisolm) 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 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 “representation 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. 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.”

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

384 Frederick Douglass, The Life and Times of Frederick Douglass: From 1817-1882, 333 (1892).
385 Remarks of Mr. Wilson (June 6, 1787), in Madison’s Notes, supra note ___, at 74.
386 Remarks of Mr. Wilson (June 7, 1787), in Madison’s Notes, supra note ___, at 85.
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.\(^{387}\)

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 Rights, the sentimentalist account gives us a better way to conceive of the essential authority that the constitutional structure reserves to the People.\(^{388}\) 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.\(^{389}\) 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

\(^{387}\) See Amar, Of Sovereignty and Federalism, supra note __, at 1519-20.


\(^{389}\) See Olmstead v. United States, 277 U.S. 438, 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”).
turns out, is actually the final cause of legitimate government. Thought they have differed on the details, philosophers from Aristotle, to Augustine, to Aquinas have agreed upon this basic purpose of politics and the state. CITE...

390 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 decide what sorts of “unenumerated” rights the Ninth Amendment guarantees, we should likewise ground our constructions in notions of sovereign moral reasoning and autonomy. The lodestar of fundamental right, 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 sentimental account may lend support Randy Barnett’s arguments that the presumption of individual consent cannot legitimate state intrusions into natural rights. 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 examine a specific controversy. 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 decide whether the Free Exercise Clause required Oregon to exempt members of the Native American Church from a state law criminalizing the use of peyote. Most observers believed the question fell within the scope of well-established doctrine, which rigorously scrutinized laws that incidentally burden religious practices. Scalia, however, drew two important

391 Employment Div. v. Smith, 494 U.S. 872 (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. at 874.
distinctions between Smith and that doctrine: First, Smith involved violations of a criminal law, where the earlier cases did not. Second, Scalia suggested that the earlier cases actually involved “hybrid” claims, which implicated both the Free Exercise Clause and another constitutional right. 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.”

Revisiting the Court’s first Free Exercise case, which denied constitutional 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.”

Scalia, then, clearly chose a pragmatic or prudential interpretive approach in Smith, but had he opted for structuralism instead, the sentimentalist account of popular sovereignty strongly suggests a different result. The first structural 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. In Smith, however, the second principle—government must not intrude on sovereign moral autonomy except to foster greater moral autonomy for all—is both relevant and decisive. Despite Scalia’s borrowed prudential protestations, the structure of 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 that 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

393 Smith, 494 U.S. at 876.
394 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. Lukumi, 508 U.S. at 566-67.
395 Smith, 494 U.S. at 879.
396 Id. quoting Reynolds v. Sims, 98 U.S. 145, 167 (1879).
experience feelings of moral obligation and act accordingly. Unless the religious use of peyote 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, and thus the state failed to overcome the presumption of moral autonomy. From a structural perspective, then, the Court’s decision fails to honor our founding commitment to popular sovereignty.

**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?” 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

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398 Henry David Thoreau, *Civil Disobedience, reprinted in Civil Disobedience and Other Essays* 1, 2 (Courier, 2012) (1849).
for autonomous moral judgment. Such judgments, after all, are the most fundamental incidents of the sovereign prerogative, and the most fulfilling experiences of the human condition.